



Authored by: Dr Robert Kovacs (Special Counsel), Tessa Schrempf (Associate) and Chloé Paloschi (Trainee) - Withers

With over 2000<sup>1</sup> cases filed internationally, climate change litigation is becoming an increasingly important and significant area of litigation. Not only is this type of litigation being used to seek to obtain compensation for affected persons, but it is also being used as a tool to hold governments and (often multinational) companies accountable for a perceived lack of climate mitigation efforts.<sup>2</sup>

This article explores the use and scope of climate change litigation and what it may mean for governments, local communities and investors.



## Actions against Governments

The majority of global climate change related litigation cases are being brought against States.<sup>3</sup> These cases, amongst others, include (a) actions by litigants challenging national governments' policy response to climate change, (b) adaptation cases or (c) initiatives in which States are looking for guidance from international courts and tribunals.

### Actions challenging national governments' response to climate change

There are a growing number of cases which seek to challenge a State governments' policy decisions in order to compel further action to set and meet national-level targets and take additional action to combat climate change. For example, in the case of *Urgenda v State*

of the Netherlands ("*Urgenda*"), the District Court in The Hague found that the Dutch government had failed to fulfil its duty of care pursuant to Articles 2 and 8 of the European Convention on Human Rights by not taking steps to reduce emissions by at least 25% by the end of 2020.

***Following this landmark case, governments of at least four other European countries (including Ireland, France, Germany and Belgium) have been held to be in breach of human rights obligations by their national courts for failing to implement climate commitments.<sup>4</sup>***

1 In December 2022 there were 1522 cases classified as climate change related in the US and 654 outside the US; see Climate Case Chart available at <http://climatecasechart.com/about>

2 "Understanding the Role of ESG and Stakeholder Governance within the Framework", Harvard Law Publication, dated 29 November 2022, available at <https://corpgov.law.harvard.edu/2022/11/29/understanding-the-role-of-esg-and-stakeholder-governance-within-the-framework-of-fiduciary-duties/>. The definitions of climate change are those used by the Grantham Research Institute of Climate Change and Environment website, available at [https://climate-laws.org/cclow/litigation\\_cases](https://climate-laws.org/cclow/litigation_cases) and Columbia Law School Sabin Center for Climate Change Law, available at <http://climatecasechart.com/>.

3 "Global Climate Change Litigation", Climate Case Chart, available at <http://climatecasechart.com/non-us-climate-change-litigation/>, with "global" climate change litigation referring to non-US cases.

4 *Urgenda Foundation (on behalf of 886 individuals) v State of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:HR:2019:2007, available at [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113\\_2015-HAZA-C0900456689\\_judgment.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200113_2015-HAZA-C0900456689_judgment.pdf)

Other cases have sought to challenge States' national policy or regulation without reference to a State's human rights obligations. One example is *R (on the application of Friends of the Earth) v UK Export Finance ("UKEF")*, where a decision by the UK's export credit agency UKEF to back a liquefied natural gas project in Mozambique has been unsuccessfully challenged by environmental campaigners, Friends of the Earth.<sup>5</sup> In another UK case, *R(oao Friends of the Earth) v Secretary of State for Business, Energy and Industrial Strategy ('Net Zero Challenge')*,<sup>6</sup> three NGOs successfully challenged the UK government's compliance with specific duties under the Climate Change Act 2008. In July 2022, the English High Court ruled in favour of the NGOs and required the UK government to produce and re-approve an updated and improved strategy.<sup>7</sup>

### Climate change adaptation cases

Another category of disputes seek compensation for monetary losses suffered by companies due to the impacts of climate change, such as rising sea levels, more frequently severe weather and intensifying wildfires affecting infrastructure and operations. These are often referred to as 'climate change adaptation cases'.

One such example is the discontinued 2016 Canadian class action of *Burgess v Ontario Minister of Natural Resources and Forestry*.<sup>8</sup> The case was brought by an individual on behalf of an affected class of persons, including companies, owning property or with ownership interests in property "situated on the shoreline of the Muskoka Lakes who suffered damages as a result of high-water levels, flooding, and/or floating ice in March or April 2016."<sup>9</sup>

Further 'climate change adaptation cases' have been brought in the United States, which have included actions seeking damages payments for losses incurred, challenges to adaptation

measures and actions seeking greater adaptation measures.<sup>10</sup> Notably, many of these cases have been brought by governments or government departments against corporations. For example, in late 2022, two such cases were brought against Exxon Mobil Corp. and other fossil fuel companies. The cases seek damages for the alleged substantial impact that fossil fuel companies have had in causing climate change and resulting harms to New Jersey;<sup>11</sup> and for losses resulting from storms during the 2017 Puerto Rico hurricane season and ongoing economic losses since 2017.<sup>12</sup>

### Initiatives before international courts and tribunals

A further significant avenue to address climate change impacts is through procuring advisory opinions from international courts or tribunals. Two such initiatives are currently being advanced by small island States in the so-called Tuvalu ITLOS Initiative and the Vanuatu ICJ Initiative:

- a) On 31 October 2021, Antigua & Barbuda and Tuvalu signed an agreement<sup>13</sup> establishing a commission with the power to request an advisory opinion from the International Tribunal for the Law of the Sea ("ITLOS").
- b) On 29 November 2022, a group of 16 States led by Vanuatu published the draft text of a proposed UN General Assembly resolution ("ICJ Resolution").<sup>14</sup> The intention of the ICJ Resolution is to request an advisory opinion from the International Court of Justice ("ICJ") on climate change. Vanuatu's related press release says that the "ICJ Advisory Opinion will clarify, for all States, our obligations under a range of international laws, treaties and agreements, so that we can all do more to protect vulnerable people across the world."<sup>15</sup>

A third initiative was commenced by Chile and Colombia on 9 January 2023, when the two States submitted a request<sup>16</sup> to the Inter-American Court of Human Rights ("IACHR") for an advisory opinion. The request asks the IACHR to opine on questions on the following issues:

- a) State obligations derived from the duties of prevention and guarantee of human rights in the face of climate emergencies;
- b) State obligations to preserve the right to life and survival in the face of a climate emergency, in light of science and human rights;
- c) State obligations with regard to the rights of children and new generations in the face of the climate emergency;
- d) State obligations arising from consultation and judicial procedures in the event of a climate emergency;
- e) the conventional obligations of protection and prevention for environmental and territorial defenders, as well as women, indigenous peoples and Afro-descendant communities in a climate emergency; and
- f) the shared and differentiated rights, obligations and responsibilities of States in the face of a climate emergency.

As climate change law develops, advisory opinions are capable of clarifying the applicable international law standards by providing guidance and serving as points of reference in future negotiations and court and tribunal decisions. These three initiatives, and others that may follow, will therefore be important developments to monitor.

5 *R (on the application of Friends of the Earth) v UK Export Finance* [2022] EWHC 568. In March 2022, a split two judge panel found that the decision-making process of UKEF was multifaceted and involved balancing different policy considerations. These included not only climate change but other factors, such as the eradication of poverty in Mozambique. Friends of the Earth was granted permission to appeal. See also J Setzer and C Higham, "Global Trends in Climate Change Litigation 2022", London School of Economics, dated June 2022, available at <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>.

6 England & Wales | *R (on the application of Friends of the Earth) v Secretary of State for Business Energy* [2022] EWHC 1841 (Admin).

7 J Setzer and C Higham, "Global trends in climate change litigation: 2022 snapshot", Grantham Research Institute on Climate Change and the Environment, dated June 2022, available at <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>.

8 *Burgess v Ontario Minister of Natural Resources and Forestry*, Court File No. 16-1325 CP, Ontario Superior Court of Justice.

9 *Burgess v Ontario Minister of Natural Resources and Forestry*, Court File No. 16-1325 CP, Ontario Superior Court of Justice, Statement of Claim, paragraph 4.

10 "U.S. Climate Change Litigation", Climate Case Chart Publication, available at <http://climatecasechart.com/us-climate-change-litigation/>, adaptation section

11 "The municipalities alleged that the defendants were responsible for 40.01% of all global industrial greenhouse gas emissions from 1965 to 2017, and that these collective emissions were a 'substantial factor in the increase in intensity of the 2017 Atlantic Hurricane Season'"; *Platkin v Exxon Mobil Corporation*, Superior Court of New Jersey Law Division, Docket No. GLO-L-000297-19; also available at <http://climatecasechart.com/case/municipalities-of-puerto-rico-v-exxon-mobil-corp/>.

12 *Municipalities of Puerto Rico v Exxon Mobil Corporation*, Case 3:22-cv-01550 (22 November 2022).

13 Multilateral Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law ("the COSIS Agreement"), dated 31 October 2021, available at <https://treaties.un.org/doc/Publication/UNTS/No%20Volume/56940/Part/I-56940-0800002805c2ace.pdf>

14 Draft Resolution of the Request for an Advisory Opinion on the obligations of States in respect of climate change, Vanuatu International Court of Justice Resolution, dated 29 November 2022, available at <https://www.vanuatuicj.com/resolution>

15 "Vanuatu Releases Draft Resolution asking the ISJ for an Advisory Opinion", Government of the Republic of Vanuatu Press Release, dated 30 November 2022, available [https://docs.google.com/document/d/1\\_kNu7m-tISjmKC4mrikHPvGYQr69mYWU/edit](https://docs.google.com/document/d/1_kNu7m-tISjmKC4mrikHPvGYQr69mYWU/edit)

16 Request by Chile and Colombia to the Inter-American Court of Human Rights, dated 9 January 2023, available at (Spanish only): [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230109\\_18528\\_petition.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230109_18528_petition.pdf)



## Actions brought by affected local communities

Recent trends in climate change litigation show that communities in developing countries are potentially more acutely impacted by climate change.

*For example, in **Ioane Teitota v New Zealand**,<sup>17</sup> the UN Human Rights Committee (“UNHRC”) observed “the author’s claim that sea level rise is likely to render Kiribati uninhabitable” in the next 10 to 15 years, noting also that the time frame could however “allow for intervening acts by Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population.”<sup>18</sup>*

A similar observation was made in the case of Daniel Billy et al v Australia (“Daniel Billy”),<sup>19</sup> in which the UNHRC amongst others, considered the islanders’ claim that the relevant Torres Strait islands were likely to be uninhabitable within 10 to 15 years due to rising sea levels. In what is considered a landmark finding, the UNHRC observed that the Australian Government had violated its human rights obligations towards eight Torres

Strait Islanders through its climate change inaction. The UNHRC noted the obligation on Australia to provide adequate compensation to the alleged victims for the harm suffered, and to take steps to secure the communities’ continued safe existence.

In the case of **Juliana v United States of America** (“Juliana”),<sup>20</sup> the United States government was sued by 21 young claimants for failing to protect the right to life, liberty and property of young people by promoting and subsidizing the use of fossil fuels despite having knowledge of the harmful environmental impacts. Similar to the Urgenda case, Juliana has precipitated similar lawsuits outside of the United States, such as the Supreme Court proceedings in Colombia, where 25 young claimants successfully sued the Colombian government on the grounds that climate change, and the government’s failure to reduce deforestation in the Columbian Amazon, had breached their fundamental rights. As a result, in 2018, the Colombian government was ordered to formulate a plan, alongside the claimants and affected communities, to address the rate of deforestation.<sup>21</sup>



## Actions brought by international investors

International investment law is also being increasingly considered as an effective avenue to address climate change issues. The international investment legal regime comprises more than 3,000 bilateral and multilateral International Investment Agreements (“IIAs”) aimed at promoting foreign investment. In becoming party to an IIA, a State commits to afford minimum levels of protection to foreign nationals in other IIA party States who invest in their territory. If standards of protection offered by a

State are breached, foreign investors may, under many IIAs, commence arbitral proceedings against the host State through Investor-State Dispute Settlement (“ISDS”).

Over the last decade there has been an increase in ISDS cases which can be considered to relate to climate change.

## Compensation claims

There are a group of claims that relate to the alleged reduction in value of existing assets or investments made by foreign investors following the introduction of policy measures intended to address climate change. For example, in the case of **RWE v Kingdom of the Netherlands**, the German energy company commenced proceedings against the Dutch government for planning to phase-out coal-fired power plants by 2030. The claim was brought under the Energy Charter Treaty (“ECT”) for a claim of damages of around EUR 1.4 billion.<sup>22</sup>

## Changes to climate legislation and policy

Another group of claims concern changes made to climate change-related legislation or policies originally introduced to meet climate goals, such as providing subsidies and other incentives to encourage investment in renewable energy. For example, in the case of **PV Investors v Spain** and **Eskosol v Italy**,<sup>23</sup> claims were brought against States after schemes were amended to reduce the level of incentives designed to encourage renewable energy investment.

## Redress claims for insufficient action

A third category of IIA claims may potentially be brought against States for a failure to take sufficient action to combat the impacts of climate change which results in damage to investments, such as impacts of extreme weather on investments or rising sea levels flooding investments.

17 Ioane Teitota v New Zealand (CCPR/C/127/D/2728/2016), available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/127/D/2728/2016&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/127/D/2728/2016&Lang=en).

18 Ioane Teitota v New Zealand (CCPR/C/127/D/2728/2016), paragraph 9.12.

19 Daniel Billy and other v Australia, No. 3624/2019, available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F135%2FD%2F3624%2F2019&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F135%2FD%2F3624%2F2019&Lang=en).

20 Juliana v United States, 947 F.3d 1159 (9th Cir. 2020), available at <http://climatecasechart.com/case/juliana-v-united-states/>.

21 Demanda Generaciones Futuras v Minambiente (STC4360-2018), available at <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/>.

22 RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands, ICSID Case No. ARB/21/4 also available at <http://climatecasechart.com/non-us-case/rwe-v-kingdom-of-the-netherlands/>.

23 The PV Investors v Spain, PCA Case No. 2012-14, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/435/the-pv-investors-v-spain>; and Eskosol S.p.A. in liquidazione v Italian Republic, ICSID Case No. ARB/15/50, available at <https://www.italaw.com/cases/5895>.