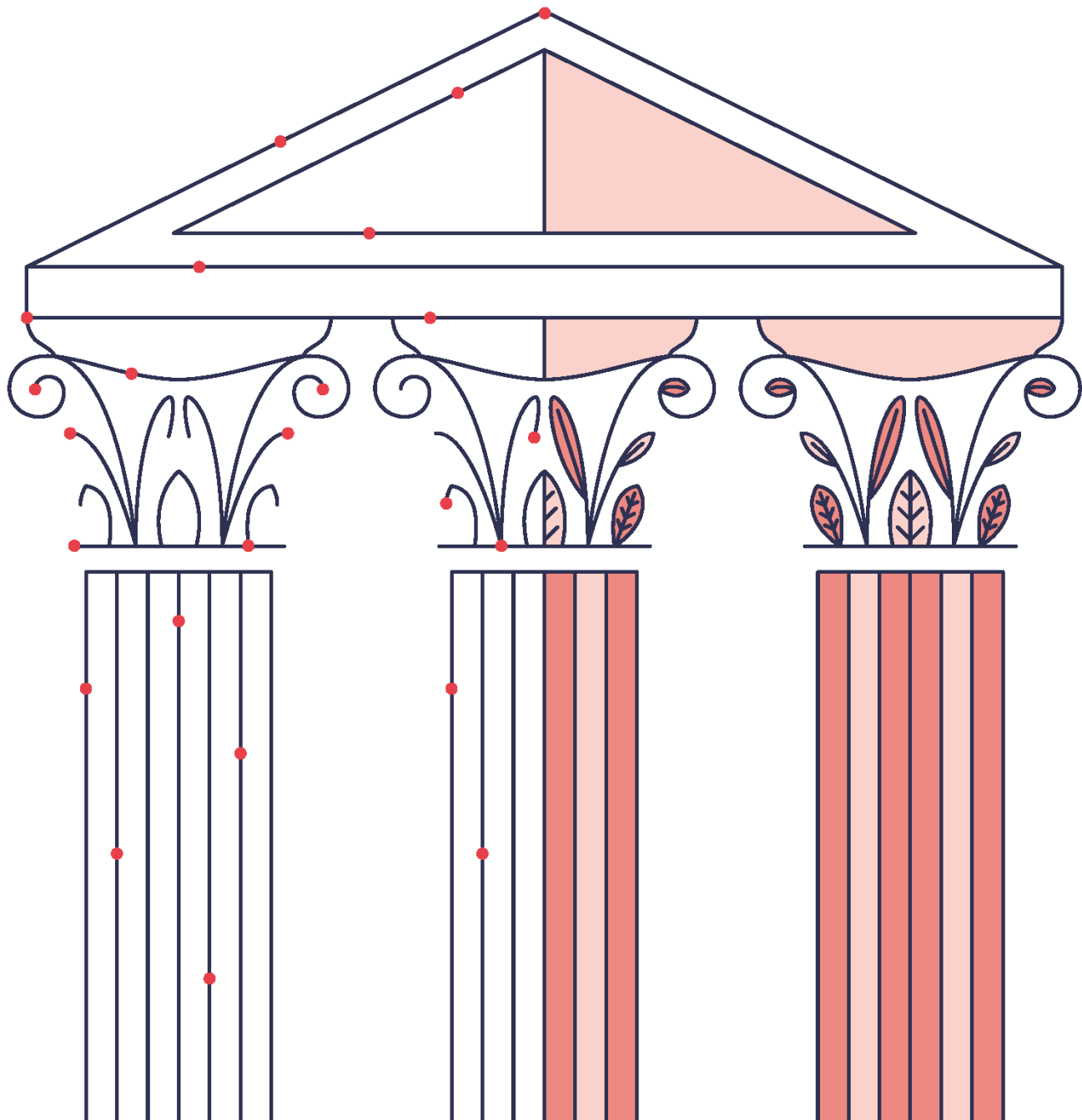


Challenging government responses to climate change through framework litigation

Catherine Higham, Joana Setzer and Emily Bradeen

Policy report

September 2022



The Centre for Climate Change Economics and Policy (CCCEP) was established in 2008 to advance public and private action on climate change through rigorous, innovative research. The Centre is hosted jointly by the University of Leeds and the London School of Economics and Political Science. It is funded by the UK Economic and Social Research Council. www.cccep.ac.uk

The Grantham Research Institute on Climate Change and the Environment was established in 2008 at the London School of Economics and Political Science. The Institute brings together international expertise on economics, as well as finance, geography, the environment, international development and political economy to establish a world-leading centre for policy-relevant research, teaching and training in climate change and the environment. It is funded by the Grantham Foundation for the Protection of the Environment, which also funds the Grantham Institute – Climate Change and the Environment at Imperial College London. www.lse.ac.uk/granthaminstitute

About the authors

Catherine Higham is a Policy Analyst and Coordinator of the Climate Change Laws of the World project at the Grantham Research Institute on Climate Change and the Environment.

Joana Setzer is an Assistant Professorial Research Fellow at the Grantham Research Institute on Climate Change and the Environment.

Emily Bradeen is a Research Assistant at the Grantham Research Institute on Climate Change and the Environment.

Acknowledgements

The authors declare financial support from the Economic and Social Research Council (ESRC), the Foundation for International Law for the Environment and the Grantham Foundation for the Protection of the Environment for the submitted work. The authors declare no other relationships or activities that could appear to have influenced the submitted work.

The views in this report are those of the authors and do not necessarily represent those of the host institutions or funders. Any errors and omissions remain those of the authors.

The authors thank Dr Yusra Suedi, Lucy Maxwell, Dr Andrew Jackson and Sam Bookman for their helpful review comments on this report.

Georgina Kyriacou copy-edited the report.

This paper was first published in September 2022 by the Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy.

© The authors, 2022

Permissions requests should be directed to the Grantham Research Institute.

Suggested citation: Higham C, Setzer J and Bradeen E (2022) *Challenging government responses to climate change through framework litigation*. London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

Contents

Summary	1
1. What is government framework climate litigation and why is it important?.....	2
Defining framework climate litigation	2
Building on a history of institutional reform litigation	3
What actors are impacted by this type of litigation?.....	4
2. Trends in framework climate litigation	5
Understanding the landscape.....	5
Evolution of cases over time	6
Common elements: fossil fuels, deforestation, and global temperature goals.....	9
3. Understanding different perspectives and grounds	11
Claimants	11
Defendants and courts	11
4. Understanding outcomes and impacts	14
Direct outcomes.....	14
Indirect impacts	15
Negative impacts	18
Corporate framework cases	18
5. Conclusion and recommendations.....	19
References	21

Summary

- Climate [change] litigation refers to a diverse body of legal proceedings, involving many different types of challenges. **A specific subset of climate litigation consists of cases in which litigants challenge the ambition or implementation of a national or subnational government's overall policy response to climate change.** We use the term 'government framework litigation' to describe this group of cases.
- **Up to 31 July 2022, at least 80 framework litigation cases had been filed against governments around the world.** Just under half of these cases were filed in 2021 alone. Cases have been filed before national courts in 24 countries, as well as before the General Court of the European Union, the European Court of Human Rights, the Inter-American Commission on Human Rights, the UN Committee on the Rights of the Child, the UN Human Rights Committee, and other UN Special Procedures.
- **We identify the following key trends among these cases:**
 - Government framework cases have been filed against both national governments (56 cases) and subnational governments (24 cases). More than half of the subnational cases were filed against German subnational governments following a successful framework case at the federal level.
 - Most government framework cases have been filed in or against Global North countries (63 cases), while a small but significant minority have been filed in or against Global South countries in Latin America (8 cases) and South Asia (7 cases). In cases filed before international bodies the decisions may apply to countries from both the North and South. Two such cases have been documented to date: the *Hearing on Climate Change Before the Inter-American Commission on Human Rights* and *Sacchi et al v. Argentina et al.*, filed before the United Nations Committee on the Rights of the Child.
 - Government framework cases may concern the design and overall ambition of a government's response to climate change (58 'ambition cases'), or they may concern the adequacy of the implementation of a policy response (9 'implementation cases'). Some cases concern both (13 'ambition and implementation cases').
 - Most government framework cases are ongoing. However, of the 9 cases challenging national-level policies that have been heard so far by the highest court in a given jurisdiction, 7 have had outcomes favourable to climate action. Cases against subnational governments have achieved less success but even when unsuccessful, government framework cases may influence the development of climate policy.
- **Successful framework cases may have a significant impact on government decision-making, requiring governments to develop and implement more ambitious policy responses to climate change.** Government entities at all levels should anticipate the emergence of legal duties to act on climate change and develop internal decision-making processes consistent with avoiding harmful impacts from climate change.
- **Government framework litigation may result in rapid changes to policy landscapes.** Companies and investors should take the potential impacts of litigation into account when assessing transition risk. Companies should also be aware of the phenomenon of corporate framework litigation, which builds on government framework litigation.

1. What is government framework climate litigation and why is it important?

Our recently released *Global trends in climate litigation: 2022 snapshot* report provides an overview of key developments in the universe of climate [change] litigation over the past year (Setzer and Higham, 2022). In this follow-up report we analyse a specific subset of climate litigation: ‘government framework litigation’, in which litigants challenge aspects of a national or subnational government’s overall policy response to climate change. These cases often consciously ‘borrow’ strategic approaches from a small handful of high-profile early cases including *Ashgar Leghari v. Federation of Pakistan*, *Urgenda Foundation v. State of the Netherlands* and *Juliana et al v. the United States*.¹ The cases may involve (i) challenges to the overall level of ambition of the response; or (ii) failure to implement measures adequate to achieve the government’s ambition.

We begin by conceptualising this subset of cases, which find their origin in the broader use of strategic litigation as a significant tool for instigating social change – most commonly by civil society movements. We then identify key trends and insights from an empirical analysis of cases filed before 31 July 2022. Finally, we draw on this analysis to formulate policy recommendations: primarily that government entities should anticipate the emergence of a legal duty to act in a way that is consistent with reducing harm from climate change and factor this into decision-making at multiple levels of governance.

Companies and investors should also pay close attention to developments in this area when seeking to understand ‘transition risk’: successful framework litigation against high-emitting governments may lead to rapid changes in policy and may in turn lead to or inspire litigation against companies.

Defining framework climate litigation

Framework cases against governments can be understood as a subset of climate litigation. Rather than challenging specific projects or individual policies that result in increased greenhouse gas emissions or that fail to account for climate-relevant impacts, these cases challenge broad, whole-of-government policies and decisions. In the context of climate change mitigation policy, the type of policies and decisions challenged can include “a state’s NDC [nationally determined contribution] for 2030 submitted to the Paris Agreement, emissions reduction targets prior to 2030 ... or a state’s carbon budgets” (Maxwell et al., 2022: 5); carbon budgets typically set a cap on emissions for a predetermined period.

Less commonly, framework cases may also challenge a government’s overall approach to climate change adaptation. An example is the case of *Ashgar Leghari v. Federation of Pakistan*, in which the claimant challenged the government’s failure to implement an existing national policy framework.

Many of these cases cite human rights and environmental obligations stemming from constitutional, regional and international law, including international climate agreements, within their grounds (Maxwell et al., 2022). Previous analysis has determined that reliance on human rights grounds in particular often makes an important contribution to the success of these cases (Barritt, 2021; Beaugard et al., 2021).

While this type of climate litigation is clearly distinguishable from other cases, the term to describe it is not yet firmly established. Maxwell et al. (2022) use the term ‘systemic mitigation cases’ to describe the subset of cases that focus on a government’s overall climate mitigation policy. They define such cases as “proceedings in which claimants challenge the overall efforts of

¹ Note: to make this report more accessible, when a case law is cited in the text, rather than including the case details in footnotes, we add the direct hyperlink to the case in the Grantham Research Institute’s [Climate Change Laws of the World](#) or the Sabin Center for Climate Change Law’s [Climate Case Chart](#) online databases.

a state to mitigate climate change” (ibid.: 5). In previous analysis, we used the term ‘systemic litigation’ when referring to these cases, including cases focused on both adaptation and mitigation (Setzer and Higham, 2021). However, it has become clear that the term ‘systemic’ may not be the best way to describe these cases. In the broader legal literature, the term ‘systemic litigation’ has been used to describe a different type of case, generally litigation in the US that attempts to solve problems in a given system (e.g. the child welfare, prison or educational system). At times, the use of the term ‘systemic climate litigation’ to describe cases that might also be thought of as ‘strategic climate litigation’ has led to confusion. In turn, people have started to use the term ‘systemic lawyering’ to describe how litigation can be enhanced if lawyers use systems thinking to identify key nodes and links where legal interventions will have greatest impact (Solana et al., forthcoming).

Therefore, in place of the term ‘systemic litigation’ we are adopting the term ‘framework litigation’ to describe litigation in which litigants challenge aspects of a national or subnational government’s overall policy response to climate change.

The term ‘framework *legislation*’ has been widely used to describe climate laws that establish the targets, policies and institutions required to meet climate change objectives, such as the UK’s Climate Change Act of 2008 (Averchenkova et al., 2017; Iacobuta et al., 2018; Muinzer, 2020). Framework legislation is seen as a key instrument to improve the predictability of climate change policy, a means to integrate climate change concerns into the relevant policy areas (Averchenkova et al., 2020; Scotford and Minas, 2019), and a means to establish accountability for the implementation of those laws (Higham et al., 2021). Framework climate litigation is often closely related to framework climate legislation. When a framework law or policy exists, most likely that law or policy will constitute the basis for or subject of lawsuits that challenge national or subnational governments’ insufficient or inconsistent climate action. For example, in the case of *Klimatická žaloba ČR v. Czech Republic*, the claimants challenged the greenhouse gas emission reduction targets for 2050 in the national Climate Protection policy, while in the case of *Neubauer et al. v. Germany*, the claimants challenged the emission reduction targets for 2030 (55% by 2030) and the design of the German Climate Protection Act. In *Greenpeace et al. v. Spain*, the claimants challenged Spain’s failure to approve a National Climate and Energy Plan as required by EU legislation, and the inadequate ambition of the 2030 targets in the existing draft plan.

Cases may also be concerned with government failures to implement existing climate framework legislation (*R [oao Friends of the Earth et al.] v. Secretary of State for Business, Energy and Industrial Strategy [‘Net Zero Challenge’]*), or with the total absence of and urgent need for such legislation (*Shrestha v. Office of the Prime Minister et al.*).

The relationship between framework litigation and framework legislation varies and is often firmly rooted in different legal traditions (Kelleher, 2022); nonetheless, the cases contain clear similarities in their focus on whole-of-government climate responses.

In this report, we focus exclusively on framework climate litigation against governments. However, there is also a closely related group of cases against companies, which can be understood as ‘corporate framework litigation’. Such cases are typically brought against large multinational companies and challenge the absence or inadequacy of group-wide emissions reduction targets. As in government framework cases, human rights grounds are often used in this type of litigation (Setzer and Higham, 2022). While a full discussion of these cases is outside the scope of this report, the relationship between government framework cases and corporate framework cases is briefly considered in Section 4.

Building on a history of institutional reform litigation

The pursuit of social reform through litigation and the courts is not a new phenomenon. Historically, ‘structural reform litigation’ or ‘public law litigation’ have been used in cases seeking court orders “aimed at reforming the day-to-day operation of government institutions that are accused of committing systemic violations of the law” (Chiang, 2015; see also Parkin, 2017). The concept of structural reform litigation is rooted in the United States’ civil rights movement of the

1970s, particularly in public law cases such as the landmark *Brown v. Board of Education* (Jeffries and Rutherglen, 2007; Fiss, 1978), in which the US Supreme Court determined that racial segregation in US schools was unconstitutional. It has also played a key role in a number of other movements for social change, such as the campaign for recognition of same sex marriage (Duncan, 2005).

There is, however, a debate regarding the effectiveness of such types of litigation. Some have argued that courts can almost never be effective producers of significant social reform – “at best, they can second the social reform acts of the other branches of government” (Rosenberg, 1991: 338). Others suggest that while the *Brown* case did not resolve the issue of desegregation alone, it was a tide-turning moment within a longer struggle, during which further litigation and other strategies continued to be employed by the movement to achieve the implementation of desegregation in practice (McCann, 1994; Chiang, 2015). Others, still, suggest that modern reform litigation is no longer filed with the sole purpose of achieving structural reforms through specific orders, but is “intended to provide the leverage needed for negotiation with defendants” (Chiang, 2015: 551). In other words, the filing of a case is only one part of the claimant’s broader advocacy and engagement strategy, a way to gain entry to where policy decisions are made.

This history of other movements provides important lessons for considering climate litigation. It suggests that while framework climate cases can have a positive impact and result in court orders requiring change, this type of litigation can also be quite abstract and ‘onerous’ for the state – and for the litigants (see Auz, forthcoming). More than other types of litigation, such cases may need additional efforts to ensure that decisions are enforced to result in real change (see Section 4 below). It is also clear from the experience of other social movements that litigation and the courts cannot be the sole drivers of significant social change, but rather that they must be accompanied by a well-resourced movement of public interest lawyers and by strategic communications campaigns to play this role (Lewis, 2015; Epp, 1998).

What actors are impacted by this type of litigation?

Framework climate litigation affects not only governments that are already responding or that might come to be involved in these lawsuits, but also companies, investors and stakeholders who are part of or are interested in efforts to promote a low-carbon transition.

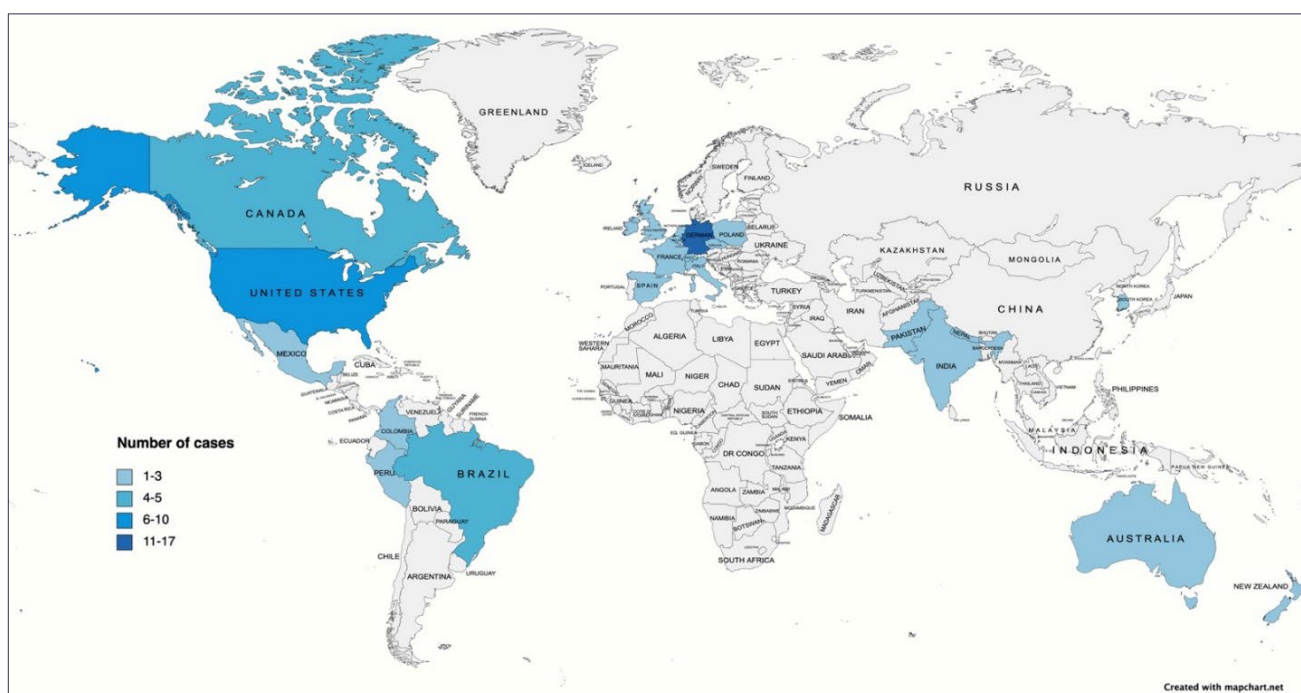
- **For governments:** Framework climate litigation can impact government decision-making, both at the national and subnational level, even where lawsuits are not fully successful. Where successful, framework cases may also lead to an increase in further litigation seeking to ensure that the principles of the litigation are implemented in practice across government departments and across different levels of government.
- **For companies and investors:** These cases matter for companies and investors as they can prompt concrete governmental policy responses. Litigation against governments may act as a spur to accelerate the transition in their respective countries, with all the knock-on impacts that may have. Such litigation may also plant the seeds for cases against corporate actors, as already seen in the Netherlands and in Germany, where litigation against major private emitters followed the successful outcomes in the *Urgenda* and *Neubauer, et al. v. Germany* cases.
- **For civil society and interested stakeholders:** These cases are a ‘channel’ through which to pursue and achieve the objectives of the Paris Agreement, among other climate-related goals. However, due to the nature of the cases and the remedies, litigants’ work does not finish when a final decision is given. To achieve the goals of the litigation, legal teams must continue to work with the communities they represent and with the communities that may be affected by the decision to secure meaningful change. Further, such cases can serve to achieve broader aims of civil society and stakeholders, such as movement-building, beyond the immediate aims of the litigation. As Rogers (2015: 180) notes, climate litigation “can form part of a paradigm shift when the public imagination is captured by the symbolic or rhetorical significance of the litigation”.

2. Trends in framework climate litigation

Understanding the landscape

As of 31 July 2022, we have identified 80 cases of framework climate litigation around the world.² These cases have been filed in 24 national courts (see Figure 2.1). Of the cases filed before national courts, 56 lawsuits were filed against national governments and 24 against subnational governments. Cases have also been filed before the General Court of the European Union, the European Court of Human Rights, Inter-American Commission on Human Rights, the UN Committee on the Rights of the Child and the UN Human Rights Committee. Thirty-three of these cases are still ongoing. In addition, some of the cases where a judgment has already been issued may be subject to ongoing appeals.

Figure 2.1. Map of cases by country (up to 31 July 2022)



Source: Map uses data from the CCLW and Sabin Centre for Climate Change databases (see footnote 2)

The earliest framework case filed against a government to garner major international attention was *Urgenda Foundation v. State of the Netherlands* in 2013. The case was decided (and upheld) by the Hague District Court in 2015. Between 2014 and 2015, five other similar cases were initiated; in India, Pakistan, the United States, New Zealand and Belgium (see Figure 2.2 below). In addition to *Urgenda*, two of these cases saw early successes in the courts, attracting significant international attention and helping to shape the strategies of subsequent litigants: *Juliana v. United States* (with the decision by the District Court Judge Ann Aiken on 10 November 2016), and *Asgar Leghari v. Pakistan* (with the decision of the then Lahore High Court Judge Syed Mansoor Ali Shah on 4 September 2015).³

² 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. The database is a joint initiative with the Sabin Center for Climate Change Law at Columbia Law School and it uses cases and summaries from the Center's non-US Climate Litigation Database. A separate US Climate Litigation Database is maintained by the Sabin Center in collaboration with the law firm Arnold & Porter Kaye Scholer and is the source for the US cases cited here. Cases filed before the European Court of Human Rights that relate to proceedings originally filed before domestic courts (for example *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others*) have not been counted as separate cases within the total number described here.

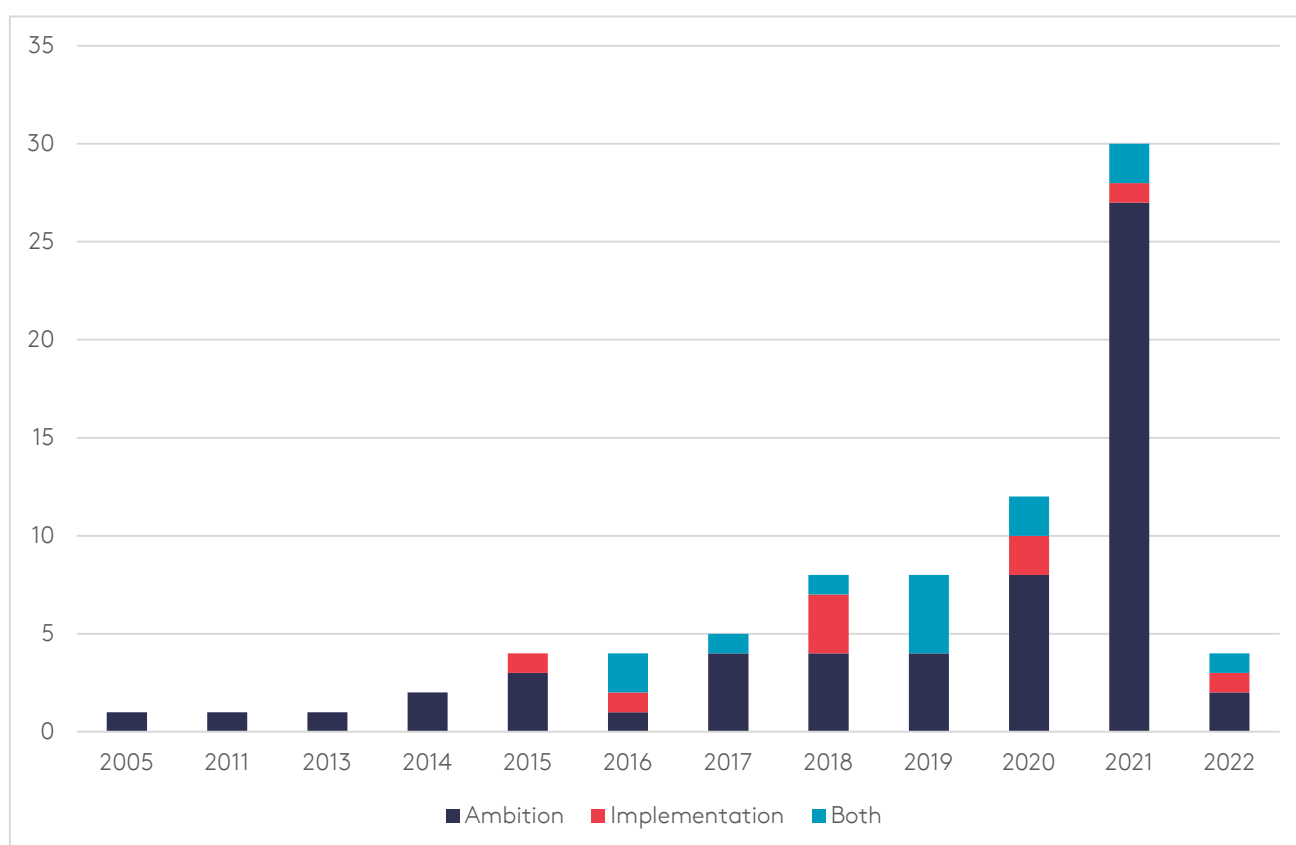
³ The full text of Judge Aiken's order can be found in the US Climate CaseChart maintained by the Sabin Center and Arnold and Porter here. The full text of Judge Shah's order can be found in the CCLW database here.

The *Urgenda*, *Leghari* and *Juliana* cases all constituted a departure from previous litigation strategies against governments, which had primarily involved administrative challenges seeking to incorporate climate concerns into existing environmental law (Setzer and Higham, 2021; Yoshida and Setzer, 2020). Instead, these cases sought to rely on broad government duties, grounded at least in part in constitutional rights or human rights (Peel and Osofsky, 2015). Since these cases, arguments based either in domestic and constitutional rights protections and/or international human rights law have been adopted in around 70% of all framework cases.

These cases built on an emerging trend in scholarship and policy discourse which saw climate change increasingly framed as a human rights issue in international negotiations starting in the mid-2000s (Jodoin et al., 2021). This connection was first explicitly adopted in legal proceedings in a complaint submitted to the Inter-American Commission on Human Rights against the United States by the Inuit Circumpolar Conference in 2005 (Jodoin et al., 2020). Although that case was unsuccessful – arguably it was too far ahead of its time – we consider it the forerunner to the subsequently filed framework cases discussed in this report.⁴

Evolution of cases over time

Figure 2.2. Government framework cases filed over time, by type (up to 31 July 2022)



The initial success of the *Juliana*, *Leghari* and especially the *Urgenda* decisions and the wide attention they attracted from media outlets and scholars motivated a wave of similar cases across the world (IPCC, 2022). Particularly since 2017, numbers have risen steadily (see Figure 2.2), with a record number of 30 new cases submitted in 2021. Just under half of these were filed in Germany, a sharp increase that is closely connected to the outcome in the case of *Neubauer, et al. v. Germany* in April 2021 (see further below). New cases were also filed in 11 other jurisdictions in Europe, Latin America and North America.

⁴ When thinking about the antecedents to the three cases noted above, it is also worth considering the case of *Chernaik v. Brown*, which was filed in Oregon in 2011 on behalf of the lead plaintiff in the *Juliana* case and another youth plaintiff.

As mentioned, government framework litigation generally addresses the ambition or implementation of climate measures. Sometimes these arguments are combined, but for the purposes of this analysis, framework litigation can be distinguished into two broad types: (i) ‘ambition cases’, concerning the absence, adequacy or design of a government’s policy response to climate change; and (ii) ‘implementation cases’, concerning the enforcement of climate protection measures to meet existing targets or implement existing plans (see Figure 2.2).

From ambition...

As Figure 2.2 shows, most framework litigation can be classified as ‘ambition cases’. Some of these cases challenge the level of ambition of climate targets in national policies or Nationally Determined Contributions (NDCs) and whether these are a sufficient contribution to limiting global temperature rise (e.g. *Do-Hyun Kim et al. v. South Korea*; *Greenpeace v. Instituto Nacional de Ecología y Cambio Climático et al.*; *Six Youths v. Minister of Environment and Others*; as well as the already mentioned *Urgenda*, *Neubauer* and *Klimatická žaloba ČR v. Czech Republic* cases).⁵ Other cases focus on the flawed design of legislation or policy to achieve a government’s stated climate ambitions (e.g. *Bushfire Survivors for Climate Action Incorporated v. Environment Protection Authority*; *Maria Khan et al. v. Federation of Pakistan et al.*; *Plan B Earth and Others v. Prime Minister*).⁶ Others still concentrate on the argument that a government has adopted a series of positive actions, which taken together amount to a whole-of-government approach that has increased high-emitting activities despite knowledge of the likely impacts on the climate and therefore that the government must desist from that activity and seek to remedy the impacts (*Juliana v. United States*; *Held v. Montana*).

...to implementation

A smaller group of cases concern exclusively the implementation of climate protection measures to meet existing targets or implement existing plans (Figure 2.2 shows their proportion). These ‘implementation cases’ are mostly found in Global South countries where, in attempting to overcome implementation constraints, litigation is often used as a last resort to compel governments to enforce existing policies for climate change mitigation and adaptation (Setzer and Benjamin, 2019). Examples include *Ashgar Leghari v. Federation of Pakistan*, and the ongoing case of *Institute of Amazonian Studies v. Brazil*, where plaintiffs allege that the federal government has failed to comply with its action plans to prevent deforestation and mitigate and adapt to climate change, violating national law and fundamental rights (see Box 2.1).

Implementation cases have also been filed (and won) in the Global North. In the UK, in *R (oao Friends of the Earth et al.) v. Secretary of State for Business, Energy and Industrial Strategy*, the three NGOs that brought the case were not challenging the ambition or design of the Climate Change Act itself but instead focused on whether the government had complied with specific duties under the Act. In July 2022 the High Court of England and Wales ruled in favour of the NGOs and required the government to produce and re-approve an updated and improved strategy, which should be published by no later than March 2023. In its decision, the High Court of England and Wales cited with approval, and “adopt[ed] gratefully”, reasoning from the July 2020 decision of the Supreme Court of Ireland in *Friends of the Irish Environment v. The government of Ireland et al.*, to the effect that there must be transparency for the public over how a government is seeking to achieve targets in national climate legislation. Both the UK and Irish cases can be understood as part of a line of cases in common law countries that have been based primarily in procedural obligations set out in framework legislation.

Implementation cases in Global North countries have also involved substantive challenges to a failure to comply with climate targets. Such arguments are often found in conjunction with arguments about ambition (i.e. national targets are weak *and* the government is not on track to

⁵ The cases *Greenpeace v. Instituto Nacional de Ecología y Cambio Climático et al.* and *Six Youths v. Minister of Environment and Others*, filed in Mexico and Brazil respectively, focused on applying the principle of ‘non-regression’ to challenge reductions in the level of ambition in a country’s NDC based on the adoption of new greenhouse gas accounting methodologies (see further).

⁶ Note that this subset of ambition cases frequently also involves arguments about implementation where some measures do exist.

meet them). Examples include *Notre Affaire à Tous and others v. France* and *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others*.

A non-linear path

As the legal and policy landscape on climate change evolves in different jurisdictions, it seems plausible that implementation cases will become increasingly popular over time. This is made even more likely by a recent trend for amending and passing climate framework legislation – such legislation is now present in more than 50 countries around the world, with more than 20 such laws passed or amended in the last two years alone (see [Climate Change Laws of the World](#)).

However, looking at the evolution of cases to date, it is clear that this process is far from linear, with several jurisdictions seeing cases focused on implementation followed by cases focused on ambition, instead of the other way round. This might be a consequence of diverse actors within the climate litigation movement choosing to focus on different elements of the climate governance challenge, and making different assessments of what will likely meet with most success before the courts.

Box 2.1. Framework climate litigation in the Global South

The vast majority of the government framework cases we have identified have been filed in Global North countries (63), while a small but significant minority have been filed in Global South countries, in Latin America (8) and South Asia (7). When comparing climate litigation in the Global South and in the Global North, there are significant differences in the capacity to bring cases, as well as constraints in enforcing decisions (Setzer and Benjamin, 2019, 2020; Auz, forthcoming). Strategic approaches to and outcomes of framework climate litigation in the Global South reflect these different characteristics.

To begin with, in many Global South countries there are significant obstacles to filing litigation, including restrictions and threats faced by those bringing cases (Setzer and Benjamin, 2019). Once these initial barriers are overcome and a lawsuit is filed, climate litigation in these regions is often purposely adapted to address challenges that are generally more acute in developing countries. For example, litigants from the Global South are more likely to use litigation to compel governments to enforce existing policies for climate change mitigation and adaptation, attempting to overcome implementation constraints (Setzer and Benjamin, 2020; Peel and Lin, 2020).

Litigants have been able to surmount such obstacles thanks to a combination of wide access to justice, progressive climate and/or environmental rights legislation or constitutional provisions, and progressive courts (Setzer and Benjamin, 2020). Out of the 15 framework cases filed in the Global South, 8 are still open and 7 have had at least one decision issued by the court. Of the 7 decided cases, 6 saw successful outcomes and only 1 was unsuccessful.

However, the implementation constraints that drive most of this litigation also affect the extent to which progressive court decisions are enforced. In the case of *Leghari v. Pakistan*, the Lahore court was willing to exercise an active role and build regulatory capacity where the statutory and institutional framework was ineffective. Yet, in *Future Generations v. Ministry of the Environment and Others* (in Colombia) a decision by the Supreme Court recognising the correlation between deforestation, climate change and the violation of the human rights of present and future generations did not translate into effective practical outcomes.

It is also possible that a climate case that was not initially filed as a framework case (i.e. because it targets one specific policy or sector) will become one as the case proceeds. The recent decision by the Brazilian Supreme Court in *PSB et al. v. Brazil (on Climate Fund)* illustrates this type of situation. In this case, four political parties filed a lawsuit challenging the federal government's failure to adopt administrative measures concerning the Climate Fund, a governmental fund that was created to support climate adaptation and mitigation projects in Brazil. The case focused on the poor implementation of one specific instrument of Brazil's climate policy, and therefore it would not be considered a framework case. But the Supreme Court ruled that climate protection has "constitutional value", thereby going beyond finding the executive branch to be in breach of its duty to execute and allocate the funds of the Climate Fund. In practice, the Court ruled that any action or omission contrary to climate protection is a direct violation of the Constitution and human rights, creating a broad decision that could raise the ambition of the overall national policy response to climate change.

Common elements: fossil fuels, deforestation, and global temperature goals

It is a prerequisite for inclusion in the group of framework cases that cases concern a government's macro-level climate policy response. Frequently, cases connect this to the global temperature goals set out in the Paris Agreement (see Box 2.2 below).

Several framework cases also focus on references to sectors that contribute significantly to a country's overall emissions in addition to making broader arguments challenging a whole-of-government approach. Most frequently, such 'supplementary' sectoral claims relate to the exploration, production and consumption of fossil fuels. There are at least 30 cases that refer to this issue, of which 18 challenge government policies that support the fossil fuel industry, and 12 cite the government's lack of measures to reduce fossil fuel extraction or consumption. In cases such as *Juliana et al. v. United States*, government support for the fossil fuel industry is central. The *Juliana* plaintiffs' reliance on the due process clause of the US Constitution required them to show that the government had not just allowed but actively contributed to the climate-related harm suffered by the 21 young people who brought the claim. To do so, the pleadings contain extensive evidence documenting the way in which the US government has 'perpetuated' a fossil fuel energy system, through approvals and subsidies.

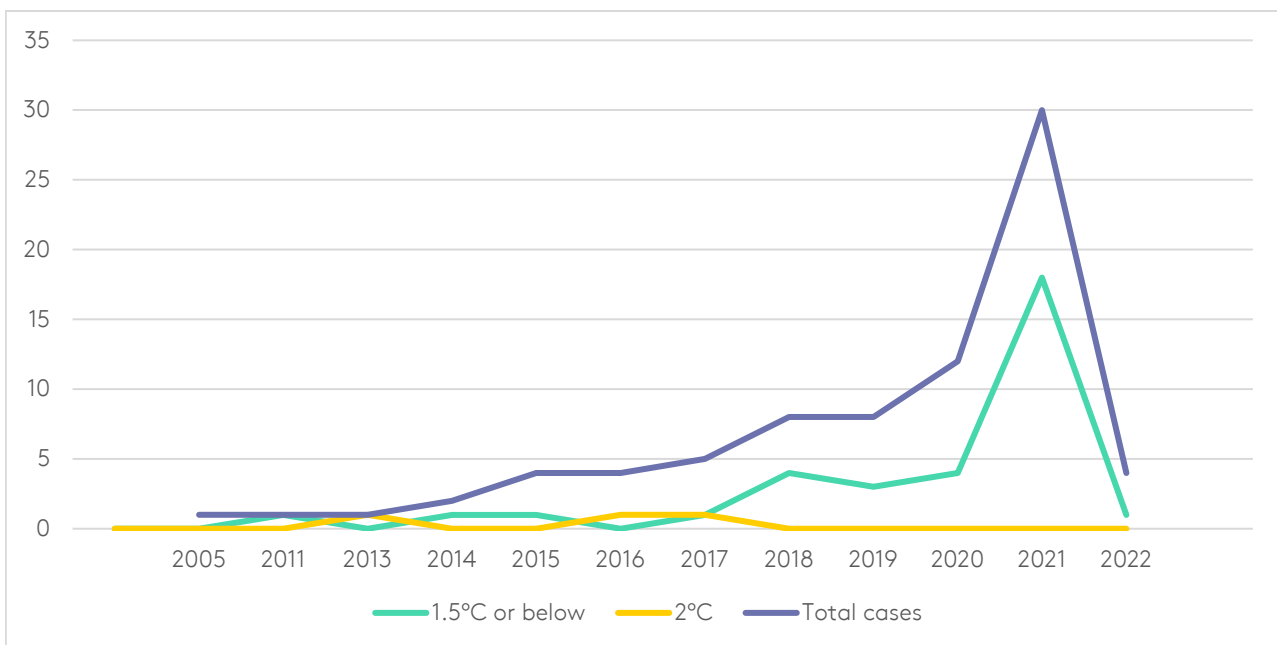
While references to the energy system and to fossil fuels are by far the most frequent sector-specific issues referred to in framework litigation, several cases from Global South countries make reference to deforestation and land use change, including cases from Peru, Brazil, Colombia and India.

Box 2.2. The role of the 1.5 degree global temperature limit

Much of the scholarship on framework climate litigation has focused on the question of national climate targets and carbon budgets, often linking these to global temperature targets. In climate litigation cases brought between 2013 and 2018, framework cases often concerned the action required from governments to limit global warming to no more than 2°C above pre-industrial levels. The *Urgenda* case, for example, initially relied on evidence from the *Fourth Assessment Report* of the Intergovernmental Panel on Climate Change (IPCC) to show that the Dutch government's climate targets fell well below the Netherlands' fair share of the effort required to limited warming to below this threshold.

However, the publication in 2018 of the IPCC's *Global Warming of 1.5°C* report shifted how evidence regarding global temperature goals is used in litigation. The majority of cases after the issuance of this report use a 1.5°C temperature target as a core feature of their arguments (see Figure 2.3). In total, the 1.5°C target (or a lower target) has played a prominent role in 34 out of 80 cases, and in 26 out of 54 cases post-2018.

Figure 2.3. Role of temperature goals in case grounds over time (no. of cases, up to 31 July 2022)



3. Understanding different perspectives and grounds

Claimants

The vast majority (75 of 80) of framework cases identified here have been brought by individuals, non-governmental organisations (NGOs), or both acting together. Of the remaining cases, one was brought by a sub-national government, one by a group of parliamentarians, one by a group of political parties, and two by governance bodies of Indigenous Peoples.⁷ Claimants in many of these cases have been inspired by previous litigation in other jurisdictions and seek to use the same tactics to advance an existing campaign (Jackson, 2021). Often, this will involve active support from transnational networks on strategy development and resourcing, for example.

The availability of funding in particular will have a significant bearing on claimants' ability to continue pursuing these strategies (Jackson, 2021). Most cases are currently funded through a mixture of crowdfunding and philanthropy, although rules against so-called 'maintenance' and 'champerty' in some jurisdictions may limit the possibilities for crowdfunding, requiring claimants and their lawyers to find creative ways to enable cases (e.g. 'conditional fee' arrangements, under which claimants' lawyers are paid only if the case is successful, with their fees being fully or partly recovered from the losing respondent) (see Rogers, 2015). The future of framework litigation is likely to be contingent on the continued availability of significant philanthropic funding, given that most of these cases do not seek monetary damages and so are less likely to attract the attention of commercial litigation funders, in contrast with other fields of climate litigation.⁸

Defendants and courts

Government (national and subnational) defendants have been defending framework litigation on several grounds. The most common defences concern issues of standing and the separation of powers. Other arguments include the 'drop in the ocean' argument, which governments use to challenge the alleged causal link between their action and inaction on climate change and alleged harmful impacts. Importantly, however, defendants do not typically seek to challenge widespread consensus on the causes of climate change and the need to prevent detrimental consequences of climate change. In some cases (e.g. *Urgenda*; *Friends of the Irish Environment*) this may be explained by the use of IPCC science in support of the claimants' arguments. Since the *Summaries for Policymakers* of the IPCC's reports are agreed line-by-line by the countries that form part of the IPCC, in practice it is not possible or credible for governments of those countries to contest the science set out in those reports.

Standing and separation of powers

Challenges to standing have been made by governments in several framework cases, as an attempt to convince courts to discard cases without considering their substantive arguments. Such challenges are often based on the absence of one of several common standing requirements: such as an injury suffered by the claimant, a causal connection between the injury and the conduct complained of (i.e. causality), and that the injury can be redressed by the court (i.e. redressability).⁹

The 'indirect, intergenerational and community-wide nature of climate change' makes framework cases particularly susceptible to questions regarding standing (Kelleher, 2022). Standing to represent the rights and interests of current generations in other countries and of future

⁷ Respectively, these cases are *Commune de Grande-Synthe v. France*; *In Re Climate Resilience Bill*; *PSB v. Brazil (on Climate Fund)*; *Lho'imggin et al. v. Her Majesty the Queen*; and *Mataatua District Maori Council v. New Zealand*.

⁸ In 2021 a representative of commercial litigation funder Harbour Litigation Funding was quoted as having an interest in being involved in climate litigation cases involving private companies (Meager, 2021).

⁹ It should be noted that there is significant variation in standing requirements between different jurisdictions, and in many cases standing is dependent on the nature of the claim.

generations has been a particularly disputed matter. Claimants may also struggle to demonstrate particularised harm, establishing that they are, or are likely to be, directly injured.

Despite this, several courts have extended standing requirements and accepted standing of the plaintiffs (see *Neubauer et al. v. Germany*; *Klimatická žaloba ČR v. Czech Republic*). In half of the successful cases, courts have accepted the standing of civil society organisations to defend the interests of the citizens and residents (see *Urgenda Foundation v. State of the Netherlands*). Often the standing of these organisations will be governed by domestic precedent or statute. Convincing courts to accept that these organisations also represent the rights of future generations or citizens of other countries is more controversial (Kelleher, 2022; Savaresi and Auz, 2019). Nonetheless, in some climate cases courts have accepted this form of standing (e.g. *Future Generations v. Ministry of the Environment and others*).

Similar to the issue of standing, the idea of separation of powers lies at the core of the debate about government framework climate litigation and affects case outcomes in a variety of ways (Nedevska et al., forthcoming). The concept of separation of powers applies to the relationship between, mainly, the legislative, executive and judicial branches of government. When this matter is brought up by defendants in framework litigation, the general argument made is that judges' rulings would interfere with the core task of elected politicians to prescribe general public policy choices and thus judges should deny jurisdiction.

What makes separation of powers particularly difficult is that such challenges can arise either at the admissibility stage or during the review of the merits. At the admissibility stage, a court might declare the matter non-justiciable. In *Family Farmers and Greenpeace Germany v. Germany*, the Court ruled that "...it is not up to the administrative court to impose this standard on the German government as a mandatory and obligatory minimum level of climate protection, taking into account the executive's scope for design and assessment". This concern has not, however, prevented other national courts from finding that framework cases are justiciable. Various national courts have proceeded to hear claims in framework cases on their merits: in the Netherlands (the *Urgenda* case), Ireland (*Friends of the Irish Environment*), Germany (*Neubauer*), Belgium (*Klimaatzaak*), Canada (*ENvironnement JEUnesse* and *Mathur et al. v. Her Majesty the Queen in Right of Ontario*), Colombia (*Future Generations*), France (*Notre Affaire à Tous* and *Commune de Grande-Synthe*) and Nepal (*Shrestha*) (Maxwell et al., 2022).

Even when a case is deemed admissible and proceeds to the merits phase, considerations over the separation of powers might still drive the courts to dismiss the case, or to limit the remedy available to a declaratory rather than injunctive (or other) relief. In *VZW Klimaatzaak v. Kingdom of Belgium et al.*, for instance, the court concluded it had authority to establish a breach of duty but not to issue an order to address that breach. The court found the federal state and the three regions jointly and individually in breach of their duty of care for failing to enact good climate governance. However, the court declined to issue an injunction ordering the government to set the specific emission reduction targets requested by the plaintiffs. The court found that the separation of powers doctrine limited its ability to set such targets and doing so would contravene legislative or administrative authority.

In the case of *Held v. Montana*, which is the first youth-led framework climate case to go to trial in a US court, the court decided to strike out claims seeking injunctive relief but allowed claims for which declaratory relief was deemed a sufficient redress to proceed.

The 'drop in the ocean' argument

Due to the broad scope of the cases and the remedies pursued, government defendants in framework litigation most often invoke the 'drop in the ocean' argument. According to this line of defence, greenhouse gas emissions stemming from any individual country or from a particular activity are 'negligible' as a contribution to global climate change, and therefore cannot be said to cause climate change harm and/or have a significant environmental impact in global terms.

However, no national court has accepted this line of argument during merits proceedings (Maxwell et al., 2022). In the *Urgenda* case the State argued that Dutch emissions are small (0.4% of global emissions) and that tightening its emissions reduction policies would only be a 'drop in the ocean' in the global fight against climate change. The Court of Appeal, however, relied on per capita emissions data to stipulate that the Netherlands is the biggest per capita emitter in the EU and the eighth biggest in the world, and that Dutch CO₂ emissions have risen since 1990. Furthermore, the Dutch government had indicated that avoiding dangerous climate change impacts requires strict policies to be adopted across the world; and that, since it cannot influence these domestic policies abroad, the Netherlands cannot be required to reduce emissions on its own accord. The Court of Appeal rejected this argument, pointing to the special position of the Netherlands as a rich, developed state that has gained much of its wealth through extensive use of fossil fuels (Verschuuren, 2019). Similar decisions were given by the German Constitutional Court in *Neubauer*, the Belgian court of first instance in *Klimaatzaak*, and the French court of first instance in *Notre Affaire à Tous* (Maxwell et al., 2022).

4. Understanding outcomes and impacts

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 Osofsky, 2015; Setzer and Vanhala, 2019; Peel and Markey-Towler, 2021). Most of the existing analyses of outcomes and impacts have focused on high-profile cases, particularly framework litigation. A recent analysis by the Institute of International and European Affairs provides a detailed assessment of three European framework cases (*Urgenda*, *Friends of the Irish Environment* and *Neubauer*) and concludes that while “climate policymaking is not a matter for the judiciary, [...] where policy has been formed, courts can have an important role in its supervision and enforcement” (IIEA, 2021: 3). The latest IPCC Assessment Report, AR6 (2022), in its *Summary for Policymakers*, recognises that climate-related litigation is growing, “and in some cases, has influenced the outcome and ambition of climate governance” (SPM-59 E.3.3).

One of the most prominent conceptualisations of climate litigation impact is Peel and Osofsky’s (2015) framework, which understands the impacts of climate litigation through its regulatory function. This framework interprets climate litigation as ‘regulatory’ in that it is an intentional activity attempting to control, order or influence behaviour. Through this definition of regulation, Peel and Osofsky create a framework of ‘direct’ and ‘indirect’ regulatory impacts. However, considerably more research is still required to help understand the overall effectiveness of litigation as a tool for advancing climate action, both in framework cases and beyond.

Direct outcomes

Almost half of all framework climate cases remain open. However, of the 47 cases in which a judgment has been rendered, 16 have had direct judicial outcomes that are positive for climate litigation, 30 have had direct judicial outcomes that are unfavourable, and one case was considered neutral (see Figure 4.1 below).¹⁰ More than half of all unsuccessful cases have been filed against subnational governments, with only one subnational case having yet resulted in a favourable outcome. In contrast to the outcomes in subnational cases, cases against national courts are more evenly split, with around half being favourable to climate action.

If we look at cases heard in apex courts (i.e. the highest court in a given country), the success rate increases significantly. Nine national-level cases have received judgments from apex courts, with 7 of these receiving favourable decisions.¹¹ Cases receiving apex court decisions such as *Urgenda* (see Box 4.1), *Neubauer*, and *Friends of the Irish Environment* have all resulted in significant changes in national climate policy. For example, within two weeks of the decision of the German Federal Constitutional Court in *Neubauer*, the Federal government presented an amendment to the Climate Protection Act.¹² The Court had found that the provisions of the German Climate Protection Law placed an unreasonable burden on future generations to reduce emissions, and were therefore unconstitutional (Minnerop, 2022). The amended Act provides for an increase in its

¹⁰ See Setzer and Higham (2021; 2022) for an explanation of direct and indirect outcomes from climate litigation, and for more detail on the methodology and approach used to determine whether outcomes advance or hinder climate action. Some of the cases where an outcome has been rendered may be subject to appeals and in others the outcome of the case has been determined by the impact of a court’s preliminary decision. For example, the case of *Mathur et al. v. Her Majesty the Queen in Right of Ontario* has been classified as a case enhancing climate action on the basis of an interim decision by the Superior Court of Ontario but has yet to proceed to a full hearing.

¹¹ The cases with outcomes favourable to climate action are: *Commune de Grande-Synthe v. France*; *Friends of the Irish Environment v. Ireland*; *Future Generations v. Ministry of the Environment and Others*; *Neubauer, et al. v. Germany*; *Shrestha v. Office of the Prime Minister et al.*; *Urgenda Foundation v. State of the Netherlands*; *PSB et al. v. Brazil (on Climate Fund)*. The cases where outcomes were deemed unfavourable to climate action are: *In re Climate Resilience Bill*; *Armando Ferrão Carvalho and Others v. The European Parliament and the Council*. Note that *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others* has not been included 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 subnational governments has already received a decision on the merits, these proceedings have not led to the case’s exclusion from this list.

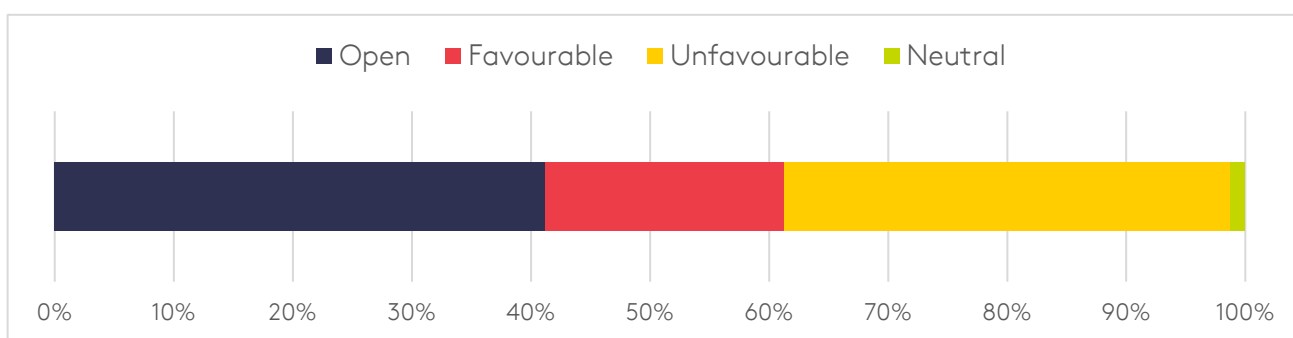
¹² See: *Die Bundesregierung, ‘Climate Protection Act 2021’*.

emissions reduction target to 65% by 2030 (from 55%) – with further amendments possible before the court deadline of 31 December 2022.

Another direct outcome of successful framework litigation has been how it is often cited in subsequent 'copy-cat' cases in the same jurisdiction. However, the filing of copycat cases is not in itself guaranteed to result in further favourable outcomes. Once again, Germany provides an illustrative example: 11 of the 29 cases that have had unfavourable outcomes were filed against the German Bundesländer (regions) following the *Neubauer* decision. These cases sought to apply the ruling at the subnational level, arguing that ambitious legislation on climate action is constitutionally required from all regional governments, but were all dismissed in one judgment from the German constitutional court in January 2022.

Interestingly, a further case in Germany has been filed challenging the amended federal legislation (*Steinmetz et al. v. Germany*), relying on the new factual basis presented by the IPCC's *Sixth Assessment Report*. The case argues that the emission reduction pathways in the new law still constitute an interference with their rights because they are insufficiently ambitious to align with the latest science.

Figure 4.1. The nature of direct judicial outcomes (up to 31 July 2022)



Indirect impacts

Even when unsuccessful, these cases may have indirect impacts (Peel and Osofsky, 2015; Setzer and Bouwer 2020). The case of *Thomson v. New Zealand*, for example, which in 2015 challenged New Zealand's climate target, resulted in only a partial win for the claimants. During the time in which the case was pending before the courts, the original decision of the Minister had become irrelevant due to the election of a new government. Nonetheless, it is conceivable that the case was influential in the Ardern administration's decision to introduce world-leading net zero legislation in 2019. Similarly, while the claimants in *Friends of the Irish Environment* were ultimately successful before the Supreme Court of Ireland in 2020, they had first been unsuccessful before the High Court in 2019. Nevertheless, before the High Court handed down its judgment, the government of Ireland introduced a new and improved national climate mitigation plan, and later sought to rely on this new plan in defending its position in the proceedings. As one legal expert commented at the time, "The point of a case like this is never just winning or losing. It has already had lasting impact. I have no doubt that the case was chief among motives for urgent delivery by the government of its Climate Action Plan in June [2019]" (O'Doherty, 2019).

Further indirect impacts of framework climate litigation cases can be seen in the way many of these cases have mobilised citizens around the litigation. Several framework cases have been filed by NGOs with the support of a large number of citizens. This is illustrated in how public petitions have been used by legal teams to support their cases. For example, *Notre Affaire à Tous and others v. France* was brought by four French NGOs, with the support of over 2.3 million members of the public who signed a petition submitted with the court filings. The Belgian case of *VZW Klimaatzaak v. Kingdom of Belgium, et al.* had almost 60,000 citizens registered as co-claimants, and *Friends of the Irish Environment* had more than 20,000 supporters.

Box 4.1. Direct and indirect impacts of the *Urgenda* case

Urgenda Foundation v. State of the Netherlands is a case that profoundly impacted the climate litigation landscape. In 2019 the Dutch Supreme Court upheld a ruling from the Court of Appeal that concluded that if the Dutch government failed to reduce greenhouse gas emissions by at least 25% by the end of 2020, it would be acting in violation of its duty of care, under Articles 2 and 8 of the European Convention on Human Rights (the right to life and the right to private and family life, respectively). While much of the literature on *Urgenda* focuses on its impact on litigation strategies (see Maxwell et al., 2022) and how it set the stage for a proliferation of similar claims against governments (Setzer and Higham, 2021), the case has also had a major influence on the Dutch policy landscape.

The case has resulted in both direct and indirect impacts. The Supreme Court decision had a direct impact on the budget for climate change mitigation policies, on the number of new mitigation measures introduced, and on the speed in which these decisions were made (Kaminski, 2022; interview with Dennis van Berkel). In its 2022 Budget Memorandum, the Dutch government stated that investments would only be made “in areas where delay is not an option”, citing actions to combat climate change directly (Ministerie van Algemene Zaken, 2021). The government announced that it will invest over €6.8 billion on climate measures in addition to existing spending on climate policies. While some of this funding was required to fulfil the government’s obligations as set out in the National Climate Agreement, the rest is directed at implementing the *Urgenda* judgment. By comparison, in the same Memorandum, the government committed an annual sum of €400 million to combat crime and €100 million (over 10 years) to building homes – thus the scale of the government’s investment in climate policy far surpassed its other budgetary commitments. More recently, the current Dutch Cabinet pledged to allocate €35 billion to measures addressing climate change over the subsequent 10 years and has committed to implementing more than 30 ‘Urgenda measures’ to reduce emissions (ANP and NL Times, 2021; Kaminski, 2022; see also Scheutjens, 2020).

Recognising that it was not on track to reduce carbon emissions in line with its ‘short-term’ goal to comply with the *Urgenda* judgment, as well as the ‘medium-term’ targets set in the Climate Act, the government also introduced major interventions in the coal sector, including a coal phase-out by 2030, the mandatory closure of one coal production plant by 2020, as well as the voluntary commitment to close by another, and a cap on coal power production (MCKE, 2021). In a letter from the State Secretary for Economic Affairs and Climate, the Secretary notes that the production cap would come into effect on 1 January 2022, “in order to make the greatest possible contribution to the implementation of the *Urgenda* judgment” (Yesilgöz-Zegerius 2021).

Indirect impacts are notoriously more difficult to account for than their direct counterparts (Peel and Osofsky, 2015). Wonneberger and Vliegthart (2021) analysed the interactions between media attention and parliamentary questions relating to *Urgenda* heard at the Tweede Kamer, the Dutch parliamentary body. The latter is used as a proxy for political salience and agenda setting. They conclude that media attention paid to the proceedings increased Parliament’s scrutiny of the government, while also having a positive impact on the public awareness of climate change policies (ibid.). In a semi-structured interview for this report, Dennis van Berkel of the *Urgenda* Foundation notes that a confluence of actors working in unison is required for a framework policy shift to take place, as has occurred in the Netherlands following this case. The Tweede Kamer played an essential role in holding the Dutch government to account and enforcing the decision, for example by stipulating that all 54 points raised by the *Urgenda* Foundation required a response from the government. The case is cited in more than 1,200 documents in the Tweede Kamer across various government departments (van Berkel, 2022; Tweede Kamer, 2022).

Taken together, this evidence of the afterlife of the *Urgenda* litigation in Dutch politics provides a clear example of how successful framework litigation may create a ripple effect that impacts agenda setting processes across several areas of government, both directly and indirectly, as well as bringing climate change policy to the forefront of public consciousness. However, it is important to note that it took more than just the judgment to achieve this: much of the result is also down to ongoing policy-engagement and campaigning work by the *Urgenda* Foundation. Fourteen additional policy measures proposed by the Foundation were considered by the Dutch Cabinet and most of these have in some way been included in the Cabinet’s package (van Berkel, 2022; Wiebes, 2020).

Source: Interview with Dennis van Berkel, lead counsel for the *Urgenda* Foundation, conducted on 1 March 2022.

Transnational exchange

A relevant indirect outcome of such cases has been how they have promoted a ‘transnational exchange’ between claimants and courts in different countries around the world, which has shaped the field of climate litigation. There are two obvious dimensions where this transnational exchange may be observed (Carnwath, 2022). One is in the use of decisions from other jurisdictions to support the arguments made by claimants. The second is in courts’ citation of decisions from other jurisdictions in their rulings. We see many examples of both in our framework case dataset. On the claimant side, for example, *Six Youths v. Minister of Environment and Others* in Brazil and *Neubauer et al. v. Germany* cite the *Urgenda* decision in their applications, while claimants *Laboratório do Observatório do Clima v. Minister of Environment and Brazil* cite eight cases from eight different jurisdictions in their arguments.¹³

Of greater impact is the way in which landmark decisions are being used by the courts to inform their decision-making, particularly in areas where domestic jurisprudence may be lacking but similar climate challenges have been addressed elsewhere by the courts (Carnwath, 2022). The *Neubauer* decision, for example, cites cases from four international jurisdictions.¹⁴ In a second example, *Thomson v. Minister for Climate Change Issues*, the High Court of New Zealand also reflects on precedents from multiple jurisdictions in determining the justiciability of the case.¹⁵

Human rights and fair share arguments in project-based cases

Finally, one of the most lasting indirect impacts of framework climate cases is the way in which human and constitutional rights grounds – and the evidence base regarding a state’s ‘fair share’ of emissions reductions – developed in these cases are starting to be deployed in other types of climate cases. This can be seen both in the emergence of ‘non-framework’ cases challenging specific actions and omissions, such as ‘granular’ challenges focused on curbing the supply of fossil energy and addressing deforestation, which are now starting to draw on the constitutional and human rights grounds developed in previous framework cases. It can also be seen in the translation of human rights grounds from ‘framework’ cases against government actors to ‘framework’ cases against corporate actors.

What these framework cases have achieved is significant: numerous national courts have recognised that the respective state has human rights obligations to take mitigation or adaptation action to protect people from the harm posed by climate change. As the UN High Commissioner for Human Rights Michelle Bachelet stated: “The decision [by the Dutch Supreme Court in *Urgenda*] confirms that the government of the Netherlands and, by implication, other governments have binding legal obligations, based on international human rights law, to undertake strong reductions in emissions of greenhouse gases” (Bachelet, 2019). This recognition has formed the basis of a new wave of ‘granular’ or project-based climate challenges based on human rights law.

Many of the cases filed outside the US between June 2021 and May 2022 involved constitutional or human rights-based arguments (Setzer and Higham, 2022). These included at least 7 cases challenging government decisions regarding fossil fuel exploration, licensing, permitting and procurement. In a challenge to offshore oil exploration in Argentina, for example, the claimants cite the decisions in both *Urgenda* and *Neubauer*, in addition to other international cases that more closely parallel the circumstances of the case.

¹³ The cases cited are *Urgenda Foundation v. State of the Netherlands*; *Ashgar Leghari v. Federation of Pakistan*; *Shrestha v. Office of the Prime Minister et al.*; *Future Generations v. Ministry of the Environment and Others*; *Commune de Grande-Synthe v. France*; *Notre Affaire à Tous and Others v. France*; *Friends of the Irish Environment v. Ireland*; and *Neubauer et al. v. Germany*, all of which are framework cases.

¹⁴ The cases cited are *Urgenda Foundation v. State of the Netherlands*, *Friends of the Irish Environment v. government of Ireland*, *Family Farmers and Greenpeace Germany v. Germany*, *Juliana v. United States* and *Thomson v. Minister for Climate Change Issues*; the international jurisdictions represented are the Netherlands, Ireland, the United States and New Zealand.

¹⁵ The cases cited are *ClientEarth v. Secretary of State*; *Juliana v. United States*; *Friends of the Earth v. The Governor in Council et al.*; and *Urgenda Foundation v. State of the Netherlands*.

The case of *Africa Climate Alliance et. al., v. Minister of Mineral Resources & Energy et. al.*, sometimes referred to as the ‘Cancel Coal’ case, is another example. In that case, a coalition of NGOs and youth plaintiffs has sought to challenge the South African government’s decision to procure 1500MW of new coal-fired power set out in its latest Integrated Resources Plan. The claimants argued that the procurement and burning of the coal will represent an unjustified infringement of the claimants’ human rights and the rights of South African youth, given coal’s disproportionate causal contribution to global CO₂ emissions. Actively pursuing the continued use of coal will impact South Africa’s ability to contribute to the global goal to limit warming to 1.5°C, and thus result in an infringement of its positive obligation to protect the people of South Africa from the impacts of climate change. The case closely parallels the arguments and evidence used in framework cases, while also building on the previous use of human rights arguments in earlier domestic proceedings (see *EarthLife Johannesburg v. Minister of Environmental Affairs & others*). However, its innovation lies in the fact that ensuring a successful outcome in the case and its subsequent implementation may be significantly easier. Rather than requesting a wide-ranging order from the court, the relief requested is limited to a declaration of illegality.

While still relatively few in number, such rights-based cases are starting to become more common. Should these early cases prove successful, they could signal the start of a ‘cascade’ effect, in which courts in many jurisdictions start to recognise the relevance of rights-based obligations to many different levels of government decision-making to avoid harmful impacts from climate change.

Negative impacts

When considering the broader impacts of framework litigation, it is also worth considering potential negative impacts of successful cases – sometimes also referred to as ‘backlash litigation’ (Rosenberg, 1991; Setzer and Vanhala, 2019). As government framework cases increase the transition risk to companies operating in high-emitting sectors, it is possible that companies will challenge government actions on climate, arguing an alleged breach of international investment agreements, even if governments’ actions were taken to comply with a judicial decision. An important recent example can be found in the still ongoing case of *RWE v. Kingdom of the Netherlands*. In February 2021, the German energy group RWE sued the Dutch government under the Energy Charter Treaty, seeking €1.4 billion in compensation in respect of the country’s plan to phase out coal production by 2030. The Dutch phase-out policy was at least in part a response to the 2019 *Urgenda* judgment, which, in turn, was based on the interpretation of two international treaties – the European Convention on Human Rights and the Paris Agreement. While this type of litigation may arise in cases where government measures such as coal phase-outs can be directly traced to successful framework cases, it may also arise in other contexts where ambitious government measures have been introduced following other forms of democratic debate and civil society engagement.

Corporate framework cases

Many of the arguments and strategies used in government framework cases have started to also appear in cases against companies. This is particularly evident in the Netherlands, where the success of the *Urgenda* case provided a model and key authority for the subsequent “corporate framework” case of *Milieudefensie et al. v. Royal Dutch Shell*. The Hague District Court, the same Court that heard the original *Urgenda* proceedings, determined that in order to meet its duty of care to Dutch citizens, the Shell group would need to reduce its overall emissions by 45% of 2019 levels by 2030. A manual for litigators published by Roger Cox, counsel in both cases, sets out the shared scientific and legal bases for the cases in some detail (Cox and Reij, 2022). A similar phenomenon can be seen in Germany, where several ‘framework’ cases against corporates have been filed since the *Neubauer* judgment (e.g. *DUH v. BMW*), and in France where the NGO *Notre Affaire à Tous* is running litigation against French multinational Total in parallel to the proceedings brought against the government, referenced above (*Notre Affaire à Tous et al. v. Total*).

5. Conclusion and recommendations

Government framework climate cases are becoming increasingly common. Cases may involve challenges to the ambition of government climate action – often pushing for emissions reduction targets to be aligned with the Paris Agreement and the latest developments in climate science – or they may involve challenges to the implementation of existing climate change laws and policies. Over time, this second category may become increasingly important, although the evolution of these cases has not followed this pattern to date.

Despite the many examples of unsuccessful cases, the successful outcomes before apex courts described in this report have had significant direct and indirect impacts on national policymaking, increasing the pace and scale of climate action. This has direct implications for how and how fast the low-carbon transition occurs in different jurisdictions.

Government framework cases have also had a significant impact on the broader legal landscape at the transnational level. Arguments from framework cases are also starting to make their way into challenges to more specific government decisions. This shift in the legal landscape has two implications: firstly, all government entities in countries where there has been successful framework litigation may be subject to challenge if they act in a manner that is inconsistent with the ruling in these cases. Secondly, even in the absence of a ruling upholding a framework climate case, government decision-makers could face challenges to more specific decisions based on the evolving understanding of positive obligations to avoid climate harm developed in this body of cases. These narrower challenges may have a significant impact as they may be more likely to meet with success and less difficult to enforce than framework cases, particularly in Global South jurisdictions.

Drawing on these key conclusions, our recommendations are as follows:

- **National and sub-national policymakers** should take time to understand the positive obligations to make decisions informed by the latest climate science that are emerging because of these cases. This is particularly important for government legal teams, who will have a major role to play in ensuring that government action is consistent with legal duties, ensuring an orderly and rapid transition from the outset and minimising the risk that policy measures have to be taken on very short timeframes to comply with judicial decisions. This applies not just to central government, but to other departments that may find themselves facing challenges to specific decisions as part of the potential cascade effect described above.
- **Parliamentarians and legislators** should familiarise themselves with the emerging transnational jurisprudence from framework cases and use it to inform the drafting of clear and ambitious framework legislation, giving full effect to states' human rights obligations and certainty and clarity to stakeholders.
- **Companies and investors** should ensure that they understand what actual and potential framework climate cases exist in the jurisdictions in which they operate. These cases and their direct and indirect impacts should be factored into transition risk assessments.
- **Potential climate litigants, including civil society organisations and funders**, should think carefully about when and how to bring framework cases, particularly in light of the challenges of enforcing rulings. Framework cases must be accompanied by ongoing and extensive strategies for engagement if they are to play a continuing role in achieving policy outcomes. In some jurisdictions it may be easier to apply the arguments and evidence first developed for framework cases to more specific policy decisions, and more likely to achieve immediate direct outcomes.

- **Judges** should work with colleagues to become more familiar with the scientific and legal bases for framework cases, ensuring their capacity to swiftly and fairly assess both framework cases and cases applying the arguments from such cases to more granular levels of decision-making.
- **Academics and analysts** should consider the effectiveness of different litigation strategies in achieving litigants' stated goals, paying particular attention to jurisdictional differences regarding the implementation and enforcement of judgments.

References

- Averchenkova A, Fankouser S, Finnegan (2021) The impact of strategic climate legislation: evidence from expert interviews on the UK Climate Change Act, *Climate Policy* 21(2). DOI: 10.1080/14693062.2020.1819190
- ANP and NL Times (2021) Coalition deal presented with €35B for climate, more nuclear power, €500m in tax cuts, *NL Times*, 8 August. <https://nltimes.nl/2021/12/15/coalition-deal-presented-eu35b-climate-nuclear-power-eu500m-tax-cuts>
- Auz J (forthcoming) The Political Ecology of Climate Remedies: An Inter-American Human Rights System Prognosis. *Journal of Human Rights Practice*.
- Beauregard C, D'Arcy C, Robinson S, Cobb C, Patton P (2021) A just alternative to litigation: applying restorative justice to climate-related loss and damage, *Third World Quarterly* 42(6): 1384-1395. <https://www.tandfonline.com/doi/abs/10.1080/01436597.2021.1877128>
- Bachelet M (2019) Bachelet welcomes top court's landmark decision to protect human rights from climate change. Press release, UN Human Rights Office of the High Commissioner, 20 December. <https://www.ohchr.org/en/press-releases/2019/12/bachelet-welcomes-top-courts-landmark-decision-protect-human-rights-climate?LangID=E&NewsID=25450>
- Carnwath R (2022) *Climate-conscious courts: reflections on the role of the judge in addressing climate change*. Grantham Research Institute on Climate Change and the Environment. <https://www.lse.ac.uk/granthaminstitute/news/climate-conscious-courts-reflections-on-the-role-of-the-judge-in-addressing-climate-change/>
- Chiang E (2015) Reviving the Declaratory Judgment: A New Path to Structural Reform, *Buffalo Law Review* 63: 549. <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol63/iss3/4>
- Cox R and Reij M (2022) *Defending the Danger Line*. Milieudefensie. https://en.milieudefensie.nl/news/defending_the_danger_line.pdf
- Curry IR (2019) *Establishing Climate Change Standing: A New Approach*. *Pace Environmental Law Review* 36(2). <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1830&context=pelr>
- Duncan WC (2005) The Role of Litigation in Gay Rights: The Marriage Experience, *Saint Louis University Public Law Review* 24(1), Article 9. <https://scholarship.law.slu.edu/plr/vol24/iss1/9>
- Fiss O (1978) *The Civil Rights Injunction*. Bloomington: Indiana University, School of Law.
- Higham C, Averchenkova A, Setzer J, Koehl A (2021) *Accountability mechanisms in climate change framework laws*. Grantham Research Institute on Climate Change and the Environment. <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/11/Accountability-mechanisms-in-climate-change-framework-laws.pdf>
- Iacobuta G, Dubash N, Upadhyaya P, Deribe M, Hohne N (2018) National climate change mitigation legislation, strategy and targets: a global update. *Climate Policy* 18(9): 1114-1132. DOI: 10.1080/14693062.2018.1489772
- Intergovernmental Panel on Climate Change [IPCC] (2022) *Summary for Policymakers. Mitigation of Climate Change Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* [ed.s Skea J, Priyadarshi R S, Reisinger A, Slade R, Pathak M et al.]. Geneva: World Meteorological Organization. https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_SPM.pdf
- Setzer J, Higham C, Jackson A, Solana J (2021) Climate change litigation and central banks. *Legal Working Paper Series*. European Central Bank Eurosystem. <https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp21~f7a250787a.en.pdf>
- Jeffries J and Rutherglen G (2007) Structural Reform Revisited, *Public Law and Legal Theory Working Paper Series*, University of Virginia Law School. <https://law.bepress.com/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1103&context=ualwps>

- Jodoin S, Savaresi A, Wewerinke-Singh M (2021) Rights-based approaches to climate decision-making, *Current Opinion in Environmental Sustainability* 52: 45–53. <https://doi.org/10.1016/j.cosust.2021.06.004>
- Jodoin S, Snow S, Corobow A (2020) Realizing the Right to Be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming, *Law and Society Review* 54(1): 168-200. <https://doi.org/10.1111/lasr.12458>
- Kaminski I (2022) Urgenda two years on: What impact has the landmark climate lawsuit had? *The Wave*, 7 August, <https://www.the-wave.net/urgenda-two-years-on/>
- Kellerher O (2021) Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach, *Journal of Environmental Law* (34)1: 107–134. <https://doi.org/10.1093/jel/eqab037>
- Maxwell L, Mead S, van Berkel D (2022) Standards for Adjudicating the Next Generation of Urgenda-Style Climate Cases, *Journal of Human Rights and the Environment* 13(1): 35-63. <https://doi.org/10.4337/jhre.2022.01.02>
- Meager E (2021) Climate Litigation is coming for the Private Sector, *Capital Monitor*, 13 April. <https://capitalmonitor.ai/institution/asset-owners/climate-litigation-is-coming-for-the-private-sector-2/>
- Ministeriële Commissie Klimaat en Energie [Ministerial Commission on Climate and Energy] [MCKE] (2021) *MCKE 20 augustus 2021 Beleidsrijke Begroting Klimaat [MCKE 20 August 2021 Policy-rich Climate Budget]*. The Netherlands: Ministerie van Economische Zaken en Klimaat [Ministry of Economic Affairs and Climate]
- Ministerie van Algemene Zaken [Ministry of General Affairs] (2021) 2022 budget memorandum: Resilience and further steps forward. News item, government of the Netherlands, 7 August. <https://www.government.nl/latest/news/2021/09/21/2022-budget-memorandum-resilience-and-further-steps-forward>
- Minnerop P (2022) ‘The Advance Interference-Like Effect’ of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court, *Journal of Environmental Law* 34(1): 135-162. <https://doi.org/10.1093/jel/eqab041>
- Muinzer T (ed.) (2020) *National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation*. (1st ed.) (Global Energy Law and Policy, Vol. 4). Hart Publishing.
- O’Doherty C (2019) Activists consider appeal after losing climate action policy case, *The Independent Ireland*, 20 September. <https://www.independent.ie/irish-news/politics/activists-consider-appeal-after-losing-climate-action-policy-case-38516079.html>
- Parkin J (2017) Aging Injunctions and the Legacy of Institutional Reform Litigation, *Vanderbilt Law Review* 70(1). <https://scholarship.law.vanderbilt.edu/vlr/vol70/iss1/2>
- Peel J and Osofsky HM (2015) *Climate change litigation: Regulatory pathways to cleaner energy*. Cambridge, England: Cambridge University Press. DOI: 10.1017/cbo9781139565851.
- Peel J and Lin J (2020) Transnational Climate Litigation: The Contribution of the Global South, *American Journal of International Law* 113(4): 679-726. DOI: 10.1017/ajil.2019.48.
- Petit S and Jacobs D (2016) Maintenance and champerty: An end to historic rules preventing third-party funding?, in *International Arbitration Report* issue 7, Norton Rose Fulbright.
- Rogers N (2015) ‘If you obey all the rules you miss all the fun’: climate change litigation, climate change activism and lawfulness, *New Zealand Journal of Public and International Law* 13(1): 179-199.
- Rosenberg G (1991) *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago.
- Savaresi A and Auz J (2019) Climate Change Litigation and Human Rights, *Climate Law* 9: 244. <https://doi.org/10.1163/18786561-00903006>
- Scheutjens M (2020) 54 Actions for 17 MTONs of CO2 Reduction. *54 Climate Solutions Urgenda*. 7 August. <https://www.urgenda.nl/en/themas/climate-case/dutch-implementation-plan/>

- Scotford E and Minas S (2019) Probing the hidden depths of climate law: Analysing national climate change legislation, *Review of European Community and International Environmental Law* 28(1): 67–81. DOI: 10.1111/reel.12259
- Setzer J and Benjamin L (2019) Climate Litigation in the Global South: Constraints and Innovations, *Transnational Environmental Law*. <https://ssrn.com/abstract=3456330>
- Setzer J and Benjamin L (2020) Climate Change Litigation in the Global South: Filling in Gaps, *AJIL unbound*, 114: 56–60. <https://doi.org/10.1017/aju.2020.6>
- Setzer J and Higham C (2021) *Global Trends in Climate Change Litigation: 2021 Snapshot*. Grantham Research Institute on Climate Change and the Environment. <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/>
- Setzer J and Higham C (2022) *Global Trends in Climate Change Litigation: 2022 Snapshot*. Grantham Research Institute on Climate Change and the Environment. www.lse.ac.uk/granthaminstitute/publications-global-trends-in-climate-change-litigation-2022
- Setzer J and Vanhala L (2019) Climate change litigation: a review of research on courts and litigants in climate governance, *WIREs Climate Change*. <https://doi.org/10.1002/wcc.580>
- Tweede Kamer (2022) Zoeken, *Tweede Kamer der Staten-Generaal*. 7 August. <https://www.tweedekamer.nl/zoeken?qry=urgenda&page=86>
- van Berkel D (2022) Interview with Dennis van Berkel, lead counsel for the Urgenda Foundation, by the authors, 1 March 2022 (unpublished).
- Wiebes E (2020) *Uitvoering Urgenda-vonnis* [Execution of Urgenda judgment]. The Netherlands: Ministerie van Economische Zaken en Klimaat [Ministry of Economic Affairs and Climate].
- Wonneberfer A and Vliegenthart (2021) Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media, and Politics in the Case of Urgenda Against the Dutch government, *Environmental Communication* 15(5): 699–714. <https://doi.org/10.1080/17524032.2021.1889633>
- Yesilgöz-Zegerius D (2021) *Wijziging van de Wet verbod op kolen bij elektriciteitsproductie in verband met beperking van de CO2-emissie, Brife Van De Staatssecretaris Van Economische Zaken En Klimaat [Amendment of the Prohibition of Coal in Electricity Production Act in connection with limiting CO2 emissions, Letter from the State Secretary for Economic Affairs and Climate]* The Netherlands: Tweede Kamer der Staten-Generaal vergaderjaar 2021–2022, 35 668, nr. 49 [House of Representatives of the States General, session year 2021–2022, 35 668, no. 49]
- Yoshida K and Setzer J (2020) The trends and challenges of climate change litigation and human rights, *European Human Rights Law Review* 2: 140–152. <http://eprints.lse.ac.uk/id/eprint/106593>.