



THE STATUS OF CLIMATE CHANGE LITIGATION A GLOBAL REVIEW

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The Status of Climate Change Litigation

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Executive Summary

Over the last decade, laws codifying national and international responses to climate change have grown in number, specificity, and importance. As these laws have recognized new rights and created new duties, litigation seeking to challenge either their facial validity or their particular application has followed. So too has litigation aimed at pressing legislators and policymakers to be more ambitious and thorough in their approaches to climate change. In addition, litigation seeking to fill the gaps left by legislative and regulatory inaction has also continued. As a result, courts are adjudicating a growing number of disputes over actions—or inaction—related to climate change mitigation and adaptation efforts.

This report provides judges, advocates, researchers, and the international community with an of-the-moment survey of global climate change litigation, an overview of litigation trends, and descriptions of key issues that courts must resolve in the course of climate change cases. One purpose of this report is to assist judges in understanding the nature and goals of different types of climate change cases, issues that are common to these cases, and how the particularities of political, legal, and environmental settings factor in to their resolution. Another goal is to contribute to a common language among practitioners around the world working to address climate change through the courts.

Part 1 describes environmental, diplomatic, and political circumstances that are making climate change litigation efforts especially important at the present moment:

- Impacts such as heat waves and destructive coastal storms are growing in frequency and severity as a result of human-cause emissions. The costs to governments, private actors, and communities of dealing with these impacts are significant.
- National and international policymakers have struggled to develop effective means of addressing both the underlying causes and the effects of climate change. Climate change mitigation and adaptation policies have emerged slowly and have often set targets based on political feasibility rather

than the consensus scientific understanding of what is required to stabilize the climate at an acceptable level.

- National and international policymakers have succeeded in creating some legal frameworks for climate action. Many nations have laws or policies addressing aspects of the climate problem, and the Paris Agreement provided for a catalogue of national commitments toward the goal of averting average global warming in excess of 1.5°C and 2°C. Litigants have begun to make use of these codifications in arguments about the adequacy or inadequacy of efforts by national governments to protect individual rights vis-à-vis climate change and its impacts.

Part 2 provides a survey of climate change litigation and a discussion of evident and emerging trends:

- Citizens and non-governmental organizations are suing to hold their governments accountable for climate-related commitments. In many instances, the arguments made to challenge government actions or inaction include reference to constitutional and statutory provisions not specific to climate change. In those cases, references to international climate agreements, which embody scientific objectives as well as political ones, often buttress the claim.
- In many cases, challenges to a project or policy identify linkages between resource extraction and climate-related impacts, both in the form of emissions due to combustion of extracted fossil fuels and in the form of impairments to resiliency and adaptive capacity. These challenges seek to make those linkages legally significant and either deserving of consideration or else compelling an alternative approach to natural resource management.
- Building on scientific understanding of the relationship between emissions and climate change, which policymakers (with notable exceptions) have generally adopted as accurate,

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several cases seek to establish liability for entities that generate emissions with full knowledge of those emissions' effects on the global climate.

- Technical understanding of climate change and the quality of predictions about future temperature and weather patterns are improving. Recognizing that adaptation efforts have not kept pace with these improvements, litigants are bringing claims that seek to assign responsibility where failures to adapt result in foreseeable, material harms.
- Litigants are making arguments for climate action based on the public trust doctrine, which assigns the state responsibility for the integrity of a nation's public trust resources for future generations. Such claims raise questions of individuals' fundamental rights and intergenerational equity, as well as concerns about the balance of powers among the judicial, legislative and executive branches or functions of governments.
- Recognizing that both slow-developing and acute environmental stresses push individuals and communities to migrate, the impacts of climate change are certain to generate migration within and across national borders. Cases brought to resolve issues arising from such migration have already been brought, and more are likely to come.
- Most climate change litigation to date has proceeded in courts in developed countries in the northern hemisphere and in Australia and New Zealand. Litigants and courts in the Global South are beginning to make use of burgeoning climate change litigation theories and know how.

Part 3 describes three categories of legal issues that tend to be disputed among the litigants involved in climate change litigation:

- **Justiciability:** Whether a case is justiciable—meaning, whether a court has the authority to hear and resolve the claims raised—turns on questions of the plaintiff's standing and on the court's role relative to that of the government's other branches. Although standards vary, courts generally only grant standing if the alleged causal connection

between the injury and the action (or inaction) complained of is plausible. In climate change cases, this sometimes presents a high bar for plaintiffs. As for separation of powers, particularly in cases that call on a court to assess inaction by a government agency, courts must be able to articulate what authority empowers them to find fault or direct the agency to revise its approach.

- **Sources of climate obligations:** Climate change litigation can draw on various sources of legal authority, including international law, constitutional provisions, statutes, or common law. In some cases, plaintiffs identify more than one of these, or a combination of them, as providing the legal basis for their claims. In instances where a statutory provision spells out climate change mitigation commitments and that statute also authorizes citizens to sue for noncompliance, the task of applying the law to the facts alleged is straightforward. But in cases where plaintiffs ask a court to apply a legal authority that does not expressly contemplate application to climate change, the task is harder and courts tread carefully, lest they be seen as legislating.
- **Remedies:** Courts can only grant remedies authorized by the law. If the remedy sought is more aggressive climate action on the part of a government agency, courts must identify the basis for instructing that agency to comply, or else to specify how exactly the agency should alter its approach.

Summaries of highly significant cases appear throughout this report. Those summaries provide a kaleidoscopic snapshot of the current state of climate change litigation, and also illustrate the circumstances, trends, and issues discussed in Parts 1, 2 and 3.

Introduction



In the 2010s, laws codifying national and international responses to climate change have grown in number, specificity, and importance.¹ As these laws have recognized new rights and created new duties, litigation seeking to challenge either their facial validity or their particular application has followed. So too has litigation aimed at pressing legislators and policymakers to be more ambitious and thorough in their approaches to climate change. In addition, litigation seeking to fill the gaps left by legislative and regulatory inaction has also continued. This report surveys the current state of this global climate change litigation, and provides judges, advocates, researchers and the international community with an overview of trends and issues in climate change lawsuits.

Part 1 of this report notes the circumstances that make climate change litigation efforts especially important just now—most especially the growing urgency of the climate crisis, ratification and entry into force of the Paris Agreement under the United Nations Framework Convention on Climate Change (“Paris Agreement”), and the inclusion of climate action as one of the 17 Sustainable Development

Goals (SDGs) enumerated in the United Nations’ Transforming Our World – the 2030 Agenda for Sustainable Development. (Climate action is also a vital, cross-cutting element of many of the other SDGs.) Part 2 provides a snapshot of the current state of worldwide climate change litigation. It also describes a number of salient current trends in this litigation and likely future ones. Part 3 discusses the recurring legal issues at play in climate change litigation around the world. Strict and comprehensive categorization is made difficult by the diversity of the world’s legal systems, which take varied approaches to the interconnected substantive areas of law that constitute climate change law—namely environmental law, natural resources law, energy law and land use law, as well as constitutional law, administrative law and common law. Nonetheless, this section offers legal professionals, researchers and others an introduction to the common issues that arise in climate change cases when determining justiciability, interpreting legal rights and obligations, and providing remedies. Summaries of highly significant cases appear throughout the report, putting these circumstances, trends, and issues into context.

¹ E. Somanathan et al., National and Sub-national Policies and Institutions, in *Climate Change 2014: Mitigation of Climate Change, Contribution of Working Group III [WG3] to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 1049, 1050–51 (O.R. Edenhofer et al. eds. 2014) [hereinafter IPCC AR5].

Part 1: The Importance of Climate Change Litigation



Source: UN Department of Economic and Social Affairs, Division for Sustainable Development

Concentrations of greenhouse gases (GHGs) in the atmosphere have already surpassed levels that many scientists consider safe, putting people everywhere in peril. The extraordinary risks posed by climate change are well-established. Sea levels are rising, making more seawater available for the storm surges that wreak destruction on coastlines during coastal storms and threatening to overwhelm coastal communities and small island nations.² Average temperatures are rising and heat waves are growing longer and more intense, threatening to strain infrastructure and agricultural systems, and posing direct threats to human health.³ In addition, more powerful storms, longer-lasting and more severe

of climate change and the risks of climate impacts to human communities, and despite the profound international accord forged through the Paris Agreement and the SDGs, progress toward effective solutions has been slow.

The international community has encountered difficulty in tackling climate change because it is a “super wicked” policy problem, capable of resisting even substantial efforts by policymakers.⁵ Three features in particular make the problem “super wicked.” First, it becomes less tractable over time. That is, the more GHGs we emit, the more committed we are to continuing emissions, the more severe the problem becomes and the less likely we are to find

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