

Swiss Arbitration Association



3 February 2023

Trends in Litigation: Climate Change and Environmental Challenges

ASA Winter Conference 2023

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swissarbitration.org/asa

Outline



1. Global trends in climate litigation

- CCLW
- Cases worldwide
- Climate-related ISDS litigation

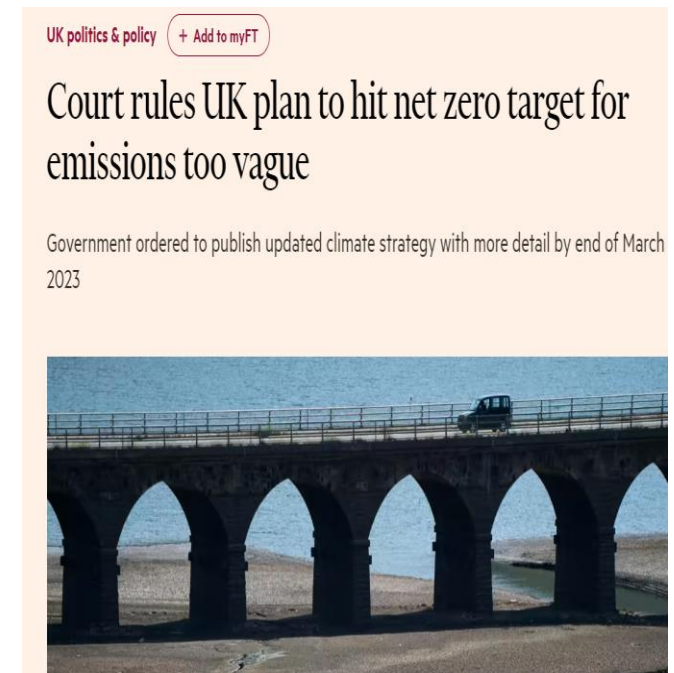
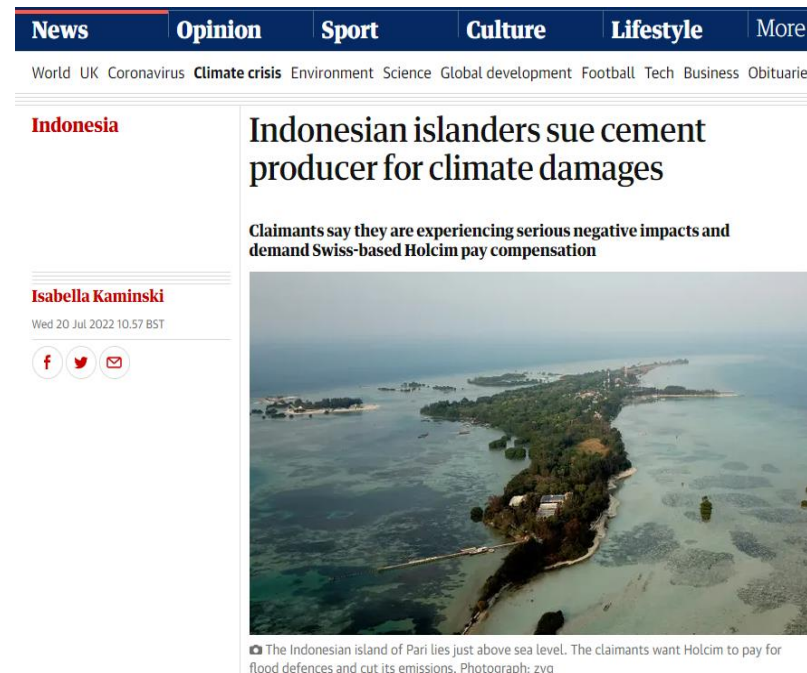
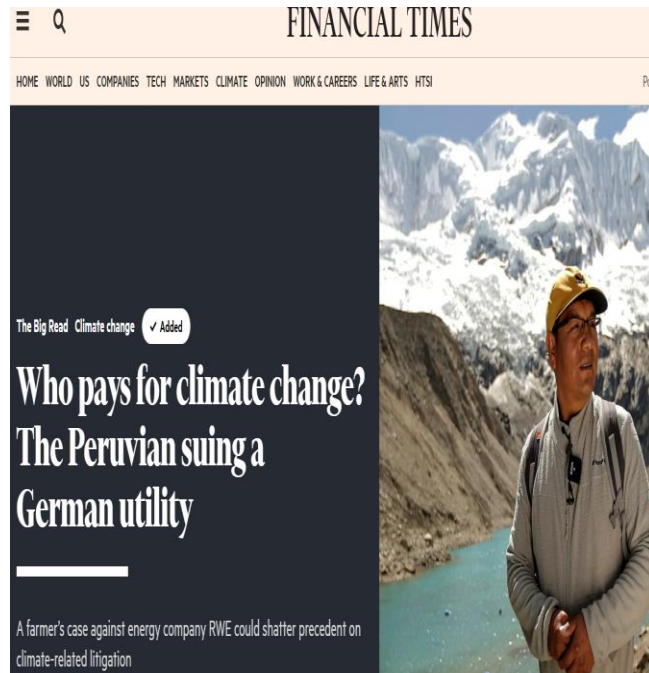
2. Global trends in private litigation

- Different sectors
- Majors and beyond
- Misinformation and greenwashing
- Corruption and integrity

Global trends in climate litigation

What is climate litigation?

- Narrow approach: judicial and quasi-judicial cases where climate science or climate policy is a material issue in the proceedings
- Many areas of law, around the world



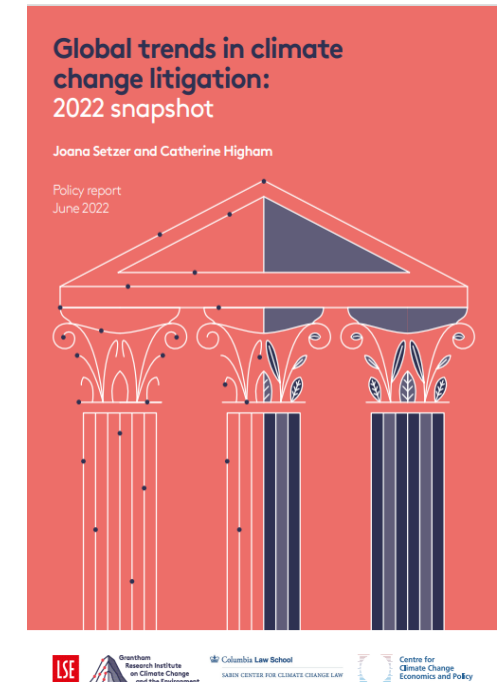
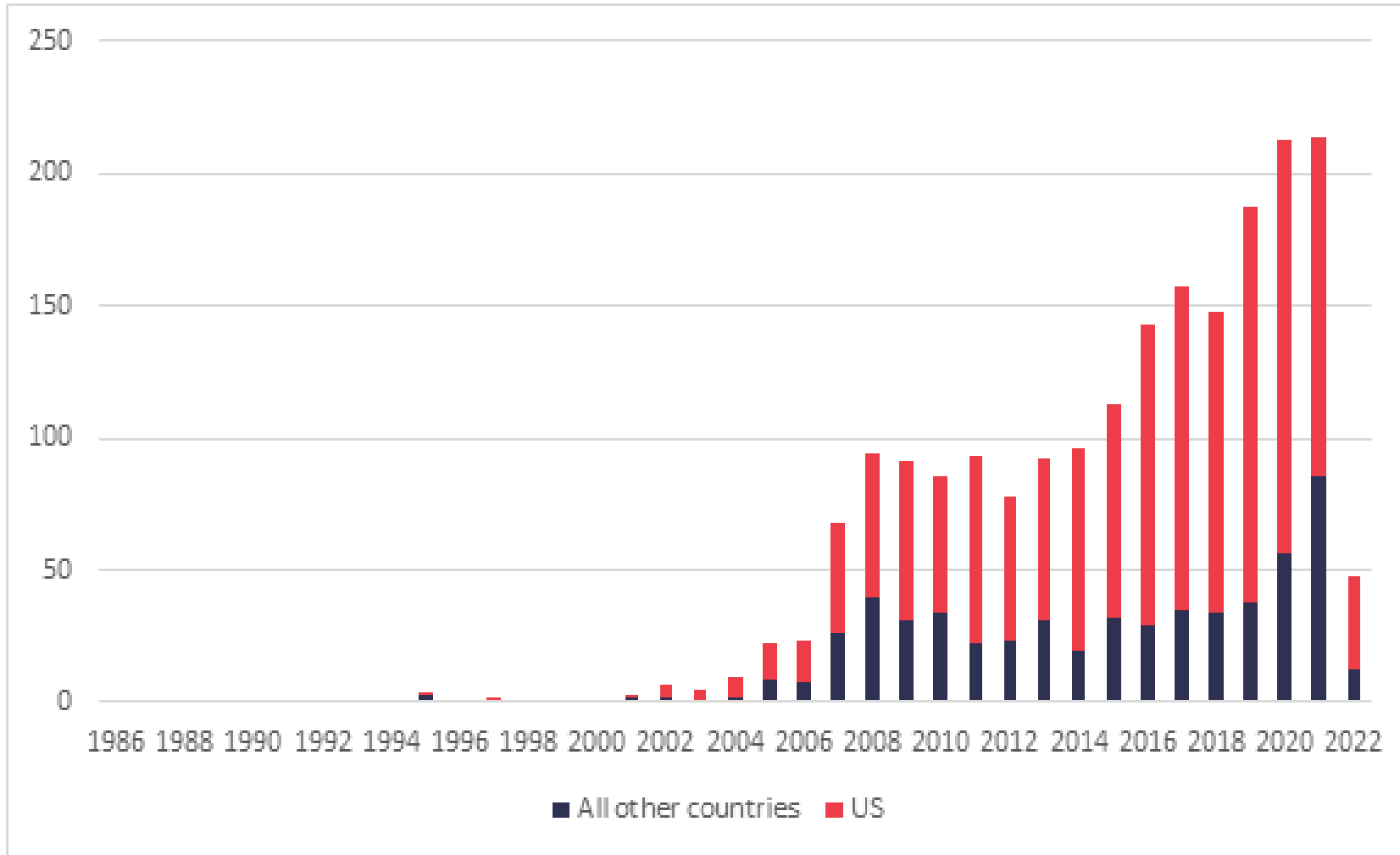
Tracking developments in Climate Change Law



The screenshot shows the top navigation bar with the LSE logo and links for 'About', 'Methodology - Legislation', 'Methodology - Litigation', and 'Collaborations and Acknowledgements'. The main heading is 'Climate Change Laws of the World'. Below it, a sub-heading reads 'Use our database to search and browse climate laws, policies and litigation cases globally.' A search bar contains the text 'Search for countries, legislation and policies and litigation cases'. At the bottom, there are three categories: 'Climate laws and policies' with a count of 3062, 'Climate litigation cases' with a count of 2180, and 'Featured country profiles' listing India, Indonesia, European Union, and China.

The screenshot shows the title 'Climate Change Litigation Databases' at the top. Below the title are two buttons: 'U.S. CLIMATE CHANGE LITIGATION' and 'GLOBAL CLIMATE CHANGE LITIGATION'. A paragraph of text reads: 'This site provides two databases of climate change caselaw. The Global database includes all cases except those in the U.S. Cases in the databases are organized by type of claim and are searchable. For many cases, links are available to decisions, complaints, and other case documents.' The background of the page features a photograph of icebergs floating in the water.

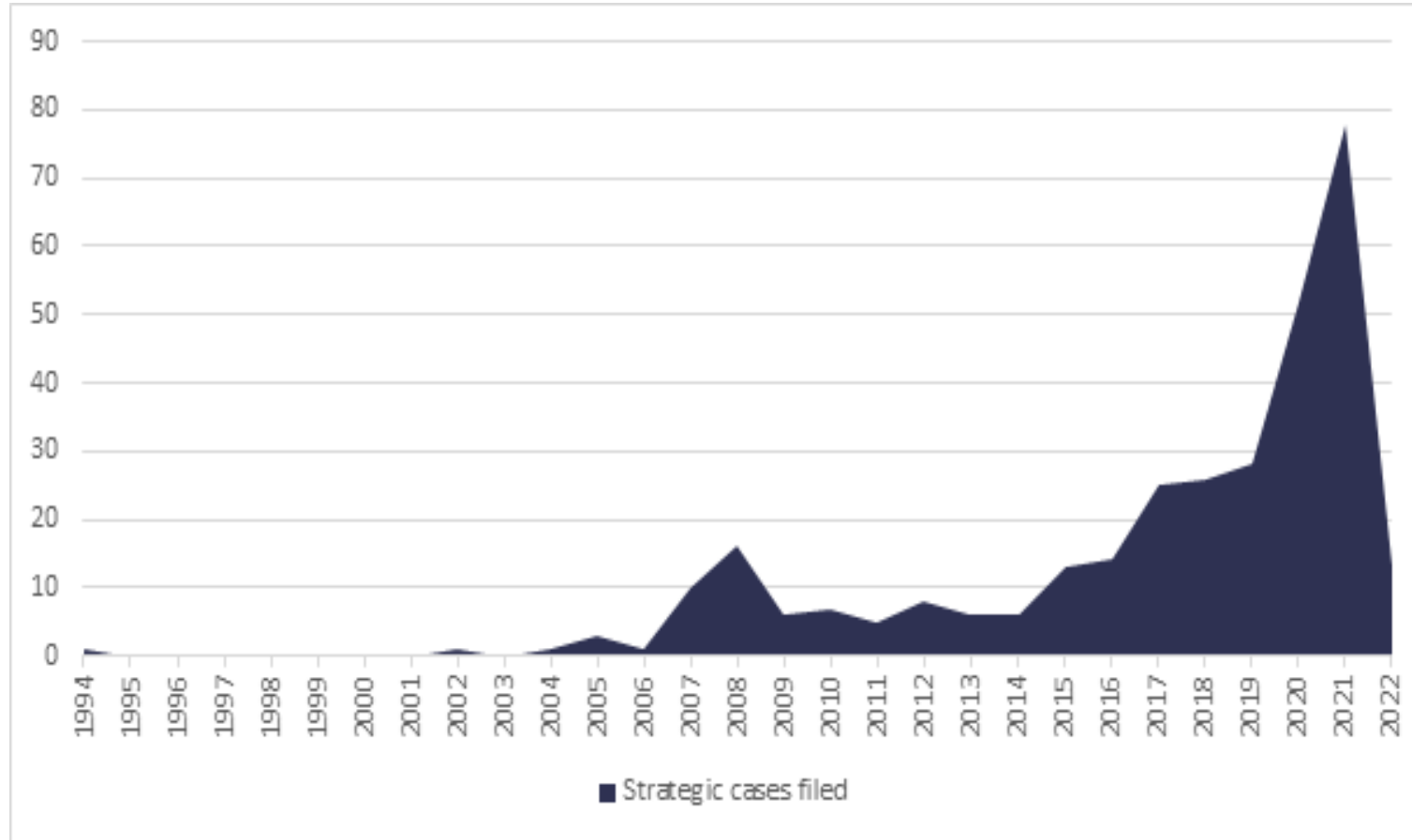
Case numbers rising year on year



2021 highest annual number of cases outside of the US

Strategic litigation on the rise

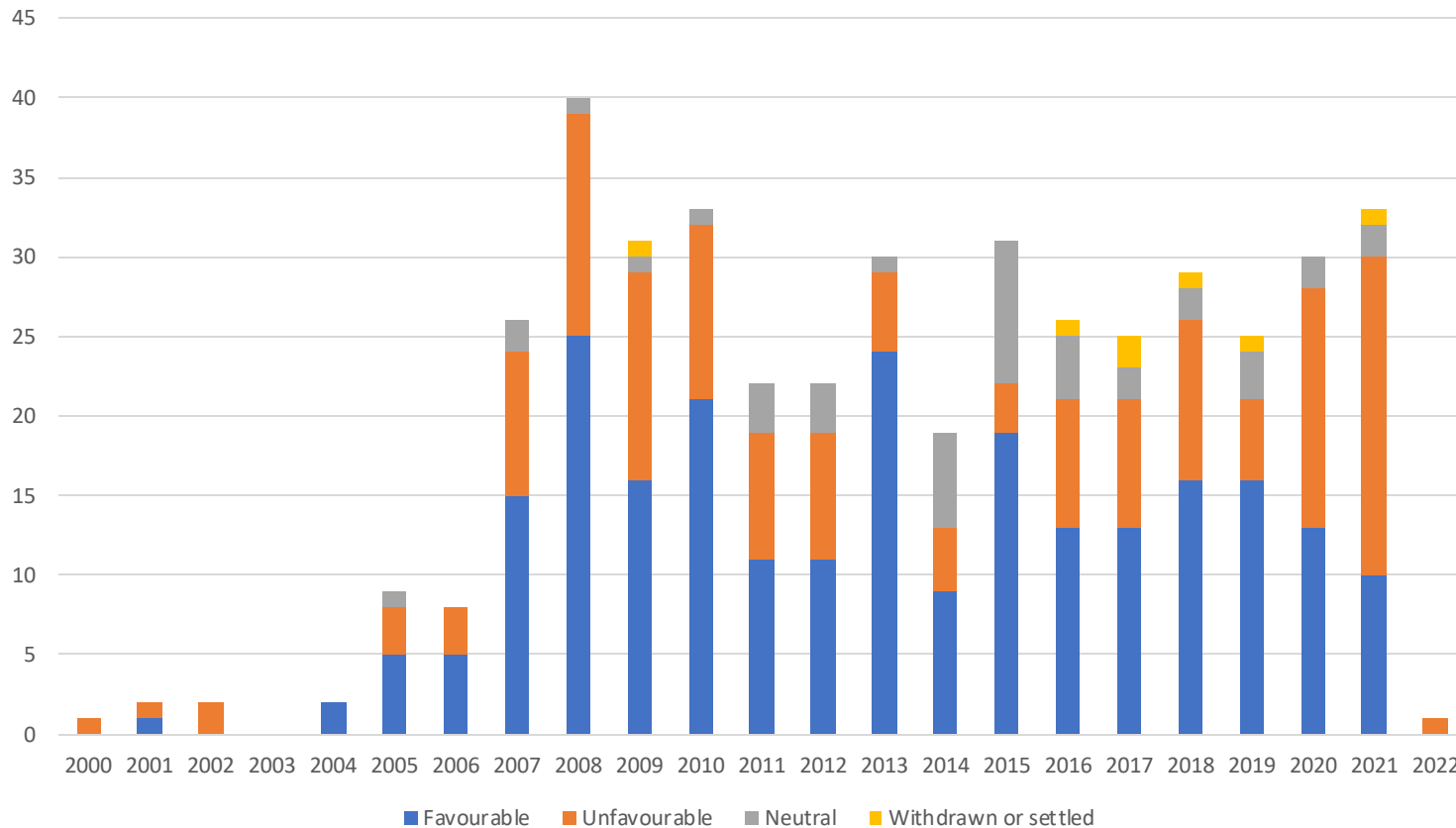
Proportion of strategic cases over time (%), outside the US, to 31 May 2021



Not all strategic litigation is aligned with climate goals.

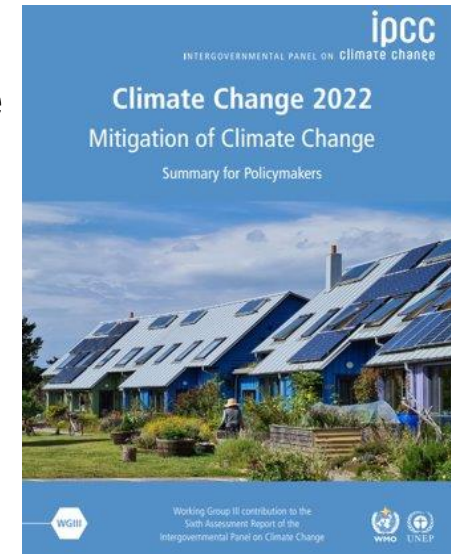
Outcomes in litigation: a complex story

Outcomes in cases where a classifiable decision has been rendered, outside the US, to 31 May 2021



>50% of litigation cases filed in the last 3 years are yet to be decided

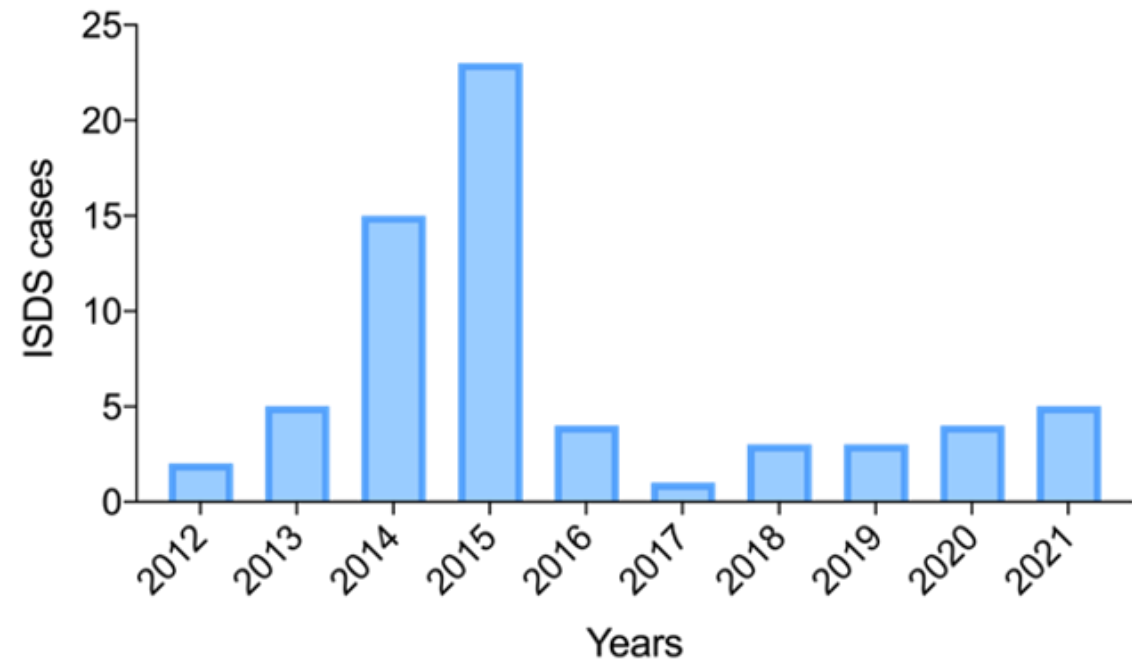
Cases may have impacts beyond the court room even if they are unsuccessful



ISDS claims as climate change litigation

- Climate objectives are generally marginal
- BUT climate policy – and its impacts on assets – is a key part of climate-relevant ISDS cases
- The Dutch case RWE v Netherlands (Feb 2021) and Uniper v Netherlands (April 2021)

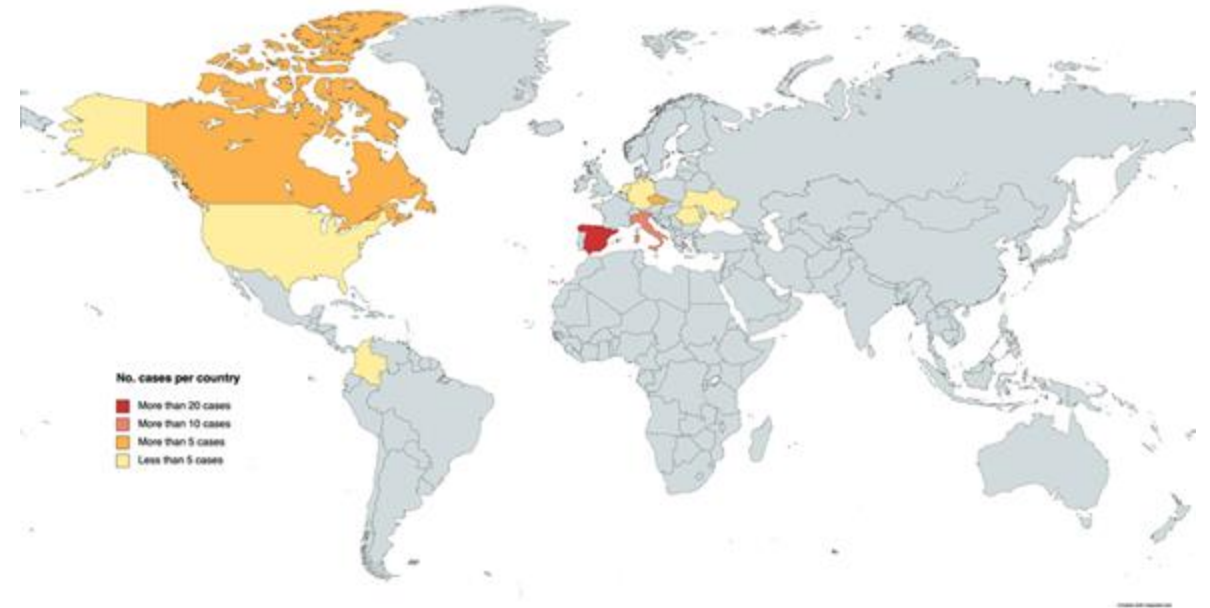
Number of climate-related ISDS cases since 2012



Mapping climate-relevant arbitrations

Two assessment criteria:

- (i) The *kind of investment* protected by IIAs
- (ii) The *kind of measure* adopted by host States and challenged by foreign investors before ISDS tribunals



65 cases in total against 10 countries

Source: Authors, based on UNCTAD Investment Policy Hub data

Global trends in private litigation

Strategic litigation against corporations

Oxford Journal of Legal Studies, Vol. 38, No. 4 (2018), pp. 841–868
 doi:10.1093/ojls/gly029
 Published Advance Access October 20, 2018

If at First You Don't Succeed: Suing Corporations for Climate Change

Geetanjali Ganguly*, Joana Setzer** and Veerle Heyvaert***

Abstract—This article discusses the history and the future prospects of private climate litigation, which seeks to hold private entities legally accountable for climate change-related damage or threats of damage. It argues that, following failed attempts to clear judicial thresholds with regard to standing, proof of harm and causation, a new wave of private climate change lawsuits can be identified, and it is by no means doomed to failure. This is because climate change litigation takes place in a rapidly evolving *scientific, discursive and constitutional* context, which generates new opportunities for judges to rethink the interpretation of existing legal and evidentiary requirements and apply them in a way that will enhance the accountability of major private carbon producers. Moreover, even unsuccessful cases can contribute to articulating climate change as a legal and financial risk, which may help to guide climate change-responsive adjudication in the longer term.

Keywords: private climate litigation, Carbon Majors, judicial interventions, climate change causation, corporate responsibility, climate risk disclosure

Downloaded from https://academic.oup.com/ojls/article-abstract/38/4/841/5140101 by London School of Economics user on 01 May 2019

Pre-2015



Post-2015



Introduction
 At James Hansen called for a wave of private climate change litigation against fossil fuel companies that are delaying action on climate science, the key is to sue Shell for the damage they are doing to

School of Economics and Political Science. Email: [redacted]
 Research Institute on Climate Change and the School of Economics and Political Science. Email: [redacted]
 financial support of the British Academy through the grant for the Protection of the Environment and the School of Economics and Political Science. Email: [redacted]

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Growing number of cases targeting the fossil fuel industry and other companies

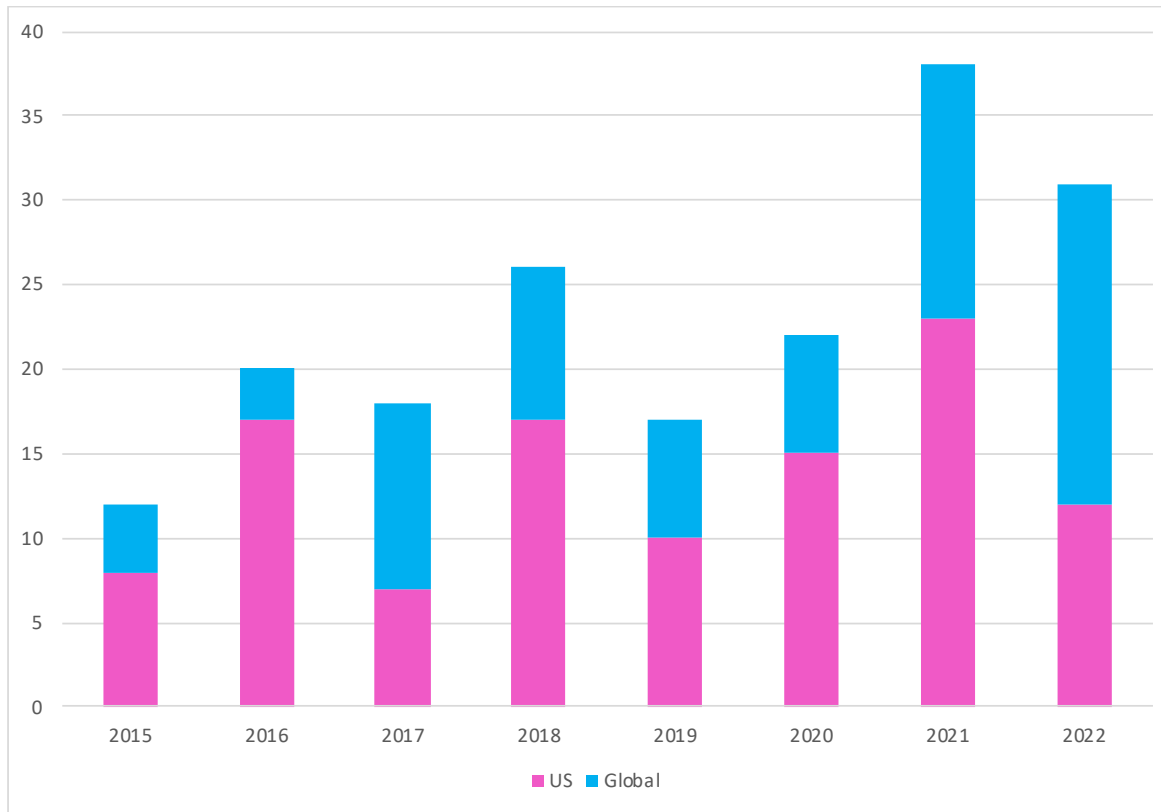
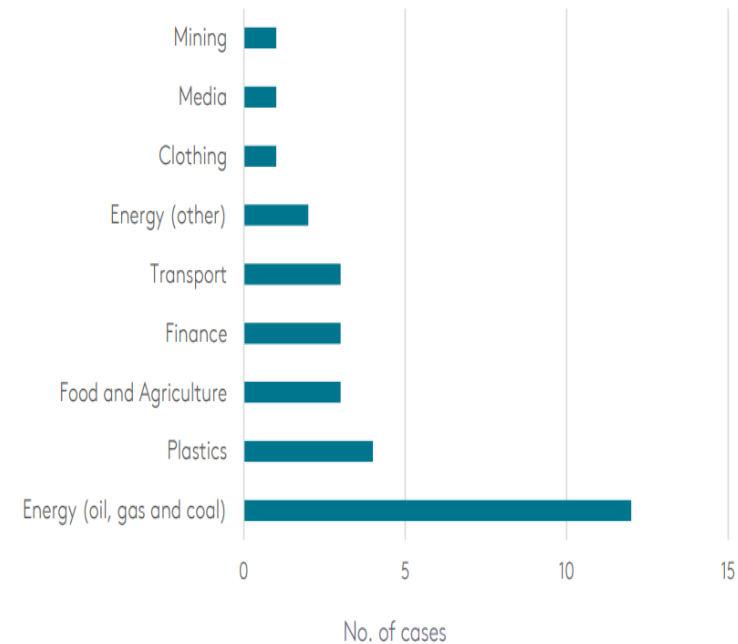


Figure 1.5. Number of climate cases involving corporate defendants by sector (31 May 2021 – 31 May 2022)



Source: Authors based on CCLW and Sabin Center data

Cases against Carbon Majors and beyond



Cases seeking damages

- Lliuya v. RWE (Germany); Smith v. Fonterra (NZ)
- Over 20 cases by cities and states in the US
- Four Islanders of Pari v. Holcim



Corporate Framework cases

- Notre Affaires a Tous v. Total (France)
- Milieudefensie et al. v. Royal Dutch Shell plc. (Netherlands)
- DUH and Greenpeace Germany v. German automakers



Climate-related Financial Risk: From Disclosure to Due Diligence

- *McVeigh v. REST (Australia)*
- *Ramirez v. ExxonMobil (US)*
- *ClientEarth v. Enea (Poland)*
- *ClientEarth v. Shell Board of Directors (UK)*

Shell directors sued for 'failing to prepare company for net zero'

Environmental law organisation ClientEarth brings action and urges other shareholders to join



ClientEarth has said it is taking the action against Shell in the company's best interests.

Mark McVeigh is taking on REST super on climate change and has the world watching

By business reporter Nassim Khadem

Posted Fri 17 Jan 2020 at 7:21pm, updated Sat 18 Jan 2020 at 1:25am



Climate Activists Win Shareholder Suit to Thwart Coal Plant in Poland

Misinformation and greenwashing

- Focus on historic deception and/or present net zero claims
- Investor or consumer protection laws
- Complaints to non-judicial oversight bodies
- Investigations by state agencies (Deutsche Bank)

CSSN Research Report 2022:1:
Climate-Washing Litigation:
Legal Liability for Misleading Climate Communications

Policy Briefing
 January 2022



Corruption and integrity risks in the climate context

Misleading information	Misuse and diversion of financial flows	Regulatory capture	Abuse of processes
Commodities “laundering”	Bribery and misappropriation of climate funds	Misalignment between climate pledges and spending	Abuse of carbon accounting and EIAs
Misleading certifications	Fraud	Conflicts of interest	Climate SLAPPs
Institutional discreditation of climate experts	Money laundering	Funding of climate denial	Anti-competitive behaviour

Future trends

- ✓ Personal responsibility
- ✓ Commitments that over-rely on GHG removals or 'negative emissions' technologies
- ✓ Short lived climate pollutants
- ✓ Climate and biodiversity nexus
- ✓ 'Loss and damage' resulting from climate change



Recommendations

Develop internal capacities/monitor

- Regulatory landscape (e.g. risk disclosure and risk assessment)
- Developments in climate litigation

Duty to advise/educate clients

- Exposed sectors
- Litigation risk (e.g. advertisement campaigns)
- Climate considerations in financial decision-making



Thank you



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Access the 2022 report:

<https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf>

Access the database:

<https://climate-laws.org>

