

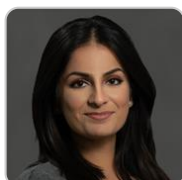


2023 Analysis Of Climate Litigation Shows Continuing Upward Trend

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In its 2023 snapshot report (the Climate Litigation Report), the London School of Economics' Grantham Institute found that climate litigation continues to grow, with 190 new cases filed in the last 12 months, including cases filed in new jurisdictions Bulgaria, China, Finland, Romania, Russia, Thailand and Turkey. Although the Grantham Institute found that climate litigation remains on the rise, it also stated that overall rate of growth appears to be slowing in part due to a continuing decline in cases filed in the U.S.

Outside the U.S., over 90% of cases filed in the last 12 months have been brought by non-governmental organizations, individuals, or both acting together, some of which are cited below. The survey found a 16% reduction from previous years in the number of non-U.S. cases being brought against governments.

The Grantham Institute also reported that the nature of such litigation, is changing with litigants filing so-called 'strategic' cases. Strategic cases are described as those with the aim of "influencing the broader debate around decision-making with climate change relevance." The Institute identified eight types of strategies:

- 'Government framework': These cases focus on a government's response to climate change and may include challenging a claimed lack of ambition in climate policies or a failure to implement policies or legislation, or both. An example can be seen in ClientEarth's challenge to the UK government's Department for Business, Energy and Industrial Strategy on the grounds that its net zero strategy was inadequate. The UK's High Court held that the strategy breached the Climate Change Act and needed to be strengthened. Government framework cases also encompass rights-based actions whereby a plaintiff invokes his or her

human or constitutional rights. Recent examples include *Held v Montana* and *Greenpeace Italy et al. v ENI S.p.A.*, which we have discussed previously.

- ‘Corporate framework’: Similar to ‘government framework’ cases described above, corporations’ climate policies are claimed to be inadequate. Many such cases often overlap with other strategies in this list. Examples include *Greenpeace Italy et al. v ENI S.p.A.*; *Notre Affaire à Tous and others v BNP Paribas* and *ClientEarth v Shell Board of Directors*.
- ‘Integrating climate considerations’: Cases seeking to compel or encourage government or corporations to integrate climate considerations, standards or principles into a particular decision.
- ‘Turning off the taps’: Preventing the financing of projects or initiatives which, when completed, would result in a high level of greenhouse gas emissions. In February, for instance, several climate groups **filed a lawsuit** against a French-based financial institution criticizing the bank for failing to “require” its clients in the fossil fuel industry “to immediately stop developing new fossil fuel projects and engage in a progressive exit from the sector.”
- ‘Failure to adapt’: Cases against a government or company for failing to adapt to climate change, such as by failing to adapt property to physical risks or failing to consider transition risks.
- ‘Polluter pays’: Cases seeking compensation from defendants based on their alleged contribution to climate change.
- ‘Climate-washing’: Cases challenging inaccurate statements made by governments or companies in relation to climate change or transition to net-zero. Recently, for example, Klima Allianz, a Switzerland-based climate action group, filed a case against the International Federation of Football Association (FIFA) alleging that FIFA’s claims that the 2022 Qatar World Cup was “climate-neutral” constituted greenwashing. This **follows a finding** by the Swiss advertising regulator against FIFA on the same claim.
- ‘Personal responsibility’: Seeking to bring climate issues to the top of the agenda among public and private decision makers by attributing personal responsibility on senior officers for failing to adequately manage climate risks. Although ultimately unsuccessful, **such an action** was brought by ClientEarth against the directors of an oil major for allegedly violating directors’ duties in connection with climate risk management.

In addition to “traditional” litigation, the Grantham Institute observes that actions seeking advisory opinions are increasingly being filed too, with three such matters filed before the International Tribunal on the Law of the Sea, the Inter-American Court of Human Rights and the International Court of Justice. Advisory opinions are not binding but may hold persuasive authority. They also bear a significantly lower cost than litigation and may therefore be sought more frequently.

Other future trends identified by the Grantham Institute include litigation arising out of biodiversity impacts; extreme weather events; the release of short-lived climate pollutants such as methane; suits seeking increased ocean protection by governments and corporations; and international litigation between states over fossil fuel production and use.

Taking the Temperature: As cited above, we have frequently commented on the rising trend of climate litigation, which the extensive survey underpinning the Climate Litigation Report confirms. The Grantham Institute aims to evaluate the overall effectiveness of climate litigation. Notably, the Report finds that of the relevant proportion of cases which result in judicial outcomes, over half have rendered decisions in favor of climate action. While this may serve as encouragement and further incentive for potential claimants, it does not tell the whole story. A significant driver of climate-related litigation is the publicity that these cases inevitably generate. Climate-activist shareholder groups and NGOs are fully aware of the reputational impact that such actions have on major companies and seek to leverage the platform that litigation in open court provides. Such litigants are not necessarily driven by the same objectives as commercial parties. We expect this trend to continue and companies, particularly in high-emitting sectors, will have to develop strategies for dealing with such interest groups.