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European Citizens Sue States for Breach of Human Rights Resulting from Failure to Take Stronger Climate Action

November 14, 2023



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On September 27, 2023, six “Portuguese young people” **were heard by the European Court of Human Rights** (ECtHR) in a lawsuit against 32 European governments, including all EU member states, alleging that their failure to act fast enough against climate change has violated the applicants’ human rights to life, physical and mental wellbeing. The applicants claim that the respondents are failing to fulfil their obligations under the Paris Agreement to limit global warming.

The **original application** cites a number of contributions to climate change made by the respondent states: (i) permitting the release of emissions within national territory and offshore areas over which they have jurisdiction; (ii) permitting the export of fossil fuels extracted on their territory; (iii) permitting the import of goods, the production of which involves the release of emissions into the atmosphere; and (iv) permitting organizations within their jurisdiction to contribute to the release of emissions overseas. Taken together, the applicants say, the respondents have contributed to climate change and, while mitigation measures have been adopted, contributions to adverse climate change continues. The applicants are seeking an order from ECtHR requiring the respondent governments to take more ambitious action.

Describing the impact on them, the applicants say that climate change has contributed to harm to human health. In an expert report commissioned to supplement their application, the applicants say that Portugal is already experiencing the impact of climate change, including an increase in mean and extreme high temperatures, with heatwaves becoming more frequent. As a result, the region is also prone to wildfires – 120 people died and 500,000 hectares of land were burned during wildfires preceded by heatwaves. Responding to the application, a lawyer on behalf of Greece claimed that climate change cannot be directly linked to an adverse impact on human health, stating “[the] effects of climate change, as recorded so far, do not seem to directly affect human life or human health.” Lawyers on behalf of Portugal stated that the applicants failed to provide evidence of the specific damages caused by climate change on their lives.

The case was originally filed in September 2020. The September 27 hearing was one of the largest before the ECtHR, with 22 judges and 86 government lawyers, and took place following one of the hottest summers on record in Europe. A decision is expected in 2024.

Taking the Temperature: The claims made in this case echo certain conclusions reached in the United Nations' [first global stocktake](#) on parties' achievements under the Paris Agreement. The UN acknowledged that although significant progress has been made, there is a crucial need for nations to significantly enhance their clean energy ambitions if they are to achieve their Paris-aligned objectives.

In July 2023, [we discussed](#) the Grantham Institute's report on trends in climate litigation and the types of strategies being employed by claimants. One of these included so-called government framework actions in which plaintiffs focus on a government's response to climate change and potentially, its failure to implement policies or legislation. The case brought by the six Portuguese young people falls squarely within this category.

In June 2023, [we discussed](#) the lawsuit filed by, among others, Greenpeace and 12 Italian citizens against ENI S.p.A. alleging that ENI knew of the detrimental effect of fossil fuel burning since around 1970 but through "lobbying and greenwashing" continued to encourage extraction, thereby contributing to climate change, and violating the citizens' rights to life, health and private and family life. In March of this year, a group of Swiss citizens accused the Swiss government of infringing on the right to life and health of elderly women via its climate-related policies. The case is pending in the European Court of Human Rights.

Comparable cases have also been filed in the U.S. In Montana, 16 residents—ranging from ages 2 to 18—[commenced litigation](#) claiming that they "have been and will continue to be harmed by the dangerous impacts of fossil fuels and the climate crisis," and that the defendants have violated the Montana Constitution by fostering and supporting fossil fuel-based energy policies in the state that led to these conditions. In September this year, [the court struck down](#) on state constitutional grounds certain provisions of the Montana Environmental Policy Act (MEPA), which restricted Montana from incorporating the impact of greenhouse gas emissions or other forms of climate change in environmental reviews. Similar constitution-based climate-related suits against state governments are pending in other U.S. states.

Island Nations Ask UN Tribunal to Spell Out Large Countries' Obligations to Protect Oceans

November 14, 2023



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The International Tribunal for the Law of the Sea held a series of public hearings that started September 11, 2023 following a request submitted by **the Commission of Small Island States on Climate Change (COSIS)** to clarify large countries' obligations to protect the oceans—and the world's smallest island states—from the impact of pollution and climate change. COSIS is calling for a legally binding framework to protect its member states from the effects of climate change and is aiming to raise these issues at upcoming UN climate change and other conferences. Established in 2021 during COP 26 in Glasgow, COSIS currently has eight members: Antigua and Barbuda, Niue, Palau, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Tuvalu, and Vanuatu.

In its **request** in December 2022, COSIS asked the tribunal for an advisory opinion on the responsibilities of the 169 state parties to the United Nations Convention on the Law of the Sea (UNCLOS). Specifically, COSIS asked the judges of the Hamburg, Germany-based tribunal to decide if greenhouse gas emissions absorbed by the ocean can be considered pollution under UNCLOS and, if so, what state parties' responsibilities are to reduce or prevent such pollution. Climate change has resulted in rising sea levels, displacing low-lying populations and threatening the existence of some small states; ocean warming and acidification that harm marine ecosystems; and food insecurity and economic devastation, said COSIS.

In its **statement to the tribunal**, COSIS said “[a]s the sole permanent dispute resolution forum established by UNCLOS and with its specialized competence in the law of the sea, the Tribunal is especially well placed to address the questions raised in the request for an advisory opinion.” “The Tribunal could assist States Parties by identifying obligations that are legally binding rather than discretionary, and defining with greater precision the specific obligations under UNCLOS with respect to climate change on the basis of established scientific evidence.”

Taking the Temperature: One of the issues likely to animate COP 28 later this month will be loss and damage for developing countries that have suffered the brunt of climate change. Although participants at COP 27 reached an agreement to establish a **dedicated fund to assist developing countries respond to loss and damage caused by climate change, key questions remained unanswered, including which countries will pay into the fund and which countries can benefit from it. This debate will continue at COP 28. An advisory opinion issued by the International Tribunal for the Law of the Sea could be a significant development for the most vulnerable island states, some of which are in danger of being overwhelmed by rising sea levels. However, an advisory opinion is not binding and enforceable, unlike a legal judgment. While governments of UN State Parties will therefore not be obliged to take any action following the Tribunal's decision, the**

opinion would potentially impact international law. As UN Secretary-General António Guterres commented in the context of a previous request by Vanuatu (see below), advisory opinions can provide clarification on international legal obligations and encourage member states to take stronger climate action.

COSIS's request for an advisory opinion is not the first time small island nations have sought a ruling from an international legal tribunal on the obligations of developed countries. [As we previously reported](#), in March the United Nations General Assembly adopted a resolution requesting an advisory opinion from the International Court of Justice on the obligations of its 193 member states regarding climate change under international law. The resolution, organized by Vanuatu, specifically requested that the court render an opinion on the legal consequences for states where they, by their acts and/or omissions, have caused significant harm to the climate system and, in particular, to small island developing states. [Proceedings](#) in that case are ongoing.

ISS: Challenges Remain in Interoperability of Sustainability Disclosure Standards

November 14, 2023



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In its annual [Global Regulatory Update](#) (the 2023 Update Report), Institutional Shareholder Services (ISS) determined that the application of different ESG disclosure and reporting frameworks presents significant challenges for companies. The 2023 Update Report delves into several recent regulatory developments and analyzes the state of ESG regulations internationally, describing these disparate regulatory initiatives as a collective “work-in-progress” that has created “a labyrinthine landscape for financial market participants to navigate.”

The 2023 Update Report addresses the comparability of the International Sustainability Standards Board’s (ISSB) Sustainability Disclosure Standards and the European Commission’s European Sustainability Reporting Standards (ESRS). The report describes the level of interoperability between the ISSB and ESRS as “an open question.” The two frameworks share the overall approach adopted by recommendations issued by the Taskforce on Climate-Related Financial Disclosure (whose work has not been taken over by ISSB), **but they diverge** on the definition of materiality, flexibility in companies’ application of materiality assessments, and time provided to implement certain disclosure requirements.

The 2023 Update Report cites regulatory fragmentation across the globe as a major concern for issuers of investment products and major fund managers that operate across jurisdictions. ISS flagged one example with respect to fund classification: the UK’s Financial Conduct Authority, the Hong Kong Securities and Futures Commission, and the Monetary Authority of Singapore have all referred to the European Union’s Sustainable Finance Disclosures Regulation (SFDR) in connection with their disclosure regimes, yet in both Hong Kong and Singapore, funds may ultimately be required to provide additional disclosures to be marketed to retail investors as ESG funds. Fund naming rules vary widely across jurisdictions: Hong Kong, for instance, requires that 70% of the fund’s net asset value (NAV) be aligned with the ESG strategy reflected in the fund name, Singapore requires that two-thirds of the product’s NAV be aligned with its ESG strategy, and in the U.S. the SEC’s recently promulgated **“Names Rule”** requires 80% alignment.

Another area that the report explores, using the EU, U.S., and Japan as case studies, is the evolution of due diligence obligations in corporate supply chains. Japan has already introduced human rights due diligence guidelines, the first in Asia. As we discuss [here](#) and [here](#) the EU Corporate Sustainability Due Diligence Directive (CSDDD) and the EU Corporate Sustainability Reporting Directive (on which the CSDDD builds), could impact significantly corporate supply chain standards in Europe. If the CSDDD comes into force by 2024 as planned, EU member states will then transpose it into domestic legislation.

Taking the Temperature: Overall the 2023 Update Report's findings are not surprising or unexpected. [As we have discussed](#), different jurisdictions' evolving ESG regulatory regime poses challenges. Standardized regimes across jurisdictions would ease the disclosure burden. We report on this trend [here](#) with respect to specifics in the EU, [here](#) in terms of Asia's developments, and [here](#) with regard to Canada.

ECB Cautions Banks About Heightened Exposure to Climate Litigation

November 14, 2023



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At a September legal conference convened by the European Central Bank (ECB), Frank Elderson, a member of the ECB's executive board and vice-chair of its supervisory board, **observed the increasing risk** of climate lawsuits and stressed the need for banks and their clients to implement Paris-aligned transition plans to mitigate that risk.

Both the sheer volume of strategic climate litigation cases, as well as their development in terms of nature, scope and diversity of defendants, have dramatically increased since 2021. Between 2021 and 2022, the Network for Greening the Financial System (NGFS) **notes** that more than 70% of climate cases named governments and public actors, including central banks and supervisors. Elderson reflected that regulators also have work to do, **citing an additional NGFS report** published this September on the micro-prudential supervision of climate-related litigation risks (i.e., risks to individual financial institutions rather than industry-wide risk). 90% of cases filed from 2022 to 2023 were filed by NGOs. Over half of relevant cases resulting in judicial outcomes have secured decisions favorable to climate action claimants.

Elderson recommended risk mitigation measures such as detailed disclosures, reexamination of governance frameworks and regular compliance checks. He also suggested that when banks rate the probability of their clients' default, they should also assess diverse risks, including reputational risks suffered by exposure to greenwashing suits. Banks should carefully consider the financing of polluting industries by mapping affected stakeholders and areas for financial loss and opportunity.

Elderson stressed that financial institutions must make their Paris-aligned transition plans realistic and should avoid "slick advertising campaign[s] with glossy photos of rainforests," noting that "that is just a recipe for greenwashing accusations." Rather, he urged banks and their clients to develop transparent and credible transition plans, and speedy implementation of such plans.

Taking the Temperature: As we have reported, strategic climate litigation is a rising global trend. We cover this with respect to potential consequences of the EU's "Fit for 55" legislative package, with respect to particular climate-related lawsuits [here](#) and [here](#), and corporate pushback against such climate litigation [here](#). We discuss the overall global rise in litigation trends in [our coverage](#) of the 2023 Grantham Institute's Climate Litigation Report.

The ECB's climate action plan for its own €385 billion portfolio is the **target of criticism** from Greenpeace after a research report from three UK universities claimed that the ECB "can and should return to a more ambitious approach that actively reshuffles its corporate bond holdings towards greener issuers."

EIB Announces New Measures to Address Biodiversity Loss

November 14, 2023



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On September 20, 2023, the European Investment Bank (EIB) announced that it was developing a methodology to assess its clients' exposure to nature-related impacts and risks. The EIB reinforced its commitment to address biodiversity loss and the threats posed by climate change and presented the measures at events taking place during the United Nations General Assembly held in New York between September 18-22, 2023.

The EIB stated that it recognizes the pressing threats that climate change poses to biodiversity and ecosystems. As a result, the Bank is implementing measures to assess and manage these risks, which will play a pivotal role in shaping future investments and support for biodiversity. The bank's Vice President, Ambroise Fayolle, unveiled the EIB's "nature-positive" framework, emphasizing the importance of supporting investments that protect biodiversity and manage risks associated with threats to nature and biodiversity. To understand and manage the financial risks associated with biodiversity loss and ecosystem degradation, the EIB is developing a biodiversity risk screening system. This system will evaluate financial risks within the EIB's portfolio and at the counterparty level. It is expected to be finalized in 2024, with implementation for EIB counterparties scheduled to commence in 2025.

In a related initiative, the EIB has also announced its intention to collaborate with Multilateral Development Banks (MDBs) to shape its approach to the impact its projects have on biodiversity. In 2021, numerous MDBs collectively adopted the "Joint MDB Statement on Nature, People, and Planet," demonstrating their commitment to nature conservation. The collective effort aims to protect and support nature while simultaneously managing the risks associated with biodiversity loss in EIB projects.

Taking the Temperature: The steps taken by the EIB build on its earlier joint announcement with the European Commission to jointly provide €18 billion in funding to finance projects covering a variety of climate-related issues, including an initiative to reverse deforestation, [as we reported on](#) in April. We have also [previously discussed](#) how the EIB is working with the European Commission to enhance public and private investment in and financing of strategic net-zero technology projects within the InvestEU Program.

MDBs are considered to be key to combating climate change and loss in biodiversity. To achieve these aims, MDBs will need to be able to identify, track and maximize the potential of nature-positive investments, assess nature-related risks and approaches, and identify opportunities for valuing nature in economic planning and decision making. [As we reported in February](#), U.S. Treasury Secretary Janet Yellen urged the World Bank

to “evolve” and be “bolder and more imaginative” in its operational approach to tackling global challenges such as climate change.