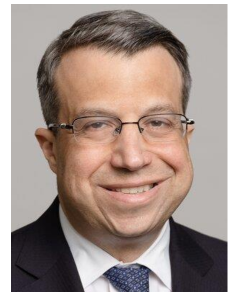
Global Analysis Of Climate Suits Reveals Strategic Focus

By **Jason Halper and Sharon Takhar** (August 7, 2023)



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Recent analysis by the London School of Economics' Grantham Research Institute on Climate Change and the Environment showed that in the period from May 2022 to May 2023, 190 new cases focusing on climate change litigation were filed around the world.[1]

The Grantham Institute's 2023 climate snapshot report, released on June 29, showed not only a continuing upward trend in climate litigation, but a diversified range of cases being litigated. One notable development is the growth in so-called strategic litigation.

In these cases, nongovernmental organizations and individual litigants are increasingly focused on generating media coverage and public pressure on target companies through litigation.

These climate-focused litigants are prepared to pursue novel legal arguments, and are not solely focused on the prospects of success in obtaining a favorable judgment or legal remedy.

This can be seen in the way that a number of cases have been combined with parallel shareholder actions seeking to raise issues at listed company annual general meetings.

Recent cases have sought to compel companies or governments to integrate climate considerations into corporate governance, have advocated for the elimination of fossil fuel investment, and have pursued compensation for pollution.

Plaintiffs have also been seeking to hold individual directors and officers liable for climate-related impacts.

The Grantham Institute's report showed that recent climate litigation includes cases filed in new jurisdictions — Bulgaria, China, Finland, Romania, Russia, Thailand and Turkey. Although the report found that climate litigation is still on the rise, it stated that the overall rate of growth appears to be slowing — due in part to a continuing decline in cases filed in the U.S.

Outside the U.S., over 90% of cases filed in the 12-month period surveyed were brought by NGOs or individuals, or both acting together, some of which are discussed 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 more strategic cases. Strategic cases are those that have the aim of "influencing the broader debate around decision-making with climate change relevance."

The report identified eight types of strategies. In this article, we explore these strategies in detail, and assess their potential future impacts.

Climate Litigation Strategies

Government Framework

Government framework cases focus on a government's response to climate change, and may include challenges to a perceived lack of ambition in climate policies, a failure to implement policies or legislation, or both.

An example can be seen in Friends of the Earth Limited, ClientEarth, Good Law Project and Joanna Wheatley v. Secretary of State for Business, Energy and Industrial Strategy, a case challenging the U.K. government's net-zero strategy on the grounds that it was inadequate.[2] The High Court of Justice of England and Wales 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, filed in Montana's First District Court in 2021,[3] and Greenpeace Italy v. ENI SpA, filed in the Civil Court of Rome in May of this year.[4]

Corporate Framework

Similar to the government framework cases described above, corporate framework cases are based claims that corporations' climate policies are inadequate. Many such cases often overlap with other strategies in this list.

Examples include the aforementioned Greenpeace Italy v. ENI; Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas, brought in the Judicial Court of Paris in February; and ClientEarth v. Shell Board of Directors, dismissed by the High Court of Justice of England and Wales in May.[5]

Integrating Climate Considerations

Some climate cases seek to compel or encourage governments or corporations to integrate climate considerations, standards or principles into particular decisions.

Turning Off the Taps

Another category of climate cases includes those that aim to prevent the financing of projects or initiatives which, when completed, would result in a high level of greenhouse gas emissions.

Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas, mentioned above, was brought by several climate groups against a France-based financial institution. The plaintiffs criticized 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."[6]

Failure to Adapt

Some climate cases are brought 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

Plaintiffs in some cases seek compensation from defendants based on their alleged contribution to climate change.

Climatewashing

"Climatewashing" cases challenge allegedly inaccurate statements made by governments or companies in relation to climate change or the transition to net-zero.

A recent example is KlimaAlllianz v. Federation Internationale de Football Association, filed last year with Switzerland's Fair Advertising Commission by a Swiss climate action group.

The case alleged that FIFA's claims that the 2022 Qatar World Cup was "climate-neutral" constituted greenwashing.[7] The Swiss advertising regulator found against FIFA in May on this claim.[8]

Personal Responsibility

Certain cases seek 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.

ClientEarth v. Shell PLC was such an action, brought by ClientEarth against the directors of an oil major for allegedly violating directors' duties in connection with climate risk management.[9] The High Court of Justice of England and Wales ultimately dismissed the suit in May,

Other Trends

The Grantham Institute's report also observed that, in addition to traditional litigation, actions seeking advisory opinions are increasingly being filed, with three such matters commenced 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 trends identified by the Grantham Institute include:

- Litigation arising out of biodiversity impacts;
- Extreme weather events;
- 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.

The extensive survey underpinning the institute's climate litigation report confirms the rising trend of climate litigation. But the report also aimed to evaluate the overall effectiveness of climate litigation.

Notably, the report found 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.

Such strategies should include focusing on climate-related governance, i.e., monitoring and assessing material risks and opportunities; data collection and assessment, including alignment with the Science Based Targets initiative or other data standard setters; and disclosure, including necessary caveats or qualifications on articulated climate goals.

These strategies can help reduce litigation exposure — and, in so doing, preserve shareholder value and protect firm reputation.

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[1] Joana Setzer and Catherine Higham, Global Trends in Climate Change Litigation: 2023 Snapshot, LSE: Grantham Research Inst. on Climate Change and the Env't and Centre for Climate Change Econ. and Policy, June 29, 2023, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf.

[2] Friends of the Earth Limited, ClientEarth, Good Law Project and Joanna Wheatley v. Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 1841 (Admin).

[3] Held v. Montana, No. CDV-2020-307, 2023 WL 4053251, at *1 (Mont. Dist. May 23, 2023); Montana Residents Challenge State Energy Policy as Unconstitutional, Cadwalader Climate, April 4, 2023, https://www.cadwalader.com/cwt-climate/index.php?eid=205&nid=47.

[4] Greenpeace Italy et al. v. ENI S.p.A., Civil Court of Rome, May 9, 2023, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230509_19287_summons.pdf; Italian citizens Sue Oil Supermajor To Compel Accelerated Emissions Reductions, Cadwalader Climate, June 13, 2023, https://www.cadwalader.com/cwt-climate/index.php?eid=267&nid=63.

[5] Greenpeace Italy et al. v. ENI S.p.A., Civil Court of Rome, May 9, 2023; Comissão

Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas, Judicial Court of Paris, Feb. 27, 2023, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2023/20230223_18777_summons-1.pdf; ClientEarth v. Shell PLC and others [2023] EWHC 1897 (Ch). See also Italian citizens Sue Oil Supermajor To Compel Accelerated Emissions Reductions, Cadwalader Climate, June 13, 2023, https://www.cadwalader.com/cwt-climate/index.php?eid=267&nid=63; Global Bank Sued in France Over Fossil Fuel Financing, Cadwalader Climate, March 7, 2023, https://www.cadwalader.com/cwt-climate/index.php?eid=170&nid=39; Climate Lawsuit Against Shell Directors Dismissed, Cadwalader Climate, May 16, 2023, https://www.cadwalader.com/cwt-climate/index.php?eid=245&nid=57.

[6] Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas, Judicial Court of Paris, Feb. 27, 2023; Global Bank Sued in France Over Fossil Fuel Financing, Cadwalader Climate, March 7, 2023.

[7] KlimaAlllianz v. FIFA [2022] (Fair Advertising Commission, Switzerland).

[8] Swiss Regulator Finds Against FIFA on World Cup Carbon Neutrality Claims, Cadwalader Climate, July 11, 2023, https://www.cadwalader.com/cwt-climate/index.php?eid=283&nid=66.

[9] ClientEarth v. Shell PLC and others [2023] EWHC 1897 (Ch); Climate Lawsuit Against Shell Directors Dismissed, Cadwalader Climate, May 16, 2023.