

LMA Committee Circular

Committee **Environment & Climate Litigation Committee**

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The Environment and Climate Litigation Committee reconvened on 19 September 2024 to discuss recent contentious climate litigation matters across the world and to hear from Catherine Higham from the Grantham Institute at the London School of Economics.

Ms Higham is a Policy Fellow at the institute and coordinates the [Climate Change Laws of the World](#) project.

Global trends in Climate Change Litigation – Catherine Higham

Climate litigation trends

Ms Higham reported on the following trends.

- Climate change litigation (which she defined as cases brought before judicial and quasi-judicial bodies which have a material issue of climate change law, science or policy at their core) is spreading globally. The highest concentration of cases is in the US with some in the UK, Australia and Brazil.
- International cases (i.e. those which are brought before international courts (including the ECJ, and the European Ombudsman which investigates complaints about maladministration)) account for 5% of all climate change cases tracked for this work.
- The number of new climate litigation cases brought globally appears to have plateaued, and the previously observed year on year increase has not continued. A possible explanation for this could be the number of ‘test’ cases currently before the court, for which the outcome is awaited before further suits are issued.
- However, an important trend is the number of private actions against companies continues to increase, whereas those brought against governments has decreased.
- There are a growing number of climate litigation cases which are not directly aligned with climate goals but more to do with climate action. For example, Exxon started an action against shareholder activist groups Arjuna Capital and Follow This, who had filed a shareholder resolution urging Exxon to adopt a more rapid emissions reduction trajectory. Although Exxon’s case was dismissed, the shareholder resolution was ultimately withdrawn.
- Europe is seeing a growing focus on corporate climate litigation compared to the US where the majority of the cases are still against the government. These corporate climate litigation cases are diversifying and can drive transition risks affecting operating environments for companies.
- Some influential cases involving government include those previously flagged to the committee:
 - the Swiss case of [KlimaSeniorinnen v Switzerland](#) where the ECHR found that Switzerland was in violation of Article 8 and Article 6 § 1 of the European Convention on Human Rights. The ECHR held that Switzerland failed to protect against the serious adverse effect of climate change on lives, health, well-being and quality of life. Switzerland had also failed to meet greenhouse gas emission reduction targets (refer to ECLIC newsletter from May 2024 for more details).

- the case of [R \(Finch\) v Surrey County Council \[2024\] UKSC 20](#), where a majority of the UK Supreme Court found that planning officials should have considered the ultimate effects of the use of fossil fuels extracted from a mine (the subject of the planning permission) rather than simply the effects of the extraction project itself when deciding on whether to grant planning permission.

Types of cases being filed:

Ms Higham characterised the types of cases tracked as follows:

Polluter pays

“Polluter pays’ cases seek monetary damages from defendants based on an alleged contribution to harmful impacts of climate change”. For example:

- [Lliluya v RWE](#):
 - A lawsuit by a Peruvian farmer, Luciano Lliuya who lives in Huaraz, Peru against RWE for declaratory judgement and damages in the District Court Essen, Germany. Luciano Lliuya who is supported by NGO Germanwatch alleged that RWE knowingly contributed to climate change by emitting substantial volumes of greenhouse gases (GHGs), therefore, bore some measure of responsibility for the melting of mountain glaciers near his town of Huaraz. Although the district court dismissed Luciano Lliuya’s requests for declaratory and injunctive relief, as well as his request for damages the case is currently on appeal.
- [Asmania v Holcim](#):
 - Four inhabitants of the Indonesian island of Pari sued Swiss-based major buildings materials company Holcim requesting proportional compensation for climate change-related damages on Pari, reduction of CO2 emissions and financial contribution to adaptation measures on Pari.
- [Falys v. Total](#):
 - A Belgian farmer is suing French energy giant Total for climate damages to repair past damage and prevent the occurrence of future and certain damage. The claimant intends to donate any damages to an environmental charity.

Corporate framework

‘Corporate framework’ cases “seek to disincentivise companies from continuing with high-emitting activities by requiring changes in group-level policies, corporate governance and decision-making extending through the companies’ operations”. These cases usually relate to companies failing to comply with human rights and environmental due diligence standards and obligations. For example:

- [Milieudefensie et al. v. Royal Dutch Shell](#):
 - This case is concerned with whether Shell violated a duty of care and human rights obligations by failing to take adequate action to curb contributions to climate change.
- [Smith v. Fonterra](#):
 - This case is concerned with whether the greenhouse gas emitting activities of New Zealand’s largest emitters amount to violations of common law duties under public nuisance, negligence, and a novel climate tort.
- [Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas](#);

- This case was filed in France where BNP Paribas's due diligence processes were criticised for failing to prevent human rights violations, specifically in its financial dealings with Marfrig, a major beef producer implicated in land-grabbing and deforestation in the Amazon.

Climate-washing litigation

These cases concern misleading claims asserting that products or services are more climate-friendly than they really are. For example:

- [Amorema and Amoretgrap v Sustainable Carbon](#);
 - This case filed in Brazil is concerned with whether the defendant companies illicitly traded in the voluntary market carbon credits generated in or around extractive reserves located in the Amazon characterising a form of illegal takeover of these assets.
- [FossielVrij NL v KLM](#);
 - The District Court of Amsterdam found that KLM violated Dutch consumer law with respect to its advertising of its climate friendly credentials. Although the Court upheld the claim, there were limits to the remedy. No injunction was issued against the company as the advertisements were no longer in use, and there was no award for damages as there is no evidence of consumers still making decisions based on the advertising campaign.
- [Australian Securities and Investments Commission v Vanguard Investments Australia Ltd.](#)
 - The claimant alleged that Vanguard made false and misleading statements and engaged in conduct liable to mislead the public in representing that all securities in the Fund were screened against certain ESG criteria. The Federal Court found that Vanguard had made misleading ESG claims relating to the Fund.

Transition risk

Transition risk cases are concerned with the (mis)management of transition risk by directors, officers and others tasked with ensuring the success of a business. These cases are concerned with the impact on the company and its finances when climate goals and corporate policies misalign. Examples include:

- [Shareholders v Enea Directors \(Ostroleka C case, Jan 2024\)](#);
 - In December 2023, Enea filed a case against the former members of the company's management and supervisory board who voted in favour of the coal power plant investment that lost the company more than \$160 million. Enea also filed a case against these members' D&O insurers.
- [Metamorphose v Total \(July 2023\)](#);
 - TotalEnergies' shareholders sued TotalEnergies in respect of alleged payment of unlawful dividends and "insincere" accounts.
 - The plaintiffs claimed that TotalEnergies erroneously valued the future price of carbon and did not properly account for its greenhouse gas emissions which led to an over valuation of its assets.

Adaptation cases

These cases are usually where governments or companies are sued for a failure to prepare or adapt to the reasonably foreseeable consequences of climate change. For example:

- [Northwest Environmental Defense Center v. Federal Emergency Management Agency](#)
 - This lawsuit challenged the continuous operation of a National Flood Insurance Program in Oregon, US, on the basis that it “incentivised” developments in flood-prone areas which put both people and ecosystems at risk.
- [R\(Jordan and Paulley\) v SoS Environment](#)
 - This case which is believed to be the first of its kind in the UK focuses on whether the UK’s ‘National Adaptation Programme 3’ (or ‘NAP3’) breached section 58 of the Climate Change Act 2008 as well as human rights.

Green v Green

These cases are concerned with the potential trade-off between the need to protect biodiversity or fulfil other environmental aims and projects or policies introduced on climate related grounds. For example:

- [MK Ranjitsinh et al. v. Union of India et al.](#)
 - This case is concerned with the interplay between safeguarding biodiversity by the preservation of the Great Indian Bustard and mitigating the impacts of climate change. The Courts acknowledged the importance of protecting biodiversity while addressing the need to meet international climate change obligations.

Outcomes and Impact

Ms Higham explained that:

- 70% of the nearly 140 climate-washing cases filed from 2016 were successful.
- Some impacts observed beyond the courtroom are the increase in:
 - Legislative reforms;
 - New cases;
 - Shift in narratives;
 - Financial risk. For example, climate litigation filed or a decision against a company saw company value drop on average by 0.41% (Sato et al., 2023); and
 - Increasing engagement from supervisors and regulators.

Recent Cases

The committee discussed the following new cases and developments in existing cases:

a) Deutsche Umwelthilfe v. BP – carbon neutrality and carbon credits. [Link](#)

BP had been claiming that its motor oil was “climate neutral”. BP justified these claims with the purchase of carbon credits from a forest protection project in Zambia, among other things. The German court found that the advertisement from BP was misleading and consumers were not adequately informed as to how the alleged climate neutrality was achieved.

b) Earth Island Institute v. Coca-Cola – Greenwashing and plastic pollution. [Link](#)

A greenwashing case where Coca-Cola made claims about environmental friendliness in their advertising. It was initially dismissed by the Washington DC Superior Court on the grounds that statements about aspirational goals cannot be proven true or false. This was revived by the Washington DC Court of Appeals which overturned this dismissal and the case will now return to the Washington DC Superior Court for assessment on its merits.

c) City of Baltimore v. BP P.L.C. [Link](#)

This case was previously highlighted in the July ECLIC newsletter. By way of recap, the case involved the City Council of Baltimore bringing a claim against oil and gas companies. It was argued that the defendants' activities contributed to climate change-related damage, and that they had also misrepresented their products' impact on the climate.

The Maryland court concluded that:

- federal common law applied as the case involved global emissions;
- the Clean Air Act displaced the City's federal common law damages related to domestic emissions; and
- the Clean Air Act pre-empted Baltimore's state law claims based on domestic emissions as the Clean Air Act is a federal act.

The Maryland court further concluded that state law could not provide a remedy for claims arising from foreign emissions.

The decision has resulted in great uncertainty, and different states have reached different conclusions in similar cases.