



EUROPEAN CENTRAL BANK

EUROSYSTEM

Legal Working Paper Series

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Climate change litigation and central
banks

No 21 / December 2021

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Abstract

Given the urgent need to dramatically reduce greenhouse gas emissions, and concern regarding insufficient climate action and ambition across the globe, NGOs and individuals are increasingly turning to the courts to force States, public authorities, and private entities to increase their climate action and ambition and hold them accountable through climate-related litigation. The three contributions in this legal working paper discuss various aspects of such climate change litigation around the world. The papers examine the evolution of climate-related cases, the scope of such cases and the varying grounds on which they have been based. They also focus in some detail on certain key judgments addressing novel issues, as well as a recent climate-related case brought against a national central bank. The papers were originally presented at the Legal Colloquium on “Climate change litigation and central banks – Action for the environment”, organised by the European Central Bank on 27 May 2021.

The first paper gives an overview of climate change litigation, notably cases filed or concluded between May 2020 and May 2021. It examines the scope and trends of such litigation, their geographical and chronological distribution, case characteristics and outcomes. The paper identifies three waves of climate litigation. The first wave, from the late 1980s to the early 1990s, was dominated by cases filed in the United States and a few in Australia. The second wave, which started in 2007, saw litigation expand into Europe. The signing of the Paris Agreement in 2015 launched the third wave of cases, with climate change litigation becoming a truly global phenomenon.

The authors broadly categorise cases as either strategic, namely where the claimants’ motives for bringing the case go beyond individual concerns and aim at a broader societal shift, or non-strategic. However, the paper recognises that not all cases fall into these two categories. It also examines a number of systemic mitigation cases as well as other cases challenging government action on climate change. The paper notes that a climate case has recently been brought against a central bank and concludes that litigation against financial market regulators and supervisors may soon arise.

The second paper provides a detailed analysis of *Climate Case Ireland* before Ireland’s High Court and Supreme Court. It outlines the origins of the case, for which the *Urgenda* case against the Dutch Government acted as a catalyst. When the Irish Government issued its first National Mitigation Plan under the Climate Act 2015 in 2017, this was perceived as the perfect target for launching an action inspired by the *Urgenda* case.

The author outlines the plaintiff’s grounds for instigating *Climate Case Ireland*, the central ground being the claim that the Government’s plan was not in compliance with the Climate Act 2015 and breached a number of rights under the Irish Constitution, including the unenumerated right to an environment, and the European Convention on Human Rights (ECHR). The case was strengthened in November 2017 when the Irish High Court recognised, in the *Dublin Airport* case, that an

unenumerated right to an environment can be identified in the Irish Constitution. In October 2018, The Hague Court of Appeal issued its judgment in the *Urgenda* case, holding that the Dutch Government had infringed rights under the ECHR, making the prospects for *Climate Case Ireland* seem even rosier.

The High Court's ruling in September 2019 was disappointing for the plaintiff, but it decided to leapfrog straight to the Irish Supreme Court, where the case was heard in June 2020. The Supreme Court issued a unanimous judgment, finding for the plaintiff and quashing the Government's National Mitigation Plan. However, the Supreme Court did not recognise the plaintiff's standing to litigate personal rights and did not identify an unenumerated right to a healthy environment in the Irish Constitution. The issues raised by the case and its possible ramifications are discussed in detail in the paper.

The third paper focuses on climate change litigation risk in relation to national central banks (NCBs) and financial institutions. The author provides a detailed analysis of the first climate change case against an NCB, namely the pending case brought by ClientEarth against the Nationale Bank van België/Banque Nationale de Belgique (NBB/BNB). ClientEarth challenged the validity of the ECB's Corporate Sector Purchase Programme (CSPP) by alleging that the NBB/BNB's purchases of corporate bonds under the CSPP, as well as the ECB decision on the implementation of the CSPP, failed to take into account environmental protection requirements. The paper highlights the Eurosystem's obligation under Article 11 of the Treaty on the Functioning of the European Union to take environmental protection requirements into account when defining and implementing monetary policy.

The third paper also identifies the types of claims that financial institutions and NCBs might face in climate-related cases. The author reflects on the risks that these cases could pose to financial institutions and the types of direct and indirect costs they could lead to.

The paper puts forward methods for financial institutions and supervisory bodies to monitor and manage the risk of climate change litigation, such as integrating this type of risk into their supervisory toolkit, incorporating climate change litigation risk into their risk management frameworks or including certain questions in supervisory stress tests on climate-related risks.

Keywords: climate-related litigation, climate change, climate risk, financial risk, compilation of cases, Article 11 TFEU, monetary policy, corporate sector purchase programme, litigation against financial institutions, Ireland, European Convention on Human Rights, transnational legal networks, right to an environment, legal standing.

JEL codes: K32, K33, K39, K41, Q54.

Climate change litigation

Prepared by Joana Setzer and Catherine Higham¹

Climate litigation is generally recognised to have started in the United States in the late 1980s but has since emerged as a growing global phenomenon. This paper provides an overview of known case numbers, metrics and categorisations, and considers some of the most relevant trends in the arguments and strategies employed by litigants. The focus is on cases filed or concluded between May 2020 and May 2021.

1 Scope and trends

1.1 Defining climate change litigation

Many scholars have defined climate change litigation in broad terms, encompassing any lawsuit brought before administrative, investigatory, or judicial bodies that touches on issues of law or fact regarding climate change mitigation and adaptation efforts or the science of climate change (Markell and Ruhl, 2012; Burger and Gundlach, 2017; Burger and Metzger, 2021). In some instances, scholars have argued that even legal proceedings which do not contain explicit references to climate change, but which may nonetheless have significant impacts for climate change should also be considered relevant for any discussion of the subject (Bouwer, 2018). Examples of this type of case might include litigation aimed at improving air quality in areas with high levels of traffic or industrial activity, which might also have implications for the rate of greenhouse gas emissions in those areas.

For the purpose of this paper, however, we follow the narrower definition of climate change litigation used to assess whether cases fall within the scope of the Climate Change Laws of the World database and the United States climate litigation database run by the Sabin Center for Climate Change Law (see Box 1). To meet this definition, cases must satisfy two key criteria. First, cases must be brought before judicial bodies (though in some exemplary instances, matters brought before administrative or investigatory bodies are also included).² Second, cases must raise an issue of law or fact regarding the science of climate change and/or climate change mitigation and adaptation policies or efforts as a main or significant issue.

¹ Joana Setzer is an Assistant Professorial Research Fellow at the Grantham Research Institute on Climate Change and the Environment. Catherine Higham is a Policy Analyst and Coordinator of the Climate Change Laws of the World project at the Grantham Research Institute on Climate Change and the Environment. This paper provides a summary of the authors' "Global Trends in Climate Change Litigation: 2021 Snapshot" report, published in July 2021. Some sections of the paper are taken directly from the text of the report.

² The database also contains a small number of advisory opinions from judicial or quasi-judicial bodies, such as the Inter-American Court of Human Rights Advisory opinion on the right to a healthy environment, issued in November 2017.

We make an exception for cases involving claims for compensation relating to climate-justified policies or actions. Such cases are typically filed under international trade law and are included because of the significant impact they may have on climate policy (for further discussion see Fermeiglia et al., 2021).

Box 1

Data sources

Our main source of data is the [Climate Change Laws of the World \(CCLW\) database](#), an open-access, searchable database created and maintained by the Grantham Research Institute on Climate Change and the Environment at the London School of Economics and Political Science (LSE). The database is a joint initiative with the Sabin Center for Climate Change Law at Columbia Law School and it uses cases and summaries from the Center's non-US Climate Litigation Database. A separate [US Climate Litigation Database](#) is maintained by the Sabin Center in collaboration with the law firm Arnold & Porter Kaye Scholer.

This paper focuses primarily on lessons to be drawn from the CCLW database, but supplements this by drawing on US data where appropriate. A summary and documents of the cases cited in this paper are available in both CCLW and Sabin's databases.

Database coverage

At the end of May 2021, the CCLW database featured 454 cases in 39 countries (excluding the United States) and 11 regional or international jurisdictions, as well as 2,247 climate laws and policies in 198 jurisdictions. The Sabin Center's database for the United States featured 1,387 climate lawsuits in the United States.

Data limitations

The Sabin Center and CCLW litigation databases are the largest global climate change litigation databases compiled to date, but due to limitations in data collection across all countries and languages, they may not include every climate case filed in each country around the world. The Sabin Center's database benefits from the assistance of commercial litigation databases in the United States and is therefore likely to be more comprehensive. These differences limit the possibilities for making universal claims about trends in climate change litigation or comparing the US and non-US data.

Trend identification

Despite the limitations described, the databases offer a diverse and cross-cutting sample of cases covering a wide range of geographies, levels of government and types of actor and argument, allowing observations about trends in high-profile cases which often inform and inspire new litigation efforts.

Access the datasets at: www.climate-laws.org and www.climatecasechart.com.

1.2 A heterogeneous group of cases

More than 1,800 cases of climate change litigation have been identified around the world. While all these cases raise climate change as a main or significant issue, they do so in very different ways and for very different reasons. In this section, we provide an overview of the geographical and chronological distribution of cases, before considering some of the characteristics of different cases in terms of their drivers, the outcomes, and the trends in litigation strategies employed.

1.2.1 Geographical and chronological distribution

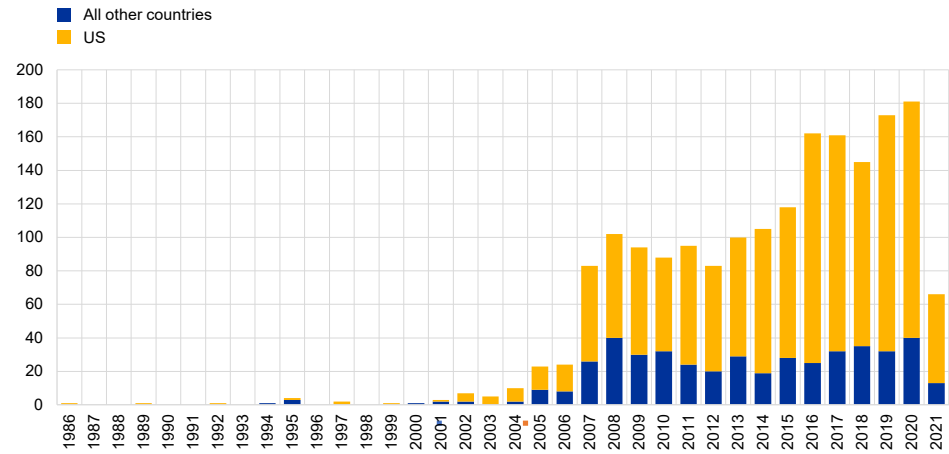
Chronological distribution

It is possible to observe three waves of climate change litigation (Geneva Association, 2021). The earliest recorded climate cases date back to the late 1980s and early 1990s. Climate litigation during this period was largely dominated by cases in the United States, with a small number filed in Australia. This “first wave” of climate change litigation lasted up until the mid-2000s. During this period, overall case numbers remained relatively low with just 84 cases in total. This was followed by a second wave of cases starting in 2007, which saw climate litigation expand into Europe and an increase in the volume of cases filed in Australia. The number of cases increased dramatically during this “second wave”, particularly as domestic legislation on climate change started to increase in the wake of the failure of international negotiations at the 15th session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (hereinafter the “COP15”) in December 2009 (Nachmany et al., 2017). By 2014, over 800 cases had been filed. However, it was not until 2015, the year in which the Paris Agreement³ was signed, that climate change litigation really started to grow as a truly global phenomenon. Since 2015, the number of cases has more than doubled, with over 1,000 cases filed as part of the “third wave” of litigation, which has seen litigation expanding to more countries and being brought against a broader diversity of defendants. Chart 1 shows the rise in climate litigation cases from 1986 to the present.

³ Paris Agreement of 12 December 2015 available at www.unfccc.int.

Chart 1 Climate litigation cases over time

(number of cases by year of filing)



Source: Setzer and Higham (2021).

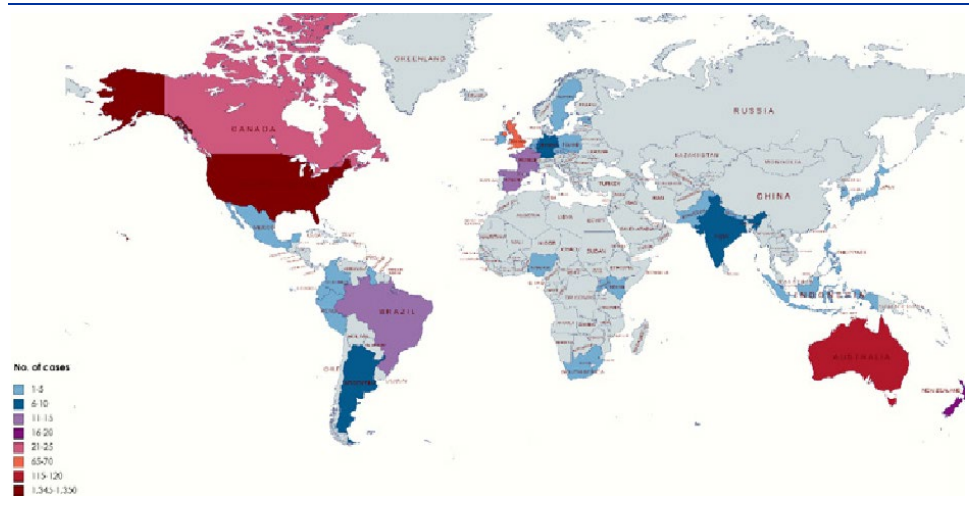
Geographical distribution

Climate change litigation has now been brought in over 39 countries and before 10 international or regional courts, tribunals, and quasi-judicial bodies. The majority of climate change litigation continues to be brought in countries in the Global North, with only fifty-eight cases so far identified in Global South jurisdictions.⁴ This may in part be because cases in the Global South can “fly below the radar” of scholarly attention (Peel and Osofsky, 2020) and may be difficult to unearth due to scholarly constraints. In part, it may also be as a result of the fact that many climate change related cases in the Global South may not be framed in climate change terms. Charts 2 and 3 show the global and regional distribution of all recorded climate change cases.

⁴ The distinction between the terms “Global South” and “Global North”, terms favoured by many scholars and policymakers, is based on economic inequalities, but crucially for this report it must be noted that the “Global South” is not a homogenous group of countries, and that legal development and legal capacity may vary from country to country.

Chart 2

Number of cases around the world per jurisdiction, up to May 2021

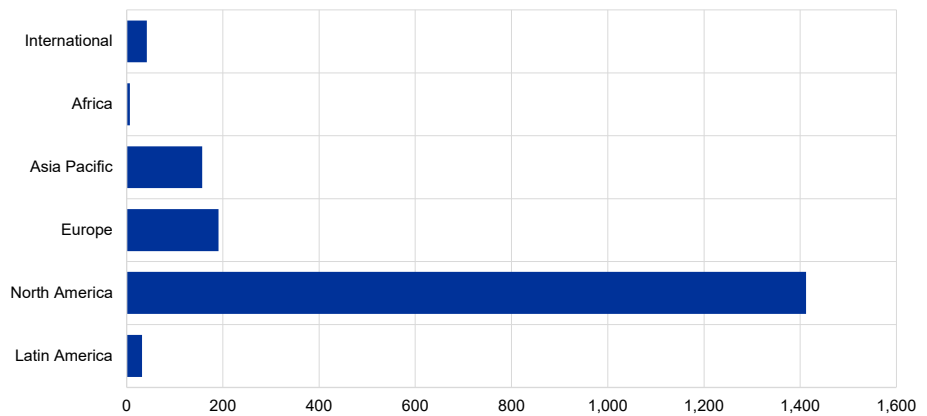


Source: Setzer and Higham (2021).
Notes: Grey = no cases/data. Cumulative figures to May 2021.

Chart 3

Regional distribution of climate change cases

(number of cases by region)



Source: Setzer and Higham (2021).
Notes: Cumulative figures to May 2021.

1.2.2 Case characteristics

Strategic and non-strategic cases

Understanding the drivers for climate change litigation can be critical to understanding the different types of cases identified to date. One approach to understanding case drivers is to divide cases into two categories: “strategic” cases and “non-strategic” cases. In strategic litigation claimants’ motives for bringing the cases go beyond the concerns of the individual litigant and aim to bring about some

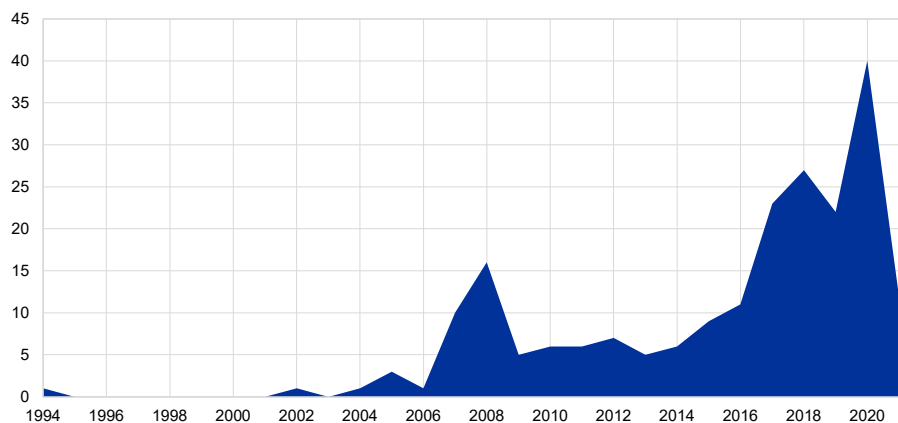
broader societal shift. For the most part, the goals of the claimants in strategic cases will include advancing climate policies, creating public awareness, or changing the behaviour of government or industry actors (Setzer and Byrnes, 2020). This type of litigation is widely studied as academics and activists alike seek to understand the potential regulatory impact of such litigation, which can often be costly to claimants and may direct resources away from other efforts (Bouwer and Setzer, 2020; Peel and Osofsky, 2020).

However, it is important to note that not every case identified in the databases falls into this category. Many cases instead involve issues that are primarily of relevance only to the parties involved. An example of such a case would be a dispute over planning permission for a new property in an area at risk from flooding or sea level rise, where climate change adaptation policies may be considered in the decision-making process.⁵

A review of non-US cases conducted for this paper shows that the number of strategic cases is dramatically on the rise (see Chart 4). These findings suggest that climate litigation is becoming more widely used as an advocacy or governance strategy. This is corroborated by analysis of the types of claimants bringing cases between May 2020 and May 2021, which suggests that most of such cases are brought by non-governmental organisations (NGOs) and individuals, or both acting together.⁶ However, as discussed in Box 2, it is important to note that not all strategic litigation is brought by litigants seeking to advance climate action.

Chart 4
Number of strategic non-US cases

(number of strategic cases by year of filing)



Source: Setzer and Higham (2021).
Notes: Cumulative figures to May 2021.

⁵ Classifying a case as non-strategic or strategic entails a subjective assessment, often made on admittedly imperfect or incomplete information about parties' intentions. See Setzer and Higham (2021) for a more detailed explanation.

⁶ See Setzer and Higham (2021) for more detail.

Box 2

When strategic climate litigation is not aligned with climate goals

To date, most study of climate litigation has been focused on cases with a “pro-regulatory” intent, i.e. cases that aim to enhance and accelerate countries’ mitigation or adaptation efforts. However, this is only part of the story (Markell and Ruhl, 2012; Savaresi and Setzer, 2021). Litigation with potential negative impacts for climate action and policy is also a growing phenomenon. Early studies referred to this type of litigation as “anti-regulatory” (Peel and Osofsky, 2015), “defensive” (Singh Ghaleigh, 2010) or simply “anti-climate” (Hilson, 2010). However, cases that are not aligned with climate goals can have very different motives and objectives, and as climate policies and litigation evolve it is important to understand the full spectrum of cases.

Some cases directly aim at obstructing or opposing climate action, challenging specific regulations or actions on constitutional grounds. Cases that may have an intentional goal of opposing climate action also include Investor-State Dispute Settlement (ISDS) filed by companies and investors claiming compensation for predicted losses caused by the introduction of climate-justified policy measures, which might even respond to previous climate-aligned litigation (see, for example, *RWE v Netherlands*; *Uniper v Netherlands*⁷). However, there are also cases that might not have opposition to climate action as their main objective, and yet ultimately might lead to such outcomes. For example, individuals bringing rights-based climate cases might not object to climate action, but rather to the way in which such action is carried out or its impacts on the enjoyment of human rights (Savaresi and Setzer, 2021).

Centrality of climate change

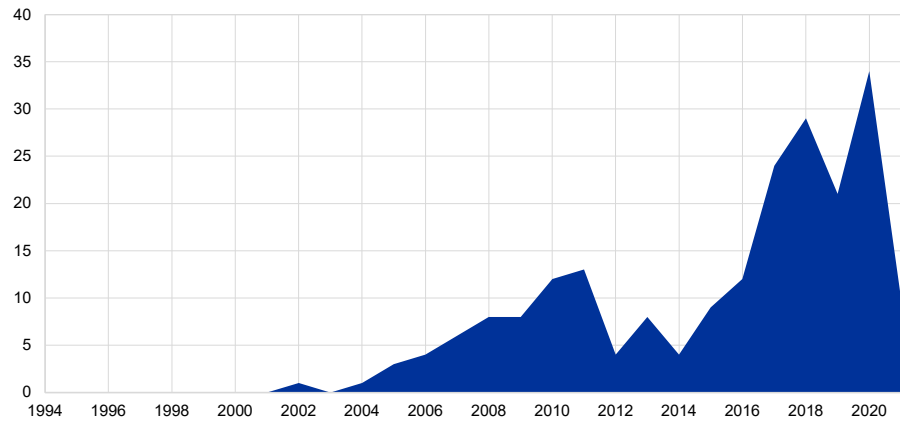
In step with the growing number of strategic cases recorded in the databases, the number of cases where climate change is a “central” issue has also increased over time – see Chart 5. For the purposes of this paper, the centrality of climate change was determined by assessing the extent to which the case raises specific issues of climate fact or law relating to climate science or climate adaptation or mitigation efforts. We categorise cases where an explicit reference to climate change forms a relevant part of the decision, but where the arguments of law and fact primarily concern other issues, as “peripheral”.

⁷ *RWE v Netherlands*, Case No. ARB/21/4 filed on 2 February 2021 and *Uniper v Netherlands*, Case No. ARB/21/22 filed on 30 April 2021, English translations available at www.climate-laws.org.

Chart 5

Centrality of climate change to litigation over time

(number of cases where climate change is central by year of filing)



Source: Setzer and Higham (2021).
Notes: Cumulative figures to May 2021.

Outcomes

There are several ways to approach the question of whether a specific example of litigation advances or undermines climate action. The first is to consider the final verdict of the case in the context of the case driver (i.e. the motivations of the parties) and to determine whether that outcome, on the face of the text, advances or undermines climate action.⁸ This approach centres on an assessment of the “direct outcome” of the case. The second, broader approach is to try to understand the “overall impact” of the case, both inside and outside of the legal proceedings and before, during and after the case has been brought and decided (Setzer and Vanhala, 2019). These impacts may include (but are not limited to) changes to the behaviour of the parties, changes to public opinion, financial and reputational consequences for a variety of actors, and further litigation. While these diverse types of “indirect” impacts have been the subject of several recent studies by both academics and practitioners, they are yet to be fully understood. The financial costs of litigation to defendants may also remain under-appreciated (Setzer, forthcoming; Solana, 2020).

Direct outcomes

Quantitative analysis of the direct outcome (in the narrower sense) has found that 58% of all cases in the CCLW database had judicial outcomes “favourable” to

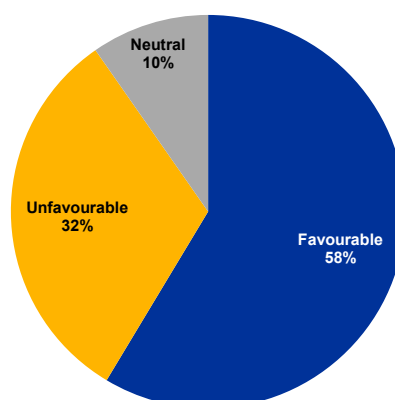
⁸ As is the case when determining whether a case should be considered strategic, conducting this type of assessment often involves subjective judgments based on limited information. As such, we have taken the intention of the parties as stated in the pleadings or described in case summaries at face value.

climate change action, 32% of cases had outcomes “unfavourable” to climate change action, and 10% had “neutral” outcomes (see Chart 6).⁹

Chart 6

The proportion of outcomes favourable, unfavourable, and neutral for climate action

(proportion of outcomes)



Source: Setzer and Higham (2021).
Notes: Cumulative figures to May 2021.

Wider impacts

While a quantitative analysis can help us to identify a broad trend in the outcomes of climate litigation cases, this can mask the disproportionate impact that some key judgments addressing novel issues may have on the field of climate governance.

The last year has seen an unprecedented number of these cases. These include the case of *Neubauer et al. v Germany*¹⁰ (see Box 3) and the case of *Milieudefensie et al. v Shell*¹¹ (see Box 6).

In *Neubauer*, the Court upheld a claim by young plaintiffs challenging the constitutionality of certain provisions of the German Climate Protection Law on constitutional and human rights grounds.¹² Just weeks after the judgment was issued, the German Cabinet approved proposals to raise their climate mitigation targets to net-zero greenhouse gas emissions by 2045, with targets to reduce emissions by 65% by 2030 (S&P Global Platts, 2021).¹³ This represents an increase in ambition far beyond what was required by the court.

⁹ See Setzer and Higham (2021) for full details on the methodology and approach used to conduct this analysis.

¹⁰ Judgment of the German Constitutional Court of 29 April 2021 in *Neubauer et al. v Germany*, English translation available at www.climate-laws.org.

¹¹ Judgment of The Hague District Court of 26 May 2021 in Case C/09/571932 *Milieudefensie et al. v Royal Dutch Shell plc.*, English translation available at www.climate-laws.org.

¹² Federal Climate Change Act of 12 December 2019 (*Bundes-Klimaschutzgesetz*). English translation available at www.climate-laws.org.

¹³ As at the time of writing, the new targets have not yet become law as these are still subject to approval by the parliament.

Similarly, the case of *Milieudefensie et al. v Shell*, in which the District Court of The Hague found that the oil giant Shell owed a duty of care to the plaintiffs to reduce emissions from its operations by 45% by 2030 relative to 2019 emission levels, is likely to have major ramifications across the corporate community. The case represents a global first, with the court taking the unprecedented step of holding a company legally responsible for its individual contribution to global greenhouse gas emissions. While the case is likely to be subject to appeal, Shell has nonetheless announced its intention to increase the speed of its planned transition in line with the judgment (Raval, 2021).

Box 3

Neubauer et al. v Germany: the rights of future generations

One of the most significant judgments of the past year is the German Constitutional Court's ruling in the case of *Neubauer et al. v Germany*, in which a group of young plaintiffs challenged the constitutionality of emissions reduction targets in the German Climate Protection Law. The claimants argued that the targets violated Article 20a of the German Basic Law (*Grundgesetz*), which protects the natural foundations of life in responsibility for future generations. The plaintiffs claimed that by introducing a legal requirement to meet the overall goals of the Paris Agreement but setting insufficiently strict 2030 emissions reduction targets and providing insufficient detail on plans to meet these targets, the law violated the rights of future generations.

The Court found that the current provisions of the law place an unreasonable burden on future generations to reduce emissions at a rate that would be unacceptable today. The judges noted that "Virtually every freedom is potentially affected by these future emission reduction obligations because almost every area of human life is associated with the emission of greenhouse gases and is therefore threatened by drastic restrictions [on emissions] after 2030." As a result, the Court ordered the Federal Government to reconsider the targets, clarifying the emissions reduction targets from 2031 onward by the end of 2022.

2 Key defendants: governments and corporations

2.1 Cases against governments: climate commitments cases

Government actors are the most common defendants in climate change litigation cases globally (Setzer and Higham, 2021). This reflects the fact that climate change litigation has now been recognised as a governance strategy, often aimed at filling the gaps left by regulatory failures and inaction (Eskander et al. 2021). Many early cases against governments were brought primarily on administrative grounds and aimed at raising environmental standards or ensuring that existing regulatory frameworks were extended to cover climate issues (see for example *Massachusetts*

*v EPA*¹⁴). Since 2015, however, a new strand of litigation has emerged, which sees claimants focusing on government action in broader terms. These cases are often focused on climate commitments or targets, either challenging the adequacy of those commitments or the adequacy of their implementation.

2.1.1 Systemic mitigation cases

Many of the most emblematic cases against governments fall into a category of cases that is referred to by scholars and practitioners as “systemic mitigation” cases (Jackson, 2020; Maxwell et al., forthcoming). These cases take a whole-of- system approach, building on the foundations laid in the landmark case of *Urgenda Foundation v State of the Netherlands*¹⁵, which was the first piece of litigation to successfully challenge the adequacy of a national government’s overall approach to reducing emissions (see further discussion in Box 4).

Box 4

Urgenda Foundation v State of the Netherlands: a government duty to reduce emissions

A Dutch environmental group, the Urgenda Foundation, and 900 Dutch citizens sued the Dutch Government to require it to do more to prevent global climate change and the court in The Hague ordered the state to limit greenhouse gas emissions to 25% below 1990 levels by 2020. In 2015, The Hague District Court accepted Urgenda’s arguments, finding that the Government’s existing pledge to reduce emissions by 17% by 2020 was insufficient to protect the lives of Dutch citizens. The court held that the Government had a duty to take climate change mitigation measures, in a judgment informed by the application of human rights norms and standards. As a result, it ordered the Government to reduce emissions by 25% by 2020. The judgment was subsequently appealed but in 2019 the Supreme Court of the Netherlands dismissed the appeal, confirming that the Government owed its citizens a duty of care to protect their rights to a private and family life, in accordance with Articles 2 and 8 of the European Convention on Human Rights.

This landmark case may be considered almost as significant for the work done outside the courtroom as for the decisions taken within it. Simultaneously with its pursuit of the litigation, the Urgenda Foundation developed and implemented a comprehensive strategy of public advocacy, conducting extensive work with about 750 organisations and businesses to develop 50 measures that would be sufficient to close the emissions gap to which the judgment relates (Urgenda Foundation, 2020). The success of these strategies can be seen in the level of engagement with climate issues by Dutch policymakers in both 2015, following the initial ruling, and 2019 around the time of the Supreme Court decision (Wonneberger and Vliegenthart, 2021).

Analysis by the authors demonstrates that there are now nearly 40 cases globally that build on the foundations laid by the decision in *Urgenda* (Setzer and Higham,

¹⁴ Judgment of the United States Supreme Court of 2 April 2007 in Case No. 05–1120 *Massachusetts et al. v Environmental Protection Agency et al.*, available at www.supremecourt.gov.

¹⁵ Judgment of The Hague District Court of 24 June 2015 in Case C/09/456689 *Urgenda Foundation v Netherlands*, English translation available at www.climate-laws.org.

2021). While many cases, like *Urgenda*, focus on the level of ambition of government targets, a growing number of these cases are instead focused on whether plans or action to meet these targets are adequate to achieve a stated goal. This trend is evident from the French cases discussed in Box 5.

Box 5

Grande-Synthe and Notre Affaire à Tous: an emphasis on achieving climate ambition

*Commune de Grande-Synthe v France*¹⁶

This case concerned the adequacy of government measures designed to meet the domestic target of achieving carbon neutrality by 2050, which was enshrined in legislation passed in 2019. The municipality of Grande-Synthe claimed that it was particularly impacted by this failure as a low-lying coastal municipality. In a landmark judgment issued in 2020, the French Conseil d'État ruled on the admissibility of the case, embarking on a full investigation to determine whether the Government's actions are sufficient to meet the goals set out in the legislation.

*Notre Affaire à Tous v France*¹⁷ (“L'affaire du siècle”)

The question of the effectiveness of government action to meet climate targets was also raised before the Paris Administrative Court in the case of *Notre Affaire à Tous v France* (“L'affaire du siècle”). The plaintiffs argued that the French State had violated a legal obligation to tackle climate change stemming from its obligations to protect the human environment, health and security by failing to implement measures to ensure a reduction in greenhouse gas emissions in line with commitments and objectives adopted into French law and policy. The Court accepted the plaintiffs' arguments that climate change has already caused significant ecological damage in France, and that the Government has “failed to carry out the actions that it had itself recognised as likely to reduce greenhouse gas emissions”. As a result, the court found the Government liable for part of the ecological damage alleged and ordered it to pay each plaintiff a symbolic one euro in compensation to account for the “moral damage”. However, the court declined to order the Government to repair the ecological harm until a further investigation into the damage caused could determine what the appropriate measures to do so would be.

2.1.2 Other climate commitments cases

While systemic mitigation cases continue to draw the most attention from commentators, such claims are far from being the only type of cases which challenge government action on climate change. Three key categories of cases stand out:

¹⁶ *Commune de Grande-Synthe v France*, Case No.427301 filed on 23 January 2019, English translation available at www.climate-laws.org.

¹⁷ Judgment of the Paris Administrative Court of 3 February 2021 in Cases N°1904967, 1904968, 1904972 and 1904976/4-1 *Notre Affaire à Tous and Others v France*, English translation available at www.climate-laws.org.

1. Challenges to specific acts or omissions which claimants allege to be inconsistent with emissions targets or obligations. These include cases challenging specific policies, such as *Greenpeace Mexico v Ministry for Energy and Others*¹⁸ (on the National Electric System Policies) and *Transport Action Network v Secretary of State for Transport*¹⁹ (on the National Policy Statement).
2. Challenges surrounding alleged failures to implement existing policies, schemes or decisions that would be critical to meeting climate obligations, such as *PSB et al. v Brazil*²⁰ (on the Amazon Fund) and *PSB et al. v Brazil*²¹ (on the Climate Fund).
3. Claims regarding authorisation of third-party activity. These cases involve claims against governments or other public authorities for authorising third-party activity that leads to increased greenhouse gas emissions. We identified 24 such cases for this paper, filed in 16 jurisdictions. These cases typically include challenges to the approvals processes for new fossil-fuel-intensive projects such as coal mines (e.g. *Sharma v Minister for the Environment*²²) or airport expansions (e.g. *Plan B v Secretary of State for Transport*²³ – the “Heathrow case”).

The most popular grounds of argument for cases challenging the adequacy of government action on climate change are based in constitutional and human rights law (Setzer and Higham, 2021).

2.1.3 Cases challenging climate-aligned policy or action

As discussed above, not all climate litigation is aligned with climate goals. A minority of cases against governments also involve challenges to government actions or decisions taken in pursuit of climate commitments. Such cases may specifically aim to undermine or prevent the passage of climate laws and policies, or they may involve significant claims for compensation following climate-aligned action. This category includes:

1. Cases challenging denials of development permits or approvals for new high-emitting developments (e.g. *H J Banks and Company Ltd. v Secretary of State*

¹⁸ Judgment of the District Court of 17 November 2020 in Case 104/2020, *Greenpeace Mexico v Ministry of Energy and Others*, Spanish text available at www.climate-laws.org.

¹⁹ *Transport Action Network v Secretary of State for Transport*, Claim No.CO/2003/2020 filed on 1 June 2020, English text available at www.climate-laws.org.

²⁰ *PSB et al. v Brazil* (on the Amazon Fund), Case 40734/2020 filed on 5 June 2020, Portuguese text available at www.climate-laws.org.

²¹ *PSB et al. v Brazil* (on the Climate Fund), Case 40741/2020 filed on 5 June 2020, Portuguese text available at www.climate-laws.org.

²² Judgment of the Federal Court of Australia of 27 May 2021 in *Sharma and Others v Ministry for the Environment*, English text available at www.climate-laws.org.

²³ Judgment of the United Kingdom Supreme Court of 16 December 2020 in *Plan B Earth and Others v Secretary of State for Transport*, English text available at www.climate-laws.org.

for Housing²⁴; *R [On the Application of West Cumbria Mining] v Cumbria County Council*²⁵).

2. Cases by sub-national government challenging the constitutionality of federal climate policy (e.g. *Saskatchewan et al. v Canada*²⁶ re Greenhouse Gas Pollution Pricing Act).
3. Cases brought by corporations challenging climate protection measures based on constitutionally protected property rights or rights to trade (e.g. *DG Khan Cement v Government of Punjab*²⁷).
4. Cases filed by companies and investors under international trade law, typically involving requests for compensation for predicted losses caused by the introduction of climate-justified policy measures (Fermeglia et al., 2021). An important recent example can be found in the case of *RWE v Netherlands*, which saw German energy giant RWE bringing a claim for compensation following the Dutch Government's plans to phase-out all coal power plants by 2030.

2.2 Private sector cases

Strategic climate change litigation continues to be used with the explicit aspiration to influence corporate behaviour in relation to climate change and/or to raise public awareness about the responsibility of major emitters. To date, this type of climate change litigation has been dominated by claims against fossil fuel companies (involved in the extraction, refining and sale of fossil fuels) and tends to be based on arguments that the activities of these companies directly relate to emissions associated with climate change. However, we are now starting to see wider diversity in the approaches taken in cases seeking to influence corporate practice. These range from direct cases against the companies with the highest historical emissions (i.e. the Carbon Majors), to cases against high emitting projects, and cases against other types of companies with a high carbon footprint. Other types of cases may also have more indirect effects for high-emitting businesses. These include cases against financial market actors, which may increase the cost of capital for these businesses, and cases against governments, which may lead to increased regulation of their activities.

²⁴ Judgment of the United Kingdom High Court of 23 November 2018 in Case No. CO/1731/2018 *H J Banks and Company Ltd. v Secretary of State for Housing, Communities and Local Government*, English text available at www.climate-laws.org.

²⁵ *West Cumbria Mining v Cumbria County Council*, case filed on 5 March 2021, English text available at www.climate-laws.org.

²⁶ Judgment of the Canadian Supreme Court of 25 March 2021 in *Saskatchewan et al. v Canada*, English text available at www.climate-laws.org.

²⁷ Judgment of the Pakistan Supreme Court of 15 April 2021 in Case C.P. 1290-L/2019 *D.G. Khan Cement Company Ltd. v Government of Punjab*, English text available at www.climate-laws.org.

2.2.1 Liability cases

There are currently at least 33 ongoing climate cases worldwide against the largest fossil fuel companies – the so-called “Carbon Majors”, a term that refers to a list of energy and cement companies identified by Richard Heede (2014) and the Climate Accountability Institute²⁸ through an assessment of the historical contributions of these companies to greenhouse gas emissions. Heede attributed 63% of the carbon dioxide and methane emitted between 1751 and 2010 to 90 entities. At least 23 of these cases seek to establish corporate liability for past contributions to climate change, often including arguments about deception and disinformation on the part of the companies. Examples include the series of high-profile cases that have been brought since 2017 by states and municipalities in the United States, seeking billions of dollars in damages to pay for infrastructure investments for climate adaptation, such as sea walls to protect coastal property (Geneva Association, 2021). Recently, we have seen the types of companies implicated by this type of claim increasing, for example in the case of *Smith v Fonterra Co-Operative Group Limited et al.*²⁹ filed before the New Zealand High Court, which involves a company involved in the meat and dairy industry.

2.2.2 Emissions reduction obligations

A number of recent cases against the Carbon Majors take a different approach to that outlined above. Instead of focusing on corporate liability for past harms, they instead focus on corporate responsibility to reduce emissions. These forward-looking cases are focused on major emitters’ activities and investment decisions from the present day and into the coming decades, and often seek a declaration from courts that fossil fuel companies’ climate change targets should be aligned with those of the Paris Agreement. In France, NGO Notre Affaire à Tous and a group of French citizens relied on France’s corporate due diligence legislation that requires corporate actors to adopt measures to protect human rights and the environment, to ask the court to order oil and gas company Total to recognise the risks generated by its business activities and align its conduct with the goal of limiting global warming to 1.5°C. The landmark case of *Milieudefensie et al. v Royal Dutch Shell* made similar arguments, and, in May 2021, these were accepted by the court (see Box 6).

Box 6

Milieudefensie et al. v Shell: a corporate responsibility to reduce emissions

In May 2021 the District Court of The Hague, the same court that six years before gave the ground-breaking decision in the *Urgenda* case, again changed the course of history, by ordering Dutch-based oil and gas multinational Shell to reduce its carbon dioxide emissions by 45% from 2019 levels by 2030, as a way to limit global warming to 1.5°C. The lawsuit, brought by several environmental NGOs and led by Friends of the Earth Netherlands (*Milieudefensie*) with more than

²⁸ Further information on Carbon Majors is available at www.climateaccountability.org.

²⁹ Judgment of the New Zealand High Court of 6 March 2020 in *Smith v Fonterra Co-operative Group Limited*, English text available at www.climate-laws.org.

17,000 co-plaintiffs, claimed that Shell’s business operations are unlawful, and that the company should reduce its emissions in accordance with the goals of the Paris Agreement.

The Court did not find that Shell is acting unlawfully but it ruled that the company has an obligation of result to reduce its own emissions, and a “significant best-efforts obligation” to reduce emissions along its entire value chain, including those of its suppliers and consumers.

Commentators observed the importance of the Court’s reliance on the “unwritten duty of care” under Dutch tort and the use of non-binding goals (of the Paris Agreement) as well as non-binding instruments (the United Nations Guiding Principles on Business and Human Rights³⁰ and the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises³¹) (Van Asselt et al., 2021). These international standards and the common facts that comprise the basis of the case arguably make this case replicable, increasing the risk of litigation against companies that set net-zero targets without credible short-term action, with knock-on effects expected for the cost of capital for oil and gas projects (Khan, 2021).

3 Finance in focus

The Paris Agreement recognises the critical importance of the financial system in the fight against climate change. Article 2 of the Paris Agreement, most famous for setting out the global goal of limiting warming to 1.5°C or at least well below 2°C also states that one of the Paris Agreement’s aims is to make “finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development”.

To this end, recent years have seen a huge amount of interest and action from both financial market actors aware of the risks climate change poses to many existing operating models and assumptions, and those who seek to influence them. Engagement with this issue has ranged from a proliferation of research on the topic by academics and groups like the Network for Greening the Financial System, to extinction rebellion activists seeking to highlight the role that insurers and bankers have to play. Unsurprisingly, there is also now a significant legal dimension to this development, with increasing numbers of cases and commentaries focusing in on the role of finance.

3.1 Cases against financial actors

A number of cases against government bodies – particularly central banks – suggest we may soon start to see more litigation against financial market regulators and supervisors, which may impact on private sector activities, particularly in high-emitting industries. As noted in Section 2.1, cases concerning government climate “commitments” have now been brought against a range of government actors,

³⁰ Available at www.ohchr.org/documents.

³¹ Available at www.oecd.org/corporate/mne.

including central banks. In April 2021, for example, ClientEarth filed a case against the Belgian national central bank (Nationale Bank van België/Banque Nationale de Belgique)³², challenging the bank's administration of the European Central Bank's Corporate Sector Purchase Programme, which is aimed at lowering the cost of debt to improve financing for eligible companies. Over half of the bonds purchased so far under the scheme have been purchased from high-emitting companies, and studies suggest there may be a structural bias towards these firms. While this case and previous cases against government-owned financial institutions have concerned the institutions' functions as lenders, it is possible that in the absence of strong action to ensure that climate risks are adequately addressed by financial market actors, cases may soon start to be brought concerning their regulatory functions as well.

Another area in which the financial market may see an increase of litigation activity concerns disclosure and information. Recent cases have raised claims around inadequate disclosure and disinformation by companies or investors. Combating these practices is the underlying driver in cases that challenge corporate strategy and governance regarding climate risks. Many of these cases consist of claims raising the lack of, or insufficient disclosure of, climate-related information to protect shareholders, consumers and investors (Solana, 2018). These claims highlight that climate change risk involves physical risks (e.g. claims for failure to adapt operations and physical infrastructure to extreme weather events) and transition risks (e.g. claims challenging the construction or financing of long-term carbon-intensive assets without consideration of emerging laws and policies designed to restrict high-emitting activities), which might give rise to litigation. Such claims also target the potential failure of directors, officers and fiduciaries to adapt investment strategies in line with climate risks. An important case is *McVeigh v REST*³³, brought by a 23-year old member of an Australian pension fund, who claimed that the fund's trustees were not doing enough to disclose and manage climate change risks. In November 2020 the fund settled the claim, acknowledging that "climate change is a material, direct and current financial risk to the superannuation fund across many risk categories, including investment, market, reputational, strategic, governance and third-party risks".

3.2 Cases targeting government spending

Climate litigation can also challenge financial incentives provided by the State to high-emitting industries such as the oil and gas sector. There is an increasing global consensus around the need to curb fossil fuel production and place strict limits on the exploration of hydrocarbon reserves. The December 2020 "Production Gap" report by the United Nations Environment Programme and leading international research institutions and experts, estimated that there is a significant gap between the 6% annual decrease in fossil fuel production required to meet the goal of limiting global warming to 1.5°C and countries' current plans, which would lead to a 2%

³² *ClientEarth v National Bank of Belgium*, case filed on 13 April 2021, English summary of the action filed available at www.climate-laws.org.

³³ Judgment of the Australian Federal Court of 17 January 2019 in *McVeigh v Retail Employees Superannuation Pty Ltd.*, English text available at www.climate-laws.org.

average annual increase (SEI et al., 2020). That report was followed by the International Energy Agency's (IEA's) landmark report "[Net Zero by 2050](#)", which sets out a roadmap to reaching net-zero emissions by 2050 in which no new investment in fossil fuel supply projects is required. Acting in line with these reports will require a rapid policy shift from governments around the world, which provided an estimated 320 billion US dollars in fossil fuel subsidies in 2019 (IEA, 2021).

While there have been multiple cases against governments challenging permitting and approvals processes for new hydrocarbon projects, relatively few cases have focused on the issue of fossil fuel subsidies and tax incentives.³⁴ However, a recent high-profile case filed in the United Kingdom suggests that this may be starting to change. On 12 May 2021, campaigners launched a legal challenge to the state-owned Oil and Gas Authority's new strategy³⁵, which sets out plans to support ongoing efforts to exploit North Sea oil and gas reserves. The claimants argue that such plans are irrational and inconsistent with the UK Government's net-zero target because they will lead to more oil and gas being extracted than would otherwise be the case. The case is accompanied by an extensive media campaign launched under the tagline "Paid to Pollute"³⁶ and a petition for citizens to express their support. As such, the case brings together the narratives about the need for comprehensive and consistent government action established by the climate commitments cases, as well as those about "big oil's" historic responsibility for both emissions and disinformation established by the cases against the Carbon Majors. The action may suggest we will see more cases targeting specific government policies inconsistent with net-zero targets.

Such cases demonstrate the need for government actors to develop mechanisms to demonstrate that potential climate and human rights impacts are adequately and consistently factored into all decision-making processes if they are to avoid the risk of litigation.

4 Conclusion

Climate change litigation continues to grow and diversify, spreading to an increasing numbers of jurisdictions and areas of law. This growth and diversity reflect the increasing urgency with which the climate crisis is viewed by the general public around the world and the growing understanding of the role that different actors – including in the financial markets – will need to play in the transition to a net-zero global economy.

Recent cases against both companies and governments have been able to rely on an increasingly strong consensus among the global climate policy community on

³⁴ Some landmark cases such as that of *Juliana et al. v United States* (case filed in 2015 before the United States Court of Appeals for the Ninth Circuit, English texts available at www.climatecasechart.com) highlight the ongoing provision of subsidies and tax incentives to the fossil fuel industry as part of a pattern of systemic inaction on climate over many years, but these do not necessarily target specific policies or programmes on this issue.

³⁵ *Loach et al. v United Kingdom Oil and Gas Authority* ("*Paid to Pollute* case"), case filed on 12 May 2021, English summary of the action filed available at www.climate-laws.org.

³⁶ See www.paidtopollute.org.uk.

global temperature limits, allowing the focus to shift to questions about the roles and responsibilities of different institutions in a rapidly changing global economy. Cases like *Milieudefensie et al. v Shell*, suggest there is a growing expectation that those with historical responsibility for emissions will take action to address the climate crisis, and that this expectation is starting to inform perceptions of reasonable standards of conduct. Actors that do not take notice of this development, either by failing to adopt serious long-term strategies and targets, or by failing to make serious efforts to achieve their targets once set, may find themselves at increasing risk of litigation. Similarly, avoiding a fully transparent appraisal of climate risks is becoming increasingly untenable.

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Systemic climate litigation in Europe: transnational networks and the impacts of *Climate Case Ireland*

Prepared by Andrew Jackson¹

This working paper addresses the experience of litigating *Climate Case Ireland* before Ireland's High Court and Supreme Court,² where the case succeeded in July 2020, becoming only the second case globally (after *Urgenda*³ in the Netherlands) to successfully challenge a government's overall mitigation ambition. The paper emphasises the importance of transnational networks and the impacts of climate cases such as this, which seek to challenge at a systemic level a country's response to climate change.

1 Introduction

The seed for the case that ultimately became *Climate Case Ireland* was planted when an article appeared on the BBC News website on 14 April 2015, under the headline "Dutch government taken to court on climate change."⁴ The article reported that the Urgenda Foundation (hereinafter "Urgenda") had taken the Government of the Netherlands to court – with the hearing before The Hague District Court at first instance having opened that day – for allegedly failing to protect its citizens from climate change. The BBC reported that "It is said to be the first time in Europe that citizens have tried to hold a state responsible for alleged inaction on climate change" and "It is also believed to be the first case in the world in which human rights are used – alongside domestic law – as a legal basis to protect citizens against climate change."⁵

Intrigued, the following day the present author contacted Dennis van Berkel of Urgenda asking for details and any available legal arguments in the case, to allow for

¹ Assistant Professor of Law, UCD Sutherland School of Law, University College Dublin; and solicitor for Friends of the Irish Environment (FIE) in *Climate Case Ireland*. While this piece and any errors are my own, special acknowledgements and thanks are due to FIE for taking the case and to all those who contributed to its success, including the other members of the legal team in Ireland (Eoin McCullough SC, Brian Kennedy SC, John Kenny BL, Orla Clarke, Aoife O'Connell, Nicola Dodd and all at O'Connell and Clarke); Dennis van Berkel, Tessa Khan, Lucy Maxwell, and Marjan Minnesma of Urgenda and its Climate Litigation Network; plus all those who offered their legal insights and expertise, including, for example, international experts such as David Wolfe QC, Zoe Leventhal, Jennifer MacLeod, and Helen Duffy; Clodagh Daly, Sadhbh O'Neill and all the volunteers who contributed to the public campaign; and countless others too numerous to mention, who know who they are.

² Judgment of the High Court of 19 September 2019 in *Friends of the Irish Environment v Government of Ireland & others* [2019] IEHC 747; and judgment of the Supreme Court of 31 July 2020 in *Friends of the Irish Environment v Government of Ireland & others* [2020] IESC 49.

³ *Urgenda Foundation v the State of the Netherlands*, The Hague District Court, Judgment of 24 June 2015, ECLI:NL:RBDHA:2015:7196 (English translation).

⁴ BBC (2015), available at www.bbc.com.

⁵ *ibid.*

consideration of whether a similar case against the Irish Government might be possible. Urgenda was clearly already conscious of the potential international reach of its case, and generously shared materials in English and Dutch. Other influential sources at this time included Roger Cox's book "Revolution Justified"⁶ and the Oslo Principles (2015).

Fast forward two years and Ireland was still doing very badly on climate action. It had the third highest greenhouse gas emissions per capita in the EU;⁷ its emissions were projected to rise by about 10% between 1990 and 2020 and to keep rising (rather than falling deeply, as required);⁸ and its Government was perceived to be playing a negative role on the international stage, e.g. negotiating numerous "flexibilities" in the EU's 2030 climate framework.⁹ The thought arose: how could the law be used to change this narrative?

The opportunity presented itself via Ireland's adoption of its first domestic framework climate law, the Climate Action and Low Carbon Development Act 2015 (hereinafter the "Climate Act 2015"), under which the Government had to make a "national mitigation plan" (hereinafter the "Plan") every five years.¹⁰ When the first draft Plan emerged for public consultation in early 2017, it was weak, vague, and aspirational; emissions were projected to continue rising over the life of the Plan, from 2017-2022.¹¹

By this time, Urgenda had won its case before The Hague District Court (in June 2015) on the grounds of Dutch tort law, with the Court ordering the Government to reduce the Netherlands' emissions by at least 25% by 2020 compared to 1990 levels (the significance of this percentage figure will be clear from Section 2.1 below). The Court held that rights under the European Convention on Human Rights (ECHR) were not directly infringed in the case but that such rights could serve as a source of interpretation when detailing the tort law duty of care.

In light of these findings, the present author argued as part of a conference panel in April 2017 that the *Urgenda* case might perhaps better be viewed as an inspiration than as a template for a climate case in Ireland, given differences between Irish and Dutch tort law and a general sense of the likely difficulty of succeeding with a tort law claim of this kind in Ireland. Instead, inspired by Urgenda's success, it might be better – the argument went – to look at plan-making in Irish climate policy, mindful of

⁶ Cox (2012). Roger Cox was one of the lawyers who acted for Urgenda successfully at first instance before the District Court; he went on to act for the successful litigants in *Milieudefensie and others v Royal Dutch Shell*, The Hague District Court, Judgment of 26 May 2021, ECLI:NL:RBDHA:2021:5339 (English translation), and the successful litigants in the Belgian climate case, *ASBL Klimaatzaak v the Belgian State*, Brussels Court of First Instance, Judgment of 17 June 2021 – an extraordinary run of legal wins.

⁷ European Environment Agency (2016).

⁸ Environmental Protection Agency (EPA) (2017a) and (2017b).

⁹ Climate Home News (2017).

¹⁰ Section 4 of the Climate Act 2015 requires a national mitigation plan to be adopted at least every five years.

¹¹ EPA (2018) and (2019).

ClientEarth's successes in challenging inadequate air quality plans in the United Kingdom by way of judicial review.¹²

Ireland's first national mitigation plan was published in final form by the Government in July 2017, and with it the three-month deadline to launch a legal action began to count down. In discussions with legal colleagues and Friends of the Irish Environment (FIE), the prospective litigant in the case, we concluded that someone ought to bring a challenge; that no one else appeared to be poised to do so; and that if no one challenged the Plan at this time, it would potentially be another five years (and the adoption of a new national mitigation plan) before another opportunity to stage a systemic legal intervention would arise. With that, the decision was taken to develop as strong a case as we could.

2 The legal grounds for the case

2.1 Background

The case was designed as an administrative law claim (judicial review) brought against the Government of Ireland (the State) by FIE, alleging that the adoption of Ireland's first national mitigation plan:

1. did not comply with Ireland's Climate Act 2015 in various ways;
2. breached Ireland's Constitution (right to life; right to bodily integrity; and a purported "unenumerated" (i.e. unwritten) right to an environment); and
3. breached the ECHR, via Ireland's domestic implementing statute, the European Convention on Human Rights Act 2003 (right to life (Article 2); right to respect for private and family life and home (Article 8)).

Significantly, the grounds were underpinned by the science of the Intergovernmental Panel on Climate Change (IPCC) and other authoritative, effectively incontestable reports evidencing a vast array of risks of harm. Since the summaries for policymakers of the IPCC's reports are agreed line by line by the governments that form part of the IPCC, including Ireland's, FIE took the strategic decision – mirroring Urgenda's approach – of relying on the IPCC's science, knowing that the State could not (and did not) contest this evidence. The result was that FIE could go into court and say: the factual evidence is agreed; what we are arguing about here is the legal consequences that flow from this agreed evidence. This was very effective.

¹² At the time Climate Case Ireland launched in October 2017: judgment of the UK Supreme Court of 29 April 2015 in *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28; and judgment of the High Court of England and Wales of 2 November 2016 in *R (ClientEarth) No. 2 v Secretary of State for the Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin). ClientEarth subsequently won again before the High Court (two judgments of 21 February 2018 in *R (ClientEarth) No. 3 v Secretary of State for Environment, Food and Rural Affairs* [2018] EWHC 315 (Admin) and [2018] EWHC 398 (Admin)), and the Court of Justice of the European Union also subsequently found against the United Kingdom on air pollution (judgment of 4 March 2021 in Case C-664/18, *Commission v United Kingdom*, ECLI:EU:C:2021:171).

In its Fourth Assessment report, the IPCC in 2007 determined that in order to stand a reasonable (66%) chance of staying below a 2°C global average temperature increase above pre-industrial levels, developed countries would need to follow an emissions reduction trajectory that would see emissions fall by 25-40% by 2020 and by 80-95% by 2050 (both compared to 1990).¹³ This was recognised and endorsed by the parties to the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol, including Ireland, in a series of decisions taken at the annual climate negotiations organised under the framework of the UNFCCC.¹⁴ However, instead of falling by 25-40% by 2020 compared to 1990, as noted above, Ireland's emissions were projected to increase by about 10% over that period, and to increase over the life of the Plan itself (2017-2022).¹⁵

In other words, the State had acknowledged that climate change poses a grave danger that must be avoided and that the only way to do so is to significantly increase emissions reduction ambitions in the short term. However, the State failed to explain, argued FIE, why the pressing need to reduce short-term emissions at the global level did not apply to itself. The State's position appeared to be that Ireland's emissions level in, say, 2020 did not really matter, so long as a longer-term reduction target (e.g. for 2050) was ultimately achieved. However, as FIE highlighted, this neglects the concept of the carbon budget and the strong, consistent, almost linear relationship between cumulative emissions (since the start of the industrial revolution) and temperature increase, as discussed by the IPCC in its Fifth Assessment Report.¹⁶

In other words, the IPCC's 25-40% reduction by 2020 and 80-95% by 2050 (compared to 1990) describe an emissions reduction trajectory to keep temperature increase below 2°C at the lowest cost. But in order to achieve that temperature goal, emissions need to stay on or below the required trajectory. Merely meeting a 2050 target is not enough. To stay within the available carbon budget to help limit temperature rise to 2°C, the 2020 emissions target also needs to be met, since the 2020 and 2050 emissions reduction targets advised by the IPCC are two points on a required trajectory to respect a particular carbon budget. Since the aim, pursuant to the Paris Agreement,¹⁷ is now to hold the increase in the global average temperature to "well below" 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C, the required emissions reduction trajectory is of course now steeper than the one advised by the IPCC in its Fourth Assessment Report.¹⁸

It was not open to the State, FIE argued, to adopt a national mitigation plan allowing Ireland's emissions to rise over the life of the Plan and beyond rather than fall substantially in the short, medium and longer term. In such circumstances, FIE argued, the State infringed fundamental rights; it acted manifestly unreasonably and

¹³ Gupta et al. (2007). Hence the courts' orders in *Urgenda*: a reduction of at least 25% in 2020 compared to 1990, in recognition of the separation of powers.

¹⁴ For a summary, see paragraphs 6.1-6.19 of *Urgenda* (2017).

¹⁵ *Supra*, nn. 8 and 11.

¹⁶ IPCC (2014).

¹⁷ Paris Agreement of 12 December 2015, available at www.unfccc.int.

¹⁸ See Article 2(1)(a) of the Paris Agreement; and see IPCC (2018).

disproportionately; the Plan was missing mandatory elements, said FIE, such as a specification of the manner in which it was proposed to achieve the national transition objective;¹⁹ and the State could not be said to have had regard to the various matters referred to in sections 3(2) and 4(7) of the Climate Act 2015, including for example the objective of the UNFCCC, climate justice, existing EU climate law obligations, and obligations under international agreements such as the Paris Agreement.

2.2 Two important legal developments after the case launched

Having received “leave” (permission to proceed) from the High Court in October 2017, two important legal developments gave increased prominence to the rights aspects of the case before the High Court hearing was held.

2.2.1 Right to an environment

When we filed *Climate Case Ireland* in October 2017 the Irish courts had not recognised an unenumerated right to an environment in Ireland’s Constitution. We argued at the time of filing that an unenumerated (unwritten) right to an environment exists via Art 40.3.1° of the Constitution, which requires the State to protect and vindicate “the personal rights of the citizen”. Over the years, certain unenumerated personal rights had been “read in” to Ireland’s Constitution by the courts via this provision – e.g. the right to bodily integrity. However, the recognition of new unenumerated rights via Article 40.3.1° had fallen out of favour and no such rights had been recognised for many years.²⁰ As Hogan (2017) put it, “the judicial ardour for unenumerated rights, which repose solely in the imaginative mind of the judiciary, has been cooling for some two decades or so.”

Nevertheless, in November 2017, one month after *Climate Case Ireland* launched, the High Court of Ireland issued its judgment in another FIE case, this time relating to Dublin Airport’s plans for a new runway.²¹ While the substantive challenge was unsuccessful, to many people’s surprise the High Court embraced one of the arguments FIE had made: that an unenumerated right to an environment can and should be identified in Ireland’s Constitution. The High Court held:

“264. A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is

¹⁹ See section 4(2) of the Climate Act 2015 before the Act’s amendment by the Climate Action and Low Carbon Development (Amendment) Act 2021. The national transition objective was defined by section 3(1) of the 2015 Act as “the transition to a low carbon, climate resilient and environmentally sustainable economy by the end of the year 2050.” Again, this provision was recently replaced by the 2021 Act, after the *Climate Case Ireland* proceedings had concluded.

²⁰ For a discussion, see Kelleher (2018).

²¹ Judgment of the High Court of Ireland of 21 November 2017 in joined proceedings *Merriman & others v Fingal County Council & others*; and *Friends of the Irish Environment v Fingal County Council* [2017] IEHC 695.

vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1° of the Constitution.”

FIE had asserted the existence of such a right in *Climate Case Ireland* knowing, of course, that the High Court would subsequently be giving its judgment in the *Dublin Airport* case. However, at the time of its inclusion in *Climate Case Ireland* the argument was naturally somewhat speculative.²² After the High Court’s judgment in the *Dublin Airport* case, the argument of course appeared much strengthened. Nevertheless, the State continued to contest the existence of such a right and said that the High Court’s judgment in the *Dublin Airport* case was *obiter dictum* on this point. As such, this dispute effectively transferred to the *Climate Case Ireland* proceedings.

2.2.2 Infringement of rights under the ECHR

Next, in October 2018 The Hague Court of Appeal gave its judgment in the *Urgenda* case,²³ finding (in contrast to the District Court at first instance) that the Government of the Netherlands had indeed directly infringed rights under the ECHR, as *Urgenda* had argued:

“the Court believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. As has been considered above by the Court, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat.”

This naturally appeared to strengthen the ECHR aspects of FIE’s case, and made *Urgenda* seem much more of a potential precedent for *Climate Case Ireland*: suddenly a national court in Europe had found a direct infringement of ECHR rights as a result of the risk of climate harms. FIE had included the argument that ECHR rights were infringed on the facts of its case knowing, of course, that *Urgenda* had appealed this aspect of the District Court’s judgment, and in any event calculating that it would be worthwhile running a similar argument in Ireland, to see whether the result before the Irish courts might be different than before The Hague District Court.

²² FIE made the argument based on a fleeting reference to a constitutional environmental right in the then recent case of *Brownfield Restoration v Wicklow County Council* (No 3) [2017] IEHC 456, paragraph 307.

²³ *The State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal, judgment of 9 October 2018, ECLI:NL:GHDHA:2018:2610 (English translation). The Supreme Court of the Netherlands subsequently upheld the Court of Appeal’s judgment: *The State of the Netherlands v Urgenda Foundation*, Supreme Court of the Netherlands, judgment of 20 December 2019, ECLI:NL:HR:2019:2007 (English translation).

3 The exhortative value of climate litigation: the public campaign

With the advice of Urgenda, FIE developed a public campaign in support of *Climate Case Ireland*, from very small beginnings.²⁴ The strategy was that, win or lose the formal legal proceedings, the case could serve as a focal point around which the climate movement in Ireland could coalesce, diversify and grow, and more generally help to apply pressure to secure improved climate action in Ireland. As Osofsky (2010) notes, “Both formally successful [climate] suits and those with little hope of achieving binding results have together helped to change the regulatory landscape at multiple levels of government by putting both legal and moral pressure on a wide range of individuals and entities to act.”

We were acutely conscious from the outset of the potential exhortative value of climate litigation: that is, its potential to promote greater public awareness (Osofsky, 2010) and its potential to inspire and help trigger a debate that “can form part of a paradigm shift when the public imagination is captured by the symbolic or rhetorical significance of the litigation” (Rogers, 2015).

FIE branded the case “*Climate Case Ireland*”, consciously reducing FIE’s own visibility, and emphasised in its public statements that the case was for everyone, with a view to ensuring that the proceedings might attract as broad support as possible from individuals and other organisations. In addition to developing a website and social media channels in support of the case, a group of volunteers began to gather around the case following an information session held after a climate litigation seminar in Dublin in December 2017.²⁵

Support came from a range of quarters, including small grants from the clothing company Patagonia to support some campaign hours, from the Tomar Trust, and by way of donations from the public, among others. In addition, Patagonia for example decorated the windows of its Dublin store in support of the case; allowed numerous *Climate Case Ireland* events to be held in-store; provided social media support; and set up a stall allowing members of the public to sign the website petition (“This case is in my name”) on tablets in-store.

The campaign built up slowly over time, but when supporters began attending the early, purely procedural, “mentions” of the case before the High Court, it became clear that public interest in the case was going to distinguish it from most other civil litigation in Ireland. By way of example of the grassroots support the case attracted, out of the blue a large mural in support of the case appeared in Cork city centre, produced by a group of artists working with the Creativity and Change programme (Figure 1).²⁶

²⁴ FIE had an annual turnover of less than EUR 20,000 in 2017.

²⁵ The public campaign was coordinated initially by Sadhbh O’Neill and Clodagh Daly and by Clodagh after the High Court proceedings.

²⁶ See www.creativityandchange.ie.

Figure 1

The present author and John Kenny BL in front of the *Climate Case Ireland* mural in Cork, 2019



Source: Andrew Jackson.

By the time the case came to be heard in January 2019, about 17,000 members of the public had signed the website petition in support, leaving the legal team in the unusual position of having to write to the Courts Service in Dublin alerting them to the significant public interest in the hearing, and asking for a large courtroom to be allocated accordingly.

The Courts Service obliged, and an extraordinary spectacle unfolded over the four days of the High Court hearing in late January 2019, with all seats and floor space taken. As O'Doherty (2019) describes, "There were school uniforms, suits, grey hair, a jolly shade of pink hair – a mix of ages and backgrounds that gave a flavour of the [thousands of] people who signed an online petition saying the case taken by Friends of the Irish Environment (FIE) was also in their name." It was an incredibly powerful and indeed moving experience to hear fundamental rights and the science of climate change aired in this atmosphere, heightened by the presence of several babies and toddlers in court,²⁷ whose small voices at times competed with those of counsel in the case.

The leader of Ireland's Green Party, now Minister for the Environment, Climate and Communications, captured the scene well: "I have never seen anything like it," he wrote. "Babies and toddlers, young and old, spread politely on the court floor, rapt in attention to the proceedings. It would make you proud of our Republic."²⁸

²⁷ O'Doherty's (2019) report mentions "14-month-old Mary Barry [who] was bum-shuffling her way around the courtroom, blissfully oblivious to the fact that before she is 14 years old, the world will have to drastically change its ways or suffer irrevocable consequences."

²⁸ Ryan (2019).

4 The judgments of the High Court and Supreme Court

When the High Court's judgment was handed down in September 2019,²⁹ the result was a disappointment to many. The High Court ruled against FIE, holding, *inter alia*, that even if the Plan was justiciable, the State must be given a broad margin of discretion in its adoption, with reference to the separation of powers and the nature, extent and wording of the statutory obligations in play.

FIE applied to "leapfrog" the case over the Court of Appeal, directly to the Supreme Court. The Supreme Court granted its consent in February 2020 and heard the case in late June 2020. This was another extraordinary, albeit very different, experience from the High Court proceedings.

The Covid-19 pandemic was of course ongoing, and the hearing was originally to be heard remotely. However, the Supreme Court ultimately decided to hold the hearing in person. To accommodate social distancing requirements for the 7-judge court,³⁰ legal teams, and attending members of the public and press, the case was held (exceptionally) in the grand dining hall of the King's Inns, the training institute for barristers in Ireland (Figure 2).

Figure 2

Day one of the *Climate Case Ireland* hearing before the Supreme Court, 22 June 2020



Source: Collins Courts.

Just one month after the hearing, the Chief Justice of Ireland delivered the Supreme Court's unanimous judgment, finding for FIE and quashing the Plan. Three elements of the Court's judgment are highlighted here. The Court held that:

²⁹ *Supra*, n. 2.

³⁰ The formation reserved for cases of particular importance or complexity.

1. the Plan fell “well short” of the requirements of the Climate Act 2015, so was quashed;
2. FIE, as a corporate body, did not have standing to litigate the personal constitutional and ECHR rights in dispute in the case; and
3. an unenumerated or derived right to a healthy environment cannot be identified in Ireland’s Constitution.

These three issues are considered in turn.³¹

4.1 The winning ground: breach of the Climate Act 2015

With reference to section 4(2)(a) of the Climate Act 2015, which required each national mitigation plan to “specify the manner in which it is proposed to achieve the national transition objective,”³² the Supreme Court found that “the Plan falls a long way short of the sort of specificity which the statute requires. I do not consider that the reasonable and interested observer would know, in any sufficient detail, how it really is intended, under current government policy, to achieve the NTO [national transition objective] by 2050 on the basis of the information contained in the Plan.”

The Chief Justice emphasised that there was no infringement of the separation of powers in reaching this conclusion: “What might once have been policy has become law by virtue of the enactment of the 2015 Act.”³³ To the present author’s mind, a pivotal moment in the hearing came at the end of the first day, when counsel for FIE referred the Court to a figure from the Plan showing projected emissions in certain sectors up to 2035 and showing what would then be required to meet the Government’s then policy aim of an 80% reduction in emissions from these sectors by 2050 (Figure 3). The “cliff edge” between 2035 and 2050 arguably laid bare for the Court that the Plan was not a plan at all but rather a statement of a predicament.

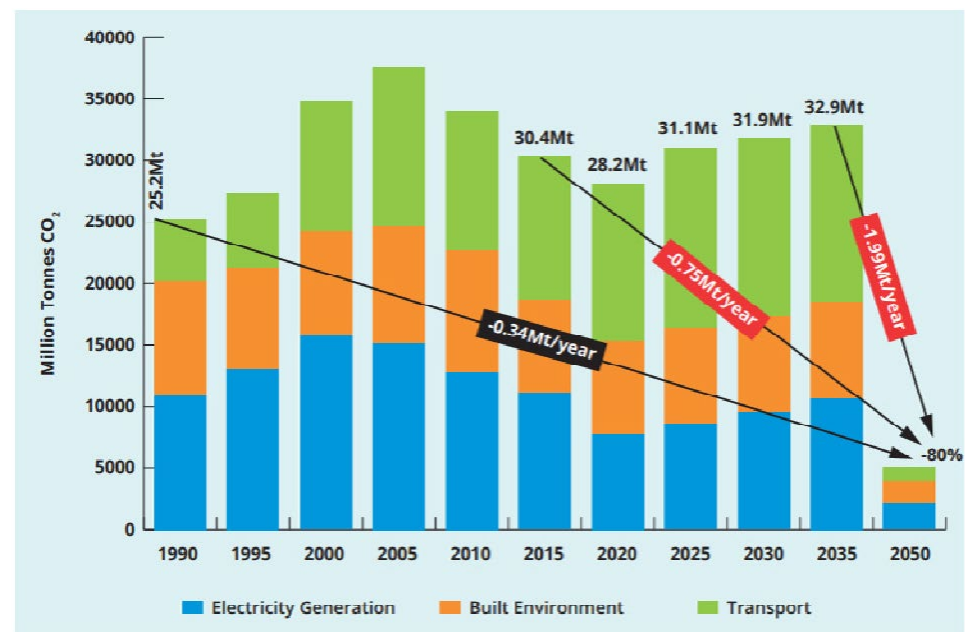
³¹ For more comprehensive analyses of the judgment, see Kelleher (2020), Kennedy et al. (2020), and Ryall (2020a).

³² *Supra*, n. 19 for the definition of national transition objective.

³³ *Supra*, n. 2, paragraph 9.1 of the Supreme Court’s judgment.

Figure 3

Historic and projected CO₂ emissions from the electricity generation, built environment and transport sectors (Figure 2.1 of the 2017 National Mitigation Plan)



Source: EPA.

Notes: The Electricity, Built Environment and Transport sectors represented here are based on National Mitigation Plan sectors rather than total emissions in the EPA inventory. In particular, emissions from the Agriculture, Forestry and Land Use sectors are not represented as a separate objective for 2050 applies in this sector.

The Supreme Court emphasised that it was quashing the Plan “on grounds which are substantive rather than purely procedural,”³⁴ a noteworthy comment given the typically procedural nature of judicial review in Ireland,³⁵ albeit the nature of the statutory obligation in play arguably necessitated a substantive review. It is necessary, the Court said, “to look at the kind of policies which the Plan suggests need to be followed in order to meet the NTO [national transition objective]. Having considered what the Plan says it does seem to me to be reasonable to characterise significant parts of the policies as being excessively vague or aspirational.”³⁶

Finally, the Supreme Court emphasised the importance of public participation in climate plan-making, as well as the need for a longer-term perspective: “The 2015 Act as a whole involves both public participation in the process leading to the adoption of a plan but also transparency as to the formal government policy, adopted in accordance with a statutory regime, for achieving what is now the statutory policy of meeting the NTO [national transition objective] by 2050. A compliant plan is not a five-year plan but rather a plan covering the full period remaining to 2050. While the detail of what is intended to happen in later years may understandably be less complete, a compliant plan must be sufficiently specific as to policy over the whole period to 2050. [...] the Plan falls well short of the level of specificity required to

³⁴ Supra, n. 2, paragraph 6.49 of the Supreme Court’s judgment.

³⁵ For a discussion, see Kennedy et al (2020).

³⁶ Supra, n. 2, paragraph 6.43 of the Supreme Court’s judgment.

provide that transparency and to comply with the provisions of the 2015 Act. On that basis, I propose that the Plan be quashed.”³⁷

The fact that FIE succeeded on domestic statutory grounds, and the Court’s conclusion that “it is important to place significant weight on the views of the Advisory Council”³⁸ established under the Climate Act 2015 (which had been strongly critical of government inaction), underlines the importance of national framework climate laws and the institutions typically created thereunder.³⁹ It is important to emphasise, however, that the case’s success on domestic grounds does not mean the court’s reasoning lacks precedential interest for cases brought in other jurisdictions, as evidenced by the recent decision of the German Federal Constitutional Court in *Neubauer* (more in Section 5.3.3): ripple effects are not limited to rights-based successes.

4.2 Standing for personal constitutional and ECHR rights

On the issue of standing to litigate personal rights, the Supreme Court held that “as a corporate entity which does not enjoy in itself the right to life or the right to bodily integrity, [FIE] does not have standing to maintain the rights based arguments sought to be put forward whether under the Constitution or under the ECHR.”⁴⁰

The Supreme Court held that FIE did not fall within the exception to this general bar on corporate bodies litigating personal rights, “which [exception] arises in circumstances where refusing standing would make the enforcement of important rights either impossible or excessively difficult.”⁴¹

During the hearing, the Supreme Court asked why an individual litigant had not been joined to the proceedings. FIE explained that an individual was not before the court because of the fear of an individual having to bear the burden of costs (requiring the individual to pay the State’s legal costs as well as its own) if the case was unsuccessful.

To give an idea of the potential level of costs in Irish litigation, Simons (2012) describes as a “common-or-garden” (i.e. ordinary) action for judicial review a case in which an individual – Mr Klohn – fell liable to pay EUR 86,000 to the respondent public body under the standard “loser pays” rule, plus his own legal costs of EUR 32,550, giving a total liability of more than EUR 118,000 for losing High Court

³⁷ *Supra*, n. 2, paragraphs 9.2 and 9.3 of the Supreme Court’s judgment.

³⁸ *Supra*, n. 2, paragraph 6.41 of the Supreme Court’s judgment.

³⁹ On which generally, see Muinzer (ed.)(2020).

⁴⁰ *Supra*, n. 2, paragraph 9.4 of the Supreme Court’s judgment.

⁴¹ *ibid.* Applying the Supreme Court’s formulation, one wonders whether a climate case brought by a corporate body but focused on the rights of future generations would fall within this exception. See, for example, *SPUC Ltd. v Coogan* (No 1) [1989] IR 734, in which the Supreme Court held that a corporate body – the Society for the Protection of Unborn Children – had standing to litigate the right to life of the unborn.

proceedings alone.⁴² Any potential costs exposure will naturally increase where a case goes all the way to the Supreme Court.

In any event, the Supreme Court did not consider FIE's explanation sufficient, commenting that "Other than a suggestion that it was desire to protect individuals from a possible exposure to the costs of unsuccessful proceedings, no real explanation was given as to why an individual or individuals could not have brought these proceedings instead of FIE. There does not seem to be any practical reason why FIE could not have provided support for such individuals in whatever manner it considered appropriate."⁴³

The Supreme Court's treatment of standing was to the present author's mind clearly a disappointing aspect of its judgment, and a missed opportunity. It also had an air of artificiality: this was a case quintessentially for and about people, as witnessed by the scenes in the High Court. Why in such circumstances must the law insist that an individual is before the Court, risking financial ruin, for fundamental rights even to be considered? As Adelmant et al. (2021a) comment, "the Court paid no heed whatsoever to the immense stakes involved in climate change for the public at large nor to the specialist expertise possessed by FIE."

It is worth reflecting that FIE had been held to have standing to litigate personal rights by the High Court in the *Dublin Airport* case in 2017 and by the High Court in *Climate Case Ireland* itself in 2019. It is also worth noting that standing was not the only preliminary hurdle FIE would have had to overcome to have a chance with its ECHR grounds: there was also domestic case-law to the effect (the State argued) that the Irish courts should not jump first on the question of ECHR rights but rather should await a judgment from the European Court of Human Rights on climate change.⁴⁴

As well as being disappointing, to the present author's mind the Supreme Court's finding on standing arguably leaves Ireland in breach of international law. While the Aarhus Convention⁴⁵ does not require parties to the Convention to introduce an *actio popularis* rule on standing (enabling anyone to litigate any decision, act or omission relating to the environment), the Aarhus Convention Compliance Committee has made it clear that those parties may not maintain "such strict criteria that they effectively bar all or almost all environmental organisations or other

⁴² This case ended in a judgment of the CJEU relating to prohibitive expense: C-167/17, *Klohn*, ECLI:EU:C:2018:833.

⁴³ *Supra*, n. 2, paragraph 7.22 of the Supreme Court's judgment. Quite what the Supreme Court had in mind here is unclear. An arrangement under which a non-governmental organisation provided financial support to an individual litigant would potentially be a risky strategy, given Ireland's rules on third party litigation funding. So-called "maintenance" and "champerty" remain both torts and crimes: see Biehler (2018).

⁴⁴ Judgment of the Supreme Court of Ireland of 10 December 2009 in *McD v L* [2009] IESC 81. FIE contested this interpretation and pointed out, inter alia, that the Supreme Court in *McD* had relied on the judgment of the UK House of Lords of 17 June 2004 in *R. (Ullah) v Special Adjudicator* [2004] 2 AC 323, a case which no longer represents good law in the United Kingdom. See the judgments of the UK Supreme Court of 21 February 2018 in *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11 and of 17 December 2014 in *Moohan v Lord Advocate* [2014] UKSC 67.

⁴⁵ The United Nations Economic Commission for Europe Convention on access to information, public participation in decision-making and access to justice in environmental matters of 25 June 1998, available at www.unece.org/environment-policy/public-participation.

members of the public from challenging acts or omissions that contravene national law relating to the environment.”⁴⁶

The first hurdle to overcome here would be showing that constitutional or ECHR rights in the context of climate harm amount to “national law relating to the environment”.⁴⁷ If that could be overcome, as the present author believes would be possible,⁴⁸ Irish law would seem to have effectively barred all or almost all environmental organisations from challenging a decision to adopt an inadequate national mitigation plan on the grounds that the decision contravenes personal rights under the Constitution and/or the ECHR. The fact that an environmental organisation might have standing to challenge the decision on other (e.g. statutory) grounds would not seem to rescue the situation from the State’s perspective. That the reason a corporate body rather than an individual was before the court was because of the problem of prohibitive expense (which is itself prohibited by Article 9(4) of the Aarhus Convention) would presumably not help the State’s case.

4.3 Constitutional right to a healthy environment?

Having concluded that FIE did not have standing to vindicate personal rights, the Supreme Court did not strictly need to go on to consider whether a right to a healthy environment can be implied in Ireland’s Constitution. However, the Chief Justice decided to consider the issue “Lest by not commenting on those matters it might in the future be argued that this Court had implicitly accepted”⁴⁹ the existence of such a right.

The Supreme Court began by commenting that “it would be more appropriate to characterise constitutional rights which cannot be found in express terms in the wording of the Constitution itself as being derived rights rather than unenumerated rights.”⁵⁰ This reaffirmed the Supreme Court’s move away from the language and doctrine of “unenumerated” rights, which had been evident in the Court’s then recent judgment in the *Simpson* case.⁵¹ In that case, O’Donnell J cited with approval a clearly influential article by Hogan (2017), in which Hogan⁵² argued that “there are indeed implied constitutional rights but...they derive principally from the text of the Constitution itself” and that “the development of the unenumerated rights doctrinewas...largely unnecessary: the same results and more were there to be

⁴⁶ Aarhus Convention Compliance Committee, Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union ACCC/C/2008/32, 14 April 2011.

⁴⁷ Under Article 9(3) of the Aarhus Convention.

⁴⁸ The Aarhus Convention Implementation Guide (UN Economic Commission for Europe (2014)) states that “national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment.”

⁴⁹ *Supra*, n. 2, paragraph 7.25 of the Supreme Court’s judgment.

⁵⁰ *Supra*, n. 2, paragraph 8.4 of the Supreme Court’s judgment.

⁵¹ Judgment of the Supreme Court of Ireland of 14 November 2019 in *Simpson v Governor of Mountjoy Prison* [2019] IESC 81.

⁵² Since nominated for appointment to the Supreme Court of Ireland, and before that Advocate General of the Court of Justice of the European Union.

achieved through a greater focus and understanding of the text of the Constitution itself’.

As the Supreme Court explained in *Climate Case Ireland*, “there is a danger that the use of the term “unenumerated” conveys an impression that judges simply identify rights of which they approve and deem them to be part of the Constitution. That does not seem to me to have been the process by which the so-called unenumerated rights have come to be identified, but nonetheless it carries a risk of misimpression. It is for that reason that I would consider the term “derived rights” as being more appropriate, for it conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived.”⁵³

The Supreme Court continued that “the right to an environment consistent with human dignity, or alternatively the right to a healthy environment, as identified in [the *Dublin Airport* case] and as accepted by the trial judge for the purposes of argument in this case, is impermissibly vague. It either does not bring matters beyond the right to life or the right to bodily integrity, in which case there is no need for it. If it does go beyond those rights, then there is not a sufficient general definition (even one which might, in principle, be filled in by later cases) about the sort of parameters within which it is to operate.”⁵⁴

The following passage is important in understanding the Supreme Court’s decision. The Court commented that: “It is...striking that, in most of the states where a constitutional right in the environmental field has been recognised, same has been achieved by the inclusion of express wording in the constitutional instruments of the state concerned. In other words, in accordance with the appropriate process to adopt or amend the Constitution of the state concerned, a particular type of environmental right has been inserted into the Constitution. The advantage of express incorporation is that the precise type of constitutional right to the environment which is to be recognised can be the subject of debate and democratic approval.”⁵⁵

It seems likely that this weighed heavily in the judges’ minds, not least because Ireland regularly amends its Constitution by way of referendum. In the circumstances, the Supreme Court clearly felt that this would be a more appropriate means to secure the introduction of a constitutional environmental right than judicial recognition.

Do the findings on this issue and standing make *Climate Case Ireland* a case of “one step forward, two steps back”, as some have suggested?⁵⁶ The answer to the present author’s mind is no, because this characterisation seems to give too much

⁵³ Supra, n. 2, paragraphs 8.5 and 8.6 of the Supreme Court’s judgment.

⁵⁴ Supra, n. 2, paragraph 8.11 of the Supreme Court’s judgment. On the issue of scope, see Adelmant et al. (2021a).

⁵⁵ Supra, n. 2, paragraph 8.12 of the Supreme Court’s judgment. While Adelmant et al. (2021a) argue that “Many more recent analyses [than Boyd (2011)] would have been readily available to the Court, showing that the right enjoys direct constitutional protection in over a hundred countries,” it is worth noting that Boyd (2011) itself records (as was made clear to the Court in written submissions) that “three-quarters of the world’s constitutions (147 out of 193) include explicit references to environmental rights and/or environmental responsibilities,” with 92 containing substantive environmental rights.

⁵⁶ E.g. McIntyre (2020) and Adelmant et al. (2021a).

weight to supposed steps backward while giving insufficient weight to positive impacts of the case (more below).⁵⁷

First, while the finding on standing is undoubtedly disappointing and may validly be criticised (as above), the present author has no doubt that systemic rights-based climate litigation possibilities remain very much alive in Ireland, even if standing for individuals may in turn raise its own issues.

Secondly, the Supreme Court's decision did not represent the loss of an extant right as such. Rather, the unenumerated right to an environment identified in the *Dublin Airport* judgment – the first unenumerated right identified in years, when many thought the doctrine was dead – might better be considered Schrödinger's right to an environment: it both existed (briefly via the High Court, never applied in an applicant's favour) yet never existed (according to the Supreme Court). The campaign to have this right now expressly recognised by way of referendum is vibrant (more below).

Thirdly, while it has been suggested that the Court's finding regarding the right to a healthy environment may have resulted from the way in which the case was argued,⁵⁸ it is important to understand this in its proper context. Ireland's Supreme Court clearly remains highly cautious when it comes to judicial recognition of new implied rights. The Supreme Court stated that "it might be said, in one sense, the beginning and end of this argument stems from the acceptance by counsel for FIE that a right to a healthy environment, should it exist, would not add to the analysis in these proceedings, for it would not extend the rights relied on beyond the right to life and the right to bodily integrity whose existence is not doubted."⁵⁹

Any recognition of a derived right to a healthy environment would have been on the facts and evidence of the instant case. The question the Supreme Court was asking was effectively: if you (FIE) say that the rights to life and bodily integrity are so clearly engaged on the evidence before the Court, do you need this new right to win on the facts? Counsel for FIE noted that if the rights to life and bodily integrity in the Constitution were interpreted narrowly, as the State contended, then FIE might need to rely on the right to a healthy environment to win its case on constitutional grounds; but if the rights to life and bodily integrity were instead understood as having a broader scope of coverage, as FIE contended, then the environmental right would not add to FIE's case on the facts, though it might add more in other cases, where the right to life is not so threatened, for example.⁶⁰

Adelmant et al. (2021a) validly argue that "even if true in this particular case, it is not an appropriate basis on which the Court could or should have drawn more far-

⁵⁷ In fairness, some of these positive impacts may have emerged since these characterisations were written.

⁵⁸ Adelmant et al. (2021b). Litigants take strategic decisions regarding how best to win a case at hearing, fully cognisant here of relevant legal issues, sources, how best in their view to articulate the case, etc.

⁵⁹ Supra, n. 2, paragraph 8.10 of the Supreme Court's judgment.

⁶⁰ It is worth noting, in passing, that the Supreme Court was referred by FIE to the parts of Boyd (2011) that seek to counter the argument that a right to a healthy environment would be redundant given the existence and scope of other rights, and it is clear the Supreme Court read this authority closely. The Supreme Court was also referred to Alston et al. (2020) regarding potential sources for deriving a right to a healthy environment from Ireland's Constitution.

reaching general conclusions” regarding a right to a healthy environment.⁶¹ While the Court could have left the door open to future judicial recognition of such a right, as noted above it evidently felt that an express constitutional amendment would be more appropriate. The Court thus concluded unanimously that no right to a healthy environment “as thus formulated” can be derived from Ireland’s Constitution, but gave some pointers regarding the potential for other constitutional rights to be invoked in environmental proceedings in future.⁶²

The Supreme Court’s judgment has given renewed impetus for constitutional change in this area, and *Climate Case Ireland* remains at the forefront of this debate.⁶³ In June 2021, *Climate Case Ireland* and more than twenty other civil society organisations including environmental, social justice, trade union, legal, medical, social justice, student, and religious groups wrote to the Government asking it to urgently convene the promised Citizens’ Assembly on Biodiversity Loss and to ensure that the possible recognition of a constitutional right to a safe, clean, healthy and sustainable environment is on the Assembly’s agenda. This argument was boosted by the fact that in March 2021 Ireland and 68 other countries co-signed a statement submitted to the United Nations Human Rights Council recording that “It is our belief that a safe, clean, healthy and sustainable environment is integral to the full enjoyment of human rights. [...] We are committed to engaging in an open, transparent and inclusive dialogue with all states and interested stakeholders on a possible international recognition of the right to a safe, clean, healthy and sustainable environment.”⁶⁴

5 Reaction, reflections, and impacts

The Supreme Court’s judgment was variously described in the press as “a watershed moment”,⁶⁵ “seismic”,⁶⁶ and “a turning-point for climate governance in Ireland”.⁶⁷ Kenny (2020b) described the judgment as “a really major constitutional, as well as environmental, judgment. One of the most important statements on rights in a generation, and offering signs of how personal rights and constitutional duties may feature in the environmental context in future.”

The remainder of this working paper offers some brief reflections on the case and its impacts.

⁶¹ Counsel for FIE had argued during the hearing that if the rights to life and bodily integrity were sufficient for FIE to win such that in the particular circumstances of the case the issue of a right to a healthy environment was rendered redundant, then the right to an environment would be a point that could be dealt with another day in another context.

⁶² *Supra*, n. 2, paragraphs 8.14 to 8.17 of the Supreme Court’s judgment.

⁶³ Slattery (2021).

⁶⁴ Core Group Statement (2021).

⁶⁵ Kenny (2020a).

⁶⁶ Irish Examiner (2020).

⁶⁷ Ryall (2020b).

5.1 Transnational networks

Transnational networks made a vital contribution to the success of *Climate Case Ireland*, helping to ensure that the lessons of climate litigation elsewhere could transfer effectively to the Irish context. From the earliest days of the case and campaign in Ireland, *Urgenda* and its Climate Litigation Network⁶⁸ played a vital supporting role, offering advice and encouragement throughout. In this regard, the contributions of Urgenda lawyers Dennis van Berkel, Tessa Khan, and Lucy Maxwell are of particular note, with Urgenda's director Marjan Minnesma also travelling to Ireland to participate in a series of events in support of the case in advance of the High Court hearing.

More generally, beyond the immediate legal and campaign teams, the case benefited from the expertise of numerous lawyers and other experts both within Ireland and abroad.

5.2 Why EU law did not feature prominently

It is a notable feature of both *Urgenda* and *Climate Case Ireland* that EU law did not feature prominently in the applicants' cases, which may seem odd to those who consider the EU a leader in climate law and policy.

As a litigator, it is fair to say that EU climate law is not an attractive prospect: its division between Emissions Trading System (ETS) and non-ETS emissions; its complex use of baselines that differ in some cases from the 1990 baseline typically used by the UNFCCC; and its multiplicity of legal instruments make for a complex maze in which a court could quickly become lost. The strategy pursued in *Climate Case Ireland* was much simpler and cleaner – and because the facts were so forcefully on their side, telling this story clearly was among FIE's most powerful weapons. The strategy involved:

1. comparing the total emissions of greenhouse gases at the national level in 1990 with the projected level in 2020;
2. comparing these figures with the IPCC's advice regarding the required reduction between 1990 and 2020;
3. developing legal arguments based on the gap between (i) and (ii).

However, this is not the central reason why EU law did not feature prominently. Rather, it is because the EU had itself adopted a 2020 target that fell below the 25-40% range advised by the IPCC: a (mere) 20% reduction compared to 1990 levels. As such, complying with EU law obligations or contributing towards the collective EU goal for 2020 could not be a good defence to an alleged infringement of fundamental rights based on a gap between the IPCC's advice and a Member State's targets/performance at the national level: see to this effect the Supreme Court in *Urgenda*.

⁶⁸ See www.urgenda.nl/en/themas/climate-case/global-climate-litigation.

This issue of relevance may re-emerge in future climate litigation: i.e. those that adopt insufficiently ambitious targets for 2030 and beyond are liable to be either challenged or bypassed by litigants pursuing more ambitious action. In that regard, the German Federal Constitutional Court's recent judgment in *Neubauer* may be a canary in the coal mine for the EU: Germany was recently found to have infringed fundamental rights under the Constitution (Basic Law) in circumstances where it was targeting an emissions reduction of at least 55% by 2030 compared to 1990 levels (more in Section 5.3.3);⁶⁹ the EU has set itself the same target by way of the new EU Climate Law.⁷⁰

5.3 The impacts of systemic climate litigation

5.3.1 Changes in law and policy

The direct result of FIE's victory in *Climate Case Ireland* was that the 2017 National Mitigation Plan was quashed, meaning that a new legally compliant Plan was needed. Interestingly, however, the State did not await the outcome of the case before developing a new plan: it made a new Climate Action Plan in 2019 and sought to rely on this new plan in defending the *Climate Case Ireland* proceedings, arguing that the 2017 National Mitigation Plan was a "living document" and that the court ought not to quash this Plan as inadequate because the court should take into account subsequent developments such as the 2019 Climate Action Plan. The Supreme Court saw through this, agreeing with FIE's argument that the 2019 Climate Action Plan was in any event non-statutory: "[it] is not a plan in the sense in which that term is used in the 2015 Act. It has not been, for example, through the public consultation process which the 2015 Act mandates."⁷¹

In any event, the pressure created by *Climate Case Ireland* was clearly one important contributor to the production of this new, more ambitious 2019 Climate Action Plan, just two years after the 2017 National Mitigation Plan had been adopted. As a leading environmental lawyer commented at the time, "I have no doubt that the case was chief among motives for urgent delivery by the Government of its Climate Action Plan in June [2019]."⁷²

This chain of events may be of interest to those considering the separation of powers in climate litigation: here the impacts of the case were non-linear, with the executive adopting a new climate plan not because it was ordered to do so by a court, but, *inter alia*, because the Government could then rely on this new plan in defending the

⁶⁹ Order of the First Senate of the Federal Constitutional Court of Germany of 24 March 2021 in *Neubauer et al. v Germany* [2021], 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.

⁷⁰ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') (OJ L 243, 9.7.2021, p. 1). Germany has since raised its 2030 target to at least 65% and brought forward its net zero target year to 2045: *Clean Energy Wire* (2021).

⁷¹ *Supra*, n. 2, paragraph 6.35 of the Supreme Court's judgment.

⁷² Slattery (2019).

ongoing litigation. This would seem to be perfectly respectful of the separation of powers.

Amongst the matters promised in the Climate Action Plan of 2019 was a significantly improved national framework climate law. To this end, the Climate Action and Low Carbon Development (Amendment) Act 2021 recently completed its legislative passage, having been “drafted in response to the recommendations of the Supreme Court,” according to the responsible Minister.⁷³ While not without its flaws, the Act overhauls Ireland’s Climate Act 2015, inter alia setting a net zero target year of 2050 and an interim target of reducing emissions by 51% by 2030 compared to the 2018 level;⁷⁴ provides for a series of 5-year carbon budgets and sectoral emissions ceilings; and reforms and strengthens the role of Ireland’s independent advisory body, the Climate Change Advisory Council. Importantly, the obligation that formed the basis for success in *Climate Case Ireland* has been preserved in the legislation. As such, future climate strategies must cover the entire period to 2050 and must be sufficiently detailed and credible, because a strategy that does not provide for deep, science-based emissions reductions in the short, medium, and longer term will stand no chance of achieving the revised aim of the Act: to achieve “by no later than the end of the year 2050, the transition to a climate resilient, biodiversity rich, environmentally sustainable and climate neutral economy.”⁷⁵

At the level of policy, there have been significant recent changes in Ireland. As experienced elsewhere in Europe, Ireland witnessed a “green wave” in its 2020 general election,⁷⁶ with the Green Party entering coalition government for the second time in its history. Among recent policy changes are a momentous change in land use, with Ireland’s semi-state peat company Bord na Móna announcing its complete exit from peat extraction in January 2021, followed by the announcement of a EUR 126 million peatland rehabilitation project covering a sizeable area of its large landholding, plus plans to raise EUR 1.6 billion to fund a series of climate focused projects.⁷⁷ Even more recently, it was announced that Ireland’s only coal-fired power station (Moneypoint) is to be replaced by a large renewable energy hub.⁷⁸ While individual policy decisions such as these cannot be attributed directly to *Climate Case Ireland*, the case undoubtedly helped to catalyse the 2019 Climate Action Plan, which made the future direction of travel clear, thus helping to create the enabling conditions for such decisions to be taken.

⁷³ Green News (2020).

⁷⁴ One of the most ambitious reduction targets over this period globally, though again not without its flaws (see McMullin et al., 2021).

⁷⁵ Section 3(1) of the Climate Act 2015, as amended.

⁷⁶ Sargent (2020).

⁷⁷ Cox (2021). Bord na Móna’s decision followed years of legal work relating to peat extraction by FIE, An Taisce and others.

⁷⁸ Electricity Supply Board (ESB) (2021). This plan received a setback recently when a key partner withdrew (RTÉ, 2021).

5.3.2 A stronger and more diverse climate movement

Climate Case Ireland certainly fulfilled its aim of helping to strengthen and diversify Ireland's climate movement, serving as a focal point for campaigners of all affiliations and none. Significantly, the influence of *Climate Case Ireland*, which has become a hard-to-define organisational offshoot of FIE, has continued to be felt beyond the closure of its legal proceedings, as witnessed by the important role it played in debates relating to the proposed amendments to the Climate Act 2015, and the leadership role it is now playing in pushing for the establishment of a Citizens' Assembly on Biodiversity Loss, to include consideration of a potential referendum on adding an environmental right to Ireland's Constitution.

5.3.3 An established dialogue between Europe's highest courts

While the *Urgenda* case and *Climate Case Ireland* were ultimately decided on different grounds, the former both inspired and arguably paved the way for the latter: in the present author's view, the Supreme Court of the Netherlands' judgment enabled or emboldened the Supreme Court of Ireland to reach its own landmark decision.⁷⁹

More recently, as noted above, in March 2021 Germany's highest court – the Federal Constitutional Court – held that the provisions of German climate law governing national climate targets and annual emission amounts permitted until 2030 are incompatible with fundamental rights under the German Constitution (Basic Law) insofar as the law lacks sufficient specifications for further emission reductions from 2031 onwards.⁸⁰ In essence, setting an insufficient 2030 target (at least 55% compared to 1990) considerably reduces the emission possibilities remaining after 2030, thus endangering freedoms protected by fundamental rights.⁸¹ As the Court puts it, “one generation must not be allowed to consume large portions of the CO₂ budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom.”⁸²

In reaching this conclusion, the Federal Constitutional Court repeatedly cited with approval the judgments of the Supreme Courts of Ireland and the Netherlands in *Climate Case Ireland* and *Urgenda*, respectively.⁸³ The decision of Ireland's Supreme Court is cited as “of prime relevance” to the following key conclusion of the German Court: “it is imperative under constitutional law that further reduction targets

⁷⁹ The present author does not share the view of Adelmant et al. (2021b) that “a better approach [in *Climate Case Ireland*] may have been not to invoke *Urgenda*, instead focusing on convincing the Irish courts on their own terms”. The Irish courts were always going to need to be convinced on their own terms – i.e. on the basis of Ireland's implementation of the ECHR – but it would have been very unusual not to invoke *Urgenda*, a decision of another Supreme Court in Europe that had addressed its mind to the very issues that were before the Irish courts.

⁸⁰ *Supra*, n. 69.

⁸¹ *ibid.*

⁸² *ibid.*, paragraph 192.

⁸³ *ibid.*, four citations and five citations, respectively.

beyond 2030 are specified in good time, extending sufficiently far into the future”.⁸⁴ As such, we now see a firmly established dialogue between Europe’s highest courts in systemic climate cases, such that litigation that is today hailed as landmark may perhaps tomorrow be viewed as the routine application of climate law principles. As well as hopefully inspiring future climate litigants, this may prove an enduring legacy of early systemic cases such as *Climate Case Ireland*.

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⁸⁴ *ibid.*, at paragraph 253. As Bäumler (2021) explains, “Past 2030...the concrete steps for reaching [the climate neutrality goal] set for 2050 were left open and to be determined by executive orders at a later stage...[T]he fact that the post-2030 period was left largely undetermined violated fundamental rights.” Ekardt (2021) adds that “targets for the period after 2030, but ultimately also before 2030 because of the budget that has already been used up by then, must be significantly tightened up.” Whether Germany’s response (*supra*, n. 70) is legally sufficient remains to be seen.

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Climate change litigation risk: central banks and financial institutions

Prepared by Javier Solana¹

1 Introduction

This paper summarises my presentation at the Legal Colloquium on “Climate change litigation and central banks – action for environment”, organised by the Directorate General Legal Services of the European Central Bank on 27 May 2021. My presentation at the Legal Colloquium and this paper draw mainly from my recent research on climate change litigation in the financial sector (Solana 2020a, 2020b) and on the impact that Eurosystem monetary policy has on climate change (Solana 2019). Where necessary to support my arguments, I also point to other publications, but an interested reader will find references to the relevant academic literature in the three papers already mentioned.

In the first section, I reflect on the climate change litigation risk that central banks face, paying particular attention to the arguments in the recent case filed against the Nationale Bank van België/Banque Nationale de Belgique (NBB/BNB) (hereinafter the “*NBB/BNB case*”),² the first climate change case filed against a central bank. In the second section, I will comment on the main types of claims that financial institutions are likely to face in climate change litigation cases, and I will reflect on the risk that these cases can pose to financial institutions, including reflections on possible ways to monitor this type of risk.

2 Climate change litigation risk for central banks

2.1 The *NBB/BNB case* and the obligation of the Eurosystem to take climate change into account

In June 2016, the Eurosystem launched the Corporate Sector Purchase Programme (CSPP), a further iteration of its Asset Purchase Programme (APP). Under the CSPP, the Eurosystem has purchased assets issued by companies incorporated in

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² For details on the filing, see ClientEarth (2021b).

several Member States of the euro area in an attempt to address problems of a prolonged period of low inflation.³

On 9 December 2016, The Guardian reported on an analysis by Corporate Europe Observatory, a non-profit research group, which revealed that the CSPP portfolio included a high proportion of assets issued by corporations in carbon-intensive sectors. Subsequent research studies have confirmed this “carbon bias” in the CSPP portfolio (Matikainen, Campiglio and Zenghelis 2017; Dafermos et al. 2020) and in other programmes of monetary policy, such as the Pandemic Emergency Purchase Programme (PEPP) (Dafermos et al. 2020).

On 12 April 2021, Client Earth, an environmental law charity, filed a lawsuit before the Belgian courts challenging the validity of the CSPP on the grounds that the European Central Bank (ECB), who is responsible for the design of the CSPP, and the NBB/BNB, who is responsible for the implementation of the programme alongside five other euro area national central banks (NCBs),⁴ have failed to take into account environmental protection requirements when buying assets under the CSPP in breach of the NBB/BNB’s legal obligations. In particular, ClientEarth alleges that the CSPP Decision is invalid and that the NBB/BNB’s implementation of the CSPP Decision “is illegal for breach of the ECB and BNB’s legal obligations to take into account environmental protection requirements, specifically in relation to climate change”.⁵ ClientEarth is seeking a preliminary reference to the Court of Justice of the European Union (CJEU) questioning the validity of the CSPP Decision.

ClientEarth’s arguments can be divided into three different categories. At a substantive level, ClientEarth argues that climate change poses systemic risks that might affect both price stability and financial stability, which the Treaty on the Functioning of the European Union (hereinafter “the Treaty”) expressly identifies as ECB objectives, and that the ECB must act consistently with the EU’s climate objectives and policies pursuant to Articles 7 and 127(1) TFEU (ClientEarth 2021a, p. 4). At a procedural level, ClientEarth argues that the ECB must take into account environmental protection requirements in the design and implementation of its monetary policy pursuant to Article 11 TFEU and Articles 37 and 41(2)(c) of the EU Charter of Fundamental Rights (hereinafter the “EU Charter”) (ClientEarth 2021a, p. 5). Lastly, ClientEarth argues that the ECB must mitigate climate-related financial risks to which it is exposed as a result of asset purchases under the CSPP (ClientEarth 2021a, p. 5).

2.2 The procedural dimension

If the Belgian courts decide to submit a preliminary reference to the CJEU, the procedural arguments identified in Section 2.1 are likely to play an important role. In the past, I have argued that, at a substantive level, Article 11 TFEU confers upon the

³ See Decision (EU) 2016/948 of the European Central Bank of 1 June 2016 on the implementation of the corporate sector purchase programme (ECB/2016/16) (OJ L 157, 15.6.2016, p. 28) (hereinafter the “CSPP Decision”).

⁴ Germany, France, Spain, Italy and Finland.

⁵ See ClientEarth (2021a), p. 1.

Eurosystem the power to promote environmental protection (Solana 2019). From a procedural perspective, however, Article 11 also imposes an obligation on the Eurosystem to take into account environmental protection requirements in the definition and implementation of its monetary policy.

An analysis of the case-law of the CJEU suggests that there may be two standards of compliance under Article 11 TFEU. Under a strict standard, the validity of an act by an EU institution might be compromised if the relevant institution failed to actively engage with relevant scientific data when designing the controversial legal rule. This standard is based on the judgment of the General Court in *Sweden v Commission*,⁶ where the General Court concluded that the scientific dossiers that the Commission had evaluated in the preparation of Directive 2003/112/EC did not contain enough evidence to support the decisions taken and annulled the said Directive.⁷ Under a more lenient standard, “It is only where ecological interests manifestly have not been taken into account or where they have been completely disregarded that Article 6 EC may serve as the standard for reviewing the validity of Community legislation.”⁸

I have argued elsewhere that if the CJEU were to examine the validity of the CSPP Decision in the light of Article 11 TFEU it would probably use a strict standard to interpret the scope of the procedural obligation contained therein (Solana 2019, pp. 562-570). In summary, there are at least two reasons that support this conclusion. First, the CJEU has never actually applied the lenient standard.⁹ The decision of the General Court in *Sweden v Commission* is the only precedent where the CJEU has applied the stricter standard to annul an act of an EU institution. Second, although the CJEU has confirmed on repeated occasions that the ECB enjoys a broad discretion in deciding how to design and implement monetary policy;¹⁰ the CJEU has also identified procedural guarantees as strict limits to that discretion. In particular, “[t]hose [procedural] guarantees include the obligation for the ESCB [European System of Central Banks] to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions.”¹¹ One of the main reasons for procedural guarantees to impose such strict limits is because of their instrumental value for the principle of proportionality: only if the Eurosystem complies with procedural guarantees such as the need to provide express reasons for its decisions will the CJEU be able to review the proportionality of the decision, even if only to uphold the broad discretion of the Eurosystem to design and implement monetary policy. It is not difficult to imagine how the same logic could apply to the procedural obligation

⁶ See the judgment of the Court of First Instance of 11 July 2007, *Sweden v Commission*, T-229/04, ECLI:EU:T:2007:217.

⁷ For a more detailed analysis of this decision, see Solana (2019, pp. 560-561).

⁸ Opinion of Advocate General Geelhoed in *Austria v Parliament and Council*, C-161/04, ECLI:EU:C:2006:66, para. 59. See also the opinion of Advocate General Kokott in *Spain v Commission*, C-304/01, ECLI:EU:C:2003:619, para. 69. Article 6 EC is the precursor to Article 11 TFEU.

⁹ Unfortunately, in *Austria v Parliament and Council*, the Republic of Austria withdrew its application almost six months after the publication of the opinion of Advocate General Geelhoed and before the Court had the opportunity to issue a judgment on the matter.

¹⁰ See for example, the judgment of the Court of 16 June 2015, *Gauweiler and Others v Deutscher Bundestag*, C-62/2014, ECLI:EU:C:2015:400, para. 68, and the judgment of the Court of 11 December 2018, *Weiss and Others*, C-493/17, ECLI:EU:C:2018:1000, para. 24.

¹¹ See *Gauweiler and Others*, para. 69 and *Weiss and Others*, para. 30.

under Article 11 TFEU: only if the Eurosystem takes environmental protection concerns into account expressly when designing and implementing monetary policy will the CJEU be able to review the proportionality of the controversial measures.¹²

If the CJEU were to apply a strict standard of compliance, there are at least three arguments that the Eurosystem could use to argue that it has discharged the procedural obligation under Article 11 TFEU. First, that the Eurosystem has purchased green bonds under the CSPP and other APPs.¹³ Second, that the CSPP has had a positive impact on the financing conditions for eligible green bonds, e.g. in terms of their liquidity and the reduction of spreads (De Santis et al. 2018; Bremus, Schütze and Zaklan 2021; Hilmi et al. 2021). And third, that the so-called principle of market neutrality, which the Eurosystem must observe when designing and implementing monetary policy, prevents the Eurosystem from taking more proactive steps in the promotion of environmental protection, e.g. skewing asset purchases to green bonds (Weidmann 2019).

If the Belgian courts refer a preliminary question to the CJEU in the *NBB/BNB* case the CJEU will have an opportunity to clarify whether it will subject the Eurosystem to a lenient or a strict standard of compliance with the procedural obligation laid down in Article 11 TFEU. Until that happens, this analysis remains speculative, but the nature and scope of the arguments that would probably be at play indicate that, if it is referred to the CJEU, the *NBB/BNB* case could set an important precedent that will define the scope of the Eurosystem's obligations to protect the environment and, in particular, to mitigate the effects of the current climate emergency.

2.3 The vulnerability of the Eurosystem to climate change litigation

The recent *NBB/BNB* case invites the question: is the CSPP the only front of climate change litigation for the Eurosystem? I would argue that it is not. There could be as many as four additional sources of climate change litigation risk for the Eurosystem.

The first source is the CSPP itself, albeit from a very different perspective than in the *NBB/BNB* case: if the Eurosystem were to take a more proactive approach to the promotion of environmental protection and, in particular, to the mitigation of the effects of the current climate emergency, those who have been openly critical of the unconventional measures of monetary policy under the APP might seek to challenge the validity of the CSPP on the grounds that, by taking too proactive an approach to environmental protection, the Eurosystem would be acting beyond the scope of its mandate as defined in the Treaty.¹⁴

¹² For a detailed articulation of this argument, the interested reader may refer to Solana (2019, pp. 564-565).

¹³ According to Cœuré (2018), "Under the [PSPP], we currently hold around 24% of the eligible 'green' universe, estimated to amount to some €48 billion. Under the [CSPP], we hold close to 20% of the eligible 'green' corporate bond universe, which currently has an outstanding volume of €31 billion euros. Under both programmes, the share we hold in 'green' eligible bonds mirrors, by and large, the share of our holdings of the entire eligible universe."

¹⁴ In a recent judgment, the German Federal Constitutional Court left the door open to this kind of challenge. See the Decision of the German Federal Constitutional Court of 15 June 2020, 2 BvR 71/20.

The second source is the PEPP. Dafermos et al. (2020) have confirmed that, like the CSPP, the PEPP has a carbon bias. This would make a potential lawsuit that challenges the validity of the PEPP on similar grounds as those raised in the *NBB/BNB* case a reasonable expectation. As already argued in relation to the CSPP, the appetite for further litigation seems high among those that might seek to challenge the validity of the PEPP on the opposite grounds, i.e. that an attempt by the Eurosystem to take climate change into consideration in the design and implementation of its monetary policy would amount to an act of economic policy that is beyond the mandate of the Eurosystem (Arnold and Chazan 2020). Exposure to climate change litigation risk from both sides puts the Eurosystem in a very sensitive position.

The third source of climate change litigation risk is the ECB's general repurchase policies. The *NBB/BNB* case challenges the implementation of the CSPP by the NBB/BNB, i.e. the net purchases under the programme and the repurchases carried out once assets purchased under the programme have matured. It is safe to assume that the ECB's repurchase policies under other programmes would be subject to the same obligations as those outlined above and, thus, exposed to a similar risk of climate change litigation.

The fourth, and last, source of climate change litigation risk is the ECB's collateral framework. Dafermos et al. (2021) have shown that, like the CSPP and the PEPP, the ECB's collateral framework also has a carbon bias. Most of the arguments raised in the *NBB/BNB* case could be used as a basis for litigation that targets the collateral framework.

I have argued above that the Eurosystem is particularly vulnerable to the risk of climate change litigation as a result of an appetite for litigation on both sides of the argument: those advocating for the Eurosystem to take a more proactive stand on climate change, and those opposed to it. An analysis of climate change from a risk management perspective adds even more complexity to the Eurosystem's exposure to climate change litigation risk. Climate change litigation can be a source of financial risk for the Eurosystem. I delve deeper into this question in the next section.¹⁵ If climate-related financial risks materialise that lead the Eurosystem to suffer financial losses, these losses could further incentivise certain litigants to challenge the validity of those purchases. For example, the allocation of potential financial losses was one of the motivations behind the *Gauweiler* litigation. At the same time, attempting to manage those climate-related financial risks effectively, e.g. by selling those assets with the highest climate-related financial risks, might usher in periods of market and price instability. These effects would run counter to the Eurosystem's objectives.

Nevertheless, the impact that climate change litigation might have on the effectiveness of monetary policy is a greater cause for concern. It is unlikely that successful climate change litigation will result in monetary policy measures being

¹⁵ Although that analysis will focus predominantly on financial institutions it also serves to illustrate the kinds of financial risk that climate change litigation might pose for central banks.

declared void ab initio,¹⁶ but integrating climate considerations presents numerous challenges, not just in operational terms – i.e. which specific measures the Eurosystem can take to discharge its obligations to mitigate litigation risk¹⁷ – but also in terms of effectiveness. If the Eurosystem integrates climate considerations but the transition to a low-carbon economy does not occur quickly enough, will there be sufficient eligible assets for the Eurosystem’s monetary policy to have an effective impact on asset prices? Could the integration of climate considerations reduce the adaptability of the Eurosystem’s responses to emergencies of a different kind, e.g. deep and unexpected economic downturns? Failure to integrate climate considerations into its decision-making processes properly would expose the Eurosystem to a continued risk of litigation.

3 Climate change litigation risk for financial institutions

3.1 Trends

In Solana (2020a), I argued that there is a growing trend of climate change litigation in financial markets.¹⁸ As at 31 December 2018, 56% of cases had been filed between 2018 and 2016, with 30% of cases filed in 2018 alone. This is in line with the growing trend of climate change litigation as more broadly documented in Setzer and Byrnes (2020).

In Solana (2020a), I identified eight different types of climate-related claims that might arise in financial markets:¹⁹

1. claims that a given financial decision violates fundamental rights, especially those related to the protection of the right to life, the right to home and family life, the right to a safe and healthy environment, the right to human dignity, and due process rights;
2. claims that question the extent to which supporting the mitigation of, and adaptation to, climate change falls within the scope of a specific mandate, e.g. that of a central bank, but also that of trustees and fund managers;
3. claims based on the need to engage in some form of environmental assessment as part of the decision-making processes of public and private institutions;

¹⁶ The CJEU would probably be reluctant to take such a bold step, especially given the unpredictability of the consequences that such a decision could have on financial markets. Indeed, it is interesting to note that, in the *NBB/BNB* case, the claimant “asks the court to order the Belgian central bank to stop purchasing bonds under the programme”. ClientEarth (2021b).

¹⁷ For the interested reader, ClientEarth (2021a) outlines a series of actions that the Eurosystem could take to discharge its climate-related obligations.

¹⁸ Interested readers might want to refer to Solana (2020a, pp. 106-108), where I explain the methodology for categorising the relevant cases.

¹⁹ Space constraints prevent me from identifying specific cases that illustrate each of these claims. The interested reader may want to consult section 3 of Solana (2020a) for specific references.

4. alleged breaches of disclosure obligations, both in primary and secondary markets;
5. claims for breach of contract, particularly in relation to green financial products such as green bonds and sustainability-linked loans;
6. claims for breach of fiduciary duties of directors and trustees of financial institutions;
7. negligence claims that seek compensation for loss and damage resulting from the inaction of public authorities to address the climate crisis; and
8. public nuisance claims in tort against financiers as “indirect polluters”, especially in the context of project finance transactions.

Amongst the cases identified in the dataset, claims that relate to decision-making processes and alleged breaches of disclosure obligations were the most common. Given the growing popularity of the recommendations prepared by the Task Force on Climate-related Financial Disclosures (2017)²⁰ and their more advanced stage of implementation, compared with other regulatory initiatives to promote sustainable finance, I also argued that disclosure obligations are likely to attract much attention from potential claimants. Since the article was published, a few developments seem to confirm this intuition. First, in some jurisdictions it is now mandatory to disclose climate-related financial risks and the number of such jurisdictions is likely to rise in the short to medium term.²¹ Second, prospective claimants may see the settlement in *McVeigh*²² as evidence of the potential for disclosure obligations to secure advancements in the integration of environmental concerns into corporate decision-making. Third, financial supervisors have recently reported that banks and other financial institutions are significantly lagging behind in their disclosure of climate-related financial risks,²³ thus making them particularly vulnerable to this type of claim.

3.2 Climate change litigation as financial risk

For the past six years,²⁴ the idea that climate change may give rise to financial risks has been gaining traction. The prevailing understanding of climate change as a source of financial risk identifies two main categories of climate-related risks: “physical risks” deriving from climate- and weather-related events, and “transition risks”, which could result from the process of adjustment towards a lower-carbon

²⁰ Available at www.fsb-tcf.org/recommendations

²¹ For an overview of different initiatives, see Davies et al. (2020).

²² *McVeigh v Retail Employees Superannuation Pty Ltd.*, Federal Court of Australia, General Division, New South Wales District, NSD1333/2018. A brief summary of the case can be found in the Climate Change Litigation Database run by the Sabin Center for Climate Change Law at Columbia University: www.climatecasechart.com/climate-change-litigation/non-us-case/mcveigh-v-retail-employees-superannuation-trust/

²³ See, for example European Central Bank (2020b).

²⁴ I take Carney (2015) as a point of reference in the debate about climate-related financial risks.

economy.²⁵ Among the latter, policy makers normally include “liability risks”, which could arise “if parties who have suffered loss or damage from the effects of climate change seek compensation from those they hold responsible”.²⁶

In Solana (2020b), I argued that this understanding of climate-related liability risks is very narrow because it is regarded as a risk that will primarily affect insurers, since companies will normally have liability insurance policies in place that will cover any pay-outs and fines resulting from climate change litigation.²⁷ Moreover, the term only covers one of the several potential costs that can arise from climate change litigation: that associated with pay-outs and fines. In Solana (2020b), I identify at least five additional types of costs that may result from climate change litigation: legal and administrative costs, insurance costs, financing costs, reputational costs, and costs resulting from increased counterparty credit risk.²⁸ This narrow definition of climate-related liability risks downplays the complexity of climate change litigation and threatens to underestimate the financial risks of the current climate emergency.

A closer examination of the potential costs that may arise from climate change litigation reveals several points that may be of interest to financial institutions, as potential targets of this type of litigation, and to those tasked with their supervision. First, climate change litigation can impose costs on a financial institution when it is a party to the case (what I call “direct costs”) as well as when it is not involved in the litigation at all (what I call “indirect costs”), e.g. when the litigation involves one of its client debtors or a company in the same industry.²⁹ Examples of direct costs include: pay-outs and fines, legal and administrative costs, insurance costs, financing costs, and reputational costs. Examples of indirect costs include: counterparty credit risk, market risk, insurance costs, and reputational costs.³⁰

Second, contrary to popular understanding, not all direct costs arise at the end of legal proceedings. Climate change litigation can give rise to direct costs at any stage of the litigation, including the stage when the case is only being prepared and has not been filed. The same is true for certain indirect costs, especially reputational costs, which are pervasive. This is the third important point. Reputational costs can be both direct and indirect and they can arise at any stage of the litigation process, even before legal proceedings have commenced at all. The other type of cost that could have a significant economic impact on financial institutions is pay-outs and

²⁵ See, for example Network for Greening the Financial System (2019).

²⁶ See Carney (2015).

²⁷ See Prudential Regulatory Authority (2018).

²⁸ In the limited space that I have I cannot elaborate on each of these costs. The interested reader will find a more detailed analysis of each of these categories in Solana (2020b, pp. 349-361).

²⁹ I use these terms in a slightly different way from the academic literature that examines the costs of litigation. In this literature, the term “direct costs” is used to describe the costs imposed expressly by a court order or an administrative decision. For a detailed discussion of the differences between these two approaches, see Solana (2020b, pp. 349-350).

³⁰ For a detailed analysis of each of these costs, see Solana (2020b, pp. 349-361). Market risk is not included as an example of indirect costs in that analysis, however. The preparation of this paper has helped me develop my thoughts on this point. By market risk I mean the risk that the market price of assets issued by a company facing climate change litigation might be affected as a result of that litigation and the cost that such an impact might have on a financial institution that holds those assets on its balance sheet.

finer. Whether these are also the most significant type of cost is an empirical question.

To date, the empirical evidence of the cost of climate change litigation is very meagre. Event studies, a method that is frequently used to evaluate the impact of different types of litigation on the market prices of financial assets, suggest that litigation can have negative impacts on the market price of shares issued by defendant companies; but event studies have not yet been carried out to evaluate the impact of climate change litigation (Setzer and Byrnes, 2020 p. 25). Anecdotally, the Legal Colloquium for which I was asked to prepare this paper was held on 27 May 2021, the day after a district court in The Hague handed down a landmark decision requiring the Shell group³¹ to further reduce the carbon emissions of its global activities by 45% by 2030 instead of 20% as required by the Shell group's current policy. The decision by the district court in The Hague has been heralded by climate lawyers as a "turning point in the fight against big oil" (Khan 2021).

Such a landmark decision, however, did not seem to have any impact on the market price of the Shell group's shares, which actually rose on the day when the decision was handed. In the limited space that I have here, I can only speculate about why that might have been the case. I can offer two possible explanations. First, investors in financial markets may be factoring in the Shell group's declared intention to appeal the district court decision. In other words: they are sceptical that the Shell group will have to abide by district court's decision. Second, although the court decision requires the Shell group to take action in the short term by revising its current emissions policy to increase its 2030 reduction target, whether the Shell group meets the 2030 target will not be ascertainable until at least a few more years into the future. In other words, even if investors were concerned about the Shell group's ability to meet the revised reduction target by 2030, a period of slightly more than eight years still leaves ample room for the Shell group to react. If anything, the decision by the district court in The Hague might give those shareholders in the Shell group who want to accelerate the transition to a less carbon-intensive business model additional leverage to put pressure on the company's directors to achieve the revised reduction target by 2030. But this type of impact is very different altogether from the potential impact on shares prices that event studies try to measure.

Reputational costs may arise in forms other than drops in share prices. Homanen (2018), for example, documents how negative deposit growth is a common reaction to bank scandals, including those associated with the financing of controversial environmental projects such as the Dakota Access Pipeline in the United States.

Other types of costs, such as pay-outs and fines, and legal and administrative costs, do arise but the data available may be scarce, e.g. because the cases are settled out of court and details of the settlement are not made public, or if companies disclose data on the costs of hiring legal services but do not break these costs down to specific cases. Moreover, given the reaction of many insurance and reinsurance companies to the aggravation of climate change, e.g. by adjusting the terms of their

³¹ Judgment of The Hague District Court of 26 May 2021 in Case C/09/571932 *Milieudefensie et al. v Royal Dutch Shell plc.*, English translation available at www.climatecasechart.com.

commercial general liability policies to reduce their exposure (Reeves and Umbert, 2019),³² we can reasonably expect insurance costs to rise in the near future. The data that is currently available makes it difficult to estimate these potential increases in insurance costs, but recent data collection initiatives may improve our ability to quantify these costs in the near future.³³

3.2.1 Implications for the ECB

As a source of financial risk, climate change litigation has several implications for the ECB. First, as a financial supervisor, the ECB may want to integrate climate change litigation risk into its supervisory toolkit. By pointing to climate litigation as a potential source of financial risk in its “Guide on climate-related and environmental risks” (ECB 2020a, pp. 28 and 39), the ECB draws the attention of supervised institutions to this type of risk and encourages them to improve their understanding of any potential exposures to such risk. The ongoing self-assessments based on the supervisory expectations outlined in the guide will shed some light on the extent to which supervised institutions perceive climate change litigation as a financial risk. If these self-assessments do not reflect on this issue, supervisors should take the subsequent supervisory dialogues as an opportunity to support supervised institutions in their understanding of the potential risks involved. The analysis in Solana (2020b), which I have tried to summarise in this paper, could provide a starting point for discussion.

Supervisory expectations and self-assessments are a first step in the right direction, but there are other supervisory tools that could help both the ECB and the financial institutions it supervises gain a better understanding of climate change litigation risk. For example, as the ECB prepares its next supervisory stress test on climate-related risks, currently planned for 2022, the ECB could include several questions that aim at collecting data that will allow the ECB and its supervised institutions to better evaluate the potential costs arising from climate change litigation. The Bank of England (2021) already includes a set of qualitative questions in its Biennial Exploratory Scenario³⁴ addressed to general insurers. While this set of questions may provide a useful guidance to the ECB and other financial supervisors interested in gaining a better understanding of climate change litigation as a source of financial risk, e.g. with the use of hypothetical cases to structure the data collection exercise, it may also provide too narrow a view given its specific focus on general insurers. The analysis in Solana (2020b) suggests that the potential scope of climate change litigation as a source of financial risk goes well beyond insurance costs, meaning that the ECB and other financial supervisors may want to consider expanding the scope of the data collection to cover other types of costs as identified in Solana (2020b) and summarised in the preceding section.

³² See also, the cases reviewed in Solana (2020b, p. 352).

³³ For example, as part of its Biennial Exploratory Scenario, the Bank of England has included a series of questions that aim to gain a better understanding of potential exposures to climate-related litigation risk for general insurers. See Bank of England (2021, pp. 41-45).

³⁴ Bank of England (2021).

Second, the ECB is exposed to both direct costs from climate change litigation, as a result of its own exposure to climate change litigation risk, which the analysis of the *NBB/BNB case* in Section 2.1 illustrates, and indirect costs, as a result of the risk of climate change litigation that several relevant third parties face, e.g. issuers of assets purchased or held as collateral by the ECB, or counterparties in monetary policy operations. As a result, the ECB may want to incorporate climate change litigation risk into its own risk management framework.

However, the ECB will face several challenges in attempting to quantify the direct and indirect costs of climate change litigation. The first, and most obvious, is the scarcity of data necessary to calculate some of these costs, e.g. data on the specific costs of legal defence in climate change cases, details of any pay-outs that may be agreed in out-of-court settlements, and details on the terms of insurance policies that may affect the extent to which any losses incurred as a result of climate change litigation may be recovered under relevant insurance policies. As I explained above,³⁵ recent data collection initiatives may improve our ability to quantify some of these costs, such as insurance costs, but others are likely to remain out of the public domain given their sensitivity. Certain tools available to financial supervisors could help them fill some of these data gaps.

In addition to the scarcity of data, there are also several methodological challenges.³⁶ For example, backward-looking exercises are likely to be of little relevance: the lack of legal precedents is not a reliable indication of future climate change litigation risk. Climate change litigation is a complex phenomenon where different factors might lead to a sudden increase in the likelihood of cases being filed.³⁷ Forward-looking exercises would be better suited to capture this complexity. Scenario analyses seem particularly well suited for this task.³⁸

Moreover, the method used to calculate the financial impact of other types of litigation may not be transferrable to the evaluation of costs arising from climate change litigation.³⁹ These evaluations are sensitive to legal variables such as the type of claim, the type of remedy being sought or the type of sanction, and the court or administrative authority issuing the decision, which vary across different types of cases and jurisdictions. An accurate estimation of all these legal variables would require an in-depth legal analysis. For entities with an extensive international presence, the exercise can become very complex and costly.

Even if financial supervisors were able to estimate all of these costs, despite the challenges of a multi-jurisdictional legal analysis, a forward-looking exercise would

³⁵ *ibid.*

³⁶ Here I summarise the most evident challenges. I invite interested readers to read Solana (2020b, pp. 361-364) for a more detailed analysis of these and other methodological challenges.

³⁷ For a more detailed analysis of some of the sources of this complexity and how they might change the prospects of climate change litigation in the future, see Solana (2020b, pp. 361-362).

³⁸ For example, De Nederlandsche Bank has used scenario analysis to develop credit risk assessments to size the financial impact of climate-related risks to micro-prudential objectives (Regelink et al., 2017). The results have pointed to an increase in climate-related claims against insurance companies as a result of climate change under all the different scenarios. This analysis, however, focuses on the insurance industry and only covers certain types of costs (Solana 2020b, p. 362).

³⁹ For example, studies of the impact that tobacco and asbestos litigation have had on shareholder wealth. See Setzer and Byrnes (2020, pp. 25-26).

face the additional challenge of estimating the probability of a suit being filed or an investigation being initiated. The factors that determine a claimant's decision to file a case or a supervisor's decision to initiate an investigation are numerous and, in many cases, very subjective (Solana 2020b, p. 363). One way of estimating the probability of a climate lawsuit being filed might be to use an institution's volume of potentially stranded assets as a proxy for the risk of climate change litigation.

4 Conclusion

There is evidence of a growing trend of climate change litigation in financial markets. As the recent *NBB/BNB case* illustrates, this trend has now reached central banks. Such direct exposure gives central banks a strong incentive to better understand climate change litigation risk. However, central banks may also be indirectly exposed to the risk of this type of litigation through the institutions whose assets central banks purchase or accept as collateral, or the institutions that act as the central bank's counterparties in monetary policy operations. Moreover, the potential costs that climate change litigation might impose on the institutions involved in such litigation would also require financial supervisors to gain a better understanding of this type of litigation as a source of financial risk. These are issues that I have explored in some of my recent work. I have tried to summarise some of the main points here, but I invite interested readers to refer to the original publications for a more detailed analysis.

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PDF ISBN 978-92-899-4798-5, ISSN 1830-2696, doi:10.2866/691992, QB-YH-21-001-EN-N