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Turbulence and crises can escalate litigation, as evidenced by the many claims spawned by the 2008 financial crisis and the deluge of disputes brought about by the COVID-19 pandemic. Climate change is a global issue with widespread effects, and related litigation cases are rising around the world. Those who suffer or expect to suffer loss as a result of climate change are already pursuing judicial remedies and looking to recover damages or fund abatement efforts.¹ Others are using litigation as a tool to leverage more ambitious climate policy and actions or to oppose them.

The current rise in climate change litigation is taking place against a backdrop of increasing societal awareness and scientific knowledge of climate change, changing requirements for states and corporations triggered by the proliferation of national and international agreements and commitments on climate change, and an evolution in the fields of energy production, transportation and heavy industry, to name a few. To reach the climate change goals set out in the Paris Agreement² and pivot away from fossil fuel dependence, policy advisors are outlining the need for dramatic business model transformations in different economic sectors as well as profound changes in everyday life that impact core and essential sectors of the world economy.

There are increasing signs that we have entered a period of transition towards a net-zero economy, with actions gaining momentum within both the public and private sectors. The availability of new technologies, e.g. green, clean and carbon capture and storage, is being coupled with increasing government willingness to support the shift to a net-zero economy, with some governments making 'green' investment part of their post-pandemic recovery plans.

Other important developments are taking place in the financial sector, including growing adoption of the Financial Stability Board's Task Force on Climate-Related Financial Disclosures recommendations for assessing and disclosing climate risk and supporting informed decision-making for investing; sustainable finance initiatives to mobilise mainstream finance to invest in the transitioning; and considerations of climate risk by financial and insurance regulators and international rating agencies.³

However, an orderly transition requires coordination in terms of effort and scale. A disorderly transition could disrupt the global economy. Those who do not successfully navigate it and are left with devalued investments and assets – whether carbon-intensive or carbon-reliant – could potentially face litigation, for example, for causal contribution to climate change, miscommunication or failure to adapt, or issues related to duty of care and their role in society.⁴

The Geneva Association, in collaboration with leading legal experts, conducted a study to better define the boundaries of this growing global phenomenon, further understanding of its development and impact, and explore the potential risks and opportunities that it entails.

Key findings

1. **Climate change is a source of new laws, standards and duties of care.** Specifically, the recognition of a duty of care to protect against the harms associated with climate change has given prospective litigants additional choice of grounds and has emboldened the novel use of existing laws.⁵ International commitments of nation states coupled with political responses to climate change have prompted a large volume of new laws and regulations, such as taxes on carbon and restrictions on certain materials or processes. This leads to a higher compliance burden on companies, especially in high-emitting sectors. The enforcement of these laws and regulations can give rise to regulatory investigation, sanctions, fines or litigation. At the same time, rising standards of care and lower legal thresholds can make successful claims more likely.

¹ Ganguly et al. 2018.

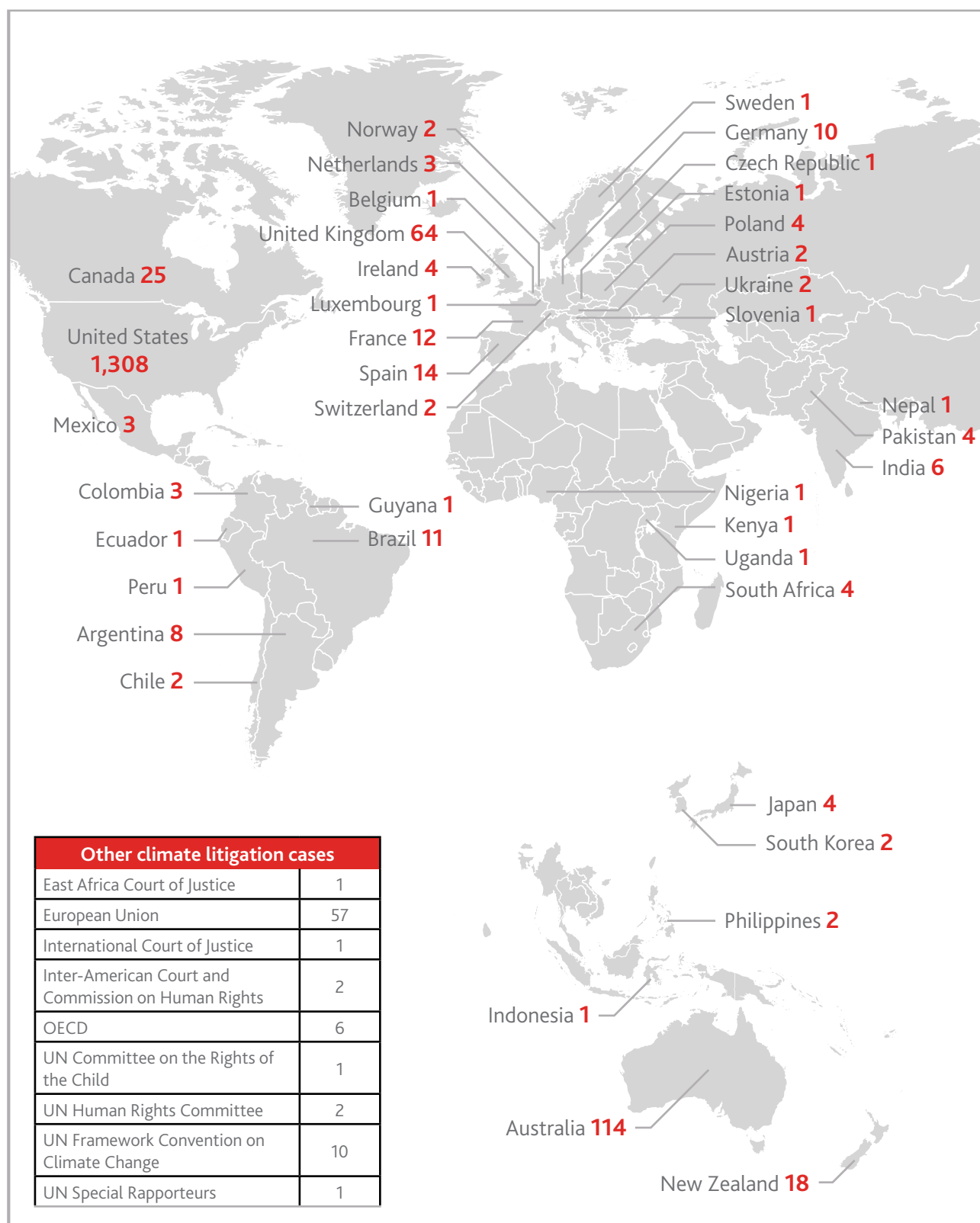
² United Nations 2015.

³ The Geneva Association 2021, Authors: Maryam Golnaraghi et al.

⁴ Solana 2019.

⁵ For example, the decisions related to *Urgenda Foundation v. State of the Netherlands*, where the Dutch Supreme Court found that the Dutch government's inadequate action on climate change violated a duty of care to its citizens, are now being used by plaintiffs in *Milieudefensie v. Royal Dutch Shell*, who seek to extend the same general principle to oblige private actors to help prevent dangerous climate change.

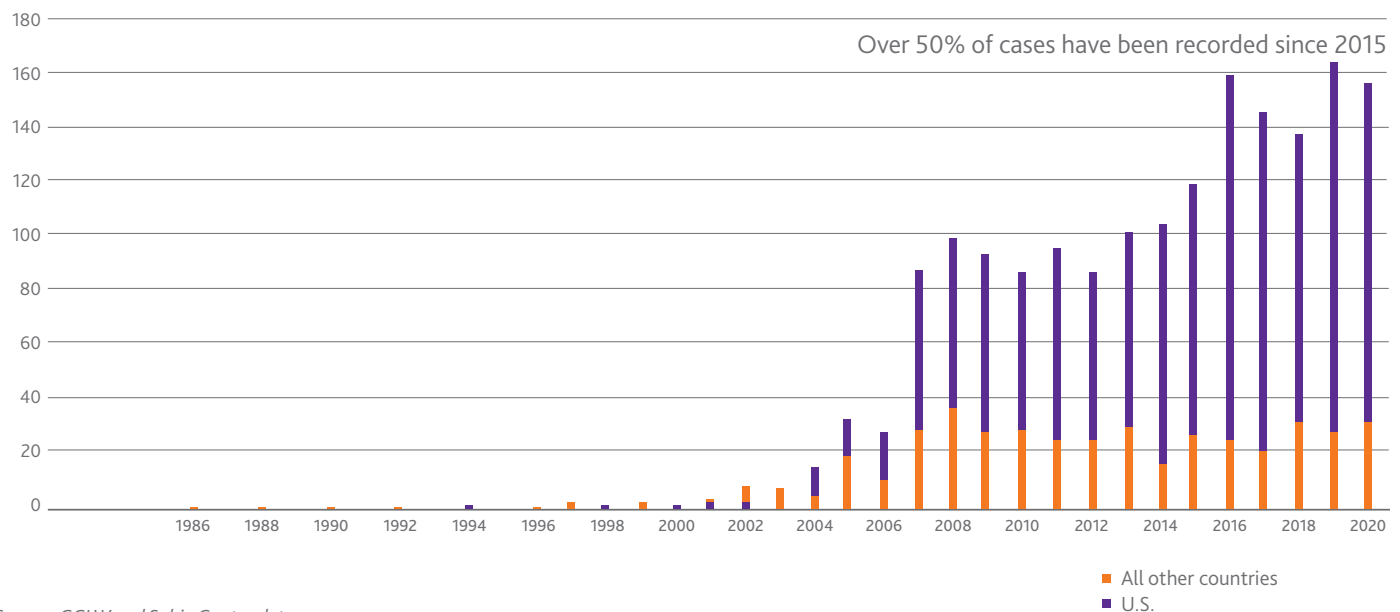
Figure 1: Geographical distribution of 1,727 cases worldwide (of which 419 are outside the U.S.) (1986–2020)



Source: CCLW and Sabin Center data⁶

6 Setzer and Byrnes 2020.

Figure 2: Total recorded climate change litigation cases (1986–2020)



Source: CCLW and Sabin Center data

2. Since the adoption of the Paris Agreement, climate litigation has gained pace, increased in volume and expanded in scope and geographical coverage.

Importantly, more than half of the total recorded cases have been brought since 2015. Three distinct waves since the 1980s can be identified:

- *The first wave* (pre-2007) was predominantly in the U.S. and Australia, with cases primarily against national governments to raise environmental standards.
- *The second wave* (2007–2015) involved a surge in climate cases with expansion to European countries and courts, primarily against governments to accelerate climate policy and tortious cases against corporations for their causal contribution to climate change.
- *The third wave* (post-2015) is characterised by the expansion of litigation to other jurisdictions, increases in volume and pace, and new types of claims. The most prominent cases involve novel causes of action and the application of established legal duties, including shareholder actions against corporate leadership or claimants using constitutional and human rights laws to force governments and companies to adopt more ambitious climate policies.

3. Climate litigation cases can be classified in a variety of ways.

- *Motivation* (private interest cases versus strategic cases). While some claims are brought in pursuit of private interest alone, cases are increasingly designed to achieve outcomes

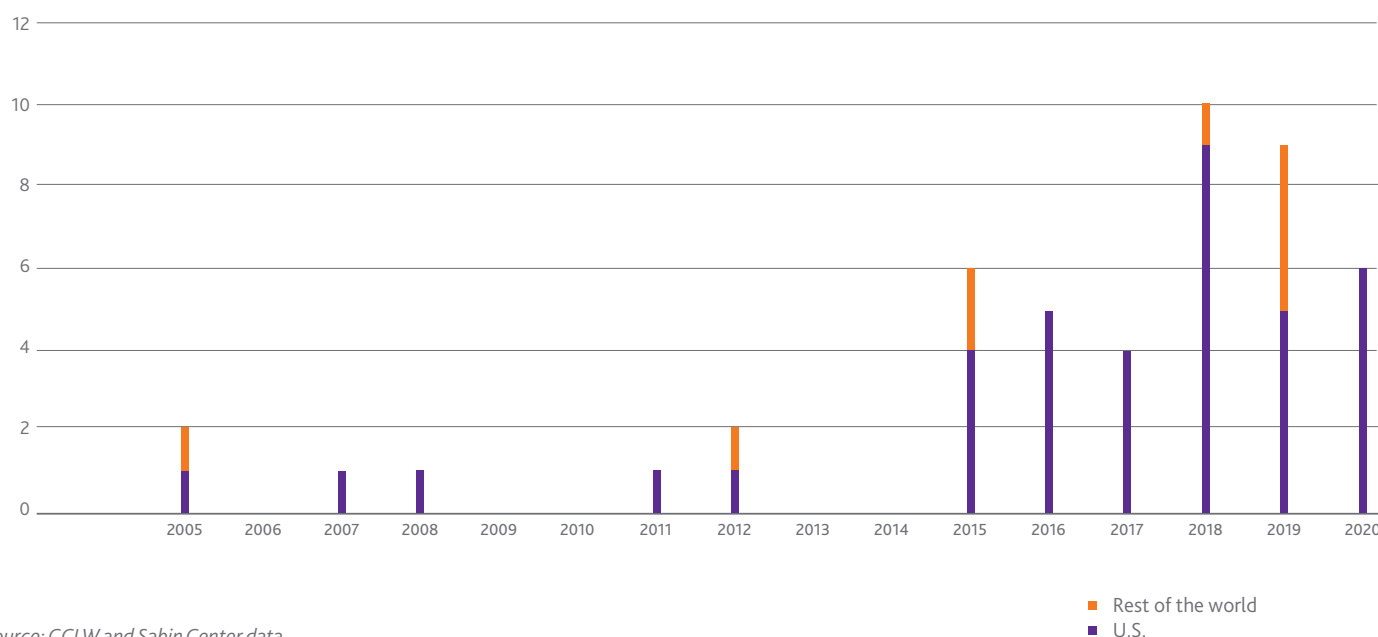
that go beyond obtaining results for the litigant bringing the case. These so-called *strategic* cases seek to advance climate policies, drive behavioural shifts in key actors, and/or create awareness and encourage public debate. Litigants bringing such cases make strategic decisions about who will bring the case, where and when the case will be filed, and what legal remedy will be sought. Strategic climate litigation can also be 'anti-climate'. These cases oppose climate change adaptation and/or mitigation projects/policies/legislation, for example claims filed by conservationists against renewable energy producers due to threats to wildlife and biodiversity.

- *Litigants (defendants and claimants)*. In past years, cases have been brought by a variety of plaintiffs such as individuals, corporations, non-governmental organisations and governments, primarily against governments and corporations.
- *Extent to which the case is about climate change*.
 - *Climate change is central to the case*: It is at the 'core' of the legal argument.
 - *Climate change is peripheral to the case*: There is explicit reference to climate change, but litigants rely on other grounds to call for climate-related behavioural change.⁷
 - *Climate change is incidental to the case*: This includes cases that make no specific reference to climate but there are practical implications for climate change mitigation or adaptation. Litigation challenging the implementation of new technologies (e.g. carbon capture and storage) and large-scale wind and solar fields is more likely to have climate as an incidental aspect of the case.⁸

⁷ Climate change has started to be considered at least as a peripheral matter in cases which, until recently, would not have mentioned climate change; for example, cases dealing with issues of air pollution, protection of forests, companies' obligations under emissions trading schemes and risks to coastal developments resulting from sea level rise.

⁸ Moreover, a case may be filed for the true purpose of addressing climate change, but litigants might opt against framing it as a climate change case for strategic reasons.

Figure 3: Cases against carbon majors between 2005 and 2020 (U.S. and the rest of the world)



Source: CCLW and Sabin Center data

- Governments and corporates are being targeted by a wide range of litigants in many jurisdictions, using myriad sources of legal duties.** At the time of writing, the majority of cases have been brought against governments. However, there is clear evidence that the number of lawsuits against corporate entities (particularly carbon majors) is on the rise.

Some cases brought against states seeking increased climate mitigation ambition have been successful, such as *Urgenda Foundation v. State of the Netherlands*, *Friends of the Irish Environment v. Ireland* and *Ashgar Leghari v. Federation of Pakistan*. To date, the most high-profile liability cases against corporates have been stayed, or are subject to a variety of jurisdictional disputes, such as *People of the State of New York v. ExxonMobil Corporation*, *Commonwealth v. ExxonMobil Corporation and BP p.l.c.* v. *Mayor & City Council of Baltimore* – the U.S. Supreme Court has just heard oral arguments on the latter, and will determine whether the case can be heard in State or Federal Court. Yet, even before a final judgment, these cases have attracted considerable media attention.

- Climate litigation risk is being amplified by seven key factors.** 1) Increased physical and transition risk; 2) increasing awareness of the climate crisis; 3) stronger climate commitments from governments, corporates and investors; 4) availability of funding for climate litigation; 5) evolving legal duties; 6) developments in climate change attribution science; and 7) the implications of COVID-19 on economic recovery and climate-related actions.

- Climate change-related litigation is a truly global phenomenon, with cross-pollination of ideas, strategies and support across jurisdictions.** This is linked to the emergence of more data and accessible global data platforms, plaintiffs using cases from different jurisdictions in novel ways, the rising number of precedent cases and a growing network within the legal community.
- Climate change disputes are also within the purview of alternative dispute resolution mechanisms.** This includes both mediation and arbitration of commercial disputes and investor-state arbitration (aka investor-state dispute settlement). The fact that these mechanisms are generally confidential means climate change disputes resolved in these ways are difficult to examine and quantify.

References

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