

Rising Sea Levels: Promoting Climate
Justice through International Law:
Climate Change Litigation before
Domestic Courts





**British Institute of
International and
Comparative Law**

Mission Statement

The British Institute of International and Comparative Law exists to advance the understanding of international and comparative law, and to promote the rule of law in international affairs.

Vision

To be a leading research institute of international and comparative law and to promote its practical application by the dissemination of research through publications, conferences and discussion.

Table of Contents

- Summary 4
- 1. Introduction..... 5
- 2. The Costs of Climate Litigation to the Insurance Industry..... 6
- 3. Perspectives from the Global South..... 9
- 4. Climate Litigation from the UK Perspective 11
- 5. Q&A Session 14

Summary

The British Institute of International and Comparative Law (BIICL) and Landmark Chambers, London held a webinar series on '[Rising Sea Levels: Promoting Climate Justice through International Law](#)'. The series approached climate-induced sea level rise as a global and intergenerational problem and the legal implications arising from it from the lens of international law and climate justice.

Four separate webinars were held examining the topic from different legal dimensions:

- Webinar 1: Rising Sea Levels & International Law: The role of the International Law Commission
- Webinar 2: Rising Sea Levels: A Matter for the ICJ?
- Webinar 3: Rising Sea Levels: Climate Displacement as a Human Right Violation
- Webinar 4: Rising Sea Levels: Climate Change Litigation before Domestic Courts

Participants included Government representatives, representatives of international governmental and non-governmental organisations, academics and practitioners of international law, and members of civil society. The webinar series was convened by [Dr Constantinou Yiallourides](#), Arthur Watts Research Fellow in the Law of the Sea, BIICL. BIICL wishes to thank all speakers, and, indeed, all those attending the series for their support and active participation.

The present report provides a summary of the discussion and synthesises some of the main conclusions of Webinar 4: Rising Sea Levels: Climate Change Litigation before Domestic Courts, held on 24th March 2021.¹ The panel discussion was convened by [Ivano Alogna](#), Arthur Watts Research Fellow in Environmental and Climate Change Law, BIICL, and chaired by the [Rt. Hon. Lord Carnwath of Notting Hill](#), Former Judge of UK Supreme Court; Landmark Chambers. Panellists: [Alex Goodman](#) (Barrister at Landmark Chambers), [Jason Reeves](#) (Managing Partner, Zelle LLP), [Dr Joana Setzer](#) (Assistant Professorial Research Fellow at the Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science), and [Deepa Sutherland](#) (Senior Associate, Zelle LLP).

This report is issued on the understanding that if any extract is used, BIICL should be credited, preferably with the date of the event.

Suggested Citation:

British Institute of International and Comparative Law, '*Rising Sea Levels: A Matter for the ICJ?*' (11 March 2021) <<https://www.biicl.org/events/11468/webinar-series-rising-sea-levels-promoting-climate-justice-through-international-law>>.

¹ The recording of the event can be found here: <https://www.youtube.com/watch?v=2bKlbSEv13Y>.

1. Introduction

1. On the 24th March, as part of the Rising Sea Levels: Promoting Climate Justice through International Law webinar series, the British Institute for International and Comparative Law, with the support of Landmark Chambers, assembled a panel to discuss the latest developments in domestic climate change litigation. The particular focus was on liability for climate change harms and damages that result from rising sea levels. The discussion was convened by Ivano Alogna (BIICL) and brought together Alex Goodman (Landmark Chambers), Jason Reeves and Deepa Sutherland (Zelle LLP), as well as Dr Joana Setzer (Grantham Research Institute on Climate Change and the Environment, London School of Economics), with the Rt. Hon. Lord Carnwath as chair. In brief, the discussion aimed to consider the rise in climate litigation from a range of perspectives: as a risk to the insurance industry, or as an opportunity to spur governmental action in the UK and in jurisdictions in the Global South.

2. The Costs of Climate Litigation to the Insurance Industry

2. The discussion began with a presentation from Ms Deepa Sutherland of Zelle LLP on the real and increasing risk that the insurance industry faces as a result of the rising trend in domestic climate litigation. What is more, the industry is vulnerable on several fronts: first, as an investor with shareholder obligations, and second, as an underwriter to claims against its policyholders. With regard to the latter, insurers are particularly concerned by both the uncertainty and reach of liability exposure for climate change-related claims, which could pose a threat to the industry itself. With the climate crisis continuing unabated, climate litigation is also on the increase and Carbon Majors (blue chip policyholders, in insurance terms) are being targeted for their contribution to the crisis. Behind each lawsuit are several liability insurers with a duty to defend policyholders — put simply, someone is going to have to foot the bill.
3. Ms Sutherland gave a brief overview of the relevant judgments in what is known as the first wave of climate litigation. Though in *Massachusetts v EPA*² the United States Supreme Court held that greenhouse gases could be regulated by the Environmental Protection Agency under the Clean Air Act, this first wave of litigation was largely unsuccessful, with cases often dismissed at an early stage on issues such as standing.³ Pertinent to the insurance industry, Ms Sutherland also noted the case of *AES Corporation v Steadfast*,⁴ which was the only case relating to an indemnity insurer's duty to defend a policyholder (here, a power company) accused of causing climate change. The case turned on the issue of knowledge and whether the defendant actually knew, or reasonably could have known, that the damage caused by its emissions was reasonably foreseeable. The Virginian Supreme Court found the harm to be 'the natural or probable consequence' of AES's emissions, therefore, holding that the damage could not be considered either an occurrence or accident under the policy, which would have been covered.
4. Despite the limited success of this first wave of litigation, Ms Sutherland emphasised that circumstances have changed. In fact, in 2018 alone, 13 nuisance suits were filed — the start of the second wave of litigation. These suits allege that various Carbon Majors created a public nuisance and, as such, should be responsible for paying for the damage associated with climate change and for the costs of adaptation against, inter alia, rising sea levels. What is more, it appears that this second wave is proving more resilient than its predecessor. That is, these cases have not been dismissed so readily at early stages in the litigation process — success that Ms Sutherland argues comes down to both improvements in climate attribution science and the renowned Carbon Majors Study.⁵ As it stands, these suits are awaiting input from the US

² (2007) 549 U.S. 497, see: <http://climatecasechart.com/case/massachusetts-v-epa/>.

³ See e.g., *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009). See: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2009/20090930_docket-408-cv-01138-SBA_order.pdf.

⁴ 725 S.E.2d 532 (Va. 2012). See: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2012/20120420_docket-100764_opinion.pdf.

⁵ R Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122 *Climatic Change* 229.

Supreme Court on the technical question of the appropriate venue for such claims to be heard.⁶ Defendant corporates, on the one hand, would prefer for such claims to be heard in federal courts, as it is more likely that they will either be dismissed at an early stage or, if they make it to the highest level, will be heard by a conservative-leaning Supreme Court. Claimants, on the other hand, feel that such cases are suited for state courts, as they are more likely to proceed further, and they deal with local issues and damages with which juries would have some familiarity.

5. Another avenue that municipalities are using is domestic fraud action against corporations who engage in misleading or fraudulent behaviour. Ms Sutherland highlighted two cases that implicate Exxon Mobil – one from New York⁷ and an ongoing case in Massachusetts.⁸ Whilst the former case was unsuccessful (the court held that the claimant had not demonstrated that Exxon’s statements had, in fact, misled any investors), Ms Sutherland highlighted that the latter case could be significant, given that Massachusetts domestic law allows for a wider basis for a claim to include misleading consumers. Furthermore, Ms Sutherland explained that, as it regards Carbon Majors, the sustained deception and the timeline is reminiscent of the tobacco litigation, though it is unlikely that climate litigation will take a further 20-30 years before it brings about meaningful, substantive results.
6. One message, however, rings clear from this second wave: climate litigation, as a risk to the insurance industry, is here to stay. If anything, the resolve of both claimants and their lawyers is strengthening. First, referencing both *Massachusetts v. Exxon Mobil* and *Juliana v. US*,⁹ we are witnessing the real-time amendment of actions so as to increase the chances of success. Second, the increase in litigation based on human rights demonstrates that claimants are after broader goals, that is, a transformation in corporate behaviour. Third, lawyers and claimants are becoming increasingly creative with the causes of action selected and the arguments deployed. Indeed, as climate and attribution science develops, Ms Sutherland noted that we may begin to see subrogation actions or D&O [directors and officers] claims.
7. Therefore, given the real and pressing risk that climate litigation poses for insurers, Ms Sutherland emphasised two immediate courses of action for insurers. First, it is clear that the industry does not, at present, afford the risk of climate litigation sufficient weight — a claim reiterated by a recent report by the UN Environment Programme:

‘[I]nsurers and insurance coverages do not yet seem to have paid out claims based on climate change-related litigation. Given this context, it appears that insurers have not yet placed significant focus on this issue’.¹⁰

⁶ The US Supreme Court has recently ruled on this point, in *BP P.L.C. et al. v. Mayor and City Council of Baltimore* (2021). See: https://www.supremecourt.gov/opinions/20pdf/19-1189_p86b.pdf.

⁷ *People of the State of New York v. Exxon Mobil Corporation* (2019). See: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20191210_docket-4520442018_decision.pdf.

⁸ Attorney General’s Office Lawsuit Against ExxonMobil. See: <https://www.mass.gov/lists/attorney-generals-office-lawsuit-against-exxonmobil>.

⁹ *Juliana v. United States* (2015). See: <http://climatecasechart.com/climate-change-litigation/case/juliana-v-united-states/>.

¹⁰ United Nations Environment Programme, ‘Insuring the climate transition: Enhancing the insurance industry’s assessment of climate change futures’, (2021). See: <https://www.unepfi.org/psi/wp-content/uploads/2021/01/PSI-TCFD-final-report.pdf>.

Therefore, in the first instance, it is critically important that the industry both recognises and acknowledges this risk that climate litigation poses. That said, development is not at a stand-still. The Bank of England plans to launch its Climate Biennial Exploratory Scenario exercise, which focuses on the financial risks of climate change, in June of this year.¹¹ Second, Ms Sutherland stressed the need for the industry to integrate climate risk at all levels of decision-making. It will be necessary to consider the long-term impacts of climate change and the risk of litigation for terms of investment and underwriting claims, which are not, at present, adequately considered. Should they fail to do so, they may be left paying out liability claims left, right and centre, which threatens to undermine the long-term health and existence of the industry.

8. Concluding, Ms Sutherland reflected on the opportunity here for the industry to play an instrumental role in the green transition. By dint of its size and power, as one of the largest global industries, it can assist in bringing about the systemic change that is needed, through incentives or by underwriting policies and new products. For the time being, however, strategic and structural barriers remain firmly in place that prevent the industry from taking up this role. This all said, Ms Sutherland concluded with the following pragmatic observation: ultimately, what the insurance industry covers will mirror what society values. At present, society is still heavily dependent on fossil fuels, and as long as hydrocarbons underpin modern economies, they will be insured. In this way, whilst the industry can provide a favourable environment and incentives for change to occur, it is only the backdrop to this wider, necessary, transition.

¹¹ 'Key elements of the 2021 Biennial Exploratory Scenario: Financial risks from climate change', 8 June 2021. See: <https://www.bankofengland.co.uk/stress-testing/2021/key-elements-2021-biennial-exploratory-scenario-financial-risks-climate-change>.

3. Perspectives from the Global South

9. The webinar then moved to Dr Joana Setzer, who covered the issue of climate litigation related to sea-level rise from a Global South perspective. Dr Setzer began by giving an overview of the current state of climate litigation globally, lighting on a number of key trends drawn from the 2020 Grantham Institute Annual Climate Change Litigation Report.¹² First, litigation remains heavily concentrated in the United States, with over 1200 cases attributed to the jurisdiction. That said, a burgeoning number of cases seem to emanate from Global South jurisdictions,¹³ potentially signalling the transnational nature of climate litigation. Second, underscoring a point made in Ms Sutherland's presentation, Dr Setzer noted that litigation is a growing trend, with a particularly notable increase after 2015. It is no longer possible for insurers, governments, and other key stakeholders to turn a blind eye to the increasing risk of climate-related litigation.
10. Before delving into case law that touches on issues of sea-level rise, it was important to be clear on the scope of this enquiry and its potential impacts on case collection in the Global South. Cases where climate is incidental, such as those focused on disaster recovery or adaptation and which do not explicitly mention climate change, would not make it through the sifting process. This is relevant in Global South jurisdictions, where several cases might not include climate change either in the filing or in the decision but may still reflect that these jurisdictions are feeling the impacts of climate change, and sea-level rise in particular. In any case, Dr Setzer's database search turned up 28 cases in the Global South.
11. Moving then to concrete cases, Dr Setzer identifies two: *In re: AD (Tuvalu)*,¹⁴ as well as the *Teitiota case*¹⁵ covered by the third webinar in this series.¹⁶ Both such cases dealt with the thorny issue of climate-induced displacement and the vulnerability faced by islanders in States whose lands continue to succumb to sea-level rise. Though *Teitiota* opens the door to future claims by such claimants, Dr Setzer notes that what is particularly interesting about these cases is that they demonstrate the limitations in existing international frameworks and domestic legislation as it pertains to those who are displaced by climate change.
12. Other than these two cases, Dr Setzer highlighted two other potentially influential cases that touch on issues of sea-level rise but bring in the responsibility of Global North jurisdictions. First is the *Torres Strait petition to the UN Human Rights Committee*,¹⁷ brought by a group of islanders against the Australian Government for its alleged inaction on climate change. The second is a

¹² Setzer & Byrnes, 'Global trends in climate change litigation: 2020 snapshot', (2020). See: https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf.

¹³ E.g., in South America, Southeast Asia and in Africa.

¹⁴ See: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2014/20140604_2014-Cases-501370-371_decision.pdf.

¹⁵ Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016, 7 January 2020. See: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200107_CCPRC127D27282016-opinion.pdf.

¹⁶ Webinar 3: Rising Sea Levels: Climate Displacement as a Human Right Violation. See: <https://www.biiicl.org/events/11468/webinar-series-rising-sea-levels-promoting-climate-justice-through-international-law>.

¹⁷ See: <http://climatecasechart.com/non-us-case/petition-of-torres-strait-islanders-to-the-united-nations-human-rights-committee-alleging-violations-stemming-from-australias-inaction-on-climate-change/>.

complaint filed before a number of UN special rapporteurs by five US Indian Tribes for the US's failure to address climate-induced displacement.¹⁸

13. One may be left wondering why we have not seen more of these cases emanating from the Global South, particularly given that these jurisdictions will likely bear the brunt of climate change's effects on sea-level rise. Dr Setzer put forward three hypotheses in this regard.¹⁹ First, these countries often lack both legal and technical capacity to pursue climate litigation. Second, noting the high costs associated with litigation, Dr Setzer highlights that claimants in Global South jurisdictions may lack the financial resources to bring cases. Third, financial considerations aside, some Global South jurisdictions are hostile to environmental defenders and, as such, they may pay the ultimate price in order to raise environmental concerns — that of their lives.

¹⁸ *Rights of Indigenous People in Addressing Climate-Forced Displacement*. See: http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200116_NA_complaint-1.pdf.

¹⁹ These hypotheses come from: Setzer & Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations', (2020), *Transnational Environmental Law*, 9(1).

4. Climate Litigation from the UK Perspective

14. Speaking to the UK experience, Alex Goodman presented on the increasingly prominent role that climate change is playing in environmental litigation, which he posits is a result of two factors, in particular: (1) the increasing desperation of climate campaigners; and (2) the enduring tensions in UK policy and practice.
15. Though sea level rise has not figured prominently in domestic litigation yet, Mr Goodman highlighted the UK Environment Agency's prediction of a 1.55 m rise in sea levels around the UK in the next 100 years. Furthermore, highlighting the divisional court's summary in *Spurrier*,²⁰ Courts in the UK are aligning with the science on climate change and its potential implications for sea-level rise. Therefore, domestic litigation that tackles a cause of this sea-level rise (that is, climate change) is of pressing importance.
16. This all said, it is true that climate litigation faces several barriers in the UK. As Mr Goodman pointed out, administrative law in the UK is to be 'a measure of last resort'.²¹ As demonstrated by the *Rights: Community: Action*²² case brought last year, the UK judiciary sees its role in judicial review as 'concerned with resolving questions of law'.²³ It is not a chance for the Court to get involved with 'political, social or economic choices', which are choices 'Parliament has entrusted to ministers and other public bodies'.²⁴ Furthermore, unlike the sorts of litigation mentioned in Ms Sutherland's presentation (that is, claims targeting private corporations), cases in the UK are usually brought either to challenge decisions made by authorities or governmental policy, more widely. Mr Goodman puts this partly down to the cost regimes in the UK, which make the ability to obtain a protective cost order in the context of nuisance claims more complex.²⁵
17. A recent example that Mr Goodman highlighted of litigation that targeted government policy was *R (Friends of the Earth) v Transport Secretary*.²⁶ The claimants in this case sought to challenge the Government's designation of the Airport National Policy Statement, which gave the green light for further development at Heathrow. Whilst the Court of Appeal held the Paris Agreement to be a component of government policy, obliging the Secretary of State to take it into account during the designation process, the Supreme Court disagreed. In its view, the Paris Agreement did not, by itself, give rise to legal rights and obligations beyond those already contained in domestic legislation (under the Climate Change Act and the Planning Act). One issue that has arisen off the back of this litigation is how the UK's revised domestic carbon reduction targets relate to Section 6 of the Planning Act, where there is a continuing duty to take account of new

²⁰ [2019] EWHC 1070 (Admin): 'The increase in global temperature has resulted in (amongst other things) sea-level change, a decline in glaciers, sea-level change, a decline in glaciers, the Antarctic ice sheet and Arctic Sea ice, alterations to various ecosystems. And in some areas, a threat to food and water supplies is potentially catastrophic.'

²¹ Mr Goodman at minute 41:38, see: <https://www.youtube.com/watch?v=2bKlbSEv13Y>.

²² *R (Rights: Community: Action v Secretary of State for Housing, Community and Local Government*, [2020] EWHC 3073 (Admin). See: <https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2020/3073.html>.

²³ *Ibid* [6].

²⁴ *Ibid*.

²⁵ *Austin v. Miller Argent* [2014] EWCA Civ 1012. See: <https://www.bailii.org/ew/cases/EWCA/Civ/2014/1012.html>.

²⁶ [2020] UKSC 52. See: <https://www.supremecourt.uk/cases/docs/uksc-2020-0042-judgment.pdf>.

material considerations that may arise. Mr Goodman pointed this out as a potential avenue for future litigation.

18. Seeking to contrast the UK to the other jurisdictions, such as the Netherlands, where litigation targeting governmental climate policy has seen success, Mr Goodman highlighted the Supreme Court's decision in *R (Plan B and others) v Secretary of State*.²⁷ The case was a challenge to the UK's failure to amend its emissions reduction target under the Climate Change Act (2008),²⁸ claiming that this was a violation of Articles 2 and 8 of the European Convention on Human Rights.²⁹ Though the finding in the Dutch case *Urgenda* might have been relevant in this regard, seeing as the UK has incorporated its Convention obligations through domestic legislation (i.e., the Human Rights Act),³⁰ Mr Goodman said that that the conclusion in the case was 'a bold one... not one that one would expect to see in a UK court'.³¹ Indeed, Supperstone J held this to be an area where the executive is granted wide discretion, before going on to dismiss the renewed application for judicial review.

19. Nevertheless, Mr Goodman then went on to discuss four recent claims in the UK that demonstrate the burgeoning success of environmental litigation.

- The first was a challenge to the Government's continued reliance on outdated energy policy statements (from 2011) to approve various fossil fuel projects, particularly given the UK's updated domestic commitments to net-zero. The litigation was settled when the Secretary of State agreed to review the energy policy.
- Another recently settled case was a challenge to a Development Consent Order (DCO) granted under the Planning Act for the development of Manston Airport.³² The action resulted in a concession from the Secretary of State that the reasons given had been inadequate, particularly as it regards climate change. The DCO will, therefore, be reconsidered.
- In *R (McLennon) v Medway*,³³ the claimant objected to a neighbour's development on the grounds that it cast a shadow over his solar panels and prevented his ability to contribute to the mitigation of climate change. Whilst the local council found this to be a purely private interest, Lane J overruled, considering this to be a material contribution. In other words, mitigation of climate change is a consideration that, if not taken into consideration, is capable of requiring a decision to be quashed.
- In a case that challenged paragraph 209(a) of the National Planning Policy Framework (on fracking), Dove J held that the Secretary of State had failed to take into account the relevant scientific and technical evidence.³⁴ The consultation exercise carried out had not proceeded with an open mind, thus, failing to consider the evidence at a formative stage in the process.

²⁷ ECLI:NL:HR:2019:2007. See: <https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf>.

²⁸ See: <https://www.legislation.gov.uk/ukpga/2008/27/contents>.

²⁹ See: <https://www.ecosia.org/search?q=european+convention+on+human+rights&addon=chrome&addonversion=3.3.0&method=topbar>.

³⁰ (1998). See: <https://www.legislation.gov.uk/ukpga/1998/42/contents>.

³¹ Mr Goodman at minute 47:38, see: <https://www.youtube.com/watch?v=2bKlbSEv13Y>.

³² See: https://static.crowdjustice.com/uploads/froala_editor/files/Consent%20Order%20sealed%2015.02.21.pdf.

³³ Env. L.R. 5, per Lane J.

³⁴ *R. (on the application of Stephenson) v Secretary of State for Housing, Communities and Local Government* [2019] P.T.S.R. 2209.

20. Concluding, Mr Goodman highlighted future claims and cases. For example, Plan B Earth has proposed a new claim, brought on behalf of three young co-claimants, which it calls 'Young people vs. UK Government'.³⁵ The co-claimants will argue that the UK has breached their rights under Articles 2, 8 and 14 of the European Convention on Human Rights (incorporated under the Human Rights Act, 1998), seeking a declaration that the Government's failed to 'take practical and effective measures to meet their Paris Agreement commitments', as well as an actionable plan to implement its obligations. Furthermore, the Transport Action Network is involved in an ongoing challenge to the National Policy Statement for National Networks,³⁶ Friends of the Earth has been granted permission to challenge the UK's use of public funds to support a liquefied natural gas mega-project in Mozambique,³⁷ and Leigh Day were given permission to seek judicial review of the UK Emissions Trading Scheme, on the basis that it failed to consider the UK's obligations under the Paris Agreement.³⁸

³⁵ See: <https://planb.earth/plan-b-v-government-bailouts-for-polluters/>.

³⁶ See: <https://transportactionnetwork.org.uk/nps-legal-case-2/>.

³⁷ See: <https://friendsoftheearth.uk/climate/friends-earth-given-permission-take-uk-government-court-over-mozambique-gas-mega-project>.

³⁸ See: <https://www.leighday.co.uk/latest-updates/news/2020-news/permission-won-for-judicial-review-of-post-brexit-emissions-trading-scheme/>.

5. Q&A Session

The Cost of Litigation for Insurers

21. The Q&A session was kicked off by a discussion on the types of insurance policies that would cover the costs of losses in climate litigation, as well as how to measure those costs. Ms Sutherland pointed out that climate change would leave very little untouched. There will be for example property damage policies, and business interruption and professional indemnity claims (e.g., against an architect who did not design adequate sea defences). In terms of litigation under the duty to defend, it is a liability policy that would cover these costs. There might also be D&O claims. In essence, directors have a duty to exercise due care, skill, and diligence. If there are issues of failure to mitigate and adapt to physical risks, as well as failure to adapt investment strategies, disclose climate-related risks, or failure to comply with environmental regulations, these may all lead to claims against directors and officers.
22. Whilst understanding the importance of evaluating the risk of climate litigation costs, Dr Setzer was sceptical of how this is being done. It is not enough to look at the potential costs of loss in a particular climate case, as the costs in climate litigation are much broader. Indeed, this is precisely the point of strategic litigation. Dr Setzer cited the RWE case,³⁹ which is a claim brought against RWE by a Peruvian farmer for damages (17,000 euros) in proportion to RWE's responsibility for global historic emissions — a small claim that an insurer could easily pay out. However, this is not what this case is about. Rather, the case aims to demonstrate how attribution science can be applied in order to see how a company might respond to damage that took place in a remote part of the world. Mr Reeves picked up this point with an anecdote about a presentation he had given to a group of insurers on the issue. He had been asked by one of the insurers why an insurance company would be ill-advised to pay out such a claim, to which he emphasised that it is not about the individual claim at issue. Once an insurer opens itself to liability in this regard, it opens itself up to a tidal wave of similar claims. In other words, 'we're on the precipice of what... is going to be the event of a huge claim for insurers'.⁴⁰

The Role of Civil Society in Climate Litigation

23. Moving to the role of civil society in climate litigation, Dr Setzer noted several ways that this can happen. First, citizens themselves can directly support litigation efforts, which happened in the Notre Affaire à Tous in France⁴¹ and in the Climate Case in Belgium.⁴² The former was supported by a petition with over two million signatures and the latter is a case brought on behalf of over sixty thousand co-claimants, making it the largest lawsuit in Belgian history.⁴³ As Dr Setzer put it, one is able to 'see how these cases are really bringing citizens to court in a way that we haven't seen before'.⁴⁴

³⁹ See: <http://blogs2.law.columbia.edu/climate-change-litigation/non-us-case/liuya-v-rwe-ag/>.

⁴⁰ Mr Reeves at 1:03:13. See: <https://www.youtube.com/watch?v=2bKlbSEv13Y>.

⁴¹ See: <http://blogs2.law.columbia.edu/climate-change-litigation/non-us-case/notre-affaire-a-tous-and-others-v-france/>.

⁴² See: <http://blogs2.law.columbia.edu/climate-change-litigation/non-us-case/vzw-klimaataak-v-kingdom-of-belgium-et-al/>.

⁴³ See: <https://www.dw.com/en/belgian-citizens-sue-government-over-climate-targets/a-57018431>.

⁴⁴ Dr Setzer at 1:05:25. See: <https://www.youtube.com/watch?v=2bKlbSEv13Y>.

24. A second way that individuals can get involved is by funding litigation, through platforms such as Crowd Justice,⁴⁵ which Dr Setzer noted has been used for the Portuguese Youth Climate case, brought against 33 governments under the ECHR.⁴⁶ Picking up on the issue from the UK perspective, Mr Goodman emphasised that crowdfunding is facilitating litigation on both a local and national scale. Having taken on a number of these cases, he found it to be a highly efficient way to raise large sums of money from those who are willing to contribute. However, Mr Goodman pointed out what fires up people are local issues. As such, in the UK, litigation often tends to focus on, for example, opposition to a new fracking proposal in a particular region. The litigation will then be run by a local community, who is opposed to the development, with the support of larger organisations (e.g., Friends of the Earth) and the use of crowdfunding. This confluence of civil and political pressure, which originates from ordinary individuals affected by a given project, has proven to be highly effective in the UK. Mr Goodman contrasts this with the air quality litigation work done by Client Earth. Whilst important, in terms of substantive policy, change has been slow to take effect.
25. In terms of the Global South, these conclusions do not necessarily translate. Dr Setzer posited that this is largely a result of competing priorities in such jurisdictions. Their primary responsibility is to meet the short-term socio-economic and environmental needs of the population, with longer-term problems, such as climate change, remaining a secondary concern. That said, things are changing, and more cases are being brought. It used to be the case that claimants would strategically decide not to bring climate-related claims, knowing that the courts of the Global South were not ready for such claims and citizen support would be low. However, as pointed out by Dr Setzer, we are now seeing more cases. For example, the Climate Fund case⁴⁷ in Brazil challenges insufficient action on the part of the Government to fund both mitigation and adaptation measures. Essentially, growth in climate litigation climbs as society becomes more concerned.

The Separation of Powers

26. The conversation then shifted to the issue of separation of powers and what recent climate litigation has meant for the doctrine.⁴⁸ Amongst other things, Mr Reeves pointed out that despite the conservative-leaning of the federal judiciary in the US, climate litigation has moved on from 10 years ago. Mentioning *Fairchild*⁴⁹ (a case in the UK that altered causation requirements in cases dealing with multiple exposures to asbestos), Mr Reeves pointed out that it is a natural part of legal evolution for courts, particularly in common law jurisdictions, to change and develop in order to militate against fundamental unfairness and reflect what society feels and believes is just. This is made easier by the fact that recent cases have turned towards constitutional remedies. That is, what the claimants are after is structural change, rather than a pot of money.
27. Mr Goodman highlighted again the Heathrow litigation in that, despite its reaffirmation of traditional orthodoxy regarding the Court's role in reviewing government policy, the combined

⁴⁵ See: <https://www.crowdjustice.com/>.

⁴⁶ See: <https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf>.

⁴⁷ See: <https://www.lse.ac.uk/granthaminstitute/news/first-climate-case-reaches-brazils-supreme-court/>.

⁴⁸ On this timely topic, BIICL has recently convened, in partnership with global law firm Hausfeld, an international virtual summit: 'Our Future in the Balance: The Role of Courts and Tribunal in Meeting the Climate Crisis'. For further details and the recordings of its plenary sessions, see: <https://www.biicl.org/events/11491/our-future-in-the-balance-the-role-of-courts-and-tribunals-in-meeting-the-climate-crisis>.

⁴⁹ *Fairchild v Glenhaven Funeral Services* [2002] UKHL 2002. See: <https://www.bailii.org/uk/cases/UKHL/2002/22.html>.

effect of Parliament's net-zero legislation and the Climate Change Committee's sixth carbon budget⁵⁰ will likely, in any case, form a compelling basis for the Government to review its airport policy. Furthermore, with the upcoming COP26 in Glasgow, the UK Government will be under even more political pressure to increase its ambitions in that regard.

28. From the Global South perspective, however, Dr Setzer pointed out that the separation of powers has not been a sticking point in most cases. Picking up on Mr Reeves's point, Dr Setzer observed that several recent cases in the Global South implicate fundamental rights, which are typically the province of the courts. This is aided by the fact that several of these countries contain constitutional provisions on protecting the environment that the State has an obligation to meet. This framing makes it easier for the judiciary to weigh in on climate-related cases. This was seen very clearly in the Leghari⁵¹ case. In response to the Government's failure to implement its own climate change adaptation plan (found to be a violation of fundamental rights), Ali Shah CJ ordered the creation of a Climate Change Commission, upon which he would sit to monitor ongoing implementation.

Domestic Courts and 'Fair Share' Obligations for States

29. Turning to the role of domestic courts and how they interact with the individual 'fair share' obligations for States, Mr Reeves pointed out that one area where we could see activists and domestic courts take a stronger position in limiting national emissions is by looking to the EU Emissions Trading System (EU ETS). As it stands, EU ETS cannot bring about shifts in behaviour because the price of a tonne of GHG emissions is too low. Mr Reeves, therefore, suggested that this might be a way 'to see some economic leveraging to put some teeth into a real... individual State share in limiting emissions.'⁵²
30. Mr Goodman noted that the question of fair share exposes the limitations of litigation and legal avenues in general. Politically (and globally) speaking, the argument on fair share requires the Global North to be contributing reductions of over 100%, based on historic emissions but these will never be politically palatable targets that could be litigated to hold a government to account. As such, the law is 'always limited to what law can be used to do' to bring a 'genuine sense of equity'.⁵³ Perhaps, as Dr Setzer pointed out, an important first step is the Urgenda decision, where the Supreme Court began to develop this notion of 'fair share' of global responsibility. In doing so, the Court rejected the Dutch Government's 'drop in the ocean' argument. That is, the Court held that the Dutch Government could not duck its responsibility to take measures to mitigate the effects of climate change on the basis that its emissions are insignificant – any contribution, even if it is small, is not negligible. Though this does not address the idea of a fair North-South distribution (and nor could it), this particular holding may be an important trigger that cascades across other Global North jurisdictions.

⁵⁰ See: <https://www.theccc.org.uk/publication/sixth-carbon-budget/>.

⁵¹ *Ashgar Leghari v Federation of Pakistan* (2015) W.P. No. 25501/2015. See: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150404_2015-W.P.-No.-25501201_decision.pdf & supplemental information at: http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2015/20150414_2015-W.P.-No.-25501201_decision.pdf.

⁵² Mr Reeves at 1:26:27. See: <https://www.youtube.com/watch?v=2bKlbSEv13Y>.

⁵³ Mr Goodman at 1:27:24. See: <https://www.youtube.com/watch?v=2bKlbSEv13Y>.

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
F 020 7862 5152
E info@biicl.org

www.biicl.org

A company limited by guarantee
Registered in England No. 615025
Registered Charity No. 209425



**British Institute of
International and
Comparative Law**