

**Next**

**Julietta  
Loro Meyer**

**Generation**

**Challenges  
in Climate  
Change Litiga-  
tion against  
Corporations**

**Nr. 3**



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## **Next Generation**

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# Challenges in Climate Change Litigation against Corporations

Julieta Loro Meyer\*

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## I. Introduction

Climate change litigation has experienced considerable growth in recent years. The number of climate cases filed before courts has significantly increased since the adoption of the Paris Agreement in 2015<sup>1</sup> and continues to do so, both in front of domestic and international courts. There are several reasons for this, and the consequences of litigation on climate governance are yet to be fully understood. Even though the majority of cases have been filed against governments, the number of lawsuits against private actors is rising. The obstacles encountered by litigants in both categories of cases, despite sharing certain similarities, diverge in other respects. Consequently, this article aims at providing an overview of the main legal challenges that plaintiffs face when trying to hold corporations accountable for their contributions to climate change. By focusing on litigation against companies the purpose followed is to provide an understanding of how a litigation approach is increasingly being used by claimants to influence corporate behavior and increase the accountability of corporations for their contribution to climate change as well as bringing about broader socio-political changes and advocating for climate action.

To this end, the first part of the article is dedicated to briefly defining the scope of cases that are going to be dealt with as well as explaining some of the reasons why people are turning to courts to advance climate action ([sections II–IV](#)). Subsequently, a classification of different types of cases against corporations based on their subject matter will be laid out in order to provide some clarity about what this diverse group of cases can entail ([section V](#)). This will establish a clear basis to then understand which challenges hold more promi-

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<sup>1</sup> Paris Agreement to the United Nations Framework Convention on Climate Change of 12 December 2015, T.I.A.S. no. 16-1104 (Paris Agreement).

nence in what type of cases. [Section VI](#) will then proceed to address, through analysis of recent case law, the primary challenges faced in these cases concerning matters of substance as well as some of the strategies employed to navigate them. The following part will briefly explore certain justiciability issues that are universally prevalent in climate change litigation, spanning all categories of cases, whether directed at governmental bodies or private entities ([section VII](#)). Afterwards, a few concluding remarks on the potential of climate change litigation against corporations will be provided ([section VIII](#)).

## II. What is climate change litigation?

As a consequence of the increasing number of cases initiated in various courts worldwide advocating for or against climate action, the term “climate change litigation” has engendered discussions among different authors. Due to the diverse group of cases that it may include, there reigns debate in the literature as to what its exact definition is.<sup>2</sup> From a broad perspective, climate change litigation encompasses “any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts.”<sup>3</sup> However, for the purpose of this article, climate change litigation is defined as including cases brought before “judicial and quasi-judicial bodies (...) that involve material issues of climate change science, policy, or law.”<sup>4</sup> More precisely, the primary focus will be exclusively on cases targeting corporations, with a primary emphasis on those brought before judicial bodies within EU member states and Switzerland. However, complaints filed under the Organization for Economic Cooperation and Development (OECD) complaint mechanism and select cases presented in UK courts have also been considered for illustrative purposes. The primary criterion for inclusion is the significant emphasis placed on climate change mitigation or adaptation measures as core issues, rather than peripheral matters.

Furthermore, the focus will be placed on strategic cases, i.e., cases in which the plaintiff’s motivations extend beyond the immediate outcome of the individual case and seek to effect a broader societal transformation, either

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<sup>2</sup> Peel/Osofsky, *Climate Change Litigation*, 23.

<sup>3</sup> Markell/Ruhl, 27.

<sup>4</sup> Setzer/Higham, 8. There are a number of cases that involve climate change in some way, but where this is not the main subject matter of the dispute. Even though these cases might still contribute to climate governance, they are not considered in the present article, as they would substantially broaden the scope, since a vast number of these lawsuits would influence climate change to some extent (see Peel/Lin, 695).

through raising awareness, advancing or delaying climate-related measures, or influencing corporate conduct.<sup>5</sup> Strategic litigation has experienced an upsurge over the past decade, with litigants advocating either in favor of or against climate-related measures.<sup>6</sup> The present article will concentrate on the former subset of cases, specifically those known as climate-aligned cases, i.e., cases that seek to advance and strengthen climate action.<sup>7</sup>

### **III. The rise in climate change litigation against corporations**

Although the USA has witnessed the highest number of climate cases filed thus far, it is important to note that climate change litigation is not only a US phenomenon. Indeed, the number of climate cases launched in Europe in the last decade (mainly since the adoption of the Paris Agreement in 2015) has continually risen.<sup>8</sup> Considering the recent emergence of this trend, a substantial portion of the cases falling under scope remain pending. Despite the majority of these cases being against governments, cases against corporations have also been on the rise, with one main target being Carbon Majors and other fossil fuel companies.<sup>9</sup> This might not appear particularly surprising, given that 100 fossil fuel producing entities (including state producers and state-owned companies as well as private and public investor-owned entities) account for 71% of global industrial greenhouse gas emissions.<sup>10</sup> Even when solely focusing on Carbon Majors that are owned by investors, their emissions contribute to approximately one fifth of the total global industrial greenhouse gas emissions.<sup>11</sup> Other sectors, however, are also increasingly being targeted (such as transport or food and agriculture).<sup>12</sup> With the growing awareness of the connection between finance and climate change, more cases have recently been filed against financial institutions and banks.<sup>13</sup>

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<sup>5</sup> Ganguly/Setzer/Heyvaert, 843; Franzius, N. 47.

<sup>6</sup> Setzer/Higham, 19.

<sup>7</sup> Setzer/Higham, 9; cf. Ghaleigh, 45.

<sup>8</sup> Setzer/Higham, 11.

<sup>9</sup> *Ibid.*, 12-13.

<sup>10</sup> Griffin, 8. See also Heede.

<sup>11</sup> Griffin, 10.

<sup>12</sup> Setzer/Higham, 21.

<sup>13</sup> Rumpf, 456.

Additionally, it is important to acknowledge that legal actions targeting private entities are initiated by a diverse array of entities, encompassing governments, corporations, individuals, and non-governmental organizations (NGOs).<sup>14</sup> However, the primary emphasis of this article will be directed towards cases instigated specifically by individuals and NGOs. This approach is adopted with the intention of offering an overview of the hurdles encountered by civil society members when litigating against major corporations.

#### **IV. Why are people turning to courts?**

The skepticism regarding the suitability of courts as a forum to address climate change-related issues is valid, given that, in principle, this is a matter left for the legislative and executive branches to decide on. Nevertheless, due to the absence of ambitious political action and the difficult international negotiations, individuals and NGOs are increasingly turning to the judicial branch (conceived as more independent than the other two) to fill in these regulatory gaps.<sup>15</sup> This demonstrates, in the words of Torre-Schaub, the “pathological” aspect of climate law: “either its absence, its inadequacy, or, in general, its maladjustment to the climate emergency”.<sup>16</sup> The gap between the projected emissions from the implemented policies and those that would be required to limit global warming to 1.5 or 2 degrees Celsius in accordance with the Paris Agreement, on a global scale<sup>17</sup> as well as in the EU<sup>18</sup> and Switzerland,<sup>19</sup> shows insufficient political action in relation to climate change. Moreover, courts might be perceived as a more accessible means to influence governmental decision-making than political institutions. This holds true even in direct democracies

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<sup>14</sup> Ibid., 447.

<sup>15</sup> Peel/Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, 10-13; Sindico/Mbengue/McKenzie, 5; Franzius, N. 2 and 49; Setzer/Vanhala, 7-8. See also Ma, 349-350.

<sup>16</sup> Torre-Schaub, 1445-46.

<sup>17</sup> IPCC, *Summary for Policymakers*, in: Core Writing Team/Lee Hoesung/Romero José (eds.), *Climate Change 2023: Synthesis Report. A Report of the Intergovernmental Panel on Climate Change. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, Geneva 2023, 23.

<sup>18</sup> *Climate Action Tracker EU*.

<sup>19</sup> *Climate Action Tracker Switzerland*. See also Bundesamt für Umwelt (BAFU), *Umwelt Schweiz 2022*, Bern 2022, 67-73.



like Switzerland, where a substantial number of signatures is still required to initiate a popular initiative.<sup>20</sup> Additionally, courts are sought after as a platform to raise awareness regarding the imperative for enhanced climate action.<sup>21</sup>

## **V. Classification of climate cases against corporations**

Considering that climate change litigation against corporations can include a very heterogeneous group of lawsuits, this section aims at providing a clearer overview of the cases under analysis by briefly classifying them based on their subject matter.

The following classification has been established based on the Sabin Center for Climate Change Law's database<sup>22</sup> as well as on the 2023 report on climate change litigation published by the Grantham Research Institute on Climate Change and the Environment and the Centre for Climate Change Economics and Policy.<sup>23</sup> These cases have been categorized based on their shared subject matter and reliance on similar legal principles, including human rights law, due diligence obligations, and tort law, among others. The majority of the cases considered in this analysis have been filed within the courts of EU member states or Switzerland. Nonetheless, certain cases presented in UK courts and through the OECD National Contact Point mechanism have also been taken into account.

The objective behind presenting this categorization is to subsequently offer a better understanding regarding the legal obstacles encountered by plaintiffs in climate cases, particularly identifying the types of cases in which these challenges are more prominent.

### **1. Reduction of greenhouse gas emissions**

The first category of cases that should be distinguished is the one including claims aiming at discouraging corporations from persisting in high-emitting activities and requiring adjustments to corporate governance. Due to the lack of legally binding obligations for companies to reduce their emissions or keep them under a certain target, these lawsuits normally make use of human rights or due diligence arguments.<sup>24</sup>

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<sup>20</sup> Federal Constitution of 18 April 1999 of the Swiss Confederation (SR 101), Arts. 138 para. 1 and 139 para. 1.

<sup>21</sup> Sindico/Mbengue/McKenzie, 5; Franzius, N. 47.

<sup>22</sup> Sabin Center for Climate Change Law's database.

<sup>23</sup> Setzer/Higham.

<sup>24</sup> Setzer/Higham, 22.

This category can include different types of claims. Some plaintiffs might seek an order from a court requiring a specific reduction of greenhouse gas emissions resulting from the corporation's operations. The Dutch landmark case *Milieudefensie v. Shell* is an example of this category, where a Dutch environmental group (together with other NGOs and a number of individual citizens) sought a declaratory and an injunctive relief on the grounds that the defendant, by emitting a certain amount of CO<sub>2</sub>, was allegedly acting in breach of a duty of care and, therefore, they should reduce their emissions by a certain percentage.<sup>25</sup>

Other claims may not explicitly seek a decrease in the defendant's emissions by a certain quantity. Instead, these claims might assert that the company should institute modifications to its comprehensive policies and strategies to curtail the emissions stemming from its operational activities. Examples of this category include lawsuits such as the one against BNP Paribas, where the plaintiffs claimed that the bank was acting in violation of the French duty of vigilance by financing businesses that develop new fossil fuel projects,<sup>26</sup> and *BankTrack et al. v. ING*, where the defendant was sued, i.a., for not setting targets to reduce the emissions of its financial products.<sup>27</sup> Some claims might also challenge the corporation's failure to take climate impacts into account in specific policies or projects (such as *ClientEarth v. Enea*).<sup>28</sup>

As previously mentioned, plaintiffs often rely on environmental due diligence standards for corporations to support their claims. There seems to be a trend whereby such regulations are increasingly being enacted under different jurisdictions.<sup>29</sup> The French Law of Vigilance offers an example of such a regulation.<sup>30</sup> In general terms, it mandates that a corporation formulate a "plan of vigilance", identifying and endeavoring to mitigate potential risks to human rights, fundamental freedoms, the environment, and public health arising either directly or indirectly from the enterprise's activities and those of the entities under its control.<sup>31</sup>

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<sup>25</sup> District Court of The Hague, *Milieudefensie et al. v. Royal Dutch Shell PLC* (26 May 2021) C/09/571932/HA ZA 19-379, English Version, para. 3.1.

<sup>26</sup> Judicial Court of Paris, *Notre Affaire à Tous, Les Amis de la Terre and Oxfam France v. BNP Paribas* (writ of summons filed on 23 February 2023), p. 24-91.

<sup>27</sup> National Contact Point for the OECD Guidelines for Multinational Enterprises, *Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) v. ING* (final statement of 19 April 2019), p. 3.

<sup>28</sup> Regional Court of Poznań, *ClientEarth v. Enea* (1 August 2019) IX GC 1118/18.

<sup>29</sup> Rumpf, 468.

<sup>30</sup> Law No. 2017-399 of 27 March 2017 on the Duty of Care of Parent Companies and Contractors (Law of Vigilance).

<sup>31</sup> Rumpf, 466-467.

In the EU, the proposed Corporate Sustainability Due Diligence Directive (CSDDD)<sup>32</sup> will be of substantial importance once enacted, as it mandates, i.a., that companies within the scope of the Directive establish a transition plan to align their businesses with the Paris Agreement goals<sup>33</sup> and even has a provision on civil liability for damages caused by not conducting the required due diligence.<sup>34</sup> This Directive, once enacted, will not only influence litigation within EU member states, but it might also inspire other jurisdictions to enact similar laws.

In Switzerland, while there are currently no binding due diligence obligations for companies specifically relating to the climate in place, the Climate and Innovation Act, which passed the referendum in June 2023, could be expected to be relevant for this category of claims, since it requires, i.a., that companies reach net zero by 2050.<sup>35</sup>

It is noteworthy that cases against other institutional investors, such as pension funds, are also starting to emerge.<sup>36</sup>

## 2. Damage compensation

A second type of cases that has become increasingly prevalent in recent years encompasses claims that seek damage compensation from corporations for allegedly carrying partial responsibility in causing climate change-related harms.<sup>37</sup> The sought-after reparation may pertain to past and present loss and damage linked to climate change, in addition to the financial outlays required to adapt to foreseeable future climate impacts. These are usually tort law-

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<sup>32</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 of 23 February 2022, COM (2022) 71 final.

<sup>33</sup> Ibid., Art. 15.

<sup>34</sup> Ibid., Art. 22. The proposed CSDDD applies to all large EU limited liability companies with either more than 500 employees and € 150 million in net turnover worldwide, or more than 250 employees and € 40 million in net turnover worldwide, which operate in defined high impact sectors. The Directive also applies to non-EU companies that have either of the turnover thresholds required for EU companies, that has been generated in the EU (see CSDDD, Art. 2).

<sup>35</sup> Federal Act of 30 September 2022 on Climate Protection Targets, Innovation and Strengthening Energy Security (BBI 2022 2403), Art. 5 para. 1.

<sup>36</sup> For a detailed analysis about the climate risks of institutional investors, see Weber/Hösli, *Der Klimawandel und die Finanzmärkte*. For a brief overview of the possibility of legal remedies against pension funds with greenhouse gas-intensive investments in Switzerland see Brunner/Bähr, 127-28.

<sup>37</sup> Setzer/Higham, 24.

based claims. The German case *Luciano Lliuya v. RWE AG* offers an example of this category. In this instance, a farmer living in Peru filed a damages claim against the German-based electricity producer for the harms caused to his property by the melting of the glacier in Huaraz (Peru), which the defendant was accused of being partially responsible for due to their known high share in global industrial greenhouse gas emissions.<sup>38</sup>

### 3. Climate-washing

A further category of cases includes climate-washing claims, which try to establish legal accountability for corporations regarding their actions or products that make deceptive claims about addressing climate change.<sup>39</sup> The recent lawsuit against TotalEnergies SE and one of its subsidiaries based on the allegedly false net zero commitments for 2050 falls under this category.<sup>40</sup>

In Switzerland, the Unfair Competition Act could serve as a legal basis for pursuing such a claim.<sup>41</sup> In relation to the EU, it is noteworthy to highlight that the proposed Directive for consumer empowerment in the green transition,<sup>42</sup> along with the proposed Directive on Green Claims<sup>43</sup> may potentially lead to more litigation.

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<sup>38</sup> District Court of Essen, *Lliuya v. RWE AG* (15 December 2016) 2 O 285/15. Inspired by this case, a lawsuit has recently been filed before a Swiss civil court by four inhabitants of the Indonesian Island of Pari against the Swiss-based cement producer, Holcim. They claim, i.a., for compensation for the damages to their properties resulting from the rising sea-level, caused by the increase in global temperature, which the defendant has allegedly knowingly contributed to with their high-emitting activities. For further information about this lawsuit see HEKS, Holcim case.

<sup>39</sup> Benjamin et al., 5.

<sup>40</sup> Judicial Court of Paris, *Greenpeace France et al. v. TotalEnergies SE and TotalEnergies Electricité et Gaz France* (writ of summons filed on 2 March 2022), p. 12-16.

<sup>41</sup> Federal Act of 19 December 1986 on Unfair Competition (SR 241), Art. 3 para. 1 letter b.

<sup>42</sup> Proposal for a Directive of the European Parliament and of the Council amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information of 30 March 2022, COM (2022) 143 final.

<sup>43</sup> Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive) of 22 March 2023, COM (2023) 166 final.

## 4. Non-disclosure of climate risks

Another type of cases encompasses lawsuits that contest the failure to disclose climate-related risks.<sup>44</sup> Banks and financial institutions tend to be usual targets for this kind of claims. The case against ING, mentioned in the first category, exemplifies such legal action, as the defendant was sued, among other things, for not reporting the indirect emissions resulting from the financed companies.<sup>45</sup> There seems to be a pattern where an increasing number of jurisdictions have been enacting legislation concerning obligations for climate-related information in recent years.

In Switzerland the recently enacted provisions on reporting on non-financial matters in Art. 964a et seqq. Code of Obligations will serve as a basis for lawsuits challenging the non-disclosure of climate-related risks by large companies,<sup>46</sup> especially after the Ordinance on Climate Disclosure<sup>47</sup> (which implements the Task Force on Climate-related Financial Disclosures (TCFD) recommendations)<sup>48</sup> enters into force in 2024.<sup>49</sup>

With regard to the EU, the Corporate Sustainability Reporting Directive (CSRD) will similarly be relevant for claims related to the reporting of climate risks against large companies falling under the scope of application.<sup>50</sup>

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<sup>44</sup> Setzer/Higham, 6.

<sup>45</sup> BankTrack v. ING (FN 27), p. 3.

<sup>46</sup> Federal Act of 30 March 1911 on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) (SR 220). The entities that fall under the reporting obligations are public companies, banks and insurance companies, that have 500 or more employees and at least CHF 20 million in total assets or more than CHF 40 million in turnover.

<sup>47</sup> Ordinance on Climate Disclosures (adopted on 23 November 2022; in force as of 1 January 2024).

<sup>48</sup> Recommendations of the Task Force on Climate-related Financial Disclosures, version of June 2017.

<sup>49</sup> For significant financial institutions, FINMA Circular 2016/1 'Disclosure - banks' of 28 October 2015 and FINMA Circular 2016/2 'Disclosure - insurers' of 3 December 2015 are also relevant in this context.

<sup>50</sup> Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No. 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322/15 of 14 December 2022. The CSRD applies to EU companies that fulfill at least two of the following criteria: more than 250 employees, a turnover of more than € 40 million, or total assets of € 20 million. Moreover, it applies to non-EU companies with a turnover of over € 150 million in the EU as well as to small and medium-sized enterprises with securities listed on an EU-regulated market (see CSRD, Art. 5).

## 5. Personal responsibility

Lastly, a further category of cases that should be mentioned is the one including personal responsibility claims, particularly against members of the board of directors of a company for not appropriately managing climate risks.<sup>51</sup> Despite these lawsuits not being directed against corporations (but rather against certain individuals), it is worth referring to them because of the close connection they bear with the cases under analysis. Indeed, the shareholders or creditors here argue that, by acting in breach of a duty of care, the board caused damages to the company (e.g., a damage to the company's assets due to an incorrect analysis of climate risks or a loss in competitiveness caused by insufficient measures to protect the climate).<sup>52</sup>

As of today, there is limited case law on this in Europe.<sup>53</sup> However, it is possible to imagine that in Switzerland a claim under these grounds would be possible based on Art. 754 para. 1 in connection with Art. 717 para. 1 Code of Obligations (which sets the duty of care of the board and other management bodies).<sup>54</sup> Nevertheless, due to the lack of legally binding obligations related to the climate (apart from the entities falling under the scope of the CO<sub>2</sub> Act<sup>55</sup> and the reporting obligations), there is no clear guidance as to what the duty of care entails in this regard. Consequently, soft law instruments, such as the OECD Guidelines for Multinational Enterprises,<sup>56</sup> the TCFD recommendations<sup>57</sup> or

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<sup>51</sup> Setzer/Higham, 24.

<sup>52</sup> Kaptan, 599-600. See also Weber/Hösli, Corporate Climate Responsibility, 609-11. As explained in Hösli/Weber, Klimaklagen gegen Unternehmen, N. 48 and in Weber/Hösli, Der Klimawandel und die Finanzmärkte, 5, in the energy sector these damages to the company's assets can include the risk that fossil fuel-related assets become "stranded assets".

<sup>53</sup> A derivative action recently filed in the UK by ClientEarth against Shell's board of directors (albeit not in the EU or Switzerland) would be an example of this category. However, the High Court of Justice dismissed the application in July 2023 for considering that there was no prima facie case (see ClientEarth v. Shell's Board of Directors [2023] EWHC 1897 (Ch)). A very similar derivative claim filed in the UK against the University Superannuation Scheme, has also been dismissed on the same month by the Court of Appeal (see McGaughey & Davies v. Universities Superannuation Scheme Limited [2023] EWCA Civ 873). The plaintiffs in both cases are considering appealing.

<sup>54</sup> Swiss Code of Obligations (FN 46). For a detailed analysis of what the duty of care of the board of directors entails in this regard, see Weber/Hösli, Corporate Climate Responsibility, 608-11.

<sup>55</sup> Federal Act of 23 December 2011 on the Reduction of CO<sub>2</sub> Emissions (SR 641.71).

<sup>56</sup> OECD Guidelines for Multinational Enterprises, 11th Edition (2011).

<sup>57</sup> TCFD recommendations (FN 48).

the UN Guiding Principles on Business and Human Rights,<sup>58</sup> will be important for the interpretation of that duty. The extent to which these can be used for the concretization of the duty of care is, however, disputed.<sup>59</sup> In the EU, the proposed CSDDD will similarly play a role for understanding what director's duties entail in this context.<sup>60</sup>

It is to be expected that, as climate risks are increasingly conceived as financial risks, claims falling under this category will increase.<sup>61</sup> However, as these cases do not primarily involve legal action against corporations, but rather individuals, they will not be subject to further in-depth analysis in the subsequent section.

## **VI. Main challenges in climate change litigation against corporations**

All the above-mentioned cases have in common that they try to hold corporations (or individuals) accountable for their contribution to climate change. In doing so, claimants face a number of challenges, which they try to overcome using different arguments.

This segment will examine two fundamental legal challenges, mainly pertaining to substantive matters, encountered by plaintiffs in climate-related cases, which are prevalent across numerous jurisdictions. These challenges involve the absence of a robust legal basis for the claims and the proof of causation and attribution. Matters such as those relating to jurisdiction or the applicable law in the context of cross-border litigation will not be delved into within this discussion. The primary objective is to highlight the substantive obstacles faced by claimants when pursuing legal action against corporations based on climate change concerns, and to showcase some of the arguments they raise in their endeavor to hold corporations responsible for their role in global warming and to propel climate-oriented initiatives forward.

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<sup>58</sup> United Nations Guiding Principles on Business and Human Rights, adopted by UN Human Rights Council Resolution, 'Human rights and transnational corporations and other business enterprises' A/HRC/RES/17/4 (6 July 2011).

<sup>59</sup> Jentsch, 68-70; Kaptan, 588-89.

<sup>60</sup> COM (2022) 71 final (FN 32).

<sup>61</sup> As explained in Weber/Hösli, Corporate Climate Responsibility, 606, international institutions, such as the European Central Bank and the OECD, recognized climate risks as financial risks. According to Franzius, N. 9, this has also been stated in *ClientEarth v. Enea* (FN 28).

For this purpose, each of the mentioned challenges will be addressed in the following manner: the primary category of cases in which the obstacle is most prominent will be identified first, followed by an explanation of the challenge itself, and subsequently, an exploration of some of the arguments put forth by plaintiffs to navigate these challenges as well as some further difficulties that these may face.

## **1. Lack of a solid legal basis for the claims**

One of the main difficulties that litigants encounter in climate cases is the absence of a concrete legal basis to support their claims. This poses a challenge mainly in claims seeking emissions reductions and damage compensation. In lawsuits that contest a corporation's failure to disclose climate-related risks as well as in climate-washing cases, the legal basis does not typically pose a primary impediment for plaintiffs. This is attributable to the fact that, as mentioned in the preceding section (see above, [V.1](#)), they rely upon tangible obligations concerning reporting and due diligence (which are progressively being implemented across various jurisdictions), alongside the utilization of consumer protection or competition law provisions, respectively. Therefore, this challenge is going to be analyzed in the context of claims for specific emissions reductions and damage compensation.

### **a. Claims for reductions in greenhouse gas emissions**

#### *aa) Why is this a challenge?*

In cases where the plaintiffs seek a specific reduction of greenhouse gases from the sued corporation, they will face a hurdle trying to substantiate their claims, due to the lack of legal provisions setting forth legally binding obligations for private actors to reduce their emissions to a certain extent or maintain them under a specific level.

While large, multinational corporations, especially Carbon Majors, bear significant responsibility for climate change,<sup>62</sup> they are not consistently bound by equivalent obligations to decrease their emissions.<sup>63</sup> Hence, claimants will struggle to legally justify why the defendant should limit their emissions to a specified extent.

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<sup>62</sup> Griffin.

<sup>63</sup> Jentsch, 76-78. See also Sindico/Mbengue/McKenzie, 9 et seqq. On the lack of climate change obligations for multinational companies in the context of international investment see Ma.



## bb) Strategy: rights-based approach

As a way to support their claims, a strategy that might be relied upon by plaintiffs is drawing on human rights law, international standards and climate science to interpret private actors' obligations.<sup>64</sup>

This rights-based approach has been employed in *Milieudefensie v. Shell*, where the plaintiffs filed a class action seeking, on the one hand, a declaration that Royal Dutch Shell's (RDS) total annual emissions (considering scope 1, 2 and 3)<sup>65</sup> constituted an unlawful act against them (and, in general, against all Dutch citizens) and, on the other hand, an order requiring the defendant to reduce its emissions by 45% by the year 2030, compared to 2019 levels, in line with the Paris Agreement goals.<sup>66</sup> The plaintiffs based their claim on the duty of care set forth in Art. 6:162(2) Dutch Civil Code, which defines as a tortious act or omission one which is in violation of what, according to unwritten law, constitutes "proper social conduct".<sup>67</sup> This provision allows for its interpretation the consideration of international instruments. Hence, in order to decide whether RDS had in fact acted in breach of said duty of care, the Hague District Court, following the decision in *The Netherlands v. Urgenda*,<sup>68</sup> interpreted the provision under Dutch tort law taking into account 14 different elements, among which were international human rights law instruments (particularly the rights to life and respect for private and family life under Arts. 2 and 8 European Convention on Human Rights (ECHR))<sup>69</sup> as well as international standards on responsible business conduct (mainly the UN Guiding Principles

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<sup>64</sup> Jentsch, 76-78. See also Yoshida/Setzer as well as Peel/Osofsky, *A Rights Turn*.

<sup>65</sup> "Scope 1 emissions are direct emissions from owned or controlled sources. Scope 2 emissions are indirect emissions from the generation of purchased energy. Scope 3 emissions are all indirect emissions (not included in scope 2) that occur in the value chain of the reporting company, including both upstream and downstream emissions." (Greenhouse Gas Protocol, 1)

<sup>66</sup> *Milieudefensie v. Shell* (FN 25), para. 3.1.

<sup>67</sup> Art. 6:162(2) Civil Code of the Netherlands of 1992 states the following: "Definition of a 'tortious act'- 1. A person who commits a tortious act (unlawful act) against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.- 2. As a tortious act is regarded a violation of someone else's right (entitlement) and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour."

<sup>68</sup> Supreme Court of the Netherlands, *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda* (20 December 2019) 19/00135, English Version.

<sup>69</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 4 November 1950, as amended by Protocols nos. 11, 14 and 15 (ETS 005).

on Business and Human Rights<sup>70</sup> and the OECD Guidelines for Multinational Enterprises<sup>71</sup>).<sup>72</sup> Based on this reasoning and taking into account, i.a., the policy-setting position of RDS in the Shell group, the Court concluded that Shell had the obligation, under tort law, to reduce its emissions as requested by the plaintiffs.<sup>73</sup>

Despite the groundbreaking decision by the Dutch Court, this approach is, however, not that straightforward. As a matter of fact, as far as the use of international human rights treaties and soft law instruments for the construction of a reduction obligation goes, this line of argumentation faces some difficulties, as it requires the establishment of two interpretative links: firstly, between human rights and climate change and, secondly, between human rights obligations and private actors.<sup>74</sup>

Regarding the former, the affirmation that human rights commitments under international law require undertaking climate change mitigation measures is not undisputed.<sup>75</sup> Despite the global recognition of the adverse consequences of climate change on human rights and the repeated acknowledgment of the right to a healthy environment,<sup>76</sup> the ECHR does not currently include a specific provision granting the right to a healthy environment. It is important to note that while other regions of the world have already addressed this con-

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<sup>70</sup> UNGP on Business and Human Rights (FN 58).

<sup>71</sup> OECD Guidelines for Multinational Enterprises (FN 56).

<sup>72</sup> *Milieudefensie v. Shell* (FN 25), para. 4.4.

<sup>73</sup> *Ibid.*, para. 5.3. It is noteworthy that, with regard to the emissions reduction obligation relating to scope 3 emissions, the Court ordered only a “best efforts obligation”, in contrast with the obligation of result for scope 1 and 2 emissions (paras. 4.4.18-4.4.25). This should be kept in mind when thinking about the degree and extent of the responsibility of the private sector in relation to climate change.

<sup>74</sup> Jentsch, 20-44.

<sup>75</sup> On the interpretation of the connection between human rights treaties and climate change mitigation see Mayer, *Climate Change Mitigation*.

<sup>76</sup> On the impacts of climate change on human rights see, for instance, UN Environment Programme, *Report on Climate Change and Human Rights* of December 2015 and UN Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, A/HRC/10/61 of 15 January 2009. On the recognition of a right to a healthy environment see UN Human Rights Council Resolution, *The Human Right to a Clean, Healthy and Sustainable Environment*, A/HRC/RES/48/13 of 8 October 2021 and UN General Assembly Resolution, *The Human Right to a Clean, Healthy and Sustainable Environment*, A/RES/76/300 of 28 July 2022.

nection,<sup>77</sup> the European Court of Human Rights (ECtHR) has not yet rendered a decision on this issue. The reliance on human rights norms that do not specifically relate to the environment in order to justify the requirement of reducing greenhouse gas emissions is, thus, questionable.<sup>78</sup> Nonetheless, the ECtHR will have the opportunity to pronounce on this issue in the three cases that are now pending before the Grand Chamber.<sup>79</sup> Should the Court establish an interpretative link between human rights obligations and climate change law, it will have an impact on this rights-based approach.<sup>80</sup> Moreover, considering that international treaties should be interpreted in the light of the legal developments that take place over time (as, for example, the Paris Agreement) and, as mentioned, the growing awareness of the impacts of global warming on human rights, plaintiffs may have strong arguments to link human rights obligations to climate issues before courts.<sup>81</sup>

In relation to the connection between human rights and corporations, the argumentation is even less straightforward, since private actors are, in principle, no direct addressees of international human rights obligations.<sup>82</sup> In order to assign obligations to corporations to respect human rights, claimants may try to defend the view that the purpose of the company should not only be to serve the interests of the shareholders but of society in general.<sup>83</sup> They might draw on soft law instruments that set forth due diligence rules for businesses in relation to human rights, such as the OECD Guidelines for Multinational Enterprises,<sup>84</sup> the UN Guiding Principles on Business and Human Rights<sup>85</sup> and the UN Global Compact. This was, indeed, as previously mentioned, the reasoning followed by the Court in *Milieudefensie v. Shell*, which relied on those kinds of instruments as well as an “international consensus” that businesses need

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<sup>77</sup> See, for instance, Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-23/17 of 15 November 2017 Requested by the Republic of Colombia: The Environment and Human Rights.

<sup>78</sup> Krommendijk, 61.

<sup>79</sup> Factsheet of the European Court of Human Rights (ECtHR) of March 2023, Climate Change <[www.echr.coe.int/Documents/FS\\_Climate\\_change\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Climate_change_ENG.pdf)>.

<sup>80</sup> Reich/Hausammann/Boss.

<sup>81</sup> Savaresi/Hartmann, 76-81; Voigt, 243-244. The Paris Agreement (FN 1), albeit in the preamble, even mentions the obligation of states to respect, promote and consider their human rights obligations when taking actions to address climate change.

<sup>82</sup> Jentsch, 30-44.

<sup>83</sup> Ma, 356-357.

<sup>84</sup> OECD Guidelines for Multinational Enterprises (FN 56).

<sup>85</sup> UNGP on Business and Human Rights (FN 58).

to respect human rights. Despite the “universally endorsed content” of these instruments, it is undeniable that, due to them being non-binding, this argumentation might be criticized for being too far-reaching.<sup>86</sup>

Furthermore, assuming that corporations bear human rights responsibilities, the requirement for them to comply with specific emission targets based on internationally agreed temperature goals, as determined by the Hague District Court, is not unproblematic, since the Intergovernmental Panel on Climate Change (IPCC) reports are not binding and they are mainly the result of political agreements. One could contend that due consideration should have been accorded to the operational practices of comparable enterprises within the same industry. This step would have facilitated the identification of a reasonable set of expectations for the potential actions achievable by RDS.<sup>87</sup> By inferring specific emission reduction targets from ambiguous treaty provisions, courts might fall under the trap of delivering unsubstantiated and, thus, unpersuasive decisions. This might, as a result, undermine courts’ credibility, which could run counter to the objectives of strategic litigation.<sup>88</sup>

Consequently, while celebrating the pioneering role that the Dutch courts are undertaking in trying to hold corporations accountable for their contribution to climate change, it remains questionable whether such a judgment could be replicated in other jurisdictions, as it will depend, among other factors, on whether there exists such an open-ended duty of care under domestic law that allows for interpretation taking into account international instruments, the possibility to launch a class action and on the willingness of the court to deliver such a decision.<sup>89</sup>

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<sup>86</sup> *Milieudefensie v. Shell* (FN 25), paras. 4.4.11 and 4.4.18; Jentsch, 76–78.

<sup>87</sup> *Milieudefensie v. Shell* (FN 25), paras. 4.4.26–4.4.30. For a critical assessment of the Court’s determination of Shell’s reduction targets see Mayer, *Shell*; cf. Verschuuren, 79 et seqq.

<sup>88</sup> See Mayer/van Asselt, 182.

<sup>89</sup> For some rather negative perspectives on the transferability of the *Shell* judgment (FN 25) to Switzerland see Jentsch, 64–71; Kaptan, 595–96; Roberto/Fisch; cf. Hösli. Roberto/Fisch conduct an analysis of the *Shell* case (FN 25) from a Swiss perspective. They conclude that a judgment such as the one delivered by the Hague District Court would not be possible under Swiss law, since a general claim for injunctive relief would require the proof of three prerequisites that a lawsuit like the one against RDS would not be able to fulfill, namely the imminent threat of a violation of legal interests, the illegality of the conduct and the causality. As regards the illegality, the authors argue, on the one hand, that, in the absence of any legally binding obligation for private entities to halt or reduce their emissions, there is no violation of a protective norm by the company and, on the other hand, there is no breach of a duty of care, since there is no objectively recognizable danger of a violation of a legal interest of a concrete plaintiff through the conduct of the defendant. The proof of causality will be analyzed in further detail in [section VI.2](#). Furthermore, it is worth adding that Swiss

cc) *Use of a rights-based approach beyond the Shell case*

The use of international treaties, such as the Paris Agreement, for the purpose of construing corporations' obligations within national legal frameworks is, nonetheless, a strategy that has proved its potential to be emulated in other types of claims. The case filed in 2020 by a group of NGOs together with other French local governments against the French Carbon Major Total offers an example of this phenomenon.<sup>90</sup> The plaintiffs argue that the company infringes the Law of Vigilance<sup>91</sup> because its "plan of vigilance" is not in line with the Paris Agreement goals and does not properly assess its climate change risks by not considering the effects of its scope 3 emissions.<sup>92</sup> As previously mentioned, the French corporate duty of vigilance requires companies to evaluate financial risks linked to climate considerations and to provide an account of the actions implemented to mitigate these risks, which may encompass the adoption of a low-greenhouse gas strategy throughout their extended production chain.<sup>93</sup> The plaintiffs referenced the Paris Agreement to interpret this duty and argued that, by not adhering to the 2 degree temperature goal, the defendant is in breach of its obligation to prevent harm to the environment, human health, safety and human rights. The resemblance to the Shell case<sup>94</sup> is remarkable and illustrates how, in the absence of legally binding obligations for corporations to curtail or constrain their emissions within specific thresholds, litigants resort to international treaties (which lack legally enforceable mandates for private entities) in an endeavor to confer legal enforceability upon emission reduction requirements within domestic legal frameworks.<sup>95</sup> With more states starting to enact due diligence regulations for companies, as mentioned in the previous section (see above, [V.1](#)), this line of argumentation might be expected to be present in future legal proceedings.<sup>96</sup>

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procedural law does not provide for the possibility to launch a class action that can have binding effects on members of a group who are not involved in the judicial process, which makes a Shell-like lawsuit also hard to imagine under Swiss law. This aspect will also be discussed in further detail in [section VII.2](#).

<sup>90</sup> Nanterre District Court, *Notre Affaire à Tous et al. v. Total SA* (complaint of 28 January 2020).

<sup>91</sup> Law of Vigilance (FN 30).

<sup>92</sup> *Notre Affaire à Tous et al. v. Total SA* (FN 90), para. 2.3; Rumpf, 466.

<sup>93</sup> Law of Vigilance (FN 30).

<sup>94</sup> *Milieudefensie v. Shell* (FN 25).

<sup>95</sup> Rumpf, 467.

<sup>96</sup> Rumpf, 468; Kahl/Weller, N. 34-37.

## b. Claims for damage compensation

### aa) *Why is this a challenge?*

In cases involving claims for damage compensation, the absence of obligatory commitments placed upon private entities to mitigate their emissions will likewise pose a challenge for the plaintiffs. Variations can be found within the specificities of varying national tort laws, especially within common and civil law systems. Yet, as a fundamental premise, the majority of jurisdictions stipulate that the establishment of liability requires not only proving damage and causation (a topic to be explored in [section VI.2](#)), but also demonstrating unlawfulness, which denotes the breach of a duty of care.<sup>97</sup> This would require proving that the emission of a certain amount of greenhouse gases goes against what “a reasonable and prudent person would do.”<sup>98</sup>

### bb) *Strategy: use of international instruments*

It is plausible that plaintiffs, as done in the Shell case,<sup>99</sup> may turn to international treaties and instruments of soft law to substantiate their argument that the defendant, through the emission of a specified quantity of greenhouse gasses, is contravening the duty of care. Due regard may, thus, be given to the IPCC reports or the Oslo Principles, for instance, which require enterprises to avoid “excessive” emissions.<sup>100</sup> Yet, due to the non-binding nature of these instruments, other factors will need to be taken into account in order to determine whether the company acted in breach of the duty of care.

The time frame within which the emissions occurred holds significance in establishing the standard of care: the potential climate hazards arising from greenhouse gas emissions should have been reasonably foreseeable during the period of the conduct. Plaintiffs will assert that enterprises possessed substantial awareness regarding the climate-related risks associated with their operations, dating back to, at minimum, the early 1990s, when the United Nations Framework Convention on Climate Change (UNFCCC) recognized the anthropogenic nature of global warming.<sup>101</sup> As an increasing number of studies center their attention on Carbon Majors, it has grown more feasible to demon-

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<sup>97</sup> Spitzer/Burtscher, 155-156.

<sup>98</sup> Spitzer/Burtscher, 158; Wagner/Arntz, N. 63.

<sup>99</sup> Milieudéfense v. Shell (FN 25).

<sup>100</sup> Oslo Principles, para. 8.

<sup>101</sup> United Nations Framework Convention on Climate Change of 9 May 1992, S. Treaty Document no. 102-38, 1771 U.N.T.S. 107 (UNFCCC), Art. 2.

strate the longstanding awareness of the issue over numerous years.<sup>102</sup> This has, in fact, been argued in the Shell case, where the plaintiffs tried to prove that the defendant was aware of the consequences of its operations on the climate since the 1950s.<sup>103</sup>

Nonetheless, this isolated fact shall not inherently imply that each greenhouse gas emission subsequent to that point constituted a violation of the duty of care. Various other factors contribute to delineating the pertinent standard of care, encompassing aspects such as the probability and severity of harm, along with the costs associated with precautionary measures. Balancing the costs linked to avoiding greenhouse gas emissions against the potential damages necessitates considering not solely the financial outlays a company would bear upon curbing or restricting emissions, but also the societal value that these activities hold.

However, as plaintiffs are likely to assert (with valid reasoning), the repercussions of global warming impose a burden upon both current and future generations that exceeds the expenses of any measures mandating emission reductions by corporations. While this assertion holds evident truth, the global dimension of climate change renders it a complex proposition to sustain within a civil court setting, given that the emissions of an individual corporate entity only constitute a small fraction of global greenhouse gas emissions. It is the cumulative effect of these emissions over an extended temporal span that contributes to the rise in global temperatures.<sup>104</sup>

Consequently, from the perspective of a judge adjudicating an individual case, substantiating the contention that a defendant is breaching a duty of care by emitting a specific volume of greenhouse gasses would pose a formidable challenge. This, in addition to the fact that the activities of the companies would normally have a public authorization and many of them will be subject to an emission trading scheme (ETS),<sup>105</sup> would render it arduous, if not unfeasible, to establish that the defendant satisfied the criterion of unlawfulness by acting in breach of a duty of care.<sup>106</sup>

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<sup>102</sup> Rumpf, 465. See also Heede.

<sup>103</sup> Milieudéfense v. Shell (FN 25), para. 4.4.20.

<sup>104</sup> IPCC (FN 17), 4.

<sup>105</sup> The EU operates an ETS to which Switzerland is linked to since 2020 (see Factsheet of the Federal Office for the Environment (FOEN) of 9 December 2019, Linking the Swiss and EU emissions trading schemes <<https://www.bafu.admin.ch/bafu/en/home/topics/climate/info-specialists/reduction-measures/ets/linking-swiss-eu.html>>). The emissions covered by the ETS are only a part of the emissions that companies are responsible for (as stated in Milieudéfense v. Shell (FN 25), para. 4.4.47).

<sup>106</sup> In relation to the whole paragraph see Wagner/Arntz, N. 63-72; Spitzer/Burtscher, 158-165.

## 2. Causation and attribution

A second challenge that plaintiffs face is the proof of a causal link between the alleged damage and the defendant's behavior. In the context of climate change litigation against corporations, this is an obstacle mainly present in claims for damage compensation. This is due to the fact that, in order to establish tort liability, apart from unlawfulness (which has already been analyzed in the previous section, see above [VI.1.b](#)), causation needs to be proven. Even in cases where domestic law does not require unlawfulness (as § 1004 of the German Civil Code,<sup>107</sup> which served as the legal basis for the claim against RWE, where Luciano Lliuya attempted to attribute liability for nuisance caused by climate change),<sup>108</sup> causation still remains as one of the main legal challenges for plaintiffs.

Before delving into this topic, it is, however, worth noting that, in order to fulfill the requirement of causation, first a damage has to exist.

### a. Damage

In cases concerning climate-related damage that has already occurred, proving the damage alone may not constitute an obstacle for plaintiffs. Conversely, in scenarios wherein plaintiffs seek compensation for preventive measures aimed at mitigating or lowering the impact of potential future climate-related damages, this requirement could eventually be a challenge.<sup>109</sup> Moreover, in numerous legal jurisdictions, the current framework lacks tort liability for harm inflicted upon the ecosystem unless it directly impacts personal or property rights.<sup>110</sup> Consequently, a claim seeking damages will likely need to pertain

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<sup>107</sup> German Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette I page 42, 2909; 2003 I page 738), last amended by Article 1 of the Act of 10 August 2021 (Federal Law Gazette I p. 3515).

<sup>108</sup> *Lliuya v. RWE* (FN 38); Franzius, N. 8. It should be noted that in Switzerland there is a comparable provision to § 1004 of the German Civil Code (FN 107). Specifically, Art. 641 para. 2 Swiss Civil Code of 10 December 1907 (SR 210) sets forth the right to protect one's object from unwarranted interference. This provision may be invoked in the event that a claim of this nature were to be presented before a Swiss court.

<sup>109</sup> See *Wagner/Arntz*, N. 14-17.

<sup>110</sup> *Spitzer/Burtscher*, 157. The EU Environmental Liability Directive exclusively confers individuals and NGOs the entitlement to petition the competent public authority to undertake necessary actions (see Directive (EU) 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143 of 30 April 2004, p. 56 et seq.).



to harm inflicted upon absolute rights, such as life, bodily integrity, or property.<sup>111</sup>

That being said, the sole encroachment upon absolute rights typically does not result in the establishment of tort liability. As previously mentioned, causation is still required.

## b. Why are causation and attribution a challenge?

The challenge associated with establishing causation stems from the characterization of climate change as a “super wicked problem”: its global dimension, the complex chain of causation, the interplay between human-induced measures and natural factors, the scientific uncertainty as well as the involvement of different actors make, among other factors, the establishment of a causal connection between the emissions of a private entity and the plaintiffs’ damage practically unattainable.<sup>112</sup> This was, in fact, one of the main reasons why the District Court of Essen dismissed Lliuya’s claim against RWE, as no linear causal chain between RWE’s emissions and the melting of the glacier could be proven.<sup>113</sup> This challenge is even harder the further one goes into the corporation’s value chain.<sup>114</sup>

In legal proceedings, causation is normally ascertained through the application of the “but-for” test. Under this test, it is essential to establish whether the defendant’s actions were the *conditio sine qua non* for the occurrence of the plaintiffs’ harm. If the plaintiffs’ harm would not have occurred except for the defendant’s actions, a causal link is established between the defendant’s

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<sup>111</sup> Ibid. It is worth adding that this aspect might also pose a challenge for plaintiffs launching claims for injunctive relief, as they may need to prove that there is an imminent and direct interference with their rights, a task that could prove challenging within the framework of climate change circumstances (see Spitzer/Burtscher, 174-175). In the context of Switzerland, as explained in Roberto/Fisch, 1232-1233, the Swiss Civil Procedure Code requires as a procedural prerequisite that the plaintiff has an interest worthy of protection, which is said to be fulfilled only if there is an imminent threat of interference with the absolute subjective right in question (see Swiss Civil Procedure Code of 19 December 2008 (SR 272), Art. 59 par. 2 letter a). In the context of climate change, it is hard to argue that it causes an imminent encroachment on absolute subjective rights. In the case Federal Supreme Court of Switzerland, Association of Swiss Senior Women for Climate Protection (KlimaSeniorinnen) v. Federal Department of the Environment Transport, Energy and Communications (DETEC) et al. (5 May 2020) 1C\_37/2019 (albeit in a case against the Swiss government) the Federal Court decided following this reasoning.

<sup>112</sup> Payandeh, N. 32. See also Lazarus.

<sup>113</sup> Franzius, N. 8; Hösli/Weber, Klimaklagen gegen Unternehmen, N. 38.

<sup>114</sup> Peel, 22.

conduct and the resultant damage.<sup>115</sup> This means that, first, a link between greenhouse gas emissions and global warming is needed (which, in accordance with the state of science today, seems to be unproblematic)<sup>116</sup> and, secondly, a causal connection has to be established between the rise in global temperature and the climate-related incident at issue (an extreme weather event or, as in *Lliuya v. RWE AG*, the melting of the glacier in Peru) as well as between the incident and the harm inflicted on the individual plaintiff.<sup>117</sup>

### c. Strategies: climate science and precautionary principle

Bearing that in mind, plaintiffs may try relying on climate science, for instance, information on companies' greenhouse gas emissions or attribution science, which differentiates between natural and human-induced causes of climate change.<sup>118</sup> By using climate science, they will try to link a company's share in the total global greenhouse gas emissions to a specific climate change-related incident, which, conversely, brought about the alleged damage. Ultimately, they may invoke the precautionary principle under international environmental law (enshrined in the UNFCCC)<sup>119</sup> which states that, even when there is lack of full scientific certainty, "precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects" should be taken.<sup>120</sup>

However, even taking these arguments into account, the but-for test would not be fulfilled due to the inability to assert that the climate-related incident (and the resulting damage) would not have taken place in the absence of global warming, let alone without the emissions from a specific entity.<sup>121</sup> What is more, even if a causal link between the company's emissions and the alleged damage could be proven, the causation would fail to be adequate, since said emissions could not be affirmed to have seriously increased the risk of the harm.<sup>122</sup>

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<sup>115</sup> Spitzer/Burtscher, 166.

<sup>116</sup> IPCC (FN 17), 4.

<sup>117</sup> Wagner/Arntz, N. 37.

<sup>118</sup> Steiner/Engdaw. Extreme weather attribution even links human-induced climate change to extreme weather events. See also Cho.

<sup>119</sup> UNFCCC (FN 101), Art. 3 para. 3.

<sup>120</sup> See Omuko, 57.

<sup>121</sup> Spitzer/Burtscher, 167; Wagner/Arntz, N. 39-47; Roberto/Fisch, 1238. For an analysis of the plausible alternatives to the but-for test and an explanation as to why the climate change scenario would not fit into any of these, see Spitzer/Burtscher, 168-173.

<sup>122</sup> Wagner/Arntz, N. 48-62; Roberto/Fisch, 1239.

Considering that the rise in global temperature is caused, in great part, by the greenhouse gases emitted by a large number of actors and that the emissions of every individual entity, thus, only represent a fraction of the total global greenhouse gases released into the atmosphere, it is not possible to attribute a specific damage to the emissions of a particular source.<sup>123</sup> It will, thus, be difficult to argue why an individual party within the extensive collective of emitters can be independently subject to liability.<sup>124</sup>

Moreover, even if a causal link were to be established between the actions of the defendant and the purported harm, claimants will still face difficulties proving the degree of responsibility of the company for the damage allegedly caused (and, therefore, the compensation owed), since, although it is certain that greenhouse gas emissions contribute to climate change (and, in turn, to the alleged damage), the extent in which the particular emissions of the corporation contributed to cause the specific harm is unknown. Consequently, as seen in the case against RWE,<sup>125</sup> plaintiffs tend to draw on calculations of the defendant's contribution to global industrial greenhouse gas emissions (e.g., the ones published by the Climate Accountability Institute).<sup>126</sup>

Accordingly, in relation to this, an argument that could be expected to be brought up by defendants in these types of cases is the “drop in the ocean” argument.<sup>127</sup> This relates to the characterization of climate change as a “tragedy of the commons”, where every individual actor has the incentive to free ride on the efforts done by others. Based on this, it is argued that a judicial order to reduce a company's greenhouse gas emissions will not be an effective measure to protect the climate, since the efforts of that actor will be cancelled out by the higher emissions of others.<sup>128</sup> The sued corporations will therefore argue (as in *Lliuya v. RWE AG*<sup>129</sup> and *Milieudefensie v. Shell*<sup>130</sup>) that, even if they would completely halt their emissions, this would not make a difference for climate change and, therefore, a single facility cannot be held accountable for this global problem.<sup>131</sup> This is an argument that has also often been raised by governments in climate cases.<sup>132</sup> Nevertheless, this reasoning, if applied by every-

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<sup>123</sup> *Sindico/Mbengue/McKenzie*, 21; *Fisch*, 537-39.

<sup>124</sup> *Kahl/Weller*, N. 64.

<sup>125</sup> *Kling*, 215.

<sup>126</sup> *CAI, Carbon Majors*.

<sup>127</sup> *Peel*, 16-17.

<sup>128</sup> *Jentsch*, 80-83; *Wagner Gerhard*, 2257-58. See also *Hardin*.

<sup>129</sup> *Kling*, 219.

<sup>130</sup> *Milieudefensie v. Shell* (FN 25), para. 4.4.49.

<sup>131</sup> *Weller/Tran*, 599.

<sup>132</sup> See, for instance, *Netherlands v. Urgenda* (FN 68), para. 2.3.2.

one, would impede all climate action and lead, indeed, to a “ruin to all”.<sup>133</sup> Climate change is a “multiscalar” problem that also requires small-scale action, i.e., by every individual actor.<sup>134</sup> As held by the Court in *The Netherlands v. Urgenda*, the effectiveness of the UNFCCC requires disregarding this defense.<sup>135</sup>

In consequence, even in light of the advanced scientific knowledge available today, establishing causation will remain a significant obstacle in tort law-based claims seeking compensation for climate change-related damages. This is primarily attributable to the intricate nature of climate change as a “super wicked problem,” which renders the task of establishing a causal connection between the defendant’s behavior and the alleged harm exceedingly arduous, if not practically impossible, within the confines of prevailing tort law requirements.

There remains hope that, in light of the inherent complexities intrinsic to climate change, certain judges might opt for a more lenient assessment of the burden of proving causation. The recent decision by the Higher Regional Court of Hamm to admit *Lliuya’s* claim against RWE could be interpreted as an optimistic signal that courts are inclined toward adopting such an approach.<sup>136</sup> However, it is imperative to exercise caution in steering too far in this direction, as an excessively flexible approach could lead to arbitrary judicial verdicts.

Consequently, the manner in which litigants will navigate this challenge and the approach that judges will adopt in addressing these issues remain subjects that warrant observation and evaluation.

## VII. Justiciability issues

In the preceding section, an analysis was conducted of two primary challenges, mainly concerning substantial matters, encountered in climate change litigation against corporations. This section will briefly discuss two additional concerns related to justiciability, which are inherent in different types of climate-related cases, either against governments or private entities – specifically, the concerns regarding the separation of powers and the issue of standing.

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<sup>133</sup> Hardin, 1244-45.

<sup>134</sup> Peel, 17.

<sup>135</sup> *Netherlands v. Urgenda* (FN 68), para. 5.7.7.

<sup>136</sup> Higher Regional Court of Hamm, *Lliuya v. RWE AG* (Indicative Court Order and Order for the Hearing of Evidence of 30 November 2017) I-5 U 15/17.

## 1. Separation of powers

A concern shared by some scholars and often raised by defendants in climate cases is that courts are not legitimized to rule on this matter, as it requires assessing political and scientific aspects, which are entrusted to the legislative and executive branches.<sup>137</sup> In what relates to cases against private actors, courts are oftentimes criticized for judging in favor of climate protection measures (e.g., emissions reduction orders) based on non-climate specific law and, thus, overstepping on legislative powers.<sup>138</sup> While acknowledging the potential role that the judiciary may undertake in holding private (and public) entities accountable for climate change-related impacts, thereby indirectly raising awareness within society, it is widely concurred among scholars that the principal responsibility for addressing climate change primarily rests with the legislative branch.<sup>139</sup> Hence, building on the US “political question doctrine”, it is frequently argued that courts should avoid issuing these judgments.<sup>140</sup> In accordance with this line of thought, it is a prevalent assertion that only in cases where the legislative body fails to act the judicial system can serve as a conduit through which civil society compels corporations to acknowledge and address the climate-related risks associated with their operations.

Nonetheless, even though it holds true that the judiciary cannot be regarded as the primary custodian of climate change matters,<sup>141</sup> there are various aspects that should be taken into account in this regard. Firstly, it should be pointed out that the judiciary, while remaining within the limits of the law, still has the competence to interpret general legal principles. Additionally, the lack of judges’ scientific knowledge might demonstrate the necessity of enhancing judicial capacity rather than the unsuitability of courts to decide on climate change-related issues.<sup>142</sup> Furthermore, due regard must be given to the fact that, while certain cases of climate litigation (particularly those examined in this article) do indeed seek to expand the established boundaries of the prevailing law, others are concerned solely with the defendant’s failure to adhere

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<sup>137</sup> KlimaSeniorinnen v. DETEC (FN 114), para. 4.3; Wallner, 372-373; Payandeh, N. 27-31; Franzius, N. 33-35.

<sup>138</sup> Payandeh, N. 31.

<sup>139</sup> Roberto/Fisch, 1241.

<sup>140</sup> Jentsch, 74-76. See also Wagner Gerhard.

<sup>141</sup> Kahl/Weller, N. 55 et seqq.

<sup>142</sup> Payandeh, N. 31.

to their legally mandated obligations.<sup>143</sup> As a result, the legitimacy of judicial rulings on matters pertaining to climate change should not be subjected to scrutiny in every individual case.

## 2. Standing

Lastly, an issue that has to be mentioned in climate change litigation is one related to the admissibility, namely the standing. This is mainly a challenge in claims against states or public bodies (see, for instance, the cases *KlimaSeniorinnen v. DETEC* or *Armando Carvalho et al. v. The European Parliament and the Council*)<sup>144</sup> but it might also be an issue in cases against private actors, since some jurisdictions might require the proof of an individual interest in the dispute, which is especially challenging with regard to climate change, as it is a global problem that affects the whole population.<sup>145</sup> The adjudication will, thus, require the representation of a global phenomenon as an individual concern. For instance, this could involve emphasizing particular attributes of the plaintiffs that render them exceptionally susceptible to the consequences of climate change,<sup>146</sup> or substantiating that the emissions produced by the defendant have directly resulted in specific harm to the property owned by the claimants.<sup>147</sup> Nevertheless, judges are not consistently convinced by such reasoning.<sup>148</sup>

In legal systems where mechanisms for collective legal protection exist and can be employed in the context of climate-related litigation, the situation might look a bit differently. This is exemplified, for instance, by the Swedish legal framework, where group lawsuits can be filed in the context of mass dam-

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<sup>143</sup> See, for instance, Higher Administrative Court Berlin-Brandenburg, *Deutsche Umwelthilfe (DUH) v. Germany* (claim filed on 5 September 2022) <<https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-germany/>>. For a non-EU example see *R (on the application of Friends of the Earth Ltd.) v. Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin). See also Payandeh, N. 29.

<sup>144</sup> In *KlimaSeniorinnen v. DETEC* (FN 111), para. 8, the Court concluded that the plaintiffs' rights were not sufficiently individually affected. In CJEU, Decision of 25 March 2021 in Case C-565/19 P, ECLI:EU:C:2021:252 - *Armando Carvalho et al. v. The European Parliament and the Council*, paras. 46-48, the European Court of Justice rejected standing based on insufficient individual concern as per the "Plaumann Test".

<sup>145</sup> *Sindico/Mbengue/McKenzie*, 8 et seqq.

<sup>146</sup> See *KlimaSeniorinnen v. DETEC* (FN 111), para. 8.

<sup>147</sup> See, for instance, Paris Court of First Instance 5th Chamber 2nd Section, *Notre Affaire à Tous et al. v. Total SA* (order of the pre-trial judge issued on 6 July 2023) RG 22/03403, p. 25-27.

<sup>148</sup> *Ibid.*; *KlimaSeniorinnen v. DETEC* (FN 111), para. 8.

ages or damages to the environment.<sup>149</sup> Nevertheless, the availability of these instruments remains somewhat limited across European jurisdictions. Hence, in numerous states, there is a rising consensus advocating for the incorporation of a collective legal protection mechanism within the realm of climate change litigation. This appeal is founded upon the premise that such an instrument is essential to ensure effective legal protection and climate preservation.<sup>150</sup>

## VIII. Conclusion

With the mounting awareness surrounding climate change and companies' role in it, it could be expected that climate change litigation against corporations will continue to rise. Businesses will face pressure from all sectors to align their activities to climate-compatible goals. This pressure will come, on the one hand, from the reputational and financial risks that will arise if they fail to do so and, on the other hand, from recently enacted and proposed changes in Swiss and EU legislation (some of which have been mentioned in [section V](#)) that will provide for a legal basis for some of the claims, furthering litigation. This expectation has led many scholars to suggest companies to take concrete measures in order to start taking climate risks into account.<sup>151</sup> Bearing this expectation in mind and having provided an overview of how litigation is increasingly being used to advance climate action, the question that arises is to what extent is a litigation approach promising to achieve actual changes in corporate behavior regarding climate change.

While the challenges examined in this article may persist in forthcoming cases, potentially thwarting plaintiffs in their efforts to surmount them, the persistent discourse surrounding these challenges may yield positive repercussions in the broader campaign for heightened climate action beyond the confines of the courtroom.

The utilization of international human rights frameworks to interpret corporations' responsibilities within domestic legal frameworks could trigger a reevaluation of these entities' societal roles. This, in turn, might stimulate the establishment of more stringent legal mandates that bind corporations to uphold human rights and environmental standards.

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<sup>149</sup> Wagner Erika, 434-435.

<sup>150</sup> For instance, in the context of Switzerland see Kneubühler/Hänni. From an Austrian perspective see Wagner Erika, 415-439.

<sup>151</sup> See, for instance, Kaptan; Weber/Hösli, Corporate Climate Responsibility; Olawuyi.

Regarding the burden of proving causation, although it remains a formidable obstacle for plaintiffs to conquer, the inherent complexity of climate change – the very complexity that amplifies this challenge – might ideally urge both private and public entities to abandon notions of their actions being mere drops in the vast ocean of climate issues. Instead, it could encourage a collective reconsideration of the shared responsibility each holds in the realm of climate change.

Concerning the matter of legal standing, even as prospective claims may continue to encounter skepticism in terms of their admissibility, this recurring predicament could stimulate progress in the development and accessibility of collective protection mechanisms in the context of climate change litigation, across various legal jurisdictions.

Lastly, in light of the possibility that certain claims could still be branded as overly “political,” the surge in climate-related lawsuits assumes a crucial role in conveying a message. These legal actions serve as a means to emphasize that although judges may not be the primary custodians of climate-related affairs, their role remains pivotal in sounding the call for more robust climate action.

With these considerations in mind, it is intriguing to contemplate the broader role of litigation as a whole in the broader struggle to enhance climate action. While it is undeniable that litigation alone will not solve this “tragedy of the commons”, it has to be concluded that it is a valuable piece of the puzzle when trying to address such a global and complex phenomenon like climate change. The effects of a case can indirectly be expanded beyond the parties by raising awareness and setting the issue in the political agenda as well as putting financial and moral pressure on corporations to take climate impacts into account.<sup>152</sup> Besides this, the importance of small-scale measures should not be disregarded: climate change has global dimensions, but it is caused by individual actions. Because of this, it is imperative that all stakeholders, on multiple levels of governance, proactively engage with the matter. Relying on the attainment of a global solution through international negotiations, which currently appears unattainable, will only serve to compound the issue further. The polycentricity of climate change, therefore, means that one thing is certain:

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<sup>152</sup> Ibid. 5; Peel/Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, chapter 2.



while climate change litigation will not stop all greenhouse gas emissions, it is still one piece in the multidimensional climate governance that is required to address one of the most urgent problems of today's society.<sup>153</sup>

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<sup>153</sup> Peel/Osofsky, Climate Change Litigation: Regulatory Pathways to Cleaner Energy, 13-15; Payandeh, N. 34-36; Kahl/Weller, N. 69. On the necessity of a polycentric approach to climate change and the importance of individual action see Ostrom.

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