

Global trends in rights-based climate litigation and the coming of just transition litigation

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Outline

Climate litigation & Rights-based climate litigation

- The rise
- Data, what we know and what we don't know
- Trends
- Against states and against corporates
- Just Transition litigation

Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers

Annalisa Savaresi and Joana Setzer*

This article revisits and expands on extant scholarly inquiries into the so-called 'rights turn' in climate litigation, with the objective of providing a more comprehensive appreciation of the role of human rights litigation in the context of the climate emergency. We rely on well-established categories used in the literature on climate litigation and on human rights and the environment to provide the first systematic analysis of rights-based litigation that aligns with climate objectives. Building on this basis, we consider the significant data and knowledge gaps concerning human rights litigation, the role of rights-based litigation towards net zero emissions, and the area at the intersection of both, for further investigation, both from an academic and a policy perspective.

Keywords: climate change, human rights, litigation, net zero emissions, just transition

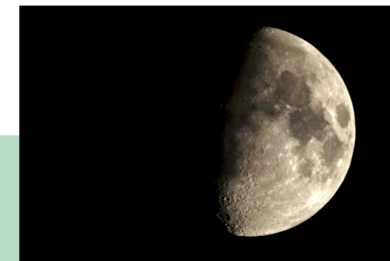
1 INTRODUCTION

Litigants around the world



Mapping the whole of the moon: The rich landscape of rights-based litigation in the climate emergency

By Editor 28th March 2022



By Annalisa Savaresi and Joana Setzer

In 2018, Jacqueline Peel and Hari Osofsky identified a 'rights turn' in climate litigation. The use of human rights law and remedies to address concerns related to climate change has since intensified and become

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A first global mapping of rights-based climate litigation reveals a need to explore just transition cases in more depth

Commentary on 29 March, 2022

Annalisa Savaresi and Joana Setzer have identified more than 100 climate cases that rely on human rights arguments to promote action on climate change – but also a growing body of 'just transition' cases that are questioning the distribution of the benefits and burdens that the drive to net-zero is creating. To better understand how the transition can be inclusive and respectful of human rights, this new frontier of litigation requires deeper exploration.

To develop a clearer and more comprehensive appreciation of the role of human rights law and remedies in the climate crisis, there is a need to consider all rights-based litigation concerning climate action. Yet to date, a focus on rights-based litigation that aligns with climate mitigation and adaptation objectives has dominated in the academic literature. We have previously referred to these cases as 'near side of the moon' cases, as they have become increasingly well-documented. Meanwhile, details of climate litigation that does not align with mitigation or adaptation have been neither systematically collected nor analysed – these are what we call 'far side of the moon' cases and they represent a significant gap in knowledge that requires further research.

The near side of the moon – cases aligned with climate action

We analysed 711 cases that relied in whole or in part on human rights arguments, brought up to May 2021. Comparing their characteristics with trends in general climate litigation reveals some striking peculiarities in rights-based climate cases.



Climate justice flyer (Credit: Ana M Amortegui / iStock)

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Climate litigation

(Broad): Lawsuits brought before administrative, judicial and other investigatory bodies, in domestic and international courts and organisations, that raise issues of law or fact regarding the science of climate change and climate change mitigation and adaptation efforts (Markell and Ruhl, 2012; Burger and Gundlach, 2017)

Human rights based climate litigation

Lawsuits raising questions of law or fact regarding climate science, climate change mitigation or adaptation, which are brought before international or domestic judicial, quasi-judicial and other investigatory bodies ***and which rely in whole or in part on human rights***

The rise of rights-based litigation

- ✓ Urgenda and Leghari
- ✓ Peel & Osofsky (2018) identified a 'rights turn' in climate litigation
- ✓ Over 2/3 of rights-based litigation filed after 2018

1. Understanding the big picture

Focus on 'climate aligned'

2. New knowledge frontiers

What about litigation that is **not aligned** with climate objectives?

Making sense of what we know

Categories and trends in climate change litigation

ARTICLES

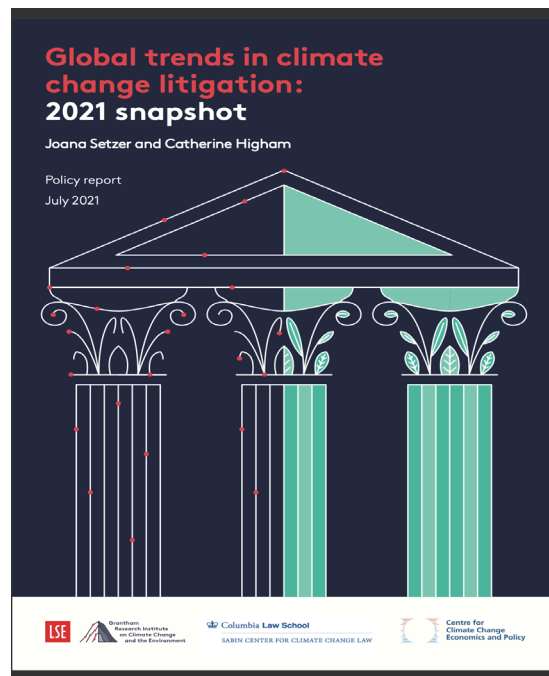
AN EMPIRICAL ASSESSMENT OF CLIMATE CHANGE IN THE COURTS: A NEW JURISPRUDENCE OR BUSINESS AS USUAL?

David Markell¹ & J.B. Ruhl¹

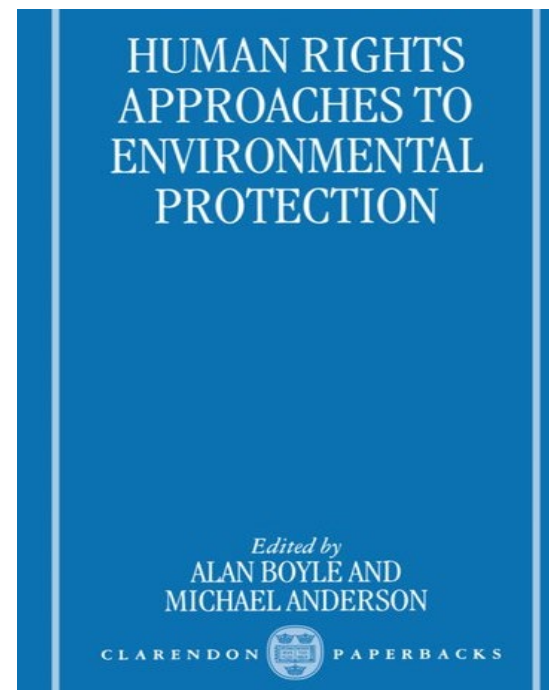
Abstract

While legal scholarship seeking to assess the impact of litigation on the direction of climate change policy is abundant and growing in leaps and bounds, to date it has relied on and examined only small, isolated pieces of the vast litigation landscape. Without a complete picture of what has and has not been within the sweep of climate change litigation, it is difficult to offer a robust evaluation of the past, present, and future of climate change jurisprudence. Based on a comprehensive empirical study of the status of all (201) climate change litigation matters filed through 2010, this Article is the first to fill those gaps and assess the state of play of climate change in the courts. It concludes that the story of climate change in the courts has not been one of courts forging a new jurisprudence, but rather one of judicial business as usual.


Part I of the Article outlines the scope of climate change litigation, explaining what qualifies as climate change litigation in our study, our methodology for identifying and coding case attributes, and our typology of the claims that have been or likely will be made as climate change moves relentlessly forward. Part II then presents and assesses the major theme revealed from our empirical study and largely missing from commentary on climate change litigation—that a siege-like battle between “pro” and “anti” regulation interests has led to an increasingly robust and complex litigation landscape but with mixed results for both sides. Drawing from those findings, Part III takes on a set of empirical and normative questions designed to summarize and assess the climate change litigation experience and its impacts on the content and institutions of climate policy. It is evident at all levels of inquiry that



Categorisations used in HRs & environment litigation



United Nations A/HRC/31/52

 **General Assembly** Dist.: General
1 February 2016
Original: English

Human Rights Council
Thirty-first session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Note by the Secretariat

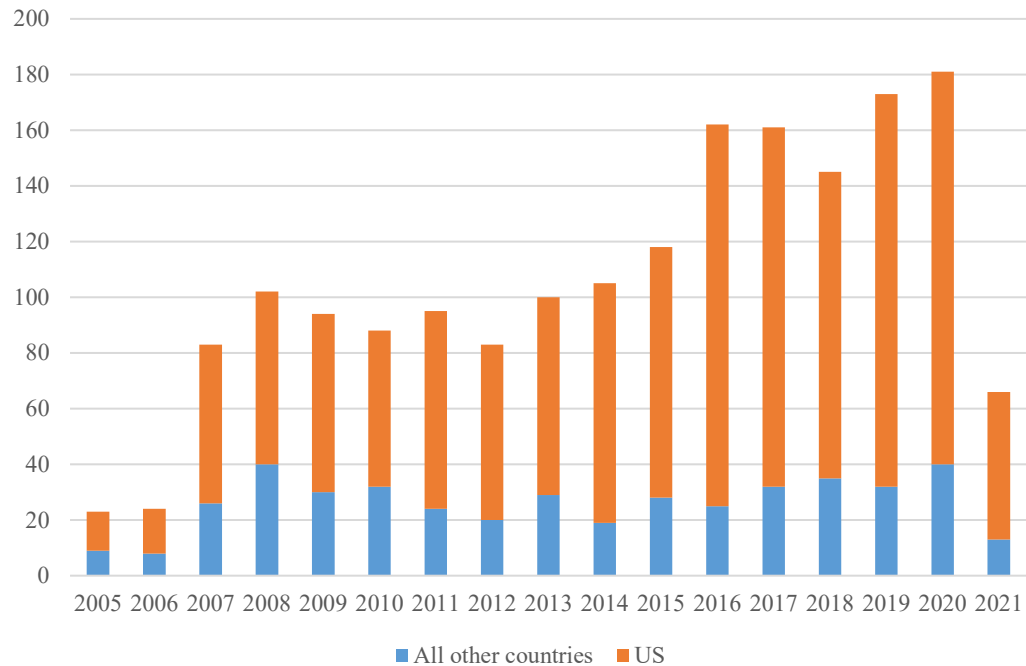
The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox, on the human rights obligations relating to climate change. In this report, he describes the increasing attention paid to the relationship between climate change and human rights in recent years, reviews the effects of climate change on the full enjoyment of human rights and outlines the application of human rights obligations to climate-related actions. He explains that States have procedural and substantive obligations relating to climate change, as well as duties to protect the rights of the most vulnerable.

Numbers and chronology

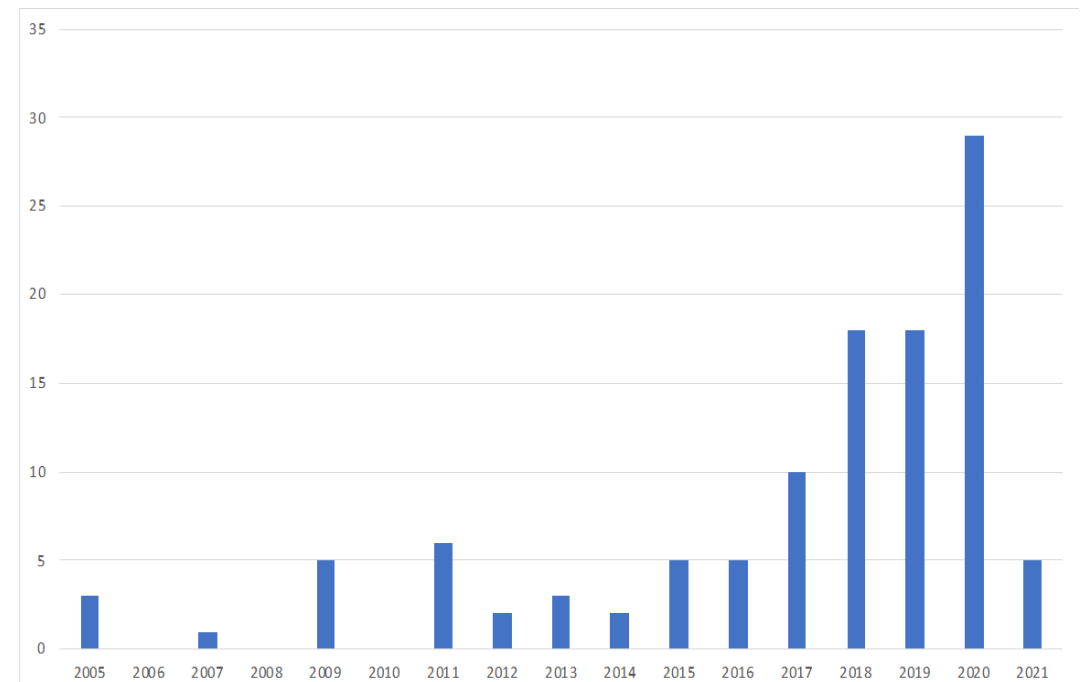
1,841 climate cases

112 human rights cases

(US and non-US databases, on 31 May 2021)

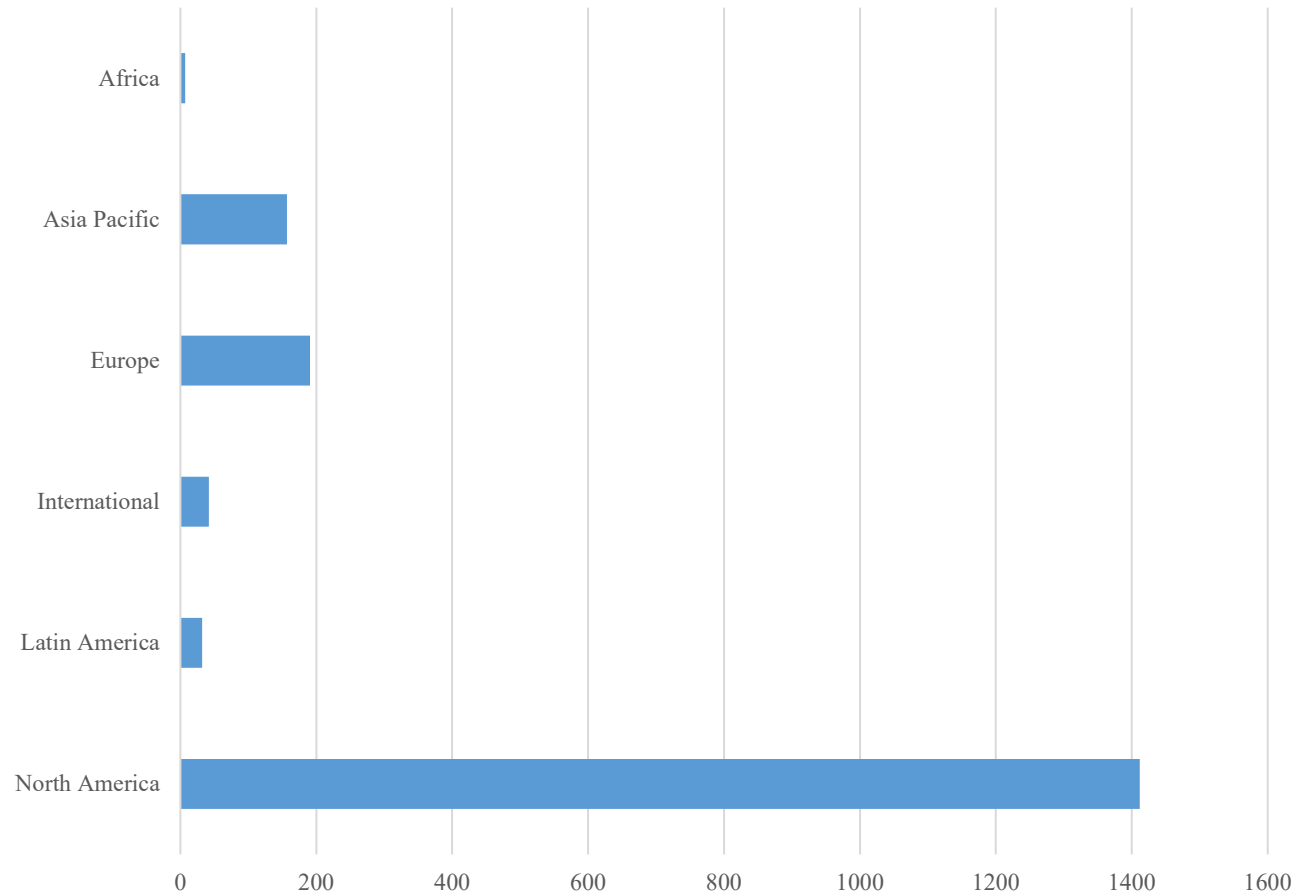


CC litigation

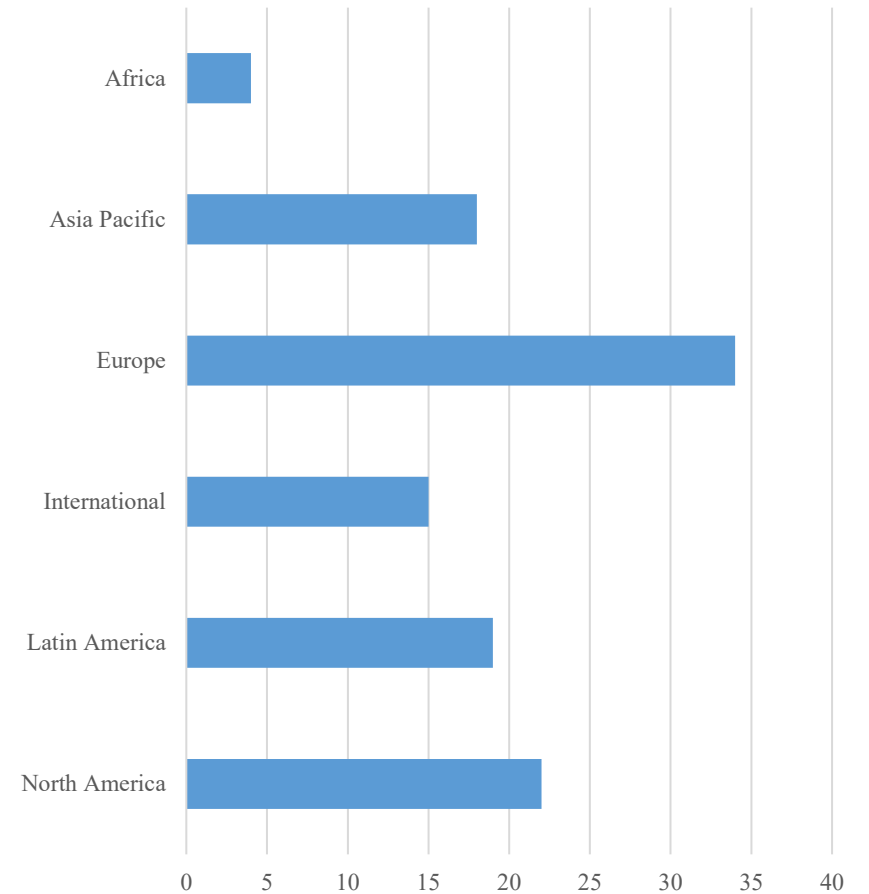


HH & CC litigation

Geography



CC litigation



HH & CC litigation

Applicants and defendants

- **Applicants**

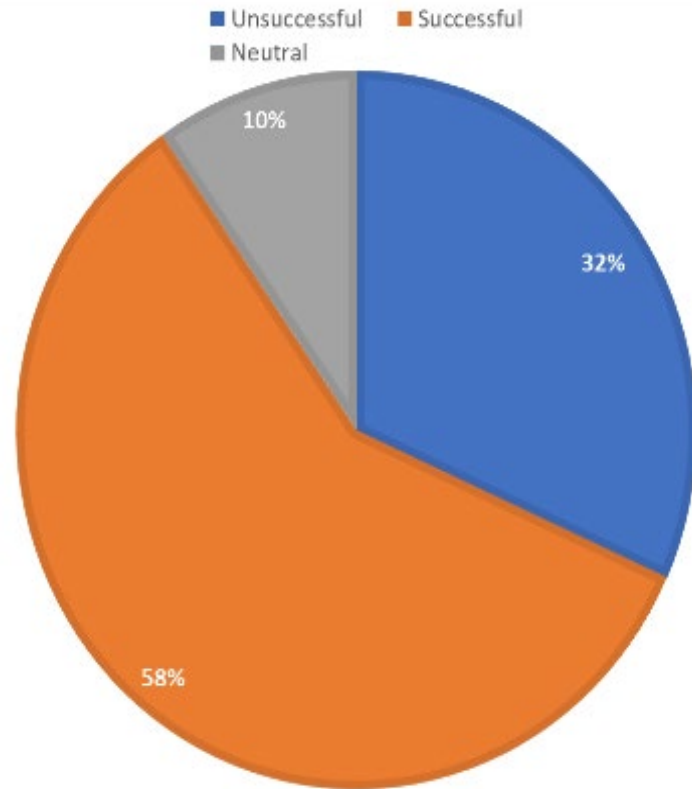
- **HR&CC:** typically individuals and groups
- **General climate litigation:** historically NGOs and corporate actors



- **Defendants**

- **HR&CC:** typically states and public authorities, small (16) but high profile cases against corporations
- **General climate litigation:** typically governments

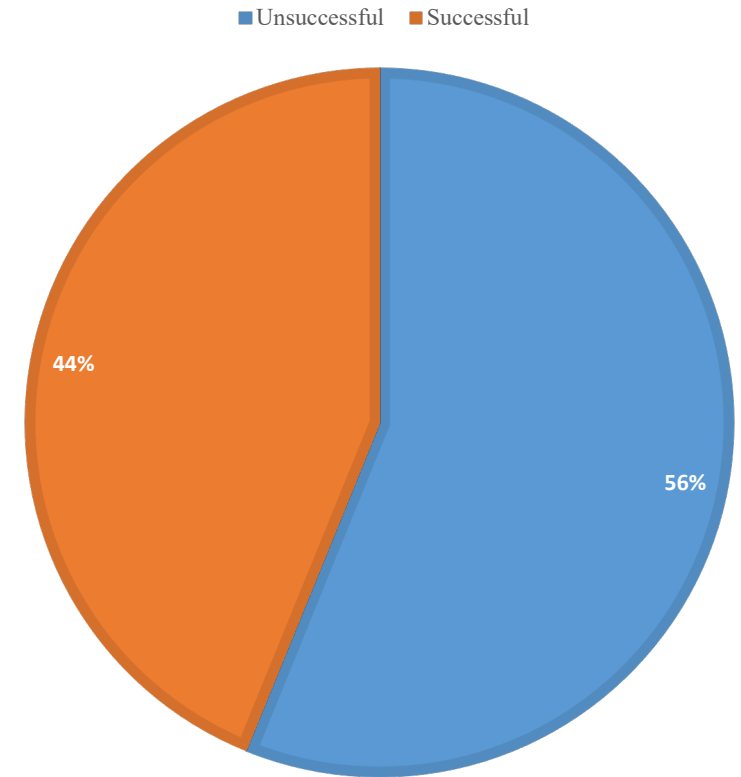
Human rights-based climate cases: the outcomes



CC litigation (non-US)

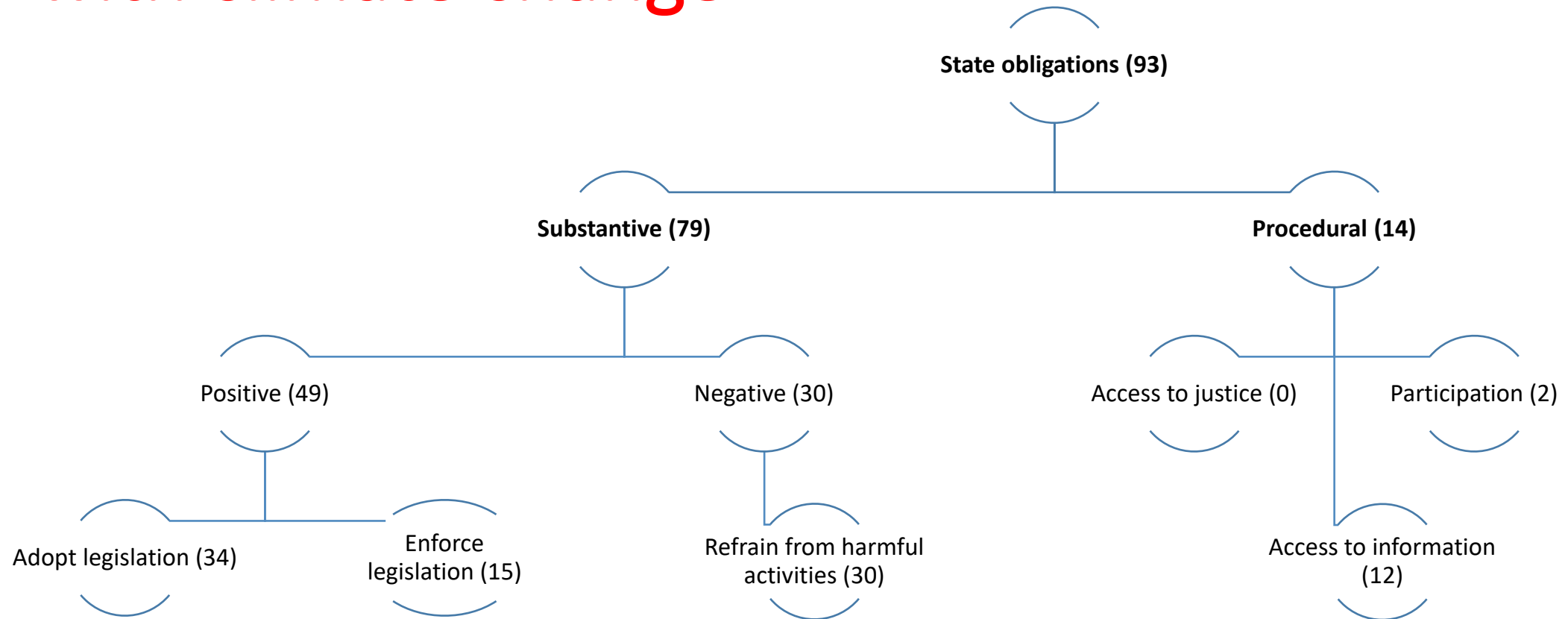


Cases may have impacts beyond the court room even if they are unsuccessful

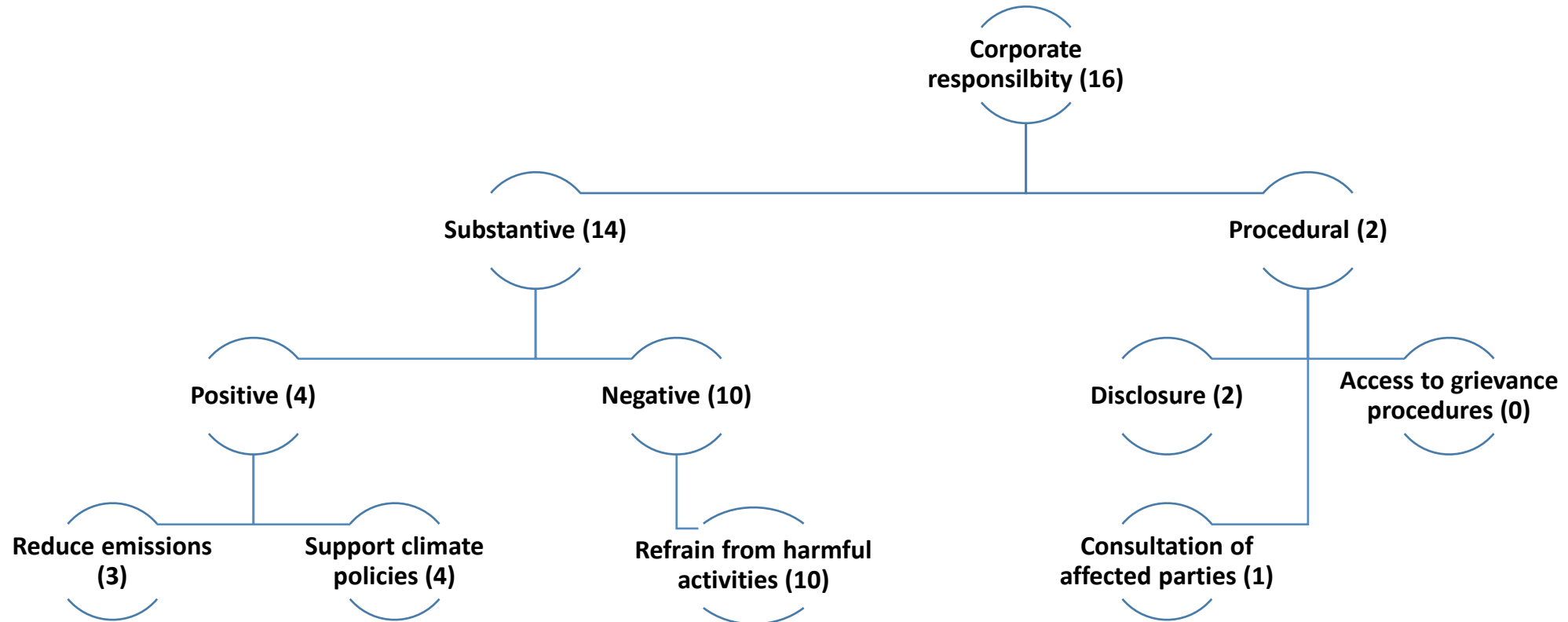


HH & CC litigation

States human rights obligations associated with climate change



Corporate human rights obligations associated with climate change



Just transition litigation: a significant gap

- Cases that rely in whole or in part on human rights arguments to question the distribution of the benefits and burdens of the transition away from fossil fuels and towards net-zero emissions
- Not objecting climate action per se, but the way it is carried out or its impacts to enjoyment of human rights
- Self-standing (not 'anti', 'anti-regulatory' or 'defensive')



Just transition litigation: a new frontier

- Equilibria between competing societal interests
 - How the benefits of decarbonisation should be shared, and those who stand to lose should be supported
 - Importance of safeguarding (procedural and substantive) rights, protecting individuals and groups from unjust decisions of governments and corporations
- Need to explore this new frontier



PELS RIICKEN



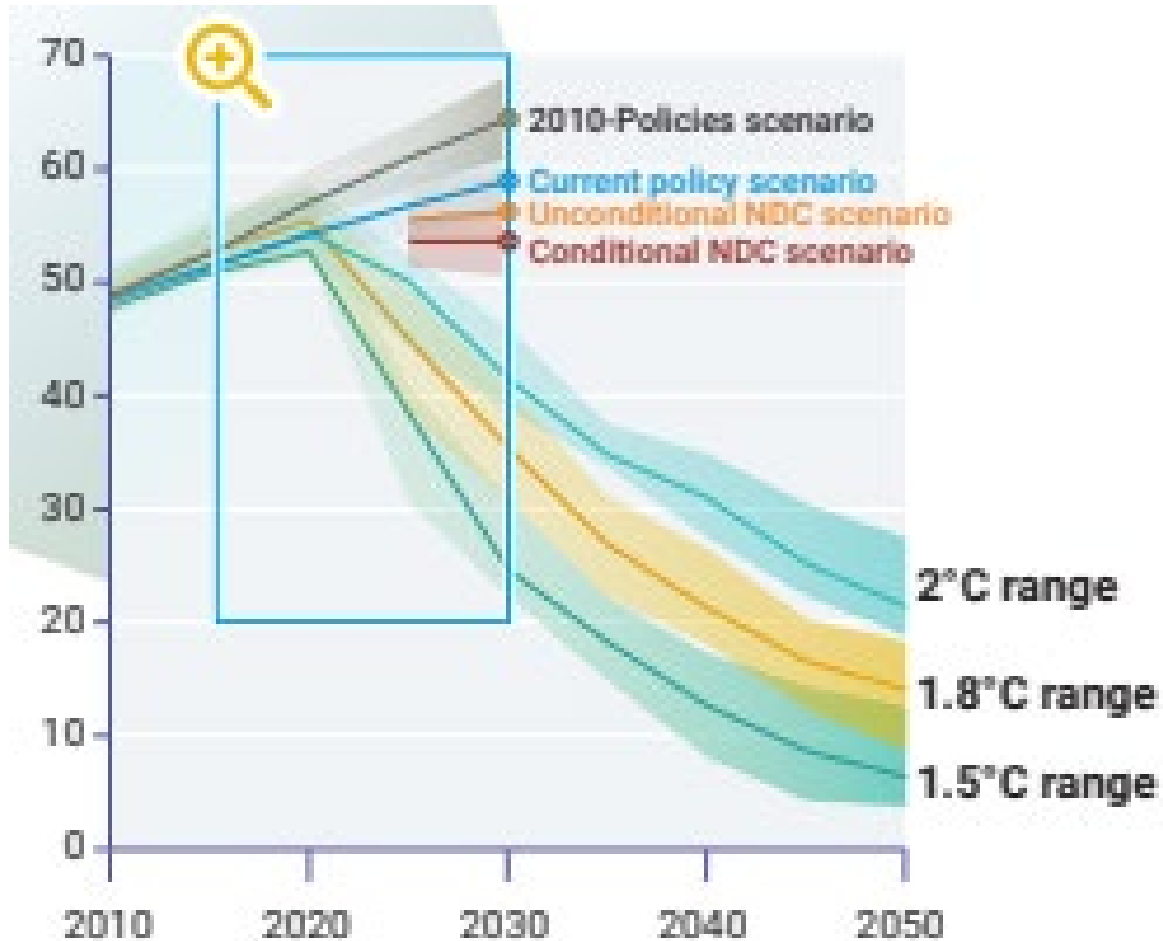
Shell climate change ruling IBA 2022 Annual Litigation Forum

Martijn Scheltema

29 April 2022



UNEP Emission Gap Report, Nov. 2020



- **Current NDCs remain seriously inadequate to meet temperature goals Paris Agreement**
- Unconditional NDCs consistent with limiting warming to 3.2°C
- Failure to significantly reduce global emissions by 2030 make it impossible to keep global warming below 1.5°C
- Dramatic strengthening of ambition is needed to achieve Paris goals.

Shell ruling

1. Climate change not exclusively Shell's problem but shared responsibility to act, even if governments implement no or insufficient measures (not sole responsibility of States)
2. 1.800 climate related cases (predominantly US) but so far no global order to reduce greenhouse gas emissions including in value chains

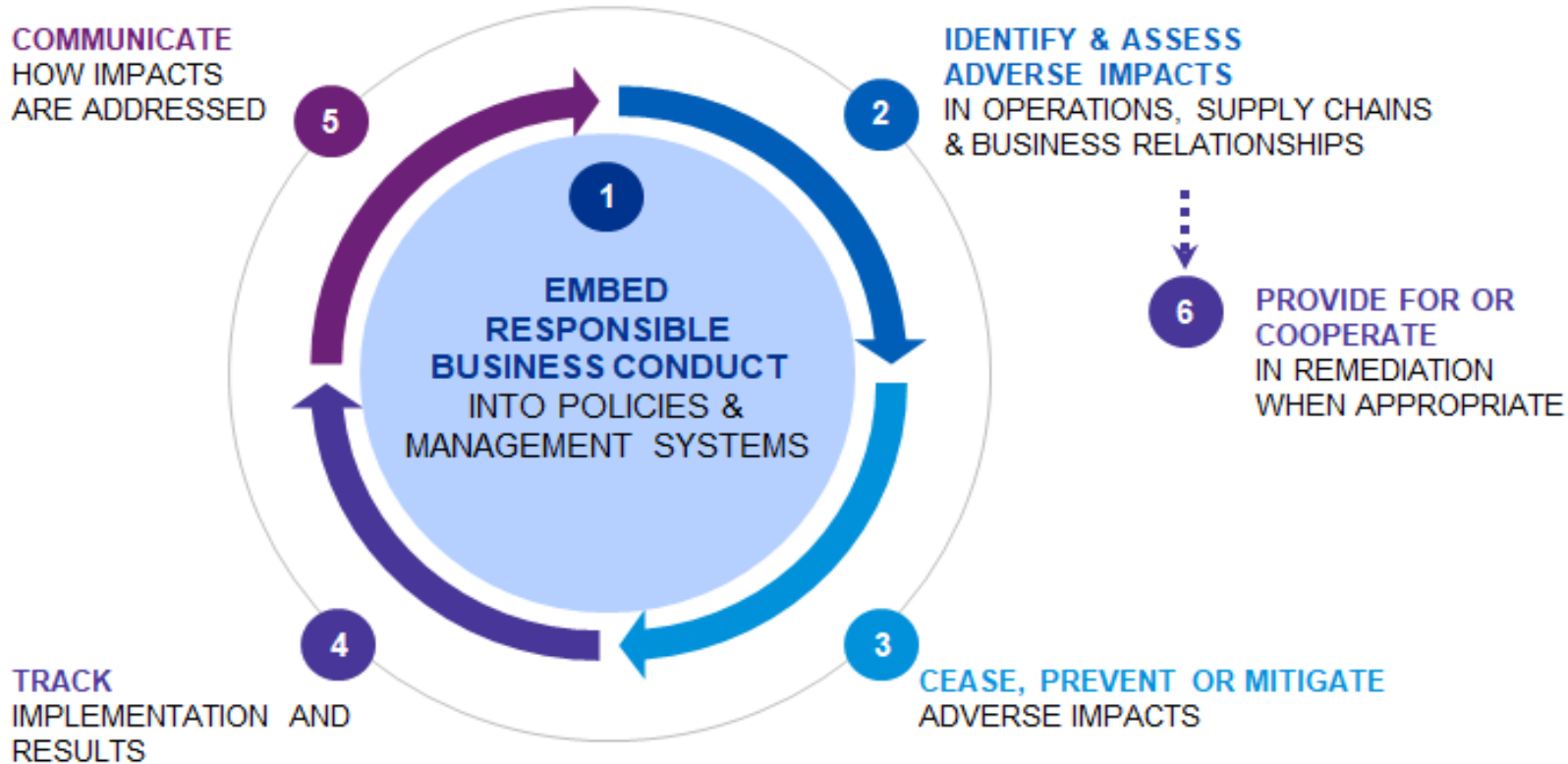
Shell ruling

1. District court starts with analysis of climate change issue and consequences building on scientific data (i.a. UNEP Emission Gap report 2020, 3.2° C in 2100 with current NDC's)
2. Shell has relatively large contribution (1.7% of global emissions compared to Netherlands (0.4%) or EU (8.7%))
3. Claim directed at parent, who controls operations of 1,100 subsidiaries and operating companies
 1. Shell has actually gathered knowledge on climate change risks, already in the '80 and '90s (internal and external reports)
4. Court does not elaborate on governance structure, because of application of UNGPs

Shell ruling

1. **Claim and decision address Scope 1, 2 and 3 emissions (based on World Resources Institute Greenhouse Gas Protocol)**
 1. Scope 1: emissions from own or controlled facilities
 2. Scope 2: emissions from third parties who provide energy to Shell
 3. Scope 3: other emissions caused by operations Shell by parties not under control of Shell (such as end users)(85% of emissions of Shell is Scope 3)
2. **District court underpins order based on art. 6:162 DCC with 14 observations**
 1. Such as policy setting position of Shell in the group, scale of the emissions, consequences of emissions for Netherlands, leverage over suppliers and end users, the onus and proportionality of a reduction measure and the UNGPs (and OECD Guidelines)

Six steps of Human Rights Due Diligence



UNGPs as hard law

1. Court rules human rights such as art. 2 and 8 ECHR are relevant also in relation between Shell and claimant (cf. Urgenda)
2. What is expected in connection with business and human rights is reflected by global consensus in UNGPs and OECD Guidelines, here focus on step 3 (and a little on 4)
 1. Shell complied with steps 1, 2 and 5
 2. UNGPs not designed as legal norm
3. Relates to Scope 1, 2 and 3 emissions, but regarding Scope 3 a significant obligation of means and not of result

UNGPs as hard law

1. Starting point is Shell has to adapt policy and implement new policy as Dutch company based on Dutch law in all its operations
2. Solves three issues:
 1. Jurisdiction (Dutch court creates de facto global jurisdiction)
 2. Applicable law (also very relevant for other non-environmental types of impact)
 3. Corporate separateness



UNGPs as hard law

1. Is human rights due diligence (especially exercising leverage) fit for climate change?
 1. Can leverage be transposed in a best efforts obligation, lacking causation or contribution?
 1. More than with 'traditional' human rights violations change in markets required
 2. Focus on end users instead of suppliers
 2. Article 29 (d) of the proposal of the EC
 3. How far does the order reach (e.g. also emissions caused by processing of waste in value chains)?

Klik om te bewerken



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