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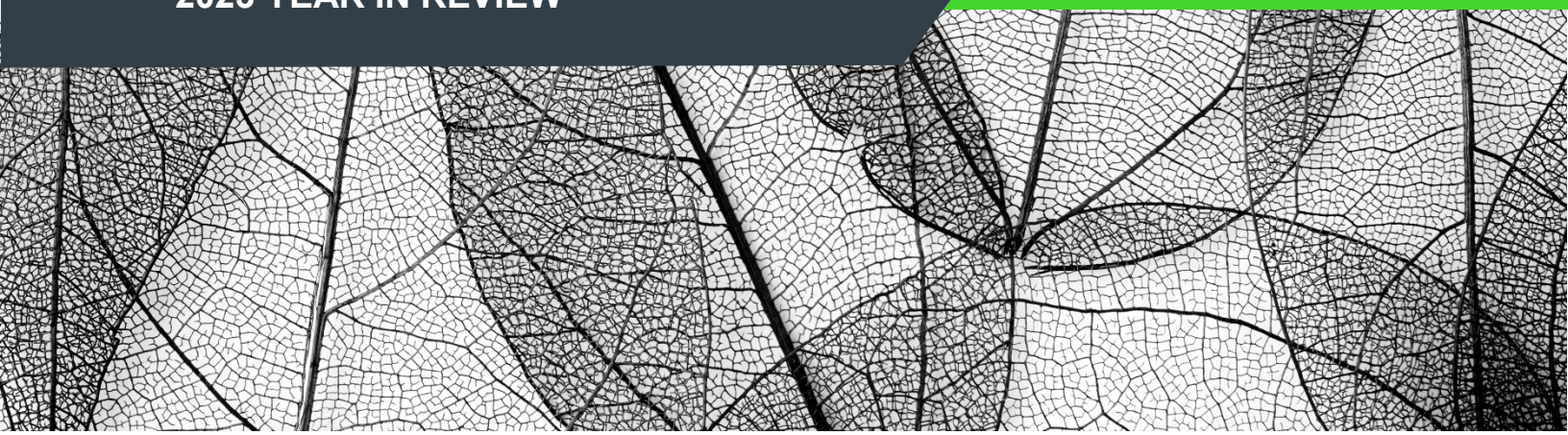
CLIMATE IMPACT NEWSLETTER
2023 YEAR IN REVIEW



As the impact of the climate crisis continues to grow, now more severe and more widely felt across different communities and industries, so too does climate litigation – a vital mechanism for climate action – continue to expand and evolve. In May, the LSE's Grantham Centre reported an increased number of cases, across a greater diversity of jurisdictions, and particular growth of 'strategic' cases, including those against corporate entities. However, 2023 can perhaps best be characterised as a year of latent potential, as regards the climate litigation and regulatory landscape, in the UK and Europe especially.

This year has seen important regulatory developments being proposed or just beginning to bite. Key concepts within environmental law and policy were debated in the courts and will soon be ruled upon – including how emissions are calculated and how human rights protections operate in this sphere – and important cases relating to the ability of shareholders or investors to hold companies to account were dismissed, but provided insights into how these cases could be brought in the future.

COP28

Even before COP28 commenced, the climate talks were riddled with controversy, especially after briefing documents were leaked ahead of the summit in which the host country, the UAE, outlined plans to strike fossil fuel deals at the conference. Concerns over the ability of the talks to result in meaningful change have become more acute since the pre-conference 'Global Stocktake' report from September 2023 concluded that, based on current progress, we are likely to miss the goal of maintaining global temperature rise to below 1.5°C.

Similarly, the heated and drawn-out debates about the final draft deal to be agreed by all 198 countries – and the removal from an early draft of language on phasing out fossil fuels – did not bode well. However, some progress appears to have been made over the course of the conference.

After lengthy last-minute negotiations, the final Global Stocktake text published on 13 December reinserted language proposing that countries transition away from fossil fuels. Agreement was also reached on more elements of the loss and damage fund, set-up to provide financial assistance to nations most impacted by the effects of climate change. Earlier in the conference, funding for the protection of particular environments, such as forests and oceans had also been agreed.

However, the final conference deal has still been criticised as insufficient: it fails to reference the need for methane emission reductions, for example, and doubts remain about the role and utility of 'transitional fuels' and technologies such as carbon capture. Questions have also been raised in relation to funding commitments from wealthier states: how will such funding be allocated and renewed? How effective will payments be and are they sufficient?

The full ramifications of COP28 will become clearer in the coming weeks and months: it will be important to see how countries respond to agreements reached at the conference and how commitments are implemented.

REGULATORY DEVELOPMENTS

Human rights and environmental corporate due diligence obligations remain high on government agendas. In June earlier this year, the European Parliament voted in support of an amended draft EU Corporate Sustainability Due Diligence Directive (CSDDD). The CSDDD would impose mandatory human rights and environmental due diligence requirements on a range of corporate actors. This change to 'mandatory' requirements for businesses is a change from earlier voluntary regimes, such as John Ruggie's 2011 Guiding Principles on Business and Human Rights. The current draft of the CSDDD would require companies to identify, prevent or mitigate their negative impacts on areas such as the environment, biodiversity, child labour, and slavery.

Ensuring high standards of human rights and environmental protection throughout supply chains is a crucial, yet complex, matter and such detailed and comprehensive guidance in this area is to be welcomed. It will be some time before the Directive becomes law but, when it does, it is likely to impact not just corporate actors in Europe, but also companies with sufficiently large turnover in the EU and, indirectly, companies who contract with EU companies. For more info.

In 2021, the UK's Financial Conduct Authority published proposals for a climate-related financial disclosure regime. The deadline for the first of these disclosures was in June earlier this year, and required UK firms managing funds and portfolios to produce a report outlining how climate-related risks and opportunities are considered when managing investments. These reports are required to be published on the firm's website and are part of an effort to ensure high-quality, accessible information on the management of climate-related risks along the investment chain. Such transparency should allow for investors to make informed decisions about how to invest, but it may also allow for greater pressure on – and potentially litigation against – those firms that fail to adapt their approach in the face of the climate crisis.

Biodiversity Net Gain (BNG) is another recent government climate strategy and aims to develop land in such a way that habitat for wildlife is in a better state than it was before development. This strategy will help to protect biodiversity whilst also delivering new homes and development across the country. BNG was initially due to be implemented in November 2023, but has now been pushed back by the Government until early 2024. From January 2024, it will become mandatory for developers in England to achieve a minimum of 10% biodiversity net gain after development. Such policies are key both for protecting biodiversity and combatting the climate crisis.

PUBLIC LAW

There have been a range of cases in the public law sphere over the past year, often focusing on the government's failure to integrate climate considerations into certain decisions or its lack of ambition in current climate policies.

Friends of the Earth v UK Export Finance, for example, concerned the need to take account of Scope 3 emissions when carrying out an Environmental Impact Assessment (EIA). In September 2020, Friends of the Earth brought a legal challenge against a UK Export Finance decision to fund a liquified natural gas project off the coast of Mozambique using over $1 billion of UK taxpayers' money. The case challenged the decision's compatibility with (and the government's understanding of) the UK's climate obligations, such as its commitments under the Paris Agreement, and its failure to consider Scope 3 emissions.

Scope 3 emissions include all the emissions which an organisation is responsible for along its value chain, such as emissions from products bought from suppliers and emissions from the products it sells. These include emissions not otherwise captured in Scope 1 and 2 reporting, as Scope 1 emissions concerns only direct emissions, whilst Scope 2 emissions concerns indirect emissions from the generation of purchased energy.

Friends of the Earth v UK Export Finance was dismissed by the Court of Appeal in January 2023, after a split judgment in the Administrative Court. The judgment held, first, that the government was only required to adopt a "tenable view" of the meaning of the Paris Agreement and that it had done so, and second, that it was not irrational for this project to be funded without quantifying its Scope 3 emissions. In June of this year, the Supreme Court refused Friends of the Earth's permission to appeal. This decision highlights the hesitance of the judiciary to intervene in areas which it views as matters of public policy. However, as climate litigation continues, and arguments and the science relating to Scope 3 emissions develop, it remains to be seen if the Court will continue to follow this position; a crucial issue in this context will be the judgment of the Supreme Court in *Finch v Surrey County Council.*

Finch is another case relating to the consideration of Scope 3 emissions in the context of a decision to allow oil drilling in Surrey. It was heard before the Supreme Court in June, but a judgment has not yet been issued. The applicants in *Finch* argued that the EIA for the oil drilling ought to have taken account of the climate impact of the downstream emissions from customers using the oil extracted from the site. *Finch* is a landmark challenge in this field and a similar case, *Greenpeace v Whitehaven Coalmine*, has been stayed awaiting its outcome. The *Whitehaven Coalmine* case involves a challenge to the approval of a new coal mine in Whitehaven, Cumbria. Such challenges seeking Scope 3 emissions to be included in EIAs could have major implications for future development in England and Wales and could potentially lead to much more stringent climate protection in future.

The importance of *Finch wa*s reiterated in the judgment of *Greenpeace and Uplift v SoS for Energy Security and Net Zero* from October, in which the claimants unsuccessfully argued that the government's authorisation of new licences for oil and gas exploration in the North Sea was unlawful. A key point in the judgment was that, on the basis of the Court of Appeal's decision in *Finch,* downstream greenhouse gas emissions were considered not "likely significant effects" of the government's plans because of the insufficient causal connection between extraction of fossil fuels and its consumption. Greenpeace has stated that it intends to appeal the decision.

Last year, there was a high-profile success in the environmental judicial review brought by Friends of the Earth, ClientEarth, and the Good Law Project against the government's climate change strategy, whereby the High Court required further clarification as to how the government's net zero policies would achieve emissions targets. Following the publication of the revised Carbon Budget Delivery Plan in March 2023, the claimants are again seeking to challenge the government's proposals, arguing that the new strategy is 'not fit for purpose', including because it relies on unreliable technologies to address climate change.

HUMAN RIGHTS AND INTERNATIONAL LAW

Climate change litigation continues to rely upon key human rights principles as codified in domestic legislation and/or international treaties. An important development in this regard from 2022 was the adoption of a UN resolution declaring a universal right to a healthy environment and calling for states to ensure that right is protected; this has bolstered legal arguments and will further serve to test the nexus between environmental and human rights law in cases now pending judgment.

Notable examples of such cases are those brought in relation to the European Convention on Human Rights (ECHR), to be heard by the European Court of Human Rights (ECtHR). There are currently several claims before the ECtHR where the claimants argue that national climate policies are failing to address the risks of climate change such that individuals' human rights are threatened. Three such claims are before the ECtHR: *Duarte Agostinho*, *Carême* and *Verein KlimaSeniorinnen.*

The *Duarte Agostinho* claim, brought by a group of Portuguese young people, is perhaps the most ambitious, alleging that 33 European states have failed to comply with their 'positive obligations' (i.e. their duties to take active steps to protect individuals' rights) under Articles 2 (the right to life) and 8 (right to respect for private and family life) ECHR, given those states' undertakings under the Paris Agreement. They also allege a breach of Article 14 (the prohibition of discrimination) given the climate crisis affects younger generations in particular. The ECtHR itself raised the question of whether Article 3 (the right to be free from inhuman or degrading treatment) is also affected. The claim was heard in September, following the March hearing of *Carême* and *Verein KlimaSeniorinnen,* and while Hausfeld were not involved in the oral hearings, the firm did act for intervenor Save the Children International in their written submissions supporting the case. The judgments in these cases are expected next year and could have vital implications for how courts in European jurisdictions, including the UK, interpret important issues in climate cases, including extra-territorial jurisdiction for climate harm (which might be caused within a state but be suffered outside it), standing (where some climate impacts remain undetermined), and positive obligations. This in turn could have a major impact on state policy and law.

2023 has also been an important year for the involvement of other international fora. For example, at the very end of last year, the Commission of Small Island States, submitted a request for an Advisory Opinion pursuant to Article 21 of the Statute of the International Tribunal for the Law of the Sea (ITLOS). The first question submitted to ITLOS concerns the prevention of pollution of the marine environment resulting from climate change and GHG emissions. The second question concerns the protection and preservation of the marine environment in relation to climate change impacts. In September this year, ITLOS conducted hearings for oral statements for the advisory opinion, allowing different legal experts and stakeholders to contribute. The advisory opinion is expected to be rendered over the next 6-8 months.

In January of this year, Chile and Columbia requested an advisory opinion from the Inter-American Court of Human Rights in relation, specifically, to the scope of human rights obligations under the American Convention on Human Rights vis-à-vis the climate emergency. The advisory opinion seeks clarification on the interrelationship between mitigation, adaptation, loss and damage, and human rights obligations. The objective of this request for an advisory opinion seems to be to build on the progressive 2017 advisory opinion of the Court, which recognised "the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights".

After the culmination of years of grassroots campaigns and advocacy, the UN General Assembly passed UN GA Resolution 77/276 on the 29 March earlier this year. This Resolution contained a request to the International Court of Justice for an advisory opinion questioning what the obligations of States are under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations and what the legal consequences of breaching these obligations are.

This is not to say that 2023 has been devoid of actual judgments or decisions in this space, though. In August, two interesting developments occurred. First, judgment was handed down in *Held v Montana,* the first constitutional climate trial in the US, in which the court found in favour of protecting the constitutional right to a healthy environment. Secondly, the UN Committee on the Rights of the Child (CRC) published General Comment 26, which emphasises the necessity of the right to a healthy environment for the full enjoyment of children's rights. This is a significant development in international law and is of particular relevance given that it was prompted by the efforts of children and youth in the *Sacchi v Argentina et al* case. This case in the UNCRC highlighted the reality that the 'climate crisis is a child rights crisis' thus States must take a 'child centred approach' to formulating climate policies toward achieving net zero by 2050. The *Sacchi* case, in which Hausfeld represented the petitioners, further argued that the respondent States had failed to take sufficient measures, under the UN Convention on the Rights of the Child, by recklessly causing life-threatening climate change. Whilst this case was deemed inadmissible, it has prompted similar litigation globally and contributed to mounting pressure on the CRC to publish legal guidance on this matter. For more info.

COMMERCIAL LAW

2023 has seen some interesting developments in investor and shareholder climate litigation too, and an increased recognition of the importance of corporate decision-makers' roles in combatting climate change. In February this year, ClientEarth filed a case against Shell's board of directors alleging, among other issues, a breach of their statutory directors' duties on the basis of their alleged failure to adopt and implement a climate strategy in alignment with the Paris Agreement. This was a derivative claim, meaning that it was brought by ClientEarth as a shareholder, on behalf of and for the benefit of the company. Such claims require permission from the Court in order to proceed, and this was rejected by the Court first on the papers and then after an oral hearing. The Court came to various conclusions but, broadly, deferred to the directors, holding that it was for them to determine, in good faith, how to promote the success of the company.

Another recent derivative case is that of *McGaughey v Universities Superannuation Scheme Limited.* This case was filed by two pension scheme members against certain directors of Universities Superannuation Scheme Limited, alleging, among other arguments, that USSL had failed to plan adequately for the divestment from fossil fuels. The Court rejected the claim and stressed that the derivative claim procedure can only be used in exceptional circumstances. Moreover, it stated that the claim could not be characterised as a derivative claim, as it had failed to establish a prima facie case that the company had suffered a financial loss as a consequence of the alleged breach of directors' duties.

O'Donnell v Commonwealth is yet another important investor case, from Australia. It alleges that the Australian government had failed to disclose climate-related risks to those investing in Australian sovereign bonds. The claimants allege that Australia's international financial reputation would be affected by the government's response to climate change and that investors trading Australian government bonds would face material risks from climate change that should be disclosed. The parties agreed to settle the case over summer, with the settlement being approved in October. One of the key terms of the settlement requires the Australian government to make a statement acknowledging that climate change is a systemic risk which may affect the value of its government bonds.

As many in the UK are aware, issues around water quality and sewage have frequently featured in the news over 2023. In response to these issues, a competition-law collective action has been launched against Severn Trent Water, with further claims planned against five other water companies, arguing that they have abused their dominant positions by under-reporting the number of pollution incidents they have caused to regulators, which led to customers being unfairly overcharged for sewage services.

This is a significant case as it represents the first collective action in which the competition law abuses deal solely with the proposed defendants' compliance with environmental laws and their reporting requirements. The complaints are being brought by Professor Carolyn Roberts on behalf of over 20 million household customers who have overpaid due to the abuse.

A similar case is that of *The Manchester Ship Canal Company Ltd v United Utilities Water Ltd,* in which Hausfeld is representing the Environmental Law Foundation as an intervener. The central question in the dispute concerns whether and when water and sewage undertakers can discharge sewage into waterways and also seeks to answer the question of whether those impacted have a private right of action again the relevant water company. The Court's order to permit this intervention highlights the urgency of the problem and the potential reach of the case in the field of environmental protection. The Supreme Court's judgment is awaited. For more info.

2024

Notwithstanding the lack of success in the *ClientEarth* and *McGaughey* cases, 2024 could see an increase in investor or shareholder climate claims which highlight the commercial risks of the climate crisis and the important role companies have to play in addressing it. These two cases provide a useful template for future litigants in terms of how expert evidence could be deployed in similar cases, how investor sentiment should be mustered to support a claim, and how to examine financial risks in the climate context. The dicta of the Court in these cases can be used as guidance, and the Australian *O'Donnell* case is also encouraging insofar as the Australian government has agreed to concede that climate change is a systemic risk which may affect the value of its government bonds.

Further, stricter regulatory and disclosure requirements, alongside growing investor pressure, is likely to offer up new opportunities for climate-conscious investors or shareholders to hold directors or fund managers to account, including by litigation. Section 90 and Section 90A of the Financial Services and Markets Act, which allow shareholders to bring claims against companies who make false or misleading statements (including about their climate change commitments), could be important in this regard.

The course of human rights litigation and the obligations on states as regards the climate crisis will certainly be influenced by the various advisory opinions and ECtHR cases discussed above. A robust reading of the relevant international treaties and the rights they give rise to in favour of the claimants and of climate action more broadly could result in significant changes to government policies globally. Within the EU and in the UK, ECtHR decisions that read positive obligations expansively, for example, could bring important protections for individuals and communities affected by all kinds of pollution, emissions, and climate harm. 2024 should also bring greater clarification of key concepts within climate litigation: in this regard, the Supreme Court's judgment on scope 3 emissions in *Finch* and private law actions in *Manchester Ship Canal Company* could also have an important impact on climate cases and climate policy, especially with regard to fossil fuel projects.

Another potential area in which international law and arbitration could see momentum in 2024 is in investor-state disputes. For example, the German company RWE has previously brought a claim against the Netherlands under the Energy Charter Treaty demanding compensation after the government agreed to phase out coal by 2030, impacting two of RWE's coal plants. That claim was withdrawn late this year but, if States do start to take more ambitious climate action, further such disputes could arise.

CONCLUSION

It remains clear that climate litigation is helping to bend the needle toward structural change in our society, polity, and economy. 2023 has been a year in which advocates of climate action – pressure groups, public bodies, NGOs, investors, lawyers, funders, journalists – have worked hard to lay the groundwork for future success. While there have been setbacks – *ClientEarth* and *McGaughey*, for example – these have shed light on where action is possible, whether through popular campaigns or strategic legal cases which leverage wider shareholder pressure, or more innovative corporate accountability mechanisms. And, importantly, we now await key judgments or opinions from international courts that could be vital in shaping our response to the climate crisis in coming years.

This Year in Review has been authored by Wessen Jazrawi, Simon Bishop, Ingrid Gubbay and Patrick Kenny with further assistance from Ariana Bourdillon Ruiz and Sarah Dent Cullen.

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The team is very good. They have shown a major commitment to strategic environmental litigation by acting pro bono for various NGOs in the Court of Appeal and Supreme Court in long-running litigations.

Legal 500 UK, 2024