

**2022 YEAR IN REVIEW**  
**CLIMATE IMPACT DISPUTES**



This year continued the upwards trend in climate and environmental litigation, including an evolving focus on the commercial sector and the exploration of claims in relation to Environmental & Social Governance (ESG) issues. There has been extensive commentary on how the landscape is expected to change as the reality of climate change tightens its grip on the legal sector. There have been a number of important decisions and new cases as claimants continue to push the boundaries of procedural and substantive law to find creative litigation strategies which can mitigate the impacts of climate change and provide remedies to those who are most affected. 2022 also saw COP27, where it became clear that 'adaptation' remains the biggest hurdle.

Governments, businesses and other stakeholders, meanwhile, make efforts to organise their operations in ways that are legally and regulatorily compliant. In the long term, this

should help mitigate their impact, and helps place ESG at the centre. Litigation in ESG-related areas has increased in recent years and strategic litigation in an environmental context has seen a sharp rise. At the same time, analysis and examination of this area often lacks focus and involves loosely defined terminology and concepts and can risk straying into well-meaning aspiration, rather than a genuine assessment of where the law is realistically heading. While strides have been made in some areas, it is unlikely, for example, that legal personage for environmental entities or a privately enforceable cause of action in ecocide will be established any time soon (at least not in the English legal system). In this newsletter, we attempt to dissipate the haze by looking at recent key developments, beginning with our analysis of the key issues emerging from COP27, most around loss and damage.

### **COP27 – A COP OUT?**

Between 9 and 17 November 2022, the Conference of Parties to the United Nations Framework Convention on Climate Change met in Sharm El-Sheik for COP27. Each COP is, with ever increasing urgency, viewed as a crucial forum in which the current impacts of climate breakdown might be mitigated, and the worst scenarios of the future avoided.

The final day of the conference was (perhaps optimistically) dubbed Solutions Day – so what progress was made, and where did COP27 fall short of its objectives? The three core elements of climate action are often described as mitigation, adaptation and loss and damage.

In short, COP27 is seen as having made progress on mitigation and loss and damage, but adaptation remains a huge challenge.

In relation to the aim under the 2015 Paris Agreement to keep temperature rises to no more than 1.5C above pre-industrial levels, the COP26 commitments were generally retained, despite some countries seeking to renege. However, and crucially, many were dismayed to see that the resolution to cause emissions to peak by 2025 was removed.

Once again, the competing demands and views of nations across the globe demonstrated the political difficulty in securing the necessary agreements. This was particularly seen in relation to climate finance where wealthy and developing nations struggled to find common ground, given that wealthy nations had been historical carbon emitters who disproportionately contributed to the current climate crisis.

There was also disappointment in relation to energy transition. Controversially, the COP26 agreement only secured a commitment to 'phase down' rather than 'phase out' coal energy. This position was maintained at COP27, and it was not possible to expand the commitment to include oil and gas. Although the conflict in the Ukraine has catapulted renewed efforts to secure a sustainable transition away from carbon energy, COP27 regrettably did not deliver any breakthrough on this issue.

By contrast, the progress made on loss and damage is more tangible. Critics note, however, that engagement on this issue only addresses the symptoms of climate change, whilst the causes – and in particular the ongoing burning of carbon fuels – remain issues upon which there is seemingly immovable obstinacy from some political leaders.

## **LOSS AND DAMAGE - COP27**

Loss and damage became the key theme of COP27 and is the area in which the most progress was made. Loss and damage refers to the irreversible economic and other costs of extreme weather events, such as hurricanes, flooding or drought, and the onset of climate disasters such as sea-level rises. Those responsible for fossil fuel pollution should be liable for the suffering and losses of those affected by it. Those most affected by climate change tend to be in those parts of the world that are least to blame.

The losses caused by climate breakdown are vast in scope and scale. Economically, communities may see their livelihoods lost and homes destroyed. They may lose access land, livelihoods, food, security and sustainable shelter. Beyond the economic costs, there are less tangible but hugely important loss of culture, identity, human dignity, and biodiversity.

Heading into COP27, the IPCC highlighted loss and damage in its 2022 report ensuring that these issues were high on the COP27 agenda. Many will view the key achievement of COP27 as securing agreement to create a loss and damage fund. A transitional committee is now expected to meet before the end of March 2023 to make recommendations on how the fund will work so that these can be presented at COP28 in November 2023. The UN climate change executive secretary Simon Stiell said, *"This outcome moves us forward. We have determined a way forward on a decades long conversation on funding for loss and damage -deliberating over how we tackle the impacts on communities whose lives and livelihoods have been ruined by the worst impacts of climate change."*

The negotiated text of the agreement has recognised that financial support under the fund should come from a range of sources, however, crucially no decisions have yet been made on who should contribute, where the funds should come from, and which countries will be eligible beneficiaries.

The COP27 agreement represents an important step towards securing equitable climate justice – but as, ever, the devil will be in the detail and the transitional committee's recommendations need to make a practical impact for the loss and damage fund to go beyond paying lip service.

## **NOTABLE TRENDS/CASES IN Q4 2022**

### **Regulatory**

As the importance of environmental and social responsibility gains momentum, the financial services industry is stepping to the forefront, and we question how governments and others will approach meeting ESG challenges. It is worth pointing to the EU's March 2022 Corporate Sustainability Due Diligence Directive, which sets out mandatory human rights and environmental due diligence obligations for corporates, together with a *civil liability regime to enforce compliance*

with the obligations to prevent, mitigate and bring adverse impacts to an end. The rebranding of the proposal is significant – it highlights the intention of the EC to harmonise legal standards and to impose a general duty on the business community and address adverse human rights and environmental impacts, rather than providing general governance rules. [For more info.](#)

In October 2022, the UK's Financial Conduct Authority (FCA) proposed a set of new measures designed to reduce greenwashing and improve consumer and investor confidence in products that make sustainability claims, in its "Sustainability Disclosure requirements (SDR) and investment labels". [For more info.](#)

The proposed rules include the introduction of sustainable investment 'labels' to apply to products – disclosure requirements regarding products' sustainability features, risks and opportunities and rules limiting how sustainability-related terms can be used in product names and marketing. These proposals represent a clear sign from the FCA that firms' sustainability related statements will be subjected to enhanced scrutiny in the future and have the potential of being a real driver for changes in financial markets. [For more info.](#)

## Public Law

### *Conectas Direitos Humanos v BNDES and BNDESPAR*

In June 2022, the NGO, Conectas Direitos Humanos, filed a claim against the Brazilian Development Bank (BNDES) and the investment arm of BNDES responsible for managing its shareholders in various Brazilian companies (BNDESPAR). The NGO alleges that the procedures currently in place in evaluating the impact of BNDESPAR's investments on the climate are inadequate, which is a violation of the Paris Agreement and Brazil's National Policy on Climate Change. The NGO has requested that the Federal Court make an urgent injunction to require BNDES and BNDESPAR to adopt (amongst others) transparency measures in relation to their investment decisions; to present a plan for future investments to be in line with Brazil's commitments under the Paris Agreement; as well as to establish a Climate Situation Room which will evaluate whether these targets are complied with.

It is said to be the world's first civil climate action against a national investment bank and its developments will undoubtedly shed light on how Brazil's judiciary plans to tackle this global trend of climate litigation.

### *R (on the application of Friends of the Earth) v Secretary of State for Business Energy and Industrial Strategy*

Friends of the Earth (together with ClientEarth and the Good Law Project) commenced judicial review proceedings against the Secretary of State for Business Energy and Industrial Strategy in connection with decarbonization policies adopted by the UK government claiming a breach of the Climate Change Act and Equality Act. On 18 July 2022, the High Court found in a landmark ruling for climate change that the Net Zero Strategy does not meet the government's obligations under the Climate Change Act to set out sufficient climate policies demonstrating how the UK's carbon budgets will be met.

The ruling was on the grounds that the Secretary of State lacked vital information when considering the strategy, which in turn did not provide sufficient information for the Parliament, and the public to properly assess it.

The government will therefore have to update its climate strategy to take into consideration how its policies will realise the proposed targets and propose a new report before Parliament by March 2023. Evidently, this landmark finding accomplishes more than an unlawfulness ruling in relation to a government strategy, but rather it demonstrates that the Climate Change Act can and should be enforced in circumstances where the government is not complying with its duties.

### *Klimatická žaloba ČR v Czech Republic*

A group of Czech individuals, the Klimatická žaloba ČR NGO and a municipality brought an action against the government on the basis that certain acts of the Ministries of the Environment, Agriculture and Trade were illegal as a result of failing to set specific and adequate mitigation measures to achieve a 55% reduction in greenhouse gas emissions by 2030. On 15 June 2022, the Municipal Court in Prague ruled in favor of the Claimants and concluded that the Czech Republic's National Action Plan on Adaptation to Climate Change (2021) did not meet the objectives set out in the government's commitments under the Paris Agreement.

The court ordered the government to take the appropriate steps towards a healthy environment by protecting the climate and in adopting climate legislation in accordance with the Paris Agreement, the Czech constitution and the ECHR. It now remains to be seen whether the Supreme Administrative Court of the Czech Republic will uphold or overturn the judgment, further to the ministries' appeals.

Despite (what has been criticized by the ministries as) the vagueness of the judgment, it is fair to say that court was influenced by the *Urgenda Foundation* case, and this is overall a notable first step for future climate litigation in the Czech Republic.

## Commercial Law

### *ClientEarth v Board of Directors of Shell*

On 15 March 2022, ClientEarth notified Shell that it was starting a derivative action against its Board of Directors, on the basis that the board is breaching their legal duties in their failure to adequately adopt and implement a strategy that truly aligns with the Paris Agreement. The claim is made pursuant to Sections 172 and 174 of the UK Companies Act 2006 on the duties to promote the success of the company and to exercise reasonable care, skill and diligence, respectively.

How will this noteworthy effort to hold directors personally liable for failing to address climate risks unravel?

### *Milieudefensie et al. v Royal Dutch Shell plc*

The District Court of the Hague found on 26 May 2021 that oil major Shell owed a duty of care to the plaintiffs to reduce emissions from its operations by 45% by 2030 relative to 2019 emission levels, which is likely to have major ramifications across the corporate community. The case represents a global first, with the court taking the unprecedented step of holding a company legally responsible for its individual contribution to global greenhouse gas emissions.

There have been two developments on the case in 2022.

- On 22 March 2022, Shell appealed to the Dutch Court of Appeal in the Hague. An appeal in the Netherlands is “*de novo*”, meaning all issues of law and evidence can be reheard.

- On 25 April 2022, Milieudefensie, issued a [letter](#) to the Board of Directors of Shell for urgent action for Shell to comply with the 2021 judgment of the Dutch court, and warning for personal liability risks towards third parties resulting from any failure by the company to take action. [For more info.](#)

### *Braskem*

On 21 September 2022, the District Court of Rotterdam handed down an interesting judgment on jurisdiction on a case involving environmental harm. The Claimants are from communities surrounding a salt mine in Brazil and allege that they have suffered enforced evacuation and consequential losses due to earthquakes related to the mining activities. The mine is in Brazil, operated by a Brazilian entity and the ultimate parent-company is Brazilian. However, the Claimants have not pursued their claims in Brazil but have instead issued them in the Netherlands. They have done so on the basis of applicable Brazilian law which, they say, holds Dutch non-operational subsidiaries jointly liable under an ‘indirect polluter’ principle. On this basis, the Rotterdam court has agreed those subsidiaries can stand as anchor defendants for the purposes of establishing jurisdiction over the Brazilian parent company.

Where many corporate accountability claims have been strategically pursued in the forum of parent company, this case is a reminder that, depending on the applicable law, creative use of jurisdictional rules can be used to secure a favourable forum. [For more info.](#)

## NEWLY FILED CASES AND LOOKING AHEAD

### *Humane Being v United Kingdom*

Following on from *Agostinho & Others* - where a group of young people are pursuing human rights claims in the ECtHR against 33 member states for failing to limit global warming - in July 2022, a new claim was commenced against the United Kingdom in the ECtHR targeting factory farming.

The application alleges that the Government is in breach of their obligations under Articles 2, 3 and 8 of the Convention for failing to address the risks of the climate crisis, future pandemics and antibiotic resistance created by factory farming. This application poses novel climate arguments focusing on the danger of agricultural methane emissions and highlighting soy feed consumption

in UK factory farming as a key driver of deforestation in the Amazon basin. It is also understood that the case raises for the first time before the ECtHR the ruling of the Brazilian Supreme Court in *PSB et al v Brazil* (on Climate Fund), which recognised the Paris Agreement as a human rights treaty<sup>1</sup>.

The Claimants have requested priority assessment by the court.

### *Plan B. Earth and Others v United Kingdom*

Also in July 2022, Plan B (and others) took their legal action against the United Kingdom for failing to take the required measures to prevent climate breakdown to the ECtHR. Their legal action was commenced domestically, but the Court of Appeal refused to hear their appeal in March 2022 on the basis that it was not accepted the Paris Agreement was relevant. The Court had noted, “The fundamental difficulty which the Claimants face is that there is no authority from the European Court of Human Rights on which they can rely, citing the Paris Agreement as being relevant to the interpretation of the ECHR, Articles 2 and 8 [the rights to life and to family life]”.

The Claimants are now seeking that authority and have requested that their application be heard under the Rule 41 priority procedure.

### *ClientEarth v. Flemish Region<sup>2</sup>*

ClientEarth, in collaboration with 13 other NGOs, are also continuing their action challenging the approval of INEOS’ plastics plant project (dubbed ‘Project One’) in the Port of Antwerp, Belgium. Although the plant is overseas, INEOS took the high-profile decision to move their headquarters back to London in 2016 after a number of years in Sweden.

ClientEarth argue that INEOS has failed to present an adequate assessment of how the project would impact the climate, nature, and surrounding air quality. They also argue the Flemish authorities’ impact assessments were insufficient with the result that the project was unlawful under domestic and EU law.

ClientEarth first submitted an appeal against the permit to the Flemish Ministry of Environment in

early 2022 arguing that the Environmental Impact Assessment (EIA) was defective. This appeal was dismissed in June 2022, and the following month they announced that they were bringing their challenge before the Flemish Courts. The action was filed before the Council of Permit Disputes on 7 September 2022, and the timetable for hearings is yet to be announced.

## **LOOKING AHEAD TO 2023**

### *Investor Actions*

Investor activism in connection with climate and other ESG issues is likely to become more established, with institutional investors coming under increasing pressure to engage in corporate stewardship and undertake private enforcement.

There has yet to be a climate-based investor claim for damages against a company listed in the UK. However, in the UK, climate reporting within annual reports has been a requirement for premium listed companies since January 2021. Such reporting makes it mandatory for large businesses to disclose their climate-related risks and opportunities, in line with the Taskforce on Climate-related Financial Disclosures recommendations. Given that the regime has been operational for a meaningful amount of time and having regard to the (i) increasing proclivity of investors to pay greater attention to how their investments perform in relation to climate and other ESG risk; (ii) ability to quantify the value of climate risk within companies, 2023 may be the year that we see the first damages claims emerging.

### *Personal Liability*

Building on the work being done in relation to shareholder actions, another key area of development is expected to be related to personal liability. ClientEarth’s letter to Shell’s Board of Directors is a first step along the path to holding directors personally liable for failing to meet their obligations on planning for net zero.

In addition, we saw the Independent Expert Panel’s legal definition of ecocide being published in June last year. Discussion at parliamentary or governmental level of introducing the

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<sup>1</sup> [Humane Being v. the United Kingdom - Climate Change Litigation \(climatecasechart.com\)](https://climatecasechart.com/cases/humane-being-v-the-united-kingdom/)

<sup>2</sup> [ClientEarth v. Flemish Region - Climate Change Litigation \(climatecasechart.com\)](https://climatecasechart.com/cases/clientearth-v-flemish-region/)

criminalisation of ecocide has been recorded in at least 15 countries so far.<sup>3</sup>

Further important jurisprudence may be created by the ongoing case of *The Planet v Bolsonaro* in the International Criminal Court. Here, it is alleged by the NGO, All Rise, that deforestation of the Amazon constitutes crimes against humanity within the meaning of the Rome Statute<sup>4</sup>.

### *Forests and food systems*

Another area of key focus will be on forests and food systems. As noted above, legal claims have been commenced alleging that deforestation could constitute crimes against humanity. The great forests of the world are also crucial in relation to carbon reduction and their removal is likely to become an increasing target of strategic climate change litigation. Food security is also likely to become an increasing issue as climate breakdown continues and populations around the world face exposure to drought, flooding, crop failure and famine. This will likely only be exacerbated by the challenges of preserving grain shipments from Ukraine where many vulnerable nations depend on that supply to avoid hunger.

### **HAUSFELD HIGHLIGHTS**

The team continues to be recognised in the leading directories, [Legal 500](#) and [Chambers UK](#), for our environment and climate change work. As part of the inaugural [Legal 500 UK Green Guide](#), Hausfeld was listed as one of 27 law firms recognised for their outstanding work in moving towards a greener economy, ranging from ESG, sustainability to climate action. Legal 500 ranks us among other top tier firms, recognising us for our work around climate action. They applaud how the launch of our Climate Impact Hub in 2021 continues to drive the conversation on the role of law in acting against climate change as well and our pro bono efforts.

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<sup>3</sup><https://una.org.uk/magazine/2021-1/ecocide-international-crime>



**Hausfeld boasts a stellar and impressive environment practice that represents NGOs, charities and groups of claimants in both domestic and international courts. The firm has notable experience handling environmental petitions, private nuisance claims and legal interventions.**

Chambers UK, Environment, 2023

### **CONCLUSIONS**

The year is coming to an end with COP27 commentators finding equal reasons for hope and despair. Whilst ambitious objectives were set and addressing loss and damage yielded a historic agreement at state level; others will reflect that policy initiatives and agreement around carbon emission capping did not go far enough.

As this end of year newsletter shows, 2022 saw diverse litigation around the world seeking to influence climate governance and debates in all types of decision-making. Such litigation plays a vital role in policing compliance with the emerging raft of climate protective regulations internationally. In practice, its impact will depend upon the decisions of national Courts opining across multiple jurisdictions international. For communities experiencing the existential impact of climate change right now - there is no time to waste. For this reason, as we move into 2023, the climate emergency should continue to impact all aspects of corporate and legal practice.

*With special thanks to Ingrid Gubbay, Wessen Jazrawi, Sarah Moore, Stuart Warmington, Lida Tsakyraki for their contributions to this newsletter.*

<sup>4</sup> [The Planet v. Bolsonaro - International - Climate Change Laws of the World \(climate-laws.org\)](#)