Climate change litigation and the private sector – assessing the liability risk for multinational corporations and the way forward for strategic litigation

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Abstract

According to the Carbon Major Study, only 100 companies are responsible for 71% of global greenhouse gas emissions; climate litigants seek to hold those 'carbon majors' responsible for their contribution to the climate crisis. Against this background, this chapter conducts a comprehensive and detailed analysis of Non-US climate litigation against private actors. Thereby, national litigation efforts, as well as claims under the OECD complaint mechanism, are considered. The chapter provides an overview of relevant case law and categorises it. The author touches upon legal challenges and litigation strategies and highlights the role of NGOs in climate litigation against private actors and its broader socio-political relevance and implications.

1 Introduction

The Corona crisis has put the global economy on a halt in an unprecedented manner. Experts and politicians are even debating on how this will change capitalism.[1] Growth rates are being questioned, probably for the first time since the beginning of industrialisation. Roads have become so empty that wild animals are taking a walk in the city, pictures of it going viral on social media. Millions of people are suddenly working from home and have quit commuting to work every day. Changes that were already urgently needed in light of climate change. But all of this has come at a high price for the economy and leads to a newly framed debate on who can and should pay the price for transitioning to a 'carbon-free' world. The outcome of this debate will be decisive for the success in climate mitigation.

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1 Oliver Nachtwey, 'Wenn der Kapitalismus eine Vollbremsung macht' *Spiegel Online* (4 April 2020) </www.spiegel.de/kultur/corona-krise-es-ist-zeit-fuer-eine-reform-von-wohlfahrt-und-wirtschaftsleben-a-afda945f-b58c-4295-bf3c-7869023d6b54> accessed 4 March 2022; William Davies, 'The last global crisis didn't change the world. But this one could.' *The Guardian* (24 March 2020) <www.theguardian.com/commentisfree/2020/mar/24/coronavirus-crisis-change-world-financial-global-capitalism> accessed 4 March 2022.

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Undoubtedly, the private sector plays a crucial role in the global efforts to combat the climate crisis – but in contrast to individuals, a relatively small number of corporations possess significant political power.[2] Yet the picture is diverse: On the one hand, most of the world's biggest firms are unlikely to meet the Paris climate targets; on the other hand, at the 2019 UN Climate Action Summit, 87 major companies took the lead to achieve the 1.5°C target.[3] Yet with companies having already lost a lot during the corona crisis, cost-cutting may well come short-sighted and at the environment's charge. Climate change litigation has played an increasing part in the climate debate all over the world in the past twenty years. It is thus a convenient time to take stock of corporate accountabilities for climate change and ask what role climate litigation can take up in the future.

The following chapter analyses private climate change litigation cases in view of their outcome and prospects of success. The chapter will give an overview of the respective cases, focusing on Non-US-litigation. The first section will give an orientation on the relevant terms and definitions and outline the methodology. The second section will take a look at the facts and figures with regard to the parties and the overall success rates. In the third section, the cases will be analysed according to the respective area of law, focusing on the specific legal challenges. Finally, section four will take up the question of what lessons can be learned from twenty years of climate change litigation.

2 Corporate climate responsibility and (strategic) climate change litigation – definitions and methodology

Since effective national regulations on climate change mitigation regarding the corporate sector are often still missing or not effectively enforced, people have taken it to the courts with climate change litigation worldwide.

A definition of climate change litigation, which has often been cited, is provided in the assessment of Markell and Ruhl as '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'.[4] Additionally, in the following assessment,

2 Corporate Accountability, 'Polluting Paris: How big polluters are undermining global climate policy' (2017) <www.corporateaccountability.org/resources/polluting-paris-big-polluters-undermining-global-climate-policy/> accessed 11 June 2020.

3 UN Global Compact, '87 major companies lead the way towards a 1,5°C future at UN Climate Action Summit' (2019) <www.unglobalcompact.org/news/4476-09-21-2019> accessed 11 June 2020.

4 David Markell and J B Ruhl, 'An empirical assessment of climate change in the courts: A new jurisprudence or business as usual' (2012) 64(15) FLR 15, 27.

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climate change litigation also includes complaints under the OECD complaint mechanism and under human rights bodies, i.e., litigation on the international level.

In terms of climate litigation, one may distinguish between strategic and non-strategic litigation and between public and private litigation. Strategic litigation can be defined as litigation which does not solely seek to address and succeed in legal matters, but also addresses social and political issues in the courtrooms and may even intend to question the applied laws or legal principles itself.'[5] Not all claims filed against corporations incorporate a strategic intention. This holds true especially for the claims filed by corporations and states. However, quite some literature was dedicated to assessing ways for litigating climate change from various angles for strategic and socio-political reasons.[6] As *Grossmann* describes it:

> (…) in the past few years, the idea of using litigation as a tool to address the causes and impact of climate change has picked up steam (…). Perceiving a lack of meaningful political action (…) lawyers around the world have begun exploring litigation strategies and, in some cases, initiating actions.[7]

He then moves on to describe the application of tort law in this context as '*the most novel or radical idea'*.[8] This chapter focuses on strategic litigation. Thus, it emphasises cases brought to the courts by non-governmental organisations (NGOs) and individuals. Moreover, it refers to private climate litigation, meaning cases filed against corporations.

Climate change litigation is a worldwide trend, which has seen an increasing number of cases in the last years.[9] Therefore, some cases may mention the climate crisis in courtrooms or address it as a side argument but not be reported internationally or without gaining international attention. Additionally, some cases may not explicitly refer to climate change at all but may nonetheless be related to it.[10] Thus,

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5 Wolfgang Kaleck, 'Mit Recht gegen Macht' in Alexander Graser and Christian Helmrich (eds), *Strategic litigation: Begriff und Praxis* (1st edn, Nomos 2019) 25; Adam Weiss, 'The essence of strategic litigation' in Alexander Graser and Christian Helmrich (eds), *Strategic litigation: Begriff und Praxis* (1st edn, Nomos 2019).

6 See for example: Hari M Osofsky and William C G Burns (eds), *Adjudicating climate change: State, national, and international approaches* (CUP 2009); Richard Lord et al. (eds), *Climate change liability: Transnational law and practice* (CUP 2012); Oliver C Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds), *Climate change: International law and global governance. Volume I: Legal responses and global responsibility* (Nomos 2013); Michael Gerrard and Gregory E Wannier (eds), *Threatened island nations: Legal implications of rising seas and a changing climate* (1st paperback edn, CUP 2014).

7 David A Grossman, 'Tort-based climate litigation' in Hari M. Osofsky and William C G Burns (eds), *Adjudicating climate change: State, national, and international approaches* (CUP 2009) 193.

8 Ibid.

9 Roughly half of the corporate cases were filed within the last two years, 2018-2020; see also Joana Setzer and Rebecca Byrnes, 'Global trends in climate change litigation: 2019 snapshot' (2019) 5 <www.lse.ac.uk/GranthamInstitute/publication/global-trends-in-climate-change-litigation-2019-snapshot/> accessed 4 June 2020.

10 Kim Bouwer, 'The unsexy future of climate change litigation' (2018) 30 JEL 438, 502.

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numbers have to be taken a little careful, as it is difficult to exhaustively gather cases concerned with climate change from all over the world. The following assessment is primarily based on the available data, which is reported to, and gathered by the Columbia University Sabin Centre.[11] According to the 'climate case chart', 35 out of 356 non-US cases to date (May 2020), are claims against corporations. Further research of the Grantham Research Institute Climate Cases Database led to nine more cases.[12] An additional two OECD complaints, which are related to climate change, could be extracted from the OECD Watch Database.[13] This amounts to a total number of 46 cases, of which 39 will be assessed in the following section.

Some seven cases will be disregarded in the following assessment as they seem to be too specific to derive a general lesson from, are not related to climate change mitigation, or do not fit in the frame of *strategic* litigation.

This holds true for the Cases *Weaver v Corcoran and Others* and *Grainger Plc and Others v Nicholson.* Both cases are concerned with statements on climate change. While the latter one relates to employment, holding that employment equality regulations cover the right to believe in climate change, the other one is concerned with a defamatory newspaper article.[14] Furthermore, four cases are concerned with governments or NGOs challenging permissions of carbon projects.[15] Since they are considered to fall in the category of 'permission challenging', which is not assessed in detail here, they are precluded from further analyses.[16] 'Permission challenging' claims are claims which target the permission of projects, predominantly in the context of environmental impact assessment. In the majority of cases, the defendant of the claim is the government agency, while the private sector is 'indirectly' affected if the challenged permission is voided.[17] Another two cases, which could be described

11 Sabin Center for Climate Change Law, 'Climate Change Litigation Database (SCCC)' <http://climatecasechart.com> accessed 4 June 2020.

12 Grantham Research Institute on Climate Change and the Environment, 'Climate change laws of the World – case database (GRICC)' <https://climate-laws.org/cclow/litigation_cases> accessed 4 June 2020.

13 OECD Watch, 'OECD Watch case database' <https://complaints.oecdwatch.org> accessed 4 June 2020.

14 *Weaver v Corcoran and Others (2015), BCSC 165; Grainger Plc. and Others v Nicholson (2010) ICR 360.*

15 *Queensland Conservation Council Inc. v Xstrata Coal (2007)* WL 2985210, QCA 338; *Greenpeace Australia Ltd. v Redbank Power Co Pty Ltd, (1994)* WL 1657428 (Land and Environment Court of New South Wales); *Royal Forest and Bird v Buller Coal Ltd* (2012) NZHC 2156.

16 Lesley K McAllister, 'Litigating climate change at the coal mine' in Hari M. Osofsky and William C G Burns (eds), *Adjudicating climate change: State, national, and international approaches* (CUP 2009); Meredith Wilensky, 'Climate change in the courts: An assessment of non-U.S. climate litigation' (2015) 26 DELPF 131, 145-147, 153-155; See for further details: Markell and Ruhl (n 4), 35-47.

17 See for example: *In re Vienna-Schwechat Airport Expansion* (2017) W109 2000179-1/291E (Austrian Constitutional Court); *Glucester Resources Limited v Minister for Planning* (2019)

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as 'reversed climate litigation' will also not be further examined here.[18] Both claims challenge the permission of a renewable energy project on the grounds of its alleged environmental harms. The legal argument made in the *Mills of Lohan Case* is weighing environmental protection against climate change.[19] Thus, a number of 39 cases remain for further assessment.

'What do we actually speak about when talking about the 'private sector'?' and 'What does it mean to be responsible for emissions?' are other preliminary questions worth shedding some light on.

One of the most cited facts in the context of corporate climate responsibilities nowadays is the *Carbon Majors Study,* which emphasises that only 100 companies are responsible for about 71% of the global greenhouse gases (GHG).[20] The companies assessed in the report are so-called *Carbon Majors,* i.e., fossil fuel producers like coal-producing and oil companies, as well as the cement industry.[21] Since the publishing of the *Carbon Majors Study*, these entities have increasingly been subject to climate change litigation.[22] Remarkably though, quite a number of the assessed Carbon Majors are state-owned or partially state-owned corporations. Thus, the emissions that can be traced back to investor-owned Carbon Majors amount to roughly 20% of the global emissions.[23]

The private sector, in general, has multiple impacts on climate change, and big corporations do have significant influence. Consequently, the private sector plays a

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NSWLEC 7, (2017); for further cases see: 'Environmental assessment and permitting', Sabin Center for Climate Change Law (n 11).

18 *City of Bredford Metropolitan Council v Gillson and Sons (1995) 10 PAD*; *Society for the Protection of Landscape and Aesthetics of France et al. v The Mills of Lohan - Case Summary* (2019) GRICC (Administrative Court of Appeal of Nantes); Some authors also refer to these category as 'con-cases', see: Dena P Adler, 'U.S. climate change litigation in the age of Trump: Year one' (2018) i, ii <https://climate.law.columbia.edu/content/searchable-library#/filter/categories/Climate%20Litigation> accessed 4 June 2020.

19 *Society for the PROTECTION of LANDSCAPE and AESTHETICS of France et al. v The MILLS of Lohan - Case Summary* (n 18).

20 Heede in its Report of 2014 stated that 90 producing entities are responsible for 63.4% of the global emissions 1854-2010, see: Richard Heede, 'Carbon majors: Accounting for carbon and methane emissions 1854-2010' (Methods & Results Report 2014) 25 <https://climate accountability.org/pdf/MRR%209.1%20Apr14R.pdf> accessed 15 June 2020; See also: Paul Griffin, 'CDP Carbon Majors Report 2017: 100 fossil fuel producers and nearly 1 trillion tonnes of greenhouse gas emissions' (2017) <https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf> accessed 15 June 2020.

21 Heede (n 20) 8-10.

22 Business & Human Rights Resource Center, 'Turning up the heat: Corporate legal accountability for climate change: Corporate legal accountability annual briefing' (2018) <www.business-humanrights.org/en/turning-up-the-heat-corporate-legal-accountability-for-climate-change> accessed 4 June 2020.

23 Heede (n 20) 29; Paul Griffin, 'CDP carbon majors report 2017: 100 fossil fuel producers and nearly 1 trillion tonnes of greenhouse gas emissions' (2017) 8 <https://bit.ly/3Lcfs7g> accessed 28 June 2022.

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role in climate change mitigation in various aspects, starting with direct emissions, which are released from producing certain commodities. Other aspects are energy consumption, waste management and the lifetime of products (e.g., electronic devices), the transport of goods as well as labourers, and not least responsibility for emissions in the supply chain.[24]

Moreover, from a consumer perspective, it is crucial that climate-friendly products are available (e.g., car industry). This leads to the responsibility of the private sector to place at disposal more climate-friendly goods.[25] Above all that, corporations are not only economic entities; nowadays, brands can even stand for and influence a whole lifestyle. Therefore, companies also have social power and moral responsibilities; those who do well in climate policies can even be role models for other companies or consumers (corporate citizenship).[26] These aspects of corporate responsibility will be taken up again in the analysis further below.

Certainly, this leads to the initial question of how the above-depicted responsibility can be litigated. In terms of climate change mitigation, lawsuits focus on carbon emissions, which can or should be accounted to a certain company.

In general, emissions are divided into three different categories, called Scope 1, Scope 2 and Scope 3 emissions.[27] Scope 1 emissions are defined as emissions that directly result from a company's activity (steam from the companies chimneys).[28] Scope 2 emissions are emissions that are caused by another company in order to provide the used energy or the required steam, heating or cooling devices.[29] Scope 3 emissions 'occur from sources owned or controlled by other entities in the value chain' (material suppliers, transport, waste management etc.).[30] Scope 3 emissions can be further divided into *upstream* and *downstream* emissions, *upstream emissions* being related to the sold goods and services and hence being passed on to the con-

24 Carbon Disclosure Project, 'Committing to climate action in the supply chain: CDP Report' (2015) <https://bit.ly/3tKGVHh> accessed 29 March 2022; Carbon Disclosure Project, 'Out of the starting blocks: Tracking progress on corporate climate action' (2016) 13-14 <www.cdp.net/en/reports/archive?page=17&per_page=5&sort_by=published_at&sort_dir=desc&utf8=%E2%9C%93> accessed 10 June 2020.

25 Expert Group on Climate Obligations of Enterprises, *Principles on climate obligations of enterprises – commentary* (Eleven International Publishing 2018) 30.

26 Angela Delfino, Mike Wallace and Paul Q. Watchmann, 'Corporate social responsibility and climate change' in Paul Q Watchman (ed), *Climate change: A guide to carbon law and practice* (Globe Law & Business 2008) 177.

27 Greenhouse Gas Protocol, 'A corporate accounting and reporting standard' (2015) 25 <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf> accessed 10 June 2020.

28 Ibid 26.

29 Mary Sotos, 'GHG Protocol – Scope 2 Guidance: An amendment to the GHG Protocol Corporate Standard' (World Resources Institute 2015) 5 <https://bit.ly/3DiJ00j> accessed 29 March 2022.

30 Greenhouse Gas Protocol, 'Technical Guidance for Calculating Scope 3 Emissions' (2013) 8-9 <https://bit.ly/3MLphut> accessed 10 June 2020; Greenhouse Gas Protocol (n 27) 26.

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sumer, whereas *downstream emissions* are emissions that occur in the supply chain, i.e., from purchased or acquired goods.[31] This should be kept in mind when speaking about the responsibility of the private sector and, moreover, when thinking about how to push strategic private climate change litigation forward.

3 Non-US-litigation – facts and figures

When analysing private climate change litigation, it is helpful first to take a look at the facts and figures. At first glance, the selected 39 cases can be separated into different categories, from purely looking at the plaintiffs. Accordingly, 17 Cases have been raised by NGOs, 7 Cases were brought to the courts by individuals, 3 fall in the category *Corporation v Corporation* and 12 cases were initiated by governmental institutions or agencies.

Claimants	Total Number of Cases 39
NGO	17
Individual	7
Corporation	3
State	12

3.1 NGOs v Corporation – 17 Cases

17 out of 39 cases (almost 50%) were brought to various legislative bodies by NGOs between 2007 and 2020, 12 of them (about 75%) within the last two years (August 2018 to April 2020). Ten of these cases were filed against so-called *Carbon Majors,* either challenging their emission reduction targets, their climate policies, or simply trying to put hold on new mining projects or the building of new fossil power plants. Five of the NGO cases targeted banks or financial institutions, and two were raised against utility companies. Since the majority of these cases have been filed quite recently, most of them are still pending (12 cases).

One can further distinguish these cases into national and international suits. Ten of the NGO cases were filed under international regimes, eight of them being OECD claims and one a complaint referring to the UN Guiding Principles on Business and Human Rights, reported to the Philippine Commission on Human Rights.[32] The most recent case, *Youth Verdict v Waratah Coal,* was filed in Australia in May 2020 under

31 Carbon Disclosure Project (n 24); Greenhouse Gas Protocol (n 30) 8-9.

32 *In re Greenpece Southeast Asia and Others* (Pending) No CHR-NI-2016-0001, (2015) SCCC (Philippine Commission on Human Rights).

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the Queensland Human Rights Act.[33] Six of the OECD reports and the Australian human rights case are still pending. The Philippine Commission on Human Rights in December 2019 held that carbon majors could indeed be held liable.[34] Also, two of the OECD complaints, *Netherlands NGO v ING Bank* and *Norwegian Climate Network v Statoil,* can be deemed successful, even though the latter one was formally rejected.[35] This will be assessed in more detail below.

Of the seven cases, which were launched under national law, two are French, three are set in Poland, one in Canada, and one in the Netherlands. Only the Polish case *Client Earth v Enea* issued in 2018 was successful out of these national cases. [36] The remaining cases are all pending.

As these NGO cases are filed by associations, some specific legal requirements must be met: The NGOs must have legal standing in order to claim common rights or social issues. The requirements for legal standing differ considerably between different legal orders. At least in the European Region, there is a minimum standard set by the Aarhus Convention for the legal standing of associations.[37] However, the application of the Aarhus Convention is, on the one hand, limited to environmental Organisations which are, on the other hand, trying to enforce environmental regulations.[38] Hence, in the context of climate change litigation, the Convention is helpful where environmental impact assessments/project permissions and other environmental standards are at stake; yet, in cases that refer to private law or in which a violation of human or fundamental rights due to climate change is invoked, NGOs may not have legal standing.[39] Not only in litigation against the private sector but generally in climate change litigation, the need for collective actions and the scope of the legal standing of associations is highly debated.[40]

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33 *Youth Verdict v Waratah Coal - Case Summary* (Pending) (2020) SCCC (Queensland Land Court).

34 *In re Greenpece Southeast Asia and Others* (n 32).

35 *BankTrack et al. v ING Bank* (2019) (OECD NCP Netherlands), *Norwegian Climate Network et al. v Statoil (2012) (OECD NCP Norway).*

36 *Client Earth v Enea - Case Summary* (2019) IX GC 1118/18 SCCC (District Court Poznan).

37 Convention on access to information, public participation in decision-making and access to justice in environmental matters, UNECE, Aarhus 25 June 1998. For Australia see: Ross Abbs, Peter Cashman and Tim Stephens, 'Australia' in Richard Lord et al. (eds), *Climate change liability: Transnational law and practice* (CUP 2012) 102; For requirements in China, see: Alexander Stark, 'Umweltrechtsschutz in China' (2019) 17(2) EurUP 193, 199-203.

38 Teresa Fritz, 'VwGH bejaht Antragsrecht von Umweltorganisationen für Luftreinhaltungsmaßnahmen' (2018) Recht der Umwelt 211; Birgit Hollaus, 'Zur dezentralen Umsetzung der Aarhus-Konvention in Österreich' (2019) 17(2) EurUP 169, 171.

39 Erika Wagner, 'Die Notwendigkeit einer Verbandsklage im Klimaschutzrecht' (2019) 17(2) EurUP 185, 187, 188.

40 Alexander Schmidt, Karl Stracke and Bernhard Wegener, 'Die Umweltverbandsklage in der rechtspolitischen Debatte' (2017) <www.umweltbundesamt.de/publikationen> accessed 13 June 2020; Fritz (n 38), 214, 215; Wagner (n 39).

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The French cases are both grounded on the newly released '*Loi de vigilance*'.[41] The Polish cases all relate to the energy sector and the ever-increasing usage of coal, which still leads to building new coal-fired power plants.[42] Poland alone makes up 50% of the coal energy produced within the EU,[43] while the Polish government is still resisting effective climate mitigation policies.[44] With regard to the obstacles in Poland's climate policies, successful litigation can be a strong vehicle. This holds especially true for claims like *Client Earth v Enea* which was successful under the Polish Commercial Companies Code, proving that an investment in coal is less profitable than renewable energies.[45] If such litigation can successfully prove that renewable energies benefit the economy, it will be hard for politicians to resist change, or put otherwise, it will be a strong incentive for companies to change voluntarily. However, the downsides of this approach are strong, where climate change mitigation contradicts economic desires.

The Dutch case *Milieudefensie v Royal Dutch Shell* is special as it builds upon the litigation milestone of the *Urgenda Case; it* will be assessed in more detail below.[46] Finally, in *Greenpeace Canada v Kinder Morgan Canada Ltd.*, which was filed in Canada in 2017, the defendant, a utility company founded in 2017, was alleged of providing misleading information to potential investors in its Initial Public Offering.[47] The *Security Act of Alberta and Ontario* requires public companies to disclose the facts about their operations and business models. In assessing the prospected future oil demand, there had been no mentioning of decarbonisation at all.[48] While

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41 *Notre Affaire à Tous and Others v Total – Case Summary* (Pending) (2019) SCCC (Nanterre District Court); Notre Affaire à Tous, '*Notre Affaire à Tous and Others v Total*: Formal Notice to comply with the duty of Vigilance Law (19 July 2020)' (unofficial translation) <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 5 June 2020; Les Amis de la Terre France, 'Manquements Graves à la loi sur le devoir de vigilance – Le cas Total en Ouganda' (2019) <http://climatecasechart.com/non-us-case/friends-of-the-earth-et-al-v-total/> accessed 5 June 2020.

42 *Client Earth v Enea – Case Summary* (n 36); *Client Earth v Polska Grupa Energetyczna - Case Summary* (Pending) (2019) SCCC (Regional Court Lodz); *Greenpeace Poland v PGE GiEK - Case Summary* (Pending) (2020) SCCC (Regional Court Lodz).

43 Climate Action Tracker, 'Country Summary – EU' <https://bit.ly/3Lse8gJ> accessed 29 March 2020.

44 'EU Carbon neutrality: Leaders agree 2050 target without Poland' *BBC News* (13 December 2019) <www.bbc.com/news/world-europe-50778001> accessed 5 June 2020.

45 *Client Earth v Enea – Case Summary* (n 36); Client Earth, 'Briefing: Ostrołęka C: Energa'sand Enea's Board Members' fiduciary duties to the companies and shareholders' (2018) <http://climatecasechart.com/non-us-case/clientearth-v-enea/> accessed 13 June 2020.

46 *Milieudefensie et al. v Toyal Dutch Shell plc - Case Summary* (Pending) (2019) SCCC (The Hague District Court); *Milieudefensie*, 'The summons of the climate case against Shell summarized in 4 pages' (unofficial translation) <http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc> accessed 1 June 2020.

47 *In re Amended and Restated Preliminary Prospectus of Kinder Moragn Canada Ltd's Initial Public Offering – Case Summary* (Pending) (2017) GRICC.

48 Ibid.

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the case is still pending, the issue has already been taken up by a shareholder motion, which instructed the parent company to set emission reduction targets.[49] Furthermore, *Kinder Morgan,* in the meantime, has started to report on climate-related business risks.[50] This instance particularly shows how the success of NGO claims embedded in an overall strategy and social discourse can go far beyond the legal success of claims.

NGO Cases

Legal Regimes	Total Number 17
Human Rights Law	2
OECD Claims	8
Loi de vigilance (France)	2
Environmental Law (Poland)	2
National Private Law (Netherlands / Canada / Poland)	3

3.2 Individuals v Corporations – Seven Cases

Seven cases were raised against corporations by individuals or groups of individuals. Groups of individuals in the present study are defined as associations of citizens, bound together by a common subjective interest (as opposed to the rather altruistic interest of NGOs), mostly representing a certain region or neighbourhood or marginalised group, such as indigenous people. Out of the seven cases brought to the courts by individuals, again, the majority (5/7) is targeting *Carbon Majors.* In contrast to the NGO cases, the individual cases are all tied to national laws. The legal grounds turn out to be diverse: out of these seven cases, one is claiming an injunction, one is a private nuisance, one is a public nuisance claim, and one refers to fundamental and human rights as well as environmental impact assessment legislation.[51] These cases will be examined in more detail below.

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49 The Energy Mix, 'Alberta regulator probes Kinder Morgan's failure to disclose climate risks' (2018) <https://bit.ly/3vVyjxe> accessed 29 April 2022.

50 Greenpeace Canada, 'Press release: Alberta Securities Commission reviewing Greenpeace complaint of inadequate disclosure of climate risks by Kinder Morgan' (2018) <www.greenpeace.org/canada/en/press-release/285/press-release-alberta-securities-commission-reviewing-greenpeace-complaint-of-inadequate-disclosure-of-climate-risk-by-kinder-morgan/> accessed 1 June 2020.

51 *Gbemre v Shell Petroleum Development Company of Nigeria Ltd and Others* (2005) FHC/B/CS/53/05; *Lliuya v RWE* (2017) 2 O 285/15 (Higher Regional Court Hamm); *Citizens' Committee on the Kobe Coal Fired Power Plant v Kobe Steel ltd et al. – Case Summary* (Pending) (2018) SCCC (Kobe District Court); *Smith v Fronterra Co-Operative Group Ltd* (2020) NZHC 419.

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Another two cases are related to shareholder rights and disclosure of climate risks under corporate law, targeting financial institutions. In *Abrahams v Commonwealth Bank of Australia* (2017), the plaintiff challenged the climate risk reporting of a bank.[52] The case was filed as a shareholder claim and withdrawn after the bank had, in the following annual report, acknowledged climate risks.[53] In *Mc Veigh v Retail Employee Superannuation Trust* (Australia 2018), a pension trust allegedly violated the Australian Corporations Act of 2001 by not disclosing climate risks.[54] The court stressed that the case raises 'a socially significant issue about the role of superannuation trust and trustees' with regard to climate change.[55] Yet, the case is still pending, and a trial was scheduled for July 2020.[56]

The *Case Mapuche Confederation v YPF* again is a criminal complaint, mainly focusing on the waste management of the concerned companies, which allegedly polluted and poisoned the environment with fracking waste.[57] In this case, climate change is mentioned with regard to fracking – but constitutes rather a side argument.[58] The argument made here, thus, is rather a strategic one, whereas, from a legal perspective, it does not tie climate change with the invoked statute.

Even though individuals filed these cases, the role of NGOs in this context should not be underestimated. The case *Lliuya v RWE,* for example, was supported by the German human rights organisation *German Watch.* Financial support and promotion of the cases to raise public awareness are essential in strategic litigation. Remarkably, five out of these seven cases were filed in the global north (Australia, New Zealand, Japan, Germany) and only two in the global south (Nigeria, Argentina). Regardless of the systemic differences of respective jurisdictions, these claims are confronted with some fundamental problems, which will be addressed in more detail below.

52 *Abrahams v Commonwealth Bank of Australia – Case Summary* (2017) VID879/2017 SCCC (Federal Court of Australia).
53 Ibid.
54 *Mc Veigh v Retail Employees Superannuation Trust – Case Summary* (Pending) FCA 14, (2019) GRICC.
55 Ibid.
56 Ibid.
57 *Mapuche Confederation of Neuquén v YPF et al. – Case Summary* (Pending) (2018) SCCC.
58 Mapuche Confederation, '*Mapuche Confederation of Neuquén v YPF et al.* – Complaint' (2018) 5, 6 <http://climatecasechart.com/non-us-case/mapuche-confederation-of-neuquen-v-ypf-et-al/> accessed 5 June 2020.

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Countries of Litigation	Total Number of Cases 39
Australia	10 + 1 OECD
New Zealand	1
Brazil	4
Canada	2
France	2
Germany	2 + 1 OECD
UK	2 + 3 OECD (1 in collaboration with Slovenia)
Poland	3
Netherlands	1 + 1 OECD
Japan	1 + 1 OECD
Philippines	1 (Human Rights Commission)
Nigeria	1
Argentina	1
Norway	1 OECD
Slovenia	1 OECD (in collaboration with UK)

3.3 Corporation v Corporation – Three Cases

Three cases were filed by corporations against corporations. All three of them are so-called routine cases (non-strategic) concerned with carbon trading systems. In *Deutsche Bank v Total Global Steel* in 2012, Deutsche Bank sued Total Global Steel for damages, alleging that the certified Carbon Emission Reductions (CER) Deutsche Bank had bought from Total Global Steel had already been surrendered and thus were of no more value.[59] The case *CF Partners (UK) LLP v Barclays Bank* was related to an acquisition of a company operating in the carbon market. Barclay Bank, which operated as a consultant, was sued for misusing confidential information.[60] Finally, the case *Chicago Climate Exchange v Bourse de Montreal* dealt with a trademark application.[61]

Two of these cases are related to climate change solely because they concern the carbon emission market, rather coincidently. The legal questions raised are ordinary business law questions. Only the case *Deutsche Bank v Total Global Steel* is directly related to the mechanisms of carbon trading.

59 *Deutsche Bank v Global Steel* (2012) EWHC 1201 (Comm.) 1.
60 *CF Partners (UK) LLP v Barclays Bank PLC – Case Summary* (2014) EWHC 3049 SCCC.
61 *Chicago Climate Exchange v Bourse de Montreal (2014) TMOB 78*.

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3.4 State v Corporation – Twelve Cases

The majority of cases in which states or state entities sued corporations have been filed in Australia and Brazil. Only one case is set in Germany under European Union Law.[62] The success of these cases is outstanding: 75% have been successful. The cases filed by governments were related to consumer protection law (Australia) and environmental law, especially forest protection (Brazil). Four cases dealt with details of the respective emission-trading scheme.[63]

Between 2008 and 2010, the Australian Competition and Consumer Commission (ACCC) filed six claims against corporations, four of them related to greenwashing and violations of the Trade Practice Act of 1974.[64] All of these cases were successful. The ACCC, under Australian law, is the federal agency for supervising trade practice law.[65] In 2010, the commission had stated that 'greenwashing action' will remain a priority.[66] However, due to the political change in 2013, parts of the former Australian climate legislation were repealed, which also had an effect on the ACCC's activities on climate change.[67] No further cases have been filed ever since, and the priority on greenwashing has disappeared from the ACCC's Agenda.[68]

In Brazil, four private climate cases have been filed between 2007 and 2019. All these cases were related to environmental laws, three of them filed by a public prosecutor and the most recent one by the Federal Environmental Agency of Brazil (IBAMA). The development of these cases is a good example of how climate change litigation and the respective argumentation evolved over the last decade. While in the first case in 2007, climate change was only used as a side argument in the context of clearing a mangrove forest,[69] it is now the core argument in the pending case *IBAMA*

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62 Case C-148/14 *Bundesrepublik Deutschland v Nordzucker AG (2015).*

63 *ACCC v Global Green Plan Ltd* (2010) FCA 1057; *ACCC v Prime Carbon Ltd (2010) NR043/10.* In *Bundesrepublik Deutschland v Nordzucker AG (n 62),* a German sugar producer was fined by the German authorities for not including emissions of steam generation, in its emission report under the European Emission Trading Scheme (EU Directive 2003/87/ED). In *Clean Energy Regulator v MT Solar Pty Ltd (2013) FCA 205,* the defendant was sued for fraudulent claim of clean energy certificates (CER), due to the fact, that the electrician who had installed solar panels was not licensed to do so.

64 *ACCC v V8 Supercars Australia pty Ltd* (2008) MR 265/08; *ACCC v Goodyear Tyres* (2008) M181/08; *ACCC v De Longhi Australia Pty Ltd* (2008) MR 112/08; *ACCC v GM Holden Ltd* (2008) MR 008/08.

65 Abbs, Cashman and Stephens (n 37) 107.

66 Ibid.

67 Jacqueline Peel and Hari M. Osofsky, *Climate change litigation: Regulatory pathways to cleaner energy* (CUP 2017) 90-94.

68 ACCC, '2020 ACCC compliance and enforcement priorities' (2020) <https://bit.ly/3tKZ9Zg> accessed 10 June 2020.

69 *Public Prosecutor's Office v H Carlos Schneider S/A Comércio e Indústria & Others – Case Summary* (2007) Appeal No 650.728-SC, (2007) SCCC (Superior Court of Justice); Gabriel Wedy, 'Climate legislation and litigation in Brazil' (2017) 20 <https://bit.ly/3iOWQ0I> accessed 29 March 2022.

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v Siderugica Sao Luiz Ltd.[70] The defendant is deemed responsible for direct and indirect emissions in the form of upstream emissions. *IBAMA* held a steel company responsible for using coal, which stems from illegal mining. By invoking the *National Climate Change policy* of 2009, IBAMA sued the defendant for the use of illegally mined coal, holding it accountable for the emissions stemming from the burning of coal, as well as the emissions caused by deforestation and the production of coal.[71] This Brazilian climate lawsuit exemplifies some typical challenges of the global south. Legislation might be in place, but countries are still facing vast amounts of illegal activities, especially in mining and deforestation, and oftentimes lack the administrative power or political will to enforce the respective laws.[72]

The remaining two cases, filed in Brazil in 2008 and 2014, notably do not relate to carbon majors. The case *Public Prosecutor's Office v Oliviera & Others* (Brazil, 2008) referred to the burning of sugar cane in low tech refineries, which, according to the court, should only be applied in exceptional cases – even though it might be cheaper than other techniques.[73] Unfortunately, in 2015 the Federal Supreme Court allowed the burning of sugarcane on the fields for harvesting, regardless of the excessive release of GHG emissions.[74] In *Sao Paolo Public Prosecutors Office v United Airlines and Others,* the prosecutor tried to hold International Airlines accountable for their GHG emissions and to oblige them to offset their emissions by regional reforestation.[75] The claim, however, was denied for lack of jurisdiction.[76]

Unlike the first impression, such state claims can be strategic in their intention.[77] Moreover, the sheer number of success rates makes it worth considering how this can be used from a strategic litigation point of view (see below).

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70 *Federal Environmental Agency (IBAMA) v Siderúrgica Sao Luiz Ltd and Martins – Case Summary* (Pending) 1010603-35.2019.4.01.3800, (2019) SCCC (15th Civil Federal Court).

71 Ibid.

72 Masha H Moghaddam and Ali Zare, 'Responsibilities of multinational corporations on environmental issues' (2017) 10(5) J Pol & L 78; Rajiv Khare and Apurva Verma, 'Green federalism and climate change: Challenges and options: An Indian perspective' (2019) 6 J Envtl L Pol'y & Dev 61, 75; Joana Setzer and Lisa Benjamin, 'Climate litigation in the Global South: Constraints and innovations' (2020) 9(1) TEL 77, 81-83.

73 *Public Procecutor's Office v Oliveira & Others – Case Summary* (2008) 2008/0215494-3 SCCC (Superior Court of Justice).

74 Wedy (n 69) 6-10.

75 *Sao Paulo Public Prosecutor's Office v United Airlines and Others – Case Summary* (2014) Civil Appeal Nº 000292010.2014.4.03.9999 SCCC/ GRICC (Regional Federal Court).

76 Ibid.

77 Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, 'If at first you don't succeed: Suing corporations for climate change' (2018) OJLS 1, 21.

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Status	**Total number of Cases 31** **(without OECD complaints)**
Successful	14
Pending	12
Dismissed	3
Withdrawn/Agreement	2

Success rates

	Plaintiff	**Legal Basis**	**Total Number**
Successful Cases			**14**
	State		**9**
		Consumer Protection	6
		Emission Trading	1
		Environmental Law	2
	Corporation		**2**
		Corporate Law	1
		Emission Trading	1
	NGO		**2**
		Shareholder	1
		Human Rights	1
	Individual	Human Rights	**1**
Dismissed			**3**
	State		**2**
		Emission Trading	1
		Environmental Law	1
	NGO	Public Nuisance	**1**
Withdrawn	Individual	Shareholder	**1**
Agreement	Corporation	Emission Trading	**1**

3.5 Who are the defendants?

The defendants in the assessed 39 cases have, in the majority, been *Carbon Majors* and financial institutions (approx. 60%). 14 Cases (approx. 40%) were brought against Carbon Majors, among them BP, Total, and Royal Dutch Shell. Some of them have already been targeted by claims several times. In general, the pressure on these companies is increasing; accordingly, the defence strategies of these companies

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are sometimes harsh.[78] In some countries, the public awareness raised inside and outside the courts even makes it increasingly difficult for them to continue with their business as usual.[79] Additionally, two claims were filed against non-producing utility companies.[80] Eight claims (approx. 20%) have been raised against financial institutions and banks, mostly relating to climate risk disclosure and 'green financing'. In general, the financial aspects of climate change have been subject to increasing public awareness in the last years.[81] This development has been flanked by divestment campaigns of the civil society, which promote removing capital from fossil fuel projects and investment funds.[82] Similarly, it has led to increasing awareness of the role of financial institutions and investment funds and an increased call for 'green investment'.

A comparatively small number of cases have been filed against what can be referred to as the *conventional* private sector, and nearly all of these claims were raised by the Australian Consumer Protection Agency. The assessed cases include only four claims against car companies (one of them a tyre producer)[83] and only one case was an attempted claim against international airlines,[84] even though the transport sector is responsible for about 24% of the global greenhouse gas emissions and thus is a crucial cornerstone for mitigating climate change.[85] Primarily, car producers have been reluctant to shift to electronic vehicles from the very beginning of the debate and still are.[86] In fact, some are even 'planning to ramp up production of ultra-polluting SUVs'.[87] As a result, despite a lot of green marketing, in 2026, Detroit automakers

78 Business & Human Rights Resource Center (n 22) 16.

79 Mareike Rumpf, 'Der Klimawandel als zunehmendes Haftungsrisiko für 'Carbon Majors'' (2019) 17(2) EurUP 145, 157.

80 *Greenpeace Poland v PGE GiEK – Case Summary* (n 42); *In re Amended and Restated Preliminary Prospectus of Kinder Moragn Canada Ltd's Initial Public Offering – Case Summary* (n 47).

81 UNFCCC, 'Information on climate finance negotiations and events at COP25' (2019) <https://unfccc.int/topics/climate-finance/the-big-picture/climate-finance-in-the-negotiations/climate-finance/information-on-climate-finance-negotiations-and-events-at-cop-25> accessed 10 June 2020; Javier Solana, 'Climate Litigation in Financial Markets: A Typology' (2020) 9(1) TEL 103, 103-105.

82 Jakob Wallace, 'Oil price crash revives fossil fuel divestment campaigns' *Foreign Policy* (15 May 2020) <https://foreignpolicy.com/2020/05/15/oil-price-crash-revives-fossil-fuel-divestment-campaigns-climate-change-activism/> accessed 10 June 2020.

83 *ACCC v V8 Supercars Australia Pty Ltd* (n 64); *ACCC v GM Holden Ltd* (n 64); *ACCC v Goodyear Tyres* (n 64); *Germanwatch v Volkswagen* (2007) (OECD NCP Germany).

84 *Sao Paulo Public Prosecutor's Office v United Airlines and Others - Case Summary (n 75).*

85 IEA, 'Tracking Transport 2019' (2019) <www.iea.org/reports/tracking-transport-2019> accessed 10 June 2020.

86 Markus Seeberger, *Der Wandel der Automobilindustrie hin zur Elektromobilität: Veränderungen und neue Wertschöpfungspotenziale für Automobilhersteller* (Universität St. Gallen 2016) 41.

87 Reuters, 'Detroit automakers' big transition to electric cars? Don't hold your breath: Trucks and SUVs are 82% of Ford and GM sales – by 2026, they'll increase to 87%' (26 March 2020) < https://bit.ly/3tPydq8> accessed 12 March 2022.

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combined will produce fewer electric vehicles than Tesla alone did *last year*.[88] In Europe, the industry is trying to play the same game.[89] However, if companies are unwilling to provide climate-friendly products, consumers are also left with no choice, and a transition towards a carbon-neutral world is hampered.

Besides, the steel industry, the sugar industry and one Dairy Farm have been subject to climate change litigation.

Defendants	**Total number 39**
Carbon Majors	14
Financial Institutions	9
Steel	3
Utility Company	2
Automotive Industry	4
Airlines	1
Sugar Industry	2
Others	4

4 Taking a closer look – legal challenges and litigation strategies

The following section will analyse the cases concerning their relevant legal arguments and challenges; therefore, they will be categorised according to different legal regimes. Some cases will be described in more detail to give a vivid picture of how the legal arguments were framed. The major legal categories identified are national private law, supply chain liability laws, and cases invoking responsibility under international regimes.

Climate change litigation against the private sector differs significantly from litigation against governments and gives rise to some specific legal problems. Some obligations that have been successfully invoked against governments cannot simply be conveyed to the private sector.[90] This holds true for fundamental rights, human rights as well as international agreements like the Paris Agreement (PA). When suing

88 Ibid.

89 Glenn Hurowitz, 'The coronavirus climate profiteers: …and the climate heroes doing the right thing in a time of crisis' *Migthy Earth* (14 April 2020) <https://stories.mightyearth.org/the-coronavirus-climate-profiteers/index.html> accessed 12 June 2020.

90 A number of public litigation cases seek to review public regulatory action with regard to international agreements or fundamental rights, see for example: *Urgenda Foundation v State of the Netherlands* (2019) ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands); *Juliana v United States* (Pending) 18-36082, (2015) (9th Circuit Court of Appeals). Other categories of public climate litigation regard the enforcement of existing legislation. Ganguly, Setzer and Heyvaert (n 77), 3; Setzer and Byrnes (n 9) 6-8.

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governments, it may still be an impediment to frame climate change as a human rights violation or to invoke international agreements (like the PA); however, with regard to the private sector, a further hurdle has to be taken: proving that private actors are indeed legally bound.[91] Even though the acceptance for multinational corporations being bound by such regimes to some extent is growing, the matter is still highly debatable.[92] Yet, some legal challenges remain unchanged regardless of whether they appear in public or private litigation.

All in all, corporations have been sued for emission reduction under environmental law on the grounds of international agreements with regard to human rights or corporate conduct codes. Claims have alleged a threat to or violation of the right to life, health and the environment. Under civil law, corporations have been held responsible for personal damages, allegedly amounting to torts and public or private nuisance. And finally, corporations have been targeted under corporate law and with regard to shareholder rights for greenwashing and the failure to disclose financial climate risks. Some claims have also been related to emission trading systems and clean energy certificates.

In total, six claims have been filed concerning emission trading systems, but none of these cases can be assumed to have been filed for strategic purposes. Nonetheless, there might be ways on how to use ETS in a strategic manner by NGOs, for example, by uncovering false emission claims.[93] However, emission trading has always been a gateway to fraud, and especially the notion of carbon offsetting bears the risk of a new 'carbon colonialism'.[94] Therefore, invoking carbon trading and market mechanisms in strategic climate change litigations might perpetuate the belief that the cli-

91 Philippe Cullet, 'Human rights and climate change: Broadening the right to environment' in Cinnamon P. Carlarne, Kevin R. Gray and Richard G. Tarasofsky (eds), *The Oxford handbook of international climate change law* (OUP 2016) 504-506. See also UNEP, 'Climate change and human rights' (2015) <https://bit.ly/3817vU1> accessed 28 March 2022; Suryapratim Roy, '*Urgenda II* and its Discontents' (2019) Climate Change L Rev 130.

92 Julia Bialek, 'Evaluating the Zero Draft on a UN Treaty on Business and Human Rights: What does it regulate and how likely is its adoption by states?' (2019) 9(3) Goettingen J Intl L 501; John G Ruggie, *Just business: Multinational corporations and human rights* (W. W. Norton & Company 2013); David Bilchitz and Surya Deva (eds), *Building a treaty on business and human rights* (CUP 2017); Markos Karavias, *Coporate obligations under international law* (OUP 2013).

93 Stephen Russell, 'Estimating and reporting the comparative emissions impacts of products' (2019) <www.wri.org/publication/estimating-and-reporting-comparative-emissions-impacts-products> accessed 10 June 2020.

94 Naomi Klein, *This changes everything: Capitalism vs. the climate* (Simon & Schuster 2014) 266-275; Simon Simanovski, 'Could net-zero emissions prove to be a fatal blow for climate justice?' *Völkerrechtsblog* (13 May 2020) <https://voelkerrechtsblog.org/could-net-zero-emissions-prove-to-be-a-fatal-blow-for-climate-justice/> accessed 10 June 2020; Michael Bauchmüller, 'Warum es für 'Klimaneutralität' starke Regeln braucht' *Süddeutsche Zeitung* (9 December 2019) <www.wri.org/publication/estimating-and-reporting-comparative-emissions-impacts-products> accessed 10 June 2020.

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mate crisis can be resolved by simply applying market mechanisms.[95] Thus, from a strategic litigation perspective, it should be handled carefully.

Shareholder claims have been successful, particularly in Poland and Australia. In these cases, courts held that an investment in coal is less profitable than renewable energies and hence violated the shareholders' interests[96] and that banks have to include climate change risks in their annual report.[97]

Environmental law does not play a major role in strategic climate change litigation against the private sector.[98] Since most environmental provisions are found in administrative law, the enforcement resides with the governmental agencies. An option for individuals to review the enforcement of environmental norms (and climate impacts) is to challenge permissions with regard to environmental impact assessment. In some regions, it is also possible for NGOs to claim a violation of environmental laws.[99] This kind of litigation thus usually targets governmental entities and does not show up in the category of private litigation.[100] As already mentioned above, this category is known as 'permission challenging'.[101] However, countries that do have progressive environmental and climate laws could benefit from the opportunity of private individuals invoking them. This holds true especially for countries of the global south, where one of the major challenges lies in the enforcement of the existing norms.[102]

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95 'Study after study shows that carbon markets make things worse. Not only they do not address the problem, they create new ones', Corporate Accountability (n 2) 16. See also Corporate Europe Observatory, 'EU ETS myth busting: Why it can't be reformed and shouldn't be replicated' (2013) <https://corporateeurope.org/en/climate-and-energy/2013/04/eu-ets-myth-busting-why-it-can-t-be-reformed-and-shouldn-t-be-replicated> accessed 11 June 2020.

96 Client Earth (n 45).

97 *Abrahams v Commonwealth Bank of Australia – Case Summary* (n 52).

98 Six of the here assessed cases are related to environmental law, four of them filed by a state agency (Brazil). Under Polish Law (Article 323 Environmental Protection Law) environmental associations or governmental agencies can file a claim to demand protection from illegal impact on the environment and seek cessation of the activity, see: *Client Earth v Polska Grupa Energetyczna – Case Summary* (n 42); *Greenpeace Poland v PGE GiEK - Case Summary* (n 42); Christian von Bar, 'Chapter 3: Accountability' in Christian von Bar et al. (eds), *Non-contractual liability arising out of damage caused to another: (PEL Liab. Dam.)* (Principles of European law v. 7, OUP 2009) 727.

99 See above, section 3.1.

100 Some Exceptions have been mentioned above, see for example: *Royal Forest and Bird v Buller Coal Ltd* (n 15).

101 See above, section 2.

102 *Goa Foundation v M/S Sea Sterlite & Others* (2018) 4 SCC 218; Nikita Pattajoshi, '*Ridhima Pandey v Union of India*: The onset of climate change litigation in India' (2019) 6 J Envtl L Pol'y & Dev 83, 95; Apurva Verma, 'Green federalism and climate change: Challenges & options – an Indian perspective' (2019) 6 J Envtl L Pol'y & Dev 61, 68-70.

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Legal Regime	Plaintiffs	Total: 39
Private Law	Individual, NGO	4
Corporate Law (incl. Shareholder and Disclosure)	Individual, Corporation, NGO	5
Criminal Law	Individual	1
Consumer Protection	State	5
Loi de vigilance	NGO	2
Emission Trading	State, Corporation	5
Environmental Law	State, NGO	6
OECD Complaints	NGO	8
Human Rights	NGO, Individual	3

4.1 Corporate accountability under private law

A comparatively small number of cases have been filed under national private law, only 4 out of 39. It is a characteristic of private law that most claims require linking a certain behaviour of one individual to a violation of a particular right of another individual. Moreover, in many instances, it is not sufficient to prove an infringement of a legal position; instead, fault of the tortfeasor is required.[103] These key principles likewise constitute the main challenges of climate change in private law claims: causation and unlawfulness.[104] This holds true for the basic concepts of liability in many countries, although the various national legal systems do certainly differ to some extent.[105] The legal figures of nuisance and injunction are nearly the same in many common law countries, and even civil law systems often contain similar provisions.[106] This is even more true regarding recent and pending climate change litigation since the vast majority of cases are filed in the global north.

103 Bar, 'Chapter 3: Accountability' (n 98) 557-563; Jutta Brunnée et al., 'Overview of legal issues relevant to climate change' in Richard Lord et al. (eds), *Climate change liability: Transnational law and practice* (CUP 2012) 34.

104 Michael Burger, Jessica Wentz and Radley Horton, 'The law and science of climate change attribution' (2020) 45(1) Columbia JEL 57, 192-217.

105 See in Detail Lord et al. (eds) (n 6).

106 Jaap Spier, 'Legal strategies to come to grips with climate change' in Oliver C Ruppel, Christian Roschmann and Katharina Ruppel-Schlichting (eds), *Climate change: International law and global governance. Volume I: Legal responses and global responsibility* (Nomos 2013) 135.

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With regard to causation, there has been significant success in the case *Lliuya v RWE* (Germany 2015); however, the case *Smith v Fronterra,* which was filed in New Zealand in 2020, was dismissed on the grounds of causation.[107]

The case *Lliuya v RWE* may well be the first case in which the plaintiff might legally prove a causal link between the act of a carbon major and specific damage.[108] In this case, a Peruvian farmer alleges that the German carbon major RWE contributed to the melting of the Palcacocha glacier in the Andes, which poses a threat to the property of the claimant.[109] The claimant, a farmer who lives below a glacial lake of the Palcacocha, seeks reconstruction of the dam, which protects the glacial lake, and reimbursement for construction work he had to carry out to protect his home from flooding.[110] Reference is made to the historical GHG emissions of RWE which, according to the carbon majors study of *Heede,* amount to 0.47% of the total global emissions.[111]

The German Civil Code provides a norm that can be described as private nuisance. Section 1004 of the German Civil Code states that

> [i]f the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.[112]

In contrast to nuisance claims in other legal systems, this norm, if applicable, does not require negligence or fault.[113] *A fortiori*, causation gains centre stage.

On the one hand, the general challenge of causation in climate change litigation lies with science, and on the other hand, roots in legal aspects. While science commonly refers to probabilities, this is not considered to be sufficient to prove legal causation.[114] The existence of climate change and its causation by human greenhouse gas emissions is fairly undisputed, some interdependencies and tipping points are more difficult to proof.[115] Thus, with regard to causation, two types of climate change impacts have to be distinguished: slow onset effects and extreme weather

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107 *Smith v Fronterra Co-Operative Group Ltd* (n 51); *Lliuya v RWE* (n 51).

108 Myana Dellinger, 'See you in court: Around the world in eight climate change lawsuits' (2018) 42 Wm & Mary Envtl L & Pol'y Rev 525, 531; Rumpf (n 79) 156.

109 Günther Rechtsanwälte, '*Lliuya v RWE: Plaintiff – Claim*' (23 Nov 2015) <https://germanwatch.org/de/14198> accessed 2 June 2020; *Lliuya v RWE* (2016) 2 O 285/15 3, 8 (District Court Essen).

110 Günther Rechtsanwälte (n 109) 2; Günther Rechtsanwälte, '*Lliuya v RWE*: Grounds of appeal' (23 Feb 2017) 2 <https://germanwatch.org/de/14198> accessed 2 June 2020.

111 Günther Rechtsanwälte (n 109) 19.

112 German Civil Code, Sec. 1004 para 1.

113 See German Federal Court of Justice, BGH NJW 1996, 845, 846.

114 Jacqueline Peel, 'Issues in climate change litigation' (2011) CCLR 15, 19; Rumpf (n 79) 156; Burger, Wentz and Horton (n 104) 201.

115 IPCC, *Global warming of 1,5°C: Summary for policymakers* (Cambridge University Press 2018) 5-6 <www.ipcc.ch/sr15/> accessed 2 June 2020.

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events.[116] While for slow onset effects, like rising of the sea level and increase of the average temperatures, a causal link with climate change can be established, this is more complicated with regard to extreme weather events.[117] Extreme weather events like floods, droughts and heavy rains are evidentially linked to climate change in so far as they are getting heavier and occur more frequently.[118] From a legal perspective, this is problematic as it is difficult to link a particular extreme weather event to climate change.[119] For slow onset events, an additional hurdle lies in linking a specific damage 'solely' to climate change.[120]

Thus, regarding causation in *Lliuya v RWE,* the plaintiff has to demonstrate that RWE did cause 0.47% of the total global GHG emissions, which contributed to climate change that caused the melting of the Palcacocha Glacier in the Andes. Further, the plaintiff must show that the melting of the glacier constitutes an imminent threat to his property, which is situated below the glacier lake.[121] The defendants held that due to the number of contributors to climate change, they could not be held liable and that it was not possible to prove whether the GHG emissions of RWE or someone else's emissions or other effects had caused the melting of the respective glacier.[122] The plaintiffs, in response, claimed that greenhouse gas emissions are distributed evenly in the atmosphere and thus do contribute to climate change in general.[123] After the case had been dismissed in the first instance, the court of appeal issued an order for taking evidence. Therein, it stressed that from a legal perspective, the argumentation of the plaintiff is convincing and that, in general, corporations can be held liable for their greenhouse gas emissions.[124]

Apart from causation, the plaintiff had to take several legal hurdles before this order was issued. The respective section in the German Civil Code constitutes a provision of neighbour law.[125] Thus, the court had to be convinced that the Peruvian farmer who lives in Peru is a neighbour to the German corporation *RWE*. Ultimately,

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116 Myles Allen et al., 'Scientific challenges in the attribution of harm to human influence on climate' (2007) 155(6) U Pa L Rev 1353, 1384-1385.

117 Burger, Wentz and Horton (n 104) 78-112.

118 Allen et al. (n 116) 1385-1387.

119 Tobias Pfrommer et al., 'Establishing causation in climate litigation: Admissibility and reliability' (2019) 152(1) Climatic Change 67, 67.

120 Rumpf (n 79) 156; Moritz Keller and Sunny Kapoor, 'Climate change litigation: Zivilrechtliche Haftung für Treibhausgasemissionen' (2019) Business Berater 706, 709.

121 Günther Rechtsanwälte (n 109) 26, 28, 31.

122 Germanwatch, '*Lliuya v RWE*: Statement of Defence – Summary' (28 April 2016) <https://germanwatch.org/de/14198> accessed 5 June 2020; Germanwatch, '*Lliuya v RWE*: Defendant: Written Submission – Summary' (15 Nov 2016) 3 <https://germanwatch.org/de/14198> accessed 5 June 2020.

123 Günther Rechtsanwälte, '*Lliuya v RWE*: Plaintiff: Written Submission' (28 Nov 2016) 4 <https://germanwatch.org/de/14198> accessed 6 June 2020.

124 *Lliuya v RWE* – Claim (n 109); *Lliuya v RWE* (n 51).

125 Klimke, 'German Civil Code sec. 906', *Beck'scher Grosskommentar* (C.H. Beck 2020) paras 270-273.

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this could be established in light of the fact that a neighbour under 'pollution control law' is anyone who is affected by the emission.[126] Secondly, the question arose whether the provision allows for liability even though the GHG emissions were lawful.[127] The latter question was unproblematic as the relevant norm does not generally require fault; in its subsections, it provides for certain exceptions, which the court of appeal clarified, do not apply in this case.[128]

On the one hand, the fact that the German court decided to take evidence and endorsed the legal argumentation of the plaintiff certainly constitutes a major success in strategic litigation. With the trend in climate change litigation to refer to precedencies from other jurisdictions, the case may have an impact on further litigation throughout various legal systems and with regard to various legal claims.[129] However, the subsequent case of *Smith v Fronterra Co-operative,* which was filed in New Zealand in 2020, was dismissed on the grounds of a missing causal link and fault.[130] The plaintiffs were suing several major greenhouse gas emitters (an oil refinery, a power station as well as a dairy farm).[131] *Smith*, the representative and spokesman of the *Iwi Chairs Forum* (a Maori Tribe in New Zealand), claimed the territory in question to have a cultural, historical, and spiritual value to him.[132] He alleged that the defendants carried out a public nuisance and negligence by contributing to climate change. Subsequently, he claimed that the 'defendants owe him a duty, cognisable at law, to cease contributing to [climate change].'[133] The court, however, found that no direct link could be established between the damage and the defendants' action, especially with regard to indirect emissions. It further held that the damage claimed is not particular to the plaintiffs.[134] Regarding causation, the court stated that the damage was caused by a 'chain of consequential and indirect steps' and that it would, moreover, 'not be prevented if the relief sought by the plaintiffs would be obtained'.[135] Additionally, it stressed that a public nuisance requires an 'underlying unlawful act' and that the defendants could not be accused of fault behaviour since they were complying with the law (legal emissions).[136] Concerning negligence, the court found that no duty of care in terms of a general duty to reduce emissions could be established since the parliament had dealt with the matter comprehensively in the

126 Will Frank, 'Klimahaftung und Kausalität' (2013) ZUR 28, 31; Hans Jarass (ed), *Federal Emission Control Act – Commentary* (C.H. Beck 2017) sec 3 para 38; Rumpf (n 79) 150.
127 Germanwatch (n 122) 10.
128 *Lliuya v RWE* (n 51).
129 Rumpf (n 79) 158.
130 *Smith v Fronterra Co-Operative Group Ltd* (n 51) 63-71.
131 Ibid 1-10.
132 Ibid 10.
133 Ibid 10, 13, 15.
134 Ibid 62-63.
135 Ibid 63.
136 Ibid 69.

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Climate Change Response Act of 2002.[137] Accordingly, the case of *Smith v Fronterra* once more reveals the typical challenges of climate change responsibility and thus amounts to a textbook example of private climate change litigation. The general problem with fault is the fact that the emission of greenhouse gases is mostly in line with the law.[138] Thus, some legal figures are precluded due to this fact itself.

This is also revealed in the pending Japanese case *Citizens Committee v Kobe Steel Ltd.* (Japan 2018). In this case, the plaintiffs seek an injunction under Japanese Law, against the construction of a new coal-fired power plant by Japans 'leading steelmaker'.[139] The power plant would amount to 0.6% of the state's carbon emissions.[140] The plaintiffs invoked a violation of the right to a clean and healthy environment and the right to a stable climate, and claimed that the construction was in conflict with the Japanese climate targets.[141] In the Japanese legal system, injunctive relief is not regulated in the civil code but is recognised by the jurisprudence and derived from general tort law.[142] The Japanese Civil Code, enacted in 1896, contains a general provision on tort liability: 'A Person who *intentionally or negligently* violates the rights of others shall be liable for the loss *caused* by the act', Article 709 Civil Law.[143] Thus, liability under tort primarily requires an *unlawful act*. However, unlawfulness in this regard is not merely determined by the legality of GHG emissions. Instead, what constitutes an unlawful act is not merely to be derived from statutes but is determined by a *balance of interest test.*[144] 'Where there is a high probability of damage to human health (…) an injunctive relief should be provided.'[145]

Additionally, the fact that climate change is caused by an unlimited number of contributors, under Japanese law, raises the question of whether the injunction sought can lead to the required outcome.[146] The same problem of multiplicity of polluters was addressed by the court in *Smith v Fronterra* and was debated in *Lliuya v RWE* in the context of cumulative causation.[147] What can be seen from the analyses of these

137 Ibid 98.
138 Rumpf (n 79) 148.
139 *Citizens' Committee on the Kobe Coal Fired Power Plant v Kobe Steel ltd et al. – Case Summary* (n 51); Kobe Steel Ltd, 'Corporate Profile' <https://bit.ly/3JQ0jIu> accessed 29 March 2022.
140 Ibid.
141 Ibid. The Japanese Constitution does not make explicit reference to such rights, see: Yukari Takamura, 'Japan' in Richard Lord et al. (eds), *Climate change liability: Transnational law and practice* (CUP 2012) 234.
142 Takamura (n 141) 228.
143 Ibid.
144 Ibid 232. Accordingly, an act is unlawful if the violation of the rights in intolerable.
145 Ibid.
146 Ibid.
147 In *Lliuya v RWE* the defendants stated that their emissions were insignificant: Germanwatch, '*Lliuya v RWE*: Response to the appeal – Summary' (10 July 2017) 5 <https://german

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three cases, is that the challenges they face are similar throughout legal systems. Even though a number of books and articles have been published assessing the prospects of such claims, the practical impact (at least from a legal perspective) is small, and changes do come only very slowly.[148]

Notwithstanding, legal progress has been made regarding the proof of fault and negligence.[149] With more studies focusing on carbon majors, it has become easier to show that there has been awareness of the problem for many years.[150] These cognitions contribute significantly to the proof of wilful behaviour and negligence. In general, it seems to become easier for claimants 'to assert with greater confidence, that corporate actors are responsible for a sizeable and knowable percentage of the choices and behaviors that result in climate change'.[151]

An outstanding case against the private sector has been filed in the Netherlands under general torts. The case *Milieudefensie v Royal Dutch Shell* constitutes a follow-up on the *Urgenda Decision.*[152] In the Urgenda decision of 2019, the Supreme Court held that the Government of the Netherlands is violating a duty of care with regard to human rights due to its inadequate action on climate change.[153] Remarkably, in the present case this argumentation is conveyed to the private sector: the plaintiffs claim that disregarding the internationally agreed climate targets amounts to a violation of the duty of care and thus constitutes negligence under national tort law.[154]

The duty of care is derived from the Dutch Civil Code Article 6:162 – a general provision on tort – in connection with Articles 2 and 8 of the European Convention on Human Rights (right to life and right to private life, family and home). A tort under the Dutch Civil Code legally requires a violation of a right as well as fault.[155] The claimants refer to documents proving that Shell was aware of the danger of climate change since the 1950s.[156] Hence, due to this knowledge, the company's misleading statements and the inadequate action amount to an 'unlawful endangerment'

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watch.org/de/14198> accessed 3 June 2020; See also: *Lliuya v RWE* (n 109) 41; *Smith v Fronterra Co-Operative Group Ltd* (n 51) 63.

148 See also Burger, Wentz and Horton (n 104) 193-196.

149 *Milieudefensie et al. v Toyal Dutch Shell plc – Case Summary* (n 46).

150 Heede (n 20); Caroll Muffett and Steven Feit, 'Smoke and fumes: The legal and evidentiary basis for holding big oil accountable for the climate crisis' (2017) <www.ciel.org/wp-content/uploads/2017/11/Smoke-Fumes-FINAL.pdf> accessed 6 June 2020

151 Ganguly, Setzer and Heyvaert (n 77) 25.

152 Mlieudefensie, 'Summons: Unofficial translation of the Dutch original' (2019) 663 <http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190405_8918_summons.pdf> accessed 15 June 2020.

153 *Urgenda Foundation v State of the Netherlands* (n 90).

154 Mlieudefensie (n 152) 570-618; Milieudefensie (n 46) 2.

155 Christian von Bar, 'Chapter 1: Fundamental provisions' in Christian von Bar et al. (eds), *Non-contractual liability arising out of damage caused to another: (PEL Liab. Dam.)* (Principles of European law 7, OUP 2009) 231; Bar, 'Chapter 3: Accountability' (n 98) 559.

156 *Milieudefensie et al. v Toyal Dutch Shell plc - Case Summary* (n 46) 553.

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of Dutch citizens.[157] However, the core legal question, which was acknowledged in the *Urgenda II* decision with regard to the government, is whether the required duty of 'due care' can be defined by international law. [158] The plaintiffs claim that, according to climate science, Shell would have to reduce its emissions by 45% by 2030 and come to net-zero by 2050 in line with the Paris Agreement to prevent the alleged harm. [159] To prove that a different pathway is possible, they referred to the Danish energy company Ørsted, which completely shifted its business to renewable energies and, according to its own statement, nowadays is the 'fastest growing and most profitable energy supplier'.[160] If successful, *Urgenda II* would be the first case in which a company would be held liable under national law for disregarding the Paris Agreements climate goals.

4.2 Enhancing responsibility of multinationals with supply chain liability laws – *La Loi de Vigilance*

After a long time of political debate, in 2017, the French National Assembly adopted the '*Loi de Vigilance*'.[161] Since it entered into force, two climate claims have been filed against the French carbon major *TOTAL.* Both cases are still pending.

The *Loi de vigilance* requires corporations to assess their environmental and human rights risks along the supply chain and to publish a yearly *Plan de vigilance.*[162] It is incorporated in the French *Code de Commerce.*[163] According to relevant provisions, the first *Plans de Vigilance* had to be published and subject to review by the end of 2018. However, most of the 'follow up plans' reviewing the initial risk assessment were published throughout the year 2019.[164]

In *Notre Affaire à Tous and Other v Total,* which was filed in 2020, the plaintiffs claimed that TOTAL does not assess its climate change risks properly since its first *Plan de Vigilance* did not consider the consequences of lifecycle emissions of the products of TOTAL (scope 3) at all.[165] TOTAL – still unfazed – is further exploring

157 *Mlieudefensie* (n 152) 634-639.
158 Gerrit Betlem and Andre Nollkaemper, 'Giving effect to public international law and European Community law before domestic courts: A comparative analysis of the practice of consistent interpretation' (2003) 14(3) EJIL 569, 581,582; Roy (n 91) 132,133.
159 *Mlieudefensie* (n 152) 733-756, referring to UNEP 'Emission Gap Report', Worldbank report 'Turn down the heat' and IPCC report SR15.
160 Ibid 823-826.
161 Law No 2017-399 of 27 March 2017; Sherpa, 'Vigilance plans reference guide' 9 <www.assosherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-VF-compressed.pdf> accessed 11 June 2020.
162 Ibid.
163 French *Code de Commerce*, Article L 225-102-1.
164 Sherpa (n 161) 10.
165 *Notre Affaire à Tous* (n 41) 2.

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oil and gas reserves and runs biofuel refineries largely dependent on palm oil which contribute to deforestation. [166] In invoking the Paris Agreement, the plaintiffs held that complying with the 2°C threshold is the only way of preventing harm to the environment, human health and safety as well as human rights.[167] With this argumentation, the claimants established the legally binding nature of the Paris Agreement for corporations via the requirement of vigilance. This argumentation has a clear parallel with the above-assessed case *Milieudefensie v Royal Dutch Shell* and might well be transferred to other cases in which the notion of 'due diligence' is at stake.

The *Loi de Vigilance* furthermore imposes on corporations a duty of diligence with regard to their supply chain. As such, it aims at lifting the *corporate veil* and filling the loopholes in corporate legal responsibilities, which originate (in parts) from the notion of separate legal personalities of multinational corporations.[168] In line with this, the case *Friends of the Earth v TOTAL* (France 2020) refers to the activities of a subsidiary of TOTAL in Uganda.[169] According to the *Loi de Vigilance* a legal responsibility evolves from the controlling of either a subsidiary or a supplying company.[170] This is an important step because responsibility otherwise is often avoided simply by undercapitalisation of the subsidiary.[171] *TOTAL Uganda* is involved in a pipeline and oil project, known as the '*Tilenga Project'*.[172] The project aims at building the 'East African Oil Pipeline' for the transport of oil from the Lake Albert through Uganda and Tanzania. Amounting to 1.445 km, this will be the longest oil pipeline in the world.[173] The project further aims at the exploitation of six oil fields with more than 400 drill holes and a daily production of 200.000 barrels.[174] The plaintiffs accused TOTAL of not sufficiently observing the risks of the project in terms of human rights and the environment as well as climate change.[175]

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166 Notre Affaire à Tous, 'Total: The climate chaos strategy: Synthesis in English of the French report' (2019) <https://bit.ly/3qLBB4t> accessed 29 March 2022.

167 *Notre Affaire à Tous* (n 41) 2; Notre Affaire à Tous, '*Notre Affaire à Tous and Others v Total*: Complaint (28 Jan 2020)' 36-42 <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/> accessed 5 June 2020.

168 See for Details: Robert Grabosch, 'Unternehmen und Menschenrechte: Gesetzliche Verpflichtungen zur Sorgfalt im weltweiten Vergleich' (2019) 35 <www.fes.de/themenportal-die-welt-gerecht-gestalten/weltwirtschaft-und-unternehmensverantwortung/wirtschaft-und-menschenrechte> accessed 15 June 2020.

169 Les Amis de la Terre France (n 41).

170 Stéphan Brabant and Elisa Savourey, 'Law on the corporate duty of vigilance' (2017) 6 <www.bhrinlaw.org/frenchcorporatedutylaw_articles.pdf> accessed 14 June 2020.

171 Carola Glinski, 'Haftung multinationaler Unternehmen für Umweltschäden bei Auslandsdirektinvestitionen' in Gerd Winter (ed), *Die Umweltverantwortung multinationaler Unternehmen* (Nomos 2005) 238.

172 Les Amis de la Terre France (n 41) 6.

173 Ibid.

174 Ibid.

175 Ibid 32-38.

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TOTAL in its published surveillance plan only vaguely mentions this project. In its Environmental and Social Impact Assessment, the company states that the effects of the GHG emissions of the project are insignificant, referring only to the machines used for extracting but excluding lifecycle emissions of the produced oil. Moreover, the practice of gas flaring – which is already approved to be harmful to the environment as well human rights – is envisaged to be practised routinely.[176] Once again, the plaintiffs refer to the Paris Agreement and relate to the fact that 80% of the explored fossil fuel resources have to stay in the ground to keep track of the 2°C threshold. Consequently, defiance of these facts amounts to a violation of vigilance.[177] According to *Friends of the Earth,* the *Plan de Vigilance* is, as a result, obviously insufficient, and a proper risk assessment should even lead to questioning the project as such.[178]

It is difficult to predict what is to be expected from these cases as they constitute the spearhead of Vigilance Litigation. Many issues of the *Loi de Vigilance* are left open to interpretation of jurisprudence.[179] Anyhow, they are capable of setting precedence on the duty of due diligence with regard to climate change. Moreover, the *Loi de Vigilance* is part of a broader international initiative. Similar laws have been enacted in some countries and are still debated in a number of other countries.[180] Consequently, this type of litigation is capable of spreading internationally. Although the legal outcome is still open, shareholders have already taken up the issue. In April 2020, a group of shareholders, amounting to about 1% of TOTAL's capital, announced in the general assembly meeting that TOTAL's climate change strategy is insufficient and that indirect emissions (which amount to 85%) need to be considered.[181] According to Greenpeace, this shareholder action might well lead to a drastic change in the company's policy.[182] A strategic success that has already been seen similarly in the *Kinder Morgan Case* in Canada.

176 *Gbemre v Shell Petroleum Development Company of Nigeria Ltd and Others* (n 51); *Les Amis de la Terre France* (n 41) 36.
177 *Les Amis de la Terre France* (n 41) 37.
178 Ibid.
179 Grabosch (n 168) 30.
180 Olga Martin-Ortega and Johanna Hoekstra, 'Reporting as a means to protect and promote human rights?: The EU Non-Financial Reporting Directive' (2019) 44(5) EnvLRev 622, 628-631; Grabosch (n 168).
181 Reuters, 'Investors plan to push Total to do more on climate change' (15 April 2020) <www.reuters.com/article/us-climatechange-total-investors/investors-plan-to-push-total-to-do-more-on-climate-change-idUSKCN21X1EH> accessed 10 June 2020.
182 Ibid.

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4.3 Corporate accountability under international law

The discourse on international human rights obligations of multinational corporations has been driven ahead continuously in the last decade.[183] It is fairly undisputed that corporations do have an international obligation to 'respect' human rights.[184] Further, soft law obligations derive from the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.[185] 11 out of 39 cases raise claims against corporations under international regimes. Three of the cases invoke human rights obligations, and another eight complaints have been made under the OECD complaint mechanism. This amounts to almost one third of the cases and strongly indicates how much weight international regulations have gained regarding corporate responsibilities.

4.3.1 Corporate responsibility, human rights and climate change

The scope and consequences of international human rights obligations for corporations are still highly debatable.[186] However, national laws can, of course, directly impose human rights obligations on corporations. This was stressed in the case *Gbemre v Shell Petroleum Nigeria Ltd.* as well as in the final statement of the Philippine Human Rights Commission.

In *Gbemre v Shell Petroleum Ltd. Nigeria,*[187] the plaintiffs sought to stop the practice of gas flaring in the Niger Delta, alleging a violation of their right to life, health and a satisfactory environment, as guaranteed under the African Charter on Human and Peoples' Rights.[188] In line with other first-generation climate claims, the impact of gas flaring on climate change was only one argument among others. Nonetheless, the judgement was ground-breaking for several reasons. Astonishingly, it clearly

183 César Rodríguez-Garavito, 'Business and human rights: Beyond the end of the beginning' in César A Rodríguez Garavito (ed), *Business and human rights: Beyond the end of the beginning* (Globalization and human rights, CUP 2017).

184 Ruggie, *Just business* (n 92); Ken McPhail and Carol A. Adams, 'Corporate respect for human rights: Meaning, scope and the shifting order of discourse' (2016) 29(4) Accounting, Auditing & Accountability Journal 650; John G Ruggie, 'Incorporating human rights: Lessons learned, and next steps' in Justine Nolan and Dorothea Baumann-Puly (eds), *Business and human rights: From principles to practice* (Routledge 2016).

185 OECD Guidelines for Multinational Enterprises 2011 (OECD); UN Guiding Principles on Business and Human Rights HR PUB 11/04.

186 Birgit Spiesshofer, *Responsible enterprise* (C.H. Beck 2018) 99-124.

187 *Gbemre v Shell Petroleum Development Company of Nigeria Ltd and Others* (n 51).

188 Amy Sinden, 'An emerging human right to security from climate change: The case against gas flaring in Nigeria' in Hari M. Osofsky and William C G Burns (eds), *Adjudicating climate change: State, national, and international approaches* (CUP 2009) 179.

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states a violation of human rights by *Shell* due to the practice of gas flaring.[189] Moreover, it was one of the first judgments in which the right to life (and dignity) was interpreted to inhere a right to a clean and healthy environment in the context of climate change.[190]

Although several international bodies have acknowledged that states do have a duty to prevent human rights violations following climate change, individual complaints give rise to further legal questions.[191] An individual invoking a human rights violation has to prove that certain conduct has already affected a human right or poses an imminent threat to its enjoyment.[192] Consequently, in the context of fundamental or human rights and climate change, it has to be shown that an imminent threat has already occurred. Additionally, the problem of causation arises similar to private law claims. *Gbemre* did not address these problems since climate change was only one of several arguments, and the environmental degradation from gas flaring had already materialised.[193]

In contrast, in 2015, *Greenpeace Southeast Asia* filed a complaint to the Philippine Commission on Human Rights against a number of carbon majors.[194] Typical for the second wave of litigation, the plaintiffs claimed a violation of the right to life, safety and housing, due to an increased intensity of storms and cyclones. They further alleged that the acidification of the oceans constitutes a violation of human rights to the people of the Philippines.[195] These allegations were linked to the defendants' contribution to climate change and GHG emissions since 1751.[196] The plaintiffs invoked corporate responsibility with respect to human rights under the UN Guiding Principles and a breach of the precautionary principle.[197]

The Commission cannot impose fines or force the defendants to reduce emissions; however, it may seek the assistance of the UN to encourage the defendants to coop-

189 *Gbemre v Shell Petroleum Development Company of Nigeria Ltd and Others* (n 51) 30.

190 Ibid; Sinden (n 188) 181.

191 OHCHR Report on the relationship between climate change and human rights, UN Doc A/HRC/10/61, 65-83; John H Knox, 'Human rights principles and climate change' in Cinnamon P. Carlarne, Kevin R. Gray and Richard G. Tarasofsky (eds), *The Oxford handbook of international climate change law* (OUP 2016) 225, 226.

192 Ottavio Quirico, Jürgen Bröhmer and Marcel Szabó, 'States, climate change, and tripartite human rights: The missing link' in Mouloud Boumghar and Ottavio Quirico (eds), *Climate change and human rights: An international and comparative law perspective* (Routledge 2016) 28.

193 Sinden (n 188) 176.

194 *In re Greenpece Southeast Asia and Others* (n 32).

195 Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement, 'Petition to the Commission on Human Rights of the Philippines: Requesting for investigation of the responsibility of the carbon majors for human rights violations or threats of violations resulting from the impacts of climate change' (5 Dec 2015) 13, 15 <http://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/> accessed 7 June 2020.

196 *In re Greenpece Southeast Asia and Others* (n 32).

197 Greenpeace Southeast Asia and Philippine Rural Reconstruction Movement (n 195) 17, 26.

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erate; furthermore, it may make recommendations to the government and issue fact-finding reports.[198] In its finding of December 2019, the Commission announced that fossil fuel companies could, in fact, be held liable for climate change impacts.[199] In terms of human rights obligations, it stressed that fossil fuel companies have a duty to respect human rights and that they do also have a moral duty, which goes beyond that.[200] It also held that legal responsibility is not covered by current international human rights treaties, but can be claimed under national law and that civil law of the Philippines provides for respective action.[201]

This final statement is in line with the common understanding of international obligations of corporations according to public international law. Unfortunately, it does not help in assessing if or how the responsibility to respect human rights can be invoked by individuals, apart from national legislation. Nonetheless, it is one more statement stressing that corporations can be held liable for their contribution to climate change. With the Philippines being already severely threatened by climate change, this case emphasises how present the violation of human rights due to climate change is.

Little information is yet available on the most recent human rights case, *Youth Verdict v Waratah Coal,* filed in Australia in May 2020. The plaintiffs challenge the permission of a coal mine, alleging that the mine will contribute to climate change and thus 'infringe the plaintiffs right to life, the protection of children and the right to culture as protected by the Queensland Human Rights Act'.[202] It is the first human rights-based climate case in Australia.[203] In general, only a few claims against corporations do expressly refer to human rights so far or try to invoke human rights directly.[204] The progress of these three cases shows that human rights violations from climate change are becoming more and more visible. Since climate change has proceeded significantly in the last decades, it is getting easier to demonstrate actual damages and violations of rights and link them to climate change. Especially in the global south, the legal challenge of proving an imminent threat is vanishing, with progressing climatic change and its devastating consequences.

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198 The Philippine Commission on Human Rights is a national human rights institution as recognised by the Paris Principles: 'Principles relating to the Status of National Institutions', UNGA Res. Dec 20 1993, 48/134; see also: UNGA Res. Nov 12 2019, A/C.3/74/L.44/Rev.1; Setzer and Benjamin (n 72) 93.

199 *In re Greenpece Southeast Asia and Others* (n 32).

200 Ibid.

201 Ibid.

202 *Youth Verdict v Waratah Coal – Case Summary* (n 33).

203 Sabin Center for Climate Change Law (n 11).

204 Not expressly, but indirectly addressing human rights aspects of climate change, e.g.: *Native Village of Kivalina v Exxon Mobil Corp* (2012) 09-17490 (9th Circuit Court of Appeals); *Lliuya v RWE* (n 51).

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4.3.2 Invoking responsibility under the OECD Guidelines for Multinational Enterprises

In the aftermath of the amendments of the OECD Guidelines in 2011, OECD complaints have become a more relevant tool in strategic litigation. The OECD Guidelines are a *soft law* mechanism outlining governance directives for multinational enterprises.[205] Due to the OECD complaint mechanism, constructed as a mediation process, no legally binding decisions can be reached.[206]

The majority of OECD climate complaints (five out of eight) were filed within the last two years (2018-2020). All of them are still pending.

The overall effectiveness and success of the OECD complaint mechanism can nevertheless be figured from looking at the statistics. From January 2018 until now, 26 out of 41 cases are still pending.[207] Considering that cases, which lead to an agreement, constitute some kind of compromise, i.e., a partial success, 40% of the complaints since 2018 have been (partially) successful.[208] This recognition fits into the overall statistics of the period 2011 until 2018. Accordingly, 42% of the total cases filed led to an agreement between the parties, and roughly 36% resulted in a policy change of the company.[209] 21% of the cases were related to the environment, whereas 57% dealt with human rights.[210] Admittedly, though, the practice of the various national contact points (NCPs) differs significantly. The German NCP, for example, was in the past alleged of tending to favour the private sector.[211] Moreover, while some NCPs strictly regard themselves as being purely a mediator and rather refuse to make clear statements on whether the OECD Guidelines have been adhered to, other NCPs are less hesitant to declare certain behaviour to be inconsistent.[212]
The remaining three climate complaints were filed in 2007, 2011 and 2017.[213] The success of the complaint, which was filed in the Netherlands in 2017, *BankTrack et*

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205 OECD Guidelines for Multinational Enterprises (n 185) Foreword; Elisa Morgera, *Corporate accountability in international environmental law* (OUP 2009) 101-105.

206 Karen Da Costa, 'Corporate accountability in the Samarco chemical sludge disaster' (2017) 26(5) Disaster Prevention and Management 540, 546-548.

207 OECD Watch (n 13).

208 Of the two cases, which were concluded by a final statement, one was successful and one was prevailingly unsuccessful, see: *CCC et al. v Adidas* (2020) (OECD NCP Germany)*; Obelle Concern Citizens & FOCONE v Shell (2020) (OECD NCP Netherlands).*

209 OECD, 'National contact points for responsible business conduct' <https://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf> accessed 7 June 2020.

210 Ibid.

211 ECCHR, 'ECCHR Evaluation: Die OECD Verfahren zu Überwachungstechnologie gegen Gamma und Trovicor sowie zu Arbeitsbedingungen gegen KiK, C&A und Carl Rieker' (2015) 11 <https://bit.ly/3DhHV8S> accessed 29 March 2022.

212 See for example: *CCC et al. v Adidas* (n 208); *Obelle Concern Citizens & FOCONE v Shell* (n 208)*.*

213 *Germanwatch v Volkswagen* (n 83); *Norwegian Climate Network et al. v Statoil* (n 35); *BankTrack et al. v ING Bank* (n 35)*.*

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al. v ING Bank, is of particular interest for the prospect of success of the now pending files.

The ING complaint was the first successful OECD complaint with regard to climate change.[214] Even though eventually an agreement was reached among the parties, the NCP made some remarkable points in its final statement. The complainants accused ING of not adequately reporting its emissions.[215] They alleged that ING did not observe the regulations on Disclosure (Chapter III), Environment (Chapter VI), and Consumer Interests (Chapter VIII), as set out in the Guidelines, which also require the fulfilment of 'due diligence' with regard to the value chain.[216] BankTrack et al.[217] urged ING to publish its carbon footprint, including indirect emissions related to loans and investments, and to publish concrete and measurable emission reduction targets. ING, in response, argued that there were no methods available to measure the indirect emissions of a bank's lending portfolio.[218] It subsequently agreed to improve its reporting (and already did so in 2019) and stated that it will assess its most carbon-intensive sectors including automotive, shipping, aviation, steel etc.[219] The NCP decided not to make a statement on whether or not the ING reporting was in compliance with the guidelines. However, it stressed that, with regard to the Paris Agreement, it could be expected that the government will also impose binding regulations on the private sector and suggested further monitoring the progress in 2020.[220]

Regarding climate change, 'the OECD Guidelines include a number of expectations extending to business action on climate change.'[221] The climate relevance of the OECD Guidelines was also highlighted in the Responsible Business and Human Rights Forum in Bangkok 2019.[222] According to the OECD Climate Action Summit, held in the context of the COP25, 'these expectations include setting science based targets that are consistent with international commitment, disclosure of social and environmental risk reporting with a particular focus on GHG emissions' as well as

214 The former case of *Norwegian Climate Network et al. v Statoil* (2011) was rejected.

215 BankTrack et al., '*BankTrack et al. v ING Bank* – Complaint' (08 May 2017) 9 <http://climatecasechart.com/non-us-case/banktrack-et-al-vs-ing-bank/> accessed 10 June 2020.

216 *BankTrack et al. v ING Bank* (n 35) 3.

217 BankTrack et al. (n 215) 9.

218 ING had started to publish its direct carbon emissions and had started to develop a methodology to measure emissions from financing in 2015. In 2017, they started to use a new methodology according to the Paris Agreement Capital Transition Assessment, see: *BankTrack et al. v ING Bank* (n 35) 4.

219 Ibid.

220 Ibid 3, 7.

221 OECD, 'COP 25 – Climate Action Side Event: Background Note' 2 <https://bit.ly/3uAy4aq> accessed 4 June 2020.

222 Responsible Business and Human Rights Forum, 'Summary report' (2019) <www.unescap.org/events/responsible-business-and-human-rights-forum> accessed 4 June 2020.

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the respective consumer information.[223] The ING decision is the first indicator that these expectations are actually taken up in practice. Accordingly, the Dutch NCP stressed that climate impact assessment is part of the due diligence requirement of the OECD Guidelines and that this includes impact assessment within the value chain.[224]

In general, the OECD complaints do raise a variety of arguments targeting corporate behaviour, e.g., misleading advertisement,[225] improper involvement in local politics,[226] insufficient environmental impact assessment, [227] and more. Stunningly, five of the recently filed complaints refer to international climate agreements (Paris Agreement/Kyoto Protocol), assuming that corporate obligations can be directly derived from the agreements in conjunction with the OECD Guidelines' requirements of due diligence.[228] Since the trend to strategic litigation seems to focus on carbon majors, this also holds true for OECD claims. However, the OECD Guidelines seem to also open opportunities to target other industries and their climate policies – especially the finance sector. Accordingly, the UK Export Finance Corporation is facing an OECD complaint, as well as several other banks (ANZ Bank Australia, ING Bank, Mizuho Bank). In *Australian Bush fire victims and Friend of the Earth v ANZ Bank,* the complainants alleged that the bank, one of Australia's largest financiers of fossil fuel industries, failed to adhere to the Paris Agreements reduction targets meaningfully.

5 Socio-political analysis – 20 years of litigation: where do we stand?

Climate change litigation has increased continuously since its beginning in the early 2000s and has received more public attention with the climate debate entering main-

223 OECD (n 221) 2.

224 *BankTrack et al. v ING Bank* (n 35) 3.

225 Client Earth, '*Client Earth v BP*: Complaint to the OECD National Contact Point UK' (5 Dec 2019) <https://complaints.oecdwatch.org/cases/Case_556> accessed 10 June 2020.

226 FOCUS et al., '*Focus v Ascent Resources plc*: Complaint to the OECD National Contact Point UK' (12 November 2019) <https://complaints.oecdwatch.org/cases/Case_555> accessed 10 June 2020.

227 Market Forces, '*Market Forces v SMBC, MUFG and Mizuho*: Complaint to the OECD National Contact Point Japan' (Nov 2016) <http://climatecasechart.com/non-us-case/market-forces-v-smbc-mufg-and-mizuho/> accessed 10 June 2020.

228 Ch. II - Commentary on general policies, OECD Guidelines for Multinational Enterprises (n 185) 14; *Norwegian Climate Network et al. v Statoil* (n 35); *BankTrack et al. v ING Bank* (n 35); Friends of the earth Australia, '*Australian bush fire victims v ANZ Bank*: Complaint to the OECD National Contact Point Australia' (30 Jan 2020) <https://complaints.oecdwatch.org/cases/Case_564> accessed 10 June 2020; Global Witness, '*Global Witness v UK Export Finance*: Complaint to the OECD National Contact Point UK' (17 March 2020) <https://complaints.oecdwatch.org/cases/Case_568> accessed 10 June 2020; Market Forces (n 227).

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stream debates. After roughly twenty years of litigation, it is a convenient time to look back and take stock.

5.1 General trend and lessons learned

From the above-assessed cases, some general trends in non-US private litigation can be identified. NGOs are increasingly involved and have launched a series of claims within the last two years. This also stands for an increasing amount of strategic litigation.[229] So far, the vast majority of cases has been filed in the global north, even though there might actually be quite some potential for claims in the global south.[230] Another trend in recent private climate change litigation is that international climate agreements are invoked in national courts more often – even with regard to the private sector. A quite strong argument has been made in France and in the Netherlands, in line with the OECD complaints: for due diligence, 'the only way to act accordingly is to submit themselves under the 2°C threshold'. Additionally, while in the earlier cases, climate change oftentimes was made only as a side argument (e.g., *Gbemre*), in the 'second wave' of cases, it constitutes the core argument.

Wilensky, in her assessment of Non-US Litigation in 2015, notes that 'cases against corporations were the most successful group' with a success rate of close to 90 percent.[231] She also notes that this number might not be representative.[232] Success rates have been analysed in detail above. On the other hand, with regard to strategic litigation, success should not only be measured by the legal outcome. In fact, it should be distinguished into legal success and strategic, i.e., socio-political success.

With regard to the legal success and although roughly one-third of the cases are still pending, it is possible to indicate some developments from particular cases, which are capable of having a knock-on effect on future cases.

One of these cases is certainly *Lliuya v RWE,* which seems to open the door to actually prove a causal link between the behaviour of a certain emitter and specific climate damage. If the court actually recognises a causal link, this could have an enormous impact on climate litigation worldwide since there is an astonishing trend of cross-referencing to decisions from other jurisdictions.[233] Nonetheless, linking

229 Nicole Rogers, 'If you obey all the rules you miss all the fun: Climate change litigation, climate change activism and lawfulness' (2015) 13 NZJPIL 179, 179; See also: Setzer and Byrnes (n 9) 8.
230 César Rodriguez-Garavito, 'Human rights – The Global South's route to climate litigation' (2020) 114 AJIL 40.
231 Wilensky (n 16) 173.
232 Ibid.
233 Rumpf (n 79) 154.

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particular damages to specific emissions of corporations remains difficult.[234] Hence, private law remains to be a very rocky road for establishing corporate climate accountability.

Surprisingly, OECD complaints have turned out to be a quite successful way of holding corporations accountable due to their increasingly recognised moral duty. An obstacle, which takes up some of the benefits, is the fact that the NCPs practice varies in different countries.[235] Still, statistics show that the OECD complaint mechanism does impact the corporate policies in question. It seems like the expected negative publicity is worthwhile to be avoided. However, it should also be assessed in how far a changed corporate policy also leads to changes on the ground.

The relevance of climate change to businesses is also revealed by the sheer number of companies, which are claiming to be or to become carbon neutral.[236] Especially when climate change is gaining more and more public attention, an enforceable judgment will not be necessary in some cases. The OECD Guidelines, thus, might well turn out to be the most effective way of addressing corporate climate responsibilities.

It is more difficult to define success outside of the legal sphere. In general, the (strategic) success of climate cases should not be underestimated. A number of cases have been quite successful in driving the public discourse, and media coverage has been high. In the US, the law firm defending Exxon Mobil has been subject to law students protest and critique; and in Germany, RWEs attempts to cut an ancient forest for a mining project has been put on halt due to protest and legal action.[237] The socio-political success of climate lawsuits is also reflected in the taking up of its goals by non-judicial shareholder initiatives. Ultimately, the legitimacy of law is tested by means of its performance on a case-to-case basis.[238] As such, reality reflects the law and can either form it or point to its defectiveness. Thus, it is indispensable to illustrate regulatory gaps and contradictions that occur due to societal or environmental changes.

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234 See: *Smith v Fronterra Co-Operative Group Ltd* (n 51); Ganguly, Setzer and Heyvaert (n 77) 25.

235 Da Costa (n 206) 547.

236 Climate Neutral, 'Climate Neutral certified brands' (2020) <www.climateneutral.org/certified-brands> accessed 15 June 2020; Climate Partner, 'Success stories' (2020) <www.climatepartner.com/en/success-stories#customers> accessed 17 June 2020; Kristian Frigelj, 'Die subversive Energie über den Hambacher Forst hinauszutragen' *Die Welt* (21 Januray 2020) <www.welt.de/politik/deutschland/article205224983/Aktivisten-gegen-Kohle-Die-subversive-Energie-ueber-den-Hambacher-Forst-hinaustragen.html> accessed 10 June 2020.

237 Emily Holden, 'Harvard law students ramp up protest against ExxonMobil climate firm' *The Guardian* (16 January 2020) <www.theguardian.com/business/2020/jan/15/harvard-law-students-protest-firm-representing-exxon-climate-lawsuit> accessed 16 June 2020.

238 Oliver Gerstenberg, 'Radical democracy and the rule of law: Reflections on J. Habermas' legal philosophy' (2019) 17(4) ICON 1054.

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On the other hand, *Lliuya v RWE* also points to another aspect of strategic litigation: In some instances, the strategic success for the societal and legal change might be a lot bigger than the one for the plaintiff personally. The case, filed in 2015, is still pending. The German court has requested the Peruvian agencies' permission to take evidence, which is expected to be completed by the end of this year.[239] Meanwhile, as time passes and the glaciers continue to melt, the plaintiff still faces severe risks in his day-to-day life.[240] Aspects, which have to be carefully assessed and clearly communicated, especially in cases that do indirectly incorporate human rights aspects and aspects of global climate justice.[241] Moreover, while in *Gbemre v Shell*, the human rights obligation of Shell was clearly pointed out by the court, the judgement was never enforced.[242]

5.2 The way forward for strategic litigation

Nowadays, private climate change litigation primarily focuses on carbon majors. Yet, the responsibility of other private players should also be addressed. This observation does not imply that carbon majors do not have a responsibility and large influence.[243] Neither does it mean that they should not be pressured to assume a fair amount of responsibility. However, the economy we live in today is not (yet) capable of functioning without fossil fuels, and other players also do have quite some influence on the path to change.

Agriculture and land use, for example, still amount to 24% of global greenhouse gas emissions.[244] Thus, it is worth taking a look at how eating habits and land use are influenced by some major corporate players, considering that the food market is by and large apportioned among a handful of multinational corporations.[245] Moreover, the role of digitalisation is hardly ever addressed, even though it is estimated that

239 Germanwatch, 'The Huaraz case at a glance' (2019) <https://germanwatch.org/de/16451> accessed 12 June 2020.

240 Germanwatch, 'The Huaraz case in its fourth year: Further Delay in taking evidence worrying in the light of harzardous situation on site' (2019) <www.germanwatch.org/en/huaraz> accessed 15 June 2020.

241 Emphasising the importance of transnational cooperation, Arite Keller and Karina Theurer, 'Menschenrechte mit rechtlichen Mitteln durchsetzen: Die Arbeit des ECCHR' in Alexander Graser and Christian Helmrich (eds), *Strategic litigation: Begriff und Praxis* (1st edn, Nomos 2019) 55, 56.

242 Sinden (n 188) 174.

243 Corporate Accountability (n 2).

244 EPA, 'Global Emissions by Economic Sector' <www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> accessed 11 June 2020.

245 Kate Taylor, 'These 10 companies control everything you buy' *The Independent* (31 May 2017) <https://bit.ly/3iMdIFs> accessed 29 March 2022; William J. Ripple, Christopher Wolf and Thomas Newsome, 'World scientists' warning of a climate emergency' (2020) 70(1) BioScience 8, 11.

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information and communication technology products and services accounted for more than 4.6% of world-wide electricity consumption.[246]

One reason why carbon majors are primarily targeted is the related progress in science with regard to attributing certain amounts of (historic) carbon emissions to certain corporations. In addition, counting emissions in other sectors does not seem to be so much of a problem when corporations apply for carbon neutrality certificates or commit themselves to the carbon disclosure project. Many of these companies have entered into a competition of boasting about their climate neutrality and climate targets, frequently making inadequate claims on the carbon savings related to their products. [247] Moreover, many companies have voluntarily participated in the carbon disclosure project.[248] With regard to causation, it will be necessary to also refer to historical emissions of the company in question, for which the data available on the conventional sector is rather poor.[249] However, from the above assessment, it seems to be worth trying to benchmark them against their own promises.

When considering the above assessment regarding the conventional private sector, the focus should be on claims that do not require proof of damage and causation. This applies to shareholder and consumer protection claims, targeting greenwashing and invoking responsibility under the OECD Guidelines and other international soft law instruments.

Cases under consumer protection and competition law, which have been filed in Australia, have been very successful. Consumer protection law may obviously vary throughout different jurisdictions. While, for example, in Australia, anybody may file a claim concerning misleading or deceptive conduct in trade and commerce, in other countries, only certain associations do have the right to file general consumer protection claims.[250] In jurisdictions where a state agency has to pursue the claim, there is only limited potential from a strategic litigation perspective. In some constellations, civil actors may file a complaint to an agency, which could be accompanied by public campaigns. Such complaints are capable of attracting the state's attention if the government is generally willing to take up action.[251] However, these cases are highly

246 Joshua Aslan et al., 'Electricity intensity of internet data transmission: Untangling the estimates' (2018) 22(4) Journal of Industrial Ecology 785.

247 Russell (n 93) 2.

248 'Carbon Disclosure Project' <www.cdp.net/en/info/about-us/what-we-do> accessed 12 June 2020.

249 Since GHG emissions remain in the atmosphere for decades and thus affect the climate cumulatively over time, historic emissions are decisive, see Allen et al. (n 116) 1369.

250 Abbs, Cashman and Stephens (n 37) 107; Wagner (n 39) 188, 189.

251 See for example the 'Bayer-Case': ECCHR, 'Bayer: Doppelstandards beim Vertrieb von Pestiziden' (2016) <https://bit.ly/3uEcRft> accessed 11 June 2020; after the ECCHR had filed a complaint to the plant protection agency of North-Rhine-Westphalia in 2016, a national task force for export control of pesticides was established.

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dependent on the political will and thus vulnerable to political changes.[252] While in Australia, the ACCC did not raise any more claims since political changes in 2013, the development in the US was to the contrary. With the election of the Trump Administration, an increased number of cases have been filed by counties and states.[253]

As shown above, a bunch of claims against the corporate sector has been filed concerning corporate law and finance. But it seems like this sphere has not yet gained as much attention as other laws (e.g., human rights and public nuisance). These areas may have been underestimated in the past. At least, they are underrepresented in present climate litigation. The prospects of financial claims have been assessed in detail by Solana.[254] Accordingly, there is a potential for either financial institutions to be held responsible for their lending portfolio and the subsequent GHG emissions.[255] Or the debtor as the bank's contractual partner may be sued for not implementing green policies as set out by the contract/policy of the bank.[256] In the first instance, the investing consumer would be the plaintiff, whereas, in the second, the bank would have to be the one who takes legal actions. Moreover, projects the World Bank Group finances can be reviewed with regard to the IFC Performance Standards.[257] Anyone who is affected by such a project can file a complaint to the IFC ombudsman who reports directly to the President of the World Bank Group.[258]

Shareholder claims can invoke a duty of disclosure with regard to financial risks from climate change and/or climate change litigation. But they can also review false promises and address greenwashing activities. As has been shown with regard to the French cases, shareholder action can put pressure on corporations even ahead of legal action. Yet, strategic litigation should not perpetuate the belief that combatting the climate crisis has to be economically profitable.

Moreover, in some cases, corporations have sued other corporations for unfair competition. While the issuing of an injunction for false advertisement is difficult to reach for a consumer, corporations do have a right to take legal action if they, as competitors, are affected.[259] The notion of 'corporate partnering' in strategic litigation has also been pointed out by *Peel*.[260] With an increasing number of truly climate concerned or green companies, competitors' interest in climate litigation may also

252 Jacqueline Peel, Hari Osofsky and Anita Foerster, 'Shaping the 'next generation' of climate change litigation' (2017) 41 MULR 793, 844.
253 Adler (n 18) iii.
254 Solana (n 81).
255 Ibid.
256 Ibid 124.
257 Performance Standards on Environmental and Social Sustainability 2012 (International Finance Corporation).
258 Elisa Morgera, 'From corporate social responsibility to accountability mechanisms' in Pierre-Marie Dupuy and Jorge E Vinuales (eds), *Harnessing foreign investment to promote environmental protection* (CUP 2013) 342-345.
259 Wagner (n 39) 187.
260 Peel, Osofsky and Foerster (n 252) 836, 837.

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increase. Thereby, NGOs would rather not be in the courtrooms but instead would support the digging out of facts about greenwashing and subsequent unjust competitive advantages. A strategic starting point could also be found in educating green companies and startups about the possibilities and advantages of climate change litigation and promoting it.

As has already been pointed out by *Bouwer,* climate change litigation should not stick to 'searching for the holy grail' but also take into account small and apparently inconsiderable climate cases.[261] In terms of stressing its nature as 'strategic litigation', private climate change litigation should not be afraid of legal defeats but also take into account the indispensability of an overall systemic change.[262] According to climate scientists, 'excessive extraction of materials and overexploitation of ecosystems, driven by economic growth, must be quickly curtailed to maintain long-term sustainability of the biosphere'.[263] Addressing responsibility of the private sector should thus also address responsibility for a systemic change and questioning the idea of constant economic growth. *In concreto*, this means taking a look at corporate responsibility for development towards sustainability, for example, with regard to the lifecycle of products, waste management and the influence on consumer habits. To include this in strategic climate litigation will surely not be an easy task or be acknowledged by courts straight away. But, quoting *Wolfgang Kaleck* of the European Center for Constitutional and Human Rights, 'strategic litigation takes part similarly within and without the legal system. It includes demanding of rights as much as the utopia of justice.[264] If we are not willing to tackle the systemic question, we should also be honest enough and consequently turn to climate change adaptation instead of mitigation.

6 Conclusion

While writing this, just another corona-miracle has occurred: The German government has warded off the car industry's request for subsidies on combustion engines. In light of the current pandemic, facing the economic crisis ahead, global climate justice and climate change mitigation will have to be eked out at all fronts. This means broadening the horizon of private climate litigation beyond carbon majors towards influential multinational corporations in general and assessing further avenues of litigation, including corporate partnering and addressing fundamental systemic questions.

261 Bouwer (n 10).
262 See also: Andreas Fischer-Lescano, 'Kassandras Recht' (2019) 52(4) KJ 407, 421.
263 Ripple, Wolf and Newsome (n 245) 11.
264 Kaleck (n 5) 25 (unofficial translation by the author).

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Even though it is certainly debatable, whether it is necessary or even helpful to address such fundamental questions in the courtroom, speaking about strategic litigation, one should not forget that driving a societal discourse for change is a crucial part of it.[265] Pointing to the weaknesses of the existing law will often come at the cost of legal success, yet nothing can be achieved by avoiding the dispute. Whatever the current corona crisis will finally be good for, it may already have assured us that the unthinkable is actually possible once we realise that the threat of climate change is as real and as current as this virus – even though neither of them we can see.

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265 Rogers (n 229) 199; Fischer-Lescano (n 262) 420-425.

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humanrights.org/en/turning-up-the-heat-corporate-legal-accountability-for-climate-change> accessed 4 June 2020.

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