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ARTICLE

Avoid, Align or Contest? An Examination of National Courts' Postures in International Climate Law Litigation

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Abstract
In numerous climate litigation cases before national courts, plaintiffs have referred to the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and/or the Paris Agreement to support their claims. So far, no systematic appraisal has been conducted on how national courts have responded to such references to international climate law and the extent to which they have engaged with it. This article examines 148 cases in which plaintiffs refer to international climate law, mapping and analyzing judgments of national courts that either avoid, align with, or contest this legal framework. The findings indicate that invoking international climate law is not an easy path to success, as courts often have opted to avoid engagement with claims based on international climate law. Yet, in several landmark cases, courts have aligned with international climate law, contributing to the advancement of the objectives of the Paris Agreement.

Keywords: International climate law; Climate change; International law; National courts

1. Introduction

The 2023 *Emissions Gap Report*, published by the United Nations Environment Programme (UNEP), revealed that national contributions to reducing greenhouse gas (GHG) emissions remain insufficient to achieve the objectives of the Paris Agreement to limit a global temperature rise to 1.5 degrees Celsius (°C), or even 2.0°C.[1] In May 2024, experts projected a global temperature increase of at least 2.5°C.[2] This highlights a glaring gap between the ambitions expressed in the 1992 United Nations Framework Convention on Climate Change (UNFCCC)[3] and the

[1] United Nations Environment Programme (UNEP), *Emissions Gap Report 2023: Broken Record – Temperatures Hit New Highs, Yet World Fails to Cut Emissions (Again)* (UNEP, 2023), available at: https://wedocs.unep.org/20.500.11822/43922.

[2] D. Carrington, 'World's Top Climate Scientists Expect Global Heating to Blast Past 1.5C Target', 8 May 2024, *The Guardian*, available at: https://www.theguardian.com/environment/article/2024/may/08/world-scientists-climate-failure-survey-global-temperature.

[3] New York, NY (United States (US)), 9 May 1992, in force 21 Mar. 1994, available at: https://unfccc.int.

Paris Agreement,[4] on the one hand, and the implementation practice of public authorities and companies, on the other.

Between 1992 and 2012, the first 20 years following the adoption of the UNFCCC, individuals and collective action groups rarely relied upon international climate law to challenge acts or omissions of states and the private sector that contributed to GHG emissions. This is reflected in the limited references to international climate law in the 2002 volume of *International Environmental Law in National Courts*, the first-ever compilation of national case law on international environmental law.[5] Similarly, the 582-page 2005 edition of *International Environmental Law in National Courts* does not contain a single case on international climate change law.[6]

One reason for the absence of international climate law judgments in these volumes is that the UNFCCC contained few principles or obligations on which plaintiffs could effectively rely in judicial proceedings. Two years after the conclusion of the UNFCCC, the Land and Environment Court of New South Wales (Australia) noted that the UNFCCC, together with the Intergovernmental Agreement on the Environment[7] and the National Greenhouse Response Strategy:[8]

> Outline policy objectives and responses to the problem of enhanced greenhouse effect, but they stop short of expressly prohibiting any energy development which would emit greenhouse gases. They are policy documents only and expressly provide that they do not bind local government. There is nothing in those documents or any other background documents which were tendered in evidence, which requires the Court to refuse to grant consent or which would prohibit the development of power stations per se.[9]

The Court did not distinguish between the UNFCCC as a treaty and the two national policy documents.

Fast-forwarding 13 years, the picture has changed significantly. The 2023 UNEP *Climate Litigation Report* lists over 2,000 climate change cases in more than 50 states.[10] The Columbia Climate School's climate litigation database continues to expand with new cases.[11] While most of these cases do not address *international* climate law, plaintiffs in over 40 states have relied on the UNFCCC, the Kyoto

4 Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

5 M. Anderson & P. Galizzi (eds), *International Environmental Law in National Courts* (British Institute of International and Comparative Law, 2002).

6 A. Palmer & C.A.R. Robb, *International Environmental Law Reports: International Environmental Law in National Courts* (Vol. 4) (Cambridge University Press, 2005).

7 Intergovernmental Agreement on the Environment 1992 (IGAE) (Australia).

8 National Greenhouse Response Strategy 1992 (NGRS) (Australia).

9 *Greenpeace Australia Ltd* v. *Redbank Power Company Pty Ltd and Singleton Council*, Decision on Development Application, 10 Nov. 1994, [1994] NSWLEC 178, ILDC 985 (AU 1994) (Land and Environment Court, New South Wales, Australia).

10 UNEP, *Global Climate Litigation Report: 2023 Status Review* (UNEP, 2023), available at: https://www.unep.org/resources/report/global-climate-litigation-report-2023-status-review.

11 Sabin Center for Climate Change Law, Climate Change Litigation Databases, available at: http://climatecasechart.com.

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Protocol,[12] the Paris Agreement, and UNFCCC Conference of the Parties (COP) decisions to support their claims.

These cases have provided a unique opportunity to evaluate how national courts have handled claims involving international climate law. What role have international law arguments played in climate change litigation? Have courts dismissed such arguments on the grounds that climate policy falls within the political domain, or have they relied on them to compel defendant states or corporations to strengthen mitigation policies in line with international commitments?

To identify the commonalities in how courts engage with international climate law and evaluate the practice of national courts, this article uses a typology of three possible judicial approaches when plaintiffs invoke international law: avoidance, alignment, and contestation. This typology was developed by a Study Group of the International Law Association (ILA),[13] and has been elaborated upon in an edited volume on *The Engagement of Domestic Courts with International Law*.[14]

Based on an analysis of 148 cases, this article examines whether, and on what grounds, national courts have chosen avoidance, alignment, or contestation when engaging with claims based on international climate law. By mapping the practices of national courts, the article advances our understanding of their role in the overall governance of global climate change policies. To some extent, judicial practice allows us to identify factors that inform and explain these forms of engagement and whether reference to international climate law can shape the outcome of national climate cases.

This article is divided into eight sections. Section 2 contains a brief review of the existing literature on how national courts address international climate law arguments. Section 3 explains how the 148 cases were identified and outlines the framework of analysis. Section 4 discusses and excludes cases where courts engage with norms derived from international climate law as domestic law, thereby not expressly engaging with international law. Sections 5, 6 and 7 map the cases where courts have explicitly engaged with international climate law, as categorized by avoidance, alignment and contestation. Section 8 provides a concluding discussion.

2. A Brief Review of Existing Research

Examining how national courts address international climate law arguments is not a completely new endeavour. On the one hand, it builds on an extensive body of knowledge and data on how national courts address international law in general, apart from the specific questions raised by international *climate* law. National (constitutional) rules on the judicial reception of international law do not usually distinguish between

[12] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto (Japan), 11 Dec. 1997, in force 16 Feb. 2005, available at: https://unfccc.int/resource/docs/convkp/kpeng.pdf.

[13] ILA Study Group on Principles on the Engagement of Domestic Courts with International Law, 'Final Report: Mapping the Engagement of Domestic Courts with International Law', Johannesburg Conference (2016), available at: https://www.ila-hq.org/en_GB/documents/conference-study-group-report-johannesburg-2016.

[14] A. Nollkaemper et al. (eds), *The Engagement of Domestic Courts with International Law: Comparative Perspectives* (Oxford University Press, 2024).

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general international law and international climate law, with the occasional exception of human rights law relevant to climate change. Assessing national case law on questions such as separation of powers, interpretation, and direct effect in the context of climate law must be informed by insights from literature that addresses the general rules and practices regarding the reception of international law.[15]

On the other hand, this article builds on several relatively recent publications that have engaged with climate litigation in national courts. None of these publications has classified climate litigation into the categories of avoidance, alignment, and contestation; nor have they systematically engaged with the reasons why courts may opt for one of these categories. However, three groups of publications provide insights relevant to the current discussion.

Firstly, Setzer and Vanhala have provided a valuable systemic literature review of climate change litigation.[16] However, only a relatively small part of their work addresses specific questions related to international climate law. One key takeaway from this review is the importance of assessing the practice of courts and litigants as part of broader climate governance. For instance, when courts decline to hear cases because of separation of powers concerns, it may be viewed negatively from the plaintiffs' perspective. However, from a broader governance standpoint, it simply indicates that other actors may act to implement international climate obligations, without an intervening role for the courts. Another important insight is the diversity of climate change litigation. While much attention is focused on 'regulatory litigation', which seeks to advance more demanding regulation, international law can also be used for anti-regulatory purposes. This article confirms and builds on these insights.

Secondly, several publications have highlighted the overriding importance of the national legal context for understanding the impact of international law arguments in climate litigation. For instance, Buser concluded that when plaintiffs invoke international climate law, courts rely predominantly on national (constitutional) law and thereby do not 'promote accountability and compliance with international climate law as much as uphold national or regional rule of law'.[17] The existence of international climate law only provides a context or, in certain cases, a specific fact that courts take note of, without any legal consequences for their decision.[18] Saiger emphasizes the role of national (procedural) law in understanding the role of domestic courts in climate change litigation.[19] The bottom-up approach of the Paris Agreement

[15] See, e.g., A. Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011); Nollkaemper et al., n. 14 above; P. Verdier & M. Versteeg, 'International Law in National Legal Systems: An Empirical Investigation' (2015) 109(3) *American Journal of International Law*, pp. 514–33; H.P. Aust, H. Krieger & F. Lange, *Research Handbook on International Law and Domestic Legal Systems* (Edward Elgar, 2024).

[16] J. Setzer & L.C. Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) *Wiley Interdisciplinary Reviews: Climate Change*, article e580.

[17] A. Buser, 'National Climate Litigation and the International Rule of Law' (2023) 36(3) *Leiden Journal of International Law*, pp. 593–615, at 595.

[18] Buser, ibid., p. 607.

[19] A.-J. Saiger, 'Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach' (2020) 9(1) *Transnational Environmental Law*, pp. 37–54.

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makes it difficult to determine whether a particular national court correctly implements international legal provisions. This also indicates that the applicability and substantive meaning of the Paris Agreement's climate goals often depend on national legal provisions.[20] Additionally, the studies by Preston[21] and Wegener[22] fall into this category. The latter offers a more general account of the effect of the Paris Agreement in domestic litigation, noting that the agreement will be used mostly to interpret domestic law.[23] These studies will be considered when reviewing the cases that fall into the avoidance and alignment categories (Sections 5 to 6).

A third set of publications relevant to understanding and assessing national climate change case law consists of publications discussing the interface between human rights law and climate change.[24] These publications show that framing claims against public and private actors, whose conduct results in carbon dioxide emissions as human rights violations, has increased the likelihood for successful claims. The current analysis adds to these publications by refining the various grounds on which national courts can engage with human rights and climate change. This includes, for instance, issues related to standing (as an avoidance technique), interpretation (as an alignment strategy), and contestation.

3. Identification of Cases and Framework for Analysis

To address the research question and to build on the scholarship referenced above, I have identified 148 cases in which plaintiffs have expressly relied on international climate law. These cases were chosen based on the Sabin Centre Global and US Climate Change Litigation databases,[25] whereby 'UNFCCC', 'Paris Agreement', and 'Kyoto Protocol' were used as search filters. Subsequently, the result was checked manually and cases in which the text of the judgment was not available were excluded, as it would not be possible to verify whether and how the courts engaged with international climate law. Finally, the 2023 UNEP *Climate Litigation Report*[26] and the

[20] Saiger, ibid., p. 49.

[21] B.J. Preston, 'The Influence of the Paris Agreement on Climate Litigation: Legal Obligations and Norms (Part I)' (2021) 33(1) *Journal of Environmental Law*, pp. 1–32; B.J. Preston, 'The Influence of the Paris Agreement on Climate Litigation: Causation, Corporate Governance and Catalyst (Part II)' (2021) 33(2) *Journal of Environmental Law*, pp. 227–56.

[22] L. Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9(1) *Transnational Environmental Law*, pp. 17–36.

[23] Wegener, ibid.

[24] M. Wewerinke-Singh, 'The Rising Tide of Rights: Addressing Climate Loss and Damage through Rights-Based Litigation' (2023) 12(3) *Transnational Environmental Law*, pp. 537–66; J. Peel & H.M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law*, pp. 37–67; M. Hesselman, 'Domestic Climate Litigations Turn to Human Rights and International Climate Law', in M. Fitzmaurice, M. Brus & P. Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar, 2nd edn, 2021), pp. 366–91; A. Savaresi & J. Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9(3) *Climate Law*, pp. 244–62; C. Rodríguez-Garavito (ed.), *Litigating the Climate Emergency: The Global Rise of Human Rights–Based Litigation for Climate Action* (Cambridge University Press, 2022).

[25] N. 11 above.

[26] N. 10 above.

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Oxford Reports on International Law in Domestic Courts[27] were reviewed to identify any relevant cases included in these sources but not in the Sabin databases.

Within the category of international climate law, the article thus considers only cases involving the UNFCCC,[28] the Kyoto Protocol,[29] the Paris Agreement,[30] and COP decisions.[31] It does not include cases related to climate change that are based solely on human rights law or other international obligations requiring states to regulate GHG emissions. This also applies to cases affecting parts of the climate system – such as the oceans, the atmosphere or biodiversity – without referring to UNFCCC instruments.[32] Consequently, the subset includes only cases that *expressly* refer to international climate law. This also excludes the many cases in which plaintiffs or courts rely solely on national law, even when it substantively overlaps with international law.[33]

In 39 of the 148 identified cases, courts have not yet delivered a judgment at the time of writing, leaving 109 instances in which a judgment has been issued. Annex 1 (in the online Supplementary Materials) contains an overview of these cases.[34] In principle, only the final judgment was analyzed and used to assign a qualification on avoidance, alignment or contestation. In cases where no final judgment has yet been issued, the latest decision by the courts was used to assign a qualification. However, in 13 instances, preliminary decisions offered an interesting reasoning that deviated from later decisions. In these cases, both the preliminary and the final judgments were assigned a qualification. The case was therefore counted twice.

The analysis relies primarily on the wording of the judgments, which was used to assess how the courts engage with the climate change law arguments. Cases not available in English were translated using the DeepL software.[35] Where accessible via the Sabin Center's database, parties' pleadings have also been reviewed to gain a deeper understanding of the international climate law arguments presented. In the absence of pleadings, how parties have invoked international climate law has been inferred from the judgment itself.

The 148 cases cannot be considered an exhaustive collection of all cases worldwide that have engaged with international climate law. The case selection method does not rule out the possibility that additional relevant cases have been brought and/or decided. In particular, there may be a distinct risk of bias towards cases decided in the

[27] Oxford Reports on International Law, *Oxford Reports on International Law in Domestic Courts* (ILDC), available at: https://opil.ouplaw.com/page/ILDC/oxford-reports-on-international-law-in-domestic-courts.

[28] N. 3 above.

[29] N. 12 above.

[30] N. 4 above.

[31] These are, of course, not legally binding, but have been used by courts for interpretative purposes.

[32] For overview see J. Peel, 'Climate Change', in A. Nollkaemper & I. Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2017), pp. 1009–50, para. 3.

[33] This category is discussed in Section 4 below.

[34] These cases are identified in Annex 1 of the Supplementary Materials.

[35] DeepL Translator Pro is an AI-powered translation tool which is able to translate full documents, available at: https://www.deepl.com.

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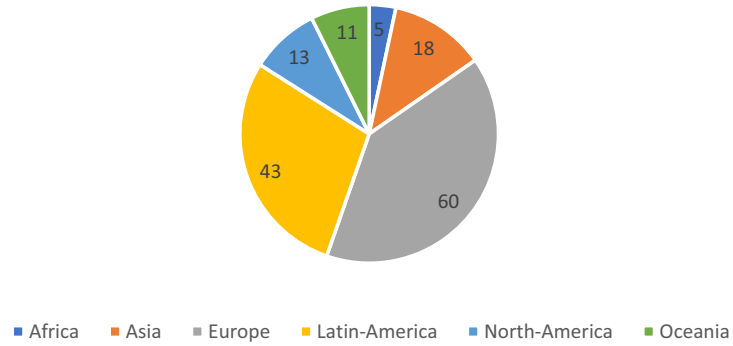

Figure 1. Regional distribution

global north.[36] However, given the global networks used by the Sabin Center and the *Oxford Reports on International Law* databases, the 148 cases can be regarded as a sufficiently inclusive collection to identify relevant cases in Latin America, Asia, and to a lesser extent Africa.

Figure 1 displays the regional distribution of these cases, with the numbers representing the case count. It shows that the identified national case law on international climate law is not evenly spread worldwide, the majority of cases coming from Europe and Latin America. It is particularly noteworthy that it does not capture major contributors to climate change such as China and Saudi Arabia. This need not be attributed to the specific nature of international climate law; in such states, relatively few cases have been reported on any area of international law.

Figure 2 shows the various reasons why plaintiffs (and courts) have referred to international climate law in the 148 cases relevant to this research. This typology has not been applied in the assessment of avoidance, alignment or contestation, but it does offer insight into the types of case brought before national courts. The largest category consists of cases where the plaintiff, often a civil society organization, relied on international climate law to challenge a state's failure to set standards and/or corresponding policies in line with the Paris Agreement (Type 1 in Figure 2).[37] The second category consists of cases in which the plaintiffs challenged an individual project – such as a power station, a new highway or a new airport runway – in the light of its (alleged) contribution to climate change (Type 2 in Figure 2).[38] A third category contains cases in which the plaintiff challenges a nationally determined contribution (NDC) as falling short of the ambitions of the Paris Agreement (Type 3 in Figure 2). A fourth category consists of cases in which the plaintiffs challenge a private company's policy or practice based on international climate law (Type 4 in

[36] See also Setzer & Vanhala, n. 16 above (making this point in their review of climate change litigation scholarship).

[37] *VZW Klimaatzaak* v. *Kingdom of Belgium and Others* [2023] 2021/AR/15gs, 2022/AR/737, 2022/AR/891 (Brussels Court of Appeal, Belgium).

[38] E.g., *Callejas* v. *Law No 406* (*Unconstitutionality of Mining Concession*) [2023] (Supreme Court of Panama).

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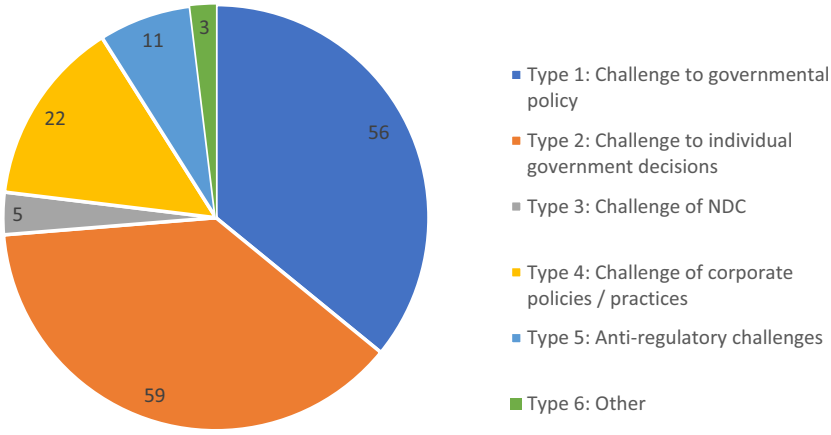

NB: The total number in the chart exceeds 148 cases, as some cases can be qualified as two types of claim.

Figure 2. Type of claim

Figure 2).[39] The final category consists of 'reverse' cases, where the plaintiff, often a corporation, invokes international climate law to challenge a governmental regulation that exceeds the requirements of its international obligations (Type 5 in Figure 2). This number is relatively low. It can be presumed that in these cases plaintiffs would not normally rely on international law, other than arguing that it contains a liberty that does not require regulatory action.[40]

For appraising the 148 cases, I use a typology of three types of engagement, or postures, that national courts can adopt when plaintiffs refer to a rule of international law: avoidance, alignment, or contestation. Where possible, I also identify the reasons that have led courts to adopt one of these postures, drawing on insights from literature on the application of international law in national courts.[41] However, these reasons are not always clear from a judgment. They may depend on the parties' pleadings and the circumstances of the case, which cannot always be inferred from publicly available information.

Figure 3 provides an overview of the types of engagement, as determined from the 148 cases.

By choosing the *avoidance* posture, courts sidestep the international climate law question raised by plaintiffs and refrain from ruling on the merits of such claim.

[39] E.g., *Milieudefensie et al.* v. *Royal Dutch Shell Plc* [2021] ECLI:NL:RBDHA:2021:5339 (District Court of The Hague, The Netherlands).

[40] See, e.g., *Ruling on the Constitutionality of State 'Green Taxes' in Zacatecas* [2020] 888/2018 (Supreme Court of Mexico) (in which the Court rejected the corporation's argument that the UNFCCC only obligates developed states to decrease GHG emissions); and *ABRAGET* v. *State of Rio de Janeiro* [2017] 0282326-74.2013.8.19.0001 (Special Court of Rio de Janeiro, Brazil) (in which the corporation makes a similar argument).

[41] ILA, n. 13 above, paras 71–9.

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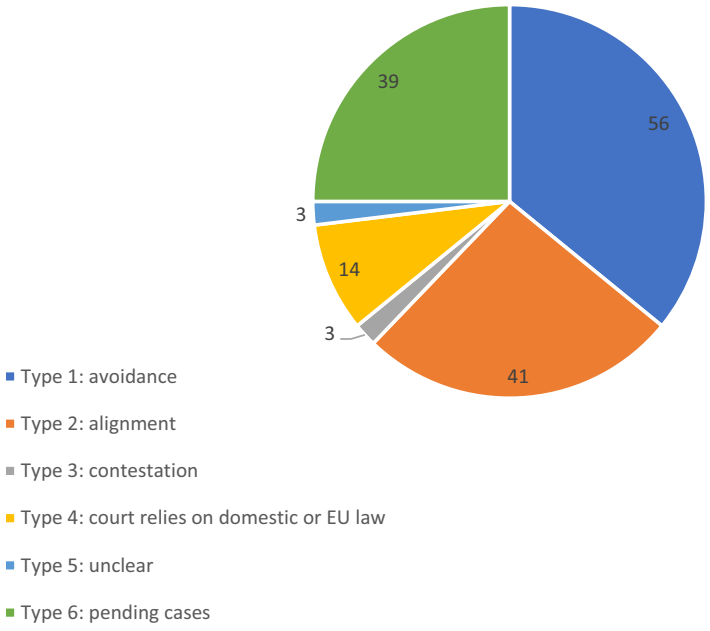

Figure 3. Type of engagement

Reasons that can induce this approach include a court finding that the UNFCCC and the Paris Agreement are interstate agreements that do not articulate individual rights, that they fall under the domain of political branches, or that the UNFCCC and the Paris Agreement are so open-textured that engagement will not make any legal difference.[42]

The posture of *alignment* refers to strategies employed by courts to align their decisions with international law, aiming for harmony between domestic law and international law. This alignment can be superficial, with courts citing international law only to support relevant domestic law without making a tangible difference.[43] However, courts can also rely on international climate law to interpret national law and sometimes even use it as a basis for their decisions.[44] In some cases, courts may go beyond what international law requires, finding, for instance, international obligations where none exist by giving effect to non-binding COP decisions.[45] The ILA report referred to this as 'hyper-alignment'.[46] Key factors that may cause a court

[42] Nollkaemper et al., n. 14 above.
[43] ILA, n. 13 above, para. 44 (referring to such alignment as 'fair weather alignment').
[44] Ibid., paras 45–6.
[45] E.g., *Urgenda Foundation* v. *State of the Netherlands*, n. 99 below (giving effect to various statements of the COPs as a means to identify 'common ground'), and *Milieudefensie et al.* v. *Royal Dutch Shell Plc*, n. 39 above (giving effect to a reduction target drawn from a report of the Intergovernmental Panel on Climate Change (IPCC), and to the UN 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', adopted by the UN Human Rights Council in Resolution 17/4, 16 June 2011, UN Doc. HR/PUB/11/4).
[46] ILA, n. 13 above, para. 55.

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to adopt a posture of alignment are that international climate law, despite being a global phenomenon, has an 'inward' orientation in that it is intertwined with virtually every aspect of domestic societies and thus also domestic law.[47] It can have an impact on human rights,[48] which in many states have traditionally found relatively easy access to courts.

In the third posture concerning *contestation*, plaintiffs challenge the contents or application of a norm of international climate law because its substance would conflict with domestic law or another norm of international law.[49] For instance, the requirements of the global climate regime may conflict with norms of international law relating to the protection of Indigenous peoples[50] or biodiversity.[51] The result may look like avoidance in that the court chooses not to align with international climate law. However, the difference is that in the posture of contestation, courts expressly engage with and challenge the application or interpretation of international climate law, either in general or in a specific context. Thereby, courts can also catalyze legal reform.[52]

Applying the postures of avoidance, alignment, and contestation raises certain methodological difficulties. While these terms refer to the stances adopted by courts, the posture that a court adopts in any given case often depends on the arguments made by the parties, particularly how they have relied (or not) on international climate law. Moreover, the posture will be influenced by the status of international (climate) law in domestic legal orders and the relationship between courts and political branches, which differ between states. The posture may also differ depending on the legal context – such as constitutional rights; tort law; administrative review; environmental impact assessment; environmental, social and governance (ESG) reporting; or criminal law.

This article does not aim to assess whether a particular strategy leads to better compliance with international climate law. The fact that a court avoids engaging with international climate law does not necessarily mean that the state breaches its international obligations, which would require a more comprehensive review of climate governance.[53] Likewise, the fact that a court aligns with international law does not necessarily mean that the state acts in conformity with international law. Such assessment would also be challenging, given the ambiguity of the content of international law at any given moment, as competing rules of international law may be at play, and compliance assessments would require a holistic assessment of states' policies.

[47] Ibid., para. 12.

[48] See the references in Section 6.1 below (identifying cases in which courts use international climate law to interpret (domestic or international) human rights law).

[49] ILA, n. 13 above, paras 57–63.

[50] J.R. Owen et al., 'Energy Transition Minerals and Their Intersection with Land-Connected Peoples' (2023) 6(2) *Nature Sustainability*, pp. 203–11.

[51] T. Armarego-Marriott, 'Climate or Biodiversity?' (2020) 10 *Nature Climate Change*, p. 385.

[52] Nollkaemper et al., n. 14 above; J. Scott & S.P. Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2007) 13 *Columbia Journal of European Law*, pp. 565–94.

[53] See also Setzer & Vanhala, n. 16 above.

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4. Indirect Engagement: International Climate Law as Part of National Law

The cases in which courts engage with international climate law are part of a larger category where courts engage with its substance entirely under the cover of *national* law that gives it effect. This is not unique to international climate law. Most rules of international law become part of national law in some form before courts address them, in both dualistic and monist states;[54] courts then engage with domestic rather than international law. Norms existing at international and domestic levels, providing the same substantive regulation, have been called 'consubstantial norms'.[55]

Consubstantial norms are relevant to each of the three postures. Depending on the domestic legal context and how a case is pleaded, courts can avoid engaging with international climate law by relying on national law, opt for alignment with domestic norms or policies that are 'consubstantial' with international climate change norms,[56] or contest the application of international climate law that has been made part of domestic law.

The global push to adopt national climate laws implementing international climate law, especially after adopting the Paris Agreement, has made national law critical for its application. Governments around the world have passed such laws to give effect to international climate commitments.[57] Consequently, plaintiffs and courts can rely on national climate laws, while their substance, arguments or decisions correspond to international climate law. This has contributed positively to the success and scale of litigation addressing the aims or contents of international climate law, beyond what would be possible if these cases depended solely on international law.

Positioning national law between international climate law and national courts is not only a formal substitution of a national norm for an international one. It is also a substantive transformation, where domestic political actors translate generally formulated international targets into more specific national law and policy. Because of the complexity of the climate transition, it is at the national level where the political debate and decision making need to occur to give this transition the needed direction and concretization. This process of domestication is essential for connecting international climate law with domestic law and politics. Given the open-textured nature of the UNFCCC and the Paris Agreement, along with the non-legally binding nature of COP agreements, courts may be more inclined to apply national or EU climate law rather than international climate law.

[54] See generally K.L. Cope & H. Movassagh, 'National Legislatures: The Foundations of Comparative International Law', in A. Roberts et al. (eds), *Comparative International Law* (Oxford University Press, 2018), pp. 271–92; Verdier & Versteeg, n. 15 above.

[55] ILA, n. 13 above, para. 30; A. Tzanakopoulos, 'Domestic Courts in International Law: The International Judicial Function of National Courts' (2011) 34 *Loyola of Los Angeles International & Comparative Law Review*, pp. 133–68, at 142–4.

[56] ILA, n. 13 above, para. 49.

[57] The database Law and Policy Search: Climate Change Laws of the World (available at: https://climate-laws.org) contains over 5,000 texts of national laws and policies and national submissions to the UNFCCC. Information on national climate laws is also available at the UNEP Law and Environment Assistance Platform, available at: https://leap.unep.org/en/countries. See generally, on the domestication of international climate law, Wegener, n. 22 above; Buser, n. 17 above.

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The European Court of Human Rights (ECtHR) emphasized this message in the *Klimaseniorinnen* v. *Switzerland* case. Interpreting Article 8 of the European Convention on Human Rights (ECHR),[58] the Court stated that the Convention requires states to include international climate targets in domestic law and supplement them with a credible path to their realization.[59] Once a legislature has done this, challenges to governmental policy will be based on domestic law rather than international law.

In ten of the 148 cases, plaintiffs relied on international climate law, but the court decided the case based on domestic law (Type 4 in Figure 3 and Annex 1 of the Supplementary Materials).[60] An example is a Kenyan case in which applicants relied on the Paris Agreement to challenge a proposed project. The Court, however, based its decision on the Kenyan Climate Change Act[61] without referring to international climate law.[62] Similarly, the District Administrative Court of Kyiv (Ukraine) ruled that the actions and omissions of the Ministry of Ecology and Natural Resources could be assessed only in relation to the implementation of the National Action Plan for the Implementation of the Kyoto Protocol to the UNFCCC, and not on the basis of the Protocol and the Convention itself.[63]

The European Union (EU) provides an additional layer of domestication as EU law gives effect to the international climate regime in the EU legal order, including the European Climate Law.[64] In cases where national climate law is incomplete or non-existent, courts may refer to EU climate law rather than international climate law.[65] The set of 148 cases provide a few examples. In the Czech Republic, the Prague Municipal Court noted that the national Climate Protection Policy needed to be revised to achieve the emissions reduction target set by the EU, which implements the Paris Agreement.[66] The German Higher Administrative Court held that while the obligation under the Paris Agreement to limit the increase in the global average temperature serves as the starting point for national climate protection targets, the EU has set targets based on these international standards, and the German Federal Climate

[58] Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: =https://www.echr.coe.int/pages/home.aspx?p=basictexts.

[59] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland*, Appl. No. 53600/20, Grand Chamber, 9 Dec. 2024.

[60] Cases in which plaintiffs rely on domestic climate law and courts decide based on domestic climate law, even when that in substance may mirror international climate law, fall outside the present analysis. These can only be uncovered by a deeper analysis of the cases.

[61] Climate Change Act (No. 1 of 2016) (Republic of Kenya).

[62] *Save Lamu et al.* v. *National Environmental Management Authority and Amu Power Co. Ltd* [2019] No. 196/2016 (National Environmental Tribunal of Nairobi, Kenya).

[63] *Environment-People-Law* v. *Ministry of Environmental Protection* [2013] No. 826/6201/13-a (District Court of Kyiv, Ukraine).

[64] Regulation (EU) No. 2021/1119 establishing the Framework for Achieving Climate Neutrality and amending Regulations (EC) No. 401/2009 and (EU) 2018/1999 [2021] OJ L 243/1 (European Climate Law).

[65] See, generally, J. Wouters, A. Nollkaemper & E. De Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and Its Member States* (TMC Asser Press, 2008).

[66] *Klimatická Žaloba ČR* v. *Czech Republic* [2023] 9 As 116/2022 (Supreme Administrative Court of the Czech Republic).

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Protection Act[67] defines the national climate protection targets with which courts will engage.[68] French,[69] Spanish,[70] and Belgian courts[71] have delivered similar judgments.

The requirement to set NDCs under Article 4(2) of the Paris Agreement is a further driver of translating international climate change law into domestic law.[72] If plaintiffs challenge government decisions based on NDCs, courts review climate policy against national instruments, not international law. The present 148 cases include a few of such examples. One such case involved plaintiffs challenging authorizations for gas flaring in Ecuador. The Provincial Court of Justice of Sucumbíos declared that the authorizations disregarded Ecuador's NDCs and ordered an update of the plan for the gradual and progressive elimination of the gas flares, without expressly engaging with the underlying obligations of international climate law.[73] However, not all states accept NDCs as a basis for reviewing national climate policy.[74] A Turkish court found that NDCs do not constitute national law but instead form part of the Paris Agreement.[75] This would mean that NDCs are not domestic instruments against which climate change practice can be reviewed.

Although domesticating international climate law will limit the need and scope for relying on it in domestic proceedings, it does not shut the door to judicial consideration of international norms. National law may not cover all legal questions that may arise in relation to the implementation of international climate law.[76] In addition, courts may rely on international norms for interpretative purposes if there is no direct alignment between international and domestic standards.[77] Finally, in some cases, national climate law explicitly allows for the consideration of international law. For example, the New Zealand Climate Change Response Act 2002[78] aims to enable New Zealand to meet its obligations under the UNFCCC, the Kyoto Protocol, and any binding amendments.[79] The Act requires the Minister for Climate Change to consider

[67] Federal Climate Protection Act of 12 Dec. 2019, *Federal Law Gazette I*, p. 2513 (Germany).

[68] *DUH and BUND* v. *Germany* [2023] OVG 11 A 11/22 (Higher Administrative Court Berlin-Brandenburg, Germany).

[69] *Commune de Grande-Synthe* v. *France* [2023] No. 427301 (Council of State, France); *Notre Affaire à Tous and Others* v. *France* [2021] Nos 1901967, 1904968, 1904972 and 1904976/4-1 (Administrative Court of Paris, France).

[70] *Greenpeace* v. *Spain I* [2023] ECLI:ES:TS:2023:3556 (Supreme Court of Spain).

[71] *Belgische Federatie der Brandstoffenhandelaars Vzw and Others and Lamine* v. *Flemish Government* [2022] ECLI:BE:GHCC:2022:ARR.147, 147/2022 (Constitutional Court of Belgium).

[72] See, generally, B. Mayer, 'International Law Obligations Arising in relation to Nationally Determined Contributions' (2018) 7(2) *Transnational Environmental Law*, pp. 251–75. See also Preston (Part I), n. 21 above, p. 8.

[73] *Herrera Carrion et al.* v. *Ministry of the Environment et al.* (*Caso Mecheros*) [2021] 21201202000170 (Sucumbíos Court of Appeal, Ecuador).

[74] Wegener, n. 22 above.

[75] *A.S. & S.A. & E.N.B* v. *Presidency of Türkiye & Ministry of Environment, Urbanization and Climate Change* [2024] No. 2024/1253 (Council of State, Türkiye).

[76] Compare *Smith* v. *Fonterra Co-operative Group Ltd* [2024] NZSC 5 (Supreme Court of New Zealand), para. 100 (stating that the New Zealand Climate Change Response Act 2002 'does not purport to cover the entire field' but is a 'companion measure designed to operate alongside' other instruments).

[77] See Section 6.2 below.

[78] Climate Change Response Act (2002 No. 40) (New Zealand).

[79] *Thomson* v. *Minister for Climate Change Issues* [2017] NZHC 733 (High Court of New Zealand).

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whether to review reduction targets following the release of future assessments by the Intergovernmental Panel on Climate Change (IPCC).[80] A court found that this provision demonstrated Parliament's intent to comply with its international obligations. If the government fails to conduct such regular reviews, litigants and courts can rely on international climate law and even new IPCC reports.[81] Thus, while national climate laws may sometimes hide the role of international climate law, courts can still engage with it.

5. Avoidance of International Climate Law

Avoidance strategies are firmly entrenched in many states' national constitutional laws and judicial practices.[82] They are particularly relevant for climate change litigation, in view of the transnational nature of international climate law, its open texture, and the profoundly political decisions that need to be made on the path to climate neutrality.

Annex 1 lists the 58 cases of this category. In more than half of them, the plaintiffs relied on international climate law, and courts have issued their final judgment. However, in several of these cases, it is unclear from the judgments the grounds on which courts declined to engage with international climate law. In 13 cases, courts dismissed arguments based on international climate law without substantive engagement or an explanation of their reasoning. Moreover, in several cases, courts simply found, without much elaboration, that the conduct in question was not incompatible with international climate law.[83] Such cases do not really constitute avoidance. Rather, courts decided on the merits against a finding of a breach of international climate law.

In several other cases, the judgments do clarify why courts adopt an avoidance posture. These cases can be categorized into three main reasons: (i) the court decided that international climate law was not part of domestic law (5.1); (ii) the plaintiffs lacked standing (5.2); and (iii) the court considered the application of international climate law to be a matter for the political branches (5.3).

5.1. Divide between International and National Law

In cases falling within the first category, courts have justified non-engagement with international climate law by relying on the separation between international and national law. This separation has multiple consequences, but two forms are dominant: (i) cases in 'dualistic states', and (ii) cases in 'monistic' states, where the lack of direct effect proved to be a barrier to the application of international law.

[80] Ibid., para. 82.
[81] Ibid.
[82] Nollkaemper, n. 15 above.
[83] E.g. *Hahn et al.* v. *APR Energy S.R.L* (*Juvevir Asociación Civil* v. *APR Energy and Araucaria Energy*) [2024] 116712/2017 (San Martin Federal Chamber of Appeal, Argentina); *FOMEA* v. *MSU S.A., Rio Energy S.A. and General Electric*, 1 June 2017, 24142/2017 (Federal Chamber of San Nicolas, Argentina); *Six Youths* v. *Minister of Environment and Others* [2021] 5008035-37.2021.4.03.6100 (Federal Court of São Paulo, Brazil).

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In dualistic states, courts have relied on the (constitutional) principle that treaties will be applied only if they have been incorporated into national law. In the *Heathrow Airport* case, the United Kingdom (UK) Supreme Court stated that the UK had ratified but not incorporated the Paris Agreement and that treaty obligations 'are not part of UK law and give rise to no legal rights or obligations in domestic law'.[84] Similarly, when Friends of the Earth challenged the UK government's approval of a US$1.15 billion investment in a liquified natural gas project in Mozambique, the Court of Appeal held that the Paris Agreement is an unincorporated international treaty that does not give rise to domestic legal obligations.[85]

In monistic states, where incorporation of international law is generally not required for courts to engage with it, several courts have concluded that they could not give effect to particular obligations of the international climate regime because such obligations had no 'direct effect'. In a few of the 148 cases, courts concluded that the UNFCCC and the Paris Agreement lacked direct effect in that the obligations were not sufficiently specific or unconditional, and required legislative implementation before courts could engage with them.[86] The Administrative Court of Tartu (Estonia), for example, ruled that a building permit could not be considered unlawful simply because it did not contribute to achieving the objectives of the Paris Agreement, as the treaty 'could be applied domestically only if the rules of the international treaty were sufficiently specific'.[87] Courts in Ukraine, Austria, the Netherlands, and France have made other determinations that international climate law lacked direct effect.[88]

The (presumed) lack of direct effect may also be a key reason that explains why the number of international climate law cases in the United States (US) is relatively low – a fact that may be considered remarkable as US courts have delivered most reported climate change judgments. In these cases, US courts rarely engage with international law. For instance, in the high-profile US climate case *Juliana* v. *United States* – in which 21 young people from Oregon alleged that the federal government's role in fuelling the climate crisis violated their constitutional rights – the Court did not engage with international climate law.[89] The main reason for this discrepancy appears to be that the norms of international climate law do not meet the conditions that US courts usually set for the judicial application of international law. Notably, they should be self-executing.[90]

[84] *Friends of the Earth and Others* v. *Heathrow Airport Ltd* [2020] UKSC 52 (Supreme Court of the United Kingdom).

[85] *Friends of the Earth* v. *UK Export Finance* [2023] EWCA Civ 14 (England and Wales Court of Appeal).

[86] C.M. Vázquez, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 *American Journal of International Law*, pp. 695–723.

[87] Administrative Court of Tartu, Decision of 4 June 2021, cited in *Fridays for Future Estonia* v. *Eesti Energia* [2023] 3.20.771 (Supreme Court of Estonia), para. 7.2.

[88] *Commune de Grande-Synthe* v. *France*, Decision on Admissibility and Justification [2020] No. 427301 (Council of State, France).

[89] The Complaint for Declaratory and Injunctive Relief does not refer to the Paris Agreement and only on a contextual point to the UNFCCC. The various decisions in the case do not refer to international law; see, e.g., *Juliana* v. *United States*, 10 Nov. 2016 [2016] 217 F Supp 3d 1224 (District Court of Oregon, US).

[90] Vázquez, n. 86 above.

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It is noteworthy that the number of judgments in which courts found that the Paris Agreement lacks direct effect is relatively low. The cases reviewed in Section 6 demonstrate that courts have found multiple strategies to work around the limitations stemming from the doctrine of direct effect and to engage with international climate law. In these situations, courts do not rely on international climate law alone, which would force the court to address the direct effect question, but rather blend international law arguments with those of domestic law. This opens the door to considering the relevance of international climate law without being hampered by the direct effect doctrine.

5.2. Standing

A second avoidance strategy is based on plaintiffs' lack of standing to bring a claim under international climate law. The concept of standing, which has different names in different legal systems, refers to a preliminary threshold requirement that applies across legal systems, often relating to admissibility. Standing determines whether an individual or entity is entitled to bring a claim in a national court that the GHG emissions of a state or corporation do not conform with the requirements of the UNFCCC, the Paris Agreement, or any other part of international climate law.

The judicial approach to standing is inevitably strongly determined by the national legal context in which a claim is brought, the procedural rules that determine standing in national law, the substantive entitlements of the parties under domestic law, and the remedies sought by the plaintiff. It will have a different meaning in an administrative procedure on impact assessment, tort cases, and constitutional rights cases.

Yet, previous judicial practice worldwide has demonstrated that the nature and substance of international law can inform plaintiffs' standing in a particular case. For instance, courts approach standing for a claim based on Article 2(4) of the UN Charter[91] differently from that for a claim based on human rights and, one might hypothesize, international climate law. Given the criteria that can be inferred from prior practice,[92] it could be expected that standing can be a barrier to adjudicating claims based on international climate law. Climate change is a global issue that does not affect any single plaintiff, and the Paris Agreement, in its form and content, is an interstate treaty rather than one that confers individual rights.

In about 12 of the 148 cases, standing proved to be a barrier. For instance, in 2022 proceedings in the Osaka High Court in Japan, the plaintiffs relied on international climate law in administrative proceedings. The Court stated that to have standing under administrative law, there must be a legally protected individual interest, and that the appellants' interests did not include climate-related damage.[93] It further noted that carbon dioxide (CO_2) emissions were not recognized as a legally protected interest in

[91] Charter of the United Nations, San Francisco, CA (US), 26 Jun. 1945, in force 24 Oct. 1945, available at: https://www.un.org/en/about-us/un-charter/full-text.

[92] Nollkaemper, n. 15 above, Ch. 5; Vázquez, n. 86 above.

[93] *Citizens' Committee on the Kobe Coal-Fired Power Plant* v. *Japan* [2022] 令和3年(行コ)第46号 (Osaka High Court, Japan).

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current society and should be addressed as a general public interest in the policy-making process.[94] Other examples can be found in Austria[95] and Mexico.[96]

However, given that the UNFCCC instruments clearly do not articulate individual rights, it is noteworthy that the number of cases in which standing proved to be a barrier is relatively low. The examples in which courts have referred to international climate law on the merits (see Section 6) shows that standing is not an inevitable barrier. Four factors can be identified that help to explain the relatively limited number of instances where standing has led to dismissal.

Firstly, in most cases, plaintiffs that invoke international climate law do not rely exclusively on international law. Their arguments are blended with domestic law, and international law plays only a subsidiary role in legal argumentation. In those cases, further reviewed in Section 6, courts did not need to make a separate determination of standing in relation to international climate law.

Secondly, framing climate change effects as human rights violations has been a significant driver behind the recognition of standing in claims based on international climate law.[97] In approximately 88 of the identified cases, the plaintiffs formulated claims in terms of human rights. It is not possible to determine exactly in which of these cases the human rights nature of the claim was decisive in overcoming the standing issue, but in at least some instances this appeared to be the case. Examples can be found in Colombia,[98] the Netherlands,[99] and Nepal.[100] However, it can be inferred from several cases that the human rights framing comes with its own standing problems, as courts may hold that climate change does not affect particular persons individually, thus determining that they lack standing. This was the conclusion of the Swiss Federal Administrative Court in the *KlimaSeniorinnen* v. *Switzerland* case,[101] which, as far as individual plaintiffs are concerned, was upheld by the ECtHR.[102]

Thirdly, several courts have adopted a broad concept of standing, which allows for a substantive engagement with international climate law. In Ukraine, for instance, the District Administrative Court of Kyiv found that 'the fulfilment of Ukraine's obligations as a state under its international commitments in the environmental field, in particular, the UNFCCC and its Kyoto Protocol, is of public interest, and any person may file a claim to declare unlawful inaction'.[103] Another example, although not expressly dealing with international climate law, is the statement by the Nigerian Supreme Court that

[94] Ibid.
[95] *Greenpeace et al.* v. *Austria* [2020] V332/2020-13 (Constitutional Court of Austria).
[96] *Greenpeace* v. *Ministry of Energy and Others* [2024] 649/2022 (Third District Court, Mexico).
[97] Wewerinke-Singh, n. 24 above; Peel & Osofsky, n. 24 above.
[98] *Josefina Huffington Archbold* v. *Office of the President and Others* [2022] T-333/22 (Constitutional Court of Colombia).
[99] *Urgenda Foundation* v. *State of the Netherlands* [2019] ECLI:NL:HR:2019:2006 (Supreme Court of the Netherlands).
[100] *Shrestha* v. *Office of the Prime Minister et al.* [2018] 074-WO-0283 (Supreme Court of Nepal).
[101] *Association of Swiss Senior Women for Climate Protection* v. *Federal Department of the Environment Transport, Energy and Communications (DETEC) and Others* [2020] 1C_37/2019 (Federal Supreme Court of Switzerland).
[102] *Verein KlimaSeniorinnen Schweiz and Others* v. *Switzerland*, n. 59 above.
[103] *Environment-People-Law* v. *Ministry of Environmental Protection*, n. 63 above.

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since countries and organizations internationally are adopting stronger measures 'to protect and safeguard the environment for the benefits of the present and future', this should expand the *locus standi*, allowing plaintiffs to bring suit.[104]

Fourthly, civil society groups have brought many international climate law cases. The exact number is difficult to determine, as court documents often lack information on the nature of plaintiffs, but in this subset it accounts for at least over 20% of the cases. Where domestic law allows for the standing of public interest groups in relation to public interests such as climate change, international climate law arguments may be raised without encountering separate standing barriers.

5.3. Separation of Powers

A third avoidance strategy that courts have employed to refrain from engaging substantively with claims based on international climate law is the relationship between courts and the state's political branches. This category overlaps, to some extent, with the two preceding categories. The connection between courts and political branches is a decisive background variable for decisions based on dualism, lack of direct effect, and standing. However, there is a distinct category of cases in which courts have expressly relied on the separation between judicial and political branches to justify non-engagement with international climate law.

Such cases align with the well-established practice in many states where separation of powers considerations have restrained the role of national courts in applying international law.[105] Against this background, it was to be expected that the separation of powers argument would be a barrier to the application of international climate law in national courts. Relevant factors include that international climate law has a strong foreign affairs component, where courts typically leave leeway to the executive, and the complex societal trade-offs involved in the transition towards climate neutrality, for which courts are not well positioned to make determinations.[106]

In about 14 cases, courts have avoided addressing the merits of international climate change claims as a matter for political branches. For instance, the Civil Tribunal of Rome (Italy) held that complaints that argued that the state's efforts to mitigate climate change are insufficient to meet the Paris Agreement targets were 'directed against the political choices made by the holders of State sovereignty as to the concrete ways in which they combat climate change'.[107] It was not for the ordinary

[104] *Centre for Oil Pollution Watch (COPW)* v. *NNPC* [2018] SC. 319/2013 (Supreme Court of Nigeria).

[105] For the US see M.J. Glennon, 'Foreign Affairs and the Political Question Doctrine' (1989) 83 *American Journal of International Law*, pp. 814–21.

[106] *Juliana* v. *United States* [2020] No. 18-36082 (Court of Appeal, Ninth Circuit, US) (stating that '[t]here is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches').

[107] *A Sud et al.* v. *Italy* [2024] No. 39415 (Second Civil Section of the Court of Rome, Italy).

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courts to order the legislature to decide whether to pass legislation and, if so, of what content. Other examples can be taken from Canada,[108] Chile,[109] France,[110] Germany,[111] Japan,[112] and New Zealand.[113]

However, the identified cases demonstrate that the separation of powers doctrines does not need to be an insurmountable barrier for national courts. In some instances, courts found that concerns over separation of powers were not a reason to abstain from reviewing the legality of plans or policies adopted by the executive branch. For instance, the Irish Supreme Court ruled in the *Friends of the Irish Environment* case that a plan for tackling climate change fell short of the requirements under domestic legislation.[114] On that basis, the plan was quashed – unhindered by separation of powers concerns.[115] In other cases, courts have ordered the executive or even the legislature to adopt measures or laws – although separation of powers concerns did limit how far the courts could go in such prescriptions. The possibility of ordering the legislature or executive to advance climate change policy depends on the exact factual and legal context, how legal arguments are framed, and the specific remedy sought. Examples can be taken from Brazil,[116] Colombia,[117] Germany,[118] Nepal,[119] and the Netherlands.[120]

[108] *ENVironnement JEUnesse* v. *Procureur General du Canada* [2021] QCCA 1871, 500-09-028523-199 (Court of Appeal, Canada) (holding that conclusions sought by the Appellants were tantamount to asking the courts to tell the legislature what to do, which is not their role; the legislative power was better placed to weigh the challenges of global warming). A similar conclusion was reached in *Friends of the Earth* v. *The Governor in Council and Others* [2008] FC 1183 (Federal Court of Canada).

[109] *Women from Huasco and Others* v. *Government of Chile, Ministry of Energy, Environment and Health* [2022] 323-2021 (Capiapo Court of Appeal, Chile) (holding that a claim by residents of Huasco – who relied on the Paris Agreement in demanding the shutdown of units of a thermoelectric power plant – involved the exercise of powers belonging to the executive branch; the thermoelectric closure was a complex process involving different factors and was not a matter for the courts).

[110] *Commune de Grande-Synthe* v. *France*, n. 88 above.

[111] *Deutsche Umwelthilfe (DUH)* v. *Mercedes-Benz AG* [2023] ECLI:DE:OLGSTUT:2023:1108.12U170.22.00 (Court of Appeal Stuttgart, Germany).

[112] *Citizens' Committee on the Kobe Coal-Fired Power Plant* v. *Japan*, n. 93 above.

[113] *Lawyers for Climate Action NZ Incorporated* v. *The Climate Change Commission* [2022] NZHC 3064 (High Court of New Zealand) (holding that Parliament should decide on more ambitious pathways and that courts should not second-guess that).

[114] *Friends of the Irish Environment* v. *Ireland* [2020] No. 205/19 (Supreme Court of Ireland).

[115] Ibid.

[116] *PSB et al.* v. *Brazil* [2023] ADO 59/DF (Supreme Court of Brazil).

[117] *Office of the Inspector General and Others* v. *Ministry of Environment and Sustainable Development and Others* [2023] 25000-2341-000-2022-01551-00 (Cundinamarca Administrative Court of Appeal, Colombia) (ordering the government to adopt regulations for short-, medium- and long-term contributions to the UNFCCC).

[118] *Neubauer et al.* v. *Germany* [2021] ECLI:DE:BVerfG:2021:Rs20210324.1bvr265618 (Constitutional Court of Germany) (finding that the legislator had failed to enact a legal framework as required by the German Constitution and concluded that the legislature must set out a legal framework for the size of the annual emission amounts).

[119] *Shrestha* v. *Office of the Prime Minister et al.*, n. 100 above (ordering the government to pass and implement a new climate law to effectuate Nepal's commitments under the Paris Agreement and obligations under the Constitution).

[120] *Urgenda Foundation* v. *State of the Netherlands*, n. 99 above (holding that while the courts are not permitted to issue an order to create legislation with specific content, they 'are not prevented from issuing a declaratory decision to the effect that the omission of legislation is unlawful … They may also order

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From the identified cases, a few examples illustrate how courts have grappled with whether the nature of climate change, as a global and deeply political problem, should prevent them from acting. The New Zealand High Court, based on a survey of case law from other states, inferred that a state's entry into international obligations, the global nature of the problem, and the fact that one country's efforts alone cannot prevent harm to its people and environment were not factors that rendered judicial engagement with global climate change a 'no-go' area.[121] The Court of Appeal of Brussels (Belgium) emphasized that, where international standards exist, there is no conflict between ordering the Belgian state to set reduction targets and the principle of separation of powers.[122] In several of the above-mentioned cases, recognition of climate change as part of (international) human rights helped to recalibrate the relationship between the courts and the political branches as fundamental rights have always been a trump card to protect and bolster a court's position against political branches.[123]

Caution is required in making generalizations, as much depends on the domestic legal context and the specific argument pleaded by the parties. However, it can be inferred from the subset of cases that while separation of powers concerns may limit the ability to give effect to international climate law, such concerns do not need to be absolute barriers. Several aspects of international climate law provide arguments for urging a state's political branches to take measures to attain the targets set by international climate law.

6. Alignment with International Climate Law

Despite the availability of avoidance strategies, in over 40 cases courts have moved beyond preliminary stages and referred to international climate law in their decisions. These cases fall under three categories: (i) international climate law resolves interpretative ambiguity (6.1); (ii) international law as a supplementary consideration in decisions (6.2); and (iii) international climate law as a liberty (6.3).

6.1. Interpretative Alignment

In about 30 of the cases, courts achieved alignment by interpreting national law in the light of international climate law. This strategy is generally well established in the practice of national courts, in both dualist and monist states,[124] and appears to be the most effective pathway for bringing international climate law before the courts.

the public body in question to take measures in order to achieve a certain goal, as long as that order does not amount to an order to create legislation with a particular content').

121 *Thomson* v. *Minister for Climate Change Issues*, n. 79 above, para. 133.

122 *VZW Klimaatzaak* v. *Kingdom of Belgium and Others*, n. 37 above, para. 286.

123 T. Risse, S.C. Ropp & K. Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999); C. Landfried (ed.), *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press, 2019).

124 Nollkaemper, n. 15 above, Ch. 7.

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In about ten of these cases, courts relied on open-textured norms of domestic law to align with international climate law. An example is the German Constitutional Court's finding that the obligation under the Paris Agreement to limit the global average temperature increase was the basis of the Federal Climate Protection Act and was 'a specification of the climate action required under constitutional law'.[125] This interpretation was an important legal basis for the Court's order requiring the German parliament to be more specific on achieving the climate protection targets from 2031 onwards.[126] Similar examples can be found in Estonia,[127] France,[128] and India.[129]

A separate category contains approximately ten cases in which courts use international climate law to interpret (domestic or international) human rights law. In Brazil, the recognition of the fundamental right to a balanced environment was central to the Federal Supreme Court's holding that the government had not sufficiently protected the Amazon.[130] The finding that the rights were breached was informed by non-compliance with the UNFCCC, the Kyoto Protocol, and the Paris Agreement.[131] Other examples can be found in cases from Belgium,[132] the Czech Republic,[133] Colombia,[134] Mexico,[135] and Panama.[136]

[125] Federal Climate Protection Act, n. 67 above.

[126] *Neubauer et al.* v. *Germany*, n. 118 above.

[127] *Fridays for Future Estonia* v. *Eesti Energia*, n. 87 above.

[128] *Commune de Grande-Synthe* v. *France*, n. 69 above (relying on the Paris Agreement to interpret carbon neutrality in the French Energy Code, allowing for the effective implementation of the principles set out in international law).

[129] *Hanuman Laxman Aroskar* v. *Union of India* [2019] 12551/2018 (Supreme Court of India) (citing the Paris Agreement and India's Nationally Determined Contribution to the Paris Agreement as critical aspects of India's environmental rule of law and as reasons that the government was required to balance environmental concerns with airport development goals adequately).

[130] *PSB et al.* v. *Brazil*, n. 116 above; see also J. Setzer & D. Winter de Carvalho, 'Climate Litigation to Protect the Brazilian Amazon: Establishing a Constitutional Right to a Stable Climate' (2021) 30(2) *Review of European, Comparative & International Environmental Law*, pp. 197–206.

[131] *PSB et al.* v. *Brazil*, n. 116 above.

[132] *VZW Klimaatzaak* v. *Kingdom of Belgium & Others* [2021] 2015/4585/A (Brussels Court of First Instance, Belgium) (holding that that the target for GHG emissions reductions by 55% compared to the 1990 level by 2030 [taken from EU law, which gave effect to the Paris Agreement] was the minimum threshold, below which Belgium cannot go without failing to comply with Art. 2 ECHR).

[133] *Klimatická Žaloba ČR* v. *Czech Republic* [2022] 14A 101/2021 (Prague Municipal Court, Czech Republic), para. 328 (holding that the defendant ministries unlawfully interfered with the applicants' right to a favourable environment under Art. 35(1) of the Charter because, contrary to the second sentence of Art. 4(2) of the Paris Agreement, they did not have a specific plan for the mitigation measures required to achieve a 55% reduction in GHG emissions by 2030 compared to 1990 levels). However, this decision was overturned by the Supreme Court on grounds of ongoing EU-level negotiations on a collective NDC: *Klimatická Žaloba ČR* v. *Czech Republic*, n. 66 above, paras 116–8.

[134] *Josefina Huffington Archbold* v. *Office of the President and Others*, n. 98 above (holding that violation of the plaintiffs' fundamental rights was substantiated and ordered the defendants to protect the islanders' rights, referring explicitly to the Paris Agreement's obligations, particularly those related to adaptation measures and efforts towards communities in vulnerable situations).

[135] *Nuestros Derechos al Futuro y Medio Ambiente Sano et al.* v. *Mexico* [2022] No. 204/2021 (District Court, Mexico).

[136] *Callejas* v. *Law No 406*, n. 38 above.

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An alternative, and at times overlapping, approach to the interpretative application of international climate law involves the use of international law in reviewing the exercise of discretionary power. The subset of cases offers a few examples. Notably, the New Zealand High Court held that '[a] statutory discretionary power is to be exercised in accordance with its purpose. It is also to be interpreted consistently with New Zealand's international obligations where that interpretation is available'.[137] However, the practice remains highly heterogeneous, with its application contingent on the specific discretion and conditions established by national law. For perspective, the UK Supreme Court left it to the Secretary of State's discretion whether it was appropriate to take into account the Paris Agreement beyond the extent to which it was already reflected in the obligations under the Climate Change Act 2008.[138]

A related set of approximately ten cases – although not always expressly framed as a review of discretionary power – involves situations in which governments fail to sufficiently consider or attach weight to international climate law in procedures under administrative law. The South Africa High Court held that section 240(1) of the National Environmental Management Act (NEMA)[139] did not expressly refer to the need to conduct impact assessments for climate change effects. Instead, the statute must be interpreted consistently with international law and 'the various international agreements on climate change are relevant to the proper interpretation of section 240(1)(b) of NEMA'.[140] Comparable judgments were given by courts in Chile[141] and the UK.[142]

Finally, there are a few cases where courts have interpreted tort law in the light of international climate law. In the *Urgenda* case, the Supreme Court of the Netherlands relied on the Paris Agreement and emissions reduction targets inferred from COP decisions to interpret human rights under the ECHR. In turn, these human rights, and thus indirectly international climate law, were the basis of the Court's future-oriented order to the State of the Netherlands.[143] This interpretative strategy can extend to applications against private actors. While international climate law does not directly apply to companies, it has been relied upon in several cases to construe domestic law and human rights obligations as the basis of tort claims. The District Court of The Hague accepted such an argument in *Milieudefensie* v. *Shell*.[144]

[137] *Thomson* v. *Minister for Climate Change Issues*, n. 79 above, para. 88.
[138] Climate Change Act 2008 (UK); *Friends of the Earth and Others* v. *Heathrow Airport*, n. 84 above.
[139] National Environmental Management Act (NEMA) (107 of 1998) (South Africa).
[140] *EarthLife Africa Johannesburg* v. *Minister of Environmental Affairs and Others* [2017] 65662/16 (High Court South Africa), para. 83.
[141] *Mejillones Tourist Service Association and Others with the Environmental Evaluation Service (SEA) of Antofagasta* [2022] 71.628-2021 (Supreme Court of Chile).
[142] *Friends of the Earth and Others* v. *Secretary of State for Transport* [2020] EWCA Civ 214 (England and Wales Court of Appeal) (stating that although the Planning Act 2008 did not expressly refer to the Paris Agreement, the Secretary of State needed to expressly consider and address the Paris Agreement when adopting the statement as this was part of 'government policy'). This judgment was later set aside by the Supreme Court: *Friends of the Earth and Others* v. *Heathrow Airport Ltd*, n. 84 above.
[143] *Urgenda Foundation* v. *State of the Netherlands*, n. 99 above.
[144] *Milieudefensie et al.* v. *Royal Dutch Shell Plc*, n. 39 above.

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These postures adopted by national courts demonstrate that interpretation has considerable power to make international climate law part of national proceedings and to allow courts to align with international climate law. They have even allowed courts to rely on IPCC reports and COP targets, despite their non-binding nature.[145] In the conceptualization of the ILA report, this could be considered 'hyper-alignment'.[146]

However, the space for interpretative alignment is not unlimited; it will depend on the text and discretion left by national law. Illustrative is a case from New Zealand, in which the plaintiff relied on the Paris Agreement, arguing that the defendant minister had failed to consider the effects of the exploration on climate change adequately by granting petroleum exploration permits under the Crown Minerals Act 1991 (CMA).[147] The Court rejected the grounds of review as, under the Minerals Act, mining for fossil fuels is to be promoted. As the purpose of the CMA is to promote mining, the Court found no room for interpretation and rejected the claim.[148] Moreover, the relationship between courts and political branches will shape the space for interpretative alignment. The argument – that if political branches do not decide to introduce particular norms or agreements through the front door, courts should not introduce them through the back door – is relevant here.[149] On this point, the considerations discussed in Section 5.3 are pertinent.

6.2. International Climate Law as a Supplementary Argument

Next to instances where courts have relied on international climate law in interpreting national law, in about 15 cases courts referred to international climate law as a basis for their decision. These, technically, are not cases where courts grant direct effect to international climate law as they rarely, if ever, are grounded on international climate law alone.[150] However, international climate law then becomes part of the broader mix of legal arguments, grounded primarily in national law.

In the identified cases, courts rely on international climate law to serve as a supportive argument mainly in three situations. Firstly, in a few cases courts relied on international climate law to find that the government failed to adopt timely climate change regulations (Type 1, Figure 2). The Prague Municipal Court (Czech Republic)

[145] For instance, *Thomson* v. *Minister for Climate Change Issues*, n. 79 above; *Urgenda Foundation* v. *State of the Netherlands*, n. 99 above.

[146] ILA, n. 13 above; Nollkaemper et al., n. 14 above.

[147] Crown Minerals Act (1991 No. 70) (CMA) (New Zealand).

[148] *Students for Climate Solutions Inc.* v. *Minister of Energy and Resources* [2022] NZHC 2116 (High Court of New Zealand). However, in a separate opinion, Mallon J. noted that the purpose of the Crown Minerals Act was not simply to promote investment in extractive industries, but that the words 'for the benefit of New Zealand' indicated that 'not all such investment will necessarily benefit New Zealand', and that this would allow for other factors to be considered, including environmental and climate-related considerations.

[149] *Minister of State for Immigration and Ethnic Affairs* v. *Teoh* [1995] 183 CLR 273 (High Court of Australia); See discussion, also in the light of later case law, in W. Lacey, 'A Prelude to the Demise of Teoh: The High Court Decision in Re Minister for Immigration and Multicultural Affairs' (2004) 26(1) *Sydney Law Review*, pp. 131–56.

[150] See Section 5.1 above.

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found that public authorities violated the Paris Agreement because they had not yet prepared a concrete mitigation plan and it was not clear how specifically the Czech Republic intended to achieve its commitment to the 2030 target in accordance with the requirements of Article 4(14) of the Paris Agreement (transparency, specificity, completeness).[151] The Supreme Court of Nepal grounded its conclusion – that the government needed to adopt a climate law to ensure climate justice, sustainable development, and intragenerational and intergenerational justice – on the petitioner's constitutional right to a dignified life, as well as to a clean and healthy environment.[152] The Court relied separately on adherence to the UNFCCC, the Kyoto Protocol, and the Paris Agreement, beyond merely interpreting constitutional rights in the light of these instruments.[153] In Mexico, the District Court decided that the 2021 amendments to the Electric Industry Law[154] violated the Paris Agreement by favouring the generation of electricity through fossil fuels. The Court found that the challenged amendments had a negative impact on Mexico's clean energy obligations and its international commitments to reduce GHG emissions.[155]

Secondly, in a handful of cases, courts have relied on international climate law to defend and justify specific governmental climate change regulations that addressed particular activities that contributed to climate change (Type 2, Figure 2). In Paraguay, for instance, farm owners petitioned the Supreme Court to declare unconstitutional an Act that prohibited 'activities related to the transformation and modification of surfaces with wood coverture' in the eastern region of Paraguay. The Supreme Court held that the challenged Act was promulgated in harmony and in accordance with the international regime and was supported by Paraguay's ratification of the UNFCCC.[156] In Papua New Guinea, a company producing renewable energy, which had obtained permits, contested a governmental decision to revoke them. The Court sided with the company and stated that the original grant of permits 'put words into action on PNG's international and domestic obligations in the light of climate change'.[157] One final example constitutes cases where courts found that the government needed to give more weight to climate change in impact assessment procedures. A Tribunal in Chile considered that a proper approach, considering the country's international commitments under the UNFCCC and the Paris Agreement, requires the incorporation of climate change scenarios in assessing mitigation measures regarding the extraction of groundwater resources.[158]

[151] *Klimatická Žaloba ČR* v. *Czech Republic*, n. 133 above.
[152] *Shrestha* v. *Office of the Prime Minister et al.*, n. 100 above.
[153] Ibid.
[154] Decree amending and adding various provisions to the Electricity Industry Law 2021 (LIE) (Mexico).
[155] *Nuestros Derechos al Futuro y Medio Ambiente Sano et al.*, v. *Mexico*, n. 135 above.
[156] *JRBS and LABS* v. *Chief of the Public Ministry* [2017] No. 1935/2017 (Supreme Court of Paraguay).
[157] *Mayur Renewables* v. *Mirisim* [2024] PGNC 7 N10649 (National Court of Papua New Guinea), para. 108.
[158] *Jara Alarcon Luis/Environmental Assessment Service* [2019] 141-2017 (Environmental Court of Chile); see also *Mejillones Tourist Service Association and Others with the Environmental Evaluation Service (SEA) of Antofagasta*, n. 141 above (ordering the Antofagasta Environmental Assessment Service [EAS] to include environmental variations caused by climate change in the extraordinary review process of the

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Thirdly, a specific category of cases in which courts relied on international law concerns the division of powers between the national government and local authorities, in particular in federal states. This category contains about ten such cases. For instance, the Canadian Supreme Court held that the UNFCCC and the Paris Agreement illustrate 'the predominantly extraprovincial and international nature of GHG emissions and support the conclusion that the matter at issue is qualitatively different from matters of provincial concern'.[159] German courts have ruled similarly in various cases brought against the German *Länder* (federal states).[160]

These cases demonstrate the wide variety of situations in which courts can draw arguments from international climate law to justify regulation or alter administrative procedures pertaining to activities that have an impact on climate change. Domestic climate litigation provides a laboratory that shows the wide variety and complexity of the types of engagement of domestic courts with international law.

6.3. International Climate Law as a Liberty

In the above-mentioned cases, the plaintiffs relied on international climate law to challenge either the absence of sufficiently demanding climate policies, or individual decisions that would interfere with the path towards climate targets. Reliance on international climate law can also serve other purposes for states and corporations. In several cases, public authorities and courts relied on international climate law to justify a particular decision to continue or even expand activities resulting in GHG emissions, on the ground that this was permitted by international law.

For instance, the South African High Court noted that the country's international obligations 'anticipate and permit the development of new coal-fired power stations in the immediate term'. It also held that South Africa's NDCs, adopted under the Paris Agreement, expressly anticipate the establishment of further coal-fired power stations and an increased carbon emissions rate until 2020.[161] The Court further held that climate change action takes place in a context where poverty alleviation is prioritized, and South Africa's energy challenges and reliance on coal are acknowledged.[162] Another example is the New Zealand High Court's observation that the UNFCCC and the Paris Agreement leave liberty to set NDCs or assess the

environmental authorization for the project. The Supreme Court expressly mentions Chile's obligations under the UNFCCC).

[159] *Reference Re Greenhouse Gas Pollution Pricing Act* (*Saskatchewan et al.* v. *Canada*) [2021] SCC 11 (Supreme Court of Canada), para. 174.

[160] *Alena Hochstadt et al.* v. *State of Hessen* [2022] ECLI:DE:BVerfG:2022:Rk20220118.1bvr156521 (Constitutional Court of Germany) (holding that on the basis of a global CO_2 residual budget that can in principle be determined for the temperature threshold articulated by the Paris Agreement, a residual amount of CO_2 can be roughly determined for the Federal Republic as a whole within the framework of a state-related emissions reduction approach, expressly referring to Art. 3 of the Paris Agreement).

[161] *EarthLife Africa Johannesburg* v. *Minister of Environmental Affairs and Others*, n. 140 above, paras 34–5.

[162] Ibid.

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costs of the measures it intends to take.[163] A comparable judgment was given by the Administrative Court of Berlin (Germany).[164]

Where international climate law does not impose any specific requirements, courts rely on international climate law to find liberty and leave it to the political branches to determine if and how national law should be aligned with international climate law. Moreover, corporations have tried to invoke the fact that the Paris Agreement did not outlaw a particular practice as a ground for the legality of practices.[165] However, surely such claims must fail. The fact that an international agreement does not regulate a particular practice may be read as sustaining a liberty for the state. However, it cannot be decisive for the legality of private actor conduct under domestic law. In the collection of relevant cases, this was confirmed in a Mexican judgment.[166]

7. Contestation

The cases in which courts rely on strategies for alignment proceed on the consideration that international climate law serves global and national interests and that courts should do well to seek alignment. While that may be true as a general proposition, in particular instances the situation is more complex. The goals of international climate law are not isolated; they form part of a larger legal fabric – both domestically and internationally – that may pull in different directions.

In other areas of international law, situations have emerged in which national courts have identified conflicts between particular objectives or requirements of international law and fundamental constitutional principles or other principles of international law. This phenomenon came to the fore in relation to the conflict between UN Security Council sanctions and human rights, but is also relevant more generally.[167] Plaintiffs and courts can then use domestic or international law to contest the contents of international law rules.[168]

This possibility of contestation is relevant to climate change, as implementing international commitments relating to climate law may lead to government policy that interferes with other interests protected by international law. Yet, only a small number

[163] *Thomson* v. *Minister for Climate Change Issues*, n. 79 above, paras 139–41; see also para. 168 (stating that 'I am also not persuaded the NDC decision was unreasonable in a judicial review sense because the costs of deeper targets are comparatively small and there are other costs associated with delay. How the costs considerations are appropriately balanced is properly for the Executive to decide, especially as the international legal framework does not stipulate how a country is to determine this').

[164] *Family Farmers and Greenpeace Germany* v. *Germany* [2018] VG 10K412.18 (Administrative Court Berlin, Germany) (stating that there are various methods for distribution of CO_2, that all of these are compatible with the Paris Agreement, and that it is not up to the Administrative Court to prescribe this standard of the federal government as a mandatory and obligatory minimum level of climate protection, taking into account the executive's scope for design and assessment).

[165] *ABRAGET* v. *State of Rio de Janeiro*, n. 40 above.

[166] *Ruling on the Constitutionality of State 'Green Taxes' in Zacatecas*, n. 40 above (dismissing the corporation's argument that the UNFCCC only called on developed countries to take action on GHG emissions; the Court noted that Mexican authorities have a duty to address the effects of climate change).

[167] J. Kokott & C. Sobotta, 'The Kadi Case: Constitutional Core Values and International Law – Finding the Balance?' (2012) 23(4) *European Journal of International Law*, pp. 1015–24.

[168] Nollkaemper et al., n. 14 above.

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of cases have actually emerged in this category, suggesting that it remains a potential litigation strategy that may become more relevant over time.

One area where this possibility has emerged is the potential conflict between requirements stemming from international climate law and the right to property. When the Netherlands adopted a Coal Ban for Electricity Production Act,[169] which prohibited power plants from using coal as fuel for electricity generation by 2030, power station owners brought a case against the state, arguing that this law violated their right to property under Article 1 of the First Protocol to the European Convention on Human Rights[170] and Article 17 of the Charter of Fundamental Rights of the European Union.[171] The Court concluded that 'a reasonable balance (fair balance) exists between the demands of the public interest that it serves and the protection of … the fundamental rights [of the power station owners]'.[172] The requirements under international climate law were one element in striving for a fair balance, and the enactment and enforcement of this law was not unlawful for the owners.[173]

Another potential conflict exists between decarbonization strategies that seek to implement the Paris Agreement and workers' rights. For instance, Chile's Energy Sector Decarbonization Plan contains a gradual closure of existing coal-fired power plants. When the Ministry of Energy issued a decree to ensure the reinsertion of workers into the labour market without consulting with workers affected by the decarbonization plan, three union workers brought a case against the Ministry of Energy.[174] It was argued that they were not consulted in the energy decarbonization agreements made between the government and the energy companies, in violation of their constitutional guarantees. In 2021, the Chilean Supreme Court upheld the plaintiffs' appeal. The agreements adopted by the State of Chile to achieve carbon neutrality required the performance of a just transition strategy, both for the workers harmed by the loss of their direct and indirect source of employment and for the communities affected by the loss of services linked to the development of the declining thermoelectric activity. The ruling ordered the government authorities to implement a plan for the reinsertion into the labour market of workers affected by the decarbonization process, consulting them in that process, and adopting the control measures to ensure compliance.[175] This case did not involve international climate law, but does illustrate the tensions that may exist between the climate change policies and other parts of international law.

[169] Prohibition of Coal in Electricity Production Act 2019 (Wvk) (The Netherlands).

[170] Paris (France), 20 Mar. 1952, in force 18 May 1954, available at: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=009.

[171] Nice (France), 7 Dec. 2000, in force 1 Dec. 2009, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT.

[172] *RWE and Uniper* v. *The Netherlands (Ministry of Climate and Energy)* [2022] ECLI:NL:RBDHA:2022:12635 (District Court of The Hague, The Netherlands).

[173] Ibid., para. 5.24.

[174] Decree No. 42/2020 (Chile).

[175] *Company Workers Union of Maritima & Commercial Somarco Ltd and Others* v. *Ministry of Energy*, 9 Aug. 2021, 25.530-2021(Supreme Court of Chile).

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Another potential conflict has emerged between the implementation of international climate law and the rights of Indigenous people. When Colombia implemented projects within the Reducing Emissions from Deforestation and Forest Degradation in Developing Countries framework (REDD+) to meet international obligations, local groups contested the project on the grounds of its local impact and lack of consultation. In 2023, the Juzgado Promiscuo Municipal de Cumbal, Nariño, found that the defendants had violated the plaintiffs' rights by not conducting the necessary free, prior and informed consultation process with the entire community regarding the carbon credits contract associated with the REDD+ project. The judge issued a temporary injunction against the REDD+ project and instructed the defendants to conduct such a consultation process in line with the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention 169.[176] Similar cases on the (potential) conflict between decarbonization projects and the international rights of Indigenous peoples are pending,[177] and the push for mineral mining is likely to lead to more conflicts with the rights of such peoples.[178]

Similar challenges may occur when states, aiming to meet the Paris Agreement's targets, implement energy transition policies that may interfere with international obligations to protect other parts of the environment, particularly biodiversity.[179] In India, the Municipal Corporation of Delhi was permitted to construct a waste-to-energy plant developed as a Clean Development Mechanism (CDM) project and registered with the UNFCCC.[180] The plaintiffs argued that the plant, which was to be established in a densely populated residential area, would be dangerous for the residents' lives, create pollution, and in fact contribute to climate change. In view of the plant's contribution to New Delhi's waste problem, the National Green Tribunal allowed the project to continue.[181]

[176] Geneva (Switzerland), 27 June 1989, in force 5 Sept. 1991, available at: https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169; *Members of Indigenous Community 'Gran Cumbal'* v. *SVP Business SAS, Global Consulting and Assessment Services SA, Deutsche Certification Body SAS, COLCX and the Indigenous Authority of 'Gran Cumbal'* [2023] 2023000095-00 (Court of Appeal Cumbal, Colombia).

[177] *Public Defender's Office of the State of Pará* v. *RMDLT Property Group and Others*, 0806582-68.2023.8.14.0015 (pending).

[178] D. Kemp, J. Owen & K. Muir, '54% of Projects Extracting Clean Energy Minerals Overlap with Indigenous Lands, Research Reveals', *The Conversation*, 1 Dec. 2022, available at: https://theconversation.com/54-of-projects-extracting-clean-energy-minerals-overlap-with-indigenous-lands-research-reveals-195438.

[179] L.J. Sonter et al., 'Renewable Energy Production Will Exacerbate Mining Threats to Biodiversity' (2020) 11(1) *Nature Communications*, article 4174; B. Aska et al., 'Biodiversity Conservation Threatened by Global Mining Wastes' (2024) 7(1) *Nature Sustainability*, pp. 23–30.

[180] The Clean Development Mechanism (CDM), set up under the Kyoto Protocol, allows emissions reduction projects that assist in creating sustainable development in developing countries to generate 'certified emission reductions' for use by the investor; see UNEP, 'Introduction to the CDM', available at: https://unfccc.int/files/cooperation_and_support/capacity_building/application/pdf/unepcdmintro.pdf.

[181] *Sukhdev Vihar Welfare Residents Association* v. *Union of India* [2017] No. 19/2014 (New Delhi National Green Tribunal, India). The interests of climate change and biodiversity were also balanced in *MK Ranjitsinh et al.* v. *Union of India et al.* [2024] INSC 280 (Supreme Court of India).

The number of cases failing in the category of contestation is very small. However, the general point is that climate change, protected under international climate law, is only one of many legally protected interests. The performance of obligations under that law may interfere with other interests in a fragmented international field. Such conflicts are also on the agenda of international institutions. Still, the fragmentation of the international institutional architecture for climate change is likely to replicate and sustain such conflicts rather than resolve them. In this situation, national courts may become the venue for mediating such conflicts.

8. Conclusions

The assessment of the 148 cases demonstrates that plaintiffs have relied on international climate law in a wide variety of instances. However, the vast majority of cases arise in situations in which plaintiffs (individuals, local groups, civil society organizations) challenge either the absence of or the inadequacy of national legislation or policies to drive a state towards the objectives of the Paris Agreement, or particular decisions or practices that would hinder the pursuit of these objectives.

The outline shows that invoking international climate law does not guarantee that the court will rule in line with international targets or principles. In the majority of cases that have been decided, courts opted for some form of avoidance. Lack of direct effect, standing, and separation of power concerns were dominant grounds on which courts based themselves to justify avoidance decisions. These factors may also explain why only a minority of the over 2,000 cases in the UNEP *Climate Litigation Report* rely on international law and why, in the majority of the cases where international climate law was invoked, courts opted for an avoidance strategy.[182]

In over 40 cases, courts sought alignment with international climate law, either through interpretation of national law or by relying on international climate law as one consideration in deciding on the (il)legality of policies or regulatory measures. In most of these cases, courts used international law to interpret ambiguous terms in national law or to guide the exercise of discretion. These cases, even if they do not represent the majority of cases in which international climate law was invoked in national courts, do indicate that, in particular cases, national courts can be critical complementary institutions in the global architecture of global climate policy.[183]

These cases cannot be described in terms of enforcing or securing compliance with international obligations. Rather, the courts, in many cases, rely on the targets of Article 2(1)(a) of the Paris Agreement, and interpret and apply domestic law to align with those targets.[184] International climate law is not so much an enforceable set of obligations that, where necessary, can set aside inadequate national law, but rather a

[182] UNEP, n. 10 above.
[183] Wegener, n. 22 above, p. 33.
[184] Buser, n. 17 above; Preston (Part I), n. 21 above.

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set of principles and objectives that guides the construction and application of national law. The outline confirms the conclusions of earlier research that the national legal context is of overriding importance for understanding the impact of international law arguments in climate litigation.[185]

The number of cases in which litigants have, with success, contested the substance or application of international climate law are limited. As the possible conflicts between climate change policies, biodiversity, and other interests become more visible, these numbers may increase in the future. The few cases that have emerged indicate that a likely path for courts is to seek balance and protection of both interests, rather than prioritization of one interest over the other.[186]

In addition to the conclusions drawn from the mapping exercise, by exposing the number of cases resulting in avoidance, alignment, or contestation, a few tentative comments can be made on the reasons that may result in the choice of one of these postures. Several factors that appear to support or facilitate alignment rather than avoidance or contestation can be identified. One is that alignment is more likely when national law has not comprehensively incorporated the substance of international climate law; otherwise, courts may prefer to decide cases based fully on domestic law. A second factor is that alignment is more likely if claims are not based exclusively on international climate law – as courts then will be likely to conclude that international obligations do not have direct effect and/or are not enforceable. In particular, interpretative alignment appears to offer the best chances for success. A third facilitating factor is whether civil society organizations are entitled to bring international climate law claims under domestic law, with a relatively large number of successful claims brought by such organizations. A fourth factor is whether climate change claims, in a particular context, can be framed in terms of human rights claims. The chances of success are significantly increased in situations where this is possible and where courts accept such claims.

It is noteworthy that the question of whether a particular jurisdiction is 'monist' or 'dualist' does not seem to be a decisive consideration. For instance, courts in India, New Zealand, and Australia appear to be relatively open to arguments based on international law, whereas in the US, where treaty law is considered the law of the land, international climate law plays a very marginal role in the many climate law cases.

Whether, in any particular case, invocation of international climate law matters for the outcome of a case and increases the pursuit of the Paris Agreement targets cannot be answered in the abstract. It is highly plausible that in several alignment cases – such as *MK Ranjitsinh et al.* v. *Union of India et al.* in India,[187] *Shrestha* v. *Office of the Prime Minister* in Nepal,[188] or the *Urgenda* case in the Netherlands[189] – international

[185] Ibid.; Saiger, n. 19 above.
[186] *MK Ranjitsinh et al.* v. *Union of India et al.*, n. 181 above.
[187] Ibid.
[188] *Shrestha* v. *Office of the Prime Minister et al.*, n. 100 above.
[189] *Urgenda Foundation* v. *State of the Netherlands*, n. 99 above.

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law played a significant role in the outcome. In other cases, courts may acknowledge international climate law without it having a meaningful impact on the case outcome. Further research is needed to identify the specific conditions under which international law does indeed influence the outcome of a judgment.

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