

## TRANSNATIONAL CLIMATE LITIGATION: THE CONTRIBUTION OF THE GLOBAL SOUTH

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### ABSTRACT

*Since the conclusion of the Paris Agreement, climate litigation has become a global phenomenon, casting courts as important players in multilevel climate governance. However, most climate litigation scholarship focuses on court actions in the Global North. This Article is the first to shine a light on the Global South's contribution to transnational climate litigation. Analysis of this experience is essential if transnational climate jurisprudence is to contribute meaningfully to global climate governance, and to ensuring just outcomes for the most climate-vulnerable.*

### I. INTRODUCTION

In August 2015, just a few months before the international negotiations that led to conclusion of the Paris Agreement,<sup>1</sup> a Pakistani farmer, Mr. Ashgar Leghari, filed a petition with the Lahore High Court claiming that the government of Pakistan was violating his fundamental constitutional rights by failing to “address the challenges and to meet the vulnerabilities associated with Climate Change.”<sup>2</sup> Mr. Leghari argued that despite the

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<sup>1</sup> Paris Agreement, Dec. 12, 2015, UNTS I-54113 (*entered into force* Nov. 4, 2016). The Paris Agreement is a multilateral environmental treaty that seeks to enhance the implementation of the United Nations Framework Convention on Climate Change (UNFCCC), May 9, 1992, 1771 UNTS 107 (*entered into force* Mar. 21, 1994) and to strengthen the global response to the threat of climate change.

<sup>2</sup> Leghari v. Pakistan, WP No. 25501/2015, Lahore High Court, Order of Sept. 4, 2015, para. 1 (Pak.), *available at* [https://elaw.org/PK\\_AshgarLeghari\\_v\\_Pakistan\\_2015](https://elaw.org/PK_AshgarLeghari_v_Pakistan_2015) (hereinafter *Leghari*, Order of Sept. 4, 2015). *See also* Anam Gill, *Farmer Sues Pakistan's Government to Demand Action on Climate Change*, REUTERS (Nov. 13, 2015), *at* [www.reuters.com/article/pakistan-climatechange-lawsuit-idUSL8N1383YJ20151113](http://www.reuters.com/article/pakistan-climatechange-lawsuit-idUSL8N1383YJ20151113).

Pakistani government's release of a National Climate Change Policy and a Framework for its implementation,<sup>3</sup> there was "no progress on the ground."<sup>4</sup> In a decision issued on September 4, 2015, Judge Syed Mansoor Ali Shah agreed with the petitioner's claim. Characterizing climate change as "a defining challenge of our time," Judge Shah ruled that "[o]n a legal and constitutional plane" the issue was a "clarion call for the protection of fundamental rights of the citizens of Pakistan."<sup>5</sup> A mere ten days later in a second decision, Judge Shah ordered the constitution of a joint expert-government Climate Change Commission "to expedite the matter and to effectively implement the fundamental rights of the people of Punjab."<sup>6</sup> According to its Chair, Dr. Parvez Hassan, the Commission's constitution by the Pakistani judiciary represented "a unique and innovative handling of climate change issues in the country" that "will likely resonate in other countries where climate change matters are not receiving due priority."<sup>7</sup> The Commission has now been superseded by a new Climate Change Council, established by the Pakistan Climate Change Act 2017,<sup>8</sup> which is designed to "fast-track measures needed to implement [climate] actions on the ground."<sup>9</sup>

The *Leghari* case is a prominent illustration of the global growth and increasing influence of litigation addressing issues of climate change in the last decade, particularly in the lead-up to, and following, the Paris negotiations.<sup>10</sup> Although the United States remains the epicenter of climate change jurisprudence globally, with more than one thousand lawsuits,<sup>11</sup> outside of the United States there are now over three hundred climate cases brought in thirty-two jurisdictions.<sup>12</sup>

<sup>3</sup> Government of Pakistan, Ministry of Climate Change, *National Climate Change Policy* (Sept. 2012), available at [www.gcisc.org.pk/National\\_Climate\\_Change\\_Policy\\_2012.pdf](http://www.gcisc.org.pk/National_Climate_Change_Policy_2012.pdf). Furthermore, see Government of Pakistan, Climate Change Division, *Framework for Implementation of Climate Change (2014–2030)*, at 1 (Nov. 2013), available at [www.gcisc.org.pk/Framework%20for%20Implementation%20of%20CC%20Policy.pdf](http://www.gcisc.org.pk/Framework%20for%20Implementation%20of%20CC%20Policy.pdf).

<sup>4</sup> *Leghari*, Order of Sept. 4, 2015, *supra* note 2, para. 1.

<sup>5</sup> *Id.*, para. 6.

<sup>6</sup> *Id.*, para. 11.

<sup>7</sup> Parvez Hassan, *Judicial Commission on Climate Change in Pakistan*, at 5 (APCEL Climate Change Adaptation Platform, APCEL 20th Anniversary Celebration, Nov. 10, 2016), available at <https://law.nus.edu.sg/apcel/cca/4.%20JudicialCommissiononClimateChangeinPakistan.pdf>.

<sup>8</sup> Pakistan Climate Change Act, § 95 et seq., 2017, National Assembly, The Gazette of Pakistan (Apr. 3, 2017), available at [www.na.gov.pk/uploads/documents/1491459994\\_555.pdf](http://www.na.gov.pk/uploads/documents/1491459994_555.pdf).

<sup>9</sup> Rina Saeed Khan, *Pakistan Passes Climate Change Act, Reviving Hopes – and Skepticism*, REUTERS (Mar. 24, 2017), at [www.reuters.com/article/us-pakistan-climatechange-lawmaking/pakistan-passes-climate-change-act-reviving-hopes-and-skepticism-idUSKBN16V19N](http://www.reuters.com/article/us-pakistan-climatechange-lawmaking/pakistan-passes-climate-change-act-reviving-hopes-and-skepticism-idUSKBN16V19N).

<sup>10</sup> Michal Nachmany, Sam Fankhauser, Joana Setzer & Alina Averchenkova, *Global Trends in Climate Change Legislation and Litigation 2017 Update*, at 1, 13 fig. 6, GRANTHAM RES. INST. (May 2017), available at <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2017/04/Global-trends-in-climate-change-legislation-and-litigation-WEB.pdf>. For the impacts of the Paris Agreement on climate litigation trends and activity, see United Nations Environment Programme (UNEP) and the Columbia Law School – Sabin Center for Climate Change Law, *The Status of Climate Change Litigation – A Global Review*, at 4, 8–9 (2017), available at <http://columbia-climatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf>.

<sup>11</sup> As of May 2019, 1,023 cases have been identified in the United States. See Joana Setzer & Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2019 Snapshot, Policy Report*, at 2, box 1, GRANTHAM RES. INST. (July 2019), available at [http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI\\_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf](http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf). For a comprehensive listing and categorization of the claims put forward in U.S. climate cases, see The Columbia Law School – Sabin Center for Climate Change Law & Arnold & Porter Kaye Scholer LLP, *U.S. Climate Change Litigation*, at <http://climatecasechart.com/us-climate-change-litigation>.

<sup>12</sup> These cases are tracked on the LSE Grantham Research Institute on Climate Change & the Environment & The Columbia Law School – Sabin Center for Climate Change Law, *Climate Change Laws of the World*, at [www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world](http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world).

This global expansion in climate litigation gives substance to claims of a transnational climate justice movement that casts courts as important players in shaping multilevel climate governance.<sup>13</sup> It also highlights the key part that domestic litigation is playing in advancing the goals of international law instruments, such as the Paris Agreement, through holding state parties accountable for their “self-differentiated” nationally determined contributions (NDCs) to the global climate change response.<sup>14</sup>

Despite the emergence of climate lawsuits in many jurisdictions around the world, a majority of the scholarship and practitioner discussion of climate litigation remains focused on court actions in developed countries of the “Global North,” such as suits in the United States, the United Kingdom (UK), Europe, New Zealand, and Australia.<sup>15</sup> Cases such as the U.S. Supreme Court decision in *Massachusetts v. EPA*,<sup>16</sup> the Hague Court of Appeal’s decision in *Urgenda v. Netherlands*,<sup>17</sup> and the ongoing U.S. litigation in *Juliana v. United States*<sup>18</sup> have attracted—and continue to attract—substantial interest and commentary. By contrast, there has been little analysis of climate litigation in the “Global South.”<sup>19</sup> Nevertheless, it is these countries—situated in Asia, the Pacific, Africa, and Latin

<sup>13</sup> See generally William C.G. Burns & Hari M. Osofsky, *Overview: The Exigencies that Drive Potential Causes of Action for Climate Change*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 1 (William C.G. Burns & Hari M. Osofsky eds., 2009); Hari M. Osofsky, *The Continuing Importance of Climate Change Litigation*, 1 CLIMATE LAW 3 (2010); Jolene Lin, *Climate Change and the Courts*, 32 LEG. STUD. 35 (2012); Hari M. Osofsky & Jacqueline Peel, *The Role of Litigation in Multilevel Climate Change Governance: Possibilities for a Lower Carbon Future?*, 30 ENVTL. & PLANNING L.J. 303 (2013); Giulio Corsi, *A Bottom-Up Approach to Climate Change Governance: The New Wave of Climate Change Litigation*, 57 ICCG REFLECTION 2 (Oct. 2017), at [https://issuu.com/iccg/docs/57\\_climate\\_change\\_litigation\\_giulio](https://issuu.com/iccg/docs/57_climate_change_litigation_giulio).

<sup>14</sup> Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT’L & COMP. L. Q. 493 (2016) (explaining the endorsement of a bottom up approach in the Paris Agreement as opposed to the top down model of its predecessor treaty, the Kyoto Protocol (*id.* at 502), and the Paris Agreement’s “bounded self-differentiation model” which permits parties to choose “their own contributions and tailo[r] these to their national circumstances, capacities and constraints” (*id.* at 509–10)).

<sup>15</sup> The literature is vast. For an introduction, see Burns & Osofsky, *supra* note 13; Lisa Heinzerling, *Climate Change in the Supreme Court*, 38 ENVTL. L. 1 (2008); Chris Hilson, *Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back)*, in FABRIZIO FRACCHIA & MASSIMO OCCHIANA, CLIMATE CHANGE: LA RISPOSTA DEL DIRITTO, at 421 (2010); Lin, *supra* note 13; David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence Or Business As Usual?*, 64 FLA. L. REV. 15 (2012); Trevor Daya-Winterbottom, *Country Report: New Zealand – the Legitimacy of Climate Change: Buller Coal in the Supreme Court*, 5 IUCNAEL EJOURNAL 231 (2014); JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY (2015).

<sup>16</sup> *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007).

<sup>17</sup> *Urgenda v. Netherlands*, Case No. 200.178.245/01, The Hague Court of Appeal, Oct. 9, 2018. An unofficial translation of the case from the Dutch original is available at [https://www.urgenda.nl/wp-content/uploads/ECLI\\_NL\\_GHDHA\\_2018\\_2610.pdf](https://www.urgenda.nl/wp-content/uploads/ECLI_NL_GHDHA_2018_2610.pdf). The Government of the Netherlands is appealing the decision to the Supreme Court. See Government of the Netherlands Press Release, State to Bring Cassation Proceedings in Urgenda Case (Nov. 16, 2018), at <https://www.government.nl/latest/news/2018/11/16/state-to-bring-cassation-proceedings-in-urgenda-case>.

<sup>18</sup> The trial hearing in this case is yet to take place. For a history of the proceedings, see Our Children’s Trust, *Details of Proceedings*, at <https://www.ourchildrenstrust.org/federal-proceedings>.

<sup>19</sup> For a notable exception, see CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE (Richard Lord, Silke Goldberg, Lavanya Rajamani & Jutta Brunnée eds., 2012). This volume includes chapters assessing national laws in several Global South countries (China, India, Indonesia, Egypt, Kenya, South Africa, Brazil, and Mexico). However, the chapter assessments document no or few climate change cases in these jurisdictions in the pre-Paris Agreement period. For another early contribution to the literature on climate litigation in Global South countries, see Jolene Lin, *Climate Change Litigation in Asia and the Pacific*, in RESEARCH HANDBOOK ON CLIMATE CHANGE MITIGATION LAW (Geert Van Calster, Wim Vandenberghé & Leonie Reins eds., 2014). See also Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10

America<sup>20</sup>—that are among the most vulnerable to impacts from climate change.<sup>21</sup> In the Global South, there are potentially many millions of people, like Mr. Leghari, who face the prospect of very real and tangible impacts from climate change on their homes, families, communities, and livelihoods.<sup>22</sup>

This Article is the first to shine a light on the contribution of the Global South to transnational climate litigation and governance. The Article comprehensively evaluates cases that have been decided, are pending, or are emerging across Asia, the Pacific, Africa, and Latin America.<sup>23</sup> We argue that analysis of the Global South experience of climate litigation is essential if transnational climate jurisprudence is to contribute in a meaningful way to global climate governance, and particularly, to ensuring just outcomes for the most climate-vulnerable. Moreover, a fuller understanding of transnational climate litigation—one that considers developments in the Global South—underscores that judicial contribution to global climate governance is not purely a Global North phenomenon. A number of courts in the Global South are taking bold steps to compel action on climate change.<sup>24</sup>

WIRES CLIMATE CHANGE 4 (2019), noting “a first comprehensive study focused on Global South climate litigation is yet to be published.”

<sup>20</sup> The term “Global South,” as well as interchangeable terms such as the “Third World,” is one of contested scope and content. *See, e.g.*, R.P. ANAND, INTERNATIONAL LAW AND THE DEVELOPING COUNTRIES: CONFRONTATION OR COOPERATION? 120 (1987); Elena Fiddian-Qasmiyeh & Patricia Daley, *Conceptualising the Global South and South–South Encounters*, in ROUTLEDGE HANDBOOK OF SOUTH-SOUTH RELATIONS, at 1 (Elena Fiddian-Qasmiyeh & Patricia Daley eds., 2019); John Toye, *Is the Third World Still There?*, in THE DEVELOPING WORLD: AN INTRODUCTION TO DEVELOPMENT STUDIES THROUGH SELECTED READINGS, at 1 (Anna Farmar ed., 1988); Joyeeta Gupta, *Changing North-South Challenges in Global Environmental Politics*, in HANDBOOK OF GLOBAL ENVIRONMENTAL POLITICS, 97 (Peter Dauvergne ed., 2d ed. 2012). In this Article, while cognizant of the wider debate about the North-South categorization, our understanding of the distinction aligns with the developed/developing country divide that is widely applied in international environmental and climate law scholarship, and which underpins the UNFCCC’s differentiation between Annex I (developed countries and former Soviet Union states) and non-Annex I (developing country) parties. Accordingly, major emerging economies such as China, India, Brazil, and South Africa are included in our analysis as part of the Global South. *See similarly* Benjamin J. Richardson, Yves Le Bouthillier, Heather McLeod-Kilmurray & Stepan Wood, *Introduction: Climate Law and Developing Countries*, in CLIMATE LAW AND DEVELOPING COUNTRIES: LEGAL AND POLICY CHALLENGES FOR THE WORLD ECONOMY, at 1 (Benjamin J. Richardson, Yves Le Bouthillier, Heather McLeod-Kilmurray & Stepan Wood eds., 2009); Sumudu Atapattu & Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, at 1 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez & Jona Razzaque eds., 2015).

<sup>21</sup> Christopher B. Field et al., *Summary for Policymakers*, in CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE FIFTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, at 3, 6 (2014). *See also*, UNFCCC, United Nations Framework Convention on Climate Change, Climate Change: Impacts, Vulnerabilities and Adaptation in Developing Countries, 5 (2007), available at <https://unfccc.int/resource/docs/publications/impacts.pdf>.

<sup>22</sup> This prospect has given rise to a significant body of United Nations resolutions and reports on the topic of human rights and climate change, detailing the impacts of climate change on human rights protections and noting the particular vulnerability of women, children, and the poor in developing countries. *See, e.g.*, Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary General: Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, UN Doc. A/HRC/10/61 (Jan. 15, 2009); John H. Knox, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, UN Doc. A/HRC/31/52 (Feb. 1, 2016).

<sup>23</sup> Consistent with our understanding of the Global South, explained note 20 *supra*, Asia for these purposes encompasses South Asia, Central Asia, and China, Africa encompasses the Middle East, and Latin America includes countries in the Caribbean.

<sup>24</sup> The *Leghari* case, *supra* note 2, is one such example. Others are discussed in Part III *infra*.

Attention to the types of climate cases emerging in the Global South promotes a reframing of our understanding of climate litigation. Adjusting the “lens” through which we view transnational climate litigation allows a clearer picture of the most promising jurisdictions for further growing the climate justice movement, as well as the potential barriers that can inhibit such development. This understanding can, in turn, inform advocacy, partnering initiatives, and capacity-building efforts designed to foster more robust climate governance in the Global South, which is essential to achieving the collective emissions reduction and adaptation goals articulated in international climate law.<sup>25</sup> At the same time, there is the potential to draw lessons from decisions in the Global South for case law development elsewhere. Litigants and judges alike in Global North jurisdictions might appeal to the Global South jurisprudence to support their arguments and judgments. Equally, advocates framing local claims might draw inspiration from other successful Global South cases,<sup>26</sup> such as the *Leghari* decision.

The remainder of this Article is divided into four parts. Part II discusses the most commonly applied understandings and definitions of climate litigation. It explains how they reflect a Global North (and particularly U.S.) perspective on the nature, purpose, and significance of climate change cases. Key to existing definitions and typologies of climate litigation is the centrality of climate change arguments or climate science to the case.<sup>27</sup> However, a recent analysis of 254 non-U.S. climate suits (of which Global South cases made up 11 percent) suggests that in 77 percent of these cases, “climate change is only at the periphery of the argument.”<sup>28</sup> We hypothesize that, in a Global South context, cases are likely to follow this broader trend as the result of climate concerns being embedded in wider disputes over human and constitutional rights, environmental protection, land-use, disaster management, and natural resource conservation. Although these cases take place in domestic courts and generally do not engage issues of international law, the final section of this Part explains the role they play as an instrument of transnational climate governance, and as an avenue for reinforcing “bottom up” state commitments to climate action made through NDCs under the Paris Agreement.<sup>29</sup>

Part III of the Article illustrates how a broader understanding of climate litigation reveals a fuller picture of climate case law developments in the Global South, and the contribution they make to transnational climate governance. This Part assesses decided, pending, and emerging cases in Asia, the Pacific, Africa, and Latin America, evaluating trends across the “Global South docket.” We also highlight an increasing level of partnering between Global North and Global South advocates to bring cases that profile, or include, the experiences of plaintiffs from Global South countries. The so-called *People’s Climate Case*—filed with the European General Court on July 2, 2018 on behalf of families and youth from Europe but also Kenya

<sup>25</sup> See Paris Agreement, *supra* note 1, Art. 4(1) and (2) (on emissions reduction and mitigation measures), Art. 7(1) (establishing “the global goal on adaptation”).

<sup>26</sup> An example is *Greenpeace Indonesia and Others v. Bali Provincial Governor*, 2/G/LH/2018/PTUN.DPS (Denpasar Admin. Ct., Jan. 24, 2018), filed in Indonesia’s Administrative Court in 2018 challenging a coal-fired power plant approval, which is closely modeled on South Africa’s first climate case *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others*, High Court of South Africa, Gauteng Division, Pretoria, Case no. 65662/16, 2017. Both cases are discussed further in Part III *infra*.

<sup>27</sup> See discussion at II.A *infra*.

<sup>28</sup> Nachmany, Fankhauser, Setzer & Averchenkova, *supra* note 10, at 13.

<sup>29</sup> Rajamani, *supra* note 14, at 502.



and Fiji—is one example.<sup>30</sup> Such partnering is strategic: Global South advocates benefit from the expertise and financial resources of Global North organizations, while the inclusion of Southern advocates' local knowledge and the stories of Global South plaintiffs may lend greater moral legitimacy to the claims advanced in court, as well as in accompanying media and public awareness-raising campaigns.

As the Global South climate jurisprudence develops, South-South cooperation is another notable trend.<sup>31</sup> A recent example is a legal challenge to expansion of a Bali coal-fired power plant filed in Indonesia's Administrative Court.<sup>32</sup> The Indonesian Centre for Environmental Law, which is supporting the local community petitioners, uses the language of partnership to refer to its interactions with the Centre for Environmental Rights in South Africa, one of the groups behind South Africa's first climate change case.<sup>33</sup> In the quest for climate justice through litigation, we would anticipate this type of interaction and exchange between Global South groups to develop further, facilitated by the growth of transnational climate advocacy networks that include Global South organizations.<sup>34</sup>

Part IV of the Article distills several key characteristics of climate cases in the Global South as a basis for reframing and broadening understandings of the phenomenon of transnational climate litigation. These features can also be found to a degree in Global North cases, but are generally more prevalent across the Global South docket. First, we note the significant number of Global South climate cases that, like the *Leghari* petition, rely on constitutional rights or human rights claims, including alleged violations of rights to life or environmental rights. Rights-based claims have been less prominent in Global North climate jurisprudence,<sup>35</sup>

<sup>30</sup> Details of the case are available from the website People's Climate Case, at <https://peoplesclimatecase.caneurope.org>. The case was conceived by the Climate Action Network, which is Europe's largest coalition of nongovernmental organizations (NGOs) working on climate and energy issues, with over 150 organizations' members in more than thirty European countries, representing over 1,700 NGOs. Further, a German NGO, Protect the Planet, is bearing all the costs related to the legal case. The petitioners claim that the EU's 2030 emissions reduction target is inadequate to safeguard their fundamental rights of life, health, occupation, and property. They are asking the European General Court to mandate that the EU lawmaking institutions take more stringent measures of climate protection to safeguard their fundamental rights as well as the global environment. On May 8, 2019, the European General Court issued an order denying the applicants' standing: *Case T-330/18 Carvalho & Others v. European Parliament and Council*, Order of the European General Court, May 8, 2019, at 14, paras. 47–50. On July 11, 2019, the applicants' filed an appeal of the General Court's decision to the European Court of Justice.

<sup>31</sup> This is one element of a broader movement for South-South cooperation on climate issues being supported by the United Nations. See, e.g., United Nations Action Plan on South-South Climate Cooperation (2017–2021), at [www.unsouthsouth.org/south-south-cooperation-action-plan-for-climate-change-engagement-strategy-2017-2021](http://www.unsouthsouth.org/south-south-cooperation-action-plan-for-climate-change-engagement-strategy-2017-2021).

<sup>32</sup> *Greenpeace Indonesia and Others v. Bali Provincial Governor*, *supra* note 26.

<sup>33</sup> In the Indonesian Center for Environmental Law's report on the litigation, it refers to the Centre for Environmental Rights as its "South African partner." See Indonesian Center for Environmental Law, *Fighting to Keep a Dirty Power Plant Out of a Tropical Paradise* (June 28, 2018), at <https://icel.or.id/en/fighting-to-keep-a-dirty-power-plant-out-of-a-tropical-paradise>.

<sup>34</sup> For further discussion, see Jennifer Hadden & Lorien Jasny, *The Power of Peers: How Transnational Advocacy Networks Shape NGO Strategies on Climate Change*, 49 BRIT. J. POL. SCI. 637 (Mar. 20, 2017); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVIST BEYOND BORDERS, ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 240 (1998).

<sup>35</sup> See Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT'L ENVTL. L. 37 (Mar. 1, 2018). Where rights arguments are raised, Global North courts interpreting these rights have sometimes taken a narrow approach to their relevance to climate change. See, e.g., *Greenpeace Norway v. Government of Norway*, Case No. 16-166674TVI-OTIR/06 (Oslo Dist. Ct. Jan. 4, 2018) (Nor.), available at [https://secured-static.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2018/Judgement%20-%204.%20jan%](https://secured-static.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2018/Judgement%20-%204.%20jan%20)

although there is increasing interest in this legal avenue as a way of putting a “human face” to the climate change problem.<sup>36</sup> Second, in contrast to a notable trend in Global North climate litigation seeking to force governments to adopt more stringent climate regulation,<sup>37</sup> Global South cases often involve efforts by individuals and NGOs to compel their governments to implement and enforce existing policies for mitigation and adaptation. For instance, in the *Leghari* case, Mr. Leghari described his petition relating to Pakistan’s National Climate Change Policy, as “aim[ing] to compel the concerned departments and ministries to take action and consider climate change an important issue before it is too late.”<sup>38</sup> While *Leghari* was an adaptation case, the focus of most Global South lawsuits tends to be on mitigation issues, including stopping the building of new coal-fired power plants or the mining of coal, and enforcing laws to prevent illegal, carbon-intensive commercial practices such as timber logging and oil palm cultivation.<sup>39</sup>

Third, many climate cases in the Global South evince a “stealthy” strategy of diluting the political potency of climate issues by packaging them together with less controversial claims or issues that resonate with local policy priorities. A parallel trend of “inadvertent” climate cases or “incidental climate litigation” has been discussed by some authors in analyses of Global North climate litigation.<sup>40</sup> Although this strategy is not evident in all Global South cases, it may be an effective means of pursuing climate-related claims in countries where climate change is a less salient public policy issue or where prevailing litigation cultures and traditions of judicial restraint militate against more activist forms of climate litigation.

More generally, our findings highlight the importance of context in evaluating the prospects for climate litigation across different countries in Asia, the Pacific, Africa, and Latin

[202017%20-%20Oslo%20District%20Court%20stamped%20version.pdf](https://www.greenpeace.org/international/press-release/14527/greenpeace-and-nature-and-youth-take-the-norwegian-government-to-the-supreme-court) (unofficial translation provided by Greenpeace). The decision of the Oslo District Court is being appealed to the Norwegian Supreme Court. See Greenpeace International Press Release, Greenpeace and Nature and Youth Take the Norwegian Government to the Supreme Court (Feb. 5, 2018), at [www.greenpeace.org/international/press-release/14527/greenpeace-and-nature-and-youth-take-the-norwegian-government-to-the-supreme-court](http://www.greenpeace.org/international/press-release/14527/greenpeace-and-nature-and-youth-take-the-norwegian-government-to-the-supreme-court).

<sup>36</sup> For an early, insightful contribution on this issue, see David B. Hunter, *Human Rights Implications for Climate Change Negotiations*, 11 ORE. REV. INT’L L. 331 (2009).

<sup>37</sup> Examples include cases such as *Massachusetts v. EPA*, 549 U.S. 497 (2007) in the United States; *Thomson v. Minister for Climate Change Issues*, CIV 2015-485-919 [2017] NZHC 733 in New Zealand; *Plan B Earth et al. v. Secretary of State for Business Energy and Industrial Strategy & Anor* [2018] EWHC 1892 in the United Kingdom; *Urgenda v. Netherlands*, *supra* note 17, in the Netherlands; and the *People’s Climate Case*, *supra* note 30, in the EU.

<sup>38</sup> Gill, *supra* note 2, quoting an interview with Mr. Leghari.

<sup>39</sup> The extent to which the Global South docket currently comprises mitigation cases, as opposed to those focused on adaptation and climate damage, was a surprising finding of the research given the lower emissions profile of many countries of the Global South and their relatively greater vulnerability to climate change impacts compared with countries in the Global North. See, e.g., Glenn Althor, James E. M. Watson & Richard A. Fuller, *Global Mismatch Between Greenhouse Gas Emissions and the Burden of Climate Change*, 6 NATURE: SCI. REP. 20281 (Feb. 5, 2016) (Finding that twenty of the thirty-six highest emitting countries are among the least vulnerable to negative impacts of future climate change whereas eleven of the seventeen countries with low or moderate emissions, are acutely vulnerable to negative impacts of climate change. These most vulnerable countries are largely small island nations and African countries in the Global South.).

<sup>40</sup> See Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30 J. ENVTL. L. 483 (2018); Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, *If at First You Don’t Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841 (2018); David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual*, 64 FLA. L. REV. 15 (2012); Jacqueline Peel, Hari M. Osofsky & Anita Foerster, *Shaping the “Next Generation” of Climate Change Litigation in Australia*, 41 MEL. U. L. REV. 793 (2017).

America. The Global South is not a monolithic grouping; as such, the extent to which litigation in particular Global South countries follows the general characteristics outlined in Part IV will necessarily differ from country to country. Nonetheless, as we discuss in the concluding section of Part IV, there are useful lessons to be drawn from analysis of the Global South climate cases about the nature of this form of transnational governance, its contribution to implementing international climate law goals, and the role of domestic courts in that global endeavor.

Part V of the Article concludes with consideration of how inclusion of the Global South experience yields a richer picture of transnational climate jurisprudence. It also highlights new avenues and strategies for climate litigation that have not been the focus of attention in the Global North. This points to the value of a more pluralistic understanding for capturing the diversity of transnational climate case law development and its potential contribution to global climate governance.

## II. CLIMATE LITIGATION AND ITS TRANSNATIONAL GOVERNANCE ROLE

Since the emergence of the first climate cases in the United States<sup>41</sup>—and particularly following the U.S. Supreme Court’s leading climate decision in *Massachusetts v. EPA*<sup>42</sup>—efforts to define and classify climate change litigation have proliferated. This “scholarly obsession,” as Elizabeth Fisher has termed it,<sup>43</sup> reflects a widely held view among those who study climate change litigation that it concerns not just a series of interesting cases in disparate courts but rather a phenomenon with a distinct “regulatory role” that cuts across multiple levels of governance.<sup>44</sup>

In this Part, we consider the most commonly referenced definitions and typologies of climate change litigation that have emerged in the scholarly literature. We argue that the importance that these definitions and conceptualizations place on the centrality of climate-focused arguments and strategies in litigation means that they may overlook cases where climate change issues are more peripheral. As this includes many of the cases decided, pending, or contemplated in the Global South, there is a danger that these seemingly universal definitions of climate change litigation will fail to capture adequately developments occurring outside the Global North. Accordingly, a fuller view of the nature and significance of transnational climate litigation requires adjusting our “lens” for understanding this phenomenon to bring into focus developments in the Global South.

An inclusive understanding of what counts as climate litigation is necessary where our purpose is to understand its role as an instrument of transnational governance. Although climate change represents one of the most urgent and existential *global* threats, the regulatory response

<sup>41</sup> Lawsuits raising issues of climate change first emerged as a phenomenon in the United States in the early 1990s. See David Markell & J.B. Ruhl, *An Empirical Survey of Climate Change Litigation in the United States*, 40 ENVTL. L. REV. 10644 (2010).

<sup>42</sup> *Massachusetts v. EPA*, *supra* note 16.

<sup>43</sup> Elizabeth Fisher, *Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA*, 35 L. & POL’Y 236, 239 (2013).

<sup>44</sup> For a clear articulation of this approach, see Hari M. Osofsky, *Is Climate Change “International”?: Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. 585 (2009).



has taken place at multiple governance levels.<sup>45</sup> This reflects both the inadequacy of international law efforts alone to prevent “dangerous anthropogenic interference with the climate system,”<sup>46</sup> and the large degree of discretion afforded state parties in their implementation of international climate treaty obligations. Within this regulatory regime, litigation—including the emerging cases in the Global South—plays an important supplementary, gap-filling role.

### A. *Classifying Climate Litigation*

Lawsuits raising issues of climate change first emerged as a phenomenon in the United States in the early 1990s. Amongst the earliest U.S. cases was *City of Los Angeles and City of New York v. National Highway Transportation Safety Administration, et al.*, decided by the D.C. Circuit Court of Appeals in 1990.<sup>47</sup> That litigation involved a challenge by cities, states, and environmental groups to the failure of the National Highway Transportation Safety Administration to prepare an environmental impact statement under the National Environmental Policy Act in order to consider the adverse climatic effects of lowering fuel economy standards for motor vehicles. This case—although unsuccessful before the D.C. Circuit—served as a prototype for the vast majority of subsequent U.S. climate change cases. As David Markell and J.B. Ruhl have discussed in articles empirically surveying the U.S. case law, “the overwhelming majority of climate change litigation matters are concentrated in claims involving substantive challenges to agency permits and rules and in claims challenging agency environmental impact assessments.”<sup>48</sup> Moreover, their analysis shows that most U.S. climate cases have a mitigation focus, i.e., they are concerned with high-emitting facilities or regulatory measures for greenhouse gas emissions reduction.<sup>49</sup> A much smaller fraction of the U.S. case law deals with questions of climate change adaptation.<sup>50</sup>

Following the U.S. Supreme Court decision in *Massachusetts v. EPA*—which held that greenhouse gases were an “air pollutant” falling within the regulatory scope of the Clean Air Act<sup>51</sup>—climate change litigation in the United States has developed exponentially. For instance, Columbia University’s Sabin Center for Climate Change Law maintains a U.S. climate change litigation database that currently lists more than one thousand claims.<sup>52</sup> To aid with collation of this vast jurisprudence, the Sabin Center applies a definition of climate change litigation that has become influential in scholarly analysis. This classifies “climate

<sup>45</sup> Jacqueline Peel, Lee Godden & Rodney J. Keenan, *Climate Change Law in an Era of Multi-level Governance*, 1 *TRANSNAT’L ENVTL. L.* 245 (2012).

<sup>46</sup> This is the objective of the UNFCCC, *supra* note 1, Art. 2.

<sup>47</sup> *City of Los Angeles v. Nat’l Highway Traffic Safety Admin.*, 912 F.2d 478, 481 (D.C. Cir. 1990).

<sup>48</sup> Markell & Ruhl, *Business as Usual*, *supra* note 40, at 38. The Sabin Center U.S. Climate Change Case Chart, *supra* note 11, confirms the continuation of this pattern with over one-third of the U.S. cases in the database concerning challenges under federal or state environmental impact assessment laws.

<sup>49</sup> Markell & Ruhl, *Business as Usual*, *supra* note 40, at 39.

<sup>50</sup> In their 2012 article, Markell and Ruhl recorded zero adaptation cases. *See id.* at 30. Such cases have since begun to emerge but still constitute only a small number of overall U.S. climate claims, with only fifty-nine such claims listed in the Sabin Center database, *supra* note 11.

<sup>51</sup> *See Massachusetts v. EPA*, *supra* note 16, 549 U.S. at 522 (interpreting § 202(a)(1), Clean Air Act, 42 U.S.C. § 7521(a)(1)).

<sup>52</sup> The Sabin Center database, *supra* note 11. The database categorizes cases by the claims they make, hence a particular lawsuit may be included under several categories.

litigation” as “any piece of federal, state, tribal, or local administrative or judicial litigation in which the . . . tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts.”<sup>53</sup>

Applying this definition for the purposes of their empirical survey of U.S. climate case law, Markell and Ruhl note that their intention was to exclude “litigation motivated by a concern about climate change or climate change policy” where it did not involve “issues of fact or law that bear directly on relevant questions of climate change law and policy.”<sup>54</sup> The authors gave as an example a case challenging a coal-fired power plant driven largely by concerns about climate change but based on non-climate grounds such as “that the environmental impact analysis did not adequately examine the effects of mercury deposition, or that the permit hearing was procedurally defective.”<sup>55</sup> They argue that success in such a case, although it “might be thought of as influencing the law and policy of climate change in the broadest sense . . . would not be contributing to any discrete body of law bearing a direct connection to climate change issues.”<sup>56</sup>

Other authors have taken a broader approach to defining climate litigation.<sup>57</sup> For example, in work focusing on UK climate cases brought by progressive social movements, Chris Hilson emphasizes that there “must be some agency in the way in which litigation is framed which deliberately brings out a climate change element in the way the case is put forward. In other words, to count as climate change litigation, cases must be framed as such.”<sup>58</sup> He notes that “this framing may not always appear on the face of the legal judgment itself,”<sup>59</sup> but rather may emerge only on review of media or campaign materials that reveal climate change as a relevant motivation for the case.<sup>60</sup> Hilson acknowledges that climate change framing—as a criterion for distinguishing climate litigation—can be elastic, with some cases potentially “a ‘stretch’ in terms of their causal immediacy or significance for climate change.”<sup>61</sup>

In his work looking at typologies of climate jurisprudence applicable in the United States and Europe, Navraj Ghaleigh has sought to separate out different kinds of motivations for

<sup>53</sup> Markell & Ruhl, *Business as Usual*, *supra* note 40, at 27.

<sup>54</sup> *Id.* at 26.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 26–27.

<sup>57</sup> This includes a broader approach to what amounts to litigation. For instance, Hilson, *supra* note 15, encompasses both cases that result in a judgment as well as those that do not progress that far but still involve court action or end in a settlement. The Sabin Center’s U.S. climate change case chart, *supra* note 11, also treats the notion of litigation broadly, noting “[t]he term ‘cases’ in the U.S. chart comprises more than judicial and quasi-judicial administrative actions and proceedings. Other types of ‘cases’ contained in the chart include rulemaking petitions, requests for reconsideration of regulations, notices of intent to sue (in situations where lawsuits were not subsequently filed), and subpoenas (at <http://climatecasechart.com/about/>).

<sup>58</sup> Chris Hilson, *Climate Change Litigation: A Social Movement Perspective*, at 2 (Apr. 2010), available at <https://ssrn.com/abstract=1680362> or <http://dx.doi.org/10.2139/ssrn.1680362>.

<sup>59</sup> *Id.* at 3.

<sup>60</sup> One of the examples Hilson discusses is *R (Friends of the Earth and Help the Aged) v. Secretary of State for Business, Enterprise and Regulatory Reform; Secretary of State for Environment, Food and Rural Affairs (2)* [2008] EWHC 2518 (Admin), a UK judicial review action to force the government to meet its fuel poverty targets. There was little mention of climate issues in the judgment, but the press releases highlighted the concerns raised by energy efficiency measures, thereby providing the bridge between climate change and fuel poverty.

<sup>61</sup> *Id.* at 3.

climate litigation.<sup>62</sup> He identifies a key form of climate litigation as “promotive”: seeking to “promote positive environmental outcomes by way of regulatory intervention sanctioned or even required by the courts.”<sup>63</sup> Ghaleigh identifies three further categories of climate litigation: “defensive” (also termed “anti-regulatory” in other typologies),<sup>64</sup> “boundary-testing” (concerned with challenging the limits of an existing regulatory regime for climate change), and “perfecting” (seeking improvements in an existing regulatory regime for climate change).<sup>65</sup> In the United States—despite an early focus on “promotive” litigation—there is a growing body of defensive or anti-regulatory case law challenging regulatory initiatives on climate change.<sup>66</sup>

In the work of Jacqueline Peel and Hari M. Osofsky, focusing on U.S. and Australian case law, notions of climate litigation that depend on mention of climate change issues in the pleadings or judgment, and those that embrace a broader consideration of the motivations of plaintiffs, are combined to conceptualize climate change litigation as a series of concentric circles. At the “core” are cases where climate change “is a central issue in the litigation.”<sup>67</sup> As the circles extend outward, they encompass “cases where: (1) climate change is raised but as a peripheral issue in the litigation, and (2) lawsuits motivated at least in part by concerns over climate change but brought and decided on other grounds.”<sup>68</sup> Finally, “[a]t the outer limits of the boundaries of climate change litigation lie cases that are not explicitly tied to specific climate change arguments but which have clear implications for climate change mitigation or adaptation.”<sup>69</sup> As Peel and Osofsky’s analysis is concerned with the regulatory impact of case law on climate legal and policy development, their focus is principally on cases at the “core.”<sup>70</sup>

As these definitions and typologies illustrate, analyses of climate litigation in the Global North tend to emphasize cases where climate change is a central part of, or motivation for, the litigation.<sup>71</sup> In the proliferating climate litigation scholarship that has paralleled the exponential growth of the case law,<sup>72</sup> this has resulted in significant attention being directed to

<sup>62</sup> Navraj Singh Ghaleigh, “Six Honest Serving-Men”: *Climate Change Litigation as Legal Mobilization and the Utility of Typologies*, 1 CLIMATE L. 31 (2010). Lin advances a similar “theoretical framework” for understanding climate cases, based on analysis of supranational and Australian decisions. Lin uses the categories of “Pressing for Regulation”; “Regulating the Regulatory Response”; and “Articulating Marginalized Concerns,” noting “[w]hat distinguishes these categories is the motivation behind the litigation suit.” See Lin, *supra* note 13, at 36.

<sup>63</sup> Ghaleigh, *supra* note 62, at 45. See also Hilson, *supra* note 15 (discussing “proactive” versus “reactive” litigation where the latter involves criminal proceedings brought against climate change activists involved in alleged unlawful direct action).

<sup>64</sup> See Markell & Ruhl, *supra* note 40. See also Tim Stephens, *International Courts and Climate Change: “Progression,” “Regression” and “Administration,”* in IN THE WILDS OF CLIMATE LAW 53, at 54 (Rosemary Lyster ed., 2010) (discussing the analogous category of “regressive” proceedings in international climate law meaning those “which may be invoked to prevent states, or groups of states, from adopting national or international climate policies that could interfere with other norms such as those relating to trade liberalization”).

<sup>65</sup> Ghaleigh, *supra* note 62, at 44.

<sup>66</sup> Markell & Ruhl, *supra* note 40, at 65–70. See also Peel & Osofsky, *supra* note 15, ch. 7.

<sup>67</sup> Peel & Osofsky, *supra* note 15, at 8.

<sup>68</sup> *Id.* at 9.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> In our own writing we have also adopted these framings in analyzing Global North case law. The above discussion is thus not intended as criticism but is merely designed to show how prevailing definitions and typologies are linked to a particular jurisdictional context.

<sup>72</sup> See the first systematic review of key literature on climate change litigation over the past twenty years by Joana Setzer & Lisa C. Vanhala, *supra* note 19, in which they show that there were only a few articles published on the

high-profile mitigation cases, such as the U.S. Supreme Court decision in *Massachusetts v. EPA*.<sup>73</sup> By contrast, other types of cases—those where the “causal immediacy or significance for climate change” is less obvious—receive minimal coverage. For instance, there is very little scholarship on adaptation cases as opposed to mitigation-focused cases, not least because the former tend to be lower-profile, smaller scale, and their causal connection to climate policy more diffuse.<sup>74</sup>

As Kim Bouwer notes, a preoccupation with high profile mitigation-focused cases against national governments and major emitters may lead to other cases being overlooked.<sup>75</sup> She advocates for a broader understanding of climate change litigation that encompasses under-explored “points of focus.”<sup>76</sup> In her view, these include: “smaller cases at lower levels of governance”; cases that extend beyond issues of emissions abatement; cases pursuing private law avenues; and cases where climate issues are less “visible” and the interface with domestic climate policy happens “inadvertently.”<sup>77</sup> “[I]n order to render the invisible visible,” Bouwer calls for thinking about “litigation ‘in the context of’ climate change, as well as litigation ‘about’ climate change.”<sup>78</sup>

### B. Cases with Climate Change at the Periphery

As we discuss further in Part III below, there are a number of high-profile Global South climate cases, which have received significant global attention, and that fit conventional understandings of climate litigation as concerned with lawsuits where climate change issues are central to the case. The *Carbon Majors Petition* currently being determined by the Philippines’ Commission on Human Rights is a case in point.<sup>79</sup> It involves a quasi-judicial proceeding of the Commission investigating a complaint that fifty-one of the world’s largest corporate emitters—known as “carbon majors”—have caused climate damage through their greenhouse gas emissions, thereby violating the human rights of Filipinos. The Petition has generated considerable media interest and commentary given the novelty of its human rights-based legal approach and its attempt to hold corporations accountable for the climate impacts of their emissions.<sup>80</sup> Notably, the *Carbon Majors Petition*—like the *People’s Climate Case* mentioned above—also involves partnering efforts with Global North lawyers and environmental organizations, which has helped increase its profile.<sup>81</sup> However, the vast majority of

topic of climate change litigation in the early 2000s but there has been a marked increase in scholarship on this topic since then. They argue that one driver for this pattern may be high-profile judgments such as *Massachusetts v. EPA*, *supra* note 16, and the 2015 *Urgenda* decision, *supra* note 17, in the Netherlands.

<sup>73</sup> Fisher, *supra* note 43.

<sup>74</sup> However, see Jacqueline Peel & Hari M. Osofsky, *Sue to Adapt?*, 99 MINN. L. REV. 2177–250 (2015).

<sup>75</sup> Bouwer, *supra* note 40, at 1.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 2.

<sup>79</sup> The Commission concluded its public hearings in December 2018 but, as at the date of writing, had not issued its findings. See further Commission on Human Rights of the Philippines Press Release, CHR Concluded Landmark Inquiry on the Effects of Climate Change to Human Rights; Expects to Set the Precedent in Seeking Climate Justice (Dec. 13, 2018), at <http://chr.gov.ph/chr-concluded-landmark-inquiry-on-the-effects-of-climate-change-to-human-rights-expects-to-set-the-precedent-in-seeking-climate-justice>.

<sup>80</sup> This case is discussed in Part III *infra*.

<sup>81</sup> The petitioners are Greenpeace Southeast Asia, the Philippine Rural Reconstruction Movement, Mother Earth Foundation, the Philippine Movement for Climate Justice, and ten other national organizations. See Greenpeace

climate cases that have been brought, are pending, or are likely to be launched in the Global South are unlikely to have similar global public visibility. Like Bouwer, we therefore believe that there is value in exploring a broader understanding of climate litigation to capture these otherwise “invisible” cases. In particular, we argue that there is a need for concepts of climate litigation that are able to capture lower-profile cases where climate change is more peripheral to arguments in, or the motivation for, the lawsuit.

The importance of extending the analysis of climate case law development to suits where climate change lies at the periphery is borne out by empirical studies that show the prevalence of these cases in the non-U.S. climate jurisprudence. The LSE Grantham Research Institute on Climate Change and the Environment, in partnership with the Sabin Center, has developed a climate litigation database that as of August 2019 lists 311 cases decided in courts and tribunals outside of the United States.<sup>82</sup> In a report on global trends issued in May 2017, researchers at the Grantham Institute found that of the 254 non-U.S. cases surveyed, climate change was “only at the periphery of the argument” in over three-quarters of the cases.<sup>83</sup> The cases surveyed included twenty-seven decisions from eight Global South countries (Brazil, Colombia, Ecuador, India, Nigeria, Pakistan, the Philippines, and South Africa).<sup>84</sup>

Although the Grantham data suggests that a peripheral framing is a major feature of cases in Global North countries outside the United States as well as those in the Global South (since cases from Global South countries made up only 11 percent of the cases analyzed by the Grantham Institute in its report), a closer look at this case law data suggests that this arises for different reasons than those that apply in the Global South. For instance, Australian cases represented seventy-seven (30 percent) of the 254 recorded cases in March 2017, with over 80 percent of these cases classified as “peripheral” on the basis that they address questions of adaptation (e.g., flooding and wildfire risk) rather than mitigation. In the United Kingdom with forty-nine (20 percent) of 254 cases, again over 80 percent are regarded as “peripheral” because they focus, to a large extent, on disputes over the siting of renewable energy installations like wind farms. In the European Union, with forty-two (17 percent) of the 254 cases, the vast majority concern the operation of the EU Emissions Trading Scheme, leading to their classification as peripheral cases. In these jurisdictions, a “peripheral” framing is not the result of a lack of climate laws, poor implementation of climate laws, or a prioritization of other environmental or sustainable development issues as we see in the

Petition, *Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change* (May 6, 2016), available at [https://storage.googleapis.com/planet4-philippines-stateless/2019/05/5a38951a-5a38951a-cc-hr-petition\\_public-version.pdf](https://storage.googleapis.com/planet4-philippines-stateless/2019/05/5a38951a-5a38951a-cc-hr-petition_public-version.pdf). The Sabin Center for Climate Change Law, Our Children’s Trust, the Centre for International Environmental Law and ClientEarth submitted amicus briefs, available at [www.business-humanrights.org/en/amicus-briefs](http://www.business-humanrights.org/en/amicus-briefs). The world’s leading climate science, policy, and legal experts, including Richard Heede, who is the principal investigator of the Carbon Majors Project, appeared as witnesses in the hearings by the Commission on Human Rights of the Philippines. See Greenpeace Press Release, *World’s Top Climate Experts to Testify in Landmark Investigation into Fossil Fuel Companies* (Aug. 28, 2018), at <https://www.greenpeace.org/international/press-release/18188/worlds-top-climate-experts-to-testify-in-landmark-investigation-into-fossil-fuel-companies>.

<sup>82</sup> See Grantham Research Institute on Climate Change and the Environment, *Climate Change Laws of the World*, *supra* note 12. A search was performed on the litigation database for all years and countries, excluding the United States, which is not covered by this database.

<sup>83</sup> Nachmany, Fankhauser, Setzer & Averchenkova, *supra* note 10, at 13.

<sup>84</sup> *Id.*, Appendix 2, at 24.



Global South. Rather, it reflects a tailoring of the case law to the applicable climate law frameworks and climate policy priorities of these jurisdictions.

As an example of climate change “on the edge” of litigation, the Grantham Institute researchers cited the Brazilian case of *Oliveira*. In that case, the Brazilian Superior Court of Justice issued an order prohibiting the use of fire as a harvesting method for sugar cane based on a consideration, among other environmental impacts, of the negative effects of carbon emissions.<sup>85</sup> The Grantham Institute researchers concluded:

. . . the majority of the [non-U.S.] cases classified as climate litigation today are not core climate change cases, but cases that acknowledge climate change as a relevant factor. [But], even if climate change is a peripheral issue, the judiciary is increasingly exposed to climate change arguments in cases where, until recently, the environmental argument would not have been framed in those terms.<sup>86</sup>

In our examination of Global South climate litigation, discussed in Part III below, a significant number of the cases reflect a “peripheral” focus on climate change rather than having the issue at the “core” of the litigation. We hypothesize that this framing is particularly likely in Global South countries for several reasons that are distinctive to those countries, in contrast to countries in the Global North.

First, climate law frameworks, as well as associated avenues for access to justice, may be absent, less well-developed, or poorly implemented in the Global South, meaning that climate cases need to draw on other laws that apply only indirectly to climate change. For example, although Indonesia does not have specific framework climate legislation, several cases that treat climate issues peripherally have arisen there, based on enforcement actions against companies engaged in illegal logging practices.<sup>87</sup>

The reasons underlying a lack of specific climate laws in the Global South are diverse. In some cases, it may reflect a lack of resources. For instance, the Grantham Institute 2017 study, mentioned above—which analyzes trends in global climate legislation alongside those in global climate litigation—highlights important gaps in climate change legislation, particularly for least developed countries (LDCs).<sup>88</sup> The forty-seven LDCs, concentrated in the Global South,<sup>89</sup> “have fewer [climate] laws and policies than the global average (5.5 laws and policies per country, compared with the global average of 7.7), while four LDCs do not have any legislative and executive acts directly addressing climate change (Comoros, Equatorial Guinea, Somalia, and Sudan).”<sup>90</sup>

Alternatively, in some Global South countries where climate policy and legislative frameworks are in place, implementation may be poor, and/or avenues for enforcement lacking.

<sup>85</sup> Public Prosecutor’s Office v. *Oliveira & Others*, (2008) 0215494-3 (Brazil).

<sup>86</sup> Nachmany, Fankhauser, Setzer & Averchenkova, *supra* note 10, at 13.

<sup>87</sup> See, for example, the Ministry of Environment prosecutions against Selatnasik and Simpang, PT Merbau Pelalawan Lestari, PT Bumi Mekar Hijau, PT Jatim Jaya Perkasa, and *MoEF v. PT Waringin Agro Jaya*, discussed in online Appendix, Table 1, *infra*.

<sup>88</sup> Nachmany, Fankhauser, Setzer & Averchenkova, *supra* note 10, at 11–12.

<sup>89</sup> LDCs – 47 countries listing, see UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, at <http://unohrrls.org/about-ldcs>.

<sup>90</sup> Nachmany, Fankhauser, Setzer & Averchenkova, *supra* note 10, at 12. The relative lack of specific climate laws in the Global South may also reflect directions under international climate laws, such as the UNFCCC and Paris Agreement, for developed countries to “take the lead” on global climate action.

This may result in other legal avenues—such as constitutional or human rights—being utilized as the basis for litigation, with climate issues assuming a more subsidiary role. For instance, a case brought by a Filipino NGO, Global Legal Action on Climate Change, is seeking proper enforcement of laws for the construction of rainwater collectors in every village on the basis that this would significantly improve climate resilience in the face of flash flooding events.<sup>91</sup> Petitioners allege that non-compliance with these laws is widespread. The petition builds on the so-called “Writ of *Kalikasan*,” which is a remedy available to Filipino citizens to enforce their constitutional right to a balanced and healthy ecology.<sup>92</sup>

China, on the other hand, presents a different scenario. The absence of a climate change law there represents a strategic and informed choice by the central government to avoid introducing any law that can potentially disrupt economic growth.<sup>93</sup> This situation is changing, as reflected in recent institutional reforms of the central government to include climate change within the portfolio of the new Ministry of Ecology and Environment, whereas it used to be within the purview of the National Development and Reform Commission (NDRC), a high-level political body responsible for economic planning.<sup>94</sup> Nonetheless, there is still relatively little political appetite in China to pass a climate change law, and Chinese analysts expect that any climate litigation that emerges is likely to take a more peripheral route, for example, by focusing on issues of air pollution.<sup>95</sup>

Regardless of the underlying reason, where climate law frameworks or implementation efforts are lacking in the Global South, cases pertinent to climate change issues may need to be framed in different ways that subjugate climate concerns to other issues. Cases might pursue a constitutional or human rights claim focused more broadly on environmental protection, or be brought under non-climate specific environmental, planning, disaster management, or natural resource conservation laws. Consequently, factual or legal arguments about climate change are likely to play a secondary role in these cases.

Second, and relatedly, the lower public policy salience of climate change issues in Global South countries (often compared with more pressing policy concerns around economic

<sup>91</sup> See *Global Legal Action on Climate Change v. The Philippine Government*, filed 2010, pending before the Supreme Court of the Philippines.

<sup>92</sup> Rules of Procedure for Environmental Cases (A.M. No. 09-6-8-SC), Part III Special Civil Actions, Rule 7 Writ of *Kalikasan*.

<sup>93</sup> Tseming Yang, *The Implementation Challenge of Mitigating China's Greenhouse Gas Emissions*, 20 *GEO. INT'L ENVTL. L. REV.* 681–88 (2008) (pointing out that the placement of climate policy within the jurisdiction of the NDRC suggests that “climate change policies are first and foremost seen as economic development policies” and arguing that many of the measures in the National Climate Change Program (2007), such as those promoting energy efficiency and conservation, are taken primarily with a view toward energy security and costs, and only secondarily with a view toward reducing environmental impacts, especially climate change). Moreover economic growth supplies an important source of legitimacy for the Chinese Communist Party's rule. See André Laliberté & Marc Lanteigne, *The Issue of Challenges to the Legitimacy of CCP Rule, in THE CHINESE PARTY-STATE IN THE 21ST CENTURY: ADAPTATION AND REINVENTION OF LEGITIMACY* (André Laliberté & Marc Lanteigne eds., 2007).

<sup>94</sup> David Stanway, *China Shake-Up Gives Climate Change Responsibility to Environment Ministry*, REUTERS (Mar. 13, 2018), at [www.reuters.com/article/china-parliament-environment/china-shake-up-gives-climate-change-responsibility-to-environment-ministry-idUSL3N1QV23P](http://www.reuters.com/article/china-parliament-environment/china-shake-up-gives-climate-change-responsibility-to-environment-ministry-idUSL3N1QV23P); Dimitri De Boer, *Will the New Chinese Ministerial Structure Help the Environment?*, CLIENTEARTH (Mar. 21, 2018), at [www.clientearth.org/will-new-chinese-ministerial-structure-help-environment](http://www.clientearth.org/will-new-chinese-ministerial-structure-help-environment).

<sup>95</sup> Yue Zhao, Shuang Lyu & Zhu Wang, *Prospects for Climate Change Litigation in China*, 8 *TRANSNAT'L ENVTL. L.* 349 (published online May 29, 2019), available at <https://doi.org/10.1017/S2047102519000116>.

development, poverty alleviation, or public health)<sup>96</sup> may lead to climate change matters being packaged with a range of other issues, such as those pertaining to pollution, land-use, forestry, natural resource conservation, disaster risk management, implementation of planning frameworks, or environmental justice and rights claims.<sup>97</sup> Climate change may be added as a subsidiary argument in the litigation without being a focus of the case. This can be seen in the Brazilian *Oliveira* case, mentioned above, where opposition to the use of fire as a harvesting method for sugar cane drew on a range of environmental impacts beyond just those from greenhouse gas emissions.<sup>98</sup> Interestingly, a similar strategy has been employed by some advocacy organizations in Global North countries, such as the United States and Australia, where the political potency of climate change may make courts wary of engaging the “political questions” posed by litigation squarely focused on issues of climate policy.<sup>99</sup>

Third, in many Global South countries, climate change adds a layer of complexity to, or exacerbates, existing environmental challenges, such as dangerously high levels of air pollution in cities, deforestation, and rapid biodiversity loss.<sup>100</sup> Laws that respond to these environmental problems usually already exist, but poor enforcement has meant that these environmental problems have only worsened.<sup>101</sup> Bringing cases within the scope of these laws may require a non-climate framing to satisfy particular statutory requirements applicable to the bringing of a lawsuit. An example is *Pandey’s Case*, which was filed under the Indian National Green Tribunal Act. This legislation empowers the tribunal to hear only civil cases

<sup>96</sup> See Tien Ming Le, Ezra M. Markowitz, Peter D. Howe, Chia-Ying Ko & Anthony A. Leiserowitz, *Predictors of Public Climate Change Awareness and Risk Perception Around the World*, 5 NATURE CLIMATE CHANGE (2015) 1014 (finding that about 40% of adults worldwide have not heard of climate change, and this figure rises to more than 65% in some developing countries like Egypt and Bangladesh).

<sup>97</sup> This is analogous to the co-benefits approach that is widely propounded, particularly in the Global South, where for most policymakers, alleviating poverty, securing energy supplies and reducing air pollution take priority over mitigating climate change. See, e.g., Paul G. Bain, et al., *Co-benefits of Addressing Climate Change Can Motivate Action Around the World*, 6 NATURE CLIMATE CHANGE 154 (2015); Benjamin Spencer et al., *Case Studies in Co-benefits Approaches to Climate Change Mitigation and Adaptation*, 60 J. ENVTL. PLAN. & MGMT. 647–67 (2017); Jethro Pettit, *Climate Justice: A New Social Movement for Atmospheric Rights*, 35 IDS BULL. 102 (2009) (describing how in the Global South “climate change has emerged primarily as a sustainable development issue, whose solutions are seen as inseparable from larger issues of poverty, trade and globalisation”).

<sup>98</sup> *Oliveira*, *supra* note 85.

<sup>99</sup> See Peel, Osofsky & Foerster, *Shaping the “Next Generation” of Climate Change Litigation in Australia*, *supra* note 40.

<sup>100</sup> Hannah Hoag, *Air Quality to Suffer with Global Warming*, NATURE NEWS, SPRINGER NATURE (June 22, 2014), at <https://www.nature.com/news/air-quality-to-suffer-with-global-warming-1.15442>. See also, Barry S. Levy & Jonathan A. Patz, *Climate Change, Human Rights and Social Justice*, 81 ANNALS GLOB. HEALTH 310–22 (2015); Fred Pearce, *Rivers in the Sky: How Deforestation Is Affecting Global Water Cycles*, YALE ENVIRONMENT 360 (July 24, 2018), at <https://e360.yale.edu/features/how-deforestation-affecting-global-water-cycles-climate-change>.

<sup>101</sup> See, for example, the case of Indonesia, where it is widely recognized that the country has a good set of laws in place but enforcement has been poor, leading to worsening environmental problems. There are myriad reasons for poor enforcement including corruption. See *Special Report on Indonesia, A Deep-Rooted Habit, The Difficulty of Battling Graft*, ECONOMIST 12–13 (Sept. 12, 2009); *Ex-Riau Governor Gets 14 Years Over Logging Permit, National Games Corruption Cases*, JAKARTA GLOBE (Mar. 12, 2014). Local bodies struggle for authority in the face of incomplete decentralization processes. See, for discussion, Keith Andrew Bettinger, *Political Contestation, Resource Control and Conservation in an Era of Decentralization at Indonesia’s Kerinci Seblat National Park*, 52 ASIA PAC. VIEWPOINT J. 252–66 (2015). There are also problems of powerful vested interests engaging in unbridled natural resources exploitation. See Paul K. Gellert, *Rival Transnational Networks, Domestic Politics and Indonesian Timber*, 40 J. CONTEMP. ASIA 539–67 (2010).

“where a substantial question relating to the environment . . . is involved and such question arises out of the implementation of the [laws] specified in Schedule 1.”<sup>102</sup> Schedule 1 includes the water and air pollution laws, and the Forest (Conservation) Act 1980. Accordingly, legal and factual arguments about climate change in the plaintiff’s affidavit took a backseat to more squarely “environmental” issues, such as the impacts of deforestation.

Our argument is that Global South cases like *Pandey* and *Oliveira* stand to make an important contribution to climate governance even if—for the reasons outlined above—climate change issues are not central to the litigation. We recognize, as have others seeking to define and classify climate change litigation, that it becomes difficult to distinguish cases as climate-relevant if the issue is not mentioned at all in the pleadings, judgment, campaign materials, or media surrounding a case. All the cases discussed in Part III below as part of the “Global South docket” engage directly or indirectly with climate change in these materials—beyond merely an incidental or passing mention—and are classified as climate change litigation on this basis. Like the authors of the Grantham Institute 2017 study discussed above, we see such climate change references—even if not the dominant issue in the litigation—as an important way for courts to engage with governance of the problem.

### C. *Climate Litigation as Transnational Governance*

On one level, the fact that prevailing understandings of climate litigation, drawn from the Global North experience, are not able to encompass fully emerging climate cases in the Global South may seem immaterial. It might be argued, for instance, that given the different laws and legal systems involved, each case needs to be assessed in its own local context,<sup>103</sup> with different applicable notions of climate litigation being an understandable consequence. On this view, climate litigation is a local (and localized) phenomenon.<sup>104</sup> Indeed, there have been no truly “international” climate cases, and the prospects for such appear slim given the lack of enforcement mechanisms under the Paris Agreement,<sup>105</sup> and the difficulty of applying other international law dispute settlement mechanisms to climate change disputes.<sup>106</sup> Moreover, only a

<sup>102</sup> National Green Tribunal Act, 2010, No.19, Chapter III, Art. 14, Ministry of Law and Justice, THE GAZETTE OF INDIA EXTRAORDINARY (June 2, 2010, India).

<sup>103</sup> Fisher, *supra* note 43, at 239.

<sup>104</sup> For an example, arguing that it is “only in light of legal culture that climate change jurisprudence in the European Union can be explained,” see Sanja Bogojević, *EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture*, 35 LAW AND POL’Y 184 (2013).

<sup>105</sup> Article 15 of the Paris Agreement provides only for a “facilitative” compliance mechanism that is to be “non-adversarial and non-punitive.” Paris Agreement, *supra* note 1, Art. 15(2).

<sup>106</sup> The efforts by Tuvalu and Palau to bring a contentious case or seek an Advisory Opinion from the International Court of Justice come closest to an international climate case. For a discussion of the prospects of an international case of this kind, see Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. ENVTL. L. 19 (2016). There have also been cases or claims before other international bodies that indirectly raise climate-relevant issues, for example, disputes concerning renewable energy subsidies before World Trade Organization and investment arbitral tribunals. For discussion, see Joanna I. Lewis, *The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development*, 14 GLOB. ENVTL. POL. J. 10 (2014); Annette Magnusson, *Climate Disputes and Sustainable Development in the Energy Sector: Bridging the Enforceability Gap*, in INTERNATIONAL ARBITRATION IN THE ENERGY SECTOR (Maxi Scherer ed., 2018). There have also been cases concerning the European Union Emissions Trading Scheme (EU ETS) decided by the European Court of Justice. For discussion, see Bogojević, *supra* note 104. Other international law dispute settlement mechanisms and their application to climate disputes have been explored in the scholarship (see particularly, Burns & Osofsky, *supra* note 13) but are subject to jurisdictional and other limits.

handful of climate change suits qualify as “transnational” claims in the classic sense of involving foreign plaintiffs,<sup>107</sup> or defendants located outside the court’s jurisdiction.<sup>108</sup>

However, from the outset, both practitioners and scholars of climate litigation have cast the jurisprudence in an alternative, broader light. It is common for climate litigation to be described as “transnational” in nature or as part of a “global” climate justice movement,<sup>109</sup> even where cases involve only domestic litigants and decisions of domestic courts.<sup>110</sup> Many advocates and practitioners see their climate litigation work as contributing to the global effort to address climate change,<sup>111</sup> and their cases are often accompanied by campaigns that seek to appeal to a wider national,<sup>112</sup> or international, audience.<sup>113</sup> Often these accompanying campaigns are also seen as a way of amplifying the “indirect effects” of the litigation, whether by raising public awareness, mobilizing public sentiment, keeping the climate issue on the political agenda, creating leverage to supplement other strategies, or forcing the opposition to settle.<sup>114</sup>

Scholars of climate litigation equally have tended to discuss climate case law in terms that stress its broader impacts and cross-cutting role in multilevel climate governance.<sup>115</sup> As a pioneer of this genre of climate litigation scholarship, Hari M. Osofsky has argued that “the problem of climate change and adjudication over it are simultaneously multiscale [i.e., ‘connected to more than one scale, whether spatial or temporal’] and scale-dependent [i.e. ‘tied to a particular scale’].”<sup>116</sup> Osofsky articulates three key reasons for this view: (1) climate change is a “multiscale regulatory problem” that “cannot be solved through

<sup>107</sup> See, for example, the case of *Lliuya v. RWE AG*, discussed in Will Frank, Christoph Bals & Julia Grimm, *The Case of Huaraz: First Climate Lawsuit on Loss and Damage Against an Energy Company Before German Courts, in LOSS AND DAMAGE FROM CLIMATE CHANGE: CONCEPTS, METHODS AND POLICY OPTIONS*, ch. 20, 475–83 (Reinhard Mechler, Laurens M. Bouwer, Thomas Schinko, Swenja Surminski & JoAnne Linnerooth-Bayer eds., 2019); and a Micronesian claim against a Czech power station, discussed in Andrew Burke, *Federated States of Micronesia v Czech Republic: Greenhouse Emissions as Transboundary Pollution*, 14 ASIA PAC. J. ENVTL. L. 203 (2011).

<sup>108</sup> The Carbon Majors Petition, for example, involves extraterritorial application of human rights law. See further discussion in Part III *infra*. On “transnational” climate damage claims, see generally Michael Byers, Kelsey Franks & Andrew Gage, *The Internationalization of Climate Damages Litigation*, 7 WASH. J. ENVTL. L. & POL’Y 264 (2017) and discussion of the limited classically transnational claims in Maria L. Banda & Scott Fulton, *Litigating Climate Change in National Courts: Recent Trends and Developments in Global Climate Law*, 47 ENVTL. L. REP. 101 (2017).

<sup>109</sup> Osofsky, *The Continuing Importance of Climate Change Litigation*, *supra* note 13; Lin, *supra* note 13.

<sup>110</sup> A good example is *Urgenda v. The Netherlands*, where it was clear that the non-governmental organization involved wanted to have a precedent that could serve as a transferrable “template” for similar cases elsewhere. Notably, shortly after the Hague District Court issued its decision, a similar suit was filed in Belgium. It is even arguable that the Hague court understood the transnational implications of its decision. An English language translation of the judgement was made available to the public almost as soon as the original Dutch judgment was issued.

<sup>111</sup> For example, UK NGO, ClientEarth, issued letters to fourteen of the UK’s biggest pension funds, including British Airways Pensions and the BP Pension Fund, urging them to consider how they manage and report on climate risks as part of an effort to mobilize global institutional investors to address climate change. See Jennifer Thompson, *Shell Pension Fund Challenged to Disclose Response to Climate Risk*, FIN. TIMES (LONDON), at 2 (Oct. 8, 2018).

<sup>112</sup> An example would be the Sierra Club’s Beyond Coal campaign, at <https://content.sierraclub.org/coal>.

<sup>113</sup> An example would be the *People’s Climate Case*, *supra* note 30.

<sup>114</sup> See Lin, *supra* note 13, at 38. On the indirect impacts of climate change litigation, see also Peel and Osofsky, *supra* note 15, ch. 2.

<sup>115</sup> Lin, *supra* note 13. See also Peel, Osofsky & Foerster *supra* note 40.

<sup>116</sup> Osofsky, *The Continuing Importance of Climate Change Litigation*, *supra* note 13, at 11.



regulation at a particular moment in time at a fixed level of government”;<sup>117</sup> (2) litigation—although involving law and institutions “structured at specific levels of governance”—allows fluid “contestation across scales” where “interested parties attempt to rescale regulatory mechanisms related to greenhouse gas emissions and impacts”;<sup>118</sup> and (3) cases have important “diagonal” qualities that facilitate “transnational regulatory dialogue through helping courts and policymakers grapple with the complex intersection of law, scale, scientific uncertainty, and climate change.”<sup>119</sup>

This view of the simultaneous local and global significance of climate litigation is reinforced by the growing literature on “transnational environmental law” and “transnational climate governance.”<sup>120</sup> As Gregory Shaffer and Daniel Bodansky explain, “transnational environmental law encompasses all environmental law norms that apply to transboundary activities or that have effects in more than one jurisdiction.”<sup>121</sup> This approach collapses traditional distinctions between the national and the international, the public and the private, and state and non-state actors.<sup>122</sup> Jolene Lin summarizes the project of transnational environmental law as seeking “to ‘move beyond the state’ and provide a theoretical framework for a more multi-actor, multi-level and normatively plural system of environmental law and governance.”<sup>123</sup> Conceived as a methodology, ideas of transnational law can be “used to assess empirically how transnational-induced legal change occurs and what type of effects it has,” thereby providing “an analytic means for assessing transnationally induced change in a globalized world.”<sup>124</sup>

Climate change has been a “prime arena” for the development of transnational environmental law because it involves “global systems with complex local linkages.”<sup>125</sup> Greater attention to actions taken at “lower levels of governance” is also linked to the slow pace of international climate legal development, and its failures to arrest the problem of climate change.<sup>126</sup> Although international treaties addressing climate change have now been in

<sup>117</sup> *Id.* at 13.

<sup>118</sup> *Id.* at 15.

<sup>119</sup> *Id.* at 27.

<sup>120</sup> See generally Dan Bodansky, *Climate Change: Transnational Legal Order or Disorder?*, in *TRANSNATIONAL LEGAL ORDERS* 287 (Terence C. Halliday & Gregory Shaffer eds., 2015); Veerle Heyvaert, *The Transnationalization of Law: Rethinking Law Through Transnational Environmental Regulation*, 6 *TRANSNAT'L ENVTL. L.* 205 (2017); Louis Kotzé and Caiphaz Soyapi, *Transnational Environmental Law: The Birth of a Contemporary Analytical Perspective*, in *RESEARCH HANDBOOK ON FUNDAMENTAL CONCEPTS OF ENVIRONMENTAL LAW* 82 (Douglas E. Fisher ed., 2016).

<sup>121</sup> Gregory C. Shaffer & Dan Bodansky, *Transnationalism, Unilateralism and International Law*, 1 *TRANSNAT'L ENVTL. L.* 31, 32 (2012).

<sup>122</sup> Heyvaert, *supra* note 120, at 211–12.

<sup>123</sup> Jolene Lin, *The Emergence of Transnational Environmental Law in the Anthropocene*, in *ENVIRONMENTAL LAW AND GOVERNANCE FOR THE ANTHROPOCENE* 329, 331 (Louis J. Kotzé ed., 2017).

<sup>124</sup> Gregory C. Shaffer, *Transnational Legal Ordering and State Change*, in *TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE* 7 (Gregory C. Shaffer ed., 2012).

<sup>125</sup> Thijs Etty et al., *Transnational Climate Law*, 7 *TRANSNAT'L ENVTL. L.* 191 (2018).

<sup>126</sup> Thijs Etty, et al., *Transnational Dimensions of Climate Governance*, 1 *TRANSNAT'L ENVTL. L.* 235, 236 (2012). For example, the predecessor instrument to the Paris Agreement—the 1997 Kyoto Protocol to the UNFCCC—is often viewed as a failure, at least in terms of its capacity to bring about needed reductions in global greenhouse gas emissions. See Amanda M. Rosen, *The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change*, 43 *POL. & POL'Y* 30 (2015); DAVID G. VICTOR, *THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING* (2004). Others attribute problems with the Kyoto Protocol to the failure of the United States to ratify the treaty and point to high levels of compliance with its

place for more than twenty years, the gap between levels of greenhouse gas emissions that would be reached if current state emissions reduction pledges are met, and the levels scientists advise are necessary to avoid catastrophic climate change, is frighteningly large.<sup>127</sup> This has led to increasing reliance on “bottom up” action—facilitated by NGOs, by subnational actors like cities, and by corporations—to meet the goals of international climate law.<sup>128</sup>

The inherently multilevel nature of climate governance was explicitly recognized in the Paris Agreement. On the one hand, the treaty sets collective emissions reduction goals for all state parties. This includes the “long-term temperature goal”<sup>129</sup> of keeping global temperature increases “to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.”<sup>130</sup> It also encompasses parties’ collective “aim” to:

reach global peaking of greenhouse gas emissions as soon as possible recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.<sup>131</sup>

At the same time, the Paris Agreement acknowledges that collective state action alone will be insufficient to address the global climate change challenge. The preamble to the Agreement thus calls attention to “the importance of the engagements of all levels of government and various actors, in accordance with respective national legislations of Parties, in addressing climate change.”<sup>132</sup>

Indeed, the model of implementation adopted in the Paris Agreement is arguably one that depends for its effectiveness on domestic efforts of non-state and subnational actors to hold each state party accountable for its self-differentiated NDC to the global climate change response, which it has pledged “it intends to achieve.”<sup>133</sup> The Paris Agreement contains a “transparency framework,”<sup>134</sup> a collective “global stocktake” requirement,<sup>135</sup> and a

provisions by parties, and its measurable impact in reducing emissions. Igor Shishlov, Romain Morel & Valentin Bellassen, *Compliance of the Parties to the Kyoto Protocol in the First Commitment Period*, 16 CLIMATE POL’Y 768 (2016); Nicole Grunewald & Inmaculada Martinez-Zarzoso, *Did the Kyoto Protocol Fail? An Evaluation of the Effect of the Kyoto Protocol on CO<sub>2</sub> Emissions*, 21 ENV’T & DEV. ECON. 1 (2015).

<sup>127</sup> See UN ENVIRONMENT, EMISSIONS GAP REPORT 2018, UNITED NATIONS ENVIRONMENT PROGRAMME 5 (Nov. 2018) (finding that pathways reflecting parties’ current emission reduction commitments put the world on track for around 3°C warming by 2100 with warming continuing thereafter, and that if the ambition of these commitments is not increased significantly before 2030, exceeding the 1.5°C goal can no longer be avoided). See also IPCC, 2018: *Summary for Policymakers*, in SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018). According to the IPCC, global warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate. *Id.* at 6.

<sup>128</sup> Thomas Hale, “All Hands on Deck”: *The Paris Agreement and Nonstate Climate Action*, 16 GLOB. ENVTL. POL. 13 (2016).

<sup>129</sup> Paris Agreement, *supra* note 1, Art. 4(1).

<sup>130</sup> *Id.* Art. 2(1)(a).

<sup>131</sup> *Id.* Art. 4(1).

<sup>132</sup> *Id.*, pmbl., Rec. 15.

<sup>133</sup> *Id.* Art. 4(2). See also Rajamani, *supra* note 14, at 497.

<sup>134</sup> Paris Agreement, *supra* note 1, Art. 13.

<sup>135</sup> *Id.* Art. 14.

facilitative compliance mechanism,<sup>136</sup> but no mandate to review the adequacy of a party's NDC, or whether subsequent NDCs represent a progression from earlier ones.<sup>137</sup> As authors such as Robert Falkner highlight, the “logic” of the Paris Agreement is one of “domestically driven climate action,” recognizing and formalizing the existing trend of multilevel governance in this field.<sup>138</sup> In this system, “naming and shaming by civil society” plays an important role, alongside the Paris Agreement's transparency requirements, in holding parties to account for the ambition of NDCs and their domestic implementation.<sup>139</sup> These civil society “naming and shaming” activities may take the form of protests, environmental campaigns or media communications, but can also be effected through legal action in the courts.<sup>140</sup> As Lord Carnwath JSC has noted:

National legislatures bear the primary responsibility to give legal effect to the commitments undertaken by states under the Paris agreement. However, the courts will also have an important role in holding their governments to account, and, so far as possible within the constraints of their individual legal systems, in ensuring that those commitments are given practical and enforceable effect.<sup>141</sup>

In this context, climate litigation becomes “part of the transnational regulatory dialogue over climate change”<sup>142</sup> that helps shape multilevel climate governance through the case law's broader effects on governmental regulatory decision making, corporate behavior, and public understanding of the problem of climate change.<sup>143</sup>

Recognition of the role that litigation may play as an instrument of transnational governance is not to suggest that it supplies an ideal or comprehensive governance tool vis-à-vis other sources of regulation, such as treaty instruments, domestic legislation, and other forms of regulation. The capacity of courts to contribute to transnational climate governance is subject to various constraints, including jurisdictional limits, restrictions on access to justice, a perception that judges should not unduly interfere in the policy realm, and the localized, fact-specific focus of their decisions that may restrict their broader impact. Consequently, litigation plays mostly a supplementary and gap-filling role in climate regulation, but it remains a key avenue for civil society to seek progress on climate change where

<sup>136</sup> Paris Agreement, *supra* note 1, Art. 15. Article 15(2) provides that the mechanism “shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive.”

<sup>137</sup> Lavanya Rajamani & Jutta Brunnée, *The Legality of Downgrading Nationally Determined Contributions Under the Paris Agreement: Lessons from the US Disengagement*, 29 J. ENVTL. L. 537, 549 (2017).

<sup>138</sup> Robert Falkner, *The Paris Agreement and the New Logic of International Climate Politics*, 92 INT'L AFF. 1107, 1118 (2016). See also Robert O. Keohane & Michael Oppenheimer, *Paris: Beyond the Climate Dead End Through Pledge and Review?* 4 POL. & GOVERNANCE 142, 142–43 (2016) (arguing “the Paris Agreement merely creates an opening for effective action on climate change. Political action by organized groups, domestic and transnational, will be essential to make Paris work.”). Hale, *supra* note 128, at 12 (arguing that there has been a shift from a “regulatory” model of binding, negotiated emissions targets to a “catalytic and facilitative” model that seeks to create conditions under which actors progressively reduce their emissions through coordinated policy shifts”).

<sup>139</sup> Falkner, *supra* note 138, at 1122.

<sup>140</sup> *Id.*

<sup>141</sup> Lord Carnwath, *Climate Change Adjudication After Paris: A Reflection*, 28 J. ENVTL. L. 5, 9 (2016).

<sup>142</sup> Osofsky, *The Continuing Importance of Climate Change Litigation*, *supra* note 13, at 27.

<sup>143</sup> *Id.* at 5.

governments and businesses are perceived as not taking sufficiently strong action to address the problem.<sup>144</sup>

A “transnational” understanding of the nature, significance, and effects of climate litigation is incomplete if it fails to encompass the Global South experience.<sup>145</sup> Arguably the broader justice aims of climate litigation—to provide redress to victims for climate harms—can only be realized as part of a truly global effort.<sup>146</sup> In addition, broadening our understanding of transnational climate litigation to include the Global South contribution offers a number of benefits for study and practice in this field. A “holistic” study of climate litigation, as Markell and Ruhl noted in their empirical analysis of the U.S. climate case law, can provide insights, “not only for how climate change policy is likely to evolve, and for who is likely to shape it, but more generally for the role of the courts in public policy governance.”<sup>147</sup> As the survey of Global South climate litigation in the next Part demonstrates, courts’ role in climate legal and policy development is not limited to the Global North. Indeed, in some cases, Global South judges have been highly creative in crafting legal remedies for climate inaction. This may provide a model for judiciaries both in the South and the North as domestic constituencies seek to play a role in holding governments and other actors to account for the implementation of international climate commitments.

A greater focus on Global South cases also opens up new avenues for advocates and their philanthropic funders to explore opportunities for seeding climate litigation in new jurisdictions, which may offer enhanced possibilities for achieving policy impact, including on a regional or global scale.<sup>148</sup> The transnational climate advocacy networks developed as a result can enhance flows of information and resources in order to mount more effective cases. The injection of new ideas, strategies, and linkages that comes with broadening these networks may also help to revitalize climate litigation efforts, even in jurisdictions of the Global North with a well-established climate jurisprudence.

### III. CLIMATE LITIGATION IN THE GLOBAL SOUTH

Apart from a few high-profile cases—such as the *Carbon Majors Petition* in the Philippines, the *Leghari* case in Pakistan, and, more recently the *Colombian Youths* case, in which a group of twenty-five youth successfully challenged the adequacy of the government’s actions to

<sup>144</sup> *Id.* at 6.

<sup>145</sup> Other scholars have echoed this call for a focus in climate litigation analysis and scholarship on developments in a greater diversity of jurisdictions. See Joana Setzer & Mook Bangalore, *Regulating Climate Change in the Courts*, in *TRENDS IN CLIMATE CHANGE LEGISLATION* 175 (Alina Averchenkova, Sam Fankhauser & Michal Nachmany eds., 2017); Lisa Vanhala, *The Comparative Politics of Courts and Climate Change*, 22 *ENVTL. POL.* 447 (2013); Meredith Wilensky, *Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation*, 26 *DUKE ENVTL. L. & POL’Y FOR.* 131 (2015).

<sup>146</sup> See International Bar Association, *Climate Change Justice and Human Rights Task Force Report: Achieving Justice and Human Rights in an Era of Climate Disruption* (July 11, 2014), at <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx> (stressing “the need for coordinated action—above and beyond the UNFCCC—to address the steadily growing threat of climate change” given the problem’s magnitude, equity aspects and intergenerational consequences: *id.* at 45).

<sup>147</sup> Markell & Ruhl, *supra* note 40, at 19.

<sup>148</sup> For example, the Children’s Investment Fund Foundation in the UK has funded a grant to ClientEarth for a program of strategic climate litigation in Europe and efforts to improve environmental governance and public interest environmental litigation in China. See <https://ciff.org/grant-portfolio/clientearth-phase-ii>.

reduce deforestation,<sup>149</sup> climate litigation in the Global South has taken place largely below the radar. To most observers, it would appear that there are scant developments worth noting about climate litigation in these parts of the world. However, one of the key arguments we seek to advance in this Article is that an adjustment of the “lens” through which we view climate litigation helps reveal notable case law developments in the Global South. Further, an understanding of the characteristics of climate litigation in the Global South leads to a richer, more nuanced, and complex understanding of transnational climate litigation and its contribution toward global climate governance.

In order to develop an understanding of climate litigation in the Global South and its contribution to transnational climate governance, Section A below provides a comprehensive examination of cases in the “Global South docket.” In total, we analyze thirty-four cases of which over half are in Asia (eighteen cases), six are in Africa, and ten in Latin America.<sup>150</sup>

Part of the difficulty of analyzing Global South climate case law lies in the fact that not all cases are included in existing “global” databases. In selecting cases for analysis, our first step was to review the cases that are presently included in the two leading climate change case law databases, the Sabin Center for Climate Change Law’s Non-US Climate Change Litigation database,<sup>151</sup> and the LSE Climate Change Laws of the World database.<sup>152</sup> This review identified twenty-one cases. As previously mentioned, we included cases where climate change is “at the periphery” of the argument or decision, but excluded cases where climate change (and related) issues are mentioned incidentally but are not otherwise considered in a meaningful way in the judgments.<sup>153</sup> This involved a systematic review of cases recorded in each Global South country category in both databases, including analysis of all reported judgments filed within these country categories to decide if they fell within the “core” or “peripheral” classifications, or ought to be excluded. This case law data was supplemented by the use of other resources to identify cases that are not recorded in the Sabin Center and LSE databases for a variety of reasons, including gaps in the reporting of cases from non-English-speaking jurisdictions. These additional resources included newspaper reports, social media, conferences,

<sup>149</sup> Andrea Lozano Barragán et al. v. Presidencia de la República et al., Sentencia de la Corte Suprema de Justicia del 5 de abril del 2018, MP Luis Armando Tolosa Villabona, STC4360-2018, Radicación No 11001-22-03-000-2018-00319-01 (Colom.). For discussion of the case, see Paola Andrea Acosta Alvarado & Daniel Rivas-Ramírez, *A Milestone in Environmental and Future Generations’ Rights Protection: Recent Legal Developments Before the Colombian Supreme Court*, 30 J. ENVTL. L. 519 (2018).

<sup>150</sup> Our analysis of Africa encompassed the Middle East and our analysis of Latin America encompassed the Caribbean, but no cases were found in either region.

<sup>151</sup> Sabin Center for Climate Change Law, *Non-US Climate Change Litigation Database*, *supra* note 11.

<sup>152</sup> *Climate Change Laws of the World Database*, *supra* note 12.

<sup>153</sup> For example, our case law review identified several Global South cases about projects with potential environmental impacts, such as roads or large infrastructure developments, that might have provided a forum for consideration of climate change impacts associated with transportation emissions or the removal of vegetation, but these matters were not raised or considered in any meaningful way in the judgments. *See, e.g.*, Lahore Bachao Tehrik v. Canal Road Project, Government of Punjab, Lahore – SMC No. 25/2009 [2011] PKSC 34 (Sept. 15, 2011) (Pak.) (involving widening of Canal Road and removal of the surrounding green belt areas); Niwat et al v. Electricity Generation Authority of Thailand et al. (Xayaburi Dam case), Decision of the Thai Supreme Administrative Court (Dec. 25, 2015) (Thai.), unofficial translation available at <https://www.business-humanrights.org/sites/default/files/documents/CourtDecisionXayaburi25%2012%202015ENG.pdf> (involving a major dam project on the Mekong River for electricity production). We have excluded these “incidental” cases in our analysis, although recognizing that petitioners or judges in similar types of cases in the future may begin to engage with climate change issues.



and our own networks.<sup>154</sup> A further thirteen cases were identified by these means, giving a total of thirty-four cases in the Global South docket.

The selected cases were coded for the following variables: (1) the identity of the plaintiffs (e.g., NGOs, local governments, individuals) and the defendants (e.g., governments, private corporations); (2) whether climate change was an issue at the core or at the periphery of the lawsuit; (3) the nature of the legal avenue pursued in the claim (e.g., whether environmental impact assessment was argued as the basis of the litigation; whether the public trust doctrine was invoked; or whether rights-based arguments were made by the parties); (4) whether the court or the parties mentioned or relied on the Paris Agreement or implementing legislation in their decision and submissions respectively; and (5) whether local and/or foreign NGOs were involved.

Section B presents our findings based on the data collection and analysis carried out in the preceding section. We highlight the key trends that emerge from our analysis. These include the more pronounced use of rights-based arguments in cases in the Global South compared to the Global North, and the significant proportion of cases in which climate change is raised as an issue at the periphery rather than at the core of the litigation.

#### *A. The Global South Docket*

A comprehensive overview, summarizing cases which are decided, pending, decision or emerging (i.e., filed but court or tribunal hearings are yet to take place) in Global South jurisdictions, is provided in an online Appendix to this Article in Table 1.<sup>155</sup> A further table in this Appendix (Table 2) provides information on cases that have been decided, are pending decision, or are emerging in Global North jurisdictions that involve Global South plaintiffs. These cases were not included in the Global South docket recorded in Table 1 as the fact that they are being filed and decided in courts in the Global North means they are not true Global South cases. In particular, the framing of arguments and approach taken in these cases share more in common with Global North climate jurisprudence than cases in the Global South docket.

However, Table 2 provides a summary of these cases because they indicate a growing interest in bringing Global South plaintiffs and their stories into Global North cases. This can be the basis for creating truly transnational coalitions of actors seeking accountability from Global North governments and corporations for their failure to reduce greenhouse gas emissions and decarbonize their economic activities. The inclusion of Global South plaintiffs supports the other plaintiffs' arguments that the failure to address climate change has far-reaching adverse consequences for vulnerable populations that make a negligible contribution toward causing climate change. This is a variation of the dominant narrative in many Global North cases, which has tended to frame climate change impacts in terms of statistics and causative probabilities, rather than accounts of human suffering.<sup>156</sup>

<sup>154</sup> An important resource, amongst others, was the APCEL-Yale Law School Climate Change Litigation Scholarship Workshop, June 7–8, 2018, held at the National University of Singapore. See NUS Law School website, at [https://law.nus.edu.sg/about\\_us/news/2018/ClimateChange.html](https://law.nus.edu.sg/about_us/news/2018/ClimateChange.html).

<sup>155</sup> Reference to online Cases Appendix (to view supplementary material for this article, please visit <https://doi.org/10.1017/ajil.2019.48>).

<sup>156</sup> These framings seem to be a genuine response to the often-superior climate justice claims advanced by those in the Global South, a perspective that is also endorsed by Global South scholars. See, e.g., Carmen G. Gonzalez &

Region	Number of Cases	Number of Cases with Climate Change “at the Periphery”	Percentage of “Peripheral” Cases
Asia	18	11	61%
Africa	6	2	33%
Latin America	10	7	70%
Pacific Islands	0	0	0%
<b>TOTAL</b>	<b>34</b>	<b>20</b>	<b>59%</b>

FIGURE 1. Cases Where Climate Change Is at the Periphery

## B. Key Findings

The following sections present our analysis of the Global South docket based on factors such as: (1) whether cases featured climate change issues at the core or periphery; (2) the basis of the legal argument in the claim, for example, environmental impact assessment law, rights-based claims, enforcement of Paris Agreement commitments or a country’s NDC, or the public trust doctrine; and (3) whether the case involved partnering with Global North or Global South NGOs.

### 1. Core or Periphery?

Fifty-nine percent of the cases in the Global South docket feature climate change at the periphery rather than at the core of the case (see [Figure 1](#)).<sup>157</sup> As discussed in Part II.B above, a case with climate change at its “core” is one where arguments raising issues of climate law or climate science are central to the pleadings or judgment. By contrast, “peripheral” climate cases are ones where climate issues are subsidiary to other arguments, or one of many arguments or issues raised in a dispute. Another way of putting this is that “core” climate cases engage directly with climate change issues whereas “peripheral” cases do so indirectly. However, where climate change is mentioned only incidentally or in passing, without any direct or indirect engagement in the plaintiffs’ arguments, case preparatory materials or the decision of the court, these cases make no meaningful contribution to advancing a specific climate jurisprudence and hence have been excluded.

In Asia, Indonesia has the highest number of climate cases (eight cases). It is notable that six of the eight cases are enforcement actions brought by the Ministry of Environment against companies in the extractive sector (mining, oil palm, and timber logging) for violations of natural resource management laws. Climate change is at the periphery, rather than at the

Sumudu Atapattu, *International Environmental Law, Environmental Justice, and the Global South*, 26 *TRANSNAT’L L. & CONTEMP. PROB.* 229 (2017); Christopher Nyinevi, *Universal Civil Jurisdiction: An Option for Global Justice in Climate Change Litigation*, 8 *J. POL. & L.* 135 (2015). Nonetheless, environmental advocates located in the Global South may equally be motivated by emissions reduction goals as by climate justice claims as Christopher Todd Beer has shown in an empirical study of goals and policy preferences on climate issues among Kenyan environmental NGOs. See Christopher Todd Beer, *Climate Justice, the Global South, and Policy Preferences of Kenyan Environmental NGOs*, 8 *GLOB. SOUTH* 84 (2014).

<sup>157</sup> Of the additional thirteen cases found in our survey that are not included in the global databases maintained by the Sabin Center and LSE Grantham Institute, twelve of these feature climate change “at the periphery” of the case.

core, of these enforcement actions. However, even though climate change was not the central issue in these cases, they all feature the Ministry of Environment—in seeking compensation and remediation action from the defendant companies—asking for the inclusion of the costs of releasing carbon into the atmosphere and the loss of “carbon sinks” in the case of areas where mangrove ecological systems had been destroyed to reclaim land for development. By contrast, the two cases from Pakistan feature climate change at their core. In both *Leghari* and *Ali*, the plaintiffs were individuals bringing legal action against the government to hold it accountable for its failure to put climate change policies into action. Both cases relied on rights-based arguments, i.e., that the government’s inaction on climate change violated the plaintiffs’ constitutional rights to life and to a healthy environment.

In Latin America, Brazil has the highest number of climate cases (five cases). Similar to the situation in Indonesia, it is notable that the majority of the Brazilian cases (four out of five) are enforcement actions brought by the government against companies for violations of natural resource management laws. These cases thus feature climate change at the periphery, rather than at their core. In some Brazilian cases—for instance, *Public Prosecutor’s Office v. H Carlos Scheider S/A Comercio e Industria*—the climate change impacts of the prohibited action (in this case, the draining and clearing of a mangrove forest to build a landfill and other structures without the requisite permits and authorizations) were one of several considerations behind the court’s decision to rule in favor of the prosecutor.

Africa has the highest number of “core” climate change cases in the Global South docket. Three of the five African cases are from South Africa, and the most recent one is from Kenya. The central argument in the South African cases was that the environmental impact assessment for the project in question was flawed because of the failure to take climate change impacts and greenhouse gas emissions into account (whereas the Kenyan case raised climate change as one of a number of grounds of invalidity). Given that the line of argument pursued in the South African cases places climate change at the center of the claim, a higher proportion of “core” cases will emerge in the Global South if this avenue of climate litigation develops further (following the pattern of development in prominent Global North jurisdictions such as the United States and Australia).<sup>158</sup>

## 2. *Environmental Impact Assessment*

Six out of the thirty-four cases in the Global South docket referred to an Environmental Impact Assessment (EIA) requirement or used this requirement as one of the grounds of action. Only one out of eighteen cases in Asia relied on an EIA requirement (the *Bali Power Plant Case*). In contrast, five out of six of the cases in Africa relied on such a requirement.

*Jonah Gbemre v. Nigeria and Shell* was the first African case in which the plaintiff challenged the government’s failure properly to implement the EIA law. This case, decided in 2005, is seen as a “periphery” case because climate change did not feature in the pleadings or the

<sup>158</sup> PEEL & OSOFSKY, *supra* note 15, at 104–06, for concise discussion on how mitigation-related litigation has played a key role in mainstreaming climate change considerations in environment assessment procedures. Equally, though, as the Kenyan *Save Lamu* case illustrates, EIA claims can feature climate change in a more peripheral role if other arguments, e.g. about the broader environmental impacts of a project and sustainable development concerns, take center stage.

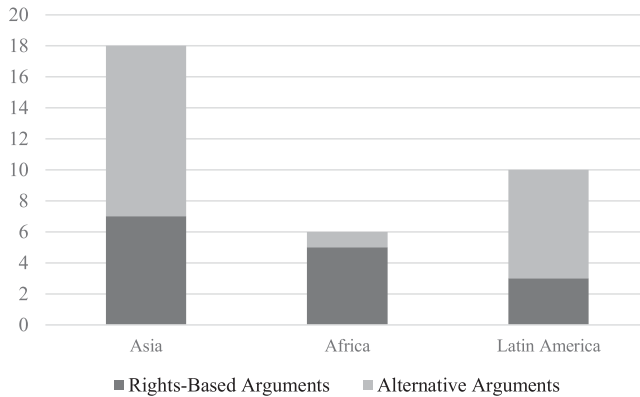


FIGURE 2. Advancing Right-Based Arguments

court's decision, but the abatement of gas flaring has clear benefits from a climate mitigation perspective. In 2017, the NGO Earthlife brought a case in South Africa challenging the validity of the EIA approval for the proposed development of a coal-fired power plant on the basis that the EIA was flawed because it did not include a climate change assessment. The court ruled in favor of Earthlife and this success inspired the subsequent filing of the other EIA-related cases (e.g., *Khanyisa Project* and *KiPower Project*). In the *Save Lamu* case, a Kenyan NGO and members of the local Lamu community worked with international NGOs to challenge the EIA license for the construction of the first coal-fired power plant in East Africa. The Kenyan National Environmental Tribunal ruled that the EIA was invalid because, inter alia, there was failure to consider climate change impacts and the Climate Change Act 2016.

The African EIA climate cases—especially if their results are amplified by South-South partnering in subsequent cases—signal a potential growth area for future Global South climate litigation. If this trend takes off, it would mirror the development of jurisprudence in climate litigation “hotspots” like the United States and Australia.

### 3. Rights-Based Litigation

Overall, the Global South has seen a substantial number of rights-based cases (see Figure 2), making up 44 percent of the Global South docket. By contrast, in the United States—the Global North country with the highest number of climate change cases overall—constitutional arguments have been raised in just sixty-two of the 1,146 recorded claims (5 percent), and only four of the cases involve claims of violation of rights protections as a consequence of climate change.<sup>159</sup> Rights-based litigation is more prevalent in Global North jurisdictions outside the United States, and particularly in Europe where broad rights protections apply under the

<sup>159</sup> Sabin Center U.S. Climate Change Case Chart, *supra* note 11. This count is by the number of different legal claims advanced rather than individual cases; hence, a case may be included under more than one category in the database as it raises different arguments (e.g., public trust claims, constitutional claims, etc.). The most notable of the U.S. rights-based cases is the *Juliana* case, *supra* note 18, which is the first U.S. case to argue a violation of constitutional rights protections on the basis of the federal government's failure to implement adequate climate policies. Other types of constitutional claims advanced in the case law concern the Dormant Commerce Clause, First and Fifth amendment rights, and the Fourteenth Amendment.

European Convention on Human Rights.<sup>160</sup> There are also some examples of climate-related petitions being made to regional human rights bodies, such as the Inter-American Commission and Court on Human Rights.<sup>161</sup> Nonetheless, in “northern” jurisdictions such as Australia, New Zealand, the United Kingdom, and the European Union that account for the bulk (more than 70 percent) of non-U.S. climate litigation, most cases have an “administrative” rationale, challenging particular projects or activities.<sup>162</sup>

The picture that emerges from the Global South docket is quite different. Rights-based arguments were advanced in five of the six cases that have been filed or adjudicated in Africa (one in Nigeria, three in South Africa, and one in Uganda). In South Africa, the courts are required (by Section 39(2) of the South African Constitution) to promote the purpose and spirit of the Bill of Rights when interpreting statutory legislation. The Bill of Rights includes the right to a healthy environment, which was taken into consideration when determining if the EIA ought to include climate change assessment in the *Earthlife* case.<sup>163</sup>

In Asia, both Pakistan and India have a rich tradition of public interest litigation that has generated a progressive jurisprudence protecting the rights of vulnerable social groups as well as the environment.<sup>164</sup> Within the Global South docket, the *Rohtang Pass* case, for example, is notable for ordering government bodies to carry out a far-reaching program of remedial action in order to halt the pollution crisis that was contributing to glacial melting in that part of the Himalayas. It was noted by the court that one of the main pollutants was black carbon, which is widely recognized to be “a significant contributor to global warming.”<sup>165</sup> Further, the court held that the failure to enforce existing environmental laws properly not only caused the

<sup>160</sup> The *Urgenda* case, *supra* note 17, is a leading example here. In other European countries, there have been a total of twenty climate cases, with twelve of these involving constitutional or rights claims. See Climate Change Laws of the World database Law, *supra* note 12 (search conducted May 4, 2019). The regional European Court of Human Rights has also developed a substantial human rights-environment jurisprudence but to date this has not extended to cases involving climate issues. See further EUROPEAN COURT OF HUMAN RIGHTS, MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT (2d ed. 2012); J.M. Verschuuren, *Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe*, in REGIONAL ENVIRONMENTAL LAW: TRANSREGIONAL COMPARATIVE LESSONS IN PURSUIT OF SUSTAINABLE DEVELOPMENT 363 (Werner Scholtz & J.M. Verschuuren eds., 2015).

<sup>161</sup> This includes one of the earliest, unsuccessful, climate-related human rights claims brought by Inuit peoples in the United States and Canada to the Commission. For discussion of this petition and other examples, see Peel & Osofsky, *Rights Turn*, *supra* note 35, at 47–48, 64–65. Most recently, Torres Strait Islander peoples in Australia, supported by the NGO ClientEarth, have lodged a climate change human rights complaint with the UN Human Rights Committee, the first such “international” climate change case based on rights arguments. See ClientEarth, *Human Rights and Climate Change: World-First Case to Protect Indigenous Australians* (May 12, 2019), at <https://www.clientearth.org/human-rights-and-climate-change-world-first-case-to-protect-indigenous-australians>.

<sup>162</sup> Nachmany, Fankhauser, Setzer & Averchenkova, *supra* note 10, at 15 and Appendix 2. By contrast, constitutional and rights claims in these Global North jurisdictions have been limited or non-existent. Australia has one constitutional claim out of ninety-four cases, the United Kingdom has none out of fifty-three cases, the European Union has one out of forty-one cases, and New Zealand has none out of seventeen cases. See Climate Change Laws of the World database Law, *supra* note 12 (search conducted May 4, 2019).

<sup>163</sup> CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, § 24, as adopted 8 May 1996 and amended 11 October 1997 by the Constitutional Assembly.

<sup>164</sup> The Supreme Court of India led the charge in the creation of environmental rights through judicial interpretation of existing constitutional provisions, particularly the right to life. See, e.g., Subhash Kumar v. State of Bihar et al., WP (Civil) No. 381 of 1988, DI-9-1-91 (Supreme Court of India) (India); M.C. Mehta v. India, WP (Civil) No. 12739 of 1985 (Supreme Court of India) (India); Indian Council for Enviro-Legal Action v. Union of India et al. (1996) 5 SCC 281 (India). For discussion, see JONA RAZZAQUE, PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN AND BANGLADESH (2004).

<sup>165</sup> Sher Singh v. State of Hp., 5 (2014) CWPI No.15/2010 (India).



pollution crisis, but also amounted to a violation of the people's constitutionally protected right to life and the right to a clean and healthy environment.<sup>166</sup>

In the Philippines, the Constitution provides that “[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”<sup>167</sup> In addition, the Philippine Supreme Court in 2009 introduced rules and mechanisms to facilitate protection of the constitutionally enshrined rights to life and a healthy environment.<sup>168</sup> In two out of the three Filipino cases, the plaintiffs relied on these mechanisms, known as the “Writ of *Kalikasan*,” to compel the government to act on climate change. As for the third case, the *Carbon Majors Petition*, as highlighted above, this is a petition to the Human Rights Commission of the Philippines to investigate the impacts of climate change on human rights. In total, seven out of eighteen cases in Asia advanced rights-based arguments.

In comparison, only three out of ten cases in Latin America included rights-based arguments. However, there is significant potential for more rights-based climate litigation in Latin America because most of the constitutions of these jurisdictions contain environmental rights and—in the case of Ecuador and Bolivia—the right of nature.<sup>169</sup> Further, constitutions throughout Latin America provide for expedited forms of legal action. They are known as the *amparo*, writ of protection, or *tutela*.<sup>170</sup> While the precise form varies from country to country, the mechanism aims to increase access to justice in constitutional cases by lowering costs and reducing delays. It will also not be surprising if the *Colombian Youths* case inspires similar litigation in Brazil or Ecuador. In this case, youth plaintiffs alleged that climate change, along with the government's failure to reduce deforestation and ensure compliance with a target for zero-net deforestation in the Colombian Amazon by the year 2020, threatened plaintiffs' fundamental rights. On appeal, the Colombian Supreme Court recognized that fundamental rights of life and human dignity are linked to the environment and ordered the government to implement action plans to reduce deforestation in the Amazon.<sup>171</sup>

Furthermore, there is potential for South-South cooperation to advance climate litigation in Latin America. Dejusticia, the NGO supporting the youths in the Colombian case, includes collaboration across the Global South as one of its organization's objectives. More specifically, it states on its website that “[w]e aim to produce concrete changes in the practice

<sup>166</sup> *Id.*, paras. 11–19.

<sup>167</sup> THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, Art. II, § 16.

<sup>168</sup> This was the result of an initiative led by Chief Justice Puno of the Philippines Supreme Court to promote public interest litigation in the quest for environmental justice. A copy of these Rules can be found at: Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC, 2010 (Phil.), at [www.lawphil.net/courts/supreme/am/am\\_09-6-8-sc\\_2010.html](http://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html). For discussion, see Gloria Estenzo Ramos, *Innovative Procedural Rules on Environmental Cases in the Philippines: Ushering in a Golden Era for Environmental Rights Protection*, 1 IUCN ACAD. ENVTL. L. E-J. (2011), at [www.iucnael.org/en/e-journal/previous-issues/157-issue-20111.html](http://www.iucnael.org/en/e-journal/previous-issues/157-issue-20111.html).

<sup>169</sup> CONSTITUTION OF THE REPUBLIC OF ECUADOR, ch. 7, Art. 71 (2008); BOLIVIA (PLURINATIONAL STATE OF)'S CONSTITUTION OF 2009, ch. V, Art. 33.

<sup>170</sup> See ALLAN R. BREWER-CARÍAS, *CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS* (2008).

<sup>171</sup> See, Claudia Fonseca, *Corte Suprema Ordena Protección Inmediata de la Amazonía Colombiana*, CORTE SUPREMA DE JUSTICIA – REPÚBLICA DE COLOMBIA (Apr. 5, 2018), at <http://www.cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana>. For discussion, see Everaldo Lamprea & Daniela García, *Recent Trends in Climate Change Litigation: Colombia's Amazon and Juliana v. U.S.*, OXHRH BLOG (Apr. 13, 2018), at <http://ohrh.law.ox.ac.uk/recent-trends-in-climate-change-litigation-colombias-amazon-and-juliana-vs-u-s>.

and framing of human rights. . . . We do this through collaborative transnational advocacy projects, expertise and experience sharing, capacity-building and education and other opportunities for Global South practitioners to learn from and teach each other.”<sup>172</sup>

#### 4. *Enforcing Climate Legislation and the Paris Agreement*

None of the thirty-four cases in the Global South docket sought enforcement of domestic climate change legislation. It should be noted that in the *Save Lamu* case, the Kenyan National Environmental Tribunal ruled that if the power company (the project proponent in this case) should choose to pursue the project, it would need to conduct a new EIA study that would, amongst other things, take into consideration Kenya’s Climate Change Act 2016. However, the tribunal did not go further to give details of how the power company might demonstrate compliance with the Act.

As highlighted above in Part II.B, this finding most likely reflects the fact that most of the jurisdictions under study do not presently have specific climate change laws. Rather, an overwhelming majority of cases in the Global South docket are brought under other laws and embed climate change considerations in wider disputes over environmental protection, land-use, and natural resource conservation.

In three out of the thirty-four cases, the plaintiffs or the court referred to the country’s Paris Agreement NDC as a relevant consideration. In the *Colombia Youths* case, the plaintiffs specifically sought judicial intervention to hold the government accountable for fulfilling its commitment to reduce deforestation as set out in its NDC. In the *Argentinian Glacier Protection Law* case, the Supreme Court referred to the Paris Agreement as being part of the international context for appreciating the importance of protecting glaciers, which form a vital source of water for the country. However, the court did not make any direct references to Argentina’s Paris Agreement NDC.

It is not surprising that there are relatively few references to Paris Agreement commitments in the case law to date, given that the treaty was only concluded in December 2015. This is also the case for Global North climate case law.<sup>173</sup> We would predict, however, that references to the Paris Agreement and countries’ pledges in the form of their NDCs will become more frequent in future litigation, both in the Global South and Global North.

#### 5. *Public Trust Doctrine*

The public trust doctrine is a common law doctrine, which has its roots in Roman law.<sup>174</sup> According to the public trust doctrine, the state holds natural resources in trust and, as a

<sup>172</sup> See DeJusticia.org, at [www.dejusticia.org/en/how-we-work/internationalization](http://www.dejusticia.org/en/how-we-work/internationalization).

<sup>173</sup> There have been two notable lawsuits in which the plaintiffs sought judicial intervention to enforce the defendant government’s international legal obligations pursuant to the Paris Agreement. See Plan B, at <https://planb.earth>; Thomson v. Minister for Climate Change Issues (New Zealand), CIV 2015-485-919 (2017) NZHC 733 (N.Z.), available at [www.nzlii.org/cgi-bin/download.cgi/cgi-bin/download.cgi/download/nz/cases/NZHC/2017/733.pdf](http://www.nzlii.org/cgi-bin/download.cgi/cgi-bin/download.cgi/download/nz/cases/NZHC/2017/733.pdf).

<sup>174</sup> Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C.L. REV. 393, 396 (2009). Justinian codified the doctrine in *Corpus Juris Civilis* (about 529 B.C.) as follows: “by the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea.” David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L.J. 711, 713 (2008). References to the public trust doctrine can be found in Chinese water law (249–207 B.C.), Islamic water law, Nigerian traditional customs, and the laws of medieval Spain and France.

trustee, is required to utilize these resources wisely and for the benefit of the citizens.<sup>175</sup> In the words of the court in *M.C. Mehta v. Kamal Nath*, “the State is the trustee of all natural resources which are by nature meant for public use and enjoyment.”<sup>176</sup> The public trust doctrine has not been a significant feature of Global North climate case law, but there is growing interest as a result of the campaign by Our Children’s Trust, a non-profit organization registered in the United States. The organization’s mission is to advocate on behalf of youth and future generations and to lead a legal campaign seeking “systemic, science-based emissions reductions and climate recovery policy at all levels of government.”<sup>177</sup> Our Children’s Trust is best known for the landmark U.S. constitutional climate lawsuit, *Juliana v. United States*.<sup>178</sup> In this case, the youth plaintiffs assert that, through the government’s actions that cause climate change, it has violated their constitutional rights to life, liberty, and property, as well as failed to protect essential public trust resources.<sup>179</sup>

In the Global South docket, we found that the public trust doctrine featured in five cases. In the *Robtang Pass* case in India, the court ordered the government to take immediate action to address the pollution crisis because, inter alia, the public trust doctrine required it to do so. Plaintiffs raised the public trust doctrine in four other Global South cases – *Pandey v. India*, *Ali v. Pakistan*, the *Carbon Majors Petition*, and the *Ugandan Youths* case. It is notable that these four cases were filed with the support of Our Children’s Trust, which has formed partnerships with youth and lawyers in the Global South to support their efforts to bring lawsuits compelling government action on climate change. We expect that, if successful, these four cases are likely to inspire the filing of similar cases on the basis of the public trust doctrine in other Global South jurisdictions.

In comparison with the Global North, there is potentially more receptiveness to arguments based on the public trust doctrine in Global South jurisdictions. The public trust doctrine is well established in the jurisprudence of some Global South countries, such as in the Indian and Pakistani environmental jurisprudence.<sup>180</sup> Further, while the doctrine is most recognized in common law countries, the concept of the public trust is well established in the civil law tradition, and is codified in law in a number of civil law countries. For example, Article 33(3) of the Constitution of the Republic of Indonesia states that “[t]he land, the waters and the natural resources within shall be under the powers of the state and shall be used for greatest benefit of the people.” In addition, several Indonesian natural resource management laws contain a similar provision that the resource in question is “controlled by the state” but

Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 (1989). See also Anne Richardson Oakes, *Judicial Resources and the Public Trust Doctrine: A Powerful Tool of Environmental Protection?*, 7(3) TRANSNAT’L ENVTL. L.J. 469 (2018).

<sup>175</sup> Richardson Oakes, *supra* note 174.

<sup>176</sup> *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388 (India).

<sup>177</sup> Our Children’s Trust, *Mission Statement*, at [www.ourchildrenstrust.org/mission-statement](http://www.ourchildrenstrust.org/mission-statement).

<sup>178</sup> The youth plaintiffs filed their complaint on August 12, 2015, but the case has yet to be heard. For a chronological report of how the lawsuit has been unfolding, see Our Children’s Trust, *Federal Proceedings*, at <https://www.ourchildrenstrust.org/federal-proceedings>.

<sup>179</sup> See, Michael C. Blumm & Mary Christina Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public Trust Doctrine*, 67(1) AM. U. L. REV. 1 (2017).

<sup>180</sup> For discussion, see RAZZAQUE, *supra* note 164; Muhammad Wajid Munir, *Putting Public Trust Doctrine to Work: A Study of Judicial Intervention in Environmental Justice*, 4 LUMS L.J. 1 (2018).

“should be used for the benefit and welfare of the people.”<sup>181</sup> There is potential for arguments premised on such provisions in civil legal codes to provide a promising avenue for the further development of climate case law in the Global South.

### 6. *Cooperation with NGOs*

Another feature of cases in the Global South docket is the degree of partnering evident with NGOs. Global South climate cases brought by local communities or individuals often enjoy the support of local NGOs (e.g., the *Uganda Youths* case). Some cases are brought by local NGOs to challenge government decisions or corporate violations of environmental laws, such as the cases filed by Groundwork in South Africa, and the *HFC23 Case* in India. Nearly 50 percent of the cases in the Global South Docket fit either of the above descriptions.

We sought to investigate the extent to which the cases that enjoyed local NGO support, or were filed by local NGOs, were themselves supported by transnational cooperation with NGOs located outside the jurisdiction in which the case was brought. Our methodology involved examining the amicus briefs (if any) submitted to the court, perusing media coverage of the cases, and reviewing the websites of the local NGOs that offered advisory support to the plaintiffs or were the plaintiffs themselves. We also gathered information from our own networks.

Local NGOs, either on their own or alongside members of the affected community, were plaintiffs in eleven out of the thirty-four Global South cases. Within this set of eleven cases, non-local NGOs and other civil society actors (including non-profit research centers) offered financial or non-financial support to the plaintiff(s) in five cases (45 percent). In 57 percent of the cases that received non-local NGO support, the NGO(s) that offered support were Global North organizations. In the remaining cases, the partnership involved both Global South and Global North organizations. In the *Protection of the Paramos* case, for example, the Interamerican Association for Environmental Defense (based in San Francisco, California) and the Bogota-based NGO, Asociación Ambiente y Sociedad, submitted an amicus brief. Dejusticia, the NGO behind the *Colombian Youths* case, also submitted an amicus brief in this case.

## IV. REFRAMING TRANSNATIONAL CLIMATE LITIGATION

In this Part, we consider how climate change case law in the Global South, analyzed in Part III, highlights new dimensions of transnational climate litigation than emerge from an analysis of Global North climate cases only. We discuss three characteristics that are particular features of the Global South climate docket and argue that enhanced attention to these features allows us to reframe our understanding of transnational climate litigation in broader ways. Although these characteristics are also evident in some Global North cases, or are a growing feature of that jurisprudence, they tend to be more pronounced in Global South

<sup>181</sup> For example, see the preambles of the Act No. 5 of 1960, Concerning Basic Regulations on Agrarian Principles; Republic of Indonesia Law No. 7/2004 on Water Resources; Law of the Republic of Indonesia, Number 27 of 2007, Management of Coastal Zone and Small Islands and Amendment to Law No. 27/2007 (by Law No. 1/2014 dated January 15, 2014); The Law of the Republic of Indonesia, Number 41 Year 1999 Concerning Forestry; and the Law of the Republic of Indonesia, Number 26 Year 2007, Concerning Spatial Management.

climate litigation. They can thus be conceptualized as a series of spectrums, with Global South cases presently concentrated at one end and Global North cases at the other. These spectrums help us identify the distinctive nature of the contribution made by Global South cases to transnational climate governance. Nonetheless, in drawing conclusions about the nature and governance role of climate litigation in the Global South, a consideration of contextual factors remains vitally important. In some cases and jurisdictions, other differences (for instance, common law versus civil law approaches, or differing traditions of judicial activism or restraint) may be more influential in shaping a country's trajectory of climate litigation, and cut across the central North-South axis.<sup>182</sup> We highlight China as a particular example of how local cultural, legal, and political factors remain critical to understanding the development of climate litigation in particular jurisdictions that may not match trends emerging from a more generalized view of the Global South jurisprudence.

While recognizing these caveats, the final section of this Part seeks to discern lessons from the analysis of Global South climate case law regarding the contribution of this litigation to transnational climate governance in distinction to both Global North cases, and other forms of regulation. Given that we are extrapolating from a much smaller body of climate case law than we have for the Global North, our conclusions in this section are preliminary. We welcome their further exploration and testing in subsequent research on Global South climate litigation and its transnational governance role.

### A. *Prevalence of Rights-Based Claims*

A distinctive feature of the Global South docket is the number of human rights or (environmental) constitutional rights claims asserting that failures of mitigation or adaptation violate rights protections. In contrast, rights-based claims have been less prominent in the Global North climate jurisprudence as the data discussed in Part III.B.3 indicates. There is the potential, however, that this avenue could be revitalized by the recent Dutch appeal court decision in *Urgenda*, which has been described as “the most important judicial decision yet on the application of human rights law to climate change.”<sup>183</sup> In the United States and Australia, the two Global North jurisdictions with the most climate cases globally, the possibilities for rights-based claims are limited given their extant legal structures. Australia lacks a national bill of rights and efforts to amend the U.S. Constitution to recognize environmental rights have not been successful.<sup>184</sup> While the *Juliana* case is attempting to argue that other rights

<sup>182</sup> See Joana Setzer & Lisa Benjamin, *Climate Litigation – Regulatory Lessons (for the Global North) from the Global South*, TRANSNAT'L ENVTL. L. (2019, forthcoming, copy on file with authors).

<sup>183</sup> John Knox, Special Rapporteur on Human Rights and Environment, @JohnHKnox, TWITTER (Oct. 9, 2018); see also Jonathan Verschuuren, *Urgenda Climate Change Judgment Survives Appeal in the Netherlands*, TILBURG U. ENVTL. L. BLOG (Sept. 10, 2018), at <http://gnhre.org/2018/10/09/urgenda-climate-change-judgment-survives-appeal-in-the-netherlands>.

<sup>184</sup> Note, however, that a number of U.S. states have enshrined environmental rights in their constitutions. For discussion, see Kenneth T. Kristl, *The Devil is in the Details: Articulating Practical Principles for Implementing the Duties in Pennsylvania's Environmental Rights Amendment*, 28 GEO. ENVTL. L. REV. 589 (2016); Audrey Wall, *State Constitutions and Environmental Bills of Rights*, COUNCIL STATE GOVERNMENTS (Sept. 1, 2015), at <http://knowledgecenter.csg.org/kc/content/state-constitutions-and-environmental-bills-rights>. A recent decision by the Hawaii Supreme Court held that the due process clause applies to “the right to a clean and healthful environment, as defined by laws related to environmental quality.” See, *Maui Electric Company, Limited (“Maui Electric”) v. Hawaiian Commercial & Sugar Company (HC&S)*, (2017) SCWC-15-0000640.



protections in the U.S. Constitution extend to climate change, the prospects for success of this argument on the merits remain unclear.

The relatively greater prevalence of rights-based claims in the Global South docket (as illustrated by the spectrum in [Figure 3](#)), can be explained, at least in part, by the fact that many of the national constitutions of Global South jurisdictions contain environmental rights. This also points to the potential for further growth of this form of climate litigation in the Global South.<sup>185</sup> The last twenty-five years has witnessed a surge in international constitution making. Part of this trend has been what David Boyd describes as an “environmental rights” revolution, where responses to environmental degradation are being addressed through the language of human rights and within constitutions.<sup>186</sup> Luis Rodríguez-Rivera argues that the term “environmental rights” encompasses three different sets of rights that have different objectives: (1) environmental procedural rights; (2) the right to environment; and (3) the right of environment.<sup>187</sup>

Environmental procedural rights include those associated with participation in decision making, access to information, and access to justice.<sup>188</sup> The right to environment is conceptualized as a right pertaining to each individual. As such, it is anthropocentric, and the environment is valued in terms of its importance for human existence rather than its intrinsic significance.<sup>189</sup> Finally, the right of environment proposes that the environment should be protected on its own merits and be given rights on that basis. Ecuador inserted a chapter on nature (or *Pachamama*) in its 2008 constitutional revision, thereby becoming the first and only country to date to give protection to the right of environment at the constitutional level.<sup>190</sup>

Environmental rights have found their way into a number of Asian constitutions, including those of Indonesia, Nepal, South Korea, Bhutan, the Philippines, and Thailand. In Thailand, the concept of community rights to protect natural resources emerged with the 1997 Constitution.<sup>191</sup> The 2017 Constitution goes further by requiring health impact assessments, in addition to an EIA, to be conducted when an activity might pose harm to the environment

<sup>185</sup> Peel & Osofsky, *Rights Turn*, *supra* note 35.

<sup>186</sup> DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 3 (2012).

<sup>187</sup> Luis E. Rodríguez-Rivera, *Is the Human Right to Environment Recognized under International Law? It Depends on the Source*, 12 *COL. J. ENVTL. L. POL'Y* 9 (2001).

<sup>188</sup> For discussion, see Birgit Peters, *Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention*, 30 *Ox. J. ENVTL. L.* 1 (2018); Joshua C. Gellers & Chris Jeffords, *Toward Environmental Democracy?: Procedural Environmental Rights and Environmental Justice*, 18 *GLOB. ENVTL. POL.* 99 (2018).

<sup>189</sup> Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 *STAN. J. INT'L L.* 103 (1991).

<sup>190</sup> For discussion, see Gwendolyn J. Gordon, *Environmental Personhood*, 43 *COL. J. ENVTL. L.* 50 (2018); Louis J. Kotzé & Villavicencio Calzadilla, *Somewhere Between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, 6 *TRANSNAT'L ENVTL. L.* 401 (2017); Mary Elizabeth Whittenmore, *The Problem of Enforcing Nature's Rights Under Ecuador's Constitution: Why the 2008 Environmental Amendments Have No Bite*, 20 *PAC. RIM L. & POL'Y J.* 659 (2011); Craig M. Kauffman & Pamela L. Martin, *Constructing Rights of Nature Norms in the US, Ecuador, and New Zealand*, 18 *GLOB. ENVTL. POL.* 43 (2018).

<sup>191</sup> VITIT MUNTARBHORN, *THE CORE HUMAN RIGHTS TREATIES AND THAILAND*, *INTERNATIONAL STUDIES IN HUMAN RIGHTS*, VOL. 117 (2016).

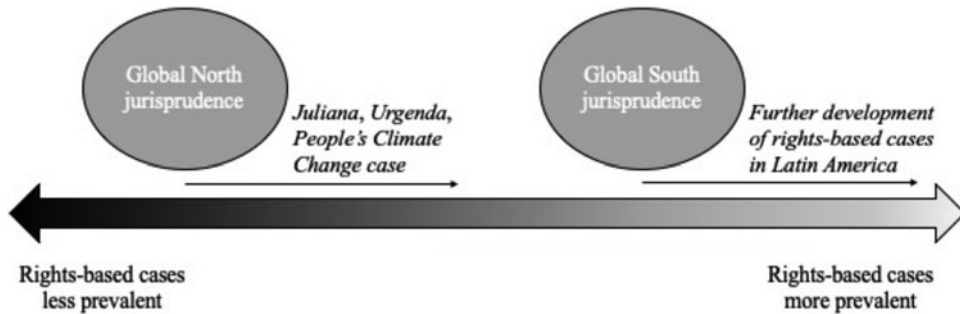


FIGURE 3. Spectrum of Rights-Based Litigation

and human health.<sup>192</sup> Further, Articles 43, 59, and 58 protect the right of communities to participate in the management, utilization and maintenance of natural resources, environment and biological diversity, the right to access public information, and “the right to receive information, explanation, and reasons from a State agency prior to the implementation or granting of permission” in respect of any undertaking that “may severely affect” natural resources or environmental quality.

The African Charter on Human and People’s Rights has been credited with driving the adoption of constitutional provisions related to the environment in African states. Article 24 of the Charter states that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development.” The influence of the Charter is most evident in the constitutions of Benin, Cameroon, and the Democratic Republic of Congo, all of which included environmental constitutionalism after 1986 (when the Charter entered into force) with wording similar or identical to Article 24 of the Charter.<sup>193</sup>

As highlighted in Part III, we see significant potential for the development of rights-based climate litigation in Latin America.<sup>194</sup> In particular, the preconditions for such litigation are in place. There is a rich environmental constitutional jurisprudence in various Latin American jurisdictions,<sup>195</sup> which could be readily expanded to encompass climate change-related issues, such as deforestation. Some countries in the region, such as Brazil

<sup>192</sup> CONSTITUTION OF THE KINGDOM OF THAILAND, B.E. 2560, ch. V, sec. 58 (2017).

<sup>193</sup> Joshua C. Gellers, *Greening Constitutions with Environmental Rights: Testing the Isomorphism Thesis*, 29 REV. POL’Y RES. 523 (2012).

<sup>194</sup> See also Astrid Puentes Riaño, *Litígio climático e direitos humanos*, in LITIGÂNCIA CLIMÁTICA: NOVAS FRONTEIRAS PARA O DIREITO AMBIENTAL NO BRASIL, at 215 (Joana Setzer, Kamyla Cunha & Amália Botter Fabbri eds., 2019) (in Portuguese).

<sup>195</sup> For discussion, see Joel Colon-Rios, *The Rights of Nature and the New Latin American Constitutionalism*, 13 N.Z. J. PUB. & INT’L L. 107 (Special Conference Issue – New Thinking on Sustainability, 2015); Jose Rubens Morato Leite & Marina Demaria Venancio, *Environmental Protection in Brazil’s High Court: Safeguarding the Environment Through a Rule of Law for Nature*, 77 SEQUENCIA (FLORIANOPOLIS) 29 (2017); Julia Mattei & Larissa Verri Boratti, *Constitutional Environmental Protection in Brazil: A Rights-Based Approach*, in LAW AND POLICY IN LATIN AMERICA: TRANSFORMING COURTS, INSTITUTIONS AND RIGHTS, ch. 19, p. 327 (Pedro Fortes, Larissa Boratti, Andres Palacios Lleras & Tom Gerald Daly eds., 2017); Teresa Kramarz, *Using the Courts to Protect the Environment in Argentina: Accountability Pitfalls When Judges Have the Last Word*, CASE STUD. ENV’T. (2018), at [http://cse.ucpress.edu/content/early/2018/06/25/cse.2017.000992?utm\\_source=TrendMD&utm\\_medium=cpc&utm\\_campaign=TrendMD\\_CSE](http://cse.ucpress.edu/content/early/2018/06/25/cse.2017.000992?utm_source=TrendMD&utm_medium=cpc&utm_campaign=TrendMD_CSE).

and Argentina, also have a tradition of subnational environmental constitutionalism.<sup>196</sup> A recent Inter-American Court of Human Rights Advisory Opinion on Human Rights and the Environment emphasized the linkages between these issues and provides regional endorsement for human rights-based environmental claims, including on issues of climate change.<sup>197</sup> Finally, leading climate cases in the region—spearheaded by local environmental organizations such as Dejusticia—offer the potential for South-South cooperation to advance climate litigation in Latin America.<sup>198</sup>

### B. Preference for Enforcement of Existing Laws

A notable feature of many cases in the Global South docket is that they involve lawsuits brought by citizens and NGOs to compel their governments to translate mitigation and adaptation policies into action, or to stop building new coal-fired power plants and mining coal. The South African and Kenyan cases, for example, are all focused on halting the construction of new coal-fired power plants by challenging the adequacy of the EIA undertaken. Equally, the Global South climate case law features a significant number of enforcement lawsuits brought by the government against companies in the extractive sector (for example, timber logging and oil palm cultivation). This is particularly the case in Indonesia and Brazil. The outcome in the majority of these law enforcement proceedings is that the defendant company was found guilty and had to pay compensation for the carbon released into the atmosphere due to its illegal activities or was ordered to alter its carbon-intensive commercial practices, such as setting fires to clear land for commercial agriculture.

This case law suggests a distinctive pathway for Global South climate claims than that which has formed a prominent part of the case law in the Global North. Of course, there are also examples in the Global North climate jurisprudence of enforcement actions aiming to secure climate co-benefits, such as the air pollution cases brought in the UK by the NGO ClientEarth to enforce the EU Air Quality directive.<sup>199</sup> In addition, there is a substantial body of “administrative” climate cases in many Global North countries challenging authorizations and approvals for emissions-intensive projects.<sup>200</sup> However, alongside these cases, litigation “brought against governments in order to drive the course of climate change policies and

<sup>196</sup> For discussion, see Antonio Maria Hernandez, *Sub-national Constitutional Law in Argentina*, in INTERNATIONAL ENCYCLOPEDIA FOR CONSTITUTIONAL LAW, at Subnational-1 (André Alen & David Haljan eds., 2019); Maria Antonia Tigre, *Implementing Constitutional Environmental Rights in the Amazon Rainforest*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES 59 (Erin Daly & James R. May eds., 2018); Marcelo Buzaglo Dantas, *Implementing Environmental Constitutionalism in Brazil*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES, *id.* at 129; Ana Lucia Maya-Aguirre, *Implementing Environmental Constitutionalism in Colombia*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES, *id.* at 143.

<sup>197</sup> Inter-American Court of Human Rights, Environment and Human Rights, Advisory Opinion OC-23/17 of Nov. 15, 2017, Requested by the Republic of Colombia. Official Summary in English Issued by the Inter-American Court, available at [http://www.corteidh.or.cr/docs/opiniones/resumen\\_seriea\\_23\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf).

<sup>198</sup> See Part III *supra*.

<sup>199</sup> R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs [2015] UKSC 28; R (on the application of ClientEarth) v. Secretary of State for the Environment, Food and Rural Affairs [2013] UKSC 25; Case C-404/3 ClientEarth v Secretary of State for the Environment, Food and Rural Affairs [2014] All ER (D) 210 (Nov).

<sup>200</sup> Nachmany, Fankhauser, Setzer & Averchenkova, *supra* note 10, at 15.

regulation” is also a significant trend.<sup>201</sup> In the United States and Australia, for example, climate litigation has often been brought with the goal of exerting pressure on governments to fill a regulatory gap.<sup>202</sup> The *Massachusetts v. EPA* case decided by the U.S. Supreme Court sought to have the EPA implement a mandate under the Clean Air Act to regulate greenhouse gases as an air pollutant.<sup>203</sup> The high-profile *Urgenda* case in the Netherlands,<sup>204</sup> and other Global North cases inspired by it such as the *Thomson* case in New Zealand,<sup>205</sup> also have pursued a climate law reform rationale, arguing for the adoption of stricter emissions reduction targets by governments. In the EU, analysts of climate litigation have highlighted that a significant portion of the case law is aimed at “perfecting” climate law measures, such as the European Emissions Trading Scheme, to make them more effective as a mitigation tool.<sup>206</sup>

By contrast, the Global South climate cases demonstrate an apparent preference for putting policies and laws already “on the books” into action and ensuring proper enforcement, rather than pushing for new or better climate laws. This concentration on enforcement—relative to more regulation-forcing actions in the Global North—is illustrated by the spectrum presented in Figure 4. In bringing lawsuits that focus on seeking judicial intervention to compel the proper enforcement of existing laws, Global South plaintiffs are able to rely on fairly well-established legal arguments, thereby avoiding the risks of judicial reluctance to address climate change directly. For Global South advocates, there is also likely to be a strategic choice made to prefer tried-and-tested methods because of perceived higher chances of success. This is an important consideration when Global South organizations have fewer financial resources to bring test cases. Tried-and-tested arguments and established legal precedents in most Global South countries are likely to be drawn from broader environmental, or other non-specific climate, laws and be applied to climate change by analogy or to address climate change indirectly.<sup>207</sup>

Further, in seeking enforcement of these laws, plaintiffs in Global South countries are often trying to address what they perceive to be more fundamental drivers of climate change. For example, in the Indian case of *Pandey v. Union of India*, the nine-year-old claimant sought the proper enforcement of the national forestry law, air pollution control law, and the EIA law on the basis that the non-implementation of these existing laws “has led to adverse impacts of climate change across the country.”<sup>208</sup>

While some Global South climate cases, like *Leghari*, have been brought to encourage implementation of national policies relating to adaptation, it is notable that most of the

<sup>201</sup> *Id.* For U.S. case law, see also Markell & Ruhl, *supra* note 40, at 30 (Table I, summarizing case numbers by category and claim type).

<sup>202</sup> PEEL & OSOFSKY, *supra* note 15, at 28–53.

<sup>203</sup> *Massachusetts v. EPA*, *supra* note 16.

<sup>204</sup> *Urgenda v. Netherlands*, *supra* note 17.

<sup>205</sup> *Thomson v. Minister for Climate Change*, *supra* note 173.

<sup>206</sup> Navraj Singh Ghaleigh, *Economics and International Climate Change Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW (Kevin R. Gray, Richard Tarasofsky & Cinnamon Carlarne eds., 2016); Bogojević, *supra* note 104.

<sup>207</sup> See the various country studies and analytical chapters in CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC (Jolene Lin & Doug Kysar eds., forthcoming 2020) (copy on file with the authors).

<sup>208</sup> *Pandey v. Union of India*, Original Application filed in March 2017 by the plaintiff, para. III, p. 2, available at [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325\\_Original-Application-No.-\\_\\_\\_\\_-of-2017\\_petition-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325_Original-Application-No.-____-of-2017_petition-1.pdf).

Global South docket to date has a mitigation focus.<sup>209</sup> The paucity of adaptation case law developments in the Global South—despite greater vulnerability to the adverse impacts of climate change—may point to a potential growth area for litigation to advance climate justice. If NDCs advance specific adaptation goals or Global South countries adopt adaptation policies, there may be increasing opportunities for litigation to facilitate implementation of these measures.

More generally, as the implementation of NDC commitments by Global South countries is subject to increasing scrutiny through the transparency procedures of the Paris Agreement, we might expect to see more litigation in these countries seeking the promulgation of specific climate laws and policies. Again, as the *Leghari* case intimates, this litigation activity might focus on developing countries' pledges under NDCs to act on adaptation issues such as resilience of agricultural systems, flood control measures, or conservation of forests. Notably, of the 161 initial NDCs covering 189 parties submitted by April 4, 2016, 137 parties had included an adaptation component, with 126 of these parties being located in the Global South.<sup>210</sup>

### C. “Stealthy” Climate Litigation

Many climate cases in the Global South evince what might be termed a “stealthy” strategy, which dilutes the political potency of climate issues by packaging them together with less controversial claims. One manifestation of this is the significant proportion of cases in the Global South that have climate change at their periphery rather than their core, as discussed in Part III.B.1 above. An important reason why litigants in some Global South countries may prefer to pursue climate cases in a more indirect fashion is because of traditions of judicial restraint and limited judicial review operating in these jurisdictions. This is a relevant factor in a number of Southeast Asian jurisdictions, which eschew notions of an activist judiciary present in other common law jurisdictions, including some South Asian countries such as India and Pakistan.<sup>211</sup>

More generally, there is often a tailoring of legal claims in Global South climate cases to what is seen to be the most important policy issue in the jurisdiction, which is not always climate change. For example, in China, the key concern may be air pollution, whereas in other countries forestry and burning practices may be more salient. While we have not yet seen climate cases emerge in the Pacific, the prevalence of disputes over land tenure or

<sup>209</sup> This attention to mitigation issues in the Global South reflects the linkage of greenhouse pollution to other chronic environmental problems in developing countries, such as poor air quality in urban areas, making mitigation claims an important way of achieving co-benefits for these pressing environmental and health concerns, see note 97 *supra*. In addition, developing countries now make up a substantial portion of the global top ten emitters, with China, India, Brazil, Indonesia, and Mexico in this group. See Johannes Friedrich, Mengpin Ge & Andrew Pickens, *This Interactive Chart Explains World's Top 10 Emitters, and How They've Changed*, WORLD RESOURCES INSTITUTE BLOG (Apr. 11, 2017), at <https://www.wri.org/blog/2017/04/interactive-chart-explains-worlds-top-10-emitters-and-how-theyve-changed>.

<sup>210</sup> United Nations Framework Convention on Climate Change, *Aggregate Effect of the Intended Nationally Determined Contributions: An Update, Synthesis Report* by the Secretariat, paras. 7, 59, UN Doc. FCCC/CP/2016/2 (May 2, 2016).

<sup>211</sup> Jacqueline Peel & Jolene Lin, *Climate Change Adaptation Litigation: A View from Southeast Asia*, in CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC, *supra* note 207.



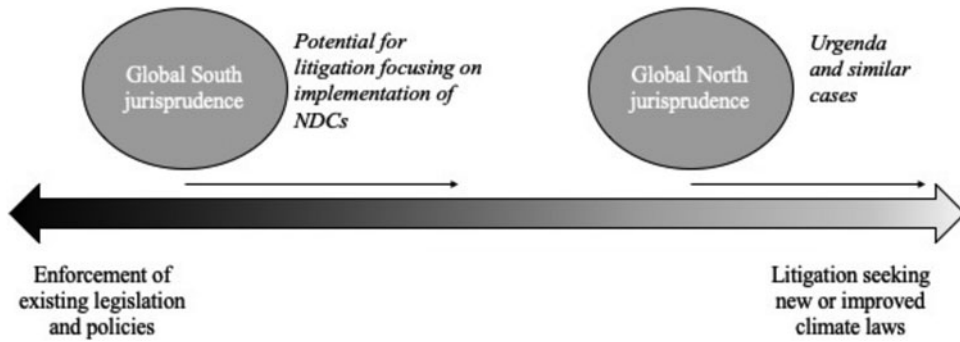


FIGURE 4. Spectrum of Enforcement-Focused Litigation

resettlement rights in many Pacific Island countries suggests that these kinds of claims might be a more likely vehicle for including climate-related arguments.<sup>212</sup>

Achieving climate goals in litigation through other means is not a trend limited to the Global South. In strategic litigation there will always be choices made by claimants about what legal avenues best serve the case and have the highest chances of achieving success.<sup>213</sup> Again, a spectrum of approaches is evident across the Global South and Global North (see Figure 5). If we take Australia as an example, that jurisdiction has a high number of adaptation cases that have been far more successful than mitigation-based challenges in the country, in part because the adaptation lawsuits are focused on lower-profile, less politically charged issues around planning, land use, and hazard risk management.<sup>214</sup> Other Global North examples of “inadvertent” or “incidental” climate litigation (used by authors here to mean cases with climate change at the periphery) include cases dealing with false green advertising, the siting of renewable energy generation, or the environmental impacts of energy projects.<sup>215</sup> Nonetheless, factors such as a conservative judiciary, the availability of non-climate laws and precedents under which to bring cases, higher prospects for success with tried-and-true arguments, and a lower policy salience of climate issues compared with other environmental or public health concerns—some or all of which characterize most Global South countries—increases the chances that a more indirect route will be pursued in these climate cases.

This feature may change over time, particularly if courts begin to recognize the links between well-established legal avenues, such as constitutional rights, and climate change, or if Global South countries adopt climate-specific legislative measures in fulfilment of their NDCs.<sup>216</sup> There is also a nascent trend in the Global South docket of using EIA as a

<sup>212</sup> Satish Chand & Ron Duncan, *Resolving Property Issues as a Precondition for Growth: Access to Land in the Pacific Islands*, in *THE GOVERNANCE OF COMMON PROPERTY IN THE PACIFIC REGION* 33 (Peter Larmour ed., 2013) (arguing that security of access to land currently under communal ownership must be enhanced so as to encourage efficient use of this resource and enhance the inflow of technology and capital in such countries).

<sup>213</sup> Jacqueline Peel & Hari M. Osofsky, *Litigation as a Climate Regulatory Tool*, in *INTERNATIONAL JUDICIAL PRACTICE ON THE ENVIRONMENT: QUESTIONS OF LEGITIMACY* 311 (Christina Voigt ed., 2019).

<sup>214</sup> Peel & Osofsky, *Sue to Adapt?*, *supra* note 74.

<sup>215</sup> For discussion see Ganguly, Setzer & Heyvaert, *supra* note 40, and Bouwer, *supra* note 40.

<sup>216</sup> For details of recent legislative initiatives of this kind in African countries, see Olivia Rumble, *Climate Change Legislative Development on the African Continent*, in *LAW, ENVIRONMENT, AFRICA*, VOL. 38, at 33, 35–36 (Patricia

basis for climate claims. If that trend continues it is likely that more core climate cases will emerge in parallel to a “stealthier” strategy.

#### D. *The Importance of Context*

In analyzing the Global South docket in this Article, we have necessarily grouped together a swathe of jurisdictions with very different histories, legal traditions, and political contexts.<sup>217</sup> While this has been useful for the purpose of analysis and drawing out trends that encourage a broadening of our understanding of what constitutes transnational climate litigation, it may give rise to the assumption that all climate case law developments across the Global South will embody the characteristics we have discussed in the previous sections. We do not make that claim and indeed recognize that the individual trajectory of climate litigation in each Global South jurisdiction will differ according to its particular social context, political settings, and legal culture.

In this regard, the case of China is prototypical. While there has been an increase in environmental litigation in China—particularly following amendments to the Environmental Protection Law in 2015 to promote environmental public interest litigation (EPIL)—the number of cases filed by non-governmental organizations is dwarfed by occurrences of environmental pollution accidents and other infractions of the law.<sup>218</sup> Based on a successful pilot program started in July 2015, China’s procuratorates (which are similar to state prosecutors) are beginning to play an important role in EPIL.<sup>219</sup> Following Chinese President Xi Jinping’s endorsement of the establishment of specialized procuratorate departments to launch public interest litigation, the volume of such cases has increased significantly.<sup>220</sup> Between January and November 2018, for instance, the procuratorates handled over 89,000 public interest litigation cases of which about half were EPIL lawsuits.<sup>221</sup> The first EPIL trial concerning air pollution in Beijing—a serious environmental problem in the capital city—was held in May 2018.<sup>222</sup> In this case, an engineering firm was prosecuted for emitting high levels of

Kameri-Mbote, Alexander Ross Paterson, Oliver C. Ruppel, Bibobra Bello Orubebe & Emmanuel D. Kam Yogo eds., 2019).

<sup>217</sup> These differences contribute to different “legal cultures” that influence the role and rule of law within different societies. See David Nelken, *Using the Concept of Legal Culture*, 29 AUSTRALIAN J. LEG. PHIL. 1 (2004).

<sup>218</sup> For discussion of the state of environmental public interest litigation in China, see Cao Mingde & Wang Fengyuan, *Environmental Public Interest Litigation in China*, 19 ASIA PAC. L. REV. 217 (2011); Gu Gong & Ran An, *Progress and Obstacles in Environmental Public Interest Litigation under China’s New Environmental Law: An Analysis of Cases Accepted and Heard in 2015*, 7 CLIMATE L. 185 (2017); Richard Zhang & Benoit Mayer, *Public Interest Environmental Litigation in China*, 1 CHINESE J. ENVTL. L. 202 (2017).

<sup>219</sup> Chao Li & Yijie Lu, *From the “Plaintiff” to the “Public Interest Litigation Prosecutor,”* CHINA YOUTH DAILY (Mar. 27, 2018), at [https://mp.weixin.qq.com/s?\\_\\_biz=MzA4MjQ5MzIxNQ==&mid=2650487550&idx=1&sn=ae10a8452a17e60aafb9d98cb76fc781&chksm=878b708eb0fc9989c09dc7415df1889ff6ae6a53d78-b28742f568a6a312a70d9bb99f1db323&mpshare=1&scene=1&srcid=0330MrNkAPO5C5fa8OL3V0mx#rd](https://mp.weixin.qq.com/s?__biz=MzA4MjQ5MzIxNQ==&mid=2650487550&idx=1&sn=ae10a8452a17e60aafb9d98cb76fc781&chksm=878b708eb0fc9989c09dc7415df1889ff6ae6a53d78-b28742f568a6a312a70d9bb99f1db323&mpshare=1&scene=1&srcid=0330MrNkAPO5C5fa8OL3V0mx#rd); *One Year on: Reform Pilots on Procuratorates Initiating Public Interest Litigation*, NPC OBSERVER (Nov. 8, 2016), at <https://npcobserver.com/2016/11/08/one-year-on-reform-pilots-on-procuratorates-initiating-public-interest-litigation>.

<sup>220</sup> Dimitri de Boer, *A New Force in China’s Environmental Public Interest Litigation*, CLIENTEARTH ANALYSIS (Feb. 25, 2019), at <https://www.clientearth.org/a-new-force-in-chinas-environmental-public-interest-litigation>.

<sup>221</sup> *Id.*

<sup>222</sup> People’s Procuratorate of Beijing (4th Division) v. Beijing Duocai Lianyi Int. Ltd. Co.. The filing of the case is described in Yang Yonghao & Li Xinyu, *Beijing: Filed the First Civil Air Pollution Litigation in the City*, PROCURATORIAL DAILY (July 30, 2017) at [http://www.spp.gov.cn/dfjcdt/201707/t20170730\\_197128.shtml](http://www.spp.gov.cn/dfjcdt/201707/t20170730_197128.shtml).

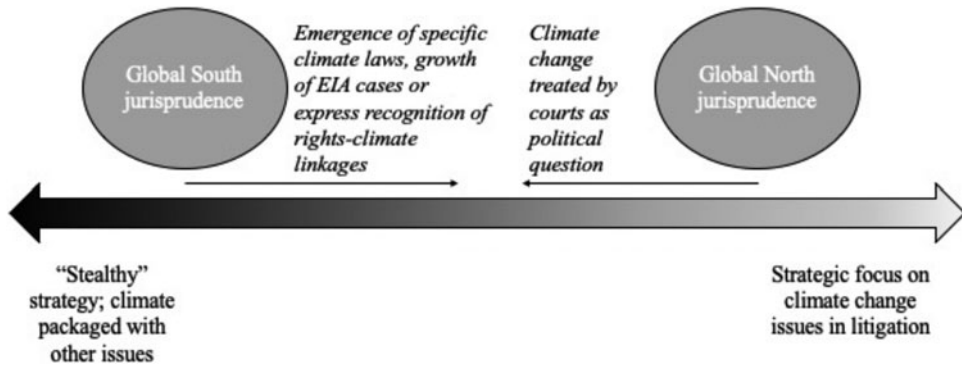


FIGURE 5. Spectrum of Climate Litigation Strategies

volatile organic compounds during welding and lacquer-spraying processes.<sup>223</sup> This points to the likelihood of China’s procuratorates playing an important role in the development of climate change litigation in that jurisdiction. If such Chinese climate change litigation emerges, it is likely to feature climate change at the periphery, rather than the core of cases, as climate change claims will generally be embedded within wider litigation strategies that seek enforcement of air pollution laws, amongst other existing laws.

As for the present situation in China, an empirical study of 177 judgments issued by Chinese courts conducted by Yue Zhao, Shuang Lyu, and Zhu Wang makes a cogent argument that “climate change litigation” currently takes the form of private disputes between energy companies and their clients.<sup>224</sup> In such cases, climate change mitigation is not even at the periphery; rather the courts seek to advance the central governmental policies of low-carbon development and promoting renewable energy and, therefore, the outcome is in favor of climate mitigation.

Our conclusions about the likely trajectory of climate litigation in China are in line with other observations about the role of the Chinese judiciary in supporting governmental policy objectives. As eminent Chinese scholar Zhu Yan has pointed out, the Chinese judiciary is seen as a key aspect of the Chinese Communist Party’s leadership and “wholly unlike the concept of judicial independence under the Western separation of powers model, Chinese courts are deemed to be organs of the state under the Chinese Communist Party’s leadership.”<sup>225</sup> Thus, in contrast to other Global South jurisdictions, climate litigation in China, if and when it emerges, is not likely to take the form of actions by citizens to compel the government to act. Instead, the actions are most likely to be against polluters by NGOs or the procuratorates in the form of EPIL. Further, the courts will seek to promote governmental policies that have been introduced to address climate change. Finally, constitutional rights-based litigation will

<sup>223</sup> *Id.*

<sup>224</sup> Yue Zhao, Shuang Lyu & Zhu Wang, *Prospects for Climate Change Litigation in China*, 8 *TRANSNAT’L ENVTL. L.* 349 (published online May 29, 2019, available at <https://doi.org/10.1017/S2047102519000116>).

<sup>225</sup> Zhu Yan, *The Subordinate and Passive Position of Chinese Courts in Environmental Governance*, in *CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC*, *supra* note 207.

not emerge in China because the Chinese constitution is not justiciable.<sup>226</sup> However, it is noteworthy that certain rights have been extended to Chinese citizens in recent years. Chapter 5 of the Environmental Protection Law, for example, has established the right to information and public participation.<sup>227</sup> It is possible that climate change litigation could emerge on the basis of these participatory environmental rights in the future.

In other Global South countries—especially those that are yet to develop climate litigation—an assessment of available legal avenues and potential barriers to such litigation will be essential in assessing prospects for climate cases to emerge. For instance, in other research we have conducted on climate litigation in Southeast Asia, we have found reduced prospects for climate cases to occur in Malaysia and Singapore, given limited (or non-existent) avenues for public interest litigation, but greater potential in the case of the Philippines that has a more activist judiciary and potential constitutional rights avenues.<sup>228</sup> Indeed, evidence both from Southeast Asian jurisdictions and efforts to seed strategic climate litigation in other parts of the world, such as Central and Eastern Europe,<sup>229</sup> demonstrates that a tradition of public interest litigation and access to justice are important preconditions for the emergence of climate litigation. Without a viable public interest litigation route, litigation on climate (or indeed other environmental issues) is too expensive, administratively cumbersome, or sometimes politically and personally fraught for advocates. The existence of public interest litigation in a particular jurisdiction is thus an indicator of its receptiveness to environmental litigation more generally, and climate lawsuits are likely to stand a greater chance in this setting. In this sense, while the North-South distinction seems to be an important one in analyzing and predicting the course of climate litigation, it is not the only factor at play.

### *E. Contribution of Global South Climate Litigation to Transnational Governance*

Although context remains important in assessing the prospects for the development of climate litigation in individual Global South countries, our analysis shows that there are still broader patterns from which we can draw lessons, both about the potential of climate litigation to serve as a form of transnational climate regulation, and the distinctive role played in that regard by Global South cases. These enquiries signal the emergence of a promising new research agenda in the field of international environmental law: one concerned with the relationship between domestic litigation and multilateral efforts, such as the Paris Agreement,<sup>230</sup>

<sup>226</sup> Fu Hualing & Zhai Xiaobo, *What Makes the Chinese Constitution Socialist?*, 16 INT'L J. CONST. L. 655 (2018).

<sup>227</sup> *Environmental Protection Law of the People's Republic of China* (Unofficial translation by the EU-China Environmental Governance Programme, published April 24, 2014), available at <https://www.chinadialogue.net/Environmental-Protection-Law-2014-eversion.pdf>. See also Zijun Zhao, *State Policy or Individual Right: The Recent Development of Environmental Protection in China*, OXFORD HUM. RTS. HUB (Aug. 21, 2018), at <http://ohrh.law.ox.ac.uk/state-policy-or-individual-right-the-recent-development-of-environmental-protection-in-china>.

<sup>228</sup> Jolene Lin & Jacqueline Peel, *Climate Change Adaptation Litigation: A View from Southeast Asia*, in CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC, *supra* note 207.

<sup>229</sup> See, e.g., Children Investment Fund Foundation, *Climate Strategic Litigation Europe*, at <https://ciff.org/grant-portfolio/climate-strategic-litigation-europe>.

<sup>230</sup> See also Bouwer, *supra* note 40, at 491–93.

and the appropriate role of domestic courts in global climate governance.<sup>231</sup> Below we synthesize three key lessons regarding climate litigation as an instrument of transnational governance that we argue can be drawn from our analysis of the Global South docket.

### 1. *Justice vs. Science-Based Framing*

As we have noted at several points throughout the Article, rights-based cases make up a substantial portion of the Global South docket compared with climate case law in the Global North. Moreover, there is the potential for rights-based climate litigation to grow further in the Global South, particularly by drawing on constitutional environmental rights. Notably, the right to environment is a relatively recent addition to constitutions, and usually introduced in post-colonial constitutional amendments.<sup>232</sup> It is therefore more likely to be found in the constitutions of Global South countries. Moreover, given the similarities in rights language used across different instruments (including international human rights treaties, regional agreements, and constitutional rights provisions) there is the potential for case law interpreting these provisions to forge a distinctive human rights-climate change jurisprudence.<sup>233</sup>

One consequence of a rights-based approach in climate litigation is a framing of the governance problem at hand in terms of considerations of fairness and justice. A “justice-centred approach to climate change,” as the International Bar Association explained in its Presidential Task Force Report on Climate Change Justice and Human Rights, is one that seeks to “foster a more human-rights and equity-conscious perspective in climate change responses.”<sup>234</sup> This contrasts with the more technocratic, science-based approach evident in many Global North cases, which feature extensive discussion of scientific studies and the economic costs of climate change, including—in some recent U.S. cases—the “social cost” of carbon.<sup>235</sup>

These contrasting starting points of Global South rights-based cases and Global North case law can be illustrated with a comparative example. In the rights-based litigation in the *Leghari* case, for instance, Judge Shah understood the threats posed by climate change in Pakistan as a “clarion call for the protection of fundamental rights of the citizens.”<sup>236</sup> His Honor saw the imperative of addressing climate change as necessitating a shift from localized concepts of environmental justice to a broader notion of “climate change justice,” with fundamental

<sup>231</sup> On the question of the contribution of *international* courts and tribunals to global environmental governance, see, for example, TIM STEPHENS, *INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION* (2009). There has also been discussion of domestic courts and global governance generally. See, e.g., Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 *TULANE L. REV.* 67 (2009). On the contribution of the courts in tackling climate change, including potentially through “creating legal precedents thereby building a common law for the environment,” see Brian J. Preston, *The Contribution of the Courts in Tackling Climate Change*, 28 *J. ENVTL. L.* 11, 15 (2016).

<sup>232</sup> See Roderic O’Gorman, *Environmental Constitutionalism: A Comparative Study*, 6 *TRANSNAT’L ENVTL. L.* 435 (2017).

<sup>233</sup> Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 *EUR. J. INT’L L.* 749 (2008) (discussing the similarities between formulations of international human rights and domestic bills of rights). On the extension of human rights protections against environmental harm to climate change, see generally Report of the Special Rapporteur on Human Rights and the Environment, *supra* note 22.

<sup>234</sup> International Bar Association, *supra* note 146, at 46.

<sup>235</sup> Jessica Wentz, *EPA’s Use of the Social Cost of Carbon is not Arbitrary and Capricious*, SABIN CTR. CLIMATE CHANGE LAW’S CLIMATE LAW BLOG (Mar. 7, 2016), at <http://blogs.law.columbia.edu/climatechange/2016/03/07/epas-use-of-the-social-cost-of-carbon-is-not-arbitrary-or-capricious> (discussing case law on this question in the United States).

<sup>236</sup> *Leghari*, Order of Sept. 4, 2015, *supra* note 2, para. 6.

rights at its core.<sup>237</sup> By contrast, in the recent Australian decision in the *Rocky Hill Coal Mine* case, which featured administrative review of a coal mine proposal, Chief Justice Preston of the New South Wales Land and Environment Court framed the climate change issues in terms of a scientific understanding of the contribution of emissions from the mine's coal to global warming.<sup>238</sup> His Honor also scrutinized the cost-benefit analysis put forward by the mining company to justify its proposal, rejecting economic arguments in favor of the mine based on the lack of market substitutes for its product, and the potential for carbon leakage.<sup>239</sup> Both normative starting points illustrated in these case examples are equally valid, but frame the goal of regulation in different terms. Whereas rights-based litigation takes a justice-centered approach focused on protecting vulnerable populations, cases with a science-based framing concentrate on the goal of reducing greenhouse gas emissions in order to prevent dangerous interference with the climate system.

The need to conform international climate law and governance to the findings of climate science and economics remains a prominent theme in the field, evidenced by the weight placed on the successive assessment reports of the Intergovernmental Panel on Climate Change (IPCC).<sup>240</sup> However, the emphasis on rights protection and climate justice in the Global South case law coheres with more recent efforts to enhance recognition of the human rights implications of climate change under international climate law, most notably through preambular language on human rights in the Paris Agreement. This language calls for states “when taking action to address climate change, [to] respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women, and intergenerational equity.”<sup>241</sup> As former UN Special Rapporteur for Human Rights and the Environment John Knox has argued, the Paris Agreement—as the first international environmental agreement to refer specifically to human rights—helps to “mainstream” human rights norms into the ongoing implementation and evolution of the climate regime.<sup>242</sup> Both Global South climate cases that draw on rights arguments to advance claims to climate justice, and the nascent body of rights-based litigation in the Global North, further that endeavor. These cases put victims of climate change and vulnerable populations at the center of legal discussion about the objectives of global climate governance.

## 2. *Mainstreaming Climate Change*

Another notable feature of Global South climate litigation is the often “peripheral” nature of climate issues in these cases. We have argued that this approach of placing climate change at

<sup>237</sup> *Id.*, para. 7.

<sup>238</sup> *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, paras. 514, 515.

<sup>239</sup> *Id.*, paras. 534–45, citing with approval The Hague Court of Appeal decision in *Urgenda*, *supra* note 17, para. 537. This decision, while focused on a science-based framing of the issues, also contains extensive discussion of the human rights obligations of the Netherlands under the European Convention on Human Rights.

<sup>240</sup> *Id.*, paras. 431, 514.

<sup>241</sup> Paris Agreement, *supra* note 1, rec. 11.

<sup>242</sup> John H. Knox, *The Paris Agreement as a Human Rights Treaty*, in *HUMAN RIGHTS AND 21ST CENTURY CHALLENGES: POVERTY, CONFLICT, AND THE ENVIRONMENT* (Dapo Akande, Jaakko Kuosmanen, Helen McDermott & Dominic Roser eds., 2018), available at <https://ssrn.com/abstract=3192106>.



the periphery rather than the center of litigation reflects a view of climate change mitigation and adaptation as embedded in wider issues of environmental protection, land-use, disaster management, and natural resource conservation. Olivia Rumble notes a similar trend of “mainstreaming” climate change in post-Paris Agreement laws emerging on the African continent. She sees this trend as beneficial for “ensur[ing] that there is an uptake in action by all relevant spheres and sectors . . . and recognis[ing] the need for climate change responses to be driven by a multitude of actors in both the private and public sphere.”<sup>243</sup>

To the extent that Global South climate cases consider issues of mitigation and adaptation within a broader environmental and sustainable development context, they support this trend of mainstreaming climate change in post-Paris Agreement governance arrangements. For many Global South legislators and advocates, this approach is also seen as an efficient use of limited resources given the potential to achieve climate co-benefits through measures that address a range of environmental concerns.<sup>244</sup> The Paris Agreement, as well as companion international instruments concluded in 2015, such as the United Nations Sustainable Development Goals (SDGs) and the Sendai Framework for Disaster Risk Reduction, further endorse this broader implementation approach.<sup>245</sup> For instance, Article 2(1) of the Paris Agreement declares its aim “to strengthen the global response to the threat of climate change, *in the context of sustainable development and efforts to eradicate poverty*” (emphasis added). By framing climate change as but one issue in a panoply of factors that must be addressed to ensure sustainable development and environmental protection, cases of the Global South docket reinforce the need for climate governance to be part of, rather than separate from, broader global environmental governance.

### 3. Forwarding a Transnational Regulatory Dialogue

One question that arises from the above points, and our discussion more broadly of the Global South docket, is whether Global South advocates and courts regard themselves as engaged in a transnational regulatory dialogue when deciding these cases. There is certainly some evidence of such an awareness in recent Global North decisions. For instance, in the *Rocky Hill Coal Mine* case mentioned above, Chief Justice Preston’s judgment engaged extensively with the influence of provisions of the Paris Agreement and climate case law from other jurisdictions in reaching his conclusion that now is the “wrong time” for approving a new coal mine.<sup>246</sup> Likewise in the New Zealand case of *Thomson v. Minister for Climate Change Issues*—in which a law student, Sarah Thomson, challenged the adequacy of New Zealand’s 2030 emissions reduction target—the High Court of New Zealand considered the justiciability of the questions raised in light of global precedents. Based on this review,

<sup>243</sup> Rumble, *supra* note 216, at 55.

<sup>244</sup> See the discussion at note 96 *supra*.

<sup>245</sup> United Nations General Assembly, Transforming our World: the 2030 Agenda for Sustainable Development, A/RES/70/1, Oct. 21, 2015, 14; Sendai Framework for Disaster Risk Reduction 2015–2030, available at [https://www.unisdr.org/files/43291\\_sendaiframeworkfordrren.pdf](https://www.unisdr.org/files/43291_sendaiframeworkfordrren.pdf). The UN Climate Change Secretariat has produced a technical paper on integrating climate change adaptation with the Sendai Framework and SDGs: see UN CLIMATE CHANGE SECRETARIAT, OPPORTUNITIES FOR AND OPTIONS FOR INTEGRATING CLIMATE CHANGE ADAPTATION WITH THE SUSTAINABLE DEVELOPMENT GOALS AND THE SENDAI FRAMEWORK FOR DISASTER RISK REDUCTION 2015–2030 (2017).

<sup>246</sup> *Gloucester Resources Limited v. Minister for Planning*, *supra* note 238, paras. 526–27, 699.

the Court found widespread transnational support for a judicial role in reviewing government decision making about climate change policy justifying the application of a local remedy notwithstanding the planetary scale of the climate change problem.<sup>247</sup>

The lack of equivalent statements in Global South cases might suggest that these courts do not see themselves as engaged in the same kind of transnational judicial conversation on climate change governance as do their “northern” counterparts. The patterns of cooperation on climate litigation between advocacy organizations in the Global South and Global North, discussed in Part III.B.6 above, might equally be driven by pragmatic needs to leverage expertise and capacity, and not by a commitment to advancing climate justice through transnational litigation. Likewise, the growing trend of South-South cooperation in this area might be explained by norm diffusion processes, including imitation and learning, rather than, again, a conscious awareness that such cooperation creates transnational networks and dialogue involving courts in global climate governance.

Our research does not allow us to draw firm conclusions on this point without more data, although this could be a fruitful area to explore in future empirical studies. However, our conversations with Global South advocates and judges, as well as the networking activities in which they are engaged, indicate an openness to shaping the emerging climate case law as part of a transnational dialogue. Initiatives such as the Asian Development Bank’s (ADB) publication of a “bench book” on climate laws and relevant environmental law precedents to support regional judiciaries “adjudicating climate change and sustainable development issues” lends support to this claim.<sup>248</sup> The idea for the bench book flowed from the outcomes of the 2016 Third Asian Judges Symposium on Law, Policy, and Climate Change and its recognition of “the growing need for judges to have tools for navigating the inevitable tide of climate change litigation.”<sup>249</sup> In a post discussing the bench book, the Asian Judges Network on the Environment, which is convened with the support of ADB, notes:

Around the world, climate change legal disputes are growing, as litigants demand that governments take stronger climate action. Climate change disputes will also continue to grow in number and complexity as climate change impacts increase in severity. Across Asia, judges will be asked to look into the eye of the figurative legal storm and discern a just and lawful path. They will be faced with new issues; potentially asking them to expand on previously settled legal principles. Climate impacts will span boundaries. So, just as we need a global response to climate change, we need the region’s judiciaries to continue to unite and work toward climate justice.<sup>250</sup>

A similar focus on building capacity in the region and across the Global South is evident in the mission statements of Global South advocacy organizations that have been active in bringing

<sup>247</sup> *Thomson v. Minister for Climate Change Issues*, *supra* note 37, para. 133.

<sup>248</sup> Law and Policy Reform Team, Office of the General Counsel Asian Development Bank Press Release, ADB’s Office of the General Counsel Launches New Technical Assistance Project to Develop Judicial Capacity for Adjudicating Climate Change Issues (Apr. 27, 2017), available at <https://www.ajne.org/article/adb-office-general-counsel-launches-new-ta-develop-judicial-capacity-adjudicating-climate-change-issues>.

<sup>249</sup> Law and Policy Reform Team, Office of the General Counsel Asian Development Bank Press Release, A Climate Change Litigation Bench Book for Judges of Asia and the Pacific (Feb. 14, 2018), available at <https://www.ajne.org/article/climate-change-litigation-bench-book-judges-asia-and-pacific>.

<sup>250</sup> *Id.*

and scoping cases. For instance, Dejusticia, the group behind the *Colombia Youths* case, states on its website that it is a research and advocacy organization “dedicated to the strengthening of the rule of law and the promotion of social justice and human rights in Colombia and the Global South.” It seeks to “promote positive social change” by, inter alia, “carrying out effective advocacy campaigns or litigating in the most impactful forums.”<sup>251</sup>

For Global South plaintiffs, this growing focus of courts and advocates on climate litigation suggests that there may be benefits in bringing their claims before southern courts rather than (or in addition to) having these heard as part of a Global North case. In particular, there is the chance to shape their own government’s local response to international obligations assumed under the Paris Agreement, which might provide a more immediate and meaningful remedy than could be derived from a Global North ruling focused on larger-scale climate impacts. If the effects of individual Global South cases are amplified by South-South transnational advocacy networks, Global South courts could begin to see a larger volume of climate cases; a phenomenon some clearly anticipate and are seeking to prepare for. And as existing innovative judgments demonstrate—like the *Leghari*, *Colombia Youths*, and *Earthlife Africa* cases—the ripples from these decisions extend well beyond their local context, highlighting ways that domestic courts can engage with, and shape, global climate governance.

## V. CONCLUSION

At a time when Global North climate change litigation is receiving intense attention with the success of the *Urgenda* appeal in the Netherlands,<sup>252</sup> and the high-profile attempts to stay proceedings in *Juliana v. USA*,<sup>253</sup> this Article has sought to shine a light on climate case law developments in other parts of the world of potentially equal importance for global climate governance, but which have so far attracted little comment. Our analysis has shown that there is a relatively rich “Global South docket” of climate cases that includes an additional thirteen cases beyond those currently recorded in widely used databases. Moreover, these cases—from Asia, Africa, and Latin America—have characteristics that distinguish them from climate cases in the Global North and suggest new dimensions to explore in our understanding of transnational climate litigation and its contribution to global climate governance. These characteristics include: climate change issues often at the periphery of cases rather than at their center; a stronger trend of employing constitutional and human rights arguments than we have seen to date in the Global North climate cases; a preference for implementation and enforcement of existing policies and laws rather than using litigation as a tool to force regulatory change; and strategic choices made by petitioners in many cases to pursue a more indirect or “stealthy” route in litigation that puts the focus on less politically charged or more policy salient issues rather than on climate change per se to advance environmental goals that also benefit climate change mitigation. It is also clear that Global South climate jurisprudence is experiencing a period of growth that may see these trends evolve over time. For instance, cases based on environmental impact assessment requirements are still

<sup>251</sup> Dejusticia, *About Us*, at <https://www.dejusticia.org/en/about>.

<sup>252</sup> The State of Netherlands (Ministry of Infrastructure and the Environment) v. Urgenda Foundation, C/09/456689/ HA ZA 13-1396 (2018).

<sup>253</sup> For details of the proceedings in this case, including U.S. government attempts to stay the trial hearings, see <https://www.ourchildrenstrust.org/federal-proceedings>.

nascent but growing in number. Equally, although adaptation cases are not yet a significant part of the Global South docket, logically this category of litigation might be expected to develop given the significant challenges of adaptation and climate-related loss and damage faced by many developing countries in the Global South.

Although the trajectory of climate case law development in individual Global South countries is likely to be shaped by factors beyond the North-South axis—including traditions of judicial activism or restraint, differences between common law and civil law systems, and local elements of the political economy—some broader patterns are emerging that point to the distinctive contribution of Global South climate case law to transnational climate governance. These include a justice-centered framing that aligns with efforts to incorporate a human rights-based approach in the international climate regime and mainstreaming of climate issues as part of a broader environmental and sustainable development governance effort. There are also nascent signs that Global South advocacy organizations and courts anticipate a growth of climate litigation and see themselves as engaged in a wider regional and global effort to work toward climate justice. More generally, the climate change case law in the Global South demonstrates that domestic courts in many countries, not just those in the developed North, are playing an important normative role in contributing to global climate governance. A number of Global South climate decisions are novel and far-reaching in their findings and remedies provided to claimants. These cases may serve as a model for similar cases brought elsewhere in the Global South. Equally, they may inspire courts in the Global North, faced with questions of climate science and climate damage in litigation, to take a more adventurous approach, building on the foundations of a transnational climate litigation movement.

Our hope is that in bringing this litigation to light and providing an analysis of key trends across the case law and its lessons for transnational climate governance, others will be prompted or inspired to expand this research, including by adding nuance to the literature on climate litigation prospects in particular Global South countries or regions. Already the level of NGO partnering and cooperation evident in the cases—both North-South and South-South—suggests an increasing interest in exploring possibilities for extending climate litigation globally. Philanthropic funders are also entering this space, which may provide needed sources of funding to take forward innovative test cases in both the Global North and the Global South.<sup>254</sup> This offers the potential not only for the global climate justice movement to become truly global, but also to reach the countries and communities most vulnerable to the impacts of climate change.

<sup>254</sup> Children's Investment Fund Foundation, *A Low Carbon World will Help Secure a Healthy and Prosperous Future for Children*, at <https://ciff.org/priorities/climate-change>. Bloomberg Philanthropies financed the establishment of the State Energy and Environmental Impact Center at New York University School of Law (NYU Law) in 2017 to help state attorneys general fight regulatory rollbacks and other actions that undermine regulation of climate change and other environmental issues. See Juliet Eilperin, *NYU Law Launches New Center to Help State AGs Fight Environmental Rollbacks*, WASH. POST (Aug. 16, 2017), at [www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a-2a9f2d808496\\_story.html?utm\\_term=.0bee17a4ca06](http://www.washingtonpost.com/politics/nyu-law-launches-new-center-to-help-state-ags-fight-environmental-rollbacks/2017/08/16/e4df8494-82ac-11e7-902a-2a9f2d808496_story.html?utm_term=.0bee17a4ca06).

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