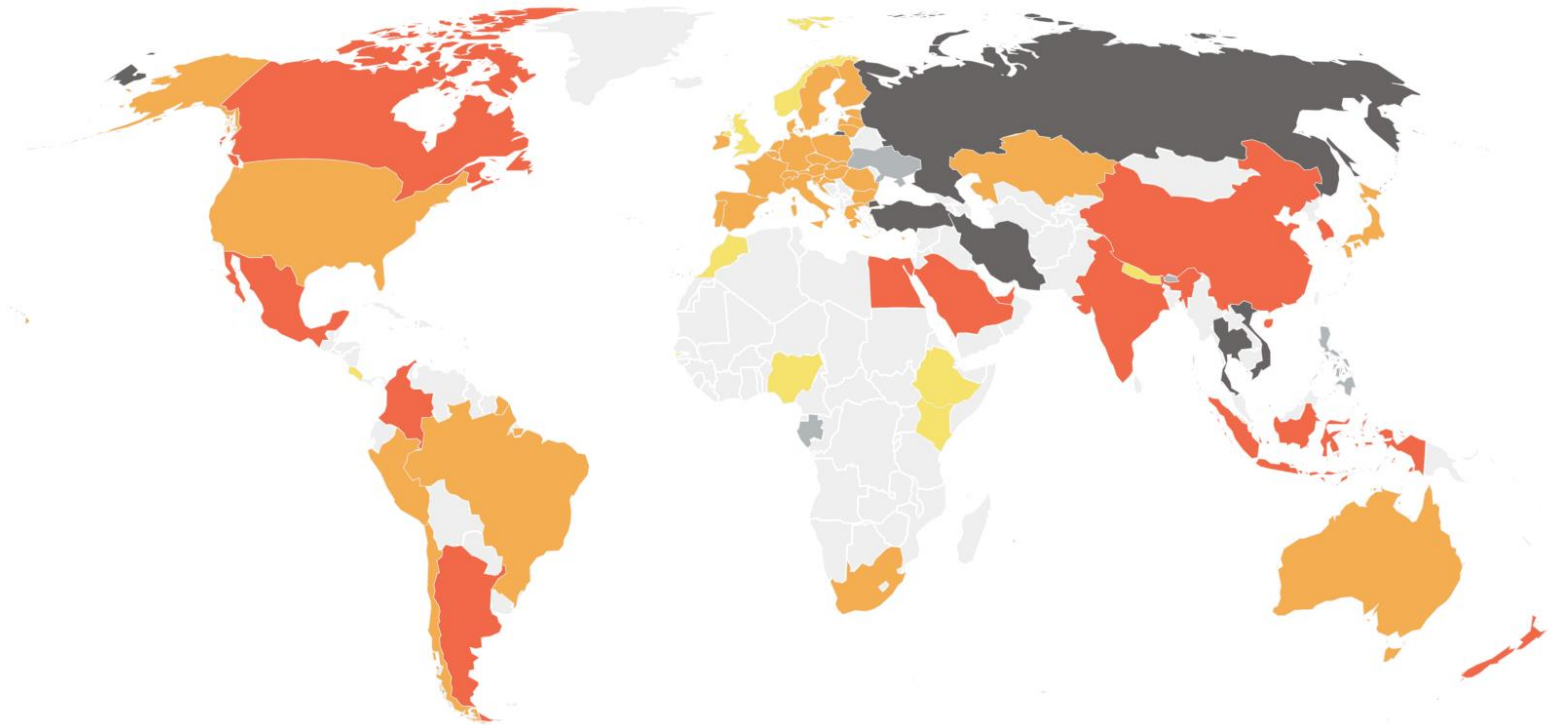

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LAST UPDATE: *October 2022*

CRITICALLY INSUFFICIENT	HIGHLY INSUFFICIENT	INSUFFICIENT	ALMOST SUFFICIENT	1.5°C PARIS AGREEMENT COMPATIBLE

Climate litigation
The Paris Agreement before Domestic Courts

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Outline

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1. Introduction

Introduction

- The slowness and lack of ambition of climate policies have led, in recent years, to the development of climate litigation.
- Around 2,300 climate-related lawsuits have been tried/are pending, and this number is still growing.
- They have been brought by individuals, towns, cities, NGOs, groups of citizens (American children from Our Children's Trust, Swiss senior women, a law student from New-Zealand...)…
- Various states in the North and South have already been ruled against by national courts because of the inadequacy of their action to reduce greenhouse gas emissions, and litigation is multiplying throughout the world.
- Legal action has also been brought against major corporations whose activities are allegedly causing global warming.
- Faced with what is perceived as a failure on the part of public authorities and companies, the law is increasingly relied on and used as a "weapon" to serve various objectives: to encourage public authorities or companies to take stronger measures to mitigate climate change, to implement more ambitious policies, to obtain compensation for damage, to stop a project that emits large quantities of greenhouse gas, etc.

Introduction

- Here, the international climate regime is likely to make a contribution the magnitude of which was somewhat unexpected.
- Indeed, the Paris Agreement, which quickly entered into force, and which now counts 194 Parties, is a relatively flexible treaty, leaving a very wide discretion to States as to its implementation.
- In order to convince (almost) all States to become Parties, the form and substance of the Paris Agreement were adjusted in comparison to its “predecessor”, the Kyoto Protocol. The compromise reached in Paris illustrates a certain evolution of the way States commit themselves. In this regard, the form and substance of the Agreement have been carefully crafted to allow for a consensus to be reached, a consensus that seemed unachievable a few months before.
- However, the way it was designed, and even though its provisions have no or little direct effect, the Agreement increases the pressure on States, including, and perhaps most importantly, at the domestic level.
- The Paris Agreement, thanks to the involvement of civil society, has provided fuel for climate litigation in a decisive manner (1) and offers national courts the opportunity to position themselves as key players in climate governance (2).

2. The Paris Agreement, fuel for climate litigation

2.1 The explosion of climate litigation, boosted by the Paris Agreement

- In many countries, courts rely increasingly on international law.
  - normative expansion of international law
  - increasing interdependence of States in the context of globalisation
  - growing openness of States to international law and growing permeability between the international and national spheres
- The Paris Agreement has amplified this phenomenon
  - it is a treaty, and national courts are known to refer more readily to treaties than to international custom or court rulings, because of their advantages in terms of clarity and ease of access for those not familiar with public international law
  - a treaty “for internal consumption”
  - Centrality of nationally determined contributions / giving wide discretion to the parties
  - A well know treaty – extensive media coverage

2.2. The Paris Agreement, an entry point for international law into climate litigation

- The Paris Agreement is the entry point. But claimants demonstrate a certain inventiveness, inviting judges to combine sources and norms in a synergistic manner. Interpreting one norm in the light of another can then make these norms say more than if they were applied in isolation (and thus more than they say).
  - **IEL customary rules** (no harm rule/duty of care-duty of diligence)
  - **IEL soft law instruments** (COP decisions)
  - **Human rights states' obligations**
    - ✓ In the Dutch Urgenda case, a particularly synergistic interpretation of a combination of customary norms (the Dutch duty of care or no harm rule), treaty rules under international HR law, together with the objectives and principles of the UNFCCC.
    - ✓ A similar combination in Belgium, with Klimaatzaak, currently pending before the Brussels Court of Appeal, where the Court of First Instance found that there had been violations of Articles 2 and 8 of the European Convention on Human Rights, read in the light of the duty of care of the good family father (or the reasonable man in Common Law), a standard itself informed by the Paris Agreement.
  - The **IPPC reports** have been relied on effectively in many cases.
    - ✓ No legal value, as scientific reports, the advantage of reflecting the global consensus of scientists, a sort of "international truth". In the New-Zealand Thomson case, the court noted that "The IPCC reports provide a factual basis on which decisions can be made". It held that the government should review its long-term objective every time the IPCC publishes a new report = a "mandatory relevant consideration" (2017).

2.3. The Paris Agreement, a cornerstone for a ‘global’ justice

- An emerging global community of courts is thus driven largely by the power of persuasion, personal contacts and claimants acting on a global “market” for justice.
- Courts know that they are going to be read
  - Worldwide publicity of climate judgments = a lot of pressure
  - This pressure has led several courts to issue press releases and/or full or partial translations, sometimes in several languages, on the very day their decision is made public
- Courts learn from each other/ find support in the case law of other domestic courts
  - No obligation: courts cherry-pick the judgements and reasonings that serve their own purposes, discarding others, usually without much explanation.
- The influence can be also top-down or bottom up.
  - The decision of the German Federal Constitutional Court on the rights of future generations could inspire the European Court of Human Rights (2021) in the case brought by Portuguese young people.

3. National courts, major players of climate governance?

3.1. An indirect rather than direct reliance on the Paris Agreement

- In climate trials, international law is rarely applied directly, as a source of positive law, either because the legal system is dualist, or because the obligations in question are not viewed as self-executing and therefore cannot be directly invoked by individuals.
- However, the Paris Agreement, alone or in combination with other international obligations, has been successfully used in many cases to interpret domestic rules.
  - The court then carries out a systemic interpretation (domestic law “in the light of”, including all of the relevant legal elements, but also factual or even moral elements), a teleological interpretation (the aim is to limit temperatures as decided in the Paris Agreement) and/or an extensive interpretation.
  - A court here has more discretion in its assessment of whether it is appropriate to use international law, as well as in the choice of sources relied on, which may include unratified treaties or soft law instruments. Indeed, as an interpretative source, the international norm becomes subsidiary: the claimants are not asking for the implementation of the Paris Agreement, but for national policies implementing the country’s international commitments. The monist or dualist nature of the legal system thus becomes irrelevant.
- Courts can be seen as a de facto international player fulfilling an international judicial function, in accordance with the role-splitting theory, as defined by Georges Scelle.
- Many academics have called for this, asking national courts to play a much more important role by taking into account “meta-national” considerations, beyond short-term national interests.

3.2. Synchronising the global goal with national policies

- Here, a provision such as Article 2 of the PA, which defines in very general terms the global goal of limiting temperatures to well below 2°C and, if possible, 1.5°C, without sharing this burden between States, acquires a significance that many States had probably not anticipated. Although there is no obligation, no creditor, no debtor, the language of Article 2 is indeed clear and unequivocal. Whatever the legal value of national contributions, whether a legal system is monist or dualist, Article 2 is like a trap that risks closing itself on States, which will be asked by the courts to align their policies with this global objective.
  - the objective of the Paris Agreement becomes the widely accepted benchmark against which to review national climate policies or decisions to authorise a particular project, such as a new coal-fired power plant in South Africa (EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others, 2017).
  - Other courts, on the contrary, have held that greenhouse gas emissions do not constitute an "*automatic and insuperable obstacle*" to the approval of infrastructure projects, the decision-maker having discretion as to the weight to be given to such emissions in approval decisions (ClientEarth v. Secretary of State, 2021), or that the executive has considerable freedom of action in responding to the coronavirus crisis (Greenpeace Netherlands v. State of the Netherlands, Rechtbank Den Haag, 2020).
  - = Divergent case law. Use for the purpose of interpreting national law is indeed more flexible and discretionary than direct use; it nonetheless provides a real gateway for international law.

3.2. Synchronising the global goal with national policies

- Courts here are led to operationalise the so-called principle of common but differentiated responsibilities, which is at the heart of international environmental law in general and of the international climate regime in particular. This principle has not been operationalised by the Paris Agreement, which does not define a carbon budget and does not share the effort between States.
  - In the Urgenda case, relying on ECHR Art. 2 and 8, the Dutch Supreme court found that the Dutch State had to do "*its part*" even when dealing with a global problem: *"this obligation of the State to do 'its part' is based on Articles 2 and 8 ECHR, because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands".*
  - The decision by the German Federal Constitutional Court emphasised that the German contribution to the international effort must be determined so as to foster mutual trust between the contracting parties, and not to minimize efforts. The court considered that it could rely on various provisions of the Agreement (such as Articles 2.2 or 4.4) to operationalise the principle of CBDR.
  - When examining the complaint filed in September 2019 by 16 children aged 8 to 17 years, including Greta Thunberg, pursuant to the third Optional Protocol to the Convention on the Rights of the Child, the Committee on the Rights of the Child held that *"In accordance with the principle of common but differentiated responsibility, as reflected in the Paris Agreement, the Committee finds that the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause to children, whatever their location."*

3.3. Synchronising greenhouse gas emissions trajectories with longer-term carbon neutrality objectives

- Commitments to carbon neutrality are multiplying, not only from companies, but also from states.
- It is very encouraging, as it could catalyse the action of other States and finally put us on the trajectory set by the Paris Agreement.
- It should therefore not be underestimated, even if States are struggling to define short- and medium-term trajectories consistent with this neutrality objective, trajectories without which this objective will remain wishful thinking.
- Here as well, courts have the opportunity to work on synchronising trajectories.
  - See French cases Grande Synthe and l'Affaire du siècle (Laura Canali)
  - See the German Decision which interprets the German Constitution in the light of an imperative of intergenerational justice. German law "*must not place disproportionate burdens on the future freedom of the claimants".* Furthermore, *"It follows from the principle of proportionality that one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom*" – something the claimants describe as an *"emergency stop".* In a way, consuming a large part of the CO2 budget in the coming years unacceptably aggravates the risk of serious losses of freedom for future generations, who will have no choice but to undergo a painful transition.

4. Conclusion

4. Conclusion

- This research has focused solely on the obligations of States, without addressing litigation involving companies, and without in any way claiming to be exhaustive.
- Within this limited framework, it shows how the Paris Agreement, described as a flexible, bottom-up treaty containing only procedural obligations, and whose transparency and international control mechanism lacks “teeth”, can today produce a useful effect in national courts, who do have very good “teeth”.
- Vague international law gains legal certainty through the intervention of national courts, who make up for the lack of an international control mechanism.
- Through their interpretation of States’ international commitments, which go well beyond the PA, national courts connect, harmonise, bring together and even hybridise international and national norms, with the various courts mutually inspiring each other across borders.
- National courts, through their cascading decisions, could be one of the keys to better combine, on the one hand, international commitments and national regulations and on the other hand, international ambition and State action.

Thank you for your attention

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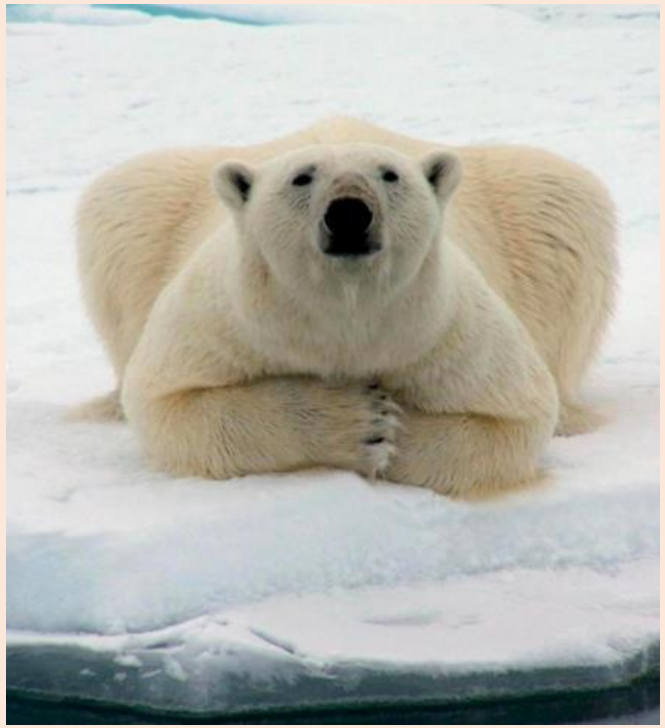

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