An Expected New Wave of Climate Change Disputes in Africa

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Abstract:
Climate change disputes are on the rise globally, being brought against both States and corporate actors, and before judicial, quasi-judicial, and increasingly, non-judicial fora. While only a handful of cases have been successfully brought in Africa to date, the emerging and increasingly sophisticated policy, legislative and constitutional frameworks seeking to tackle Africa's extreme vulnerability to climate change impacts – coupled with the introduction of specialised environmental courts – render the region particularly fertile for future climate-related claims.

In this article we offer some reflections on (i) jurisdictional 'hotspots' where claimants have been especially active in bringing disputes so far in the region; (ii) recent cases in Africa that fall in-step of the broader international trend of NGOs and environmental defenders using litigation to address climate governance gaps, identify and prevent environmental risks and promote human rights; and (iii) evolving and emerging categories of Africa-inspired climate change disputes, such as claims brought against parent companies in the English courts concerning alleged harms caused by African subsidiaries, or energy transition-related investment disputes before arbitral tribunals.

We also share horizon-scanning insights on how disputes before non-judicial international fora are expected to rise (for example, before OECD National Contact Points and the UN Special Procedures mechanism). We further note how African courts

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are demonstrating an increased willingness to provide judicial resources and a platform for NGOs to intervene as third-party observers of climate cases, enabling them to provide expert perspectives on novel aspects of climate impacts on human rights to be taken into account in judges' decision-making.

Furthermore, we predict that the NGOs and environmental activists already active in launching strategic climate litigation in other jurisdictions (namely North America, Europe, and Australia) are likely to make considerable efforts in developing regions like Africa, towards capacity-building of the judiciary instead. For example, NGOs have already signalled intentions to continue working with local lawyers and communities to draft, bolster, interpret and enforce new or existing legislation or constitutional rights, with a view to holding State and corporate actors to account for contributing to climate change without adequately safeguarding human rights and the environment while pursuing their investments and/or operations.

We conclude with a recommendation to all affected stakeholders, whether as a prospective claimant, respondent, or third-party intervener in such cases, to seek advice from counsel who have experience advising clients in cross-border climate change-related disputes. Despite an enormous potential for such disputes in the region, because only a small number have been brought before the local courts in African states to date, potentially impacted stakeholders will need to carefully scrutinise decisions adopted in North America, Australia, and Europe for interpretative guidance on how African judges may approach similar cases domestically (for example, the recent decision by the European Court of Human Rights in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*).

Keywords: Climate change disputes; strategic litigation; African courts; rights-based claims; fossil fuel investment; investment arbitration; non-judicial fora; climate governance; right to a clean environment.

1. INTRODUCTION

Over the last decade, the number of climate change disputes[1] brought before judicial and non-judicial fora globally has been consistently rising.[2] Yet to date, this trend has only marginally affected Africa, with most disputes being in North America, Europe, and Australia. This is a paradox, given the impact climate change has and will have on the African continent. Nonetheless, as

1. There are several types of climate change disputes. Among other things, they can take the shape of lawsuits from individuals or NGOs against states or corporates to coerce them into lowering their carbon emissions; they can be disputes for liability, e.g., from states against corporates for damages resulting from carbon emission-caused climate change. Climate change disputes can be investment disputes before an international arbitral tribunal between a foreign investor and a state that is changing its legislation on carbon emissions (either liberalizing or restricting it). All these disputes have in common that they relate to the human-caused effects of climate change and seek liability for such effects.
2. Approximately 2,300 disputes overall, of which 1,500 were initiated after 2015, cf. 'Climate Change Litigation Databases - SABIN Center for Climate Change Law', in *Climate Change Litigation*, 10 August 2023, https://climatecasechart.com/ (last accessed on 2 May 2024).

African states implement measures to combat the effects of climate change, such endeavours may collide with the continent's aspiration for economic growth. The resulting conflicts, in turn, may trigger disputes both before local and regional courts, international arbitral tribunals and other non-judicial fora.

2. A FERTILE REGION FOR CLIMATE CHANGE DISPUTES

Despite having only contributed less than three percent of global energy-related carbon emissions to date, African countries will be among the hardest-hit by climate change.[3] According to the World Meteorological Organization, the average rate of warming in Africa is above the global average: at +0.3°C/decade during the 1991–2022 period, compared to +0.2°C/decade between 1961 and 1990.[4] The warming has been most rapid in North Africa, which has been gripped by extreme heat, e.g., fuelling wildfires in Algeria and Tunisia in 2022. Climate change not only leads to increased temperatures. It also triggers changing rainfall patterns and more frequent extreme weather events, which in turn, impact agriculture, water resources, and biodiversity. As such, climate change can damage roads, bridges, and buildings, affecting transportation and economic development. Changes in temperature can also affect energy demand and the availability of hydropower resources, which many African countries rely on. Sub-Saharan Africa, for example, is particularly vulnerable to adverse impacts because of limited resources for climate adaptation and a high dependence on climate-sensitive sectors such as agriculture, hydropower energy, and tourism.[5]

Furthermore, the link between climate change and human rights impacts cannot be overlooked. Environmental degradation and climate change affect the lives of local communities living throughout Africa. Climate change can exacerbate and reinforce human rights impacts, as it threatens citizens' rights to life, natural resources, culture, social services, and development, particularly in developing countries.[6]

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3. International Energy Agency ('IEA'), 'Key Findings – Africa Energy Outlook 2022 – Analysis', https://www.iea.org/reports/africa-energy-outlook-2022/key-findings (last accessed on 2 May 2024).
4. World Meteorological Organization, 'Africa Suffers Disproportionately from Climate Change', 5 September 2023, https://wmo.int/news/media-centre/africa-suffers-disproportionately-from-climate-change (last accessed on 2 May 2024).
5. IMF, 'Africa's Fragile States Are Greatest Climate Change Casualties', 30 August, 2023, https://www.imf.org/en/Blogs/Articles/2023/08/30/africas-fragile-states-are-greatest-climate-change-casualties (last accessed on 2 May 2024).
6. Moodley P. 'The Tide of Climate Litigation Is upon Us in Africa,' in César Rodríguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Globalization and Human Rights Series, Cambridge University Press, 2022), 376–86.

To help address the climate emergency in the region, African heads of state and government convened in September 2023 for the inaugural Africa Climate Summit (ACS) in Nairobi, Kenya. They released a declaration which called *inter alia* for:[7]

- An increase in Africa's renewable generation capacity from 56 Giga Watts (GW) in 2022 to at least 300 GW by 2030.
- A rediversion of exports of energy intensive primary processing of Africa's raw material back to the continent.
- The design of global and regional trade mechanisms and infrastructure that would enable the trade of Africa-derived products to compete on fair and equitable terms.
- Acceleration of efforts to decarbonize the transport, industrial, and electricity sectors through smart, digital, and highly efficient technologies such as green hydrogen, synthetic fuels, and battery storage.
- The design of industry policies that encourage global investment to locations that offer the most and substantial climate benefits, while ensuring co-benefits for local communities; and
- Implementation of a mix of measures that elevate Africa's share of carbon markets.

In December 2023 at COP 28, the Coalition for High Ambition Multilevel Partnerships (CHAMP) for climate action was launched and joined by 12 African states.[8] CHAMP's purpose is to promote greater collaboration between national and subnational governments in climate action planning, financing, implementation, and monitoring of climate strategies, including NDCs, with a view towards collectively limiting the temperature increase to 1.5°C above pre-industrial levels.

Attempts to pursue such measures could ultimately inspire climate change disputes. On the one hand, if the subscribing African states fail to adopt and implement such measures effectively, individuals or interest groups may bring legal proceedings against these states seeking to compel them to act. On the other hand, if adopted, these measures may contrast with these states' attempts to grow their economies: many African nations still rely heavily on the exploitation of their fossil fuel resources to boost economic development. In addition, climate-resilient agricultural practices often require changes that disrupt traditional methods, affecting livelihoods in the short term.

7. 'Africa Climate Summit 2023 | Driving Green Growth and Climate Finance Solutions for Africa and the World', https://africaclimatesummit.org/ (last accessed on 2 May 2024).
8. For full list of states, see: https://www.cop28.com/en/cop28-uae-coalition-for-high-ambition-multilevel-partnerships-for-climate-action (last accessed on 2 May 2024).

At the same time, we can expect significant changes in energy policies and regulations adopted by African states, for example: introduction of requirements for more robust environmental impact assessments, enhanced or reduced incentives for renewable energies, stricter application of exchange control rules, new reporting obligations, increased taxation driven by resource nationalism, or mandatory emissions reduction targets. Such changes can limit industrial expansions and/or adversely impact foreign investments, which could in turn give rise to investor-state disputes. Meanwhile, communities in Africa may continue to turn to courts as part of their strategy to stop potential human rights violations and protect their territories against further fossil fuel exploration and exploitation by, for example, challenging environmental planning permits. Such conflicting objectives by various stakeholders create a perfect storm for climate change-related disputes.

3. DISPUTES UNFOLDING IN THE REGION

Considering the conflicting interests of the various stakeholders,[9] climate change disputes likely will multiply in Africa. So far, however, there are only 19 registered in Africa according to the (non-official) repository of global climate change disputes maintained by Columbia University's Sabin Center for Climate Change Law.[10] Yet, experts believe there are far more cases in lower courts that have not been documented.[11]

3.1 Regional climate change disputes 'hotspot': South Africa

As of today, the African jurisdiction in which this disputes trend is most tangible is South Africa. The country's mining and minerals processing, as well as its coal-intensive energy system, renders it a significant contributor of global GHG emissions. South African courts are alert to this, and to South Africa's particular exposure to the adverse effects of climate change exacerbated by its socio-economic and environmental vulnerabilities.

Against this background, South African courts have engaged at least since 2017 with climate change adaptation or mitigation issues, and climate science.[12]

9. E.g., states devising and implementing mitigation/adaptation strategies, populations seeking to stop fundamental rights abuses and to protect their territories, or investors challenging a state's refusal to authorize a new fossil fuel exploration project.
10. 'Jurisdiction – Climate Change Litigation', in Climate Change Litigation, 19 November 2021, https://climatecasechart.com/non-us-jurisdiction/ (last accessed on 2 May 2024).
11. Kaminski I, 'The Unique Character of African Climate Litigation', in The Wave, 19 February 2024, https://www.the-wave.net/climate-litigation-africa/ (last accessed on 2 May 2024).
12. Murcott MJ and Vinti C, 'The Judge-Made 'Duty' to Consider Climate Change in South Africa' [2024] *Journal of Human Rights Practice*, https://doi.org/10.1093/jhuman/huad069.

For example, in *Earthlife Africa Johannesburg v. the Minister of Environmental Affairs and Others* (2017, upheld in 2020),[13] the court imposed a responsibility and obligation on government authorities granting permissions for projects requiring an environmental impact assessment, to adequately consider climate change impacts. The court underlined that:

- South Africa is a developing country and one which is 'water-stressed' and dependent on agriculture and other climate-sensitive sectors. Thus, it is impacted by the smallest variations in rainfall and temperature and is especially prone to droughts. Such risks are exacerbated by the global rise in greenhouse gas emissions.
- A 'mandatory pre-requisite' climate change impact assessment must be conducted before the granting of any environmental authorisation. The court considered the relevant planning application laws, the South African Environmental Impact Assessment Regulations, section 24 of the South African Constitution (the Right to an Environment contained within the Bill of Rights as part of the Constitution), South Africa's domestic environmental policies and South Africa's obligations under international climate change conventions.
- The court recognised that under section 24 of the Constitution (Right to an Environment), there are 'human rights' implications of climate change, which should be considered in authorisation processes for fossil fuel projects. As a result, this was the first case before the South African courts which gave a human rights dimension to climate litigation.

In *Philippi Horticultural Area Food and Farming Campaign v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape (PHA)*, the court expanded the precedent set by *Earthlife Africa*. The court ordered government officials to reconsider their approval of a proposed urban development project, to assess new evidence which considered the potential impacts of the development on climate change and water scarcity. In delivering its ruling, the court noted that its role was not to 'second-guess' the *evaluation* of relevant considerations such as climate change or water security, but to rather ensure that the officials had discharged their duties by rationally and lawfully *taking such factors into account*. The court therefore balanced its law-making function by demonstrating deference to the executive branch. The effect of this precedent is to caution decision-makers from relying on outdated reports which fail to take climate adaptation issues (such as water scarcity) into account, as such decisions may be set aside. The court also drew upon the

13. *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* (65662/16) [2017] ZAGPPHC 58; [2017] 2 All SA 519 (GP).

'precautionary principle' entrenched in South African environmental law and found that a 'risk-averse and careful approach' was required of the decision-makers in relation to water scarcity and climate change, 'especially in the face of incomplete information'.[14]

In *Eloff Landgoed (Pty) Ltd v. Minister of Forestry, Fisheries, and the Environment and Others (GDP)*,[15] the court emphasised that broader ESG concerns – not only 'climate' – must be considered when determining whether authorisations should be granted for fossil fuel projects. In this case, the court set aside a government ministry's approval for a coal mining project, considering factors such as the local community's objections to the project, the negative balance of economic impacts vs. irreparable harm to agricultural land, and the negative findings in the proposed project's Social Impact Report. The decision is currently under appeal and is expected during 2024.

In *Vukani Environmental Justice Alliance Movement in Action v The Minister of Environmental Affairs and Four Others*,[16] otherwise known as the 'Deadly Air' case, environmental activists sued the South African government for alleged violation of the constitutional right to clean air. The court interpreted that section 24 of the South African Constitution (Right to the Environment) extends to the right to be protected from poor air quality. The case demonstrated that the South African courts are minded to deploy human rights approaches and environmental principles such as 'intergenerational equity' in adjudicating environmental disputes, which could, in future, extend to climate change disputes.[17]

In *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*,[18] the court set aside approval for an oil and gas exploration project also based on the 'precautionary principle'; specifically, that the original approval had ignored: (i) the anticipated harm to marine and bird life along the Eastern Cape coast; (ii) communities' spiritual and cultural rights and their rights to livelihood; and (iii) climate change considerations. The court explicitly acknowledged that granting an exploration right was tied to subsequent extraction of fossil fuels and took a social justice-oriented approach to prevent the culmination of exploration and then exploitation which would

14. *Philippi Horticultural Area Food and Farming Campaign v. MEC for Local Government, Environmental Affairs and Development Planning: Western Cape* (2020) ZAWCHC 8.
15. *Eloff Landgoed (Pty) Ltd v Minister of Forestry, Fisheries, and the Environment and Others* (21525/2020) [2023] ZAGPPHC 434.
16. *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* (39724/2019) [2022] ZAGPPHC 208.
17. This was the case, e.g., in Germany with *Neubauer et al. v. Germany* (1 BvR 2656/18) [2021] BGBl. I 1720.
18. *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2022] ZAECMKHC 55; 2022 (6) SA 589 (ECMk).

lead to 'the production and combustion of oil and gas, and the emission of greenhouse gases that will exacerbate the climate crisis and impact communities' livelihoods and access to food'. The case is currently under appeal, and a decision is expected in 2024.

Another example is *Africa Climate Alliance et. al. v. South African Minister of Mineral Resources & Energy et al.*[19] The applicants allege that the procurement of 1,500 Megawatts of new coal-fired power allowed by the Ministry represents a severe threat to the constitutional rights of the people of South Africa, especially their environmental rights, the best interests of the child, the rights to life, dignity, and equality, among others. On 17 November 2022, the High Court of South Africa held a hearing on the matter of the respondents' document production. The court delivered its interlocutory judgement on 9 December 2022, which ordered that the Minister must release records relating to the decision to include new coal power in the 2019 Integrated Resource Plan for Electricity (IRP), and to the 2020 Ministerial determination for new coal issued under the IRP. Should the Minister fail to release the records, the applicants will be entitled to proceed with the case against the Minister without his opposition. It is unknown whether the Ministry complied with these orders.

More recently in South Africa, two NGOs filed a new environmental planning case seeking to have the High Court review and set aside environmental authorisation granted to TotalEnergies for a project involving exploratory drilling: *The Green Connection and Natural Justice vs. Government Ministers and TotalEnergies*.[20] The legal grounds for seeking the review include the government's alleged failure to assess the socio-economic impacts of a potential oil spill on local fisheries, while also ignoring the climate change impacts associated with oil or gas usage.

These cases broadly reflect the international trend of NGOs and environmental defenders using litigation to address climate governance gaps, identify and prevent environmental risks and promote human rights.

There might be even more momentum for bringing climate litigation in South Africa once the South African Climate Change Bill enters into force. The Bill was passed by the National Assembly in October 2023 and awaits National Council of Provinces concurrence and Presidential signature. It will establish a comprehensive legal framework in the country for the regulation of the effects of climate change, with the goal to achieve net zero by 2050. While the legislation does not explicitly require consideration of climate-relevant issues in environmental decision-making, once approved, courts may generally

19. *African Climate Alliance and Others v Minister of Mineral Resources and Energy and Others* (56907/21) [2022] ZAGPPHC 946.

20. Claire Martens, 'South Africa: Legal Challenge Launched against TotalEnergies' Drilling Decision' (Natural Justice, 25 March 2024), https://naturaljustice.org/south-africa-legal-challenge-launched-against-totalenergies-drilling-decision/ (last accessed on 2 May 2024).

interpret provisions generously to cover climate change considerations, as has been the case with the courts' interpretation of similar legal provisions under other South African instruments such as the National Environmental Management Act 107 of 1998 (NEMA) and the National Water Act 36 of 1998 (Water Act). South African judges may thus likely continue to fill legislative gaps relating to climate action through judicial interpretation of existing, as well as emerging, environmental, and human rights provisions to conceive additional climate change obligations.

3.2 Evolving and emerging categories of Africa-inspired climate change disputes

Aside from these concrete examples, and considering current global trends, there are climate change-related disputes expected to evolve either within Africa, or in relation to projects located in Africa but commenced in other international fora.

Without being exhaustive, the following categories of existing and potential disputes are particularly worth mentioning.

(i) Liability and Compensation

In some cases, individuals, communities, or even states and municipalities may seek compensation for losses and damages caused by the effects of climate change. This can lead to legal actions against entities, such as fossil fuel companies, alleging responsibility for greenhouse gas emissions and their contribution to climate change. While not a 'climate change dispute' in nature (rather an 'environmental pollution' case), it is worth considering the example of the 'Ogale and Bille Litigation'; the ongoing eight-year battle before the English courts brought by two communities in the Niger Delta against Shell plc (as UK parent company) and its Nigerian subsidiary, SPDC. The case revolves around oil contamination affecting two Nigerian communities in the Bille and Ogale regions. Over the course of 2015–2017, thousands of allegedly affected claimants living and/or working in the Ogale and Bille communities filed four sets of claims. They claim that Shell's operations have caused severe oil pollution in the two regions, including water and ground contamination, and seek orders from the English courts compelling Shell's parent and Nigerian subsidiary to clean-up the oil and compensate the claimants for losses suffered.

A brief (though incomplete) procedural timeline of the case can be found on the claimants' counsel's website,[21] which sets in context the jurisdictional decision of the Supreme Court judgment of *Okpabi & Others v Royal Dutch*

21. Leigh Day, 'Legal Briefing Note – Ogale & Bille Communities v. Shell Plc', https://www.leighday.co.uk/media/3wzjpauj/bille-and-ogale-legal-briefing.pdf.

Shell Plc & Another [*2021*].[22] The Supreme Court decided that the claimants' case was at least 'arguable' in the English courts; adding to the series of landmark decisions on parent company liability under English law for claims alleging environmental damage and human rights abuses of foreign subsidiaries. Trial on the merits is expected to take place before the English High Court during 2024.

In the meantime, and pending the merits trial, the Ogale and Bille Litigation has faced several further 'staging posts' which are set out in a recent High Court judgment in the case of 22 November 2023, which dealt exclusively with three matters in the ongoing litigation.[23] One of the matters concerned whether the claimants should be allowed to re-amend certain Particulars of Claim, to include new causes of action under the African Charter and Nigerian Constitution. This included Shell's alleged breaches of the claimants' right to a clean environment under Nigerian constitutional law. At paragraph 93 of her judgment, Mrs Justice May DBE explains: 'I am satisfied that the Constitutional claims [associated with the right to a healthy environment] are at this stage arguable, to be resolved by factual evidence from expert Nigerian lawyers' given that 'the Constitutional claims plainly arise out of the same facts as existing claims and accordingly fall to be allowed within [procedural rules of English litigation]'. While the *Okpabi* strand of the Bille and Ogale Litigation reminds that victims of environmental damage in Africa may seek remedies against the UK parent company of the African subsidiary in the English courts, the November 2023 judgment in the ongoing litigation shows the English courts' willingness to hear evidence from local lawyers on the applicability of Nigerian constitutional law in such cases, such as the right to a clean environment.

(ii) Environmental Regulations

Legal disputes may arise over the implementation and enforcement of environmental regulations aimed at mitigating climate change. Industries and local governments may challenge the legality of such regulations, leading to court cases or investment arbitrations, depending on the stakeholders involved. For instance, in *West Virginia et al. v. EPA*, 20 States and several energy companies had sued the Environmental Protection Agency (EPA) for overstepping its powers. The case revolved around the Clean Power Plan (CPP) proposed by the EPA in 2015. It aimed to regulate emissions at existing power plants by using technology and shifting to clean energy sources. The CPP faced challenges, leading to court stays and was never enforced. The Trump administration introduced a similar Affordable Clean Power rule in 2019, which also

22. *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC.
23. 'The Bille and Ogale Group Litigation' [2023] EWHC 2961 (KB).

faced legal challenges. Even with the change in administration to President Biden in 2020, the case remained relevant, because the EPA kept its intentions to include certain emissions controls, so that the central issue of the case – EPA's regulatory authority – still applied. On 30 June 2022, the United States Supreme Court ruled that the EPA lacked the authority to regulate emissions from existing power plants based on generation shifting mechanisms, thus invalidating the Clean Power Plan. Even so, the EPA can still regulate emissions at existing plants using emissions reduction technologies.

If such a dispute about overstepping powers by introducing new environmental regulation[24] involves a foreign investor, it may end up in a dispute before an investment arbitration tribunal (see 'investment disputes' below).

However, disputes over environmental regulations can also arise when individuals or NGOs request their governments to act, as described above in the South African cases.

(iii) Investment Disputes

As anticipated above, investment arbitration disputes related to climate change involving African countries have not occurred so far but are very likely to be launched. In fact, investment disputes often revolve around issues such as environmental regulations, changes in government policies affecting investments, and the effects of climate change on specific industries. A prominent example is *Rockhopper v. Italy*: In 2015 the Italian government re-introduced a ban on oil and gas exploration within 12 miles of the Italian coastline it had lifted in 2012. In 2017, UK company Rockhopper Exploration Plc, along with its Italian subsidiary, filed a claim for compensation alleging violations of the investor protection provisions of the Energy Charter Treaty (ECT). The claim concerned its interests in the Ombrina Mare oil rig, for which it was hoping to obtain a production concession from the Italian Government before the introduction of the ban. On 23 August 2022, the ICSID arbitral tribunal ordered the Italian government to pay EUR 184 million to the claimants.[25]

Similar scenarios are likely to appear in Africa. For instance, if a government decides to introduce stricter environmental regulations to address climate change, foreign investors in industries like mining, energy, or agriculture may challenge these regulations through investment arbitration. They might argue that the new rules harm their investments or violate international treaties. However, the risk of disputes does not come only from the fossil fuel industry: as Africa invests in renewable energy projects to mitigate climate change, disputes can arise between governments and foreign investors over contracts,

24. Or simply introducing another environmental regulation that affects the profitability of an investment.

25. *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14.

incentives, and policy changes related to these projects. Prominent examples are the many investment cases of investors against Spain (and to a lesser extent Italy) for withdrawing state incentives for the solar industry. Similarly, climate-resilient infrastructure projects can involve significant foreign investments. Disputes may emerge over contract issues or government decisions related to these projects. Finally, climate change can exacerbate land and resource disputes in Africa, leading to conflicts between indigenous communities, governments, and foreign investors.

Investment arbitration concerning climate change in Africa underscores the intricate relationship between environmental sustainability and economic development. African states have taken proactive measures to mitigate the potential risks associated with such disputes. For instance, the 2012 Model Bilateral Investment Treaty (BIT) of the Southern African Development Community (SADC) placed obligations on both states and investors, with the explicit aim of achieving a balanced distribution of rights and responsibilities among the signatory parties.[26] In doing so, the SADC model BIT even preceded the much-acclaimed 2019 Dutch model-BIT. The SADC model BIT comprises many provisions that oblige investors to adhere to commitments pertaining to environmental preservation, human rights, and anti-corruption measures.[27]

Additionally, a commonly observed environmental provision is the general exception clause, which safeguards a state's sovereign right to enact and apply legislation for environmental protection, ensuring that the BIT does not restrict this authority. Furthermore, non-derogation clauses, often included in BITs concluded by Nigeria and Tanzania, specifically articulate that international investment agreements should not be interpreted as permitting any deviation from or waiver of compliance with established environmental standards.

In the same vein, several African states have incorporated exceptions or elucidations within their International Investment Agreements (IIAs) to address substantive legal protections, including the Fair and Equitable Treatment (FET) standard, indirect expropriation, and the national treatment standard. These provisions explicitly declare that environmental measures should not be considered as unfavourable treatment contravening the FET standard, thus empowering states to enact environmental regulations without the fear of arbitration. Morocco, for instance, has included such an exclusion related to FET in several of its IIAs.[28] As an illustration, the Morocco-Japan

26. Preamble, SADC model BIT: '*Seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Agreement*.'
27. E.g., articles 13, 14, and 15.
28. El-Kady, Hamed, Rwananga, Yvan (2020), 'Morocco's New Model BIT: Innovative features and policy considerations' *Investment Treaty News* (International Institute

BIT of 2020 specifies that '[*m*]*easures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriation.*'[29] Older Moroccan BITs, such as the one with Germany (1961) or France (1996) do not contain similar provisions.

4. ON THE HORIZON

The accelerating impacts of climate change and attempts of African states (and communities) to combat its negative effects will no doubt contrast with conflicting economic interests. This will trigger disputes on all possible avenues: It may lead to disputes before state courts (perhaps with an increase of involvement of African domestic courts) but also to large-scale investment disputes before investment arbitral tribunals.

Climate change disputes brought before non-judicial fora are also expected to rise (for example before OECD National Contact Points and the United Nations Special Procedures mechanism), given their lower cost to initiate, and the significant press attention they can garner. For example, in November 2021, mandated UN experts issued a public (non-binding) 'communication' to Canadian-based Reconnaissance Oil and Gas (ReconAfrica)[30] and the National Petroleum Corporation of Namibia,[31] in connection with oil and gas exploration and extraction activities on the lands of the San indigenous peoples in Namibia and Botswana. The communication publicly highlighted allegations of the companies' locally registered subsidiaries and joint ventures potentially causing irrevocable damage to the fragile ecosystem and protected areas on which indigenous peoples depend for their physical and cultural survival.[32] The mechanism of the UN Special Procedures is likely to be deployed more often following the UN Working Group on Business & Human Rights' publication of its 'Information Note on Climate Change and the Guiding Principles on Business and Human Rights' (June 2023).[33] The UN

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for Sustainable Development, 20 June 2020), https://www.iisd.org/itn/en/2020/06/20/moroccos-new-model-bit-innovative-features-and-policy-considerations-hamed-el-kady-yvan-rwananga/ (last accessed on 2 May 2024).

29. Annex referred to in Article 9 – Expropriation and Compensation, Morocco-Japan BIT 2020.
30. Communication to ReconAfrica, (UN, 17 November 2021), https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26806 (last accessed on 2 May 2024).
31. UN, Communication to National Petroleum Corporation of Namibia, 17 November 2021, https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26824 (last accessed on 2 May 2024).
32. Ibid.
33. Working Group on the issue of human rights and transnational corporations and other business enterprises, 'Information Note on Climate Change and the Guiding Principles on

guidance clarifies 'what actions should be taken by States and businesses in relation to embedding human rights considerations into climate change policies, processes and actions'. In 2023, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct were updated for the first time since 2011, with one of the stated focuses to 'strengthen procedures to ensure the visibility, effectiveness, and functional equivalence [of National Contact Points] with respect to [Responsible Business Conduct]'. The refreshed OECD Guidelines are likely to breathe new life into the institution of National Contact Points (which have been established in Egypt, Morocco, and Tunisia); and we could see increased momentum in climate change disputes being brought before this alternative non-judicial grievance mechanism.

All involved actors (states, local communities, as well as domestic and foreign investors) should be prepared to address the issues resulting from the need to combat climate change and, if possible, prevent time and cost-consuming disputes. For example, governments should consider the effect of new legislation on current domestic and foreign investments and contemplate strategies to negotiate and settle potential disputes at the outset. At the same time, investors should consider carefully the environmental and emission impact of their investment and the likelihood of changes in legislation, perhaps by looking into legislative trends in the region or in similar jurisdictions. Both governments and corporates/investors should also consider involving affected local communities and NGOs in discussions on how to handle the issues a project or a change in regulation/legislation may pose to mitigate litigation risks, especially in developing regions such as Africa.

In fact, African courts are demonstrating their increasing willingness in climate litigation to provide judicial resources and a platform for NGOs to intervene and provide perspectives on novel aspects concerning climate change impacts. An example of this can be found in the case of *Kituo Cha Sheria and another v. Attorney General of Kenya and others.* The case concerns government officials' alleged failure to prevent or mitigate the effects of climate change in accordance with its duties under the Kenyan Climate Change Act. In October 2023, the specialist Kenyan Environment and Land Court granted a joint application for two NGOs to intervene in the case (Initiative for Strategic Litigation in Africa (ISLA) and Kenya Legal & Ethical Issues Network on HIV and AIDS (KELIN)).[34] The court ruled that their participation

Business and Human Rights' (2023), https://www.ohchr.org/sites/default/files/documents/issues/business/workinggroupbusiness/Information-Note-Climate-Change-and-UNGPs.pdf (last accessed on 2 May 2024).

34. 'The Environmental and Land Court at Iten in Kenya Admits ISLA and KELIN as Joint Amici in a Case Challenging Kenya's Legal Obligation to Mitigate against Climate

in the proceedings would be valuable because the information to be provided would be of great assistance to the Court in addressing the issues raised in the petition, such as the gendered impact of climate change. The court further considered that it would benefit from the national, regional, and international perspectives on the gendered impact of climate change which the joint amici would provide to the court.

And while NGOs may face structural limitations in bringing strategic litigation in developing regions, they refocus their efforts on collaborating with governments, regulators, civil society, the private sector, and the judiciary to maximise impact. For instance, in early 2023, ClientEarth assisted the Supreme People's Court of China with developing novel guidance on climate change.[35] In late 2023, ClientEarth (supported by the UN Environment Programme) also hosted a training course in Indonesia for judges from China, India, and South East Asia on how to handle climate-related litigation.[36] The objective of the course was for judges to share best practices and personal experiences, as well as perspectives on how to interpret the latest climate science. Such training could have an influence over how, for example, the courts in Asia-Pacific will interpret and give weight to ongoing or future climate-related cases.

It is likely that African-based NGOs will pursue similar objectives, which could have a tangible impact on the development of climate jurisprudence in the region. ClientEarth has already confirmed that it 'work[s] with local lawyers and communities to design, strengthen and enforce laws around the use of forests and land in Ghana, Gabon, Ivory Coast, Liberia and the Republic of Congo'.[37] Such capacity-building could also be driven, in part, by ambitions to hold corporate giants accountable for developing or financing carbon offsetting projects in Africa to further their own climate mitigation strategies, while disregarding or not effectively safeguarding against

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Change' (KELIN Kenya, 20 November 2023) https://www.kelinkenya.org/the-environmental-and-land-court-at-iten-in-kenya-admits-isla-and-kelin-as-joint-amici-in-a-case-challenging-kenyas-legal-obligation-to-mitigate-against-climate-change/ (last accessed on 2 May 2024).

35. De Boer and Jiang Boya D, 'China's Supreme People's Court Issues Guidance on Climate Cases – CCICED' (CCICED, 13 June 2023), https://cciced.eco/climate-governance/chinas-supreme-peoples-court-issues-guidance-on-climate-cases/ (last accessed on 2 May 2024).
36. Fogarty D, 'See You in Court: Training Equips Asian Judges for Climate Litigation Cases', The Straits Times (15 November 2023), https://www.straitstimes.com/asia/see-you-in-court-training-equips-asian-judges-for-climate-litigation-cases (last accessed on 2 May 2024).
37. 'Africa' (ClientEarth, 21 September 2023), https://www.clientearth.org/where-we-work/africa/.

potential human rights and environmental impacts often associated with such projects.[38]

In any event, all stakeholders are well-advised to seek the support from counsel with cross-border experience in climate change-related disputes. Such legal advice can help stakeholders to anticipate potential disputes risks, and pursue their rights based on similar experiences in other jurisdictions. This is particularly true for virtually all African jurisdictions. Despite an enormous potential for climate-change-related disputes, because of the current dearth of cases brought before the local courts in African states, potentially impacted stakeholders will need to carefully scrutinise decisions adopted in North America, Australia, and Europe for interpretative guidance on how judges may approach similar cases domestically. An example for such guidance could be, for example, the newly-released groundbreaking decision by the European Court of Human Rights in *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, which found that the European Convention on Human Rights encompasses a right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life.[39] African courts likely may find similar rights enshrined in their domestic constitutions or supranational pieces of legislation.

38. Carbon offsetting related controversies in the region include: **(1)** Shaner A, 'Blood Carbon: Kenyans Are Being Erased so the UAE Can Greenwash' (CounterPunch.org, 17 December 2023), https://www.counterpunch.org/2023/12/18/blood-carbon-kenyans-are-being-erased-so-the-uae-can-greenwash/; **(2)** Marshall BC, 'Kenya's Ogiek People Being Evicted for Carbon Credits – Lawyers' BBC News (November 9, 2023), https://www.bbc.co.uk/news/world-africa-67352067; **(3)** Madhuri, 'Systemic Sexual Abuse at Celebrated Carbon Offset Project in Kenya' (SOMO, 6 November 2023), https://www.somo.nl/systemic-sexual-abuse-at-celebrated-carbon-offset-project-in-kenya/; **(4)** A major investigation by the Centre for Research on Multinational Corporations (SOMO) and the Kenya Human Rights Commission (KHRC) has exposed serious, systemic sexual abuse of women at the celebrated Kasigau carbon offset project in Kenya, run by the US-based company Wildlife Works – 'Offsetting Human Rights' (SOMO, 12 December 2023), https://www.somo.nl/offsetting-human-rights/; **(5)** Greenfield P, 'Allegations of Extensive Sexual Abuse at Kenyan Offsetting Project Used by Shell and Netflix' Environment | the Guardian (7 November 2023), https://amp-theguardian-com.cdn.ampproject.org/c/s/amp.theguardian.com/environment/2023/nov/07/accusations-of-widespread-sexual-abuse-at-offsetting-project-used-by-netflix-and-shell-aoe (each last accessed on 2 May 2024).
39. *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (53600/20), ECHR 087 (2024).