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Connecting Climate Change and the Law

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This week, we discuss the first settlement between a state and a group of young plaintiffs who claimed that their government's inadequate climate policies violated their constitutional right to a healthy environment. We discuss the Grantham Institute's report on 2023 trends in climate litigation, a topic that permeates the majority of issues in this publication. The EU deploys a further €3 billion to fund projects which aim to modernize energy systems to reduce greenhouse gas emissions in the energy, industry and transport sectors, and the International Capital Markets Association (ICMA) publishes guidance to support two areas of issuance in respect of green bonds and the financing or refinancing of sustainability-linked loans within the structure of a bond.

Young Plaintiffs Settle with Hawaii Over Climate-related Constitutional Rights Violation Case

On June 24, 2024, a Hawaiian court **approved a settlement** of a climate lawsuit brought against the state by a group of young plaintiffs who claimed that their constitutional right to a healthy environment had been violated. The settlement stipulates that Hawaii's Department of Transportation must create and implement a road map to achieving net zero emissions in respect of ground transport, inter-island sea and air transportation by 2045. The settlement does not include monetary relief, but instead requires the state to make changes to reduce greenhouse gas (GHG) emissions. It also recognizes the plaintiffs' right to a "clean and healthful environment" per Hawaii's Constitution. The state's government has agreed to set out a plan to decarbonize its transportation system within 20 years, including plans to expand bicycle lanes as well as install electric vehicle chargers. However, decarbonizing some areas of transportation such as airports will prove more difficult, as is the case globally given the challenges of finding sustainable alternatives to jet fuel.

This is the first climate case in which a settlement has been reached between a state and young plaintiffs and is thought likely to set a precedent for future similar action. It is not, however, the first time a state has been sued by a group of young citizens who claim that their right to a clean and healthy environment – a right enshrined in the state's constitution – has been violated. **As we discussed in September 2023**, the Montana First Judicial District Court found in favor of a group of 16 Montana residents ranging in age at the time between two and 18, and struck down certain provisions of the Montana Environmental Policy Act, which restricted Montana from incorporating the impact of greenhouse gas emissions or other forms of climate change in environmental reviews. By enacting this limitation, the court found that the state was responsible for harming plaintiffs, basing its conclusion in an analysis of climate science and environmental projections. Among other requests for relief, the plaintiffs sought declarations of law concerning their constitutional rights in Montana to a clean environment and that Montana's "aggregate actions to implement a fossil fuel-based energy system...are unconstitutional." Other states with similar constitutional rights include Massachusetts and Pennsylvania. In both cases in Hawaii and Montana, plaintiffs were backed by Our Children's Trust, a non-profit public interest law firm that provides advice to youth to secure their legal rights to a safe climate. Our Children's Trust currently has litigation pending in Alaska, Florida, Utah and Virginia as well as a **federal lawsuit against the U.S. Environmental Protection Agency (EPA)** in which the claimants assert that the EPA violated the U.S. Constitution by allowing harmful levels of climate pollution to accumulate in the air.

The settlement is undoubtedly a significant victory for both Hawaii and its citizens, as well as those looking to file similar climate change litigation to compel state governments to take stronger action on climate change. However, not all will be as swift or relatively straightforward; both parties in this case appeared to have been more closely aligned in their climate ambitions and Hawaii has long supported a progressive climate change agenda; indeed, this case had been fast-tracked by judges for trial, which is thought to have been an important factor in reaching a settlement so swiftly. The state previously sued Sunoco and several other oil majors for misleading the public about the risks of climate change. Such cases – with a state institution suing fossil fuel companies in "polluter pays" style cases – are also becoming increasingly popular. In June 2023, an Oregon county filed a civil suit against more than a dozen large

fossil fuel companies in connection with extreme heat events that the county alleges were caused by the defendants' **contributions to climate change**.

Beyond the U.S. we have discussed several victories for citizens taking on both public and private institutions for violations of human rights including in April, when the European Court of Human Rights held that **Switzerland had violated the human rights** of KlimaSeniorinnen Schweiz (Swiss Senior Women for Climate Protection) as a result of "critical gaps" in its climate policies; and in May 2023 when Greenpeace, fellow climate change activist group ReCommon and 12 Italian citizens from regions affected by impacts of climate change announced their intention to file a **first-of-its-kind lawsuit in Italy** against the country's largest energy company. Individuals are also increasingly taking on oil majors for other violations. For example, on May 21, 2024, a group of individual claimants, and three civil society organizations, **filed a criminal suit** accusing French oil major, TotalEnergies, of manslaughter, endangering others, failing to combat a disaster and harming biodiversity as a result of activities that contributed toward extreme weather events caused by climate change. Courts are increasingly finding in favor of plaintiffs in these cases and we therefore expect to see a continued rise in lawsuits with strategic objectives where plaintiffs are vying for the defendant to be compelled or obliged to take action against climate change.

Climate Litigation Analysis Shows Slower Rate of Cases Filed but Diversification of Scope and Higher Impact

According to a report published by the Grantham Research Institute on Climate Change and the Environment, the highest number of climate lawsuits were filed in the United States in 2023, but at a slower rate than previous years, suggesting a consolidation of strategic litigation in areas which have high impact. Tracked through the databases of the Sabin Center for Climate Change Law, the U.S. recorded 129 new cases bringing the total to 1,745 out of a total 2,666 globally. However, the report outlines an overall plateauing of cases with 233 filed globally in 2023 compared with 270 in 2022. **We discussed last year's report in detail in a previous issue**.

International courts and tribunals played a more prominent role throughout the year with those institutions being increasingly asked to rule on climate cases. Although only 5% of climate cases were taken to international courts and tribunals, the Grantham Institute reports that these had significant potential to impact domestic proceedings. One such example is the decision handed down by the European Court of Human Rights to KlimaSeniorinnen Schweiz (Swiss Senior Women for Climate Protection) where it was held that the Swiss citizens' human rights were violated as a result of critical gaps in their government's climate policies. **We discussed the significance of this case in detail here**. Such cases, categorized as "government framework" cases by the Grantham Institute, seek to challenge the ambition or implementation of a government's overall climate policies. Another example can be found **in the UK**, where the High Court ordered the government to revise its Carbon Budget Delivery Plan which sets out the country's strategy for meeting its legally binding carbon budgets under the Climate Change Act 2008 and international climate commitments, including those under the Paris Agreement. And, most recently of course, *Held v. State of Montana, et al*. and *Navahine v. Hawaii Department of Transportation* as we discuss above in this edition.

As with 2022 data, the report shows that the U.S. also had the highest number of so-called "non-aligned" climate litigation. Some cases in this category challenge climate action; others are more concerned with the way it is implemented rather than the action itself. The different types of non-aligned climate litigation include:

- ESG backlash cases, which challenge the incorporation of climate risk into financial decision-making.
- Strategic litigation against public participation (SLAPP) suits against NGOs and shareholder activists that seek to deter them from pursuing climate agendas.
- Just transition cases, which challenge the distributional impacts of climate policy or the processes by which policies were developed, normally on human rights grounds.
- Green v. green cases, which concern potential trade-offs between climate and biodiversity or other environmental aims.

Another type of strategic litigation concern "corporate framework" cases in which, similar to government framework cases, the corporation's climate policies are claimed to be inadequate. The report outlined key trends in this type of litigation:

- Important developments in "polluter pays" cases: more than 30 cases worldwide are currently seeking to hold companies accountable for climate-related harm allegedly caused by their contributions to greenhouse gas emissions. We have discussed a number of these cases previously. For example: ClientEarth is supporting a group of **Colorado property owners** in a lawsuit against fossil fuel companies who allegedly left millions of wells

unplugged that continue to emit methane; and an **Oregon county** sued several fossil fuel companies alleging that they were responsible for a number of extreme heat events and is seeking more than $50 million in damages.

- Cases in which claimants seek to ensure that companies align their group-level policies and governance processes with climate goals continue to be filed but only one has been allowed to proceed in New Zealand. Another high profile case, ***Milieudefensie v. Shell***, in which the Hague District Court ordered Shell to reduce its emissions by 45% by 2030 from 2019 levels across all activities (including direct emissions and end-use emissions) is currently under appeal.
- This year, the Grantham Institute introduced a new category of 'transition risk' cases, which includes cases filed against corporate directors and officers for their management of climate risks. The report's authors cite the example of shareholders of Enea who approved a decision to bring such a case against former directors for planned investments in a new coal power plant in Poland.

Another key trend lies in an increase in 'climate-washing' cases; 47 such cases were filed in 2023, bringing the recorded total to more than 140. More than 70% of completed cases have been decided in favor of the claimants. Climate-washing cases concern those that "challenge inaccurate government or corporate narratives regarding contributions to the transition to a low-carbon future." The report notes that they continue to be a focal point in climate litigation having risen from just a handful in 2017 to 140 at the time the report was published. Many of the recorded 140 cases concerned investigations by regulators and complaints before quasi-judicial bodies but 2023 also saw important court victories, too. For example, in March 2024, a Dutch court held that airline KLM **misled customers through vague environmental claims** and depicted an "overly rosy picture" of its use of sustainable aviation fuel (SAF). As the authors outline, however, there are limits to the remedies in such cases – KLM was no longer using those advertisements and therefore no injunction was required, and there was also no evidence of customers still making decisions based on the misleading claims, so no award for damages was granted. The authors also caution against the long-term impact of the success of climate-washing cases given that they have little direct contribution to reducing carbon emissions or achieving substantive climate action.

Geographically, after the U.S., the Grantham Institute noted that the UK had the highest number of cases filed in 2023, with 24. This was followed by Brazil (10), Germany (7) and Australia (6). Climate cases had also continued to spread to new countries with Panama and Portugal seeing the first of such cases.

The analysis in this year's report brings to mind the old adage "quality over quantity." Litigants appear to be focusing on putting together cases which are backed by climate science providing the court with robust evidence on which to base their decisions. We have frequently observed that climate litigation carries significant risk ranging from enforcement by regulatory authorities, to reputational damage. While the slower rate of cases being filed may on the surface appear as though such risk is abating, the fact that climate litigants are filing more sophisticated cases means that the opposite is likely true. Such cases pose a higher level of risk to a corporation than in previous years, particularly given the increasing number of cases being found in favor of the claimant.

Looking forward, the report outlines several trends we should expect to see:

- post-disaster cases, where a legal dispute arises over recovery efforts following climate disasters;
- ecocide, where the criminalization of environmental harm and damage is included in legislative rulemaking; and
- environmental and climate litigation synergies, where climate litigation strategies are applied to environmental cases, such as plastic pollution.

EU Distributes 3 Billion Revenue from Emissions Trading System in 2024

On June 24, 2024, **the European Commission announced** that €2.967 billion had been disbursed via the Modernisation Fund to support 39 energy projects across 10 Member States. The funds are intended to help meet climate and energy targets and contribute to the EU's long-term target of reaching climate neutrality by 2050, often referred to as the European Green Deal. The investments will support the modernisation of energy systems, in order to reduce greenhouse gas emissions in the energy, industry and transport sectors. This latest installment brings the total spending via the Modernisation Fund to €12.65 billion since January 2021. Examples of the proposals that have received funding include deployment of photovoltaic and energy storage capacity for public water service providers, support to households for the acquisition and installation of new photovoltaic systems, modernisation and development of renewable energy-based district heating systems and the production of renewable hydrogen and highly efficient co-generation.

The Modernisation Fund is funded by revenue from the auctioning of emissions allowance under the EU's Emissions Trading System (EU ETS). The EU ETS is key to the EU's policy to combat climate change and an important way to reduce greenhouse gas emissions cost-effectively. Key features of the EU ETS include:

- **Cap-and-Trade System:** The EU ETS operates on a cap-and-trade principle. A cap is set on the total amount of certain greenhouse gases that can be emitted by installations covered by the system. The cap is reduced over time so that total emissions fall.
- **Emission Allowances:** Companies receive or buy emission allowances, which they can trade with one another as needed. Each allowance gives the holder the right to emit one ton of CO2 (or its equivalent in other greenhouse gases).
- **Sectors Covered:** The EU ETS covers power and heat generation, energy-intensive industrial sectors, and aviation within the European Economic Area.
- **Phases of Implementation:** The system has been implemented in phases. It started in 2005 and is currently in its fourth phase (2021-2030), which focuses on strengthening the system to better achieve the EU's climate goals.
- **Market Stability Reserve:** A Market Stability Reserve (MSR) was introduced to address the surplus of allowances and improve the system's resilience to major shocks by adjusting the supply of allowances to be auctioned.
- **Linking with Other Systems:** The EU ETS is designed to link with other compatible emissions trading systems. For instance, it has been linked with the Swiss ETS.
- **Revenue Use:** The revenues generated from the auctioning of allowances are used by member states to finance climate and energy-related projects, including renewable energy, energy efficiency, and low-carbon technologies.
- **Revisions and Updates:** The EU ETS is regularly revised to align with the EU's evolving climate targets, such as the European Green Deal and the goal of climate neutrality by 2050. **We have discussed this previously** in the context of the EU's "Fit for 55" package.

The next deadlines for Member States to submit investment proposals for potential support by the Modernisation Fund are August 13, 2024 for non-priority proposals, and September 10, 2024 for priority proposals.

ICMA Publishes Guidance on Green-Enabling Projects and Sustainability-linked Loan Financing Bonds

The International Capital Market Association (ICMA) published materials to support two areas of issuance in respect of green bonds and the financing or refinancing of sustainability-linked loans within the structure of a bond: **Guidance on Green-Enabling Projects** and **Guidelines on Sustainability-linked Loans Financing Bonds**.

Guidance on Green Enabling Projects

The Green Enabling Projects Guidance provides a framework for identifying and reporting on projects that enable substantial environmental benefits but are not classified as "green" by themselves. The guidance aims to support the development of the green bond market by broadening the range of eligible projects. Key points of the guidance are as follows:

1. **Definition and Scope:** Green Enabling Projects (GEPs) are activities or assets that indirectly contribute to environmental sustainability by enabling other projects or technologies to achieve significant environmental benefits.

2. **Criteria for Eligibility:** GEPs must meet specific criteria to be eligible under this guidance. They should:

- Facilitate substantial improvements in environmental performance.
- Support the transition to a low-carbon, climate-resilient economy.
- Align with internationally recognized standards and taxonomies.

3. **Examples of GEPs:** The guidance provides illustrative examples of GEPs, such as:

- Infrastructure for renewable energy (e.g. transmission lines for wind or solar power).
- Technologies that improve energy efficiency (e.g. smart grid systems).
- Projects that support sustainable transport (e.g. electric vehicle charging stations).

4. **Reporting and Transparency:** Issuers of green bonds for GEPs must adhere to rigorous reporting standards to ensure transparency and accountability. This includes:

- Clear disclosure of the project's environmental objectives and expected benefits.
- Regular reporting on the project's progress and impacts.
- Verification by external reviewers to confirm compliance with the criteria.

5. **Alignment with Green Bond Principles:** The guidance aligns with the Green Bond Principles (GBP), which are voluntary guidelines for issuing green bonds. This alignment ensures that GEPs are integrated into the broader green finance ecosystem and adhere to best practices.

6. **Market Development:** By expanding the range of eligible projects, the guidance aims to stimulate innovation and investment in new technologies and infrastructure that support environmental sustainability. This, in turn, helps to grow the green bond market and mobilize capital for climate action.

The Green Enabling Projects Guidance is intended to serve as a valuable tool for issuers, investors, and other stakeholders in the green finance market, promoting projects that indirectly but significantly contribute to environmental sustainability.

Guidelines for Sustainability-linked Loans and Bonds

The guidelines for sustainability-linked loans (SLLs) and bonds are designed to promote transparency, disclosure, and integrity in these financial instruments. The key components of the guidelines include:

1. **Core Components:**

- *Selection of Key Performance Indicators (KPIs):* Borrowers should choose KPIs that are relevant, core to their business, and material to their overall sustainability strategy.
- *Calibration of Sustainability Performance Targets (SPTs):* SPTs should be ambitious, representing a material improvement over a predetermined timeframe. They should be based on a combination of past performance, peer performance, and external references.
- *Loan Characteristics:* Financial or structural characteristics of the loans can vary based on whether the borrower achieves the SPTs. This may include adjustments to the interest rate.
- *Reporting:* Borrowers are expected to regularly report on their performance against the SPTs. Reports should include information on how the KPIs are measured and monitored.
- *Verification:* External review and verification of performance against the SPTs by independent, qualified third parties are recommended to enhance transparency and credibility.

2. **Purpose and Scope:**

- The guidelines aim to facilitate the growth and development of the sustainability-linked loan market by providing a clear framework that can be used by borrowers and lenders.
- They seek to encourage a broader adoption of SLLs, ensuring that these financial instruments genuinely contribute to sustainability goals and do not result in greenwashing.

3. **Market Participants:**

- The guidelines are intended for a wide range of market participants, including issuers, investors, and financial intermediaries.
- They support the integration of sustainability considerations into financial decision-making and encourage alignment with broader environmental, social, and governance (ESG) objectives.

ICMA's guidelines for sustainability-linked loans and bonds emphasize the importance of clearly defined, ambitious and transparent sustainability targets, advocating for regular and rigorous reporting and verification to ensure that these financial instruments effectively contribute to sustainable development.