# *The rise of international climate litigation*

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# The rise of international climate litigation

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## Abstract

International climate litigation is on the rise, with international courts and tribunals being asked to offer advisory opinions on climate change, several rights-based climate change claims being put forward before international human rights bodies and courts, and international economic tribunals increasingly being engaged with the issue. This special issue on international climate litigation examines these trends and seeks to better understand how international litigation may foster (or, sometimes, impede) action on climate change. In this introduction to the special issue, we offer our reflections based on some of the central themes of the special issue. In particular, we underscore the need to think strategically about the possible (intended and unintended) outcomes of international climate litigation.

## 1 | INTRODUCTION

Three decades of international climate negotiations have not achieved nothing,[1] but for many, they have not achieved enough. The 'global peaking of greenhouse gas emissions' that the 2015 Paris Agreement aimed to achieve 'as soon as possible' is yet to come.[2] The nationally determined contributions (NDCs) that States have communicated under the Paris Agreement lack the ambition suggested by the Agreement's objective of holding global average temperature 'well below' 2°C, or close to 1.5°C, above preindustrial levels[3]—and their implementation remains uncertain.[4] And despite a breakthrough on financing 'loss and damage' at the United Nations (UN) Climate Conference in Sharm El-Sheikh in 2022,[5] there remains little prospect for comprehensive reparation to the States and communities most affected by the impacts of climate change.

These observations have led advocates to look beyond international negotiations for ways to prompt climate action. Courts appeared to offer an attractive alternative. Until recently, cases had almost exclusively been filed before national courts. Some of these cases have led to judicial decisions enforcing existing commitments,[6] identifying procedural obligations that can be expected to enhance mitigation action,[7] reviewing the internal consistency of a national policy on climate change mitigation,[8] or even (albeit only in the Netherlands) imposing new emission reduction targets on a national government and a corporation.[9] Yet, these successful cases have mainly unfolded in and against smaller, mainly European countries,

[1]See A Patt et al, 'International Cooperation', in PR Shukla et al (eds), *Climate Change 2022: Mitigation of Climate Change* (Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press 2022) 1451, 1477.

[2]Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 107 art 4(1). The decrease in global emissions during the COVID-19 pandemic was transient: emissions bounced back as soon as social-distancing measures were lifted.

[3]ibid art 2(1)(a). See, e.g., United Nations Environment Programme (UNEP), 'Emissions Gap Report 2022' (UNEP 2022); UNFCC 'Decision 1/CMA.4, Sharm El-Sheikh Implementation Plan' UN Doc FCCC/PA/CMA/2022/10/Add.1 (17 March 2023) para 20.

[4]M Roelfsema et al, 'Taking Stock of National Climate Policies to Evaluate Implementation of the Paris Agreement' (2020) 11 Nature Communications 2096; J Rogelj et al, 'Credibility Gap in Net-Zero Climate Targets Leaves World at High Risk' (2023) 380 Science 1014.

[5]UNFCCC 'Decision 2/CP.27, Funding Arrangements for Responding to Loss and Damage Associated with the Adverse Effects of Climate Change, Including a Focus on Addressing Loss and Damage' FCCC/CP/2022/10/Add.1 (17 March 2023).

[6]See, e.g., Conseil d'État (France), *Grande Synthe v France*, Decision No 427301 (1 July 2021), ECLI:FR:CECHR:2020:427301.20201119, and Decision No 467982 (10 May 2023), ECLI:FR:CECHR:2023:467982.20230510.

[7]See, e.g., *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7.

[8]See BVerfG, *Neubauer v Germany*, 1 BvR 2656/18 (24 March 2021).

[9]See Hoge Raad der Nederlanden (HR) (Supreme Court of the Netherlands), *Urgenda v the Netherlands*, 20 December 2019, ECLI:NL:HR:2019:2006; Rechtbank Den Haag (The Hague District Court), *Milieudefensie v Royal Dutch Shell*, 26 May 2021, ECLI:NL:RBDHA:2021:5337.

and not generally against the largest greenhouse gas emitters. Many other cases, especially cases seeking a complete overhaul of national mitigation policies, have been unsuccessful because national courts decided to defer to the political branches for what they considered to be inherently political matters.[10] And in countries with more authoritarian governments—including some of the largest greenhouse gas emitters—strategic climate litigation remains a distant prospect.

In this context, international litigation has emerged as an increasingly attractive tool to complement international negotiations and domestic litigation. International courts are seemingly better situated than domestic courts to capture the global nature of climate change. These courts may more readily interpret and apply international norms arising from the climate treaties and other sources of international law than domestic courts. In at least some countries, international judicial decisions could be more authoritative and influential than a foreign court's interpretation.[11] And while domestic courts might defer to the political branches of the government for questions that they feel are largely 'political' in nature, international courts are not bound by similar considerations: They can entertain any question that can be approached from a legal perspective, notwithstanding its political dimension.

The idea of international climate litigation—even narrowly construed as strategic litigation aimed at advancing climate change mitigation—is not new. Small island developing States have considered recourse to the International Court of Justice (ICJ) for over two decades.[12] In 2005, the Inuit Circumpolar Conference filed an unsuccessful petition to the Inter-American Commission on Human Rights.[13] Palau ran a short-lived campaign for the UN General Assembly to request an advisory opinion in 2011.[14] In recent years, however, States become more determined and their attempts have attracted broader support. Within just a few months, advisory opinions were requested from three international courts: The International Tribunal for the Law of the Sea (ITLOS) in December 2022,[15] the Inter-American Court of Human Rights (IACtHR) in January 2023,[16] and the ICJ in March 2023.[17] A similar request is likely to be made before the African Court of Human and Peoples' Rights (AfCHPR).[18] A dozen contentious cases have been filed before the European Court of Human Rights (ECtHR), of which nine remain pending as of March 2023.[19] UN human rights treaty bodies have adopted statements on climate change and human rights,[20] made recommendations to some States on their climate policies,[21] and decided individual complaints touching on climate change.[22]

Yet, international litigation can be a double-edged sword: It may promote climate action but might also get in the way of it. This is most clearly demonstrated by the developments in international investment law. A 2022 ICSID award found that Italy had unlawfully expropriated the company Rockhopper by rescinding its implicit approval of an oil-and-gas extraction project.[23] Trade law disputes that may stymie climate action are also being considered, for instance by India against EU's proposal to impose a 'carbon border adjustment' on the importation of certain goods.[24] In other cases, international litigation may have more ambivalent effects on climate action, as in the case of 'just transition litigation' seeking to address the human rights impacts of climate action.[25]

These new developments raise many questions with which legal scholarship is only beginning to grapple. Legal research can most obviously identify the procedural constraints and opportunities facing international climate litigation, assess the (comparative) advantages and drawbacks of various institutions as venues for such litigation,

[10]See, e.g., *Juliana v* United States, 947 F.3d 1159 (9th Cir., 17 January 2020); *Reynolds v State*, No 2018-CA-819, 2020 WL 3410846 (10 June 2020) para 3; *La Rose v Canada*, 2020 FC 1008 (27 October 2020) para 41; *Smith v Fonterra*, [2021] NZCA 552, CA128/2020 (21 October 2021) para 27; *Minister for the Environment v Sharma*, [2022] FCAFC 35 (15 March 2022) paras 7, 342; *Pandey v India*, Order of 15 January 2019, para 3; *R (Plan B Earth) v Prime Minister* [2021] EWHC 3469 (Admin), [2021] All ER (D) 92, paras 3(1), 50; *Grande-Synthe v France* (Conseil d'État, 19 November 2020), ECLI:FR:CECHR:2020:427301.20201119, para 1.

[11]See, e.g., Italian Court of Cassation, *Dorigo (Paolo)* (25 January 2007) Case No 2800/2007, (2007) 90 Rivista di Diritto Internazionale 601, ILDC 1096 (IT 2007), cited in A Nollkaemper, 'Conversations Among Courts: Domestic and International Adjudicators' in CPR Romano et al (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2013) 523, 532.

[12]See, e.g., 'Vanuatu to Seek International Court Opinion on Climate Change Rights' (The Guardian, 26 September 2021).

[13]See Joanna Harrington, 'Climate Change, Human Rights, and the Right to Be Cold' (2007) 18 Fordham Environmental Law Review 513.

[14]'Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases' (UN News, 22 September 2011) <http://news.un.org/en/story/2011/09/388202>.

[15]Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, ITLOS Case No. 31/2022 (12 December 2022) <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf>.

[16]Ministry of Foreign Affairs, Government of Chile, 'Chile y Colombia realizan inédita consulta a la Corte Interamericana de Derechos Humanos sobre emergencia climática' (9 January 2023) <https://www.minrel.gob.cl/noticias-anteriores/chile-y-colombia-realizan-inedita-consulta-a-la-corte-interamericana-de>.

[17]UNGA 'Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change' UN Doc A/RES/77/276 (4 April 2023) (Resolution 77/276).

[18]Columbia Climate School, 'Advisory Opinions on Climate Change: An Overview'; (27 April 2023) <https://www.climate.columbia.edu/events/advisory-opinions-climate-change-overview>.

[19]ECtHR, 'Climate Change: Cases Pending before the Grand Chamber of the Court' (Factsheet, March 2023) <https://perma.cc/EQK4-VB2C>. Two cases were declared inadmissible in non-public written procedures on the ground that the applicants had not sufficiently justified their standing as victims. See ibid 4.

[20]Committee on the Elimination of Discrimination Against Women (CEDAW) 'General Recommendation No. 37 on the Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change' UN Doc CEDAW/C/GC/37 (13 March 2018) para 14; Committee on Economic, Social and Cultural Rights (CESCR) 'Statement: Climate Change and the International Covenant on Economic, Social and Cultural Rights' UN Doc E/C.12/2018/1 (31 October 2018) para 6; CEDAW et al, 'Joint Statement on "Human Rights and Climate Change"' (16 September 2019) <https://perma.cc/6VXT-LAD4>.

[21]See, e.g., CESCR 'Concluding Observations, Sixth Periodic Report of Norway' UN Doc E/C.12/NOR/CO/6 (2 April 2020) paras 10–11; CESCR 'Concluding Observations, Fourth Periodic Report of Ecuador' UN Doc E/C.12/ECU/CO/4 (14 November 2019) paras 11–12.

[22]*Teitiota v New Zealand*, Communication No 2728/2016, and Human Rights Committee 'Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019' UN Doc CCPR/C/127/D/2728/2016 (7 January 2020) (*Teitiota*); *Daniel Billy* et al *v Australia*, Communication No 3624/2019, and Human Rights Committee 'Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019' UN Doc CCPR/C/135/D/3624/2019 (22 September 2022); *Sacchi* et al *v Argentina* et al, Communication No 105/2019, and Committee on the Rights of the Child 'Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 104/2019' UN Doc CRC/C/88/D/104/2019 (11 November 2021); see also M Gavouneli, 'Views Adopted by the Committee under Art. 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019 (U.N.H.R. Committee)' (2023 fc) International Legal Materials.

[23]*Rockhopper Exploration Plc and others v Italian Republic*, ICSID Case No ARB/17/14, Final Award (23 August 2022).

[24]M Kumar and N Arora, 'India Plans to Challenge EU Carbon Tax at WTO' (Reuters, 16 May 2023).

[25]A Savaresi and J Setzer, 'Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2022) 13 Journal of Human Rights and the Environment 7.

and survey the substantive law that may or may not be applied by such institutions. It could explore how court decisions may influence one another, how judicial and political processes—including the UN climate negotiations and national policymaking processes—may interact, and what the implications for litigation strategies may be. Further, there is a need to better understand what actors are involved in these strategies, how representative they are, how they are related to one another, and to what extent they coordinate. In particular, it could be worth exploring what States, advocates, nongovernmental organizations (NGOs), communities and individuals actually engage with international climate litigation, what constraints might prevent others from doing so, and whether it is actually States that engage in these processes or rather non-State lawyers and NGOs acting on their behalf. There is also room for scholarship that questions whether and how international climate litigation can engender genuine behavioural change among States and non-State actors, whether international courts have the legitimacy to do so, and whether there could be unintended effects on the willingness of States to engage in international negotiations or on the credibility of international courts and tribunals.

The contributions to this special issue aim to fill some of these research gaps and offer a platform for further research on international climate litigation. The high number of responses to the call for papers confirms the growing interest in many aspects of the topic. Perhaps unsurprisingly given recent developments, the responses showed less scholarly interest in inter-State contentious cases than in advisory proceedings or asymmetrical litigation (e.g. individuals against States). The responses also showed that the boundaries between international and national climate litigation can be porous. Cases at the national level may involve the interpretation of the same international legal instruments as 'international' cases, such as the European Convention on Human Rights. They may also involve the same litigants, or they may involve the escalation of unsuccessful national cases.[26] However, to retain a clear focus the contributions in this issue are squarely focused on cases involving international judicial or quasi-judicial bodies.[27] We are therefore not looking at the interesting phenomenon of cases with a transnational character, such as cases involving a plaintiff from one jurisdiction and a defendant from another one.

In the following, we introduce the various contributions to the special issue while presenting our own reflections on two central issues. One issue concerns the extent to which courts offer opportunities for international litigation on climate change. In Section 2, we explore, in turn, the prospects for international advisory proceedings, for decisions by international human rights institutions, and for litigation before economic and financial institutions. Section 3 discusses what could possibly come out of such litigation. We reflect upon the substantive law that courts could apply, what they might say about it, and what could be the real-world outcome of these decisions. Section 4 offers brief conclusions.

[26]See, e.g., *Greenpeace Nordic* et al *v Norway* App No 34068/21 (ECtHR, communicated 16 December 2021); *Plan B. Earth and Others v United Kingdom* App No 35057/22 (ECtHR, 13 December 2022).

[27]*Saul Luciano Lliuya v RWE* (2017) 20171130 Case No. I-5 U 15/17 (Oberlandesgericht Hamm).

## 2 | BRINGING CLIMATE CHANGE TO INTERNATIONAL COURTS

The contributions to the special issue reflect the multiple ways international litigation could relate to climate change. Some contributions focus on the international advisory proceedings that have been initiated before ITLOS, the IACtHR and the ICJ, and could soon follow before the AfCHPR. Others discuss the role of international human rights institutions, including contentious proceedings before regional human rights courts, quasi-jurisdictional procedures under human rights treaties or under the UN Human Rights Council, and complaint mechanisms established by national or international agencies. Yet others discuss the prospects for the World Trade Organization (WTO) dispute settlement mechanism or for investor-State arbitral tribunals to decide cases related to climate change.

### 2.1 | Advisory proceedings

Within just a few months, three advisory proceedings were initiated before international courts and tribunals on the obligations of States with regard to climate change (and a fourth one is likely to follow soon). The ICJ, ITLOS and the IACtHR will have to decide whether these requests fall within the scope of their advisory jurisdiction and, if so, whether there are 'compelling reasons'[28] for them to exercise their 'discretionary power to decline to give an advisory opinion'.[29] Such compelling reasons could include the overly abstract nature of some of the questions—making it practically impossible for a court to give a response within a reasonable time frame[30]—or the risk of interference with political processes.[31] The ITLOS request may appear problematic in this regard, due, first, to the lack of clear definition of the scope of its advisory jurisdiction (e.g. for lack of treaty basis),[32] and, second, to the unlikelihood that the Commission of Small Island States on Climate Change and International Law, which requested the opinion, would be able to act upon the opinion it requested. Further, a potential substantive impediment to proceedings in ITLOS and the IACtHR relates to the content of the requests in light of the subject matter jurisdiction of these courts: Climate change would respectively have to be approached through the lenses of the law of the sea and human rights law. Before the IACtHR, it would have to be approached with a focus on the international law applicable to American countries.

[28]*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius* (Advisory Opinion) [2019] ICJ Rep 95 (*Chagos*) para 65; see also *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion) [2015] ITLOS Rep 4 (*SFRC Advisory Opinion*) para 71.

[29]*Chagos* (n 28) 63; see also *SFRC Advisory Opinion* (n 28) para 71; *Exceptions to the Exhaustion of Domestic Remedies*, Advisory Opinion OC-11/90, Inter-American Court of Human Rights Series A No 11 (10 August 1990) para 12.

[30]See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 15; *SFRC Advisory Opinion* (n 28) para 72.

[31]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 paras 51–54.

[32]See, e.g., Y Tanaka, 'The Role of an Advisory Opinion of ITLOS in Addressing Climate Change: Some Preliminary Considerations on Jurisdiction and Admissibility' (2023) 32 Review of European, Comparative and International Environmental Law 3; R Barnes, 'An Advisory Opinion on Climate Change Obligations Under International Law: A Realistic Prospect?' (2022) 53 Ocean Development and International Law 180.

The special issue includes four contributions focusing specifically on advisory proceedings, two of which focus on the prospects for advisory proceedings before ITLOS. Tanaka focuses on preliminary hurdles that the case would need to cross before a substantive advisory opinion can be given. In particular, he highlights questions relating to the scope of the advisory jurisdiction of ITLOS as a full court and about the possible existence of compelling reasons for the Tribunal to decline the request.[33] Roland Holst, by contrast, focuses on the response that ITLOS could give to the request if these hurdles were overcome. She suggests that the advisory opinion would be an opportunity for the Tribunal to contribute to the progressive development of the law of the sea in relation to climate change. The Tribunal, she argues, could take this opportunity to build further on its case law on States' due diligence obligations on the protection of the marine environment and also, perhaps, on difficult questions relating to State responsibility.[34]

Two other contributions to the special issue are more cautious about the prospects for advisory proceedings. First, Bodansky raises important questions about the role that international advisory proceedings would be expected to play. Notwithstanding what the courts may or may not reply to the questions, he asks whether advisory opinions could induce national governments to change their behaviour.[35] Raising questions of legitimacy, he suggests that courts might not be 'the appropriate institution to determine what states must do to address climate change'.[36] Second, Shams questions the ability of courts to address what he calls 'highly polycentric' problems, such as climate change, in contrast to the 'monocentric' issues courts usually deal with, such as questions of transboundary environmental harm. The main method international courts and tribunals settle environmental disputes, he argues, is by balancing the rights and interests of the parties to the dispute; doing so is far more challenging in the context of climate change.[37]

The special issue does not contain any contribution focusing on the potential for inter-State contentious cases before a court or tribunal of general competence such as the ICJ. Such contentious proceedings were once envisaged by Tuvalu against large greenhouse gas emitters,[38] but they now seem to be attracting less attention. However, the procedural obstacles to such a dispute are not obviously insurmountable. In principle, an applicant could rely on the acceptance of the ICJ's compulsory jurisdiction.[39] It could also invoke the compulsory dispute settlement procedure under the UN Convention on the Law of the Sea (UNCLOS) or under other environmental or human rights treaties that could plausibly be interpreted as implying an obligation of States to mitigate climate change.[40]

The prevailing understanding seems to be that advisory proceedings would more fittingly accommodate what Shams calls the polycentric nature of climate change. In particular, as Roland Holst notes, advisory proceedings could 'go some way towards accommodating the diversity and multilateral character of interests involved'.[41] By contrast, that advisory opinions lack the binding force of judgments is unlikely to be decisive—for lack of enforcement capability, the difference between an authoritative and a binding statement of the law is of limited practical implications.[42] At any rate, Roland Holst points out that an advisory opinion could possibly be implemented through subsequent contentious cases (e.g. if the advisory opinion is sufficiently clear and specific), in particular under UNCLOS. However, it is unclear whether an advisory case could overcome the more substantive obstacles related to the extraordinary characteristics of the issue. As Shams observe, the climate change issue is far more polycentric and complex than virtually any issue an international court or tribunal has ever had to pronounce upon, and it is worth asking whether an international court would be able to find some sort of common ground that States could accept to live by—or, if not, what an advisory proceeding can be expected to achieve (see Section 3).

## 2.2 | Human rights institutions

In addition to the advisory proceedings before the IACtHR (and, in all likelihood soon, the AfCHPR), several contentious cases and other complaints have been filed with human rights institutions, in particular the ECtHR and UN treaty bodies. These institutions are often accessible to individual claimants, allowing advocates and NGOs to play a more direct role than before inter-State institutions. They also contribute to crafting a promising political narrative by presenting climate action as a matter of rights and justice, rather than (as often in climate treaties) in broader terms of 'sustainable development' and 'food security',[43] or (as often in the economic literature) in the technical and dry language of cost–benefit analyses, economic valuations and discounting rates.[44] Nevertheless, there are strong obstacles to interpreting human rights law as the source of an obligation to mitigate climate change.[45]

[33]Tanaka (n 32).
[34]RJ Roland Holst, 'Taking the Current when It Serves: Prospects and Challenges for an ITLOS Advisory Opinion on Oceans and Climate Change' (2023) 32 Review of European, Comparative and International Environmental Law.
[35]D Bodansky, 'Advisory Opinions on Climate Change: Some Preliminary Questions' (2023) 32 Review of European, Comparative and International Environmental Law.
[36]ibid 7.
[37]A Shams, 'Tempering Great Expectations: The Legitimacy Constraints and the Conflict Function of International Courts in International Climate Litigation' (2023) 32 Review of European, Comparative and International Environmental Law.
[38]PM Ede, 'Come Hell or High Water: Rising Sea Levels and Extreme Flooding Threaten to Make the South Pacific's Tuvalu the First Victim of Global Warming' (2003) 29 Alternatives Journal 1.
[39]Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 art 36(2).
[40]United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 UNTS 397 Part XV.
[41]Roland Holst (n 34) 4.
[42]See, e.g., M Feria-Tinta, 'On the Request for an Advisory Opinion on Climate Change under UNCLOS before the International Tribunal for the Law of the Sea' (2023) Journal of International Dispute Settlement idad012, 4–5.
[43]United Nations Framework Convention on Climate Change (adopted 29 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) arts 2, 3(4); Paris Agreement (n 2) recitals 10, and art 2(1).
[44]See, e.g., W Nordhaus, 'Climate Change: The Ultimate Challenge for Economics' (2019) 109 American Economic Review 1991.
[45]See JH Knox, 'Climate Change and Human Rights Law' (2009) 50 Virginia Journal of International Law 163; AE Boyle, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67 International and Comparative Law Quarterly 759; B Mayer, 'Climate Change Mitigation as an Obligation Under Human Rights Treaties?' (2021) 115 American Journal of International Law 409, 416–419.

Two of the contributions in this special issue aim at providing an overview of the landscape of actual and potential human rights-based litigation. Luporini and Savaresi focus on the cases and complaints that have already been filed before international and regional human rights institutions. Their survey reveals not only the diversity of these complaints but also the similarity of the hurdles they often face—in particular, exhaustion of domestic remedies, extraterritorial effects of a State's greenhouse gas emissions, and the difficulty of attributing individual harm to a State (e.g. of identifying 'victims'). So far, they show, human rights institutions have only granted claims in one case—and yet, only for what concerned the obligation of the State to promote adaptation action, as opposed to mitigation action.[46]

By contrast, Rocha and Sampaio look forward: They assess the prospects for successful climate litigation before the ECtHR and the IACHR by engaging in a detailed analysis of the treaties, precedents and cultures that would inform these two courts. They argue that both courts are likely to find breaches of human rights obligations when States fail to tackle climate change, and perhaps also to find a State liable for its lack of action on climate change mitigation.[47]

Another contribution, by Iyengar, looks at what lies behind these cases: Through a series of interviews with advocates and lawyers involved in human rights-based climate litigation, she seeks to determine why and how these cases are brought to courts in the first place. Among other things, her research sheds light on the emergence of a network of civil society organizations, lawyers, legal scholars, and funders promoting human rights-based climate litigation across borders.[48]

While much of the literature approaches climate change as a threat to the enjoyment of human rights, it may also be the case that climate action affects these human rights.[49] Antoniazzi looks at some of these unintended effects of climate action on human rights in the context of an underexplored but important type of international litigation: The complaint mechanisms aimed at safeguarding human rights in projects funded by international financial institutions. She shows that while such complaint mechanisms are often available, they are seldom effective, in particular as they frequently lack sufficient guarantees of independence from the funding agencies. Nevertheless, she argues, these complaint mechanisms are necessary to fill a protection gap that national law rarely covers due, among other things, to the scattering of responsibilities over multiple agencies and the immunity from legal proceedings enjoyed by some of these agencies.[50]

## 2.3 | International economic institutions

While climate activists have pinned significant hope on international advisory proceedings and human rights litigation advancing climate action, they are more likely wary of developments in the field of international trade and investment law. The creative destruction implied by a transition from a fossil-fuel-based economy to a cleaner one inevitably affects the value of some investments, giving rise to investment disputes that may hinder climate action.[51] Specifically, investment treaties such as the Energy Charter Treaty, as well as their associated system of investor-State dispute settlement, have come under fire for protecting fossil fuel investors, and offering them significant compensation.[52] Moreover, a range of climate policy measures—such as the adoption of product carbon standards, renewable energy subsidies, and perhaps most controversially, border measures to tackle carbon leakage—may conflict with rules facilitating international trade.[53] Compared with advisory proceedings and claims before human rights bodies, what sets these types of disputes apart is that the relevant bodies of law—that is, trade and investment law—have very specific economic objectives, which may clash with the goals of climate protection.[54]

The four contributions of the special issue on the topic fully recognize that international trade and investment law are at least as likely to hinder climate action as it is to foster it. When Asmelash considers the prospects for the WTO dispute settlement mechanism to decide cases related to climate change, he identifies important hurdles to what he terms 'pro-climate' litigation in this forum, but he also shows that there is room for 'anti-climate' litigation against mitigation action that has an impact on trade. Asmelash highlights the importance of developing international trade law in ways that would minimize obstacles to climate action.[55]

Similarly, Hailes discusses ways to minimize the burden that international investment law puts on national climate action that may lead to fossil fuel assets becoming stranded, for instance when the foreign investor successfully argues that they have been expropriated or that there was a breach of the standard of fair and equitable treatment. His argument focuses on the method of calculation of the

[46]R Luporini and A Savaresi, "International Human Rights Bodies and Climate Litigation: Don't Look Up?" (2023) 32 Review of European, Comparative and International Environmental Law.

[47]A Rocha and R Sampaio, 'Climate Change before the European and Inter-American Courts of Human Rights: Comparing Possible Avenues before Human Rights Bodies' (2023) 32 Review of European, Comparative and International Environmental Law.

[48]S Iyengar, 'Human Rights and Climate Wrongs: Mapping the Landscape of Rights-based Climate Litigation' (2023) 32 Review of European, Comparative and International Environmental Law.

[49]See Paris Agreement (n 2) recital 8.

[50]C Antoniazzi, 'Strengthening the Complaint Mechanisms of Multilateral Climate Funds and Carbon Markets: A Critical Step towards a Human Rights-based Green Transition' (2023) 32 Review of European, Comparative and International Environmental Law.

[51]K Tienhaara et al, 'Investor-State Disputes Threaten the Global Green Energy Transition' (2022) 376 Science 701. Even the very threat of investment claims may lead to the stymying of climate action through the phenomenon known as 'regulatory chill'. See K Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 Transnational Environmental Law 229.

[52]Interestingly, one instance of international litigation before a human rights court involves the Energy Charter Treaty: in *Soubeste*, plaintiffs argue that the 12 respondent States are violating their human rights by complying with the Energy Charter Treaty. See *Soubeste and Others v Austria and 11 Other States* Apps Nos 31925/22, 31932/22, 31938/22, 31943/22 and 31947/22 (ECtHR, not communicated); see also E Jackson, 'Litigating the Energy Charter Treaty at the European Court of Human Rights' (EJIL:Talk!, 16 June 2023).

[53]See generally H van Asselt, 'Trade and Climate Disputes before the WTO: Blocking or Driving Climate Action?' in I Alogna et al (eds), *Climate Change Litigation: Global Perspectives* (Brill 2021) 433.

[54]This does not mean that environmental and/or climate goals are not given any consideration whatsoever. Indeed, over time, WTO case law has 'greened' significantly. See A Cosbey and PC Mavroidis, 'Heavy Fuel: Trade and Environment in GATT/WTO Case Law' (2014) 23 Review of European Community and International Environmental Law 288.

[55]Henok Asmelash, 'The WTO Dispute Settlement System as a Forum for Climate Litigation?' (2023) 32 Review of European, Comparative and International Environmental Law.

compensation that the State may owe to the foreign investors in such cases. He suggests that the prohibition of unjust enrichment rules out reliance on the 'discounted cash flow' method to the extent that this method would assume the legitimacy of future income that are inconsistent with the global mitigation objective of the Paris Agreement. Although Hailes does not propose any specific valuation method as an alternative, he posits that relevant rules of international law could offer room for different valuation methods that would not amount to unjust enrichment.[56]

Two other contributions consider whether investor-State arbitration could be relied upon in ways that would foster climate action. Without denying 'a trend seemingly inherent' in investor-State arbitration 'towards undermining the very ability of host States to engage in … climate change mitigation measures',[57] Mejía-Lemos argues that a foreign investor's obligations related to climate change could sometimes be the object of counterclaims brought by host States in arbitral proceedings initiated by the foreign investor.[58] Ma considers an even more radical option: He suggests that new international investment agreements could allow States to initiate direct claims against foreign investors in much the same way as foreign investors can currently initiate claims against host States. This, he suggests, would ensure that international investment agreements provide a more balanced treatment of the rights and obligations of foreign investors, and could lead to more climate-friendly outcomes in investment disputes.[59]

## 3 | THE OUTCOMES OF INTERNATIONAL CLIMATE LITIGATION

It is increasingly clear that international courts and tribunals can be—and are being—called upon to decide on the merits of cases relating to climate change. This, however, begs another series of questions about what these courts and tribunals could possibly be expected to decide and, more importantly, what could be the outcome of these decisions. Some of the contributions to the special issue shed new light on these questions. In this section, we will discuss what potential legal arguments international courts and tribunals could rely upon, what decisions they could make, and finally what could be the real-world consequences of these decisions.

### 3.1 | Potential legal arguments

Strategic international climate litigation can rely on a vast range of legal arguments. The UN General Assembly's resolution requesting an advisory opinion of the ICJ, for instance, refers not only to climate treaties but also to various other multilateral environmental agreements, human rights treaties, and general international law (e.g. customary international law and the UN Charter) as norms potentially relevant to the obligations of States relating to climate change.[60]

The choice of legal argument should be informed, among other things, by doctrinal research gauging the likelihood that these arguments might prevail in courts. In the special issue, Duvic-Paoli and Gervasi engage in this stream of research with a focus on the prevention principle, in particular as it is applied by the ICJ and ITLOS. They show that prevention—either as customary law, or else as a general principle of law—'has consolidated into a norm complementing climate treaty obligations'.[61] In their view, this principle offers a valuable complement to (the mainly procedural) climate treaty obligations.[62] Likewise, Rocha and Sampaio outline possible ways of interpreting European and American human rights law as the source of an obligation to mitigate climate change.[63] Voigt, in turn, explores how international courts and tribunals could rely on the Paris Agreement to define a standard of due diligence that they could apply under various sources of international law. In particular, she highlights the value of mitigation objectives and of the standards of progression and 'highest possible ambition' to the interpretation of this standard of due diligence.[64]

Two other contributions explore more innovative legal arguments. First, Jones suggests that the right of States to self-determination could shed light on correlative State obligations in the context of climate change. At the very least, she argues, States that lose the effective use of their territory because of climate impacts have the right to free determination of their political status.[65] In particular, she argues, high-emitting States may have an obligation to put an end to the illegal situation by cutting their emissions, ceding territory, or making reparation.[66] Second, Lorteau is interested in how greenhouse gas-emitting activities are attributed to States. He shows that a significant share of these emissions result from the action of State-controlled entities such as national fossil fuel companies or public utilities. What he calls 'State-as-polluter litigation' could be a relatively promising avenue in relation to climate change as it would allow a more direct attribution of emissions to States.[67]

None of these legal arguments necessarily offers a silver bullet. Climate treaties may define relatively clear obligations, but undemanding ones—especially under the Paris Agreement, with its reliance on nationally determined contributions. On the other hand, customary international law, by definition, cannot require States to do more than

[56]O Hailes, 'Unjust Enrichment in Investor–State Arbitration: A Principled Limit on Compensation for Future Income from Fossil Fuels' (2023) 32 Review of European, Comparative and International Environmental Law.
[57]D Mejía-Lemos, 'The Suitability of Investor-State Dispute Settlement and Host State Counterclaims for Implementing Climate Change International Responsibility' (2023) 32 Review of European, Comparative and International Environmental Law 14.
[58]ibid.
[59]J Ma, 'Bridging Multinational Corporations' Investment-Climate Gap: Prospects for the Direct Claims Approach' (2023) 32 Review of European, Comparative and International Environmental Law.
[60]Resolution 77/276 (n 17) recitals 5–6 and opening paragraph.
[61]LA Duvic-Paoli and M Gervasi, 'Harm to the Global Commons on Trial: The Role of the Prevention Principle in International Climate Adjudication' (2023) 32 Review of European, Comparative and International Environmental Law 2.
[62]ibid 7.
[63]Rocha and Sampaio (n 47).
[64]C Voigt, 'The Power of the Paris Agreement in International Climate Litigation' (2023) 32 Review of European, Comparative and International Environmental Law.
[65]N Jones, 'Prospects for Invoking the Law of Self-determination in International Climate Litigation' (2023) 32 Review of European, Comparative and International Environmental Law.
[66]ibid 7–8.
[67]S Lorteau, 'The Potential of International "State-as-Polluter" Litigation' (2023) 32 Review of European, Comparative and International Environmental Law.

what most of them are already doing.[68] And human rights-based arguments might face more systemic objections, including the extra-territorial nature of the impacts of a State's greenhouse gas emissions and the difficulty of identifying 'victims' of a State's alleged failure to take sufficient measures on climate change mitigation.[69] More fundamentally, while much of the literature on the subject approaches climate change as a threat to the enjoyment of human rights, climate action itself can affect the enjoyment of human rights, either because of the unintended effects of ill-designed climate policies[70] or, more structurally, due to the sheer cost of climate change mitigation and the cost of opportunity for other rights-relevant policies.[71] Last but not least, the obligations arising from customary international law or human rights treaties are extremely vague, and their interpretation could be highly controversial—all the more so given the extensive implications that any court decision would have for State interests.

The choice among various legal arguments (or any combination thereof) may, of course, be constrained by the forum in which cases are brought—which, in turn, depends largely on the forums that are available to litigants.[72] In this regard, human rights institutions and ITLOS have been called upon to play a major role due mainly to considerations of opportunity, despite the constraints that these forums impose on litigants. Before ITLOS, as Tanaka notes, the questions asked in advisory proceedings 'must be formulated in such a way that it would fall within the scope of the purposes of [UNCLOS]'.[73] Roland Holst adds that ITLOS 'cannot extend jurisdiction *rationa materiae* to other areas of international law, unless this would be truly incidental to the interpretation and application of UNCLOS'.[74] Similarly, Rocha and Sampaio note that the ECtHR could not find infringements of climate treaties or 'order States to comply with these treaties',[75] but that it would need to approach mitigation action exclusively as a human rights obligation. On the other hand, Mejía-Lemos points out that investor-State arbitration could implement norms arising under international law as well as domestic law,[76] thus allowing various other legal arguments (e.g. based on statutory law or tort law) in counterclaims against foreign investors.

More fundamentally, these various legal arguments reflect the fact that climate change means different things to different people. Climate change may, for instance, be approached as the outcome of State conduct, corporate conduct or individual conduct; as harm to States, individuals, indigenous communities, ecosystems or future generations; as a threat to human security or to sovereign interests; in utilitarian or deontological terms; as a responsibility of individuals, States, corporations or humankind as a whole. No legal argument is capable of reflecting all of these ways of framing climate change, although some legal grounds (e.g. customary law and tort law) are more conducive to a broad framing than others.

## 3.2 | Potential judicial output

International climate litigation could result in many different types of judicial outcomes. Some cases could raise relatively specific issues where it is perfectly conceivable that courts could help to clarify the law. Thus, international courts and tribunals could help clarify human rights obligations relevant to particular effects of climate change, the status of maritime baselines affected by sea-level rise[77] or the obligations of States relating to the international protection of forced migrants.[78] They could also make useful pronouncements on the regulatory space offered by WTO law for adopting climate-related trade measures, or specify clear limits on compensation provided for stranded fossil fuel assets under international investment law. By contrast, it is not entirely clear what could be expected from international courts and tribunals in cases raising more general questions about the obligations of States relating to the mitigation of climate change. In particular, the ICJ, ITLOS, IACtHR and ECtHR have been asked to interpret the general obligations of States arising from customary international law, human rights law, and multilateral environmental agreements, among other things. These questions are so broad, complex, and controversial—so extraordinarily 'polycentric', as Shams puts it[79]—that it is difficult to imagine how an international court or tribunal could give meaningful and persuasive answers.

In this regard, Ragnarsson explores an interesting parallel between climate litigation and socio-economic rights litigation—another type of litigation that has sought to address complex, structural and polycentric issues. Drawing lessons from court experience with socio-economic rights litigation, he argues that climate litigation should seek 'balanced doctrinal tools to provide meaningful protection of rights while avoiding insurmountable costs to the legitimacy of courts'.[80] At times, courts might merely 'disrupt decision-making processes and unresponsive institutions with the view of triggering policy processes that will seek to address these issues'.[81] In other instances, he suggests that, 'despite the complexity of the policy terrain', courts might be able to specify a 'non-negotiable floor'[82] or to rule out clearly 'unreasonable' policies.[83]

With regard to strategic climate change litigation perhaps even more than in socio-economic rights litigation, however, courts run a risk of being caught in three separate traps, leading respectively to

[68]See B Mayer, 'Climate Change Mitigation as an Obligation under Customary International Law' (2023) 48 Yale Journal of International Law 105, 111.
[69]See discussion in Luporini and Savaresi (n 46).
[70]Antoniazzi (n 50) 2.
[71]B Mayer, 'Climate Change Mitigation as an Obligation Under Human Rights Treaties?' (n 45) 416–419.
[72]See Iyengar (n 48), showing that some litigators rely on human rights law not as a first choice, but as a way to fill perceived gaps in existing law.
[73]Tanaka (n 32) 10.
[74]Roland Holst (n 34) 4–5.
[75]Rocha and Sampaio (n 47) 10.
[76]Mejía-Lemos (n 57) 6.
[77]See, e.g., V Lanovoy and S O'Donnell, 'Climate Change and Sea-Level Rise: Is the United Nations Convention on the Law of the Sea up to the Task?' (2021) 23 International Community Law Review 133.
[78]See *Teitiota* (n 22).
[79]Shams (n 37).
[80]K Ragnarsson, 'What Can Climate Change Litigation Learn from Socio-economic Rights Litigation?' (2023) 32 Review of European, Comparative and International Environmental Law 9.
[81]ibid 7.
[82]ibid 9.
[83]ibid 8.

insignificant, unsubstantiated or arbitrary decisions. Courts would stumble into the first trap when their pronouncements are too vague and general to provide operational guidance to States (or, as the case might be, other actors). For instance, as Roland Holst notes with regard to an ITLOS advisory opinion, the mere statement that 'due diligence … obliges States to do more'[84] would appear rather unhelpful—States know already very well that more needs to be done[85]—unless the court itself could do more to 'spell out what and how much "more" exactly would be required from individual States'.[86]

The second trap—leading to unpersuasive decisions—would catch courts inclined towards more 'creative' interpretations of the law. Such could be the case, for instance, if a court sought to infer a clear and specific burden-sharing formula from vague and ambiguous treaty provisions on differentiation in global efforts on climate change mitigation,[87] to determine national mitigation targets,[88] or to assess whether existing mitigation targets are sufficiently ambitious.[89] In the absence of adequate enforcement mechanisms, these decisions would have little effect on the conduct of States unsympathetic to these interpretations. These decisions could also erode the reputation and credibility of international courts and tribunals, all the more if they appear to usurp States' law-making power.[90] A court seeking to avoid these first two traps would have little, if any, room for manoeuvre. In this regard, Bodansky argues that an advisory opinion going 'beyond generalities would necessarily involve substantial judicial discretion'; that it 'would have a creative character, rather than simply constituting an interpretation or application of existing law'; and that the court would thus, '[i]n effect, … take law-making on climate change out of the State's control and arrogate some for itself'.[91]

To avoid this conundrum, a court could elude the 'big' question (e.g. States' requisite level of mitigation action) and focus instead on 'smaller', more manageable ones. In doing so, however, it could fall into a third trap—arbitrariness—if it was to infer too much out of obligations that are too vague. For instance, a court might 'choose' to find that States must phase out coal-fired power, halt deforestation, or adopt carbon taxes, out of other possible ways for States to limit and reduce global greenhouse gas emissions in compliance with open-ended obligations on climate change mitigation. By doing so, courts would have to make several potentially questionable assumptions about the preferable ways of mitigating climate change, for instance with an emphasis on some sectors (e.g. electricity generation) rather than others (e.g. meat production), with different implications for countries depending on their emissions profile and other national circumstances. These choices could have vast distributive implications, both within and among States, as, for instance, the States, corporations and individuals who benefit from coal-fired power are not the same as those who benefit from deforestation.

### 3.3 | Potential outcome

Other important questions concern the potential outcome of international climate litigation outside the courtroom. A central issue regards the prospects for compliance with a judicial decision, in particular one that would be in favour of enhanced climate action. Broader, even more difficult issues relate to how international judicial decisions, whether favourable to climate action or otherwise, or the cases themselves notwithstanding any substantive decision, could influence political, social, cultural and economic processes through which climate action is devised.

An obvious limitation of any advocacy strategy relying on international litigation is the lack of an international enforcement mechanism. Notwithstanding whether compliance with a judicial pronouncement is legally binding or not, national governments will need some convincing to comply with it—especially if the pronouncement requires major policy changes with extensive cost implications. In this regard, Iyengar shows that the lawyers and advocates involved in human rights-based climate litigation are already well aware of 'the difficulties of implementing even successful decisions'.[92] Indeed, advocates have noted that climate litigation must be integrated in a broader advocacy strategy: 'A case alone is not the solution, and the judgment is not the end.'[93]

One could theorize that domestic courts would ensure that recalcitrant national governments comply with international judicial decisions. This scenario, however, can only play out in countries with an independent judiciary capable of reviewing national policies. It also assumes that this judiciary would be willing to defer to international judicial decisions. But, as Bodansky points out, 'not all States are likely to accept an ICJ advisory opinion on climate change'.[94] States are perhaps less likely to defer to an advisory opinion given by ITLOS on questionable jurisdictional bases, or on pronouncements by regional human rights courts in matters whose human rights framing can be called into question. While UN human rights treaty bodies have already made a number of recommendations on climate policies during their review of national periodic reports in recent years,[95] this does not seem to have prompted any major policy change in the

[84] Roland Holst (n 34) 7.
[85] See, e.g., Decision 1/CMA.4 (n 3) para 21.
[86] Roland Holst (n 34) 7.
[87] See UNFCCC (n 43) art 3(1); Paris Agreement (n 2) arts 2(2), 4(3).
[88] See *Urgenda v the Netherlands* (n 9); *Milieudefensie v Royal Dutch Shell* (n 9). The willingness of Dutch courts to determine a State's mitigation policy remains an exception.
[89] See Tribunal de première instance francophone de Bruxelles (Section Civile), *Klimaatzaak v Belgium*, 2015/4585/A (17 June 2021). The Court found that Belgium's mitigation policy was insufficiently ambitious but, on the ground of the separation of powers, declined to determine what would be a sufficiently ambitious policy. This position is hardly consistent: if a court can determine that a national mitigation policy is insufficient, it should be able to explain what policy would be sufficient.
[90] *Lotus Case (France v Turkey)* (Judgment) PCIJ Ser A No 10 (1927) 18.
[91] Bodansky (n 35) 7.
[92] Iyengar (n 48) 11.
[93] B Batros and T Khan, 'Thinking Strategically about Climate Litigation' in C Rodríguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (Cambridge University Press 2023) 97, 109.
[94] Bodansky (n 35) 6.
[95] See, e.g., CESCR 'Concluding Observations, Fourth Periodic Report of Argentina' UN Doc E/C.12/ARG/CO/4 (1 November 2018) paras 13–15; Committee on the Rights of the Child 'Concluding Observations, Combined Fifth and Sixth Periodic Reports of Australia' UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) paras 40–41; CEDAW 'Concluding Observations, Ninth Periodic Report of Norway' UN Doc CEDAW/C/NOR/CO/9 (17 November 2017) paras 14–15.

States concerned. Yet even the partial implementation of some decisions in some States could yield valuable outcomes from an advocacy perspective.

Another theory is that international judicial decisions would contribute to raising awareness and to mobilizing society on the need to mitigate climate change, leading to enhanced political support for mitigation action from national governments and potentially other public and private actors.[96] More broadly, courts could be approached as a 'forum for protest',[97] allowing advocates to attract public attention, maintain momentum, and keep issues on the political agenda, notwithstanding the prospects for a favourable judicial decision. A potential objection to this theory is that society is already well aware of climate change, especially for what concerns the segment of society more likely to be informed by international judicial decisions. Likewise, the issue is already very present in national and global discourse. More research, including empirical studies, is needed to assess the effect that international (or domestic) climate litigation could have on public opinion and political support for climate action.

A variant of this theory is that international climate litigation can promote certain framings or narratives of climate change that could enhance society's support for climate action. This theory has generally been deployed in relation to human rights-based climate litigation. In particular, Iyengar notes the importance that some advocates attach to 'the storytelling quality' of such cases.[98] Similarly, Luporini and Savaresi suggest that rights-based litigation can 'put a "human face on climate change"'.[99] While storytelling is certainly an effective advocacy technique in many contexts, however, it might be less effective with regard to climate change given the difficulty of attributing any individual experience to climate change and *a fortiori* to the failure of policies addressing it. Relying on questionable factual narratives seeking to attribute personal stories (e.g. 'climate refugees') to these policy failures exposes advocacy to sceptical arguments, with potentially counterproductive effects.[100] On the other hand, there is no denying that litigation might contribute to attracting attention on particular aspects of climate change. For instance, cases before domestic and international courts may have helped to raise awareness on the ability of a State to mitigate climate change by limiting the exportation of fossil fuels,[101] to emphasize the impacts of climate change on small island developing States,[102] or to shed light on the impacts of climate change on the marine environment.[103]

Questions must also be asked about potential unintended effects of international climate litigation. There are reasons to question whether international courts and tribunals, and in particular human rights institutions, are well equipped to determine national climate policies.[104] These policies are far more complex than often suggested, and ill-designed measures can be needlessly costly, ineffective or even counterproductive. Thus, it was shown in retrospect that compliance with the *Urgenda* decisions has likely resulted in a slight increase in global greenhouse gas emissions as the government of the Netherlands hurriedly reduced national emissions by taking measures that caused a disproportionate increase in overseas emissions.[105] What is needed is perhaps not always *more* climate action at all costs, but rather *better* climate action—measures that lead to global, long-term mitigation outcomes rather than transient reductions in national emission statistics.[106] International climate litigation could also have more indirect effects on international processes and institutions. In particular, Bodansky voices concern about the impact of judicial decisions on international negotiations on climate change, which could become even 'more adversarial and acrimonious'.[107] He also suggests that there could be a risk for the credibility of the international courts and tribunals that are being 'thrust … into the middle of an extremely fraught and contentious issue', and which 'may be heavily criticized' for any decision they might take.[108] Beyond international courts and tribunals, international climate litigation could damage the very credibility of international legal system on which climate cooperation relies. These hypotheses, like others, need to be tested through further research.

## 4 | CONCLUSION

This article has presented some reflections on the central themes of the special issue. Section 2 has considered the potential for proceedings on climate change before international courts, tribunals and quasi-jurisdictions. Section 3 has discussed the potential outcomes of these proceedings by considering the range of legal arguments that could be made, the different types of judicial outputs that could be produced and the effects these could have on policy and society.

Our conclusion on the prospects for international climate litigation is (perhaps inevitably) a half-full glass. There are certainly reasons to agree with Shams on the need to manage our expectations[109]—international climate litigation will not solve the issue of climate change in a single fall of a gavel. International courts and tribunal might only play a limited role, and at times an ambivalent one, in prompting enhanced climate action. Few national governments might

[96]Iyengar (n 48) 7.
[97]J Lobel, 'Courts as Forums for Protest' (2004) 52 UCLA Law Review 477, cited in ibid.
[98]Iyengar (n 48) 6.
[99]Luporini and Savaresi (n 46) 9, citing D Magraw, 'From the Inuit Petition to the Teitiota Case: Human Rights and Success in Climate Litigation' (2020) 114 Proceedings of the ASIL Annual Meeting 86.
[100]B Mayer, *The Concept of Climate Migration: Advocacy and its Prospects* (Edward Elgar 2016).
[101]See, e.g., *Duarte Agostinho and others v Portugal and 32 Other States* App No 39371/20 (ECtHR, communicated 13 November 2020); *Greenpeace Nordic* et al *v Norway* (n 26); Gloucester (n 7).
[102]See Resolution 77/276 (n 17); Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (n 15).
[103]Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law (n 15).
[104]Luporini and Savaresi (n 46) 9.
[105]B Mayer, 'The Contribution of Urgenda to the Mitigation of Climate Change' (2022) Journal of Environmental Law eqac016.
[106]See CF Sabel and DG Victor, *Fixing the Climate: Strategies for an Uncertain World* (Princeton University Press 2022).
[107]Bodansky (n 35) 7.
[108]ibid 8. See also B Mayer, 'International Advisory Proceedings on Climate Change' (2023) 44 Michigan Journal of International Law 41, 113–114.
[109]Shams (n 37).

be willing to comply, and in few other countries might domestic courts implement the decisions of international courts.

Albeit partial, these outcomes might nonetheless make a useful contribution to global, multipronged efforts to address climate change. As Ragnarsson notes, courts have shown their ability to think carefully about new, complex issues, and, just as they have come to play an important role in socio-economic rights litigation, they could stand up to the task of making persuasive and meaningful pronouncements on the obligations of states relating to the mitigation of climate change.[110] Such pronouncements, if properly crafted, could become a vital part of the growing body of jurisprudence related to climate change, providing a much-needed legal basis for the further development and implementation of climate change mitigation and adaptation strategies.

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[110] Ragnarsson (n 80).