



# Climate Change: Challenges and Opportunities for Litigation

Francesco Sindico

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## Outline

- **SCELG project in the context of existing work on climate change litigation**
- Earth jurisprudence/litigation
- Climate change litigation (trends) in light of earth jurisprudence
- Challenges and opportunities for countries with little or no climate change litigation

# SCELG project

## Existing work on climate litigation

2018 issue | Issue 12 Climate Change Litigation | 11

### Issues in Climate Change Litigation

*Jonathan Hill\**

Climate change is an urgent environmental problem for many governments have struggled to develop effective national regulatory responses. However, governmental activities have turned increasingly to courts for a solution, mounting ambitious climate change suits to ensure rapid action and the United States, as well as other countries, have seen the courts become central venues for addressing climate change. This article examines several cases currently under review that present challenges for general litigation across the broad spectrum of climate change litigation. It includes problems of proof of standing and causation and broader impacts of using non-binding a significant contribution to global warming, as well as issues surrounding the higher rates of costs and litigation in developing a regulatory response to a problem of climate change.

**Introduction**

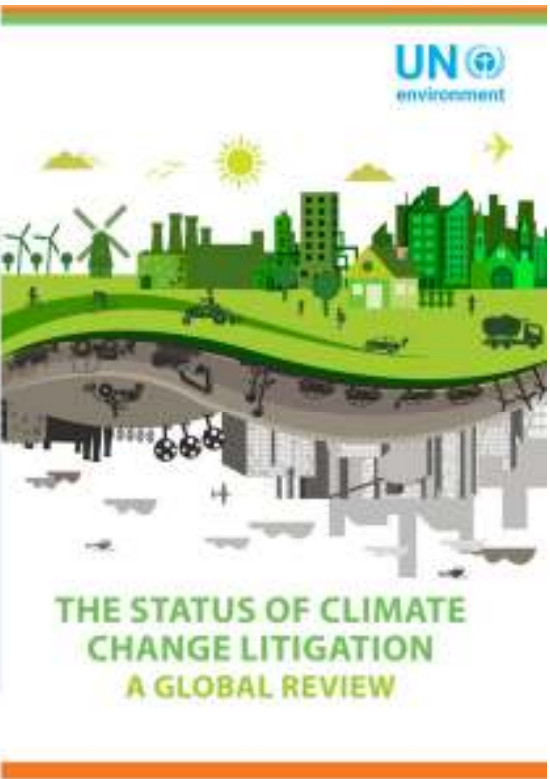
In governmental efforts to address climate change, courts in many countries and at the international level, governmental activities have increasingly turned to courts to fill the void in climate change governance. Litigation seeking climate change mitigation or adaptation has been treated as a matter of jurisdiction and competence in broad scope of legal systems. Indeed, for the first time, both public international law and domestic law have been used to address climate change. This article examines several cases currently under review that present challenges for general litigation across the broad spectrum of climate change litigation. It includes problems of proof of standing and causation and broader impacts of using non-binding a significant contribution to global warming, as well as issues surrounding the higher rates of costs and litigation in developing a regulatory response to a problem of climate change.

\* Jonathan Hill is a senior lecturer in law at the University of Strathclyde, Glasgow, Scotland. He is also a senior lecturer in law at the University of Strathclyde, Glasgow, Scotland. He is also a senior lecturer in law at the University of Strathclyde, Glasgow, Scotland. He is also a senior lecturer in law at the University of Strathclyde, Glasgow, Scotland.

SABIN CENTER FOR CLIMATE CHANGE LAW

Grantham Research Institute on Climate Change and the Environment

Climate Change Laws of the World





## **SCELG project**

- International Academy and Comparative Law
  - University of Geneva – Prof Makane Moise Mbengue
  - More than 50 rapporteurs included
- Scenario based methodology
  - NDCs
  - Human rights
  - Airport and EIAs and other procedural obligations

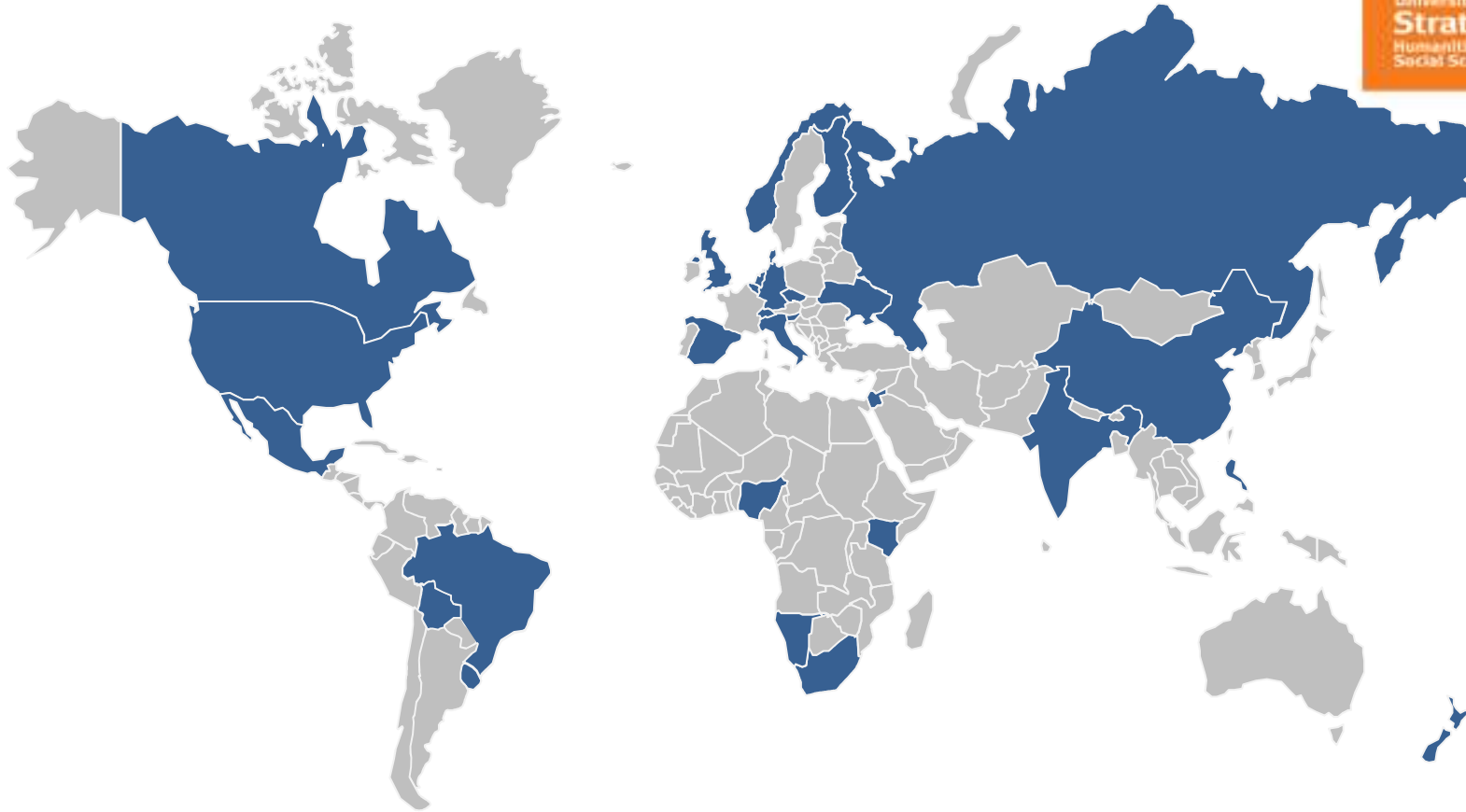




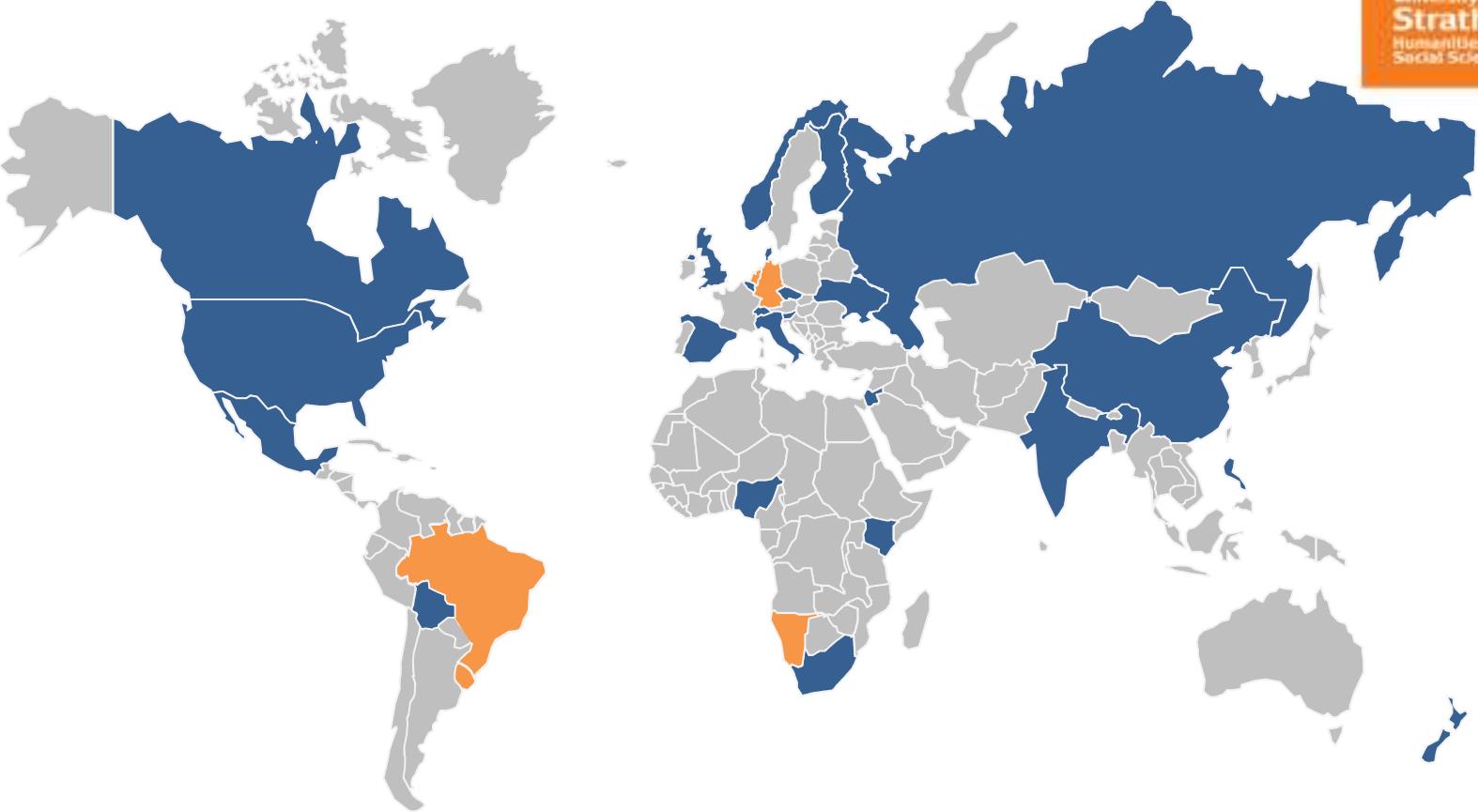
## **SCELG project**

- Scenario based methodology
- Flood resilience planning
- Aluminium and health
- Pension funds
- Living project and collaborations
- Insights from countries with little or no climate litigation

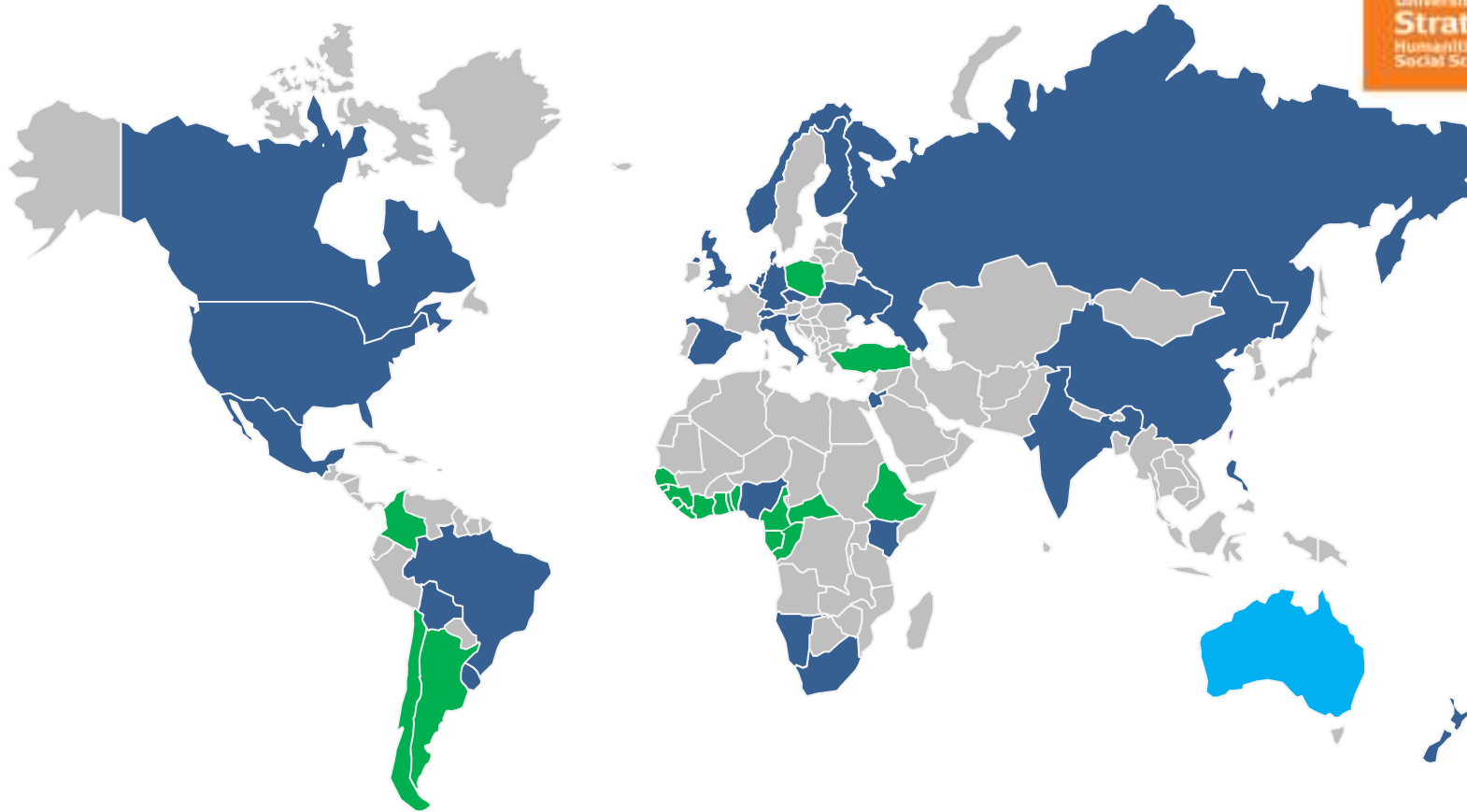
# National Reports Submitted



# National Reports Analysed



# National Reports Pending





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- Climate change litigation (trends) in light of earth jurisprudence
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## Earth Jurisprudence/litigation



“After 140 years of negotiation, Māori tribe wins recognition for Whanganui river, meaning **it must be treated as a living entity.**” – The Guardian, 16/3/2017

# Earth Jurisprudence/litigation



## Earth Jurisprudence/litigation

- Biodiversity hotspot
- Mining (mercury contamination leading to birth defects)
- Disruption to seasonal floods
- Environmental displacement for indigenous communities





## Earth Jurisprudence/litigation

- Corte Constitucional de Colombia, Sala Sexta de Revision, Sentencia T-622 de 2016
  - Protection
  - Conservation
  - Maintenance
  - Restoration

Rights of the  
river Atrato

“Awarding environmental rights is not the same as realising them”, The Independent, 13/10/17



## Earth Jurisprudence/litigation

“Awarding environmental rights is not the same as realising them”, The Independent, 13/10/17

- Positive Role of law/litigation
- Starts a process and sets a direction of travel
- The realisation of rights through the establishment of “guardians”



## Earth Jurisprudence/litigation

“Awarding environmental rights is not the same as realising them”, The Independent, 13/10/17

- Limits/challenges of/for law/litigation
- Role and funding for the “guardians”?
- Clear understanding of the environment that needs to be protected, conserved, restored and maintained (role of science)
- Clear understanding of the “political economy” of the factors contributing to the environmental degradation



# Earth Jurisprudence/litigation



## Earth Jurisprudence/litigation

- Colombian Constitutional Court, Decision C-035/16, 8 February 2016
  - Mining, oil and gas operations approved prior to 2010 “unconstitutional”
  - High-altitude wetlands (paramos) a “carbon capture system”

What, if anything, would change if wetlands were to have rights?





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## Climate litigation and earth Jurisprudence

- Cross fertilisation – what can earth/river jurisprudence bring to climate litigation?



## Climate litigation and earth jurisprudence

- Trends of climate litigation (UNEP, *The Status of Climate Change Litigation, a Global Review*, 2017, p. 14)
  - Holding governments to their legislative and policy commitments
  - Linking the impacts of resource extraction to climate change and resilience
  - Establishing that particular emissions are the proximate cause of particular adverse climate change impacts
  - Establishing liability for failure to adapt and the impacts of adaptation
  - Applying the public trust doctrine to climate change





## Climate litigation and earth jurisprudence

- Cross fertilisation – what can earth/river jurisprudence bring to climate litigation?
- Climate litigation can be linked to different ecosystems having rights, which are being negatively impacted by climate change
- Oceans and ocean ecosystems may have rights



## Climate litigation and earth jurisprudence

- Cross fertilisation – what can earth/river jurisprudence bring to climate litigation?
- If the paramos are awarded rights by a Court
- It will be more difficult for a law to be passed authorising damage thereto (role of judicial precedent)





## Climate litigation and earth jurisprudence

- Cross fertilisation – what can earth/river jurisprudence bring to climate litigation?
- An individual brings litigation because of the negative effects of climate change on coral reefs (on the ocean)
- Legal grounds will be a provision to protect the environment

- An ocean “guardian” brings litigation because of the negative effects of climate change on coral reefs (on the ocean)
- Case will focus on the rights of the ocean and not only on the obligations upon public and private entities that are being “sued”



## Climate litigation and earth jurisprudence

- From a human right to a clean and healthy environment to environment having rights
- International “human” rights developments still very anthropocentric and “State” centred
- ✓ Inter-American Court of Human Rights, Advisory Opinion OC-23/17, 15/11/17, requested by Colombia
- ✓ Report of the SR on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (A/HRC/37/59, 24/01/18)



## Climate litigation and earth jurisprudence

- From a human right to a clean and healthy environment to environment having rights
- Some national Constitutions have opened themselves to a more eco-centric approach
- ✓ 2008 Ecuador, section 71
- ✓ 2010 Bolivia Law no. 071 on the Rights of Mother Earth
- Will enshrining rights to nature in the Constitution (in law rather than relying only on judicial precedents) make a difference?



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- Climate change after the Paris Agreement
- **Challenges and opportunities for countries with little or no climate change litigation**

# Namibia



- Increase in direct and indirect climate change legislation
- Constitution interpretation
- Role of the Paris Agreement

Potential for future  
climate litigation

## Challenges and opportunities

- Just having climate change legislation does not lead necessarily to climate litigation
- (Constitutional) Judges understanding of climate change and of climate change (direct and indirect) law (different legal systems vs increase number of case law)
- Ability and capacity of civil society







## Challenges and opportunities

- Capacity building directed to judges and civil society
  - NGOs
  - Universities/research institutes
  - Bar Associations (legal sector)
  - International organisations





## Concluding remarks

- SCELG project on climate litigation: July 2018 as the start not the end of a policy relevant international and multipartner initiative
- Earth jurisprudence/litigation needs to be operationalised and given time to show that it goes beyond “awarding” environmental rights and moves towards their “realisation”
- Earth jurisprudence may present opportunities for climate change litigation by giving nature affected negatively by climate change legal rights
- Countries with little or no climate litigation have an appetite for building capacity when it comes to litigation



UNIVERSITY of STRATHCLYDE  
CENTRE FOR  
ENVIRONMENTAL LAW  
AND GOVERNANCE



Francesco Sindico  
Co-Director of SCELG  
[francesco.sindico@strath.ac.uk](mailto:francesco.sindico@strath.ac.uk)

University of Strathclyde Law School

Level 3, Lord Hope Building

141 St James Road Glasgow

G4 OLT

W:

<https://www.strath.ac.uk/research/strathcly>



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