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Climate Change Litigation in Indonesia: The Good, the Bad, & the Ugly

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Climate Change Litigation in Indonesia

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Introduction

This chapter attempts to examine Indonesia's climate change litigation. In doing so, it first classifies Indonesia's climate change litigation into three different types of lawsuits. The first are lawsuits against the government for failure to meet its obligations related to climate change. The second are lawsuits related to the failure of the existing environmental impact assessment (EIA) documents to take into account the likely impacts of a proposed activity on climate change. The last type are lawsuits related to illegal logging and peatland fires. These lawsuits are brought by the government through the Ministry of Environment (MoE), or currently the Ministry of Environment and Forestry (MoEF), against timber or oil palm plantations for peatland fires or companies allegedly involved in illegal logging.

The third category merits further attention since it is comparable to tort-based climate change litigation. In these lawsuits, the government asks the defendants to pay damages for environmental damage and restoration costs resulting from the defendants' activities or illegal conducts.[1] Nevertheless, similar to other tort-based climate change litigations, successful prosecutions of these claims face the challenge of the notoriously difficult questions about causation.

This chapter argues that the third type of Indonesian climate change litigation is novel and unique in two different senses. First, it addresses climate change not as a primary tort or a tort per se, but rather as a secondary tort. Second, instead of pursuing claims for climate damages

[1] Kevin Haroff and Jacqueline Hartis, 'Climate Change and the Courts: Litigating the Causes and Consequences of Global Warming' (2008) 22(3) *Natural Resources & Environment* 50, 55. See also Michael B. Gerrard, 'What the Law and Lawyers Can and Cannot Do about Global Warming' (2007) 16(1) *Southeastern Environmental Law Journal* 33, 39–40.

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What Might Future Rights-Based Climate Litigation Look Like in Indonesia? A Preliminary Analysis

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Abstract

While there has been some climate litigations in Indonesia, a rights-based climate case has yet to emerge. On the other hand, several rights-based environmental cases have seen the light of day before the Indonesian courts, although with more failures than successes. This note explores the prospects and challenges for future rights-based climate litigation in Indonesia by reflecting on previous climate and rights-based environmental cases. At the same time, with reference to *Urgenda*, this note recognizes a growing global discourse on transnational climate litigation, unveiling the possibility of replicating successful climate litigation strategies from one jurisdiction to another. This note inquires into what potential plaintiffs can learn from *Urgenda* and previous Indonesian climate and rights-based environmental litigation to strategize future rights-based climate lawsuits before Indonesian courts.

Keywords: climate litigation; Indonesian law; rights-based environmental litigation; transnational climate litigation.

1. Introduction

Global climate litigation scholarship and practice have seen an increasing trend of plaintiffs arguing their cases with recourse to human rights (Savaresi and Setzer 2022: 7–8; Cameron and Weyman 2022; Zemel 2018: 492; Peel and Osofsky 2019: 40; Moreira et al. 2024). Human rights arguments can be helpful in filling gaps by providing remedies where other areas of law do not. However, the remedies available under human rights laws were not necessarily designed to redress environmental damage. Nevertheless, human rights law has often been an alternative recourse to redress personal and property damages caused by environmental pollution (Savaresi and Hartmann 2020: 74). Moreover, arguing for the environment in a rights-based context potentially advances the legal protection and vindication of individual and collective rights (Varuhas 2016: 1).

In light of the global discourse on rights-based climate litigation, this note explores the prospects of and challenges to future rights-based climate litigation in Indonesia. The terms 'rights-based' or 'human rights arguments' refer to practices of plaintiffs framing the government's inaction in responding to climate change through mitigation or adaptation measures as violating their human rights, such as the right to life and other fundamental rights.

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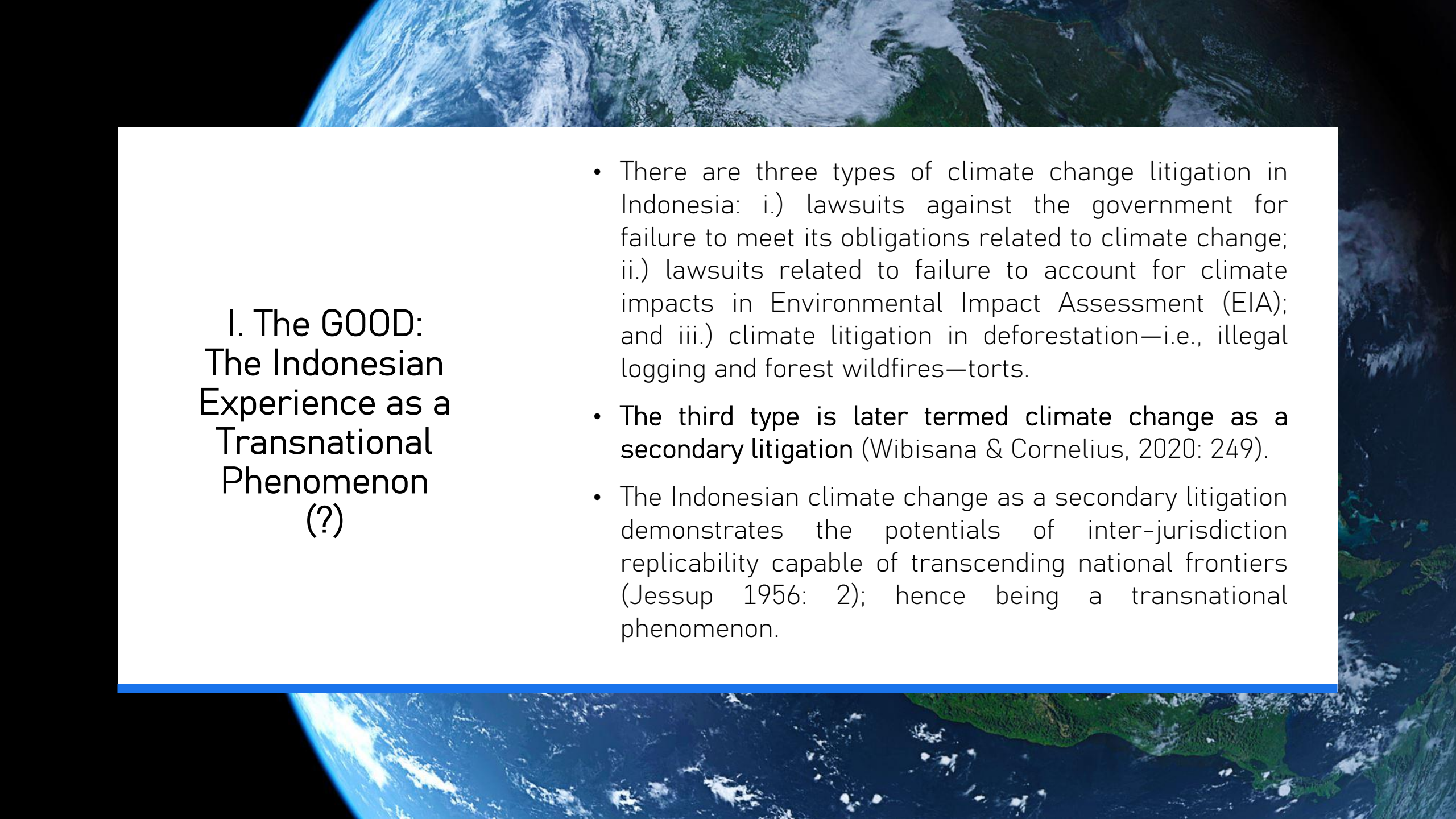


I. The GOOD: The Indonesian Experience as a Transnational Phenomenon (?)

- There are three types of climate change litigation in Indonesia: i.) lawsuits against the government for failure to meet its obligations related to climate change; ii.) lawsuits related to failure to account for climate impacts in Environmental Impact Assessment (EIA); and iii.) climate litigation in deforestation—i.e., illegal logging and forest wildfires—torts.
- **The third type is later termed climate change as a secondary litigation** (Wibisana & Cornelius, 2020: 249).
- The Indonesian climate change as a secondary litigation demonstrates the potentials of inter-jurisdiction replicability capable of transcending national frontiers (Jessup 1956: 2); hence being a transnational phenomenon.

Climate Change as a Secondary Litigation

- These cases are primarily illegal logging and forest wildfires torts in which the Government of Indonesia (**GoI**), through the Ministry of Environment and Forestry (**MoEF**), acted as a plaintiff bringing lawsuits against timber companies and palm-oil concession holders for illegal logging and causing wildfires on peatland.
- Under Indonesian law, the GOI has a legal standing based on two legal grounds:
  - Article 33(3) of the Indonesian Constitution: the Earth, water, and natural resources therein is under the State's possession and to be managed for the welfare of the people. Article 33(3) can be read as equivalent to the public trust doctrine under the common law legal tradition.
  - Article 90(1) Law No. 32 of 2009 [Environmental Act]: Central- and regional government agencies responsible for environmental affairs are authorized to initiate lawsuits claiming for damages and/or injunction against businesses and/or activities causing environmental pollution and/or destruction (occurring in non-privately owned property)

- In these cases, the GOI sued both illegal loggers and peatland wildfire defendants for having destroyed the forest. Note that as regards to peatland wildfire defendants, the GOI did not include in their submission to the court any argument requesting that the defendants should also be held liable for any consequential injuries arising from peatland wildfires, such as smoke haze and the health impairments (e.g., respiratory infection, etc.) it entails. This was because of the impossibility of clustering and demonstrating an individualized proof of causation; hence the reason why both illegal logging and peatland wildfire share similar legal facts: they are both forest destruction torts.
- In the GOI's request for remedy to both cases, in addition to requesting for environmental damages, the GOI also requested for compensation to restore the forests' impaired carbon sink in illegal logging cases and holding peatland wildfire defendants liable to pay per ton carbon credit for the carbon emission resulting from the wildfire.
- The way through which liability for carbon emission entered only later in the process of calculating the total damages and compensation that the defendant is liable to pay is what is termed as climate change as a secondary litigation

The Contribution of the Indonesian Climate Change as Secondary Litigation to (Global) Climate Litigation Scholarship (?)

1. STRATEGIC "LEEWAY" TO AVOID PROVING CAUSATION FOR CLIMATE LIABILITY

- Because **climate change was presented as neither a material nor central issue of the litigation but peripheral**, the plaintiff was not tasked with the burden of having to demonstrate specific proof of causation between an emission to a localized climate-related injury.
- While this may be "unsexy" (Bouwer, 2018), **the Indonesian climate change as secondary litigation "highlight an interesting avenue for the emergence of climate change litigation through actors responsible for enforcing environmental and natural resources laws,"** (Lin & Peel, 2024: 169) especially in the absence of specific domestic laws(s) on climate change.

2. POTENTIALS OF REPLICABILITY (?): THE INDONESIAN EXPERIENCE AS A TRANSNATIONAL PHENOMENON (?)

- Despite emerging from a local practice and domestic legal context, the Indonesian experience can be seen to demonstrate a transnational potential in that **the strategy of "tying"/"associating" liability for climate change to other relevant and related legal fact(s), particularly deforestation, can be replicated in any other jurisdictions elsewhere.**
- The term 'transnational' may refer to various concepts and categorizations. In global climate litigation scholarship, the term refers to **bringing climate claims before domestic courts seen as part of the global climate justice movement** (Peel & Lin 2019: 296).

Conceptualizing Climate Change Litigation (Peel & Osofsky 2015: 8)

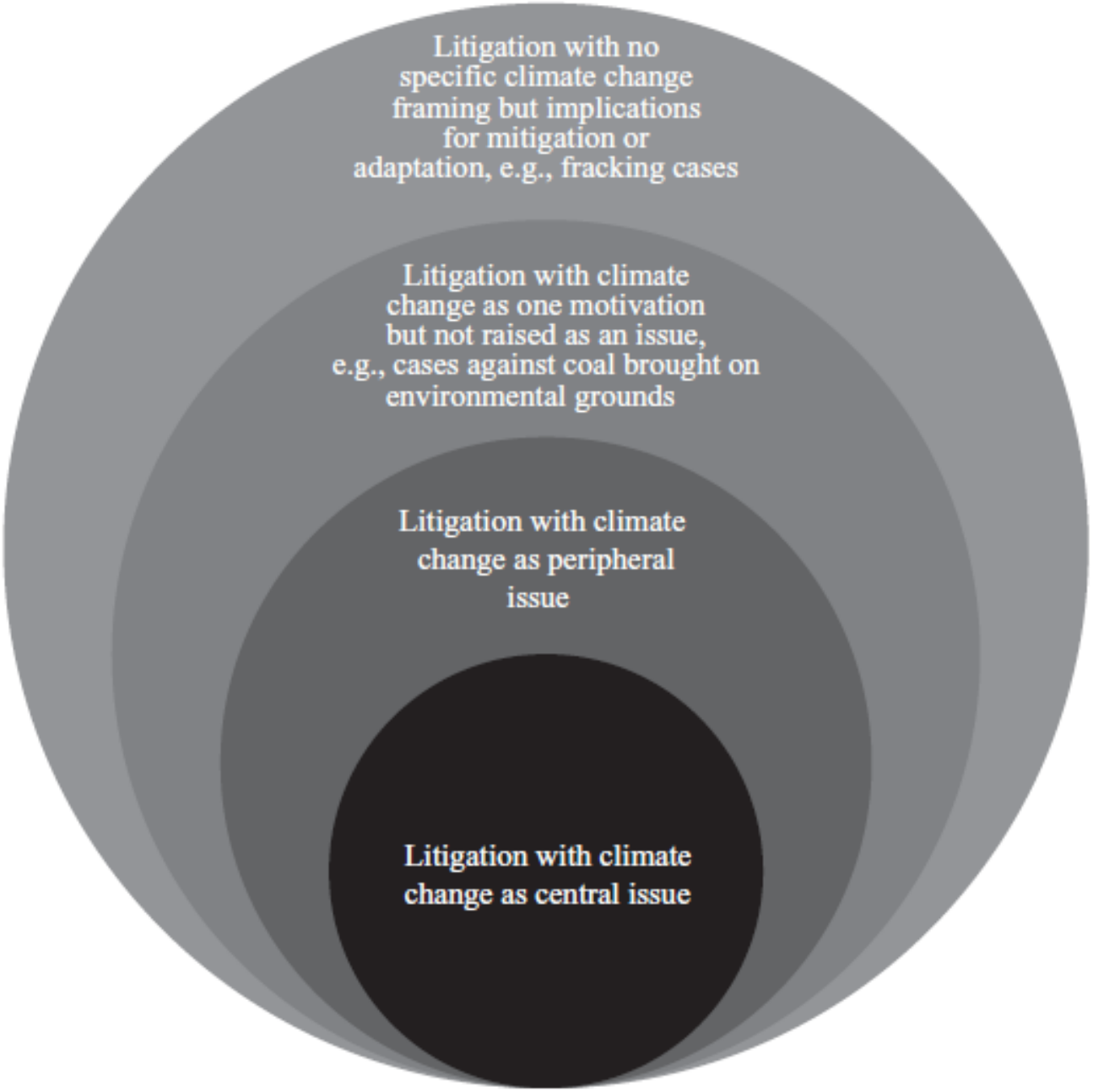
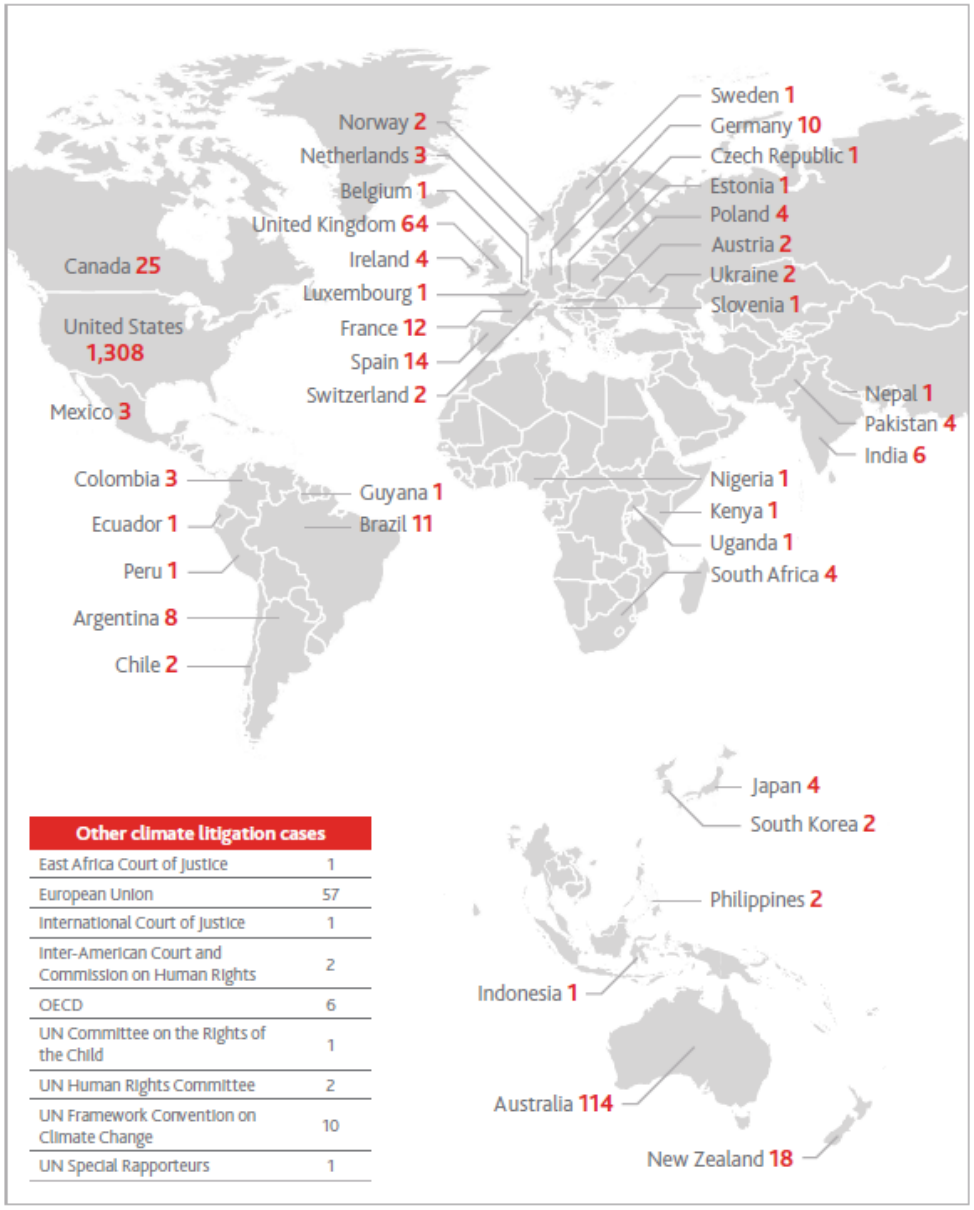


Figure 1.1 Conceptualizing climate change litigation.

Figure 2: Geographical distribution of 1,727 cases worldwide (of which 419 are outside the U.S.) (1986–2020)



Other climate litigation cases	
East Africa Court of Justice	1
European Union	57
International Court of Justice	1
Inter-American Court and Commission on Human Rights	2
OECD	6
UN Committee on the Rights of the Child	1
UN Human Rights Committee	2
UN Framework Convention on Climate Change	10
UN Special Rapporteurs	1

Source: CCLW and Sabin Center data[39]

39 Setzer and Byrnes 2020.

Recorded Climate Change Litigation Cases in Indonesia (prior to 2021)

Criteria

To fall within the scope of the U.S. and Global databases, cases must satisfy two key criteria.

First, cases must generally be brought before judicial bodies (though in some exemplary instances matters brought before administrative or investigatory bodies are also included). Historically, the term "cases" in the U.S. database included more than judicial actions and proceedings. Other types of "cases" formerly contained in the database included quasi-judicial administrative proceedings, rulemaking petitions, requests for reconsideration of regulations, notices of intent to sue (in situations where lawsuits were not subsequently filed), and subpoenas. Since 2018, these other types of cases have not been added to the U.S. database, and approximately 100 older such cases were removed from the database in November 2021.

Second, climate change law, policy, or science must be a material issue of law or fact in the case. Cases that make only a passing reference to climate change, but do not address climate-relevant laws, policies, or actions in a meaningful way are not included.

In general, cases that may have a direct impact on climate change, but do not explicitly raise climate issues, are also not included in the database. Examples of such cases may include challenges to government inaction on local air pollution or challenges to the development of fossil fuel infrastructure on the basis of other types of harm to human health and/or the environment. The intent of the litigants with regard to the climate-related consequences of such cases is not considered during the assessment process.

Recorded Climate Change Litigation Cases in Indonesia (after 2021)

15 CASES FOUND

Ministry of Environment and Forestry v. PT National Sago Prima

At issue: Whether a sago plantation company is liable for compensation for damage caused by wildfires.

Jurisdictions: Indonesia > Jakarta Court of Appeal
Indonesia > District Court of South Jakarta
Indonesia > Supreme Court

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II. The BAD

Despite offering a creative alternative climate litigation strategy, there are two problems that nevertheless remain:

- First, the Indonesian experience failed to differentiate liability for negative emissions (i.e., impairing forest's carbon sink capacity) and positive emissions (i.e., carbon emitted from an activity). While the liability for negative emissions can be justified (i.e., illegal logging cases), there are reasons to doubt liability for positive emissions for causation reasons.
- Second, despite having won and receiving the damages and compensation for restoration, there has not been a single forest restoration taking place to date.

III. The UGLY: The (Grim) Future of Rights-Based Climate Litigation in Indonesia (?)

- Until recently, scholars and practitioners in Indonesia have been discussing the possibility of bringing a rights-based climate litigation lawsuit against the government. While there have been some climate litigations in Indonesia, a rights-based climate case has yet to emerge. In the context of Indonesia, the terms 'rights-based' or 'human rights arguments' refer to practices where plaintiffs frame the government's inaction in responding to climate change through mitigation or adaptation measures as a violation of their human rights, such as the right to life and other fundamental rights.
- Given the limited time, **this presentation will only focus on the issue of references to international law in Indonesian domestic courts and how human rights arguments** are understood and viewed by Indonesian judges.

Human Rights in the Indonesian Constitution, Human Rights-, and Environmental Acts

RELEVANT KEY HUMAN RIGHTS PROVISIONS

- Article 28A of the Constitution: '[E]veryone has the right to life and the right to safeguard one's life and livelihood';
- Article 28H(1) of the Constitution: '[E]veryone has the right to… have a decent and healthy environment…';
- Article 9(1) of Law No. 39 of 1999 [Human Rights Act]: '[E]veryone has the right life, to maintain one's life, and improving one's livelihood'; and
- Article 9(3) of Law No. 39 of 1999: '[E]veryone has the right to a decent and healthy environment'.
- Article 65(1) of Law 32 of 2009 [Environmental Act]: ''[E]veryone has the right to a decent and healthy environment as part of human rights.'

PROBLEMS WITH RIGHTS-BASED PROVISIONS IN INDONESIA:

- **The right to a decent and healthy environment**: i.) When does the environment cease to be decent and healthy?; ii.) Is the element of "decent" and "healthy" one and the same, or are they different? If different, does a petitioner need to establish the state of "indecent"- and "unhealthy" environment cumulatively to secure standing?
- **Indonesian judges seem to have a very limited view of human rights violations as limited to those contemplated in the Rome Statute**—i.e., aggression, genocide, war crimes, and crimes against humanity. The idea that there could be a human rights violation beyond this narrow category—for example, from not fulfilling a constitutional duty to ensure the enjoyment of a healthy environment—may seem an alien concept in Indonesia.
- **References to international law often seem to be dismissed with hostility**, save to the extent that recourse to international law is consistent with, and does not prejudice, Indonesian domestic law (Agusman 2014: 16; Agusman 2021: 185)

The Precarity of Rights-Based Arguments in Environmental Litigation and Judicial Review Cases before Indonesian Courts

CIVIL COURT

- The cases of *Rompas* (2017, 2018) and *Soebono* (2019).
- *Rompas* and *Soebono* are rights-based environmental litigation cases in East Kalimantan and Central Jakarta in which a class-action plaintiff sued the government for violating the people's human rights because of its failure to prevent and regulate air pollution; yet they resulted in two contrasting decisions as to the success of their rights-based arguments. Why?
- In *Rompas*, the plaintiff supported their rights-based arguments with documented records of the adverse health impacts caused by smoke haze resulting from recurring forest wildfires in East Kalimantan and an official human rights report from the Indonesian Human Rights Commission establishing the State's failure to control and regulate air pollution as a human rights violation. Unlike *Rompas*, *Soebono* only relied on abstract and theoretical human rights arguments in its brief (Cornelius 2024: 293-294).

CONSTITUTIONAL COURT

- In several notable constitutional review cases concerning environmental degradation, rights-based arguments in constitutional review cases are characterized by being indirectly related to pursuing environmental ends through reliance on a range of other constitutional rights—such as right to life, right to health, and right to freedom of speech and assembly—holding the government under the duty to ensure responsible and sustainable use of natural resources.
- The main reason for the reluctance of petitioners to directly rely on the "right to a decent and healthy environment" provision concerns the ambiguity of the element of "decent," "and," and "healthy" in the article (Butt and Murharjanti 2021: 36; Cornelius 2024: 292-293).

Solutions? The Importance of Utilizing Normative Environmental-Climate Science in Climate Litigation Cases

- Learning from the Netherlands' *Urgenda*: **the Common Ground Method** (Wewerinke-Singh & McCoach, 2021: 278-279).
- On the cassation appeal, the Supreme Court of the Netherlands used the common ground method when considering the 25–40 per cent reduction target as a common ground practice of parties to the United Nations Framework Convention on Climate Change (UNFCCC), to which the Netherlands is a party. **The common ground method is a method of accounting consensus emerging from specialized international instruments and from the practice of contracting states to constitute a relevant consideration for a court when it is interpreting the provisions of a convention.**
- In this case, unlike scientific research on climate change produced by think-tank organizations or independent academic research centers or laboratories, climate science knowledge production by the Intergovernmental Panel on Climate Change (IPCC) plays a determining role in global climate governance. Establishing itself as an authoritative global voice on international climate science, the reports produced by the IPCC serve as a standard for implementing and monitoring climate policy actions. IPCC's climate science not only describes and predicts the state of climate science but also prescribes the range of precautionary and preventive measures that governments ought to take in their respective domestic climate change mitigation and adaptation policies (Cornelius, 2024: 296).
- In addition to IPCC, we may also now consider the science developed by the Stockholm Resilience Institute on planetary boundaries.

Conclusions & Recommendations

- Reflecting on the Indonesian climate change as a secondary litigation strategy, **present and future climate litigations should focus not only on trying to "win" litigations but winning (or perhaps also "losing") in a way that advances arguments and concepts which can be replicated in other jurisdictions,** "here, there, and everywhere." Climate change litigation cases can, and should, be seen as a *locus* for transnational climate governance through (domestic) courts.
- Rights-based arguments may often be precarious for various reasons. In the context of Indonesia, the difficulty arises due to ambiguous constitutional provision drafting and limited judicial capacity for legal scholarship. This predicament may also be shared by various other countries, particularly developing countries. **In such a non-ideal world, reliance on official human rights reports and normative environmental-climate science (e.g., IPCC Report, Planetary Boundaries) may help fill in the gaps where existing law seems to fail or is absent**.

Thank You ☺

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