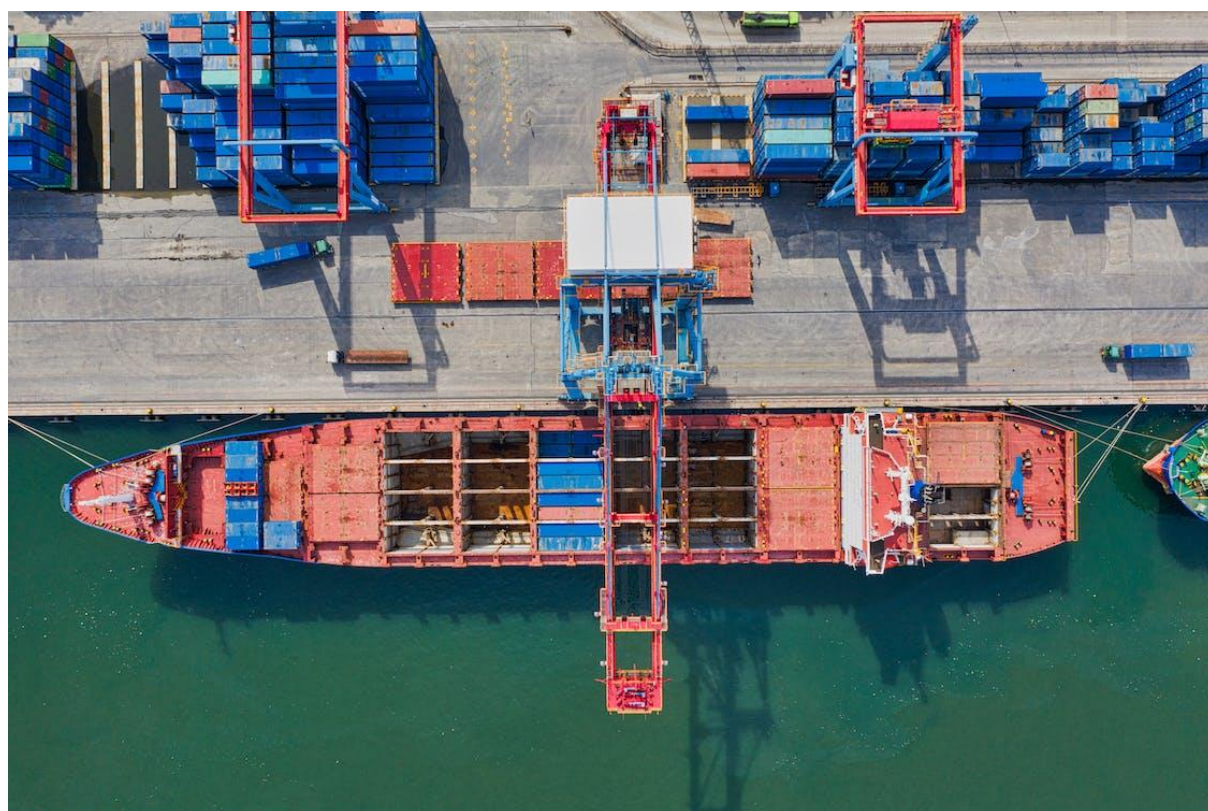




# Climate change litigation and shipping: taking stock

Briefing | March 2024



## Executive Summary

- To date, there are relatively few shipping-related climate change lawsuits worldwide. In our high-level review, we identified around 30 cases, most of them filed in the United States.
- In many of the climate change cases targeting the shipping sector, litigation challenges the permitting and approval of shipping related projects, often concerning environmental impact assessments.
- These 'permitting' cases seek to incorporate greater climate considerations into the approval processes, and many of them simultaneously challenge linked biodiversity threats and air pollution impacts.
- In corporate climate change cases which specifically seek to tackle shipping's climate impacts, greenwashing is emerging as a key issue. There have been both quasi-judicial and judicial cases that fit into this category.
- In relation to ports, litigants are not only challenging inadequate climate mitigation measures, but also the failure to adapt critical port infrastructure to the physical risks of climate change.
- In the United States, several shipping related climate change lawsuits have been filed that seek outcomes that curb climate action.
- Advisory proceedings before the International Tribunal for the Law of the Sea and other international legal fora are contributing to increased legal scrutiny on shipping at the international level.
- The full shipping corporate ecosystem, including directors, investors, and insurers, must be alive to the increasing risks of climate litigation and ensure that they properly consider – and crucially, take – concrete, meaningful action to reduce the company's climate impact. Not to do so exposes companies to significant legal, reputational and financial risks.

## Introduction

Climate change litigation is on the rise with more than 2,300 cases having been filed worldwide to date (Setzer and Higham, [2023](#)). The International Chamber of Shipping (ICS), the global trade association for shipowners and operators which represents over 80% of the world merchant fleet, has warned that the increasing trend and scope of climate change litigation could herald a new legal risk for shipping companies and directors (ICS, [2023](#)).

While some attention has been given to the important question of how climate change litigation *could* affect the shipping industry (ICS, [2023](#); Zografakis and others, [2023](#); McGaughey, [2021](#)), this briefing seeks to explore how climate change litigation is *already* affecting the shipping industry and reflects on the broader lessons and impacts of such litigation. To this end, we take stock of existing climate change cases in the shipping sector to date and reflect on key developments.

### Box 1. Scope and methodology

In this briefing we primarily draw on cases captured by the climate change litigation [databases](#) maintained by the Sabin Center for Climate Change Law. Our observations are largely facilitated by well-established categorisations of climate change litigation (Setzer and Higham, [2023](#); UNEP [2023](#)).

We used a two-stage approach to determine what climate change cases are “shipping related”. First, we used the following key search terms: “port”, “terminal”, “ship”, “vessel”, “marine”, “maritime”, “shipping”. Second, we used a rather restrictive (subjective) approach to assess whether the captured cases showed a sufficient connection to shipping; either by referring to emissions from shipping, or by clearly relating to key stakeholders in the shipping industry. This review revealed around thirty cases, although it is important to note that there may exist many more, including contractual disputes which give rise to litigation but to which the databases accessed necessarily do not extend.

The shipping related climate change cases discussed in this briefing are not exhaustive; rather we discuss key cases and developments. Preference is given to more recent cases, and cases that seek outcomes that curb climate action (“backlash” cases) are not discussed in detail (for an example of such a case see **Box 3**).

## Litigation to date

This section discusses some of the key developments in shipping related climate change litigation to date. In the cases reviewed, we observe the following case categories: (i) permitting and reviewing processes; (ii) greenwashing; (iii) financial flows; (iii) failure to adapt; and (iv) international climate cases. As noted in **Box 1**, backlash cases are not discussed in detail in this briefing, although it is worth noting that several such cases have been filed in the United States (US). An example is discussed in **Box 3**.

### Permitting and reviewing processes

To date, most of the shipping related climate change cases that have been filed relate to permitting and approval decisions of shipping related projects, often involving environmental impact assessments. In some of these cases, the maritime sector is at the forefront, with key stakeholders, such as ports, marine terminals, and shipping companies, at the core of the case. We note that in other cases, shipping is *indirectly* affected. These cases do not just involve the climate impacts of shipping, but often also involve impacts on local air pollution levels and health impacts on coastal communities, as well as biodiversity threats (see **Box 2**).

### Air pollution and GHG emissions

For example, in [\*West Oakland Environmental Indicators Project v. Port of Oakland\*](#) (filed in 2022, United States), an environmental group challenged a port's approval of a bulk marine terminal which would import, store and distribute sand and gravel, leading to an increase in air pollution levels and greenhouse gas (GHG) emissions. The case was subsequently [\*settled\*](#), resulting in a new agreement which sought to ensure that bulk shipping operation at the port prioritised 'sustainable, community-conscious development'.

In [\*South Coast Air Quality Management District v. City of Los Angeles\*](#) (filed in 2020, US), an environmental review for a shipping terminal project at a port was challenged. The petitioner argued that the respondents had failed to implement and enforce the mitigation measures in a previous environmental impact report and had further failed to adequately account for the project's climate impacts, including air quality impacts, and include sufficient mitigation measures in a supplemental environmental impact report. In 2022, the [\*court\*](#) confirmed that the port was in breach of Californian environmental law.

### Why is this important?

*These cases highlight that climate impacts as well as air pollution impacts should be considered when signing off on port expansion. Pollution in ports contributes significantly to pollution and health damages (Mueller et al., [2023](#); EPA, [2023](#)), with disproportionate impacts on vulnerable near-port communities (C40 Cities, [2023](#)). To this end, the Special Rapporteur on toxics and human rights recently called for a human rights-based approach to the shipping sector by States and businesses (Orellana, [2023](#)).*

### Downstream shipping emissions

Other cases focus on a project's downstream shipping emissions. In [\*Columbia Riverkeeper v. U.S. Army Corps of Engineers\*](#) (filed in 2019, US), a non-governmental organisation (NGO) challenged a permit for a maritime export terminal linked to a proposed methanol facility for allegedly failing to consider the project's GHG emissions. The court subsequently vacated the permits due to a failure to consider the indirect cumulative GHG impacts, such as from increased fracking (and related emissions), and crucially, emissions from

shipping the methanol globally. In a separate case, [Columbia Riverkeeper v. Cowlitz County](#), several NGOs filed a petition to challenge a county's permit for a proposed methanol manufacturing and shipping facility. Particularly, the claimants alleged that the environmental impact statement was inadequate, one of the issues being the failure to adequately consider downstream shipping emissions. The Board decided that the review had failed to adequately assess the project's GHG impacts.

In a number of cases, maritime stakeholders are not directly involved, but claimants nevertheless seek to highlight shipping emissions' climate impacts. For example, in [Sierra Club Canada Foundation et al. v. Minister of Environment and Climate Change Canada et al.](#) (filed in 2022, Canada), several NGOs challenged the approval of an environmental assessment report of an offshore oil production project in the Atlantic Ocean. In particular, the applicants argued that the approval decision had failed to consider downstream and shipping emissions. The court however disagreed with the applicants and concluded that the decision had been reasonable. The applicants appealed the decision in September 2023. Another case which was ultimately dismissed, [Australian Conservation Foundation Incorporated v Minister for the Environment and Energy](#) (filed in 2015, Australia), concerned the approval of a coal mine in Australia, which the claimant claimed had failed to consider the emissions from transport by shipping, amongst other things.

### **Why is this important?**

*With these cases litigants seek to make decisionmakers responsible for assessing full lifecycle emissions when approving projects. International shipping carries over 80% of global trade and is responsible for approximately 3% of global GHG emissions (Faber and others, 2020); decarbonising shipping is therefore essential to manage emissions across the entire value chain (UNCTAD, 2023). These include direct emissions (Scope 1), indirect emissions (Scope 2) and all other indirect emissions throughout the value chain (Scope 3), including [downstream transportation emissions](#).*

### **Increased vessel traffic**

Several cases which challenge the approval of shipping-related projects also highlight the linked increase in vessel traffic, which exacerbates climate impacts as well as pollution near coasts and ports.

For example, in the [West Oakland Environmental Indicators Project v. Port of Oakland](#) case (see page 4) one of the key arguments was that the project in question would also require up to 49 new ocean-going vessel visits to the port per year which further intensified climate and pollution impacts.

In [El Puente v. U.S. Army Corps of Engineers](#) (filed in 2022, US), certain NGOs challenged a dredging project, arguing that this would primarily allow larger tankers of liquefied natural gas (LNG) and petroleum to transit the bay. In this regard, they criticised the government's environmental review, which they argued ignored an inevitable fossil fuel lock-in and posed biodiversity threats. The court in this instance rejected the challenge, confirming that the environmental assessment had been adequate and that the LNG infrastructure was not a connected action in the context of the project that would necessitate consideration of its environmental impact.

### **Why is this important?**

*As noted above, shipping is already a major contributor to global GHG emissions, but projections show that emissions could increase by up to 130% compared to 2008 levels (Faber and others, 2020). Given demand for shipping has outstripped the emissions savings made by fuel efficiency improvements, it is increasingly urgent to mainstream*



decarbonisation objectives into decision-making processes (UNCTAD, [2023](#)). In addition to contributing to GHG emissions and environmental pollution, increased shipping activities may also have impacts on biodiversity (Robbins and others, [2022](#)), as discussed in more detail in **Box 2**). These cases show that port authorities and companies should not only embed proper environmental impact assessments into planning processes, but also consider the potential legal and reputational risk of increased levels of local pollution on port communities and ecosystems, and the potential of stranded infrastructure assets built to service increased traffic that later shift to alternative fuel options.

### Box 2. Triple crisis: Climate change, pollution and biodiversity threats

Recognising that the climate crisis, pollution and biodiversity loss are interconnected, the 2030 shipping pact for people and nature was [launched](#) at COP28 in Dubai. The initiative seeks to address this triple crisis and ensure that shipping's transition to net-zero is aligned with the sector's overall environmental impact (Dumbrille and Menezes, [2023](#)). The cross-cutting impact of the shipping sector has also been subject of climate litigation in shipping.

For example, in [Center for Biological Diversity v. U.S. Maritime Administration](#) (filed in 2021, US), an NGO filed a lawsuit against the US Maritime Administration, alleging that the America's Marine Highway Program required programmatic and project-specific consultation with respect to listed species. The plaintiff alleged that the linked activities increased vessel traffic which affected populations and habitats of protected species for example through ship strikes but also by contributing to the climate crisis. In 2023, the court granted the motions [in part](#).

Another example is [San Antonio Bay Estuarine Waterkeeper v. Connor](#) (filed in 2022, US), in which several NGOs challenged the approval for a shipping channel deepening and expansion project. The plaintiffs alleged that the defendants had failed to consider the environmental risks fully, such as impacts on climate change, air pollution, biodiversity and the economic and environmental health of the bay and gulf region more broadly. Subsequently, the defendant announced it would prepare a supplemental environmental impact assessment.

### Greenwashing litigation

The shipping sector is also beginning to be targeted by so-called 'greenwashing' litigation (or 'climate-washing' litigation; Benjamin and others, [2022](#)), both directly and indirectly. For example, a greenwashing lawsuit (filed in 2023, US) challenged Etsy's [marketing claims](#) of "100% offsetting all carbon emissions from shipping" over integrity concerns concerning the voluntary carbon offset market. The case was dismissed on procedural grounds.

Legal actions can also occur outside the courtroom, for example complaints to regulatory bodies. An example of such legal interventions is the series of greenwashing complaints that Opportunity Green [launched](#) under consumer protection rules to challenge the cruise

industry's advertising of the use of LNG to consumers as being 'green' (Opportunity Green, [2023](#)).

### **Why is this important?**

*This type of legal action has exploded in recent years (Wilkes, [2023](#)) and seeks to address greenwashing practices which have been on the rise. A 2021 study conducted by the European Commission and national consumer authorities illustrates the extent of the issue: their screening of websites revealed that 42% of 'green' claims lacked evidence (European Commission, [2021](#)). Greenwashing promotes false solutions to the climate crisis, misleads consumers, investors and the public and distracts from and delays credible climate action (United Nations, [2023](#)). Corporate greenwashing not only risks the achievement of a sustainable, timely transition, but also opens companies up to potential future legal action – not only from civil society, but also from investors, insurers and customers.*

*In shipping, for example, LNG has been widely promoted as a climate-friendly fuel solution. However, when LNG is used as a shipping fuel, methane (an extremely powerful GHG) leaks and slips into the atmosphere across the entire lifecycle. Recent research found real-world methane emissions from some LNG-powered ships to be more than twice as high than estimates used by the European Union (Comer and others, [2024](#)). While LNG indeed has air pollution benefits, the scientific evidence strongly suggests that the benefits of lifecycle GHG emissions of using LNG as a marine fuel are limited if not negative compared to conventional fuels (Pavlenko and others, [2020](#)).*

### **Scrutinising finance flows**

Sustainable finance is crucial to decarbonising shipping, and we expect to see a growth in legal challenges in this area as sustainable finance legislation develops around the world. At the start of 2024, five NGOs – including Opportunity Green – launched a legal challenge against the European Commission under the Aarhus Regulation, requesting it to review its green investment rules on aviation and shipping in the EU Taxonomy. The applicants highlighted in respect of the shipping criteria that investments into large LNG-powered ships could be deemed taxonomy compliant, despite not being a pathway to achieving the Paris Agreement temperature goals as required by the relevant EU legislation (Opportunity Green, [2024](#)).

### **Why is this important?**

*Finance is key to achieving climate goals, and it is estimated that at least USD 1 trillion in investments is needed to decarbonise shipping (Krantz, Sogaard and Smith, [2020](#)). It is crucial that finance flows in the shipping sector are directed to projects and activities that are aligned with a 1.5° C pathway, and not going to inadequate solutions such as LNG (Englert and others, [2021](#)). In fact, researchers estimate that the global fleet of LNG-capable ships is at risk of stranded assets worth USD 850 billion (Fricaudet and others, [2022](#)). To incentivise investments into technologies that will support the decarbonisation of shipping (such as green hydrogen as a feedstock for e-fuels), strong policy signals are needed (SASHA Coalition, [2023](#)).*

### **Failure to adapt**

In the examined cases, claimants do not only challenge alleged insufficient climate mitigation but also failure to adapt – mostly with regard to critical port infrastructure. The [Conservation Law Foundation](#) has filed several lawsuits alleging failures to prepare bulk

storage and fuel terminals for the physical risks of climate change. Some of these cases are still pending, have been dismissed or settled.

### **Why is this important?**

*Ports are at the forefront of climate impacts; climate risks can involve physical impacts, for example due to flooding, but also economic impacts, due to interruption to port operations (MacAllister, [2023](#)). A study by the Environmental Defense Fund found that climate impacts could amount to additional costs of USD 25 billion every year by 2100 (Van Houtven, [2022](#)). While the awareness around these risks is increasing, decisive adaptation action lags behind, both in shipping (wtw, [2023](#)) and beyond (UNEP, [2023](#)).*

### **International court proceedings**

With ongoing advisory proceedings before three international courts and tribunals, climate change is taking to the international legal stage. The impacts of the climate crisis on the oceans is at the forefront of the [request for an advisory opinion](#) before the International Tribunal (ITLOS) for the Law of the Sea (Alarcon and Tigre, [2023](#); Keuschnigg and Higham, [2023](#)).

At Opportunity Green we believe that legal action and climate diplomacy efforts are complementary and can be mutually reinforcing (see also Merner, [2023](#)). In June 2023, Opportunity Green submitted a [written statement](#) to ITLOS, urging the Tribunal to clarify States' obligations to address climate impacts from shipping (Kaminski, [2023](#)), as the sector is currently underregulated and largely unaccountable for these. The brief was filed shortly before crucial talks at the International Maritime Organization (IMO), to whom the management of emissions from international shipping has largely been left and where Opportunity Green's international shipping policy team supports climate vulnerable countries. While the talks concluded with an agreement to ramp up the ambition of the IMO's GHG strategy, it remains unaligned with the Paris Agreement temperature goals (Comer and Carvalho, [2023](#)).

### **Why is this important?**

*The ongoing advisory proceedings pose a unique opportunity to clarify States' obligations under international law with respect to climate change, and furthermore, to address the climate impacts of international shipping (Kerr, [2023](#)). The shipping sector is currently on a 3 °C to 4 °C trajectory (Climate Action Tracker, [2023](#)). While the IMO is the primary forum through which emissions from international shipping have historically been addressed and managed, in the absence of effective IMO action in line with the Paris Agreement goals, Opportunity Green's view is that States should put appropriate unilateral decarbonisation measures in place for the sector, and that port and flag states have particular responsibility to act and enforce (Hicks, [2023](#)).*

*International legal proceedings relating to States' obligations on climate change have the potential not only to draw increased attention to those sectors which are not playing their part in the global decarbonisation agenda, but also to result in practical legal levers that could form the legal basis for future challenge where individual States fail to meet their international legal obligations. UNCLOS obligations fall on individual countries, not on a collective.*



### Box 3. Backlash cases

Our review of shipping related climate litigation also revealed a number of cases that seek outcomes that curb climate action (backlash cases). Most of these were filed by corporations against governments in the US. An example of such a backlash case is discussed below.

In [\*Montana v. Washington\*](#) (filed 2020), the States of Montana and Wyoming filed a motion for leave to file a bill of complaint in the US Supreme Court, based on the State of Washington's alleged discriminatory denial of port access to ship Montana and Wyoming coal to foreign markets which they asserted was in breach of commercial clauses. They argued that the State of Washington discriminatorily favoured their own products over their coal, was politically opposed to coal, and considered extra-territorial environmental impacts of coal combustion in foreign markets. The State of Washington denied that the denial of port access was based on discriminatory motives, arguing that valid environmental concerns had motivated the refusal. The US Supreme Court subsequently denied the motion for leave.

## Conclusion

The climate change cases discussed in this briefing evidence the increasing legal pressure on the shipping sector to decarbonise. While most of these cases concern permitting and reviewing processes, the litigation strategies are increasingly diversifying, with greenwashing claims challenged, financial flows scrutinised, and climate risks highlighted. The international legal arena also presents a potential avenue in which States' obligations to mitigate shipping's climate impacts may be clarified, which may in turn facilitate the bringing of further legal action, potentially between States.

While certain cases highlighted have been rejected by the relevant court, it is crucial to note that even unsuccessful climate cases can have important outcomes. At the most fundamental level, they are evidence of an increasing level of scrutiny on a particular sector. Even unsuccessful cases have the potential to stall a project and increase costs. Moreover, unsuccessful cases and the principles they have established are often built upon in subsequent cases, whether in the same jurisdiction or elsewhere, can often also spark public discussion about climate concerns and corporate accountability, and can contribute to wider climate movement-building.

The full shipping ecosystem – shipping and cruise companies, charterers, port authorities, insurers and investors – must therefore be alive to the increasing risks of climate litigation across the entire value chain. Companies should ensure that they properly consider – and crucially, take – concrete, meaningful action to reduce their organisation's climate impact and make robust investment decisions in true decarbonisation solutions. Not to do so exposes companies and authorities to ever-increasing legal, reputational and financial risks.

## **Opportunity Green**

Opportunity Green is an NGO working to unlock the opportunities from tackling climate change using law, economics and policy. We do this by amplifying diverse voices, forging ambitious collaborations, and using legal innovation to motivate decision makers and achieve climate justice, with particular emphasis on the aviation and shipping industries.

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