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Climate Litigation and Investor-State Arbitration: Implications of the European Court of Human Rights' Historic Ruling in KlimaSeniorinnen

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On April 9, 2024, the European Court of Human Rights ("Court" or "ECtHR") delivered its highly anticipated ruling in ***Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*** ("*KlimaSeniorinnen*"), holding that Switzerland had breached the **European Convention on Human Rights** ("Convention" or "ECHR") by taking inadequate action on climate change.

Two other climate-related cases that were decided the same day—**Duarte and Others v. Portugal and 32 Others** ("*Duarte*") and **Carême v. France** ("*Carême*")—were dismissed on jurisdiction and admissibility grounds.

In *KlimaSeniorinnen*, the Court held 16:1 (Judge Eicke dissenting) that Article 8 ECHR (right to private and family life) encompasses a right to effective protection from—and a corresponding duty (or "positive obligation") on States to mitigate—the serious adverse effects of climate change on human lives and health.

After summarising the key aspects of the decision, this post considers the implications for climate-related disputes—not only before the domestic courts, but also before investment arbitration tribunals, which, as the world races to achieve net-zero emissions, will increasingly be called upon to decide claims implicating host State actions taken in the context of climate change.

The Alleged Breaches

The applicants were the Swiss association KlimaSeniorinnen (Senior Women for Climate Protection) and four of its individual members, who complained of the adverse effects of climate change on their health and living conditions. In the absence of any right to a healthy environment in the Convention, they invoked Articles 2 (right to life) and 8 (right to private and family life). They also asserted the non-fulfilment of Articles 6 (right to access a court) and 13 (right to an effective remedy), concerning the Swiss courts' dismissal of a complaint alleging similar Article 2 and 8 violations against Switzerland.

The Court's Jurisdiction and Admissibility Findings

Unlike in *Duarte* where the Court rejected six Portuguese youths' attempt to have the Court extend jurisdiction to 32 Contracting States other than Portugal, no such difficulties arose in *KlimaSeniorinnen*. The Court readily concluded that Switzerland was answerable for the alleged infringements, on the basis that the applicants were residents of Switzerland and thus were under its territorial jurisdiction.

The Court's findings on admissibility are significant.

To have standing, ECtHR applicants must prove their personal "victim" status under Article 34 ECHR. Actions asserting a violation of the Convention *in abstracto* or in the general public interest (so-called *actiones populares*) are not allowed. In **other recent climate-related cases**, and again in *Carême*, the Court declared the applications inadmissible on the grounds that the applicants were insufficiently affected by the purported violations.

In *KlimaSeniorinnen*, the Court confirmed that the threshold under Article 34 ECHR for individual applicants alleging climate-related harm is "especially high." Applicants must be personally and directly affected by the impugned failures, and, specifically, be able to show both a "high intensity of exposure to the adverse effects of climate change" and a "pressing need" for individual protection. The Court did not consider that the four individual applicants satisfied these criteria, rendering their Article 2 and 8 complaints inadmissible.

By contrast, the Court considered it appropriate to adopt a more accommodating stance toward association applicants in climate cases, given, in particular, the large number of interested individuals. Accordingly, it held that associations should have standing provided they meet certain conditions relating, e.g., to their lawful establishment and purpose—without their individual members or other individuals on whose behalf they act having to demonstrate individual victim status. On this basis, KlimaSeniorinnen's Article 8 complaint was admissible.

As for KlimaSeniorinnen's Article 2 complaint, the Court considered it "more questionable" whether the alleged failures threatened the right to life, but found it unnecessary to decide. The Court was careful, however, to keep open the future possibility of such violations, noting that Article 2 raised considerations which were "to a very large extent […] similar to those under Article 8."

Lastly, regarding Article 6, the Court found the individual applicants' complaint inadmissible, and KlimaSeniorinnen's complaint admissible.

The Court's Findings on the Merits

For the first time, the Court in *KlimaSeniorinnen* recognised that States owe positive obligations under Article 8 ECHR to protect individuals within their jurisdiction from the serious adverse effects of climate change on their health, well-being, and quality of life.

In so finding, the Court drew a distinction between, on the one hand, States' obligation to set and meet climate targets, as to which the margin of appreciation (*i.e.*, room to manoeuvre) afforded to States is reduced, and, on the other hand, States' choice of means to meet those targets, as to which

the margin of appreciation remains wide. Notably, the Court considered that respect for Article 8 requires States to seek to achieve net neutrality within, in principle, the next three decades.

On the facts, the Court held that Switzerland had violated Article 8, finding, *inter alia*, "critical lacunae" in the domestic framework.

The Court also upheld the alleged violation of Article 6, stating that "[t]he domestic courts did not engage seriously or at all" with KlimaSeniorinnen's complaint, including by failing to consider the scientific evidence on climate change. Given this finding, the Court found it unnecessary to separately examine Article 13.

The Court concluded that Switzerland had a legal obligation to put an end to its violations, but, in view of the complexity of the issues, declined to prescribe any specific measures—leaving this to Switzerland to decide, subject to the Council of Minister's supervision.

Impacts on Climate Litigation

Six other cases filed by both individual and association applicants alleging similar climate-related Convention violations are still pending before the Court. In one, the applicant suffers a condition making him wheelchair-bound in temperatures of 30°C or above; whether these circumstances will be deemed sufficient to satisfy the restrictive admissibility criteria for individual applicants established in *KlimaSeniorinnen* is yet to be decided.

The Court's permissive findings in *KlimaSeniorinnen* as to the standing of association applicants and the possibility of climate-related violations of Articles 2 and 8 open the door to further cases against all 46 ECHR Contracting States, where the Convention is incorporated into national law. At the same time, the impacts of the decision may be felt even in non-Contracting States, where ECtHR judgments are generally considered influential interpretations of universal human rights principles. As such, the decision may embolden claimants elsewhere to bring similar human rights-based claims seeking action on climate change.

Climate litigation asserting human rights violations has already grown significantly in the past decade. According to a 2021 **study**, since the 2015 Dutch court decision (upheld on appeal) in **Urgenda v. Netherlands**—the first to accept climate inaction as a human rights violation, including by reference to Articles 2 and 8 ECHR, and to impose an emissions-reduction obligation on a government—over 90% of climate cases worldwide now incorporate human rights-based grounds.

While the majority of cases are filed against States, an increasing number target private actors. In 2021, in **Milieudefensie v. Shell** (under appeal), a Dutch court imposed a binding emissions-reduction obligation for the first time on a corporation, derived from tort law. After acknowledging that Articles 2 and 8 ECHR were not invocable directly against corporations, the court stated that, given "the fundamental interest of human rights and the value for society as a whole they embody," it would nonetheless factor in these rights when interpreting the applicable standard of care. Human rights-based climate litigation against corporations is set to continue apace, bolstered by the growing body of jurisprudence framing climate change as a human rights issue.

Implications for Investor-State Disputes

The effects of the developments discussed above are likely to be felt in investor-State disputes, most notably by intensifying pressure on States to take action to set and meet emissions-reduction targets. This potentially entails a hardening of States' positions toward industries perceived not to be contributing to the energy transition. The ensuing legal and regulatory changes may then spur claims by foreign investors under international investment agreements.

Climate-related investment claims bring into sharp focus any tension between private (investor) rights and sovereign interests. This is especially the case where the host State raises a defence asserting the State's emissions-reduction obligations, requiring the tribunal to balance the investor's right to protection under the relevant investment treaty, on the one hand, and the host State's right to regulate, on the other. Following decisions like *KlimaSeniorinnen*, such defences may increasingly be articulated through both an environmental and a human rights lens. It is too early to conjecture whether and in what circumstances such defences will succeed; whereas the margin of appreciation for States to set and meet climate targets is shrinking before domestic and human rights courts, it remains an open question whether investment tribunals will afford a wider (in that context) deference to host States concerning policy actions taken to address climate change.

In one recent case, ***Rockhopper v. Italy*** (annulment action pending), the tribunal upheld an expropriation claim based on a refusal to grant an offshore production licence following Italy's decision to ban hydrocarbon exploitation off its coastline. The legislative history examined by the tribunal suggests the ban was enacted "taking into account the need to revisit national energy policies in light of [the **Paris Agreement**]". However, Italy did not rely on this policy rationale in the arbitration, choosing instead to invoke its right to regulate to protect the local environment. It can only be speculated whether an added climate and human rights dimension to the police powers doctrine would have moved the needle in the circumstances of that case.

Whether, given the current landscape, more States will be compelled to take the approach seen in some model and new-generation investment agreements, incorporating provisions reaffirming the right to regulate on the climate and sustainable development—even imposing specific obligations on investors in these respects—remains to be seen. Equally, only time will tell whether and to what extent developments of the kind discussed in this article will impact tribunals' assessment of investors' legitimate expectations, or damages.

Conclusion

One thing is clear: arbitration practitioners must become human rights literate to help their clients effectively navigate transition and liability risk, and to handle any disputes that do arise. Arbitrators, for their part, must bring to their decision-making process a human rights-informed understanding of how climate policy impacts private investment. In the words of the Court in *KlimaSeniorinnen*, "there is force to the argument that […] the question is no longer whether, but how, human rights courts should address the impacts of environmental harms on the enjoyment of human rights." The same could soon be said of investment tribunals.

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