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CASE NOTES

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David versus Goliath? Indigenous people, carbon majors and climate litigation in South Africa

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Abstract

In two recent South African cases, Indigenous communities successfully challenged proposed fossil fuel exploration activities by the Shell petroleum company off South Africa's pristine West Coast. In contrast to earlier climate litigation cases in South Africa, the litigants relied specifically on their Indigenous rights and knowledge. In this case note, we highlight the ways in which the two courts engaged with the communities' cultural beliefs and practices as well as their knowledge related to sustainability and how this relates to protecting their livelihoods, cultural practices and identities that are threatened by the proposed activities. We highlight the important role played by Indigenous communities in the climate movement and argue that, in the future, Indigenous and related considerations could provide a strong basis for climate litigation in South Africa and potentially contribute to efforts to protect Indigenous communities against the activities of carbon majors.

1 | INTRODUCTION

Against the backdrop of rapidly rising climate litigation internationally, nongovernmental organisations (NGOs) and affected communities in South Africa have recently started to utilise climate litigation as a tool to oppose projects concerned with fossil fuel exploitation and non-renewable energy power generation. We refer to climate change litigation broadly to include cases in which climate change considerations have been invoked by the litigants and have been engaged with by the judiciary. This includes what Tigre, Urzola and Goodman term peripheral climate litigation cases, which are cases not directly invoking climate science or law, yet they could impact climate governance.[1]

The most well-known South African climate case to date is *Earthlife Africa v Minister of Environmental Affairs and Others*,[2] which was decided in 2017.[3] In this case, the applicants successfully sought judicial review of government's decision to authorise the construction of a 1200 MW coal-fired power station in the water-scarce and ecologically sensitive northern parts of the country. More recently, NGOs and individuals, including from Indigenous communities, approached the South African High Court to successfully prevent the Shell petroleum company from undertaking seismic surveys off South Africa's Wild Coast in its search for oil and gas resources. A first case, *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*,[4] was heard in 2021 (*Shell 1* case), and a second case, *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others*,[5] was heard in 2022 (*Shell 2* case).

[1]MA Tigre et al, 'Climate Litigation in Latin America: Is the Region Quietly Leading a Revolution?' (2023) 14 Journal of Human Rights and the Environment 67, 71–73.
[2][2017] 2 All SA 519 (GP) (*Earthlife Africa*).
[3]See LJ Kotzé and AA Du Plessis, 'Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent' (2020) 50 Lewis and Clarke Environmental Law Review 615.
[4]2022 (2) SA 585 (ECG).
[5]2022 (6) SA 589 (ECMk).

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This duology marks a departure from earlier cases in that the applicants, in addition to relying on environmental grounds, also relied on their Indigenous rights and eco-cultural knowledge to challenge proposed oil and gas exploration activities.[6] While Indigenous knowledge and rights have been considerations in a few climate cases elsewhere in the world,[7] these are the first cases before South African courts that explicitly raise Indigenous issues. The cases are also examples of increasing climate litigation against so-called carbon majors such as Shell,[8] in which litigants seek to establish ex post facto liability against fossil fuel companies and/or attempt to change the future behaviour of such companies,[9] for example, by demanding that they reduce their greenhouse gas emissions.[10] Such cases are on the rise in several jurisdictions.[11] In this article, we consider specifically the extent to which Indigenous and related considerations provide a basis for climate litigation in the South African context and, more generally, how couching climate litigation in Indigenous terms might bolster claims against carbon majors.

In the next section, we briefly consider some of the knowledge approaches and practices of African Indigenous people in relation to nature as well as their increased vulnerability due to ever-expanding hydrocarbon exploration and exploitation. We also consider in broad terms and, with reference to developments around the globe, how Indigenous rights and knowledge have been used in climate litigation specifically. Section 3 sets out the South African context and then discusses the *Shell* cases in detail, highlighting the judiciary's recognition of the applicant communities' Indigenous rights and knowledge. In Section 4, we reflect further on these cases and consider whether they might provide support for future litigants to rely on Indigenous rights and knowledge as a basis for climate litigation. The final section provides concluding remarks.

2 | CLIMATE LITIGATION AND THE PROTECTION OF INDIGENOUS PEOPLE

Indigenous communities have historically emphasised the importance of environmental stewardship, which is a form of enduring responsibility[12] that is critical in a world marked by increasingly unpredictable earth system changes and growing interlinked social-ecological impacts on a vulnerable living order.[13] Within the African context, nature is holistically viewed as an interconnected continuum consisting of humans and non-humans co-existing in a harmonious relationship, the essence of which is captured by the African notion of *Ubuntu*.[14]

The ethos of *Ubuntu* is focused on collective community interests and is illustrated by attempts to harmoniously co-exist with nature, which is seen to contribute to the preservation of traditional surroundings. In many African regions, including South Africa, this commitment endures through practices like revering forests and water bodies, which are believed to be homes to gods, spirits and ancestors.[15] Animals and plants are also deified, and taboos safeguard landscapes, which are considered to be sacred or to hold medicinal value.[16] Through these practices, Indigenous knowledge nurtures relational bonds that are essential to the well-being and survival of Indigenous peoples.[17]

Their survival and well-being are, however, increasingly threatened by the ever-expanding activities of carbon majors that are lured by the prospect of unexploited hydrocarbon resources in Africa. The last 5 years alone have seen (failed) attempts to litigate climate conflicts in Namibia,[18] the auctioning of land to carbon majors in the Democratic Republic of Congo,[19] and the planned construction of the East African Crude Oil Pipeline.[20] With projections indicating a surge in Africa's energy demands, and carbon-intensive corporations gearing up to invest more than €800 million in 'new' oil and gas

[6]See the use of the terms 'indigenous and local knowledge' and 'traditional ecological knowledge' in W Leal Filho et al, 'The Role of Indigenous Knowledge in Climate Change Adaptation in Africa' (2022) 136 Environmental Science and Policy 250, 251, and F Berkes, *Sacred Ecology: Traditional Ecological Knowledge and Resource Management* (Taylor & Francis 1999) 8, respectively.

[7]See *Arayara Association of Education and Culture and others v FUNAI, Copelmi Mineração Ltda. and FEPAM (Mina Guaíba Project and affected indigenous communities)*, 2019 N° 5069057-47.2019.4.04.7100/RS, *Kang* et al *v KSURE and KEXIM*, 2022 (pending) and *Tipakalipaa v National Offshore Petroleum Safety and Environmental Management Authority* (No 2) [2022] FCA 1121. These cases can be accessed at <https://climate-laws.org/> <https://climatecasechart.com/>.

[8]In 2014, Heede identified that 90 international entities, or 'carbon majors', were responsible for 63% of all global greenhouse gases emitted between 1751 and 2010: R Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010' (2014) 122 Climatic Change 229.

[9]J Setzer, 'The Impacts of High-Profile Climate Litigation Against Major Fossil Fuel Companies' in C Rodríguez-Gavarito (ed), *Litigating the Climate Emergency* (Cambridge University Press 2022) 206.

[10]See *Milieudefensie* et al *v Royal Dutch Shell Plc*, ECLI:NL:RBDHA:2021:5339.

[11]Setzer (n 9); M Sato et al, *Impacts of Climate Litigation on Firm Value* (Grantham Research Institute on Climate Change and the Environment, London School of Economics 2023) <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/05/working-paper-397-Sato-Gostlow-Higham-Setzer-Venmans.pdf>.

[12]K Whyte, 'Settler Colonialism, Ecology, and Environmental Injustice' (2018) 9 Environment and Society 125, 133.

[13]LJ Kotzé, 'The Anthropocene, Earth System Vulnerability and Socio-Ecological Injustice in an Age of Human Rights' (2019) 10 Journal of Human Rights and the Environment 62.

[14]DT Chibvongodze, 'Ubuntu is Not Only About the Human! An Analysis of the Role of African Philosophy and ethics in Environment Management' (2016) 53 Journal of Human Ecology 157, 157; C Terreblanche, 'Ubuntu and the Struggle for an African Eco-Socialist Alternative' in V Satgar (ed), *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives* (Wits University Press 2018) 168; L Le Grange, '*Ubuntu/Botho* as Ecophilosophy and Ecosophy' (2015) 49 Journal of Human Ecology 301, 304; J Church, 'Sustainable Development and the Culture of Ubuntu' (2012) 45 De Jure 511.

[15]PA Ikuenobe, 'Traditional African Environmental Ethics and Colonial Legacy' (2014) 2 International Journal of Philosophy and Theology 1, 5.

[16]GB Tangwa, 'Some African Reflections on Biomedical and Environmental Ethics' in K Wiredu et al (eds), *A Companion to African Philosophy* (Blackwell 2004) 389; Ikuenobe (n 15) 8.

[17]See also Leal Filho et al (n 6) 251; and Berkes (n 6) 8.

[18]*Ncumcara Community Forest Management Association v Environmental Commissioner* (HC-MD-CIV-MOT-GEN 289 of 2022) [2022] NAHCMD 380 (29 July 2022).

[19]See J Igamba, 'How DRC's Land Auction to Big Oil Threatens Africa's Biggest Carbon Sink' (Greenpeace, 31 May 2023).

[20]D Carrington, '"Monstrous" East African Oil Project Will Emit Vast Amounts of Carbon, Data Shows' (The Guardian, 27 October 2022).

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fields by 2030,[21] the lands of Indigenous communities are set to face immense and intensified threats from both carbon majors and the governments that often profit from and approve their destructive practices.

The rights of vulnerable Indigenous people, however, are recognised in international legal instruments such as the United Nations Declaration on the Rights of Indigenous Peoples,[22] and the International Covenant on Economic, Social and Cultural Rights.[23] They are also increasingly being recognised in global climate negotiations and their outcome documents. While the 1992 United Nations Framework Convention on Climate Change[24] and the 1997 Kyoto Protocol[25] do not contain any references to Indigenous peoples, the 2015 Paris Agreement[26] includes two references to Indigenous peoples, and the 2021 Glasgow Climate Pact[27] includes 15 references to Indigenous peoples and their rights.

Supported by such rights, and in response to the abovementioned threats, Indigenous communities are increasingly relying on litigation in order to seek climate justice, with cases being based on, inter alia, the rights to culture, self-determination, life and health.[28] Tigre argues that Indigenous groups can strategically use climate litigation to compel meaningful engagement, choose which issues to focus on and ensure that their voices are heard.[29]

Several climate cases involving Indigenous people, their rights and knowledge systems have already been heard in some countries and regional and international forums, and these have been discussed elsewhere.[30] It is worth noting briefly that the legal grounds of these cases usually differ in national as opposed to regional and international contexts. Thus, at the national level, Indigenous people have challenged specific projects, basing their claims primarily on, for example, common law or administrative law. In regional and international forums (including quasi-judicial and non-judicial human rights' bodies), applicants have, more broadly, alleged the violation of their right to culture in addition to other human rights such as the right to life, under international instruments.

For example, in *Arayara Association of Education and Culture and Others v FUNAI, Copelmi Mineração Ltda. and FEPAM*[31] and *Tipakalipaa v National Offshore Petroleum Safety and Environmental Management Authority*,[32] Indigenous communities claimed they had not been consulted regarding proposed fossil fuel-related projects. In both cases, the applicant communities were successful, and the courts recognised that since the proposed activities had the potential to impact their traditional way of life and the culture of these Indigenous communities, they had a right to participate in decisions relating to such activities. In *Daniel Billy and Others v Australia*,[33] the Torres Strait Islander petitioners alleged that, by failing to implement adequate mitigation and adaptation measures, Australia had violated some of their fundamental rights under the International Covenant on Civil and Political Rights (ICCPR).[34] In finding that Australia had violated article 27 of the ICCPR, the UN Human Rights Committee accepted that climate change impacts had interfered with the ability of the petitioners, which relied on territory and natural resources, to preserve their traditional way of life and carry out traditional activities such as fishing, hunting and cultural ceremonies. Australia's failure to implement adequate adaptation measures thus impaired the minority group's ability to maintain and transmit their culture and traditions and constituted a violation of their right to enjoy their culture.[35]

While some of the foregoing examples suggest that Indigenous litigants elsewhere are increasingly relying successfully on their Indigenous rights to support climate litigation,[36] there is no clear pattern yet emerging in favour of Indigenous peoples in any general sense. We now turn to consider the position in South Africa.

3 | INDIGENOUS PEOPLE AND CLIMATE LITIGATION IN SOUTH AFRICA

3.1 | Indigenous people and extractive activities

The South African economy was built mainly on the back of the extractive industry, and the country's economic diversification seems

[21] R Frost, 'Fossil Fuel Firms Set to Spend More than €800bn on New Oil and Gas Fields by 2030' (euronews.green, 12 April 2022) <https://www.euronews.com/green/2022/04/12/world-s-biggest-oil-and-gas-companies-projected-to-spend-more-than-800bn-on-new-fields-by>.

[22] UNGA 'United Nations Declaration on the Rights of Indigenous Peoples' UN Doc A/RES/61/295 (2 October 2007) (UNDRIP).

[23] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

[24] United Nations Framework Convention on Climate Change (adopted 29 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

[25] Kyoto Protocol to the UNFCCC (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148.

[26] UNFCCC, 'Decision 1/CP.21, Adoption of the Paris Agreement' UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016).

[27] UNFCCC 'Decision 1/CMA.3, Glasgow Climate Pact' UN Doc FCCC/PA/CMA/2021/10/Add.1 (8 March 2022).

[28] MA Tigre, 'Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation' (2022) 9 e-Publica 210, 240–241. See also S Bookman, 'Indigenous Climate Litigation in Anglophone Settler-Colonial States' (Völkerrechtsblog, 25 March 2022).

[29] Tigre (n 28) 240–241.

[30] See, e.g., K Boom, 'The Rising Tide of International Climate Litigation: An Illustrative Hypothetical of Tuvalu v Australia' in RS Abate and EA Kronk Warner (eds), *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar 2013) 409 and HM Osofsky, 'Complexities of Addressing the Impacts of Climate Change on Indigenous Peoples Through International Law Petitions: A Case Study of the Inuit Petition to the Inter-American Commission on Human Rights' in RS Abate and EA Kronk Warner (eds), *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Edward Elgar 2013) 313; S Jodoin et al, 'Realizing the Right to be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming' (2020) 54 Law & Society Review 168; Bookman (n 28); M Feria-Tinta, 'Torres Strait Islanders: United Nations Human Rights Committee Delivers Ground-Breaking Decision on Climate Change Impacts on Human Rights' (EJIL:Talk!, 27 September 2022); Tigre (n 28); 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 267.

[31] See n 7.

[32] ibid.

[33] 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). See G Lenter and W Cenin, '*Daniel Billy* et al *v Australia* (Torres Strait Islanders Petition): Climate Change Inaction as a Human Rights Violation' (2024) 33 Review of European, Comparative and International Environmental Law.

[34] Namely the right to life (Article 6); the right to be protected from unlawful interference with privacy, home and family (Article 17); and the right of ethnic, religious or linguistic minorities to enjoy their culture (Article 27).

[35] ibid paras 8.13–8.14.

[36] See Tigre (n 28) 221. Africa lags behind other continents in terms of the number of climate change cases instituted: see 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, 10.

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to have changed little since apartheid (extractives are still the highest exported commodity).[37] The government remains determined to promote mineral and hydrocarbon exploitation, while the political and economic elite in the country, plagued by systemic corruption as this ruling class is, relentlessly pursues development at all costs.[38] This has been exacerbated by the present energy crisis, euphemistically described as 'load shedding', which is promoting the search for cheap, easily obtainable, non-renewable energy resources, such as coal and gas, regardless of where they are located.

The Wild Coast area is rich in natural resources[39] and inhabited by many Indigenous communities who rely on this land for their livelihoods. South Africa's Wild Coast is an environmentally important area[40] and an example of Guyot's eco-frontiers, which are 'places of pristine biodiversity and scarce but valuable natural resources (e.g., water, minerals, forest and local knowledge). [They are] [u]nstable, highly coveted, and instrumentalised.'[41]

In the last few years, the Wild Coast eco-frontier has been at the centre of many contestations around natural resources and extractive activities,[42] and the recent (growing) protests by traditional communities who oppose extractive activities must be placed within a specific context. The deleterious nature of mineral extraction in South Africa is well known, and there is evidence of ghost towns that exist where extractive activities used to occur.[43] There is also heavy-handedness in the manner in which some communities are forced to consent to extractive processes that occur where they live.[44] This often plays out through contestations around leadership and community mobilisation as shown in the 2014 documentary *The Shore Break*,[45] which specifically focused on the Wild Coast and revealed how issues of community engagement and consent to socio-ecologically destructive activities can often be volatile.[46]

With South African offshore oil and natural gas resources now estimated at being approximately 9 billion barrels and 11 billion barrels oil equivalent respectively,[47] and with corporations like Shell having made £32 billion in profits globally in 2022 alone,[48] it is understandable why the Wild Coast's Indigenous communities' lands and seas have become the centre of interest for carbon majors. South Africa is an important emerging energy market, which means it is increasingly susceptible to seismic surveys, with hydrocarbon producers including Shell standing to lose out should seismic surveys (and, ultimately, hydrocarbon exploitation) not be allowed to commence or continue.[49] In many ways, the communities living in and around the Wild Coast emblematically represent the 'last stronghold' against carbon majors, as it were, in their efforts to protect some of South Africa's fragile, but still more or less intact, wild places. In the following section, we explore how they used climate litigation to protect their interests.

3.2 | The legal context

The dominant strategy of litigants in South African climate cases thus far has been to challenge the environmental authorisations that have been granted in respect of proposed coal and gas power projects,[50] and claims have been based primarily on environmental grounds, including the need to undertake a climate change impact assessment.[51] However, as noted above, the *Shell* cases represent the first time where South African litigants have relied on, and courts have recognised, Indigenous rights and knowledge in the context of climate litigation.

South African law recognises the rights of Indigenous communities and accepts that Indigenous people are entitled to reside on their lands, often with their own collective social and legal structures. The Constitution of the Republic of South Africa, 1996, provides for the right to participate in the cultural life of one's choice and for those belonging to a cultural community to enjoy their culture.[52] The rights of Indigenous communities to lands and customs generally have been recognised by both the Constitutional Court, in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*,[53] and the Supreme Court of Appeal, in *Gongqose and Others v Minister of Agriculture, Forestry & Fisheries and Others; Gongqose and Others v State and Others*.[54] There have also been attempts to regularise traditional justice through the Traditional Courts Bill, which now only

[37]OEC, 'South Africa' <https://oec.world/en/profile/country/zaf>; World's Top Exports, 'South Africa's Top 10 Exports' <https://www.worldstopexports.com/south-africas-top-10-exports/?utm_content=cmp-true>.

[38]See J Akert 'Not a Man of the People: Gwede Mantashe's Endorsement of Shell's Seismic Survey was Straight Out of the Apartheid-Era Playbook' (Daily Maverick, 11 January 2022) <https://www.dailymaverick.co.za/opinionista/2022-01-11-not-a-man-of-the-people-gwede-mantashes-endorsement-of-shells-seismic-survey-was-straight-out-of-the-apartheid-era-playbook/>.

[39]JA Singh et al, 'Marine Seismic Surveys for Hydrocarbon Exploration: What's at Stake?' (2022) 118 South African Journal of Science 13420, 1.

[40]F Pearce, 'A Death in Pondoland: How a Proposed Strip Mine Brought Conflict to South Africa's Wild Coast' (YaleEnvironment360, 13 March 2017) <https://e360.yale.edu/features/titanium-mine-conflict-south-africa-pondoland-rhadebe-caruso>.

[41]S Guyot, 'The Eco-Frontier Paradigm: Rethinking the Links Between Space, Nature and Politics' (2011) 16 Geopolitics 675, 679.

[42]See T Pierce, 'South Africa's Wild Coast under Threat of Mining – Photo Essay' (The Guardian, 19 August 2018); B Goldblatt and S Hassim, '"Grass in the Cracks": Gender, Social Reproduction and Climate Justice in the Xolobeni Struggle' in C Albertyn et al (eds), *Feminist Frontiers in Climate Justice* (Edward Elgar 2023) 246.

[43]See S Sara, 'South Africa's Blyvoor: From One of the World's Richest Gold Mines to Ghost Town' (ABC News, 5 August 2017).

[44]Extractive activities in South Africa have in the past often led to slow violence which manifests in various ways, including through the proliferation of diseases and increases in human conflicts and trafficking: C Soyapi and LJ Kotzé, 'Environmental Justice and Slow Violence: Marikana and the Post-Apartheid South African Mining Industry in Context' (2016) Verfassung und Recht in Übersee/Law and Politics in Africa| Asia| Latin America 393, 409.

[45]<https://africanfilmny.org/films/the-shore-break/>.

[46]See K Schneider, 'A Murder on South Africa Wild Coast Escalates Conflict Over Water, Land, Mining' (2016) <https://www.circleofblue.org/2016/south-africa/murder-south-africa-wild-coast-escalates-conflict-water-land-mining/>.

[47]Department of Planning, Monitoring and Evaluation: Operation Phakisa, 'Offshore Oil and Gas Exploration' (undated) <https://www.operationphakisa.gov.za/operations/oel/oilgas/pages/default.aspx>.

[48]A Thurston, 'Shell's Record £32 Billion Earnings Spark Fury' (The Energyst, 2 February 2023) <https://theenergyst.com/shells-record-32-billion-earnings-spark-fury/>.

[49]Singh et al (n 39) 2.

[50]These cases include *Trustees for the Time Being of the GroundWork Trust v Minister of Environmental Affairs and Others* (case number: 54087/17) and *South Durban Community Environmental Alliance v Minister of Environment, Forestry and Fisheries and Others* [2022] ZAGPPHC 741 (6 October 2022). Information on these cases is available at <https://climate-laws.org/> and <https://climatecasechart.com/>.

[51]See, e.g., *Earthlife Africa* (n 2).

[52]Sections 30 and 31 of the Constitution of the Republic of South Africa, 1996 (Constitution).

[53]2019 (2) SA 1 (CC).

[54]2018 (5) SA 104 (SCA).

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awaits the President's signature before it becomes law.[55] Furthermore, the Traditional and Khoi-San Leadership Act 3 of 2019 seeks to deal with leadership issues related to traditional communities and their lands (although it was recently declared unconstitutional and thus requires amendment by the legislature).[56]

While climate change was not the sole focus in the *Shell 1* and *Shell 2* cases,[57] the applicants did refer to climate-related concerns, including regarding climate change impacts that they experience; the concern that the proposed seismic surveys would proceed without a climate change impact assessment; and the incompatibility of the proposed project with the global imperative to reduce greenhouse gas emissions.[58] Moreover, the nature of the proposed activities to be carried out by Shell, including the extraction and production activities that would inevitably follow should seismic surveys reveal commercially viable underwater hydrocarbon reserves, also reveals the climate change dimensions of these cases. The remainder of this section briefly sets out the facts of these cases and the arguments presented, before considering in detail the courts' engagement with the applicants' submissions regarding their Indigenous rights and knowledge.

3.3 | The facts of the cases

Shell was the part-holder of an exploration right, which had been granted in terms of South Africa's Mineral and Petroleum Resources Development Act 28 of 2002. In October 2021, Shell announced its intention to undertake a 3D seismic survey along the country's South-Eastern Coast. Seismic surveys, which consist of the production of high-intensity and low-frequency impulsive sounds at regular intervals,[59] present a threat to the environment and to human livelihoods and cultures (expanded on below). Seismic surveys are used by exploration companies to produce an image of the seabed in order to determine where hydrocarbon resources are located.[60] In the short term, these surveys have the potential to adversely impact diverse marine species, including humpback dolphins, fin and humpback whales, African penguins, turtle hatchlings, zooplankton and several fish species.[61] While less researched, such impacts also have implications for humans, including as a result of reduced fish catch rates.[62] Expert evidence submitted in the *Shell 1* case revealed that seismic surveys conducted by Shell between 2012 and 2017 adversely impacted the tuna albacore industry and resulted in job losses by seasonal fishermen.[63] Should viable hydrocarbon resources be found, seismic surveys are effectively a precursor to the extraction and consumption of hydrocarbon resources, which give rise to the possibility of devastating oil spills, and will most likely contribute to catastrophic climate change[64] and, eventually, further transgression of the climate planetary boundary.[65]

Faced by these threats, in December 2021, activists and affected Indigenous communities—including Sustaining the Wild Coast NPC, the Dwesa-Cwebe Communal Property Association, a traditional healer and local fishers—approached the Eastern Cape High Court for an urgent interim interdict to prevent Shell from proceeding with the seismic survey (Part A: *Shell 1*), pending the outcome of the separate application (heard in September 2022) to have the exploration right set aside (Part B: *Shell 2*).

3.4 | The arguments

To obtain an interim interdict in the *Shell 1* case, several elements had to be established, namely: the existence of a prima facie right, a reasonable apprehension of irreparable harm should the interim interdict not be granted, that the balance of convenience favoured the granting of the interim interdict and that there was no alternative remedy.[66]

The founding affidavit in the application was deposed to by the director of the first applicant (Sustaining the Wildcoast NPC) and member of the Amadiba traditional community in the Eastern Cape, who submitted in the affidavit that

> Unlike other coastal stretches in South Africa, indigenous people have maintained continuous possession of [the Wild Coast] despite waves of colonial and Apartheid aggression. This is no accident. Our ancestors' blood was spilt protecting our land and our sea. We now feel a sense of duty to protect our land and sea for future generations, as well as for the benefit of the planet.[67]

While the legal arguments were dealt with—relatively briefly—in the latter part of the affidavit, the first part of the affidavit was used to provide context, and it descriptively and expansively set out the

[55]Parliamentary Monitoring Group, 'Traditional Courts Bill [B1-2017]' (2022) <https://pmg.org.za/bill/680/>.

[56]The law was declared unconstitutional because the State failed to ensure there was adequate public participation during the process of promulgating the law. For a critique of the Traditional Courts Bill and the Traditional and Khoi-San Leadership Act, including from a feminist perspective, see Goldblatt and Hassim (n 42).

[57]This is arguably consistent with the tendency, noted by Peel and Lin, for climate litigation in the Global South to place climate change at the periphery rather than at the 'core' of the litigation: J Peel and J Lin, 'Transnational Climate Litigation: The Contribution of the Global South' (2019) 113 American Journal of International Law 679, 692.

[58]See the founding affidavit of Reinford Sinegugu Zukulu, *Shell 1* case <https://cer.org.za/wp-content/uploads/2021/12/FA-Signed.pdf> paras 52–53.

[59]Singh et al (n 39) 1.

[60]ibid; *Shell 1* case (n 4) para 6.

[61]Such adverse impacts emerged from expert evidence submitted in the *Shell 1* case (n 4) and are also detailed in sources cited in Singh et al (n 39).

[62]M Maruf and YC Chang, 'Further Development of the Law of the Sea Convention in the Anthropocene Era: The Case of Anthropogenic Underwater Noise' (2023) 15 Sustainability 9461.

[63]*Shell 1* case (n 4) para 63.

[64]Singh et al (n 39) 1.

[65]On planetary boundaries, see J Rockström et al, 'A Safe Operating Space for Humanity' (2009) 461 Nature 472; J Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14 Ecology and Society 32; W Steffen et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347 Science 1259855; and K Richardson et al, 'Earth Beyond Six of Nine Planetary Boundaries' (2023) 9 Science Advances.

[66]The requirements for the grant of an interim interdict were set out in *Setlogelo v Setlogelo* 1914 AD 221 and refined in *Webster v Mitchell* 1948 (1) SA 1186 (W): *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC), para 41.

[67]Founding affidavit (n 58) para 5.

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connection of the Amadiba community to the land and the sea, and the centrality of the land and sea to their identities, livelihoods and culture.[68] Concern was specifically expressed about the climate impacts of the fossil fuel exploitation that would inevitably result should the seismic surveys reveal viable hydrocarbon resources, and the affidavit described some of the climate impacts already being experienced.[69] The accounts of the other applicants were set out, also emphasising the importance of the sea to their sustenance, livelihoods and cultures,[70] as well as the environmental significance of the area.[71]

The applicants referred to the increasing recognition in domestic and international law of the rights of Indigenous people to self-determination and argued that Shell ignored these rights and instead 'act[ed] like the colonial and Apartheid powers that came before them by only approaching Kings and assuming that they can speak for all their subjects'.[72]

The applicants briefly addressed the specific requirements of an interim interdict, submitting that the community's right to culture (Section 30 of the Constitution) and right to a healthy environment (Section 24 of the Constitution) would be impacted by the proposed seismic survey. It was also submitted that irreparable harm would be caused if the interim interdict were not granted, including because the proposed seismic survey would disturb the community's ancestors and because environmental and other impacts caused by the survey would be irreversible.[73]

In September 2022, in the *Shell 2* case, the same parties (with the addition of two further applicants, namely, the non-profit companies Natural Justice and Greenpeace), returned to the Eastern Cape High Court to attempt to have the exploration right set aside. The parties challenged the legality of the exploration right on three grounds, namely, that the consultation process was procedurally unfair; the decision-maker failed to take account of relevant considerations, including the applicant communities' cultural and spiritual beliefs; and there was a failure to comply with 'applicable legal prescripts'.[74]

3.5 | The *Shell 1* judgement

Although the application in *Shell 1* was concerned with a relatively technical issue—namely, whether the requirements of an interim interdict were satisfied—the Eastern Cape High Court took the opportunity to engage deeply with issues directly relevant to the applicants as Indigenous people who are being threatened by carbon majors. In considering whether the applicants had established the existence of a prima facie right, the Court focused on the consultation process and emphasised that providing notifications of the proposed project in English and Afrikaans language publications (rather than in isiZulu or isiXhosa publications—the languages of the relevant Indigenous communities), and not holding the meetings where the communities concerned reside, served to exclude these communities from the consultation process.[75] The Court noted that the communities held customary fishing rights[76] and also had regard to the communities' customary rules regarding consultation and decision making. It was observed that none of the Kings consulted were empowered to speak on behalf of all of the community members and that meaningful consultation required providing community members with the opportunity to make representations on the seismic survey.[77] With regard to the communities' cultural beliefs and practices, in the context of the constitutional right to culture, the Court emphasised the importance of accepting the customary practices and beliefs of the applicant communities, even though they might be 'foreign to some and therefore difficult to comprehend'.[78] Furthermore, the Court had a duty to protect the holders of such practices and beliefs and the environment from the possible infringement of their rights.[79] The Court found that the applicants had established constitutional rights 'worthy of protection', and thus, the applicant communities had established the existence of a prima facie right.[80]

In considering whether the applicants had established the second requirement for the grant of an interim interdict—namely, a reasonable apprehension of irreparable harm should the interim interdict not be granted—the Court focused primarily on the environmental impacts. Nevertheless, the Court also referred to expert evidence confirming the sacred status of the sea in these communities and stated that, since Shell had chosen not to deal with the communities' statements regarding the threat of harm to their cultural beliefs and practices, these statements were undisputed and there was no reason not to accept their evidence in this regard.[81] The Court thus held that the applicants had established a reasonable apprehension of irreparable harm due to the negative impacts of seismic surveys on the fishers' livelihoods, cultural and spiritual harm, as well as irreparable harm to marine life.[82]

In dealing with whether the balance of convenience favoured the grant of an interim interdict, the Court considered the financial loss that would be suffered by Shell if the interim interdict were to be granted against the harm that would be suffered by the applicant communities if the interim interdict were not granted, and it was stated that the anticipated financial loss to Shell (and Impact Africa) could not justify the infringement of the applicants' constitutional rights, which would threaten, inter alia, the cultural practices and spiritual beliefs of the applicant communities.[83]

[68] ibid paras 38–39, 48–49. Although not emphasised in the founding affidavit, the communities were also holders of customary fishing rights.
[69] ibid paras 52–53.
[70] ibid paras 57–73.
[71] ibid para 77.
[72] ibid para 54.
[73] ibid paras 146–158. The affidavit deals with the other requirements, namely the balance of convenience and the lack of alternative remedy in paragraphs 159–172.
[74] *Shell 2* case (n 5) para 84.
[75] *Shell 1* case (n 4) paras 20–30.
[76] ibid para 31. The Court also referred to *Gongqose and Others v Minister of Agriculture, Forestry & Fisheries and Others; Gongqose and Others v State and Others* (n 54), in which the Supreme Court of Appeal recognised the applicants' customary fishing rights.
[77] *Shell 1* case (n 4) para 26.
[78] ibid para 32.
[79] ibid.
[80] ibid para 34.
[81] ibid paras 38–39.
[82] ibid para 65.
[83] ibid para 68.

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The Court accepted the applicants' statements that were fashioned around sustainability and Indigenous knowledge as well as its transmission, including that the Amadiba traditional community 'practise[s] the customary practices which they have been taught, namely when they fish, they think of tomorrow'.[84] The Court found that the requirements for the grant of an interim interdict had been established, and Shell was thus interdicted from carrying out a seismic survey off South Africa's coastline.

At a deeper level, this case is highly significant as it signals the judiciary's increased willingness to engage with the cultural beliefs and practices of the Indigenous communities as well as their knowledge related to sustainability. The Court also tried to relate to these beliefs and practices, as noted above, stating that they should be accepted even if they might be 'difficult to comprehend'.[85] Also of significance was the Court's finding that Shell's estimated total loss of more than ZAR 1 billion (approximately €49 million), if the seismic survey were terminated and the exploration right subsequently lapsed, could not justify the threatened harm to the livelihoods, well-being, and cultural practices and spiritual beliefs of the applicant communities.[86] Considering that corporate power and profit often trump nature and people, this elevation of the rights of vulnerable Indigenous people and the environment is highly significant and bodes well for any future efforts to protect Indigenous communities from corporate destruction and exploitation.

3.6 | The *Shell 2* judgement

While the grant of the interim interdict temporarily prevented Shell from undertaking a seismic survey, this did not provide permanent protection of the Wild Coast, which required that the exploration right be set aside in its entirety. Thus, as noted above, the applicants returned to the Eastern Cape High Court in 2022. In the *Shell 2* case, the Court was required to determine whether the exploration right part-held by Shell was lawful. In short, the full bench of the High Court found that the consultation process followed had been procedurally unfair and that the exploration right was reviewable and could be set aside on this ground alone.[87]

In considering the fairness of the consultation process, the Court criticised the publication of the advertisements in English and Afrikaans language newspapers, 'which members of the affected communities barely understood as they are Xhosa speaking'.[88] It was stated that 'little regard (or no regard at all) was paid to the significance of language as a tool of communication',[89] and the Court went so far as to suggest that the notice could have been published in *I'solezwe lesiXhosa*—a Xhosa language newspaper—or broadcast on *Umhlobo Wenene*—a Xhosa language radio station.[90] Like in *Shell 1*, the Court in *Shell 2* had regard to the communities' rules regarding consultation and decision making and took note of the failure of the relevant consultants to deal directly with the affected communities despite being urged to do so by the traditional leaders.[91] The Court also took issue with the fact that information had been provided online as part of the consultation process, while 'a great number of the population, especially in rural communities, still lacks access to [computer or mobile] devices …. The applicant communities are part of those who are still disadvantaged [after the fall of apartheid]'.[92]

Since one ground of review had already been established, the Court was not required to consider the further claims but nevertheless did so (briefly) due to the importance of the matter.[93] While mere speculation on our part, we would suggest this might show the weight the Court attributed to the plight of the Indigenous communities and the importance of justifying and fashioning appropriate protective measures. In regard to the claim that relevant considerations, including the communities' spiritual and cultural rights and their livelihoods, had not been considered, the Court did point out that it would be for the relevant administrative functionary to decide the weight to be accorded to the various considerations.[94] However, the Court emphasised the constitutional protection of cultural rights and referred to the Court's remarks in *Shell 1* regarding the duty of the court to accept that the relevant beliefs and practices existed even though they may not be easy for all to comprehend. The Court also recalled the applicant communities' submissions regarding their customary practices and the importance of the sea to their way of life, including that 'the ocean is the sacred site where their ancestors live and so [they] have a duty to ensure that their ancestors are not unnecessarily disturbed and that they are content'.[95] The Court found that none of the measures proposed by the respondents to mitigate the impacts of the proposed seismic survey 'addresse[d] the potential harm to the applicants and their religious or ancestral beliefs and practices'.[96]

The practical outcome was that the exploration right was set aside, and Shell was thus prevented from undertaking a seismic survey. Like *Shell 1*, this judgement holds deeper significance, and it was celebrated as a victory for people and planet by the applicant communities and community activists, among others.[97]

The Court in *Shell 2* did not deal as fully with the cultural rights of the communities as in *Shell 1* (in view of the Court's finding that the consultation process was unfair, which obviated the need to deal with the applicants' further challenges). Nevertheless, it is arguable that the Court showed a clear willingness to take account of the vulnerability of the applicant communities and, like in *Shell 1*, the Court engaged with the communities' cultural practices and beliefs, thereby upholding their constitutional rights related to culture and language.

[84] ibid para 17. See also paras 13 and 15–16.
[85] ibid para 32. See also para 14.
[86] ibid para 68.
[87] *Shell 2* case (n 5) para 103.
[88] ibid para 91.
[89] ibid para 100.
[90] ibid para 99.
[91] ibid para 92.
[92] ibid para 101.
[93] ibid para 105.
[94] ibid para 114.
[95] ibid para 115.
[96] ibid para 119.
[97] See, e.g., C Vlavianos, 'Communities Celebrate as Court Sets Aside Shell's Exploration Right Off the Wild Coast of South Africa' (Greenpeace, 1 September 2022).

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4 | DISCUSSION

The judgements in the *Shell* cases suggest a general openness of South African courts to the concerns of Indigenous people as well as an acceptance of Indigenous knowledge, where their livelihoods and cultural practices and identities are threatened by climate impacts and climate change-related activities. It is noteworthy that in *Shell 1*, the Court had regard to the concerns of the Amadiba traditional community that they were already observing climate impacts, including more droughts and extreme weather events and livestock falling sick more often, as well as their concern regarding rising sea levels.[98] Furthermore, in *Shell 2*, in response to the respondents' arguments that climate change considerations are irrelevant at the exploration right stage, the Court noted that these are two stages 'in a single process that culminates in the production and combustion of oil and gas, and the emission of greenhouse gases that will exacerbate the climate crisis and impact communities' livelihoods and access to food'.[99] This suggests a willingness by the judges to be pre-emptive as to the potential for harm, as the environment and the interests emanating from the environment are rarely restored to the same state as before the harm was caused. This approach potentially indicates a crucial ideological turn in the judicial acceptance of the increased vulnerability of Indigenous communities due to climate change and the need to act with precaution. It is also an important recognition on the part of the judiciary that efforts to tackle climate change must already commence at an early stage in any development process, even if the initial processes do not at first glance directly relate to climate change.

It has generally been observed that where Indigenous communities bring litigation under general legal frameworks, such as tort law or administrative law, they are likely to support their claims with 'specific obligations owed to Indigenous peoples' in order to overcome procedural hurdles such as standing and causation.[100]

While establishing *locus standi* before South African courts in environmental matters is unlikely to be problematic[101] (and as far as we know no claims have yet been brought under tort law where causation is required to be proved), in the *Shell* cases, the applicant communities bolstered their claims—grounded in administrative law—by relying on their constitutional rights relating to culture and the environment. It is notable that the communities chose to frame their claim around the right to culture and their cultural practices (as well as their right to a healthy environment), rather than also invoking the constitutional right of access to sufficient food.[102] At the procedural level, Indigenous communities thus present themselves as active participants with agency, dignity and interests that require open, just and serious consideration in the balancing act, which administrators are required to undertake. Put differently, Indigenous communities seem to increasingly realise they are protected by the law, and the Constitution specifically, and it is likely that they will make future use of these provisions to directly oppose any actions by carbon majors that might threaten their livelihoods, culture and well-being.

This litigation arguably also allowed the relevant Indigenous communities to tell their stories in their own voices, thus avoiding the risk of 'relying on other people's voices, risking retelling, and reconstituting their speech', as Tigre says.[103] This is evidenced in the applicants' submission that '[a]s communities were not engaged in the process, it is necessary to set out the accounts of the various community applicants in the matter here. I start with my own community'.[104] This contributes to 'centering the voices of Indigenous people in climate change'.[105]

The founding affidavit referred to the increasing recognition in domestic and international law of the rights of Indigenous peoples to self-determination, arguing that Shell ignored these rights.[106] While this was not specifically raised in the applicants' heads of argument (and thus was not argued before the Court), it has been highlighted that Indigenous people's right to self-determination can be affected by climate change impacts on land, sources of food, and cultural and traditional sites.[107] Thus, relying on the right to self-determination could possibly strengthen the claims of Indigenous people in climate litigation. The applicant communities also did not rely on other international instruments and confined their argument to reliance on their cultural rights under the South African Constitution. In these cases, such reliance was clearly sufficient. In the future, such arguments could possibly be bolstered by reliance on international legal instruments, such as the UNDRIP and ICESCR.[108] After all, South African law is decidedly 'international law friendly',[109] and courts are even obliged to consider international law when interpreting the Constitution.[110]

In considering the relevance of these cases beyond the South African context, Murcott and colleagues highlight the significance of South Africa's broad standing provisions, including in the environmental context, which could possibly inspire a broader approach to standing, for example, in the European Court of Human Rights.[111] Furthermore, the right to culture is recognised in many countries, including through countries' ratification of international instruments incorporating such rights, such as UNDRIP,[112] and in national legislation, such as the (Australian) Human Rights Act 2019

[98] *Shell 1* case (n 4) para 15.
[99] *Shell 2* case (n 5) para 123.
[100] Bookman (n 28).
[101] This is due to broad standing provisions in regard to constitutional and environmental matters: see section 38 of the Constitution (n 52) and National Environmental Management Act 107 of 1998, section 32. See also M Murcott et al, 'Climate Change Litigation: What the ECtHR Could Learn from Courts in the Global South' (Völkerrechtsblog, 23 March 2022).
[102] This right is provided for in section 27(1)(b) of the Constitution (n 52).
[103] Tigre (n 28) 214.
[104] Founding affidavit (n 58) para 34.
[105] Tigre (n 28) 214.
[106] Founding affidavit (n 58) para 54.
[107] See, e.g., N Jones, 'Prospects for Invoking the Law of Self-Determination in International Climate Litigation' (2023) 32 Review of European, Comparative and International Environmental Law 250, 253.
[108] Indeed, South Africa's Constitution provides that when interpreting legislation, the Court must prefer a reasonable interpretation of the legislation that is consistent with international law: section 233 of the Constitution (n 52).
[109] ibid sections 231–233 of the Constitution (n 52). See, e.g., LJ Kotzé and AA Du Plessis, 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' (2010) 3 Journal of Court Innovation 157.
[110] Section 39(1)(b) of the Constitution (n 52).
[111] Murcott et al (n 101).
[112] Murcott et al (n 101).
ted in favour of UNDRIP: see <https://digitallibrary.un.org/record/609197?ln=en>.

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(Section 28), and other legal documents, including agreements between governments and Indigenous people, such as the Tsawwassen First Nation Final Agreement.[113] The *Shell* cases could provide an example of how, at least, the right to culture could be used to support climate litigation elsewhere.

Overall, these cases suggest that where Indigenous applicants can provide evidence to establish that climate change impacts might threaten their rights, this could strengthen their claims, including against carbon majors. This is supported by experience elsewhere: in the *Tipakalipaa* case, the Federal Court of Australia found that 'there was a real potential for Santos' [the largest Australian oil and gas corporation] proposed drilling activity to have a potentially significant adverse effect on the marine resources closer to the Tiwi Islands, which were a fundamental part of the traditional culture and customs of the Tiwi Islanders'.[114] Although Bookman cautions against the 'fetishization of courts (and law generally) as the solution to climate change',[115] the *Shell* cases demonstrate the potential for climate litigation, based on the rights of Indigenous people, to contribute to climate action.

5 | CONCLUSION

Driven by a 'collective sense of responsibility to conservation',[116] Indigenous people are clearly playing an increasingly important role in the larger global climate movement, including through physically challenging fossil fuel-related projects and through legal action in their home countries. This is a positive development with already tangible results: it has, for example, been estimated that Indigenous resistance has been responsible for avoiding or delaying emissions equivalent to 24% of annual emissions in the United States and Canada.[117]

The *Shell* cases were significant as they represented the first time in the South African context that Indigenous communities specifically invoked their rights to challenge fossil fuel exploration activities. While, as noted above, climate change was not central to these cases, by emphasising the 'costs and consequences [of climate change] for particular communities and bringing to the forefront the voices of marginalized communities',[118] the Indigenous applicant communities in the *Shell* cases arguably, similarly to Inuit community petitioners in other cases, also invoked a 'climate rights' frame.[119] The willingness of the South African judiciary to engage so deeply with the concerns of the relevant Indigenous communities, and to elevate the rights of vulnerable people and the environment over corporate interests, suggests that, going forward, carbon majors might no longer have unchecked licence to plunder natural resources, especially where this threatens the cultural beliefs, practices and identities as well as the survival of Indigenous communities.

Thus, where Indigenous communities can show that proposed carbon-intensive activities are likely to threaten the land and natural resources on which they rely to maintain their cultures and traditional ways of life, courts may be more inclined to find in their favour and enforce such rights. These cases suggest further that, in the future, Indigenous rights and knowledge and the concerns of Indigenous peoples could provide a strong basis for climate litigation in the South African (and possibly global) context, thereby potentially bolstering the claims of vulnerable 'Davids' in the world against the many mighty carbon major 'Goliaths' that relentlessly pursue short-term profits at the expense of an increasingly vulnerable living order.

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[113] Canada, Tsawwassen First Nation and British Columbia, *Tsawwassen First Nation Final Agreement* (6 December 2007) <https://tsawwassenfirstnation.com/wp-content/uploads/2019/07/1_Tsawwassen_First_Nation_Final_Agreement.pdf>.
[114] *Tipakalipaa* case (n 7).
[115] Bookman (n 28).
[116] Chibvongodze (n 14) 159.
[117] D Goldtooth et al, 'Indigenous Resistance Against Carbon' (2021) <https://www.ienearth.org/wp-content/uploads/2021/09/Indigenous-Resistance-Against-Carbon-2021.pdf>.
[118] Jodoin et al (n 30) 173.
[119] Jodoin et al, ibid, do, however, highlight that this framing did not resonate with the Inuit community petitioners.

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