

Network for Greening the Financial System
Technical document

Climate-related litigation: recent trends and developments

September 2023



Foreword



Ravi Menon
Chair of the NGFS



Chiara Zilioli
Chair of the Experts' Network on Legal Issues

It is with great pleasure that we present this report on Climate-related litigation: recent trends and developments.

The NGFS Experts' Network on Legal Issues began preparing this report in 2022, with the initial idea to offer a modest update to the 2021 NGFS report on Climate-related litigation: raising awareness about a growing source of risk. However, the Network quickly realised that the trends and developments were far from modest or incremental. As this report outlines, climate-related litigation is growing rapidly, not only in terms of the volume of cases being initiated, but also crucially in terms of the legal arguments being used, and the diversity of addressees of such claims. In several recent cases, financial institutions have been targeted directly. The financial and reputational impact of such cases can be substantial. It is hence crucial for central banks and supervisors to be fully aware of climate-related litigation as a source of risk for the economy and for the financial sector.

Looking ahead, we cannot be complacent when it comes to climate- and more broadly environment-related litigation risk. We can already see that governments and civil society are turning their attention beyond greenhouse gas emissions, to the importance of nature and the environment. As alarm grows at the unprecedented decline in nature, and in nature's ability to provide the ecosystem services on which humanity depends – including climate regulation – we can expect litigants to turn to the courts, drawing inspiration from climate-related litigation. Indeed, the latest report of the Grantham Research Institute on Climate Change and the Environment on Global Trends in Climate Change Litigation: 2023 snapshot published on 29 June 2023, anticipates that litigation focused on the biodiversity–climate nexus will grow over the coming years, driven in part by legislation, including on addressing deforestation-free supply chains. Thus, we can expect climate- and environment-related litigation to remain an important subject in the work of the NGFS going forward.

This report is published together with a Report on micro-prudential supervision of climate-related litigation risks from the NGFS Workstream on Supervision. The publication of these two comprehensive and complementary reports highlights the multidisciplinary approach of the NGFS and the collaboration of experts across its membership.

Table of Contents

| | |
|---|----|
| Foreword | 2 |
| Introduction | 4 |
| 1. Climate-related litigation against states and public entities: from climate commitments to licenses and state investments | 6 |
| 2. Climate-related litigation against non-financial institutions | 9 |
| 3. Climate-related litigation against financial institutions | 13 |
| Conclusion | 15 |
| Annex I – Bibliography | 16 |
| Annex II – Examples of recent litigation across jurisdictions | 18 |

Introduction

Following the publication of the NGFS report ‘Climate-related litigation: Raising awareness about a growing source of risk’¹ in November 2021, the number of climate-related cases across the world has continued to increase in volume and to develop in terms of nature, scope and addressees.

This report provides an update on climate-related litigation by outlining recent trends in greater detail. Monitoring has taken place on the basis of reporting by the members of the NGFS, along with research using the Climate Case Chart databases of the Sabin Center for Climate Change Law (Columbia University), the Climate Change Laws of the World database of the Grantham Research Institute on Climate Change and the Environment (London School of Economics),² and academic and trade publications. This report follows the approach of those databases in defining climate-related litigation as cases before judicial and quasi-judicial bodies that involve material issues of climate change science, policy or law.³

The above databases indicate a notable increase in ongoing climate-related litigation cases. The databases recorded 253 new cases filed in 2021, 223 cases filed in 2022, and 84 cases filed between January and July 2023. Based on this data, it is clear that litigation continues to expand as an avenue for action on climate change, whereby 2021 saw the highest number of recorded cases being filed outside the US,⁴ and whereby the diversity of cases – in terms of defendants, jurisdiction and legal rationale – continues to grow.⁵ The jurisdiction with the highest overall volume of cases continues to be the US, followed by Australia, the UK and the EU, although cases are also increasing in the Global

South, with more than 50 of those filed in the last three years since 2020.⁶ The NGFS notes that this concentration of cases in some jurisdictions together with the eventual outcomes of those cases will factor into assessing the probability and scale of future litigation risks in those jurisdictions. A further trend relates to non-climate-aligned litigation, where litigants challenge the introduction of regulations or policies that would lead to reductions in greenhouse gas emissions or other positive climate outcomes.⁷

Based on this data, this report identifies three categories of climate-related litigation and provides an overview of the trends and developments observed in each of these categories. The report focuses, in particular, on how these trends can impact the financial sector, and the work of central banks and supervisors. The first category explored in this report is **climate-related litigation against states and public entities**. Between 2021–2022, more than 70% of cases were brought against governments and public actors, including central banks and supervisors.⁸ The second category focuses on **climate-related litigation against non-financial institutions**. The report notes that cases against fossil fuel and energy companies have continued to grow, and strategic cases are also increasingly being filed against a more diverse range of corporate actors. For instance, in the calendar year 2021, 38 cases were brought against corporates, with more than half of these cases filed against defendants in sectors other than fossil fuels and energy, notably food and agriculture (five cases), transport (four cases), plastics (five cases) and finance (three cases).⁹ In addition, the NGFS notes that a wide variety of legal arguments are being put forward to

1 NGFS (2021), *Climate-related litigation: Raising awareness about a growing source of risk*.

2 From May 2023, the information from both databases is accessible through one single website: <http://climatecasechart.com/>.

3 Setzer and Higham (2022); Setzer and Higham (2023); Basel Committee on Banking Supervision (2021).

4 Setzer and Higham (2022); see also Setzer, Narulla, Higham and Bradeen (2022).

5 See also, Setzer and Higham (2023).

6 Setzer and Higham (2023).

7 Setzer and Higham (2022); Setzer and Higham (2023). According to these sources, these cases are filed by litigants who have a financial or ideological interest in delaying or obstructing climate action, or by litigants who might not oppose climate action per se, but the way in which such action is carried out or its impacts on human rights (just transition cases). Examples of the former include e.g. US (*West Virginia v. EPA*), and various cases in Europe arising from states’ commitments under the Energy Charter Treaty, which protects foreign investments in the field of energy (*RWE v. Netherlands; Uniper v. Netherlands*). As a result of such litigation, in 2022 a number of countries, including the Netherlands, France, Spain, Germany and Poland announced their withdrawal from the Energy Charter Treaty.

8 Setzer and Higham (2022).

9 Setzer and Higham (2022); Higham and Kerry (2022); Setzer and Higham (2023) calculate that the number of corporate cases filed in 2021 represented around 30% of all *strategic* cases filed that year.

ground such claims against companies in the private sector. These include claims under tort law, supported by arguments that corporate actors have responsibilities to respect and protect human rights; claims under corporate due diligence legislation; under consumer protection and competition law, to challenge alleged greenwashing; and under company law, to challenge directors, for breaches of their fiduciary duties. The third category addressed in this report is **climate-related litigation against financial institutions**. The report highlights that several cases have already been brought directly against defendants in the financial sector, including the first cases against a credit institution in 2023.

The NGFS notes that this report focuses on assessing the impact of the initiation of climate-related litigation, rather than on the outcome of the cases.¹⁰ This is partly due to the nascent nature of this field of jurisprudence, with many cases not yet decided, and partly due to the fact that the outcome of the case reflects only some of the implications such litigation will have on climate governance, transition costs, and the financial and reputational implications for corporates.

¹⁰ Setzer and Higham (2023) report that a review of the direct outcomes in cases filed outside the US demonstrates that circa 50% of decided cases (547 cases) can be understood as favourable to climate action.

1. Climate-related litigation against states and public entities: from climate commitments to licenses and state investments

As noted above, litigation against states and public entities has continued to grow since the November 2021 report.

First, the success of the plaintiffs in the *Urgenda* case in the Netherlands continues to trigger similar challenges in other jurisdictions. Such **systemic climate litigation**¹¹ aims to ensure that governmental action on climate change is more ambitious, and better aligned with the need to avert or respond to climate impacts identified and predicted by the scientific community.¹² Such claims against states allege that insufficient actions are being taken to reduce emissions, and therefore they are breaching international climate commitments, public administrative law, and/or constitutional or human rights.¹³ These include challenges which scrutinise the substance of climate action plans, for instance by claiming that those plans are not specific enough.¹⁴ Challenges have also been initiated against the choices of public authorities in respect of the classification of activities as sustainable, notably the European Commission's decision to classify gas and nuclear power as environmentally sustainable under certain conditions, for the purposes of the EU's Taxonomy Regulation.¹⁵ Moreover, litigants in federations have also taken cases against federal states, bringing about increased awareness that climate considerations should be addressed through policy making at both state and federal level.¹⁶ In addition, several actions

have been taken against states before the European Court of Human Rights.¹⁷ With respect to other regional courts of human rights, an advisory opinion has recently been requested from the Inter-American Court of Human Rights.¹⁸ That court already issued an advisory opinion in 2017 to confirm the obligations of its Member States to prevent significant environmental damages within or outside their territories.¹⁹ In 2022, a request for an advisory opinion was also filed before the International Tribunal on the Law of the Sea asking for clarification on States' obligations to prevent, reduce and control pollution of the marine environment from climate change and protect and preserve the marine environment in relation to climate change impacts.²⁰ Finally, one action has been taken before the International Criminal Court, attempting to link environmental destruction to crimes against humanity, allegedly committed by a former Brazilian President and other government officials²¹.

As noted in the November 2021 Report, while it is unclear whether these cases have a direct impact on climate-related financial risks, if a court finds that a public entity needs to take more ambitious actions with respect to climate change mitigation, this could have a bearing on transition risks.²² Moreover, the NGFS observes that litigants, particularly NGOs, are taking a strategic approach to build on and expand judicial precedents within and

11 Dubash and Mitchell (2022) explains that systemic climate litigation refers to climate-aligned cases against governments that challenge the overall effort of a state or its organs to mitigate or adapt to climate change. See also Jackson (2020).

12 Dubash and Mitchell (2022); Setzer, Narulla, Higham and Bradeen (2022) more broadly identify 'strategic litigation' when the motivation for filing the case goes beyond the individual litigation.

13 Recent cases include litigation brought before national courts in **Australia, Austria, Belgium, Brazil, Canada, Colombia, the Czech Republic, Finland, France, Germany, India, Indonesia, Ireland, Italy, Mexico, New Zealand, Poland, Romania, Russia, South Korea, Spain, Turkey, and the United Kingdom**. Further details are provided in Annex II, section 1.

14 **UK** (R on the application of Friends of the Earth et al. v. Secretary of State for Business Energy and Industrial Strategy) also known as the "Net Zero Challenge".

15 *Austria v. European Commission*; *Repasi v. European Commission*; *ClientEarth et al. v. European Commission*.

16 These include cases taken in the **US** (e.g. *Aji P v. State of Washington* and *EmpowerNJ v. New Jersey Department of Environmental Protection*) and **Germany** (e.g. *Marlene Lemme et al. v. State of Bavaria*).

17 Cases have been taken by litigants from **Austria, France, Italy, Norway, Portugal and Switzerland**. Further details are provided in Annex II, section 2.

18 **Colombia and Chile**, *Request for an advisory opinion on the scope of the state obligations for responding to the climate emergency*, January 2023.

19 **Inter-American Court of Human Rights**, *Advisory Opinion OC-23/17*.

20 **International Tribunal for the Law of the Sea**, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, December 2022.

21 **International Criminal Court** (*The Planet v. Bolsonaro*).

22 Basel Committee on Banking Supervision (2021).

across jurisdictions, utilising transnational networks.²³ For example, in some instances NGOs are relying on successful cases against states to ground actions against corporates in the same jurisdiction.²⁴

Second, actions against states and public entities are increasingly relying on international climate commitments, European Union law and fundamental rights to **challenge state decisions authorising, subsidising, or incentivising third-party activities**.²⁵ These include state decisions to grant licences for fossil fuel exploration and extraction, and for the construction of fossil-fuel infrastructures, such as power plants; or to invest in or finance such projects.²⁶ Such cases can pose a more immediate and direct risk to financial and non-financial institutions with a financial interest in such projects, by delaying such projects, by making them more costly, or even by blocking the project altogether, potentially resulting in financial losses and stranded assets.²⁷

Third, actions against states and public entities can also rely on **procedural obligations**²⁸, often with the aim of increasing access to information²⁹ and access to justice in environmental matters.³⁰ Such cases also have the potential that the applicants will use any information obtained to ground substantive claims. These cases may be of particular interest to central banks, supervisors, and development

banks due to the applicability of transparency and public access provisions to such public entities.³¹

Fourth, regarding the recent litigation brought against a **central bank**, outlined in the November 2021 report, the case of *ClientEarth v. NBB*³² was dismissed by the Brussels Tribunal of First Instance in December 2021. The applicant NGO brought an appeal before the Brussels Court of Appeal in February 2022 but subsequently discontinued the case in November 2022, citing the ECB's decision to amend its corporate sector purchase programme, to take into account climate-related considerations.³³ More recently, the same NGO has brought a case against a **supervisor** – the UK's Financial Conduct Authority – challenging a decision to approve the prospectus of an oil and gas company.³⁴ The applicant claims the prospectus does not adequately outline the climate change risk to which the company is exposed.

Finally, the NGFS notes that the debate about **loss and damage sharing** gained further traction after COP27.³⁵ Developing states and those geographically most affected by the climate emergency successfully initiated discussions about the equitable allocation of the burdens incurred due to climate change. While this began as a predominantly political and diplomatic discourse and paves the way for a specific financial response, it is also

23 Setzer, Higham, Jackson and Solana (2021).

24 For instance, in the **Netherlands**, *Milieudefensie et al. v. Royal Dutch Shell plc* was built on the success in *Urgenda* – see Machi and van Zeven (2021) and Heemskerk and Cox (2023); while in **Germany**, the constitutional case in *Neubauer v. Germany* is cited as a basis for, inter alia, the claims in *Barbara Metz et al. v. Wintershall Dea AG*; *Kaiser et al. v. Volkswagen AG*; *Deutsche Umwelthilfe v. Bayerische Motoren Werke AG (BMW)* and *Deutsche Umwelthilfe v. Mercedes-Benz AG*.

25 Such cases include challenges brought in **Argentina, Australia, Brazil, Bulgaria, France (French Guiana), Guyana, India, Ireland, the Netherlands, New Zealand, Norway, South Africa, South Korea, Thailand, and the United Kingdom**. Further details are provided in Annex II, section 3.

26 Savaresi and Setzer (2022); Dubash and Mitchell (2022); Clarke, Hille, Hussain, Kerschner, Merryman, Power, and Subocz (2021); and Setzer, Higham, Jackson and Solana (2021). Setzer and Higham (2023) include such cases under the category 'turning off the taps', which refers to cases that challenge the flow of (public and private) finance to projects and activities that are not aligned with climate action.

27 Setzer and Higham (2022) note that the threat of litigation alone may have significant outcomes for decision-making in respect of projects and investments.

28 Savaresi and Setzer (2022).

29 E.g. **Luxembourg** (*Greenpeace Luxembourg v. Schneider*).

30 For instance, the case of *ClientEarth v. EIB*, ClientEarth challenged a procedural decision by the EIB refusing its request to carry out an internal review of a financing decision. ClientEarth's case was based on the access to justice provisions of EU Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention. The claim succeeded at first instance before the General Court of the EU, and on appeal before the Court of Justice. See also *ClientEarth et al. v. European Commission and Greenpeace v. European Commission*.

31 Ibid. See also e.g. **Brazil** (*Conectas Direitos Humanos v. BNDES and BNDESPAR*); **South Korea** (*Tiwi Islanders v. Export-Import Bank of Korea (Kexim) and the Korea Trade Insurance Corp (K-Sure)*).

32 **Belgium** (*ClientEarth v. NBB*).

33 ClientEarth, *Press Release*, 29 November 2022.

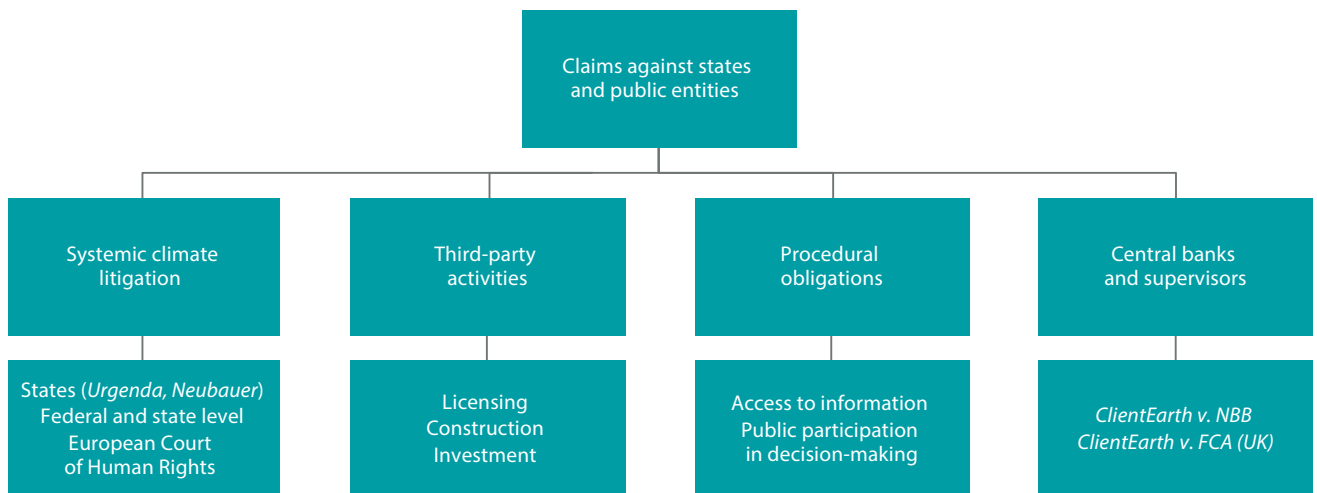
34 Financial Times, *UK financial watchdog hit with claim over prospectus climate risk disclosure*, February 2023.

35 The 2022 United Nations Climate Change Conference (COP 27) was the 27th yearly session of the Conference of the Parties (COP) to the 1992 United Nations Framework Convention on Climate Change (UNFCCC).

advancing to the legal realm. A coalition of 18 states,³⁶ led by the Republic of Vanuatu,³⁷ submitted a resolution to the UN General Assembly, which was adopted on 29 March 2023.³⁸ The resolution requests an advisory opinion from the International Court of Justice (ICJ) to clarify the rights and obligations of states under international law in relation to the protection of the climate system

for present and future generations, and the legal consequences where states have caused significant harm to the climate system. While ICJ opinions are not legally binding, they carry significant persuasive influence, and contribute to the development of international law. Therefore, this advisory opinion could impact future litigation, including between states.³⁹

Figure 1 **Categories of climate-related litigation against states and public entities**



36 The Republic of Vanuatu was joined by Antigua and Barbuda, Costa Rica, Sierra Leone, Angola, Germany, Mozambique, Liechtenstein, Samoa, Federated States of Micronesia, Bangladesh, Morocco, Singapore, Uganda, New Zealand, Vietnam, Romania and Portugal. The request gained the co-sponsorship of 132 states.

37 In addition, Vanuatu and Tuvalu have proposed the development of a [Fossil Fuel Non-Proliferation Treaty](#).

38 UN General Assembly Resolution [A/77/L.58](#), "Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change".

39 Averchenkova and Chan (2022).

2. Climate-related litigation against non-financial institutions

Litigation against non-financial institutions has also continued to develop since the November 2021 report.

In terms of defendants to such actions, cases against **fossil fuel and energy companies** have continued to increase.⁴⁰ These cases can include claims against fossil fuel companies for physical damage and/or the need to adopt adaptation measures; allegations of misleading sustainability claims (greenwashing); challenges to proposed investment in carbon intensive projects; allegations of failure to adhere to climate and environmental regulation; and failure to reduce carbon emissions. This trend can be expected to increase as companies are required to become more transparent and accurate in respect of their climate and environmental impacts, for example, as a result of legislative and non-legislative measures mandating that Environmental, Social and Governance (ESG) metrics must be included in corporate reporting.⁴¹

Moreover, as anticipated by the November 2021 report, a wider range of entities are now beginning to be affected

by climate-related litigation. Litigants are moving beyond challenges to fossil fuel and energy companies,⁴² for instance, and bringing challenges against **airlines**⁴³ and **car manufacturers**.⁴⁴ In addition to these direct actions, car manufacturers are also likely to be indirectly affected by litigation concerning policies to support better air quality in heavily populated areas. For instance, there have been recent cases before the Court of Justice of the European Union (CJEU) concerning rules adopted by cities limiting the local circulation of certain motor vehicles⁴⁵ and on state liability for air pollution.⁴⁶

Similarly, there have been past cases in which activists achieved the revocation of environmental licences for projects in the **mining** and **transport infrastructure** sectors.⁴⁷ Furthermore, litigants are also beginning to bring cases against entities in the **agriculture, food, plastics and construction sectors**, notably in respect of food producers, packaging producers, supermarkets and **a building materials company**.⁴⁸

40 Notable actions have been taken in **China** (*Friends of Nature Institute v. Gansu State Grid*; *The Friends of Nature Institute v. Ningxia State Grid*), **France** (*Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France*), **Germany** (*Barbara Metz et al. v. Wintershall Dea AG*), **Italy** (*Greenpeace Italy et al. v. ENI S.p.A., the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A.*), and also in the **US**, where US states and municipal authorities have commenced proceedings against energy companies, seeking compensation for the alleged injuries caused to local communities owing to climate change (e.g. *City of Annapolis v. BP plc*; *Anne Arundel County v. BP plc*; and *Connecticut v. Exxon Mobil Corporation*).

41 See for example in the **US** (*SEC Proposes Rules to Enhance and Standardise Climate-Related Disclosures for Investors*).

42 Higham and Kerry (2022); in **Germany** (*Luciano Lliuya v. RWE*) where a Peruvian farmer sued the German company RWE for its contributions to climate change and to the melting of mountain glaciers.

43 For example, in the **Netherlands** (*FossielVrij NL v. KLM*), where Fossielvrij NL sued Dutch airline KLM for alleged greenwashing in its advertising campaigns. The case is supported by other organizations, including ClientEarth, and could provide a precedent internationally.

44 In particular before courts in **Germany** (*Kaiser et al. v. Volkswagen AG*; *Deutsche Umwelthilfe v. Bayerische Motoren Werke AG (BMW)*) and *Deutsche Umwelthilfe v. Mercedes-Benz AG*) and **Italy** (*Altroconsumo v. Volkswagen AG*). See e.g. Gharibian, Pieper and Weichbrodt (2021).

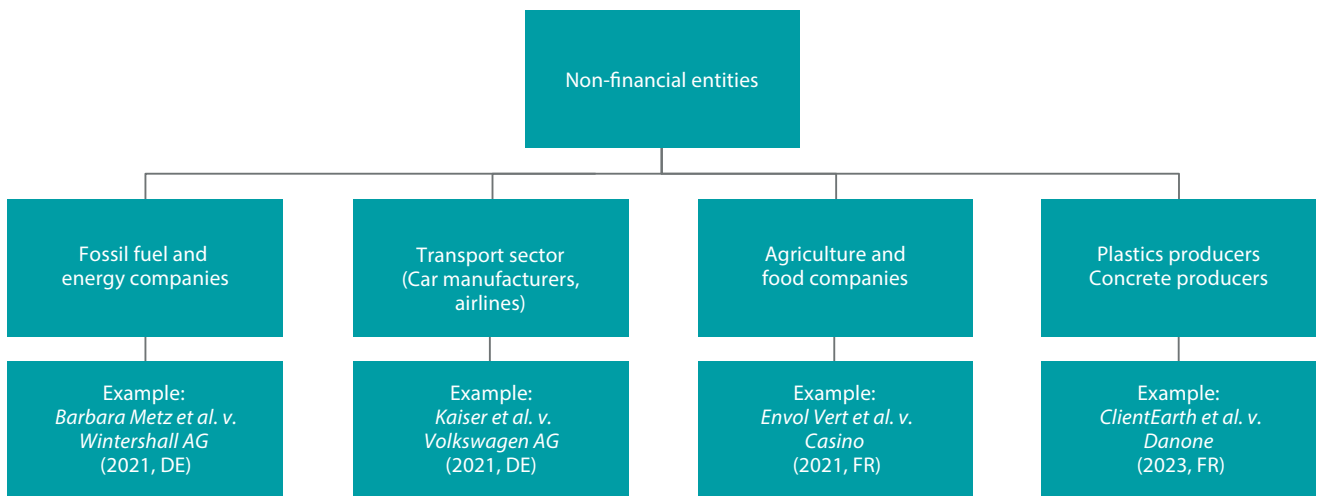
45 In 2022, the CJEU in *Federal Republic of Germany v. Ville de Paris and others* held that the adoption by cities and municipalities of rules limiting the local circulation of certain vehicles for the purposes of protecting the environment would **not** infringe EU rules on the approval and free movement of motor vehicles (para. 99).

46 In 2022, the CJEU held in *JP v. Ministre de la Transition écologique and Premier ministre*, that an infringement of the limit values for the protection of air quality under EU law (in this case, nitrogen dioxide levels in the Paris agglomeration) does **not** give rise to entitlement to compensation from the state.

47 In **India** (*TN Godavarman Thirumulpad v. Union of India and others [mining sector]*) and (*TN Godavarman Thirumulpad v. Union of India and others [railway infrastructure]*). Notably, the court stressed that in case of doubt, environmental protection shall prevail over economic interests.

48 Cases have been taken, in particular in **Denmark** (*Vegetarian Society et al. of Denmark v. Danish Crown*); **France** (*Envol Vert et al. v. Casino and ClientEarth et al. v. Danone*); **New Zealand** (*Smith v. Fonterra Co-Operative Group Limited*); the **US** (*Earth Island Institute v. Coca-Cola Co*); and **Switzerland** (*Asmania et al. v. Holcim*).

Figure 2 Trends in climate related litigation against non-financial entities: range of addressees



In terms of the substance of the claims, litigants continue to take action on the basis that corporate actors have responsibilities to respect and protect **human rights**.⁴⁹ Moreover, litigants are taking actions under **tort law**, claiming the corporate activities constitute public nuisance, negligence and/or breach of a duty, and seeking damages and or injunctions against such activities; and in some cases, under **corporate due diligence legislation**.⁵⁰ There have been recent developments in corporate due diligence legislation in a number of jurisdictions,⁵¹ obliging corporations take measures to identify risks, prevent and mitigate impacts on human rights and the environment. In particular, litigants seek to challenge the compatibility of such entities’ activities with **greenhouse gas reduction targets** – including with respect to planned projects – and/or seek **damages** for past emissions.

Another key trend relates to claims based on **“greenwashing”**, i.e. challenges based on allegations of unsubstantiated, misleading, or selective claims regarding an entity’s environmental performance.⁵² Litigants are seeking monetary damages, civil penalties and/or injunctive relief in respect of “greenwashed” communications. Allegations of greenwashing are being taken not only as actions before judicial bodies,⁵³ but also as complaints to supervisory, advertising and oversight authorities.⁵⁴ Claims can be based on accusations of fraud, misrepresentation and breaches of consumer protection and advertising laws. This trend is likely to continue as jurisdictions develop legislation to protect consumers from greenwashing, unfair commercial practices and anti-competitive behaviour.⁵⁵

49 Setzer and Higham (2023). See e.g., **Italy** (*Greenpeace Italy et al. v. ENI S.p.A., the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A.*).

50 See Rajavuori, Savaresi and van Asselt (2022) and Setzer, Narulla, Higham and Bradeen (2022). For example, a number of cases brought before the French Courts rely on a provision of the French Commercial Code which requires a company to produce a “plan of vigilance” that identifies and seeks to mitigate risks to human rights, fundamental freedoms, the environment, and public health that could result directly or indirectly from the operations of the company and of the companies it controls. See e.g. *Notre Affaire à Tous and Others v. Total*; *Les Amis de la Terre v. Total*; *Envol Vert et al. v. Casino*; and *ClientEarth et al. v. Danone*.

51 For example, in **France** (*Duty of vigilance under the French Commercial Code*); and **Germany** (*Lieferkettensorgfaltspflichtgesetz*), and the **EU** proposed *Directive on Corporate Sustainability Due Diligence*.

52 Benjamin, Bhargava, Franta, Martínez Toral, Setzer, and Tandon (2022); Goldman, Ewing, and Shargel (2022); Setzer and Higham (2023).

53 For example, in the **Netherlands** (*FossielVrij NL v. KLM*); and in the **US** (*Commonwealth v. Exxon Mobil Corporation*), where the Attorney General of Massachusetts alleges that Exxon Mobil Corporation committed deceptive practices against Massachusetts investors and consumers, including by failing to disclose climate change risks.

54 For example, **Australia** (*Volkswagen v. Australian Competition and Consumer Commission*); **New Zealand** (*Lawyers for Climate Action Complaint to the Advertising Standards Board*); **UK**: the NGO ClientEarth has made referrals to the UK’s Financial Conduct Authority regarding its concerns about reporting of certain entities; and the **UK**: the UK’s advertising standards authority found that a supermarket made unsubstantiated claims about a product (*ASA Ruling on Tesco Stores Ltd t/a Tesco*).

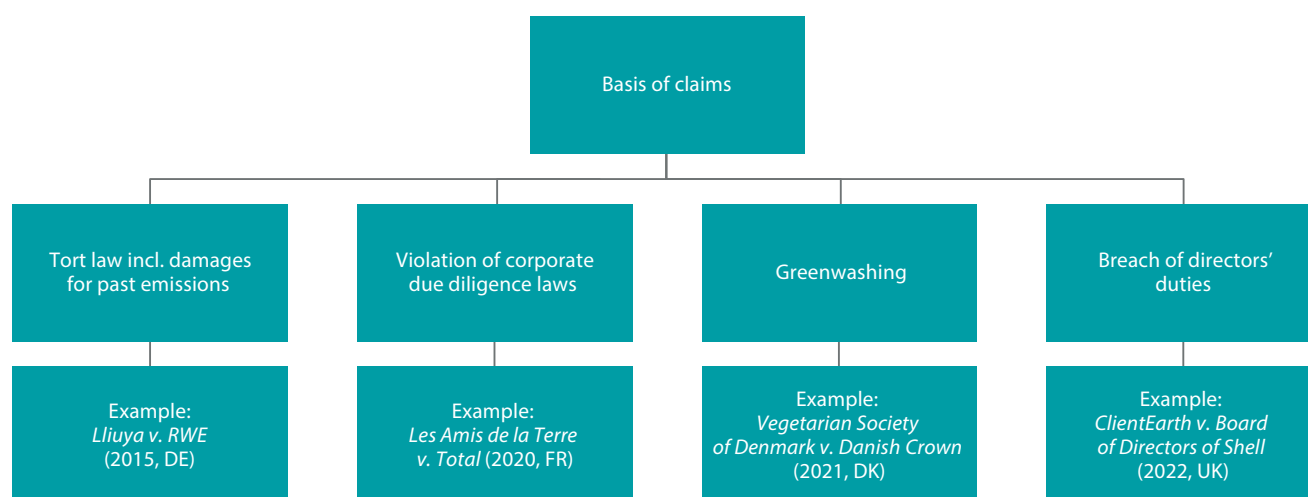
55 For example, **Australia** has increased penalties for competition and consumer law breaches (in the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022*); while the **EU** has proposed a *Directive empowering consumers for the green transition through better protection against unfair practices and better information*; and a *Directive on substantiation and communication of explicit environmental claims*.

Moreover, as legislation in the field of sustainable finance continues to develop, litigants are increasingly bringing challenges on the basis of alleged non-compliance with rules on disclosures of investments, financial risks and harm caused.⁵⁶ In that respect, the NGFS emphasises that climate disclosure laws in certain jurisdictions may have a transnational impact, particularly due to companies' cross-listing in major foreign capital markets. Securities laws or regulations requiring climate disclosure in jurisdictions where major capital market centers are located are likely to apply to foreign companies listed in that jurisdiction.⁵⁷ As a consequence, this may generate climate litigation

against foreign public companies.⁵⁸ In turn, climate litigation arising from the new climate-disclosure requirements, may potentially impact risk-assessment in the financial system from these companies' countries of origin.⁵⁹

A further trend identified relates to **claims arising from company law**, such as shareholder actions against directors for breaches of fiduciary duties. One aspect of the trend relates to NGOs purchasing shares in a company, with a view to exercising the rights of shareholders to force change within a company.⁶⁰

Figure 3 Trends in climate related litigation against non financial entities: basis of claims



56 Goldman, Ewing, and Shargel (2022); Setzer, Narulla, Higham and Bradeen (2022). See e.g. **US** ([Securities and Exchange Commission v. Vale SA; In re Oatly Group AB Securities Litigation](#)).

57 For example, the recently proposed SEC rules requiring registrants to provide certain climate-related information in their registration statements and annual reports may affect not only US companies, but also foreign companies listed in the US. Securities and Exchange Commission, 17 CFR 210, 229, 232, 239, and 249, [The Enhancement and Standardization of Climate-Related Disclosures for Investors](#) (March 21, 2022).

58 One example is the case in the US of [Securities and Exchange Commission v. Vale SA](#), where the SEC took action against a Brazilian public company in respect of alleged greenwashing communications, leading to securities' law violations. This concerned communications in respect of the safety of Vale SA's dams prior to the January 2019 collapse of its Brumadinho dam. This was the SEC's first ESG-related enforcement action since the SEC's Division of Enforcement formed its Climate and ESG Task Force in March 2021.

59 Goldman, Ewing, and Shargel (2022).

60 Examples of this trend are evidenced by litigation in **Poland** ([ClientEarth v. ENEA](#)) and the **UK** ([ClientEarth v. Board of Directors of Shell](#)). Another non-litigation example relates to shareholders in **Australia** ([AGL Energy](#)). See also, Financial Times, [Activist group 'Follow This' launches climate campaign against Big Oil](#), 19 December 2022 and [Investors to press TotalEnergies over climate goals](#), 6 April 2023.; Setzer, Narulla, Higham and Bradeen (2022) observing that personal responsibility (of directors) is gaining traction.

In respect of both greenwashing and company law claims, the NGFS observes a tendency that **NGOs, as plaintiffs**, play a significant role in expanding the traditional litigation risks faced by entities. This may be linked to the fact that their pursuit of claims is driven by conviction,⁶¹ and with the aim to influence public policy through publicity, rather than by financial outcome.⁶²

As noted in the November 2021 report, cases against non-financial institutions can have **significant financial implications** not only for the defendant to the litigation but also for other institutions with financial exposures to the defendant.⁶³ Such litigation can lead to direct financial losses (legal fees and costs, damages, fines, and adaptation and compliance costs), with a possible impact on the value of the firm, its creditworthiness and/or its financing costs.⁶⁴ This impact could be particularly potent where a court finds that companies are under a legal obligation to reduce their

emissions in a manner aligned with the Paris Agreement, which could lead to significant transition risks.⁶⁵ This can, in turn, have an impact on the company's share price, and result in stranded assets. Moreover, such litigation – particularly in respect of claims of greenwashing – can lead to reputational costs, potentially with spill-over effects for institutions in the same sector.⁶⁶ For prudential supervisors, this can become particularly relevant in respect of accounting for corporates' credit risk.⁶⁷ Furthermore, it has also been emphasised that climate-related litigation risk could present a potential exposure and risk management challenge for some insurers, particularly where litigants are seeking financial redress, and are successful, but also in respect of legal defence costs, regardless of whether the litigation is successful.⁶⁸ This, in turn could lead to increases in premia or the withdrawal of insurers from certain lines of business.⁶⁹

61 Setzer and Higham (2023). For instance, NGOs may aim to establish the existence of a directly applicable legal obligation on the part of states, non-financial corporates, and financial institutions to contribute their fair share in emission reduction, in a manner compatible with the Paris Agreement, and to enforce such legal obligation against the defendant. See e.g., **Italy** (*Greenpeace Italy et al. v. ENI S.p.A., the Italian Ministry of Economy and Finance and Cassa Depositi e Prestiti S.p.A.*).

62 See also, however, the recent trend in respect of professional litigation funding: Financial Times, *The money behind the coming wave of climate litigation*, 5 June 2023; Setzer and Higham (2023).

63 See also Setzer, Higham, Jackson and Solana (2021).

64 See Sato, Gostlow, Higham, Setzer and Venmas (2023), who examined 108 climate change lawsuits against US and European-listed corporations between 2005 and 2021. On that basis they estimated that climate litigation filings or unfavourable court decisions reduced firm value by -0.41% on average.

65 See Heemskerck and Cox (2023).

66 For instance, if litigation emphasises that food companies with high plastic use need to have plastic exit plans in place, this will put pressure on the whole sector, with reputational and financial consequences for the sector even before the case is decided.

67 European Banking Authority (2022), Basel Committee on Banking Supervision (2021).

68 Bank of England (2022). The circumstances under which litigation costs will be borne by insurance companies will depend on the respective insurance policies as well as the law applicable to them.

69 Financial Times, *Climate litigation threatens to push up companies' insurance costs*, 28 August 2022; International Association of Insurance Supervisors, *IAIS Global Insurance Market Report 2022 highlights key risks and trends facing the global insurance sector*, 15 December 2022, which identifies climate-related risks as a supervisory priority in the insurance sector. See also **the US** (*Aloha Petroleum Ltd. v. National Union Fire Insurance Co. of Pittsburgh*) where a fossil fuel company has brought an action against its insurer for refusing to defend and indemnify the company in underlying climate change cases brought by Honolulu and Maui.

3. Climate-related litigation against financial institutions

Climate-related litigation against financial institutions shows emerging trends, in particular in respect of claims of greenwashing and breaches of directors' duties. Also, in light of this, supervisors may need to ensure that such liability risk is incorporated into financial institutions' operational risk management, and that appropriate account is taken of the financial impact arising from reputation risks.⁷⁰ This topic is further explored in the companion NGFS Report on micro-prudential supervision of climate-related litigation risks.

First, in respect of **greenwashing**, there is an increasing risk that climate-related disclosures become the subject of litigation before courts or become subject to investigations by advertising standards authorities, by supervisory authorities or even by public prosecutors.⁷¹ Beyond traditional litigation,⁷² applicants have made complaints against financial institutions to the National Contact Points under the OECD's Guidelines for multinational enterprises.⁷³ It can be expected that this trend will continue to grow in the wake of the further development of legislation to better regulate climate-related disclosures.⁷⁴

Second, in respect of **breaches of directors' duties**, a recent example includes beneficiaries taking action

to seek to compel the directors of a pension scheme to agree and implement plans to divest from fossil fuels, in order to protect the beneficiaries' interests from risks to the performance of that asset class.⁷⁵ While the case was ultimately dismissed, it illustrates that the notion of prudent financial management is being reassessed in light of the transition to a low carbon economy.⁷⁶ It is worth monitoring whether this trend will continue in the wake of the increasing adoption of legislation⁷⁷ which stipulates that neglecting environmental considerations in financing decisions will be treated as a breach of fiduciary duty. It is worth noting that, depending on the jurisdiction and circumstances, damages awarded as well as the cost of litigation may be covered by directors' and officers' insurance. This may lead insurance companies to adjust their risk assessment and may possibly lead to an increase in the premia of policy holders.

Third, **corporate due diligence laws** are also being used by litigants to ground claims against financial institutions. Notably, a group of NGOs is relying on corporate due diligence legislation in France to take legal action against a French credit institution for financing fossil fuel projects.⁷⁸

70 European Central Bank (2021); European Banking Authority (2022); and Basel Committee on Banking Supervision (2021 and 2022).

71 **Australia** (*Abrahams v. Commonwealth Bank of Australia; Complaint to Ad Standards on HSBC's Great Barrier Reef advertisement; O'Donnell v. Commonwealth*); and **Germany** (media reports in respect of investigations into DWS; consumer group case against DWS; *Verbraucherzentrale Baden-Württemberg e.V. v. Commerz Real Fund Management S.à.r.l.*); **UK** (*Complaints to the Advertising Standards Authority in respect of advertising by HSBC*) as well as the **US** (*Goldman Sachs to pay \$4mn penalty over ESG fund claims*).

72 National Contact Points (NCPs) established under the *OECD's Guidelines for Multinational Enterprises* offer a non-binding resolution mechanism for issues arising related to the implementation of the Guidelines. NCPs thus provide an important forum where company practices are assessed against the Guidelines.

73 **Australia** (*Friends of the Earth Australia and Others v. ANZ Bank Group Limited*); **Japan** (*Market Forces v. Mizuho Financial Group, Inc, Sumitomo Mitsui Banking Corporation and Mitsubishi UFJ Financial Group Inc*); and the **Netherlands** (*BankTrack et al. v. ING Bank*). See Law Society of New South Wales (2021).

74 Goldman, Ewing, and Shargel (2022); European Banking Authority (2022). For example, legislators and regulators in **Brazil**, the **EU** and the **UK** have already put in place corporate sustainability reporting and disclosure rules, while public consultations on proposed rules are underway in **Australia** and the **US**.

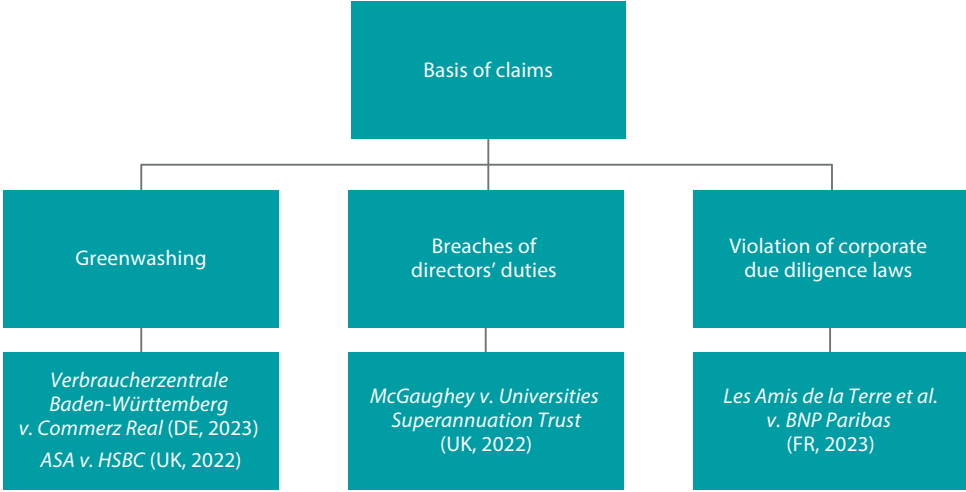
75 **UK** (*Ewan McGaughey et al. v. Universities Superannuation Scheme Limited*). See also **Australia** (*McVeigh v. Retail Employees Superannuation Trust*) and Law Society of New South Wales (2021); see also **Luxembourg** (*Greenpeace Luxembourg v. Schneider*) where the Minister of Social Security was sued. A revision of the investment strategy of the Public Pension Fund (*Fonds de compensation commun au régime général de pension*) has been announced and a related draft law is pending (parliamentary file Nr. 7729).

76 Setzer and Higham (2022).

77 **Portugal** (*Portuguese climate framework law, approved by Law no. 98/2021, 31 December*); **India** (*Indian Companies Act 2013*).

78 **France** (*Les Amis de la Terre France and others v. BNP Paribas*); Jones Day (2022) outlining the extraterritorial scope of due diligence laws, which also encompass subsidiaries and global supply chains. See also Heemskerk and Cox (2023).

Figure 4 Trends in climate related litigation against financial institutions



Conclusion

Looking to the future, the NGFS expects climate-related litigation will continue to increase in volume, and to develop in terms of the nature, scope, and addressees of legal action. For instance, litigation may begin to expand beyond the topic of greenhouse gas emissions, to encompass the topic of biodiversity loss, due to increasing recognition of the climate-biodiversity nexus.⁷⁹

In particular, the NGFS expects that some of that litigation may become more closely linked to the development of climate-related legislation, particularly in the fields of **greenwashing**, **climate disclosures** and **corporate due diligence**,⁸⁰ with a consequent impact on transition risks. This may become particularly relevant for the financial sector, where the recent expansion of regulatory reporting requirements may increase the likelihood of cases being taken directly against financial institutions.

In that respect, the Intergovernmental Panel on Climate Change (IPCC) has noted that “Climate-related litigation, for example by governments, private sector, civil society and individuals, is growing [...] and in some cases, has influenced the outcome and ambition of climate governance”⁸¹. The NGFS highlights that according to academic literature this interaction can be expected to occur in three ways⁸². First, legislation can offer new grounds for future litigation. Second, litigation may fill gaps where legislation does not yet exist or is weakly enforced. And third, climate litigation may act as a driver for new legislation. Overall, this means climate litigation will continue to affect the transition costs and risks faced by financial and non-financial entities.

At a more general level, the NGFS notes three potential accelerants of climate-related litigation. First, as noted in the November 2021 report, the further development

of climate attribution science may gradually fill the “evidence gap”, particularly in respect of cases for damages. Second, litigation may be accelerated by the evolution of jurisprudence in respect of the duty of care attributed to corporates. Third, climate science is showing the acceleration of climate change and, as a consequence, the need for decisive action in the current decade 2020-2030.

An expected additional consequence of the proliferation of climate-related litigation might be that financial and non-financial entities could increasingly explore the possibilities to establish themselves in jurisdictions that impose less onerous requirements and compliance costs. This risk of **regulatory arbitrage** might pose challenges to supervisors and financial stability authorities and might require an increase in cooperation and coordination at a global level. Further developments will have to be carefully observed before a final statement can be made, also in order to ensure that structural changes in the industrial environment are recognised.

Similarly, further consideration should be given to the likelihood of **forum shopping**, whereby litigants may seek to bring cases in jurisdictions where the outcome could be more favourable to their cause.⁸³ Such litigants may seek to establish the vicarious liability of parent companies or financial institutions established in jurisdictions in the Global North for the operations of subsidiaries or clients in emerging markets,⁸⁴ especially in connection with the violation of fundamental rights.

Thus, the NGFS highlights that these developments continue to pose risks for micro-prudential supervision and financial stability monitoring and continue to be relevant factors to be considered by central banks and supervisors.

79 Setzer and Higham (2022); Setzer and Higham (2023). According to the authors, this could in particular encompass claims arguing that more ambitious measures are needed for forest restoration and to enhance forests’ carbon absorption capacities. Further potential trends identified by Setzer and Higham include cases addressing the protection of oceans, litigation arising from extreme weather events, and cases concerning short-lived climate pollutants.

80 Setzer, Narulla, Higham and Bradeen (2022); Higham, Setzer, Narulla and Bradeen (2023).

81 IPCC (2022), Dubash and Mitchell (2022).

82 Rajavuori, Savaresi and van Asselt (2022); see also Setzer and Higham (2023).

83 Macchi and van Zeben (2021). See for instance the letter sent by *Milieudefensie to 30 companies* in the wake of *Milieudefensie v. Royal Dutch Shell*. In the **Netherlands** *Milieudefensie* is questioning the boards of various companies, including ING and Rabobank at their shareholder meetings on their Co2-reduction plans. The organization has said the answers of the board members are ultimately determining whether it will pursue court cases against these institutions. See also Heemskerk and Cox (2023) in respect of banks in the Netherlands.

84 Macchi and van Zeben (2021); Jones Day (2022) highlight the risk for companies to be held vicariously liable for their subsidiaries and suppliers is especially pertinent in **France** and **Germany** due to their extensive corporate due diligence laws.

Annex I – Bibliography

Alina Averchenkova and Tiffanie Chan (2022)

Commentary: What role could legislation and litigation play following COP27 in closing implementation gaps on mitigation and Loss and Damage? Grantham Research Institute on Climate Change and Environment

Bank of England (2022)

Results of the 2021 Climate Biennial Exploratory Scenario

Basel Committee on Banking Supervision (2021)

Climate related risk drivers and their transmission channels, April 2021

Basel Committee on Banking Supervision (2022)

Principles for the effective management and supervision of climate-related financial risks, June 2022

Lisa Benjamin, Akriti Bhargava, Benjamin Franta, Karla Martínez Toral, Joana Setzer and Aradhna Tandon (2022)

Climate-Washing Litigation: Legal Liability for Misleading Climate Communications, Policy Briefing, The Climate Social Science Network

Mark Clarke, David Hille, Tallat Hussain, Seth Kerschner, Bryan Merryman, Tim Power and Michał Subocz (2021)

Climate change disputes: Sustainability demands fuelling legal risk, White and Case

Navroz Dubash and Catherine Mitchell et al. (2022)

National and sub-national policies and institutions, in IPCC (Ed.), *Climate change 2022: Mitigation of climate change. Working Group III contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*

European Banking Authority (2022)

The role of environmental risks in the prudential framework, Discussion Paper, EBA/DP/2022/02

European Central Bank (2021)

The state of climate and environmental risk management in the banking sector: Report on the supervisory review of banks' approaches to manage climate and environmental risks, November 2021

Armineh Gharibian, Nadine Pieper and Johannes Weichbrodt (2021)

Climate Change Litigation – aktuelle Entwicklungen, BB 2021, 2819, Beck online

Rachel Goldman, Kevin Ewing, and David Shargel (2022)

Litigation and Enforcement Impact of the SEC's Proposed Rules on Climate-Related Disclosure, National Law Review, Volume XII, Number 118

Pim Heemskerk and Roger Cox (2023)

Bancaire klimaataansprakelijkheid onder invloed van duurzaamheidswetgeving, Maandblad voor Vermogensrecht

Catherine Higham and Honor Kerry (2022)

Commentary: Taking companies to court over climate change: who is being targeted? Grantham Research Institute on Climate Change and Environment

Catherine Higham, Joana Setzer, Harj Narulla and Emily Bradeen (2023)

Climate change law in Europe: What do new EU climate laws mean for the courts? Grantham Research Institute on Climate Change and Environment

Intergovernmental Panel on Climate Change

Climate Change 2022 Mitigation of Climate Change: Summary for Policymakers, Working Group III Contribution to the Sixth Assessment Report of the IPCC

Andrew Jackson (2020)

Ireland's Climate Action and Low Carbon Development Act 2015: Symbolic Legislation, Systemic Litigation, Stepping Stone?, National Climate Change Acts: The Emergence, Form and Nature of National Framework Climate Legislation, Muinzer, TL (ed.), Bloomsbury, London

Jones Day (2022)

ESG – Climate Change and Related Litigation Take Center Stage in Europe

Law Society of New South Wales (2021)

Briefing Paper: Climate Change Litigation – trends, cases, and future directions, November 2021

Chiara Macchi and Josephine van Zeben (2021)

Business and human rights implications of climate change litigation: Milieudefensie et al. v. Royal Dutch Shell, Review of European, Comparative and International Environmental Law, 2021; 30(3): 409-415.

NGFS (2021)

Climate-related litigation: Raising awareness about a growing source of risk

Mikko Rajavuori, Annalisa Savaresi and Harro van Asselt (2022)

Mandatory Due Diligence Laws and Climate Change Litigation: A Typology of Interactions

Misato Sato, Glen Gostlow, Catherine Higham, Joana Setzer and Frank Venmas (2023)

Working Paper: Impacts of climate litigation on firm value, Grantham Research Institute on Climate Change and Environment

Annalisa Savaresi and Joana Setzer (2022)

Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers, Journal of Human Rights and the Environment

Joana Setzer and Catherine Higham (2022)

Global trends in climate litigation: 2022 snapshot, Grantham Research Institute on Climate Change and Environment

Joana Setzer and Catherine Higham (2023)

Global trends in climate change litigation: 2023 snapshot, Grantham Research Institute on Climate Change and Environment

Joana Setzer, Catherine Higham, Andrew Jackson and Javier Solana (2021)

Climate change litigation and central banks, ECB Legal Working Paper Series, No 21

Joana Setzer, Harj Narulla, Catherine Higham and Emily Bradeen (2022)

Climate litigation in Europe: A summary report for the European Union Forum of Judges for the Environment, Grantham Research Institute on Climate Change and Environment

Wolfgang Kahl, Marc-Philippe Weller (2021)

Climate Change Litigation. A Handbook

Annex II – Examples of recent litigation across jurisdictions

1. Actions against states alleging that insufficient actions are being taken to reduce emissions

Australia

Pabai Pabai and Guy Paul Kabai v. Commonwealth of Australia

Austria

Mex M v. Austria

Belgium

VZW Klimaatzaak v. Kingdom of Belgium and Others

Brazil

Laboratório do Observatório do Clima v. Minister of Environment and Brazil and *PSB et al. v. Brazilian Federal Government*

Canada

ENVironnement JEUnesse v. Canada and *Sierra Club of British Columbia Foundation v. Minister of Environment and Climate Change Strategy*

Colombia

Office of the Inspector General and Others v. Ministry of Environment and Sustainable Development and Others

Czech Republic

Klimatická žaloba ČR v. Czech Republic

Finland

Finnish Association for Nature Conservation and Greenpeace v. Finland

France

Commune de Grande-Synthe and others v. France

Germany

Steinmetz et al. v. Germany

India

Intellectuals Forum, Tirupath i v. State of A. P. and others

Indonesia

Indonesian Youths and others v. Indonesia

Ireland

Friends of the Irish Environment v. Government of Ireland

Italy

A Sud et al. v. Italy - Giudizio Universale/Universal Judgment

Mexico

Greenpeace v. Instituto Nacional de Ecología y Cambio Climático and Others and *Nuestros Derechos al Futuro y Medio Ambiente Sano et al. v. Mexico; Julia Habana et al. v. Mexico*

New Zealand

Lawyers for Climate Action NZ v. the Climate Change Commission

Poland

Górska et al. v. Poland

Romania

Declic et al. v. The Romanian Government

Russia

Ecodefense & Other NGOs v. Russia

South Korea

Do-Hyun Kim et al. v. South Korea

Spain

Greenpeace v. Spain

Turkey

S.S. Gölarmara ve Çevresi Su Ürünleri Kooperatifi v. Republic of Türkiye Ministry of Agriculture and Forestry, Manisa Directorate of Provincial Agriculture and Forestry

United Kingdom

Plan B Earth and others v. Prime Minister and R (On the Application of Cox & Ors) v. The Oil and Gas Authority and others

2. Actions against states taken before the European Court of Human Rights

Austria

Soubeste and Others v. Austria and Others – Energy Charter Treaty

France

Carême v. France

Italy

De Conto v. Italy and 32 other states and Uricchio v. Italy and 32 other states

Norway

Greenpeace Norway v. Government of Norway

Portugal

Duarte Agostinho and Others v. Portugal and Others

Switzerland

Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others

3. Actions against state decisions authorizing, subsidizing, or incentivizing third-party activities

Argentina

Guillermo Tristan Montenegro v. Ministry of Environment and Sustainable Development

Australia

Youth Verdict v. Waratah Coal; Environment Victoria v. Environment Protection Authority and Ors

Brazil

Conectas Direitos Humanos v. BNDES and BNDESPAR

Bulgaria

Association “Za Zemiata (For the Earth) – Access to Justice” and “The Green Tank”, Hellenic Republic v. Executive Director of the Environment Executive Agency, TPP “Maritsa-Iztok 2” EAD

France (French Guiana)

Guyane Nature Environnement and France Nature Environnement v. France

Guyana

Thomas and De Freitas v. Guyana

India

Save Mon Region Federation v. Union of India; TN Godavarman Thirumulpad v. Union of India and others [mining sector] and TN Godavarman Thirumulpad v. Union of India and others [railway infrastructure]

Ireland

Friends of the Irish Environment v. Minister for Agriculture, Food and the Marine

Netherlands

Coöperatie Mobilisation for the Environment U.A and others v. Executive Board of Province of North Holland (Vattenfall Power Generations Netherlands BV intervening)

New Zealand

Students for Climate Solutions v. Minister of Energy and Resources

Norway

Greenpeace Norway v. Government of Norway

South Africa

Africa Climate Alliance et al. v. Minister of Mineral Resources and Energy et al. - #CancelCoal case

South Korea

Tiwi Islanders v. Export-Import Bank of Korea (Kexim) and the Korea Trade Insurance Corp (K-Sure)

Thailand

Residents Omkoi v. Expert Committee on EIA Consideration and the Office of Natural Resources and Environmental Policy and Planning

United Kingdom

Friends of the Earth v. UK Export Finance



NGFS
Secretariat

