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## LITIGATION RISKS IN THE FINANCIAL SECTOR AND CLIMATE CHANGE

*Strategic Litigation is becoming an increasingly important tool in the fight against climate change thanks to the awareness of this global problem throughout the world and the increased knowledge about case law in this area. This article tries to elaborate on the kind of disputes in the financial sector related to climate change, and the increased importance of litigation in order to change corporate behavior.*

Key words: *climate change, climate litigation, financial sector, sustainable finance*

### INTRODUCTION

Judges and arbitrators in general do not decide whether a claim, or in particular a claim about climate change, is justiciable or arbitrable, or whether rights have been violated without considering potential remedies.<sup>1</sup> A full range of

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<sup>1</sup> Kent Roach, "Judicial Remedies for Climate Change", *Journal of Law and Equality*, Vol. 17, No. 1, 2021, 105.

remedies and entry points, as well as redress options, alone or in combination,<sup>2</sup> are available which raises the issue of the litigation strategy to follow. Remedies are one of the fundamental pieces in the fight against climate change and the type of remedy to be sought will depend on a variety of factors, both procedural and substantive, namely the kind of method available for litigants, in isolation or in parallel (judicial, arbitration, administrative, etc.), which is also dependent upon the kind of relationship between the parties, the costs associated with the method of resolving disputes, the applicable laws and regulations to be applied, and indeed it will be very much interrelated with the objectives to be pursued by litigants. Contrary to what we might think at first sight, a variety of remedies are available in a climate change litigation and many times pecuniary remedies are left behind in order to seek for climate change justice, including a change in corporate or governmental behavior, creating, modifying or updating the corporate policies on human rights and climate change (as well as including them into supply chains and codes of ethics or conduct), or upgrading the national plans on climate change (strategic litigation). Notwithstanding this, some actions against governments have been rejected since no remedy was available to the Court.<sup>3</sup>

In this paper, I will focus on climate change litigation in the financial sector, since another essential element in the fight against climate change is finance,<sup>4</sup> which is key to drive a sustainable, net zero recovery and to achieve the goals established by the Paris Agreement towards 2050,<sup>5</sup> i.e., a carbon-free world where the limitation of global average temperature increases to well below 2°C, while trying to achieve the more ambitious 1.5°C limit (Article 2.1 a).<sup>6</sup>

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<sup>2</sup> *Ibidem*, 131. As considered by Roach, a single-track approach to remedies is not suitable: neither the traditional remedial goals of restitution nor Compensation alone will remedy climate change. Therefore, he defends “a “two-track” approach to remedies that borrows from the frequent distinction that supranational adjudicators make between specific measures that provide remedies (often damages) for individual litigants and more ambitious, dialogic, and interactive systemic remedies to prevent continuing or new violations”.

<sup>3</sup> *Aji P.v. State of Washington*, 10 June 2021. The matter is highly debatable as shown by the dissenting view within the Court by the Chief Justice (González, CJ), [http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2021/20211006\\_docket-99564-8\\_order.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/case-documents/2021/20211006_docket-99564-8_order.pdf), 01.10.2023.

<sup>4</sup> More so since as considered by Nicholas Stern, *The Economics of Climate Change: The Stern Review*, Cambridge University Press, 2007, viii: “Climate change is the greatest market failure the world has ever seen, and it interacts with other market imperfections”.

<sup>5</sup> International Energy Agency (IEA), *Net Zero by 2050. A Roadmap for the Global Energy Sector*, October 2021, addressing Governments to implement energy policies to the 2050 climate objectives.

<sup>6</sup> *Global Landscape of Climate Finance 2021*, Climate Policy Initiative, December 2021, 8.

The so-called sustainable finance is key to promoting a sustainable economy and achieving the objectives established by the Paris Agreement towards the year 2050<sup>7</sup> (Article 2.1 a), the European Green Deal,<sup>8</sup> as well as in the EU Strategy on Sustainable Finance.<sup>9</sup> As indicated in Mark Carney's 2015 seminal speech<sup>10</sup> "climate change is a tragedy of the horizon": *sustainable finance can help fight against that tragedy that the horizon holds for us*. This speech is considered to have marked a turning point with a view to reinforcing the financial sector's commitment to climate change.<sup>11</sup>

Financing the transition, mitigation and adaptation<sup>12</sup> of both developing countries and corporations to a net zero economy requires the involvement and cooperation between the public and private sectors<sup>13</sup> in order to achieve the goals

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<sup>7</sup> International Energy Agency (IEA), Net Zero by 2050. A Roadmap for the Global Energy Sector, October 2021.

<sup>8</sup> Commission Communication, The European Green Deal, Brussels, 11.12.2019, COM(2019) 640 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Investment Plan for a Sustainable Europe, Investment Plan of the European Green Pact. Brussels, 14.1.2020, COM (2020) 21 final.

<sup>9</sup> Action Plan: Financing Sustainable Development, 2018, 8 March 2018, COM(2018) 97 final. This is the first major instrument in this matter that has been followed by the New Strategy of July 6, 2018. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Strategy to finance the transition to a sustainable economy, 6 July 2021, COM(2021) 390 final.

<sup>10</sup> *Breaking the tragedy of the horizon* - a speech given by former Bank of England Governor, Mark Carney, at Lloyd's of London on 29 September 2015, specifically at 5:13, <https://www.youtube.com/watch?v=V5c-eqNxeSQ>, 01.10.2023.

<sup>11</sup> Final report, Green finance in the UK and Spain: latest developments and main service providers, 1 July 2020, 4, also citing another relevant passage from the speech "when climate change becomes a determining factor for stability finance, it may be too late", <https://finresp.es/wp-content/uploads/2021/03/las-finanzas-verdes-en-reino-unido-y-espana.pdf>, 01.10.2023, 17.

<sup>12</sup> "Mitigation finance is needed across renewable energy, energy efficiency, transport and forestry, while adaptation finance is needed for activities related to water, agriculture, coastal protection and resilience". See: UNFCCC Synthesis Report: 'Nationally Determined Contributions Under the Paris Agreement: revised synthesis report by the secretariat' (UNFCCC, 25 October 2021), n°196. Particularly, the needs of financing for the adaptation period are considered key but several gaps and vulnerabilities have been identified in The Technical Summary IPCC WGII Sixth Assessment Report, TS-56-57 (hereinafter TS).

<sup>13</sup> International Energy Agency (IEA), Net Zero by 2050. A Roadmap for the Global Energy Sector, October 2021, imploring the governments to implement energy policies to the 2050 climate objectives, 154: "the private sector is central to finance higher investment needs. It requires enhanced collaboration between developers, investors, public financial institutions, and governments.

of the Paris Agreement,<sup>14</sup> in particular “to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty” (Article 2.1 Paris Agreement); a process that has been rightly coined as “financing green”, and that goes hand in hand with the other side of the coin “green finance”, i.e., mainstream climate and environmental factors in financial decision making and market products globally.<sup>15</sup> An increase of at least 590% in annual climate finance is required to meet internationally agreed climate objectives by 2030 and to avoid the most dangerous impacts of climate change.<sup>16</sup> As considered by the IPCC Report 2022, the adaptation finance needs estimates to be higher than those presented in the previous report (AR5) and therefore, enhanced mobilization of and facilitating access to financial resources removing legal barriers are essential for implementation of adaptation and to reduce adaptation gaps.<sup>17</sup>

The consideration of climate risk must be seen from the triple perspective of materiality (the possible damages could be enormous), of its systemic consideration (a wide range of financial and non-financial entities may be affected), instability (both in terms of developments in climate science as in laws and regulations) and finally singularity (climate change is a unique and global type of risk).<sup>18</sup>

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Collaboration will be especially important over the next five to ten years for the development of large infrastructure projects and for technologies in the demonstration or prototype phase today such as some hydrogen and CCUS applications. Companies and investors have declared strong interest to invest in clean energy technologies, but turning interest into actual investment at the levels required in the NZE also depends on public policies”.

<sup>14</sup> An important effort was made in the last COP26. Megan Bowman, “Turning Promises into Action: ‘Legal Readiness for Climate Finance’ and Implementing the Paris Agreement”, *Carbon & Climate Law Review*, Vol. 16, Issue 1, 2022, 42. According to Bowman, “the COP26 summit was deemed the ‘Finance COP’ for its explicit focus on discussions about the public and private sector finance needed to implement the Paris Agreement. Indeed, the resulting Glasgow Climate Pact interweaves non-state actors and private finance into the delivery of Paris objectives in terms that are explicit and unprecedented”.

<sup>15</sup> M. Bowman, “Law and Regulation for Climate Finance: Presenting a Legal Analytical Framework”, *Climate Change and Sustainable Finance: Law and Regulation* (Ed. R Smits), Edward Elgar, 2022, 12, referring to “blending finance”.

<sup>16</sup> Global Landscape of Climate Finance 2021, Global Climate Policy, December 2021, 2.

<sup>17</sup> IPCC (Intergovernmental Panel on Climate Change), *Climate Change 2022, Impacts, Adaptation and Vulnerability, Summary for Policymakers*, Working Group II contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, 30 (hereinafter: IPCC Report (AR 6)).

<sup>18</sup> Climate Related Litigation: Raising awareness about a growing source of risk, Network for Greening the Financial System, Technical document, November 2021, 9, [https://www.ngfs.net/sites/default/files/medias/documents/climate\\_related\\_litigation.pdf](https://www.ngfs.net/sites/default/files/medias/documents/climate_related_litigation.pdf), 01.10.2023.

Mitigation or adaptation actions that focus on short-term solutions will often lead to maladaptation of infrastructures and institutions resulting in inflexibility, exacerbating existing inequalities and increasing expenditures for adaptation needs.<sup>19</sup> Therefore, further economic losses and litigation are likely to increase during the transition period, either from failing to take a perspective based on the long-term impacts of adaptation and mitigation options, or from insufficient consideration of climate risks when designing a project.<sup>20</sup> In addition, as considered by Prof. Solana: “In light of the growing trend of climate change litigation, companies that ignore their potential exposure to climate change litigation could see their operations, value and profitability seriously affected.”<sup>21</sup>

The financial sector, including also the world of insurance and reinsurance, has a fundamental role in this fight against climate change. It is evident that climate issues affect insurance companies in terms of double materiality, both in terms of the object of their business - underwriting activity - and their investment facet. Hence, many insurance companies have publicly stated that they will not secure contracts or invest in projects covering certain oil and gas activities. However, they will accompany those companies that have credible and verifiable plans on the path to decarbonization.<sup>22</sup>

## EXAMPLES OF CLIMATE LITIGATION

There is no uniform definition of “climate change litigation” or “climate litigation”, nor a uniform typology of it, be in general or in particular in the area of climate finance, and climate change cases are difficult to distinguish from the more

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<sup>19</sup> IPCC Report (AR 6), 29 and TS-58.

<sup>20</sup> International Energy Agency (IEA), *Net Zero by 2050. A Roadmap for the Global Energy Sector*, October 2021, 29: “there has been a rapid increase over the last year in the number of governments pledged to reduce greenhouse gas emissions to net zero. Net zero pledges to date cover around 70% of global GDP and CO2 emissions. However, fewer than a quarter of announced net zero pledges are fixed in domestic legislation, and few are yet underpinned by specific measures or policies to deliver them in full and on time”. With these data, the risks of litigation for lack of ambition on climate change will certainly increase in the future.

<sup>21</sup> Javier Solana, “Climate Change Litigation as a Financial Risk”, *Green Finance*, Vol. 2, Issue 4, 2020, 346.

<sup>22</sup> A reasonable position is adopted by financial institutions such as the World Bank Group (Climate Change Action Plan 2021-2025, 25, 27), considering that natural gas investments may be considered aligned in countries where there are urgent energy demands and no short-term renewable alternatives to reliably serve such demand, <https://openknowledge.worldbank.org/server/api/core/bitstreams/86de07e6-a8a2-5ae5-bc20-99a9ffee0b57/content>, 01.10.2023.

general category of environmental cases. This phenomenon is broad and mostly unknown for financial institutions and thus poses new challenges and risks due to the different causes of actions and remedies associated with climate change, and the different procedural and substantive rules. Since the definition adopted is directly linked to the type of disputes to be included in the scope of this paper, we will follow a broad approach and thus we will consider cases that has climate change as an issue of discussion including those with human rights associated to it. This includes lawsuits or complaints that can be brought before internal, investigative, administrative, judicial, or arbitral bodies (commercial and investment). Finally, we will also consider cases where climate change is at the core of the dispute, and to a lesser extent those where it is ancillary to others.<sup>23</sup> Climate litigation in the financial sector can cover different causes of action, whether contractual, non-contractual, corporate (breach of loyalty, diligence or fiduciary duties, information, or disclosure obligations, as in the case of *greenwashing*), administrative, commercial or civil. Examples are beginning to abound in the field of financial companies, except in insurance companies where the phenomenon is still very incipient.<sup>24</sup> Several real examples illustrate the potential litigation that we will see with increasing frequency in the future:

1. *ClientEarth v. European Investment Bank*: Judgment of the General Court, January 27, 2021<sup>25</sup>

The financing by the European Investment Bank (EIB) of a biomass power plant project in Galicia (Curtis Project) is the basis of the litigation that confronted

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<sup>23</sup> Joana Setzer, Catherine Highman, “Global Trends in Climate Change Litigation: 2021 Snapshot”, Grantham Research Institute on Climate Change and the Environment, 2021, 5, 12-13, considering a growing trend of cases where climate change is at the core of the dispute. For a recent discussion of the different concepts: Ana Vargek Stilinović, “The Rise of Climate Change Litigation: Is There a (Real) Legal Risk for EU Banking Sector?”, EU and Comparative Law Issues and Challenges Series (ECLIC), Vol. 6, 2022, 239-242.

<sup>24</sup> Javier Solana, “Climate Litigation in Financial Markets: A Typology”, *Transnational Environmental Law*, Vol. 9, Issue 1, 2019, 19-20, refers to the complaints received by the Financial Conduct Authority (FCA) by ClientEarth, against three insurance companies in the United Kingdom for not having sufficiently reported non-financial information related to climate change in line with the Non-Financial Information Directive as transposed in the UK. Other potential litigation for insurance companies may occur if polluting companies are insured. See: information on Lloyd’s and coal mine insurance on the ClientEarth website, <https://www.clientearth.org/latest/latest-updates/news/lawyers-warn-lloyd-s-over-legal-risks-of-underwriting-contested-carmichael-coal-mine/>, 01.10.2023.

<sup>25</sup> *ClientEarth v. European Investment Bank*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=237047&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2967749>, 01.10.2023.

the NGO activist, ClientEarth, with the EIB, supported by the European Commission as intervener, on account of the rejection by the EIB of the request for internal review made by the NGO of the agreement to grant the financing. The basis on which the EIB Board of Directors preliminarily granted financing to the Curtis project was based on the contribution of the project to the EU objective of mitigating the effects of climate change, counting on the prior favorable opinion of the Commission and of a non-objection opinion from the Kingdom of Spain.

The NGO, ClientEarth, requested before the EIB an internal review of the agreement in accordance with article 10 of Regulation (EC) No. 1367/2006 of the European Parliament and of the Council, of September 6, 2006, regarding the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Regulation) and Decision 2008/50 (Decision of the Commission of December 13, 2007 establishing the provisions for the application of Regulation (EC) no. 1367/2006 of the European Parliament and of the Council regarding the Aarhus Convention with regard to requests for internal review of administrative acts).

In particular, ClientEarth criticized the Board of Directors of the EIB for having committed, in the contested agreement, a manifest error of assessment in considering that the Curtis project would make a significant contribution to Union policy by responding to three of the objectives pursued by it, namely: i) the Curtis project would not contribute to the achievement of Spanish and European objectives in terms of renewable energy production, energy security and environmental objectives; ii) the project would not contribute to preventing forest fires and to the sustainability of forestry activities in Galicia; and iii) the project was not in line with the EIB's priorities in terms of lending in favor of renewable energies and the fight against climate change, therefore, in their opinion, the Curtis project did not have a positive balance in terms of greenhouse gases.

The rejection of the request for internal review was based on legal criteria relating to the application and interpretation of the Aarhus Regulation. Leaving aside the legal vicissitudes and legal grounds that the interested reader can find in detail in the text of the Judgment itself, in particular regarding the interpretation of the concept of measure of individual scope adopted "according to environmental law", included in the article 2, paragraph 1, letter g) of the Aarhus Regulation, it is now worth noting that this is a historic ruling, which has found an NGO right against an institution as sophisticated and unlikely to be the target of legal actions such as the EIB, and has annulled the EIB's decision to declare inadmissible the NGO's request for an internal review of a financing decision taken by the EIB's

Board of Directors. The EIB's refusal to grant legitimacy to an NGO that demands a review of a decision for (supposedly) infringing environmental criteria is curious, given that the institution, if it does boast something precisely, is its "new and ambitious climate strategy and an energy loan policy", as announced on its website.<sup>26</sup> In any case, the tension that exists between the objectives (environmental sustainability) and the means to achieve them (independence and discretion in decision-making, without interference from third parties, NGOs or not) is revealed. In this sense, the ruling focuses its arguments on the admissibility of the application, and on the concept of "act adopted in accordance with environmental law" (which it interprets in a very broad sense) but does not go so far as to question the discretion of the EIB on the merits of the decision itself.

It is a case that also demonstrates how the involvement of third parties can contribute to the control function of sustainable financing and serve as a basis, where appropriate, for future litigation in this area. Transparency of information, the duty to motivate acts, even to review them, may be key to understanding the elements that have been taken into consideration to adopt sustainable financing decisions by public authorities or private institutions.

This decision of the General Court confirms that the very decision to reject an application can be the subject of litigation and that the *enforcement* of sustainable climate policies can come from the (potential) litigation faced by relevant actors, such as corporations, but from which governments, or European institutions such as the EIB, do not escape it either. The growing judicial activism in ESG matters is particularly intense in relation to environmental criteria in general and climate change in particular, and it is here to stay.

In a similar vein, in the case *UK Export Finance (2022)*,<sup>27</sup> a decision by UKEF (the UK's export credit agency) to back a liquefied natural gas project in Mozambique has been unsuccessfully challenged by Friends of the Earth in judicial review proceedings. The campaigners claimed that the decision was unlawful as it was not aligned with the UK and/or Mozambique's Paris Agreement commitments and failed to take into account relevant considerations, including the project's Scope 3 emissions. The Court found that the decision was lawful, concluding that the decision-making process of UKEF was multifaceted and involved balancing

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<sup>26</sup> EIB Announcement, <https://www.eib.org/en/press/all/2019-313-eu-bank-launches-ambitious-new-climate-strategy-and-energy-lending-policy>, 01.10.2023.

<sup>27</sup> Friends Of the Earth Ltd, R. (On the Application Of) v The Secretary of State for International Trade Export Credits Guarantee Department (UK Export Finance) ("UKEF") & Anor [2022] EWHC 568 (Admin) (15 March 2022), <http://www.bailii.org/ew/cases/EWHC/Admin/2022/568.html>, 01.10.2023.



different policy considerations. These included not only climate change but other factors, such as the eradication of poverty in Mozambique.

2. *Abrahams v. Commonwealth Bank of Australia (2017)*<sup>28</sup> illustrates the risks of failure to report. In this case, shareholders of the Bank of Australia sued the bank, alleging a breach of the Companies Act 2001 in relation to the issuance of the 2016 annual corporate report, as financial risks related to climate change, in particular the possible investment in a controversial coal mine were not disclosed. Before the court issued its decision, the shareholders withdrew their lawsuit after the company published an annual report in 2017 that acknowledged the risk of climate change and committed to conducting a climate change scenario analysis to estimate the risks to the company business.

Connected to this case, is *Abrahams v. Commonwealth Bank of Australia (2021)*,<sup>29</sup> in connection with the request for information regarding the bank's reported involvement in various projects, including a gas pipeline in the US, a gas project in Queensland, a gas field and an oil field, among other projects that potentially violate the bank's Environmental and Social Framework (E&S Framework) and Environmental and Social Policy (E&S Policy). In particular, the E&S Framework and the E&S Policy require the bank to carry out an assessment of the environmental, social and economic impacts of projects and whether the projects are in line with the objectives of the Paris Agreement.

*Church of England Pensions Board and others v. Volkswagen AG (2022)*<sup>30</sup> is also worth mentioning. Pension funds from England, Sweden and Denmark filed a lawsuit against Volkswagen AG, after it failed to provide information about its corporate lobbying activities. Through the lawsuit, the institutional investors seek to include in the agenda of the next general meeting a proposal to modify the by-laws by which the company must provide information on its "lobbying" activities to determine to what extent are aligned with the company's climate objectives.

3. *Ewan McGaughey et al v Universities Superannuation Scheme Limited (October 29, 2021)*<sup>31</sup> represents a clear example of potential claims for breach of fiduciary duties of the managers of financial institutions. On 26 October 2021, the claimants,

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<sup>28</sup> *Abrahams v. Commonwealth Bank of Australia (2017)*, <http://climatecasechart.com/non-us-case/abrahams-v-commonwealth-bank-australia/>, 01.10.2023.

<sup>29</sup> *Abrahams v. Commonwealth Bank of Australia (2021)*, <http://climatecasechart.com/non-us-case/abrahams-v-commonwealth-bank-of-australia-2021/>, 01.10.2023.

<sup>30</sup> *Church of England Pensions Board and others v. Volkswagen AG*, <http://climatecasechart.com/non-us-case/church-of-england-pensions-board-and-others-v-volkswagen-ag/>, 01.10.2023.

<sup>31</sup> *McGaughey & Davies v. Universities Superannuation Scheme Limited*, <http://climatecasechart.com/non-us-case/ewan-mcgaughey-et-al-v-universities-superannuation-scheme-limited/>, 01.10.2023.

who are university professors and researchers and contributors to the University's pension fund, commenced proceedings in the UK High Court of Justice against the managers of the private pension scheme (*University Superannuation scheme (USS)*), which is considered the largest private pension scheme in the UK, for breach of duty to act in the best interest of beneficiaries and breach of fiduciary duties.

Along with various other issues related to the administration of the scheme, the plaintiffs argue that fossil fuels have been the worst-performing asset class since 2017 and that the failure of current and former managers to create a credible plan for fuel divestment fossil fuels has hurt and will continue to hurt the Company's success. For the purposes of the claim, it is assumed that the plan's level of investment in fossil fuels exceeds £1 billion. On May 4, 2021, the USS announced its ambition to become "net zero" by 2050. However, according to the plaintiffs, the company does not have a credible plan to achieve this goal. Furthermore, no credible assessment of the financial risk posed to the company by climate change has been provided. On May 24, 2022,<sup>32</sup> the High Court denied permission to bring a derivative action against USSL on procedural grounds. In October 2022, it was reported that the Court of Appeal had granted permission to appeal, with the trial being set for June 13, 2023.

4. ING Bank exemplifies the concept of "indirect polluter" in the context of privately financed projects. In 2020, the OECD National Contact Point for the Netherlands accepted for processing a complaint filed by Friends of the Earth against ING Bank for human rights and environmental abuses in palm oil plantations run by funded companies. by the Bank. The case is particularly significant because it was one of the first to argue that a financial sector actor (in this case, ING Bank) should be considered to have "contributed to" (rather than the lower threshold of being "directly linked" to) abuses in oil palm plantations, for its financing of oil palm companies and for failing to carry out effective due diligence to prevent or mitigate the impacts.<sup>33</sup>

5. *ClientEarth v. Belgian National Bank (April 13, 2021)*<sup>34</sup>

The lawsuit is based on whether the Belgian National Bank's purchase of bonds from fossil fuel companies breached EU law, and has been dismissed on procedural grounds by the Court of First Instance although an appeal is pending before the Brussels Court of Appeal.

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<sup>32</sup> [2022] EWHC 1233 (Ch), <https://www.bailii.org/ew/cases/EWHC/Ch/2022/1233.html>, 01.10.2023.

<sup>33</sup> As pointed out in United Nations, *Remedy in Development Finance: Guidance and Practice*, 2022, 17, <https://www.ohchr.org/sites/default/files/2022-03/Remedy-in-Development.pdf>, 01.10.2023.

<sup>34</sup> *ClientEarth v. Belgian National Bank*, <http://climatecasechart.com/non-us-case/clientearth-v-belgian-national-bank/>, 01.10.2023.

6. *Kang et al. v. Ksure and Kexim (March 23, 2022)*<sup>35</sup> is a sample of the legal and financial risks that are at stake when financing a project related to fossil fuels. In this case, the claimants argued that the project has a significant financial risk since (i) the development of new fossil gas wells is incompatible with the climate objectives of the Paris Agreement, (ii) the demand for fossil gas is expected to fall 55% by 2050 based on the IEA projection of the Net Zero 2050 scenario, and (iii) CCS technologies are not mature enough to ensure reliable capture and storage of CO<sub>2</sub> emissions, creating a serious risk of cost overruns.

7. The pre-complaint letters sent to *BNP Paribas* in October 2022 under the French Duty of Vigilance Act are a recent example and heralds the coming litigation movement in relation to supply chains, as it is the first financial institution that could be held responsible for illegal deforestation and serious human rights violations linked to the Brazilian beef industry.<sup>36</sup> In addition, when complaining about climate change, through this type of letters,<sup>37</sup> which are mandatory under French Law, companies can adopt different attitudes: ignore them, deny any type of responsibility or adopt a proactive attitude that avoids potential litigation.<sup>38</sup> Considering the answer by *BNP Paribas* as largely insufficient and non-satisfactory, the NGOs have decided to bring suit before the Judicial Court of Paris on February 2023.<sup>39</sup>

8. *Connect Human Rights v. BNDES and BNDESPAR (2022)*<sup>40</sup> suggest another important trend that could lead to the modification of corporate policies and

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<sup>35</sup> Kang et al. v. KSURE and KEXIM, <http://climatecasechart.com/non-us-case/kand-v-ksure-andkexim/>, 01.10.2023.

<sup>36</sup> Banktrack Article, 17.10.2022, [https://www.banktrack.org/article/bnp\\_paribas\\_receives\\_a\\_formal\\_notice\\_for\\_financing\\_major\\_brazilian\\_beef\\_producer\\_marfrig\\_implicated\\_in\\_illegal\\_deforestation\\_indigenous\\_land\\_rights\\_violations\\_and\\_slave\\_labor](https://www.banktrack.org/article/bnp_paribas_receives_a_formal_notice_for_financing_major_brazilian_beef_producer_marfrig_implicated_in_illegal_deforestation_indigenous_land_rights_violations_and_slave_labor), 01.10.2023.

<sup>37</sup> Those pre-litigation letters should be taken seriously by company executives. Letters are usually sent giving enough time for the company to act. An example: *Milieudefensie et al. v. Royal Dutch Shell plc*, C/09/571932 / HA ZA 19-379, Judgment of May 26, 2021, the Court refers in no. 2.6 to two letters (Notification of liability) in 2018 and 2019.

<sup>38</sup> For example, *Casino case: Envol Vert et al. v. Casino (2021)*, <HTTP://CLIMATE-CASECHART.COM/NON-US-CASE/ENVOL-VERT-ET-AL-V-CASINO/>, 01.10.2023.

<sup>39</sup> *Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas*, <http://climatecasechart.com/non-us-case/comissa%cc%83o-pastoral-da-terra-and-notre-affaire-a-tous-v-bnp-paribas/>, 01.10.2023; *Notre Affaire à Tous Les Amis de la Terre, and Oxfam France v. BNP Paribas*, <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas/>, 01.10.2023.

<sup>40</sup> *Conectas Direitos Humanos v. BNDES and BNDESPAR*, <http://climatecasechart.com/non-us-case/conectas-direitos-humanos-v-bndes-and-bndespar/>, 01.10.2023.

that includes the participation of third parties that are related to the company. On June 21, 2022, Conectas Direitos Humanos filed a lawsuit against BNDES (Brazilian Development Bank) and BNDESPar, the bank's investment arm responsible for managing its stakes in various Brazilian companies held by the bank. According to Conectas, this is the world's first civil climate action against a national development bank. Although BNDESPar, which is publicly owned, follows an Environmental and Social Policy for Operating in Capital Markets, which bans support for companies with a track record of environmental crimes and modern-day slavery, this policy does not include climate criteria. The company also does not report the carbon emissions associated with its investment portfolio and still maintains equity positions in sectors that are among the most carbon-intensive in the Brazilian economy. The lack of rules or protocols for assessing the impacts of its investments on the climate crisis are in violation of the Brazil's commitments under the Paris Agreement and the country's own PNMC (National Policy on Climate Change), among other provisions.

Based on two technical opinions, Conectas asks the court to require BNDESPar and its controller, BNDES, to be given 90 days to adopt transparency measures and present a plan with rules and mechanisms to commit their investments and divestments to the reduction of greenhouse gas emissions by the companies they finance. In practice, these actions will affect the just transition and guarantee the country's readjustment in the world economy towards sustainable development, which would be the institutional mission of BNDES itself. The plan should align with commitments to reducing GHG emissions by 2030 in the sectors currently financed by the company, in accordance with the international commitments assumed by Brazil. In addition to presenting concrete goals, the plan should be prepared together with civil society, public bodies and academics, and it should provide for environmental and social compensation whenever the targets are not achieved. The case also calls for the creation by BNDESPar of a Climate Situation Room to assess compliance with the targets established in the plan to reduce greenhouse gas emissions, while publishing the progress or setbacks in the sectors that have investments from BNDESPar. One of the requests made in the case is for the Room to be accessed by representatives of civil society, traditional peoples and communities, the Public Prosecutor's Office, the Public Defender's Office, academics and members of the Judiciary.

9. Whether the financial disclosures required for an oil and gas company to list on the London Stock Exchange were lawful, despite not detailing in the prospectus certain climate-related risks is the core issue in *ClientEarth v. Financial Conduct Authority (Ithaca Energy plc listing on London Stock Exchange)*

(2023).<sup>41</sup> The case is also directed against the FCA for breach of the EU Regulation 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market.

10. *Greenwashing*. - The example of greenwashing can be useful to see the complexities of the different litigation systems and remedies to be applied to the same issue. Greenwashing is gaining a lot of attention in general<sup>42</sup> and is likely to be a source of future litigation.<sup>43</sup> The reasons are the adoption of the EU taxonomy regulation of financial products and the investments associated to them,<sup>44</sup> as well as because the supervisory role of market regulators like market, banking, insurance or competition authorities,<sup>45</sup> legal texts such as Unfair Commercial Practices Directive,<sup>46</sup>

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<sup>41</sup> ClientEarth v. Financial Conduct Authority (Ithaca Energy plc listing on London Stock Exchange), <http://climatecasechart.com/non-us-case/clientearth-v-financial-conduct-authority-ithaca-energy-plc-listing-on-london-stock-exchange/>, 01.10.2023.

<sup>42</sup> See for example: “The Corporate Climate Responsibility Monitor” that evaluates the transparency and integrity of companies’ climate pledges, particularly the 2022 Report where none of the 25 companies analyzed are in the financial sector, <https://newclimate.org/sites/default/files/2022/02/CorporateClimateResponsibilityMonitor2022.pdf>, 01.10.2023.

<sup>43</sup> On the 1 June 2023, The European Supervisory Authorities (EBA, EIOPA and ESMA – ESAs) published their Progress Reports on Greenwashing in the financial sector. See: EBA, EIOPA, and ESMA reports. In these reports, the ESAs put forward a common high-level understanding of greenwashing applicable to market participants across their respective remits – banking, insurance and pensions and financial markets.

<sup>44</sup> There are several cases where investors allege that public information of the financial products are fraudulent in relation to climate change risks or that there was a failure to take into account physical and transition risks that are material to the investments. See the cases in: Global Climate Litigation Report, 2020, Status Review, United Nations Environment Programme, Sabin Center for Climate Change Law, 26-27, <https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y>, 01.10.2023. The regulation in this area is well-known. See: EU Taxonomy for Sustainable Activities, [https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities\\_en](https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/eu-taxonomy-sustainable-activities_en), 01.10.2023.

<sup>45</sup> Italian Competition Authority Ruling Eni’s Diesel+ Advertising Campaign (2019), <http://climatecasechart.com/non-us-case/italian-competition-authority-ruling-enis-diesel-advertising-campaign/>, 01.10.2023; and Greenpeace Canada v. Shell Canada (2021), <http://climatecasechart.com/non-us-case/greenpeace-canada-v-shell-canada/>, 01.10.2023. Greenpeace Canada submitted a formal complaint to the Competition Bureau of Canada alleging that Shell’s Drive Carbon Neutral products are making false and/or misleading representations to the public in contravention of the Federal Competition Act.

<sup>46</sup> Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricity and Gaz France, March 2 2022, <http://climatecasechart.com/non-us-case/greenpeace-france-and-others-v-total-energies-se-and-totalenergies-electricite-et-gaz-france/>, 01.10.2023. This case was brought under the French national law implementing the European Union Unfair Commercial Practices Directive, and

unfair competition laws,<sup>47</sup> or misleading or false marketing advertising as by the specific laws<sup>48</sup> or general laws, such as consumer protection rules.<sup>49</sup> A new Directive proposal on greenwashing (Green Claims Directive) could be an important step forward in this area.<sup>50</sup> Other cases could affect the climate neutrality of the General Meetings of the companies.<sup>51</sup>

Greenwashing is by itself emerging as a specific subsector in climate change litigation<sup>52</sup> with its own peculiarities, which in certain cases involves specific

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according to the summary of the case this is the first case challenging an oil and gas major's net-zero claims for greenwashing in Europe. Most recently, on 28 April 2023, Total has counterattacked by filing a civil lawsuit against Greenpeace and the climate consulting group Factor-X alleging that the report issued by the organizations, which claimed that Total did not report its 2019 greenhouse gas (GHG) emissions, is knowingly false and misleading, <https://www.greenpeace.org/international/press-release/56491/greenpeace-finds-totalenergies-emissions-almost-4-times-higher-than-reported/>, 01.10.2023. Total is seeking a French court order to force Greenpeace to withdraw the report and remove all references to Total from its website and in communications. Total has also asked the court to impose a penalty of 2,000 euros on Greenpeace for each day that the complaints remain published and grant a symbolic compensation of 1 euro. Total Press Release, <https://totalenergies.com/media/news/press-releases/totalenergies-response-greenpeace-report>, 01.10.2023.

<sup>47</sup> Verbraucherzentrale Baden-Württemberg e.V. v. Commerz Real Fund Management S.à.r.l., <http://climatecasechart.com/non-us-case/verbraucherzentrale-baden-wuerttemberg-ev-v-commerz-real-fund-management-sarl/>, 01.10.2023. In January 2022, the Court (Landgericht Stuttgart) considered that the advertising of an investment with its positive effect on the 'personal carbon footprint' is a misleading commercial practice and violated Art. 5.1 of the Law against Unfair Competition.

<sup>48</sup> Vegetarian Society et al. of Denmark v Danish Crown (2021), <http://climatecasechart.com/non-us-case/vegetarian-society-et-al-of-denmark-v-danish-crown/>, 01.10.2023.

<sup>49</sup> Ad ex., the cases in relation to investor's fraud and consumer protection in the US, analyzed by: Mark B. Taylor, "Litigating Sustainability - Towards a Taxonomy of Counter Corporate Litigation", *University of Oslo Faculty of Law Legal Studies Research Paper Series No.2020-08*, 8-10.

<sup>50</sup> Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive), COM/2023/166 final, 22 March 2023, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A0166%3AFIN> 01.10.2023.

<sup>51</sup> In a similar vein, see: KlimaAllianz v. FIFA (2022); New Weather institute v. FIFA (2022), Notre Affaire à tous v. FIFA (2022), Carbon market Watch vs. FIFA (2022), in relation to the Celebration of the 2022 Soccer World Cup in Qatar and the publicity about being a carbon neutral event.

<sup>52</sup> Other subsectors are identified. For example, the specialized dispute resolution methods provided for by The World Intellectual Property Organization (WIPO) (Arbitration and Mediation Center) in relation to the disputes derived from the new technologies (patents, transfer of technology, licenses, etc) that can help to mitigate climate change and the transition to a green economy involving the area of intellectual property.

bodies for resolving disputes in the area of marketing and false advertising<sup>53</sup> that are easily accessible to consumers in general and with no litigation costs.<sup>54</sup> In terms of remedies, the most usual are the cessation or modification of the misleading marketing and advertising campaigns and the publicity of the decision.<sup>55</sup> However, the reputational effects of being sued for greenwashing also operate as a “remedy”. The latest case of Deutsche Bank (DB) AG’s asset management is an example after investigations made by the US and German regulators. One of the results so far has been the resignation of the CEO after the shares down more than 20% and the vote against the Board in the Shareholder’s meeting by main investors.<sup>56</sup> Complaints were also made by consumer associations.<sup>57</sup>

Regulators and companies must take into account the risks associated with climate-related litigation against financial and non-financial corporations. This is

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<sup>53</sup> *Australasian Center for Corporate Responsibility v. Santos*, 25 August 2021, <http://climatecasechart.com/non-us-case/australasian-centre-for-corporate-responsibility-v-santos/>, 01.10.2023 (whether an oil and gas company’s representations that natural gas is a clean fuel and that the company has a credible net zero emissions plan were misleading).

<sup>54</sup> See *Complaint to Ad Standards on HSBC’s Great Barrier Reef ad*, 13 October 2021, <http://climatecasechart.com/non-us-case/complaint-to-ad-standards-on-hsbc-great-barrier-reef-ad/>, 01.10.2023.; Id., *Advertising Standards Authority’s Ruling on Shell UK Ltd’s Shell Go+ Campaign* (2020), <http://climatecasechart.com/non-us-case/advertising-standards-authoritys-ruling-on-shell-uk-ltds-shell-go-campaign/>, 01.10.2023.; *ASA Ruling on Ryanair Ltd t/a Ryanair Ltd* (2019), <http://climatecasechart.com/non-us-case/asa-ruling-on-ryanair-ltd-t-a-ryanair-ltd/>, 01.10.2023; *Lawyers for Climate Action Complaint against Energy company Firstgas* (2021), <http://climatecasechart.com/non-us-case/lawyers-for-climate-action-complaint-to-the-advertising-standards-board/>, 01.10.2023.

<sup>55</sup> *Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricity and Gaz France*, 2 March 2022, <http://climatecasechart.com/non-us-case/greenpeace-france-and-others-v-totalenergies-se-and-totalenergies-electricite-et-gaz-france/>, 01.10.2023. The claim was filed before the Judicial Court of Paris on the 2<sup>nd</sup> of March 2022, and the organizations claim for an injunction to stop the campaign, the publication of the decision, the compensation of the moral damages suffered by the organizations and the repayment of legal fees (see full text at: [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220302\\_15967\\_petition.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2022/20220302_15967_petition.pdf), 01.10.2023). Id., *Advertising Standards Authority’s Ruling on Shell UK Ltd’s Shell Go+ Campaign* (2020), <http://climatecasechart.com/non-us-case/advertising-standards-authoritys-ruling-on-shell-uk-ltds-shell-go-campaign/>, 01.10.2023. The ASA stipulated that the advertisement must appear in the “complained of” form and that Shell UK Ltd must clarify that carbon offsetting is contingent on membership of a loyalty scheme.

<sup>56</sup> Reuters, 9 June 2022, <https://www.reuters.com/markets/europe/union-investment-vote-against-dws-management-supervisory-board-agm-2022-06-09/>, 01.10.2023.

<sup>57</sup> *DWS Greenwashing* (2022), though ultimately shelved by DWS’s cease and desist statement, <http://climatecasechart.com/non-us-case/dws-greenwashing/>, 01.10.2023.

particularly important since litigation is a legal and financial risk factor with special characteristics.<sup>58</sup> That includes “materiality” (potential damages could be enormous), systemic importance (financial and non-financial entities may be affected), uncertainty (both in terms of developments in climate science and laws and regulations), and finally uniqueness (climate change is a unique and global type of risk).<sup>59</sup> At the same time, however, these new litigation risks<sup>60</sup> create opportunities to improve accountability. Therefore, it is imperative to treat the various instruments aimed at protecting sustainability and climate change as complementary to each other rather than as alternatives.

Climate change litigation in the financial sector should be taken seriously by corporations and their managers because of the potential legal and financial risks,<sup>61</sup> as well as the disruption it could cause to the core business of financial and other companies in general. The initiation of complaints procedures that cannot offer direct remedies but can provide indirect relief is a possibility that can be used effectively in the fight against climate change. It provides a good example of reputational effects and how attitude change can be achieved indirectly.

#### LITIGATION RISK AS A LEGAL AND FINANCIAL RISK

Litigation risks due to climate change are a legal and financial risk and should be treated as such. From this perspective, it is necessary to avoid the financial and legal risks associated with climate change,<sup>62</sup> and thus align business investments, plans, corporate policies and the duties of administrators with the

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<sup>58</sup> Network for Greening the Financial System, *Raising awareness about a growing source of risk*, 2021, 9.

<sup>59</sup> *Ibidem*.

<sup>60</sup> If weather-related litigation risk should be treated as a subcategory of physical and transition risks, *Raising Awareness*, op. cit., 5.

<sup>61</sup> *Milieudefensie et al. v. Royal Dutch Shell plc*, C/09/571932 / HA ZA 19-379, Judgment of May 26, 2022, no. 2.3.6: “All parts of Europe will suffer the adverse effects of climate change. Individual citizens and businesses will be at substantial financial risk as a result of these impacts”, <https://uitspraken.rechtspraak.nl/#/details?id=ECLI:NL:RBDHA:2021:5339>, 01.10.2023.

<sup>62</sup> A description of the different climate risks faced by banks and insurance companies (physical, transition and legal) can be found in the Supervisory Statement | SS3/19, *Enhancing banks’ and insurers’ approaches to managing the financial risks from climate change* of the Bank of England, Prudential Regulation Authority, <https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/supervisory-statement/2019/ss319>, 01.10.2023.



objectives of the Paris Agreement. The actual scenario depends on many factors such as the corporate object or “purpose” of the company, whether the board complied with the duties of diligence, loyalty and care, the type and location of the investment and others, such as the need to support energy companies during the transitional period. As exemplified in the famous Shell case,<sup>63</sup> which can also extend to financial companies, non-credible, general, vague, intangible, non-binding or vague business plans or objectives or corporate policies are a source of litigation. As such, financial companies’ corporate plans and policies should encompass reduction obligations that are in line with legal obligations.

The remedies sought in such strategic litigation may be less or more intrusive to the essence of the business and the duties of managers. For example, following some of the cases mentioned in the previous section in *Kang et al., v. Ksure and Kexim*, the plaintiffs sought an injunction<sup>64</sup> prohibiting financial and insurance institutions from providing financial support in connection with an investment in a gas project.<sup>65</sup> In *Ewan McGaughey et al v Universities Superannuation Scheme Limited*, the plaintiffs requested that the members of board be removed.

As evidenced, in the financial sector we find not only an increase in litigation, but also a growing shift towards increased liability of financial institutions due to climate change, particularly in relation to investment projects being financed or insured and therefore a change of perspective is evident: from an absence or at most an indirect responsibility to a possible direct responsibility.

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<sup>63</sup> *Milieudéfensie et al. v. Royal Dutch Shell plc*, C/09/571932/HA ZA 19-379, Judgment of 26 May 2021, <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2021:5339>, 01.10.2023. Further: PCWP and others v. Glencore (2022), a legal complaint was lodged on behalf of The Plains Clan of the Wonnarua People (PCWP) and Lock the Gate Alliance, with the Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investments Commission (ASIC) regarding Glencore’s misleading claims about climate impact and its behaviour towards Traditional Owners, <http://climatecasechart.com/non-us-case/pcwp-and-others-v-glencore/>, 01.10.2023.

<sup>64</sup> Roach, op. cit., 120-122, refers to the advantages of requesting precautionary measures prior to litigation, since it helps to give visibility to the problem of climate change, the standard to be applied from the point of view of the procedural satisfaction is less demanding than if it were the merits of the case.

<sup>65</sup> See: O’Donnell case, which is the first case to focus on sovereign bonds and government liability: *O’Donnell v Commonwealth* (2020) VID482/2020: ‘O’Donnell v. Commonwealth’, <http://climatecasechart.com/non-us-case/odonnell-v-commonwealth/>, 01.10.2023. See M. Bowman (Turning Promises), op. cit., footnote 75.

There is a growing tendency to shape climate change litigation with arguments related to human rights,<sup>66</sup> and in what interests us now combined with: i) financial law;<sup>67</sup> ii) corporate law, duties of the board and long-term interests of the company;<sup>68</sup> and iii) civil liability law.<sup>69</sup>

Likewise, there is evidence of growing judicial activism on the part of shareholders and other interested parties against companies and their boards of directors,<sup>70</sup> including those from the financial sector, for not contributing enough to combat climate change,<sup>71</sup> due to deceit or lack of information about climate change,

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<sup>66</sup> J. Solana (2019), op. cit., 6-10; J. Setzer, C. Highman, op. cit., 6.

<sup>67</sup> *Kang et al. v. Ksure and Kexim*, invoking Art.100 of the South Korean Finance Law.

<sup>68</sup> *Ewan McGaughey et al v. Universities Superannuation Scheme Limited* (2021) as derived from sections 171-172 of the UK Companies Act 2006: see claim 4. Breach of the company's long-term duty to act interests: fossil fuels, n°101 and ss of the Petition.

<sup>69</sup> See outside the financial sector: *Neubauer v. Germany* (Constitutional Court of Germany, 24 March 2021, [http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210324\\_11817\\_order-1.pdf](http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210324_11817_order-1.pdf), 01.10.2023; *Steinmetz, et al. v. Germany*, 24 January 2022, <http://climatecasechart.com/non-us-case/steinmetz-et-al-v-germany>, 01.10.2023; *Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG*, 20 September 2021, <http://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/>, 01.10.2023; *Kaiser, et al. v. Volkswagen AG*, 8 November 2021, <http://climatecasechart.com/non-us-case/kaiser-et-al-v-volkswagen-ag/>, 01.10.2023; *Asmania et al. vs. Holcim* (2022), four inhabitants of the Indonesian island of Pari, supported by 3 NGO's, have sued Swiss-based major buildings materials company Holcim. They request compensation and reduction of GHG's emissions, <http://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/>, 01.10.2023.

<sup>70</sup> A current observation, see among others: Global Climate Report (2020), 5, 13. See *ClientEarth v. Board of Directors of Shell*. On 12 May 2023, the UK High Court dismissed the lawsuit brought by ClientEarth against Shell's board of directors, finding that ClientEarth failed to establish a *prima facie* case against the board for its management of climate risks. The claim was based on the fact that the directors breached their duties under the Companies Act, which creates a duty to promote the success of the company and to act with reasonable care, skill and diligence. ClientEarth stated that, among other things, Shell was obliged to adopt and implement an energy transition strategy consistent with the Paris Agreement in meeting these obligations and that it is not because it excludes short- and medium-term objectives to reduce Scope 3 emissions when such emissions represent 90% of the company's total emissions and it is estimated that they will be reduced by only 5% by 2030. The High Court did not agree with the NGO and considered that the allegations were insufficient to declare a violation of the Companies Law, appealing to the judgment of discretion enjoyed by administrators in decision-making since the plaintiff failed to establish the unreasonableness of the decision; it added that the weather-related duties asserted in the lawsuit were "vague" and could not establish "enforceable personal legal duties".

<sup>71</sup> *McVeigh* case which is the first disclosure and due diligence case brought by a beneficiary against his public pension fund: *McVeigh v. Retail employees Superannuation Pty Ltd*, <http://>

either in relation to the projects to be financed or modifications to the corporate structure,<sup>72</sup> by not complying with the obligation to carry out environmental or climate due diligence on a project or a corporation in general or in particular as a condition for granting financing, by investing in projects that are not green, ad ex, on fossil fuels.

Focusing on all interested parties (*stakeholders*) is precisely a trend that is observed at all levels, including the corporate one, where not only shareholders but also third parties are receiving attention, as evidenced by the expansion of legal doctrines in this matter,<sup>73</sup> and that the neglect of those interests can be a source of litigation.<sup>74</sup>

Finally, several interesting phenomena cannot be ignored, some of which have already been mentioned: i) the taking of a shareholding position by climate activists to exercise the rights that may correspond to them as shareholders; ii) coordination between the different organizations of climate activists; iii) in the legal sector, different trends are observed: an increase in teams specialized in matters of sustainability and climate change in law firms,<sup>75</sup> which also includes lawyers who support NGOs;<sup>76</sup> an increase in class action lawsuits; an increased use of litigation financing through crowdfunding and the use of companies specialized in this type of financing; a high degree of legal creativity on the part of lawyers and judges; a greater judicial role of NGOs through the figure of *amicus curiae*, and a certain

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*climatecasechart.com/non-us-case/mcveigh-v-retail-employees-superannuation-trust/*, 01.10.2023. See: M. Bowman (Turning Promises), op. cit., 74; J. Solana (2019), op. cit., 27; J. Setzer, C. Highman, op. cit., 29. “In November 2020 the fund recognized that “climate change is a material, direct and current financial risk to the retirement fund across many risk categories, including investment, market, reputational, strategic, government and third-party risks”.

<sup>72</sup> *AGL Limited*, 12 May 2022, <http://climatecasechart.com/non-us-case/in-the-matter-of-agl-limited/>, 01.10.2023.

<sup>73</sup> Pilar Perales Viscasillas, “Climate Change and Corporate Governance in Spain”, *Ex/Ante Special Issue 2023, Zeitschrift der juristischen Nachwuchsforschung*, 2023, 52-64.

<sup>74</sup> *Kang et al. v. Ksure and Kexim*, where among the causes invoked is that the companies have not completed the required consultation process with the indigenous communities. Also: *Connect Human Rights v. BNDES and BNDESPAR* (2022).

<sup>75</sup> Burkhard Hess, “Strategic Litigation: A New Phenomenon in Dispute Resolution”, *MPILux Research Paper Series*, N°2022 (3), 3.

<sup>76</sup> The publication of handbooks and toolkits for undertaking climate litigation against corporate actors. See: R. COX-M. REIJ, *Defending the Danger Line*, 2022, which offers a manual for lawyers and interested institutions, prepared by the lawyers of the Mileudensie case that describes the legal basis and the approach taken in the lawsuit of the famous Shell case.

judicial permissiveness in the face of the violent actions of some climate activists<sup>77</sup> with the creation of the “state of climate necessity”.<sup>78</sup>

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## RIZICI SUDSKIH SPOROVA U FINANSIJSKOM SEKTORU I KLIMATSKE PROMENE

### Rezime

Strateška parnica postaje sve važnije sredstvo u borbi protiv klimatskih promena zahvaljujući povećanoj svesti o ovom globalnom problemu ali i poznavanju sudske prakse u ovoj oblasti. U ovom članku, autor nastoji da predstavi ne samo različite vrste sporova u finansijskom sektoru u vezi sa klimatskim promenama, već i rastući značaj ovakvih sporova u cilju korigovanja korporativnog ponašanja.

*Ključne reči:* klimatske promene, klimatski sporovi, finansijski sektor, održive finansije

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<sup>77</sup> Example: R v. Brewer and others (Just Stop Oil protest, Esso terminal, Birmingham), 2022.

<sup>78</sup> J. Setzer, C. Highman, op. cit., 13. Décrochons Macron (2019) rejecting the “state of necessity”, <http://climatecasechart.com/non-us-case/decrochons-macron/>, 01.10.2023.

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Article history

Received: 04.10.2023.

Accepted: 03.11.2023.

ORIGINAL SCIENTIFIC PAPER



DRUGA SEKCIJA

ARBITRAŽA

