

Network for Greening the Financial System  
Technical document

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

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*It is my great pleasure to present this document entitled “Climate-related litigation: Raising awareness about a growing source of risk”.*

*Precisely in these days, at the COP26 in Glasgow, leaders from across the globe gather to find ways to address one of the greatest challenges of our time: achieving global net zero by mid-century and keeping the goal of limiting global average temperature increases to 1.5 degrees within reach.*

*In addition to these efforts by politicians, civil society plays an important role in the fight against climate change. One avenue that is increasingly being pursued relates to climate litigation against public and private actors not convincingly supporting the climate change transition.*

*2021 has been an exceptional year for such climate-related litigation. Indeed, both the German Constitutional Court and the French Council of State (Conseil d’Etat) decided, in essence, that the German and French governments, respectively, are not doing enough to combat climate change. In the Netherlands, a court of first instance ruled that the oil and gas company Royal Dutch Shell has to cut its greenhouse gas emissions by 45% by 2030 to align its policies with the Paris Agreement. 2021 was also the year when the first climate-related case we are aware of was brought against a central bank.<sup>1</sup> These are just a few examples of judicial control in this rapidly evolving field of law; in fact, the number of cases brought to court has accelerated across the world.*

*Understanding the risks arising from climate-related litigation is also crucial for central banks and supervisory authorities, as the financial implications of such cases can be substantial. The purpose of this document, based on work conducted this year by the NGFS Legal Task Force on climate-related litigation, is to raise attention to the risks ensuing from climate-related litigation, as they are relevant for microprudential supervision and for the monitoring of financial stability. The document outlines general trends in climate-related litigation and proposes ways of addressing these risks. It has a section on climate-related litigation risk as a sub-category of physical and transition risks and also briefly discusses the direct exposure of financial institutions to climate-related litigation. It includes an overview of selected cases as well as the results of a survey that was conducted amongst NGFS members to gather information from the respective jurisdictions about climate-related litigation.*

*I sincerely hope that this document can provide a first overview about this fast-moving topic, the importance of which, in my opinion, will only further increase in the coming years. Hence, litigation risk will definitely remain an important subject in the work of the NGFS.*

<sup>1</sup> ClientEarth v NBB (pending).

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# 1. Introduction

Climate change is one of the biggest global challenges of our time: it may eventually, but irreversibly, lead to an uninhabitable world.<sup>1</sup> To avoid catastrophic impacts of climate change, the Paris Agreement establishes a climate mitigation goal of keeping global average temperature increases to well below 2°C, preferably 1.5°C, and requires its parties to submit, and periodically update, national climate mitigation targets (“Nationally Determined Contributions”- NDCs) expected to reflect a party’s “highest possible ambition”. According to the latest report of the Intergovernmental Panel on Climate Change (IPCC), global surface temperature will continue to increase until at least the mid-century under all emissions scenarios considered.<sup>2</sup> Even if the world is successful in limiting global warming to below 2°C, there are robust differences in terms of climate impacts between limiting global warming to 1.5°C or between 1.5°C and 2°C above pre-industrial levels.<sup>3</sup> These include increases in mean temperature in most land and ocean regions, increases in the frequency and intensity of hot extremes, marine heatwaves, heavy precipitation in several regions, and the probability of drought and precipitation deficits in some regions as well as reductions in Arctic sea ice, snow cover and permafrost.<sup>4</sup> The 2018 IPCC report also predicts impacts on biodiversity and ecosystems, including species loss and extinction, as well as climate-related risks to health, livelihoods, food security, water supply, human security, and economic growth.

Given this scientific background, the urgency of having to dramatically reduce greenhouse gas emissions, and a perceived lack of sufficient climate action and ambition around the globe, NGOs and individuals are increasingly

turning to the courts to sue States, governmental authorities, and private entities for failing to take appropriate climate action and hold them accountable for their past actions, for failing to comply with existing climate obligations and regulations, and for their current lack of ambition through climate-related litigation.<sup>5</sup> Such court actions may also be brought against central banks and supervisors. For example, in April 2021, the first climate-related litigation against a central bank was launched: The NGO ClientEarth initiated proceedings against the Banque Nationale de Belgique (NBB) before the Tribunal of First Instance in Brussels, alleging that the NBB’s purchases of corporate bonds under the Corporate Sector Purchase Programme (CSPP), as well as the European Central Bank’s (ECB) decision on the implementation of the CSPP violate the European Union (EU) treaties and fundamental rights, as – according to the plaintiff – neither the ECB nor the NBB took environmental requirements into account (*ClientEarth v NBB*).

Apart from such cases targeting central banks and supervisors directly, the financial risks arising from climate-related litigation against other actors are substantial. Back in 2015, Bank of England Governor Mark Carney highlighted that risks arising from such litigation are “significant, uncertain and non-linear” and “will only increase as the science and evidence of climate change hardens.”<sup>6</sup> Based on the work of the NGFS Legal Task Force, this document discusses the implications of this rise in climate-related litigation and the ensuing risks for microprudential supervision and financial stability monitoring.

1 Cf. for instance: Eun-Soon Im, Jeremy S. Pal, Elfatih A. B. Eltahir, *Deadly heat waves projected in the densely populated agricultural regions of South Asia*, *Science Advances*, August 2017, Volume 3, No 8: “Previous work has shown that a wet-bulb temperature of 35°C can be considered an upper limit on human survivability. On the basis of [...] climate change simulations, we project that extremes of wet-bulb temperature in South Asia are likely to approach and, in a few locations, exceed this critical threshold by the late 21st century under the business-as-usual scenario of future greenhouse gas emissions.”

2 *IPCC Report Climate Change 2021: The Physical Science Basis: Summary for Policymakers*, at p. 18.

3 *IPCC Special Report 2018: Global Warming of 1.5°C: Summary for Policymakers*, at p. 7 et seqq.

4 IPCC 2021 Report, at p. 20; IPCC 2018 Report, at p. 7 et seqq.

5 The *UNEP Global Climate Litigation Report: 2020 Status Review*, at p. 6, defines “climate change litigation” as including “cases that raise material issues of law or fact relating to climate change mitigation, adaptation, or the science of climate change”.

6 *Breaking the Tragedy of the Horizon – climate change and financial stability, speech given by Mark Carney at Lloyd’s of London*, 29 September 2015.

## 2. Understanding climate-related litigation in the context of climate-related financial risks

### 2.1. Climate-related litigation risk as a sub-category of physical and transition risks

In its 2019 report “A call for action”, the NGFS presented and discussed the climate-related physical risks and transition risks that could affect economic and financial stability.<sup>7</sup>

**Physical risks** cover the economic effects of both acute climate-related events (e.g. heatwaves, floods, hurricanes and wildfires) and chronic impacts of climate change (e.g. rise in temperatures, sea levels rise and changes regarding precipitation). Acute climate-related events can impair or destroy asset values, and increase underwriting risks for insurers, possibly leading to lower insurance coverage in some regions. On the other hand, the chronic impacts of climate change will require a significant level of investment and adaptation from companies, households, and governments to prevent losses of revenue and capital erosion.<sup>8</sup>

**Transition risks** relate to the process of adjustment towards a low-carbon economy, including the introduction of policy and regulation measures, developments in technology, and changed consumer preferences. Transition risks affect the profitability of businesses and the wealth of households, creating financial risks for lenders and investors. They also affect the broader economy through investment,

productivity and relative price channels, particularly if the transition leads to stranded assets or activities.<sup>9, 10</sup> In general, both physical and transition risks are therefore understood as potentially having an impact on counterparties and/or assets.

While physical and transition risks can and do exist by themselves, these risks can be exacerbated by climate-related litigation.

Regarding physical risks, litigation may be brought against an entity alleged to be (indirectly or directly) responsible for a climate-related extreme event/impact. In the context of climate change, such liability can arise through different routes: The adverse event/impact may be directly attributed to the action (or inaction) of a corporation, government, or other entity. This is the case, for example, if a company is held responsible for directly starting a wildfire which, on the other hand, climate change made more probable. However, sometimes, the action is further removed from the impact. For instance, in the case of *Lliuya v RWE AG* that is currently pending before German civil courts, the plaintiff, a Peruvian farmer, alleges that the utilities company RWE's emissions are partially responsible for the dangerously high-water levels in the farmer's proximity due to melting mountain glaciers. Similar cases have been brought in the United States and New Zealand.<sup>11</sup>

7 NGFS, *First Comprehensive Report, A call for action: Climate change as a source of financial risk*, April 2019.

8 NGFS, *Climate Scenarios for central banks and supervisors*, June 2021, at p. 10.

9 An asset is “stranded” where infrastructure has to be retired before the end of the asset's useful life in order to meet emission reduction targets. This leads to a fall in value of the assets, resulting in losses to both capital and income for owners and increased market and credit risks for lenders and investors. See NGFS, *First Comprehensive Report*, at p. 16 et seq.

10 NGFS, *Climate Scenarios*, at p. 10.

11 See Joana Setzer and Catherine Higham, *LSE Report: Global trends in climate change litigation: 2021 snapshot*, at p. 28 et seq.

### **The notion of attribution in climate science:**

In the past, it has often been considered difficult to attribute the detrimental impacts of climate change to the actions of an individual entity. However, recent scientific developments have made this attribution easier. For instance, according to the latest report of the IPCC, evidence of observed changes in extreme events and their attribution to human influence has strengthened and the remaining carbon budget has been further specified. From a legal point of view, such evidence may support future plaintiffs' attempts to establish causation.

On the other hand, in contrast to many environmental cases in the past that focused on obtaining substantial damages after environmental disasters and were thus backward-looking, recent cases are often forward-looking and try to prevent the scientifically projected gradual destruction of the environment. While plaintiffs in some of these cases are still requesting damages, these damages are often of an ancillary nature, while the main purpose is to increase climate ambition amongst governments and other actors by encouraging them to better manage and reduce climate risks. However, it cannot be excluded that this trend may reverse as climate impacts intensify, climate-related damages increase, and climate science further improves to allow plaintiffs to establish a causal link between greenhouse gas emissions and climate impacts.

The most common avenue of climate-related litigation to date relates to transition risks. Some examples are included in Annex I. First, this covers cases brought against states, companies, or other entities on the basis of their failure to take sufficient action to reduce greenhouse gas emissions as mandated by (newly introduced) national laws or international agreements. Moreover, changed attitudes of customers and rising awareness amongst investors have led to companies being more often sued, for instance, for failing

to take into account or disclose known climate-related risks, or for alleged breaches of the fiduciary duties of their directors or other officers.<sup>12</sup> On the other hand, cases may also be filed by corporations against governments alleging that, for instance, new environmental regulations have led to unforeseen losses amounting to expropriation, which may serve as the basis for compensation claims under bilateral investment treaties or international treaties such as the Energy Charter Treaty.<sup>13</sup>

### **Litigation against public entities:**

In general, and in addition to arbitration cases, the majority of climate-related litigation brought against public entities, i.e. governments or governmental agencies, alleges that they are not taking sufficient actions to reduce emissions and are therefore breaching international climate commitments, public administrative law, and/or constitutional or human rights (see Annex I for examples). 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, it could have a bearing on transition risks.

<sup>12</sup> Setzer and Higham, at p. 29.

<sup>13</sup> See Setzer and Higham, at p. 15.

Climate-related litigation may have significant financial implications, not only for the defendant to the litigation, but also for other institutions with financial exposures to the defendant, including financial institutions. If such litigation is successful, the defendant may have to pay damages, fines and/or costs associated with adapting its operations to comply with the court judgment, with a possible impact on the value of the firm, its creditworthiness and/or its financing costs. The outcome could have an impact on the company's share price and may result in stranded assets.<sup>14</sup> If such litigation is unsuccessful, the defendant may still have to pay substantial legal fees and costs, which may be difficult to recover. Moreover, regardless of the outcome of the case, the defendant may face reputational costs, with spill-over effects for institutions in the same sector. Such reputational costs could also arise when governance and regulatory compliance issues in respect of the institution become evident, and they may then translate into financial costs when there is an impact on the share price of the institution. Eventually, from the perspective of a financial institution, the possible impact of climate litigation on the companies it is exposed to needs to be factored in the assessment of its credit risk, its market risk, etc.

## 2.2. The direct exposure of financial institutions to climate-related litigation

In parallel to climate litigation against companies and governments, the number of climate cases against financial institutions is also rising. For example, cases are brought claiming that financial actors are failing to appropriately disclose and manage climate-related risks.<sup>15</sup> This can cover statements made in annual reports but also in advertisements. Due to regulatory developments, financial institutions may in the future

increasingly face claims relating to disclosures under various taxonomies for green financial products and potentially also breach-of-contract claims relating to such products. Another category are cases alleging breaches of fiduciary duties, for instance if a bank's directors continue to decide to finance highly greenhouse gas emitting projects. It is also conceivable that financiers may be sued as "indirect polluters" for financing such polluting projects. Academics have identified further categories of (possible) climate cases against financial institutions.<sup>16</sup>

In all these cases, financial institutions may then no longer be only indirectly exposed to the risks associated with climate litigation through the asset side of their balance sheet but may bear a potential direct liability.

In addition, insurance companies are exposed on the liability side of their balance sheet in case they insure a client for the liability it can incur (liability risk). This risk is usually provisioned but may be underprovisioned if insurance premiums did not take into account the probability of the client being recognised as responsible or in breach of its obligations. In the long run, this may impact liability insurance premia.

<sup>14</sup> Setzer and Higham, at p. 18.

<sup>15</sup> Setzer and Higham, at p. 28; Javier Solana, *Climate Litigation in Financial Markets: A Typology*, Transnational Environmental Law 2020, Volume 9, at p. 103 et seqq.

<sup>16</sup> Solana, at p. 103 et seqq.

### 3. General trends in climate-related litigation

There is a clear indication of a trend of more climate-related cases being filed around the world in recent years, in particular following the adoption of the Paris Agreement in 2015. The cumulative number of climate-related cases has more than doubled since 2015.<sup>17</sup>

While the vast majority of these cases were filed in the United States, cases have also been filed in at least 39 other countries and before international courts and tribunals.<sup>18</sup> Most litigation takes place in the Global North. However, recently, an increase in climate cases in the Global South has been observed.<sup>19</sup>

As part of its work, the NGFS conducted a survey amongst all NGFS members to gather information from the respective jurisdictions about climate-related litigation.<sup>20</sup> According to the answers received, 58% of respondents expect a general increase in climate-related litigation in the future. However, there is a great variety regarding the current prevalence of climate-related litigation. 52% of respondents confirmed there were climate-related cases in their jurisdiction, while 46% were not aware of any such litigation.

Regarding the outcome of the cases, in 2021, several landmark cases have been decided by courts in different jurisdictions holding that states and corporations violated their environmental obligations under national and international law (e.g. *Constitutional Complaint against the German Federal Climate Change Act*; *Oxfam et al v France*; *Milieudéfensie et al v Royal Dutch Shell*; see Annex I for a detailed description of these cases). In general, there appears to be a growing tendency for courts to grant plaintiffs standing and find in favour of plaintiffs in climate-related litigation.

As to the type of cases that are brought, most cases are filed against governments.<sup>21</sup> On the plaintiffs' side, the survey has identified a notable trend for NGOs to bring litigation against

public and private actors.<sup>22</sup> The NGOs are either parties to the litigation themselves or provide support to individual litigants. At times such NGOs openly acknowledge that they are utilising litigation as a catalyst, and for the purposes of raising awareness and applying pressure, rather than as an end in itself. This rise of strategic litigation, i.e. cases where plaintiffs are using litigation as an activist strategy to pursue a societal shift going beyond the interests of the parties in the case, has also been confirmed in academic literature.<sup>23</sup>

Moreover, NGOs are beginning to emulate the litigation strategies of NGOs in other jurisdictions and cooperating across borders. This is evident in Europe, where the successful *Urgenda* case in the Netherlands led to litigation being brought on similar grounds *inter alia* in France, Ireland, Germany, Italy, and before the Court of Justice of the European Union and the European Court of Human Rights (see Annex I for details).

However, the exact legal basis for climate-related cases varies in different jurisdictions. In the survey, respondents were asked to describe provisions of domestic, international, or supranational law applicable in their jurisdiction that may be relevant to climate-related litigation. The answers indicated that some form of environmental regulation exists in virtually all participating countries. 66% of respondents stated that climate or sound environmental rights resulted (either directly or indirectly) from their constitution. In some jurisdictions, this question is however unresolved and faces litigation in the courts. Many answers also referred to international treaties and conventions, including, but not limited to, the Paris Agreement. Respondents also referred to a variety of other applicable laws and regulations in many different fields of law, including criminal, administrative, and civil law, as well as to decrees issued by courts. EU member states also frequently referred to measures taken on an EU level.

17 Setzer and Higham, at p. 4; see also UNEP Global Climate Litigation Report, at p. 13.

18 Setzer and Higham, at p. 5.

19 Setzer and Higham, at p. 11.

20 In total, the NGFS Legal Task Force received 50 answers from central banks, supervisory authorities, and observers spread over all continents. Thus, about 47% out of the then NGFS' 92 plenary members and 14 observers contributed to the Survey.

21 Setzer and Higham, at p. 5.

22 This trend is also recognised by Setzer and Higham, at p. 12.

23 Setzer and Higham, at p. 12.



Increasingly, in addition to being based on administrative or constitutional law, cases are built on alleged infringements of human rights<sup>24</sup>, which can, in some cases, also broaden the geographical scope of the claim or the geographical impact of the judgment. Other cases invoke breaches of a duty of care under tort and civil law. Moreover, cases are regularly based on facts

that are deemed scientifically settled, as contained, for instance, in the IPCC reports.

In short, these rapid developments indicate that the risk of climate-related litigation has become material in the past years, and it is likely that the number of climate-related cases will continue to rise in the future.

## 4. Addressing the risks associated with climate-related litigation

The prevalence and growth of climate-related litigation should serve to emphasize that all concerned actors, including potential defendants but also supervisory authorities, should observe, address, and manage the risks associated with such litigation.

While the direct risk of litigation should be captured as operational risk by companies, the ensuing risks to assets and counterparties also should be assessed and managed, in particular by financial institutions. Moreover, liabilities undertaken by insurance companies should be provisioned.

The risks associated with climate-related litigation vis-à-vis financial and non-financial corporations should be taken into account in microprudential supervision and financial stability monitoring. This is particularly important as climate-related litigation is a risk factor that displays five noticeable characteristics. First, the potential **magnitude** of the financial impact of these litigations on financial and non-financial entities is very large. The possible damage caused by climate change could be enormous, with a consequent risk that defendants might be held liable for substantial awards of damages or required to undertake significant and costly adaptation measures with possible cliff-effects, e.g. potential bankruptcies and ensuing chain effects on the financial system. Second, a **wide range** of financial and non-financial entities may be affected. Third, the impact of climate-related litigation could materialise in a **non-linear manner**. For example, rapidly evolving developments in the field of climate science (in particular, a more granular

understanding of the remaining global carbon budget and how it is being used up by different stakeholders) may better enable litigants to establish causation between CO<sub>2</sub> emissions and climate impact-induced damages and lead to a wave of potentially successful, and thereby financially devastating, lawsuits against a range of entities. Fourth, parties to the Paris Agreement are required to submit, and periodically update, their NDCs, including **quantifiable climate mitigation targets**, that in some jurisdictions may be transposed into legally binding domestic laws and regulations. These may increase the likelihood of such domestic legal obligations being enforced in the courts. Fifth, climate change is a unique type of risk, as vital interests are affected globally. Given the growing importance of physical and transition risks in general, **climate-related litigation risk may grow** in parallel.

In its 2019 comprehensive report, the NGFS has already identified liability risk as a subset of both physical and transition risks that should be taken into account by supervisors.<sup>25</sup> Hence, supervisors have the responsibility to ensure that financial institutions supervised by them adequately manage financial and operational risks resulting from potential litigation against themselves as well as against institutions to which they are exposed, as is already happening, for example, through stress testing scenarios.

The results of the NGFS's survey reveal that, in general, supervisors and central banks recognize the importance of climate change and related litigation, as well as its potential impact on their work. However, many respondents have

<sup>24</sup> Setzer and Higham, at p. 32.

<sup>25</sup> NGFS, First Comprehensive Report, at p. 14.

not yet taken measures to monitor and incorporate insights from global climate-related litigation into their policy development, modelling, and decision-making processes. 50% of survey respondents reported that they have taken some steps to address these risks by incorporating climate risk (including relevant legislative procedures and obligations) into the exercise of their functions and the design of new policies. These included gathering a better understanding of climate-related risks relevant to their

mandates and operations; and taking into account these risks in supervision, for instance by conducting climate-risk-related stress-tests. Many respondents also reported that they had published guides and/or established working groups, specific units, or started public consultations. However, 22% of respondents reported so far not having taken specific measures to address the risks. Therefore, further incorporation of the risks associated with climate-related litigation is highly recommended.

## 5. Conclusion

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On the basis of the research and the results of the survey, the following conclusions can be drawn.

First, it is clear that climate-related litigation is increasing across jurisdictions and is a fast-moving target. Climate-related cases are increasingly brought directly against financial institutions, and the NGFS considers it likely that these developments will continue in the coming years.

Second, supervisory authorities may not have, so far, fully recognised the impacts of such cases when assessing climate-related financial risks even though they constitute

an important channel through which physical risks and transition risks may affect assets or counterparties of financial institutions.

Therefore, the current trend of rising climate litigation requires a careful monitoring of these risks by supervisors and central banks. Supervisors need to ensure that financial institutions supervised by them adequately manage financial and operational risks resulting from potential climate-related litigation against themselves as well as against institutions to which they are exposed.

## ANNEX I – Examples of recent climate-related litigation

**This Annex provides a selection of cases that were considered particularly interesting by the NGFS.** For a more comprehensive overview, readers may consult the *Climate Change Laws of the World* (CCLW) database, maintained by the Grantham Research Institute on Climate Change and the Environment, or the *Climate Litigation Database*, maintained by the Sabin Center for Climate Change Law.

### Litigation against central banks and supervisors

*ClientEarth v NBB (pending)*: In April 2021, the NGO ClientEarth initiated proceedings for injunctive relief against the Banque Nationale de Belgique (NBB) before the Tribunal of First Instance in Brussels. It appears that this is the first case where proceedings were brought against a central bank as a defendant in climate-related litigation. ClientEarth alleges that the NBB, by implementing the Corporate Sector Purchase Programme (CSPP), violates various EU Treaty provisions as well as the Charter of Fundamental Rights of the EU. In addition, the plaintiff argues that the ECB Decision on the implementation of the CSPP was adopted in breach of these Treaty provisions as, according to the plaintiff, requirements regarding the protection of the environment were not taken into account. Therefore, ClientEarth asks that the Tribunal requests a preliminary ruling from the Court of Justice of the EU (CJEU) on the conformity of the CSPP Decision with the Treaties, and, secondly, that the Tribunal orders the NBB to stop buying corporate bonds under the CSPP.

### Litigation against States before national courts

*Urgenda v the Netherlands (won by NGO)*: In 2019, the Dutch Supreme Court, relying *inter alia* on the European Convention on Human Rights (ECHR), found that the Dutch State was under an obligation to reduce greenhouse gas emissions. It ordered the State to reduce greenhouse gases by at least 25% by the end of 2020 compared to 1990.

*Friends of the Irish Environment v Ireland (won by NGO)*: In 2020, the Irish Supreme Court found that the Irish National Mitigation Plan, adopted pursuant to the Irish Climate Act 2015, did not comply with the requirements of the 2015 Act, because the Plan did not set out a sufficient degree of specificity on how Ireland could transition to a low carbon climate resilient and environmental sustainable economy by the end of 2050.

*Oxfam et al v France (won by NGO)*: In March, the Paris Administrative Court held the French government had failed to do enough to reduce greenhouse gas emissions, thereby failing to comply with its commitments under the Paris Agreement. The court ordered the State to pay a symbolic sum of one euro as compensation for the moral damage. It also gave the relevant State Ministries two months to submit observations with a view for the court to decide on eventual measures including injunctions against the French State to stop the aggravation of the ecological damage. In October 2021, the court ordered the State to take immediate and concrete actions to comply with its commitments on cutting carbon emissions and repair the damages caused by its inaction by December 31, 2022. In a similar case filed by the city of Grande-Synthe (*Commune de Grande-Synthe et al v France*), the Council of State, France's highest administrative court, ruled that the French government is not doing enough to fight climate change and ordered it take "all necessary measures to curb the curve of greenhouse gas emissions" before March 2022.

*Greenpeace et al v Germany (lost by NGO)*: In 2019, a similar challenge was unsuccessfully brought before the Administrative Court of Berlin. However, the German court did recognise that the German government's climate policy is, in principle, subject to judicial review and must be consistent with the government's duties to protect fundamental rights under the German Constitution. The plaintiff decided against appealing this judgment due to a change in the law they had relied upon.

Constitutional Complaint against the German Federal Climate Change Act (won by plaintiffs): In April 2021, the German Constitutional Court held that the provisions of the German Federal Climate Change Act governing national climate targets and the annual emission amounts allowed until 2030 were incompatible with fundamental rights insofar as they lacked sufficient specifications for emission reductions from 2031 onwards. The case was brought by a group of young people from Germany and other countries, supported by various NGOs. The Court specifically relied on the young age of the plaintiffs, finding that their freedoms were violated as under the regime foreseen under the Climate Change Act, the reductions still necessary after 2030 would have to be achieved with ever greater speed and urgency. As an immediate reaction to the judgment, the German Government committed itself to adopt an updated, more ambitious Climate Change Act.

Juliana v United States (pending): The plaintiffs – 21 young citizens, an environmental organization, and “a representative of future generations” – seek an order requiring the government to develop a plan to phase out fossil fuel emissions and draw down excess atmospheric CO<sub>2</sub>. They assert violations of various rights under the US Constitution. In 2020, the Court of Appeals for the Ninth Circuit found that the plaintiffs lacked standing. However, the plaintiffs are pursuing further recourse in district court.

Sharma et al v Minister for the Environment (won by plaintiffs in first instance – on appeal): In a case filed by a group of children as a class action against the approval of a coal mine expansion in 2020, the Federal Court of Australia established a novel duty of care. It declared that the Minister for the Environment, when deciding whether to exercise her powers to approve the mine expansion project, has a duty to take reasonable care to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia at the time of the commencement of the proceedings arising from emissions of carbon dioxide into the Earth’s atmosphere. In establishing the duty of care, the court found that the foreseeable harm from the project could be “catastrophic”, and therefore children should be considered persons who would be so directly affected that the Minister ought to consider their interests when making the approval decision. However, the court declined to issue an injunction to block the coal mine expansion, holding that the plaintiffs had not established that it was probable that the Minister would breach the duty of care in making the approval decision. The Minister has appealed the decision.

### **Litigation against States before the European Court of Human Rights (ECtHR)**

Duarte Agostinho and Others v Portugal and Others (pending): In 2020, a group of Portuguese citizens brought a case before the ECtHR against all EU Member States plus Norway, Russia, Switzerland, Turkey, the UK, and Ukraine. They allege that the States share responsibility for the harms caused by climate change due to their respective contributions to greenhouse gas emissions. As a legal basis, they *inter alia* rely on Articles 2 and 8 ECHR (right to life; right to respect for private and family life), read in conjunction with the Paris Agreement. In addition, the ECtHR has also asked the parties to comment on Article 3 ECHR (prohibition of torture) and Article 1 of Protocol No. 1 (protection of property).

### **Litigation against European institutions and bodies before the Court of Justice of the EU**

Case T-330/18 Carvalho (lost by plaintiffs): In 2018 various individuals from in and outside the EU brought a case against the European Parliament and the Council, arguing that the EU’s existing target to reduce domestic greenhouse gas emissions is insufficient to avoid dangerous climate change. The General Court ruled the action for annulment was inadmissible, on the grounds that the applicants had failed to demonstrate direct and individual concern. In 2021, the CJEU upheld the General Court’s decision and *dismissed the appeal* (C-565/19).

Case T-9/19 Client Earth v EIB (won by NGO in first instance): In January 2021, the General Court of the European Union annulled a decision of the European Investment Bank (EIB) under the Aarhus Regulation to reject a request by an NGO for an internal review of an EIB resolution in respect of a loan for a biomass power plant. The case has been *appealed* by the EIB (C-212/21).

## Litigation against non-financial corporations

The following constitute examples of pending climate-related litigation against corporations.

*Milieudefensie et al v Royal Dutch Shell (won by NGO in first instance)*: In May 2021, the District Court of the Hague in the Netherlands ruled that the oil and gas company Royal Dutch Shell (RDS) has to cut its greenhouse gas emissions by 45% by 2030, based on a violation of the duty of care under Dutch law and human rights obligations. The Court found that RDS is also responsible for emissions from its subsidiaries in other countries and supply chain partners, and therefore for downstream CO<sub>2</sub> reductions. According to the plaintiffs, the first time a court has ruled that a corporation needs to align its policies with the Paris Agreement in a forward-looking manner.

*Lliuya v RWE AG (pending)*: In 2015 a Peruvian farmer brought a case before the German courts against the utilities company RWE. The plaintiff alleges, in essence, that RWE's emissions are partially responsible for the dangerously high-water levels in the farmer's proximity. He is seeking that RWE contributes a percentage to the building of flood-protection measures that is equal to RWE's proportion of global CO<sub>2</sub> emissions from 1751 to 2010. In 2017, the relevant German Appeals Court held that the case was admissible and ordered the parties to submit expert evidence.

*Notre Affaire à Tous and Others v Total (pending)*: In 2019, NGOs brought a case against the French oil company Total, alleging that it had violated the French Commercial Code by failing to adequately report climate risks associated with its activities and take action to mitigate those risks in line with the goals of the Paris Agreement.

## ANNEX II – Bibliography

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## ANNEX III – NGFS Legal Task Force Survey results

**The NGFS Legal Task Force conducted a Survey amongst NGFS members to gather information from the respective jurisdictions about climate-related litigation.** The Survey was sent out to all NGFS plenary members and observers on 16 April 2021, and answers were accepted until 8 June 2021. The goal was to give an overview of the most relevant climate-related litigation cases, including concluded procedures, and, where public, pending or expected procedures, and assess the trends in respect of litigation in different countries. The initial focus was to collect information on climate-related litigation with regard to greenhouse gas emissions based, *inter alia*, on non-compliance with the Paris Agreement. Thus, cases arising from individual pollution incidents, such as oil spills, whether linked to an accident or misconduct, fell outside the scope of the Survey.

**In total, the NGFS Legal Task Force received 50 answers from central banks, supervisory authorities, and observers spread over all continents.** Thus, about 47% out of the then NGFS' 92 plenary members and 14 observers contributed to the Survey.

**None of the NGFS members were aware of any climate-related litigation filed directly against central banks or supervisory authorities in their jurisdiction.** This suggests that the recent case filed by ClientEarth against the Belgian National Bank might indeed be the first climate-related case taken against a central bank. However, 58% of respondents expect a general increase in climate-related litigation in the future. Only 10% of respondents did not expect such an increase, and the remaining 32% did not comment on this question.

**In general, respondents recognize the importance of climate change and related litigation, as well as its potential impact on their work. However, central banks and supervisory authorities so far have only taken limited measures to monitor and incorporate insights from global climate-related litigation risks into their policy development, modelling, and decision-making processes.** 50% reported that they have taken some steps to address these risks by incorporating climate risk (including relevant legislative procedures and obligations) into the exercise of their central bank and supervisory functions and the design of new policies. However, 22% reported so far not having taken specific measures to address the resulting risks.

In the following, a broad overview of the answers to the individual questions of the Survey is given.

### Question 1: Climate-related litigation

Question 1 asked respondents to identify recent or pending climate-related litigation in their jurisdiction, with a focus on greenhouse gas emissions. Where possible, respondents were asked to categorize the cases and identify several key aspects of the litigation.

According to the answers received, there is a great variety in the prevalence of climate-related litigation. 52% confirmed there were climate-related cases in their jurisdiction, while 46% were not aware of any such litigation. Moreover, while some countries only reported a few cases, the United States of America – the country with the highest number – identified 1,200 such cases.

The cases reported covered a wide variety of other topics, including climate rights; domestic climate commitments; keeping fossil fuels in the ground; corporate liability and responsibility; failure to adapt; and climate disclosures and greenwashing.<sup>26</sup> Many of the reported cases concerned climate change indirectly, as they referred, for instance, to planning permits.

<sup>26</sup> This suggested classification was broadly based on the 2020 UN Global Climate Litigation Report.

There was also considerable variety in the types of claims filed, their legal bases, and the plaintiffs and defendants. However, in many countries, NGOs seem to play a very active role, and some answers highlighted the NGOs' specific expertise and international cooperation in the area.

### **Question 2: Provisions relevant to climate-related litigation**

Question 2 asked respondents to describe provisions of domestic, international, or supranational law applicable in their jurisdiction that may be relevant to climate-related litigation.

This question was answered by 94% of respondents, indicating that some form of environmental regulation exists in virtually all participating countries.

66% of respondents stated that climate or sound environmental rights resulted (either directly or indirectly) from their constitution. In some jurisdictions, this question is unresolved and faces litigation in the courts.

Many answers also referred to international treaties and conventions, including, but not limited to, the Paris Agreement. Respondents also referred to a variety of other applicable laws and regulations in many different fields of law, including criminal, administrative, and civil law, as well as to decrees issued by courts. EU member states also frequently referred to measures taken on an EU level.

48% of respondents stated that their jurisdiction had enacted a specific emission-reduction target (often in line with their commitments under the Paris Agreement). Among the 20% that answered the question by saying that they did not have such a target in place, there was nevertheless an indication that such targets would be adopted in the near future, often as part of "climate laws" currently being debated or already in the legislative process.

### **Question 3: Impact of trends on climate-related litigation**

Question 3 asked about the expected impact of recent national and global legal trends on climate-related litigation in the respective jurisdictions. Answers tended to be short but highlighted a general increase in climate-related litigation and rapid developments regarding judicial attitudes in many countries.

### **Question 4: Assessment of climate-related litigation**

Question 4 required an overall assessment of climate-related litigation in the respondents' jurisdictions.

58% of answers stated they expected a rise in climate-related litigation, often citing international developments, new domestic laws but also heightened public awareness as reasons.

With regard to possible consequences of climate-related litigations, respondents cited reputational and transition costs for the financial sector as well as for central banks and supervisors; potential negative impacts on financial stability; the costs of liability itself; regulatory risks; litigation and compliance costs; systemic risks; and potential harmful impacts on monetary policy.

### **Question 5: Measures to address climate-related litigation risk**

Question 5 gave respondents the opportunity to describe measures taken and anticipated by their institution to assess, manage, and mitigate climate-related litigation risk for central banks and supervisors and/or supervised entities.



50% reported that they have taken first steps to address these risks, but 22% explicitly said that no such measures had been implemented. Most of the answers reflected general steps of central banks and supervisors to take into account climate risks. These included gathering a better understanding of climate change-related risks relevant to their mandates and operations; taking into account these risks in supervision, including by conducting climate-related stress-tests; providing climate-related data and information; integrating these risks in central banks' own portfolios and/or into the broader risk management framework; and contributing to the development of taxonomies. Many respondents also reported that they had published guides and/or established working groups, specific units, or started public consultations. Some also indicated their intention to do more in the future. Many answers also referenced steps taken in the Eurosystem as well as the work of the NGFS.



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