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Climate change litigation – a real risk?

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SUSTAINABLE FINANCE CONFERENCE

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Climate change litigation: overview

Climate Change Laws of the World & Grantham Research Institute (May 2022)

- Climate-related litigation cases globally: **2002**
- Climate-related litigation cases globally between 1986 and 2014: **800**
- Climate-related litigation cases globally in the last eight years: over **1,200**
- Roughly one-quarter of these cases filed between 2020 and 2022

Claims against governments:
policies and projects

Claims against corporates:
the impacts of climate change

Claims against corporates:
specific environmental harms

Claims against directors:
derivative claims

Greenwashing

Claims against governments – challenges to policies

Government policy on climate change (e.g., commitments to the Paris Agreement) provides an increasingly fertile ground for legal challenges that have a knock-on impact on businesses and investors. If successful, challenges may prompt further legislative proposals from government, further changing the legal and regulatory environment in which businesses have to operate. Some examples of successful challenges include:

Mar 2021

> The **German Constitutional Court** declared parts of the German Climate Law unconstitutional on the basis that it failed to provide sufficiently detailed CO₂-reduction targets for the period post 2030 until the envisaged climate neutrality by 2050.

> The **Federal Court of Australia** found the environment minister, Sussan Ley, has a duty of care to protect young people from the climate crisis.

May 2021

June 2021

> The **Belgian Court of First Instance** held that, in pursuing their climate policy, the Belgian State infringes human rights by failing to take all necessary measures to prevent the effects of climate change on the plaintiffs' life and privacy.

> The **French Administrative Court** has ordered the French government to repair the consequences of the excess of the greenhouse gas emissions cap set by the first carbon budget (2015-2018) by the end of 2022.

Oct 2021

July 2022

> The **English High Court** found the UK government's plans for reaching net zero was unlawful because it was too vague regarding how the target would be met, and ordered the UK government to publish an updated strategy with more detail.

Conversely, where governments change policies to meet the green agenda, foreign investors materially adversely affected by changes in regulatory frameworks may seek to pursue investment treaty claims for compensation against states.

Claims against governments – challenges to projects

- > NGOs are increasingly bringing legal challenges to project-specific authorisations:
 - > challenge brought by **Friends of the Earth** against the **UK government** in relation to a decision to provide up to \$1.15bn in export finance for a liquefied natural gas project in Mozambique;
 - > challenge brought by **ClientEarth** against the **UK government** in relation to a decision to grant permission for development of the largest gas power plant in Europe; and
 - > challenge brought by **Munupi Clan** of the Tiwi Islands in relation to a decision by **Australia's Federal offshore gas regulator** to approve Santos' AUD 4.7 billion Barossa Project.
- > There have also been claims brought against governments in international fora:
 - > in May 2022, environmental groups sued the **Canadian government** in a bid to overturn its approval of Equinor ASA's huge Bay du Nord offshore oil project; and
 - > in 2020, the **Czech Republic** took **Poland** to the CJEU in relation to Poland's decision to permit expansion of a lignite mine.

Claims against corporates

- > Claims against corporates in relation to their climate/business strategy:
 - > *Milieudefensie v Royal Dutch Shell*: landmark decision by a Dutch court in a claim brought against Shell in May 2021 (now under appeal). The Court found that Shell's decarbonisation plan was not ambitious enough and ordered it to reduce its CO2 emissions by 45% by 2030; and
 - > German NGOs *Deutsche Umwelthilfe* and *Greenpeace* sued *BMW*, *Mercedes* and *Volkswagen* to reduce the sale of cars with a view to achieving certain sector-specific CO2 emissions targets.
- > Claims against corporates in relation to their contribution to climate change:
 - > *Saul Liuya v RWE*: lawsuit by the Peruvian farmer Saul Liuya against RWE, requesting that RWE contribute to the costs of flood protections, in an amount that is equal to RWE's alleged contribution to global warming; and
 - > Various *US states and cities* have filed suits against a number of energy companies seeking compensation for alleged damages traceable to emissions, including under tort (e.g., public nuisance) and consumer protection (i.e., deceptive marketing theories).
- > Claims against corporates in relation to specific environmental harm: *Okpabi v Royal Dutch Shell*, *Mariana v BHP*
- > Soft law claims against corporates (e.g. OECD complaints).

Claims against directors

- > Claimants are also looking to hold directors liable for their decisions in relation to climate risks:
 - > *Ewan McGaughey et al v Universities Superannuation Scheme Limited*: in late 2021, contributors to the USS pension fund sought the court's permission to issue proceedings against the directors of the corporate trustee of the private pension scheme. The members alleged that the directors' decision to continue to invest in fossil fuels, without any or any adequate plan for divestment, constituted a breach of directors' duties (under s.171 and 172 Companies Act 2006) and that this had prejudiced and continued to prejudice the success of the company.
 - > *ClientEarth Letter Before Action (UK)*: in March 2022, ClientEarth (in its capacity as a shareholder of Shell) issued a Letter Before Action in relation to a derivative claim against the Shell Board of Directors. ClientEarth claims that the Shell Board is mismanaging foreseeable risks relating to the physical and transitional impact of climate change, in breach of its duties.

Greenwashing

- > Financial regulators across the globe have made greenwashing a priority area of focus. In 2022:
 - > **SEC** levied fines of \$4m and \$1.5m against financial institutions in relation to ESG investments;
 - > **BaFin** raided the offices of a financial institution in relation to ESG investments;
 - > **ASIC** fined an energy company in relation to sustainability statements; and
 - > **FCA** issued its consultation paper, with a proposed new “anti-greenwashing rule” and stated “*tackling greenwashing is a core regulatory priority for us*”.
- > Advertising regulators are also being brought into the spotlight. In 2022:
 - > **Dutch advertising watchdog** ruled against an energy company in relation to carbon ‘compensation’ adverts; and
 - > **ASA** ruled against a financial institution in relation to adverts that promoted its positive contribution towards the transition to net zero.
- > Allegations of greenwashing can also give rise to litigation risk. In 2022:
 - > two class action law suits were commenced in the US against corporates, in relation to sustainability statements concerning their product; and
 - > a German consumer group announced that it was suing a financial institution for allegedly misrepresenting its green credentials.

What does this mean for sustainable finance?

- > Sustainable lending targets
- > Sustainability-linked loans
 - > KPIs
 - > Sustainability coordinator - contractual protections
- > Claims against lenders
 - > Direct liability?
 - > Creative ways of bringing claims?
- > Reputational risk



Questions?



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