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Preliminary communication

THE RISE OF CLIMATE CHANGE LITIGATION: IS THERE A (REAL) LEGAL RISK FOR EU BANKING SECTOR?*

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ABSTRACT

Banks had a crucial role in both major crises that hit the globe in the last fifteen years. While they were held responsible for onset of the global financial crisis in 2007, banks, oppositely, greatly contributed in mitigating the negative effects of recent health crisis caused by COVID-19. The latter calamity showed us that certain natural events can represent significant threat not only to human lives and health but also to financial markets. Apart from pandemic, there is another nature related threat on the financial market horizon – the climate change. Recent actions on EU and international level show that role of the banks in tackling climate change crisis would not be negligible.

For decades there were multiple attempts to encourage governments to take bolder measures to combat climate change by signing various international agreements. Nonetheless, only the Paris Agreement, that aims to reduce greenhouse gas emission to achieve a climate neutral world by 2050, proved to be a real game changer. Ever since the Agreement entered into force in 2015, there is a continuous and significant rise in climate change litigations. Such litigations are initiated primarily against governments for not reaching the Paris Agreements goals, but also against private sector – notably the emitters of CO2. However, not only are CO2 emitters held personally responsible for environmental damage in legal proceedings conducted, but also other parties that could influence CO2 emissions.

Banks can indirectly influence CO2 emission, for example by providing credit lines to carbon-intensive sectors. However, this indirect influence of banks to climate change is still not specifically recognized and regulated.

Analysis of the climate change litigation landmark cases shows that national jurisdictions do not contain the legal basis for climate change responsibility stricto sensu. This legislative short-

* Views expressed herein are personal to the author and not necessarily attributable to the Croatian National Bank

coming is, however, overcome by interpreting legal principles and human rights obligations that arise from various international documents.

Against this backdrop, it is necessary to ascertain is there a real climate change litigation risk for EU banks? Could banks, as private entities, be held responsible for contribution to climate change by invoking human rights? If the answer is affirmative, what can banks do in order to mitigate this risk? And finally, according to existing legal framework, are Croatian banks exposed to climate change litigation risk?

Keywords: *banks, climate change, climate change litigation, crises, human rights*

1. INTRODUCTION

The outbreak of COVID 19 pandemic has certainly changed our view of potential unforeseen events that could harm our health, our jobs, businesses and economies in general. Now, more than two years into pandemic, the necessity to anticipate such seemingly distant events in a timely manner became evident more than ever.

Climate change was for a long time considered as a distant threat or even as a threat that is fictional, unreal.[1] However, its consequences (heatwaves, hurricanes, floods etc.) are already detrimentally affecting our lives.[2] Unlike pandemic, climate change cannot cease on its own. As it is a global threat, it requires worldwide action aiming to prevent its further adverse effects. Big steps towards that direction have already been made. In 2015, 195 countries, including the EU, reached the Paris Agreement[3] with the purpose to achieve a goal of keeping a global temperature rise well below 2º (preferably 1.5º) above pre-industrial levels and to limit greenhouse gas (GHG) emissions in order to achieve net zero carbon emissions by 2050.[4] While governments are taking effort to reach the mentioned goal by creating and complying with the nationally determined contributions[5], citizens are also doing their part by initiating legal proceedings aiming to prevent further contributions to climate change. Those proceedings, collectively known as

1 See Busch, T.; Judick, L. *Climate change—that is not real! A comparative analysis of climate-sceptic think tanks in the USA and Germany*, Climatic Change, Vol 164, No. 18, issue 1-2, 2021

2 Working Group II contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, *Climate Change 2022 Impacts, Adaptation and Vulnerability, Summary for Policymakers*, pp. 10-21, [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf], Accessed 15 April 2022

3 Paris Agreement, United Nations, Treaty Series, Vol. 3156, adopted on 12 December 2015, entered into force on 4 November 2016 (Paris Agreement)

4 Art. 2(1)(a) and Art. 4(1) of the Paris Agreement

5 Art. 4(2) of the Paris Agreement

climate change litigation, are rising exponentially, especially after the Paris Agreement came into force.[6]

Targets of climate change litigations are primarily addressees of the Paris Agreement, i.e. governments that fail to align with its objectives.[7] Howbeit, the recent trends show that plaintiffs are now shifting their focus on the private stakeholders, claiming their responsibility for preventing to achieve the Paris Agreement goals.[8] Although the private entities are not obliged to act under the Paris Agreement, plaintiffs are finding the way to argue and prove their responsibility.[9] This so-called private climate change litigation is notably initiated against the biggest global direct GHG emitters. Nevertheless, according to publicly available data[10], private climate change litigation can touch the entities that are considered as indirect GHG emitters as they facilitate and enable direct GHG emissions.[11] Banks are obvious example of indirect GHG emissions. The most obvious case of facilitating direct GHG emission would be financing the projects in carbon intense sector. The question that arises is can banks be held legally accountable for providing the finance to carbon intensive sector if lending is their core business? Indeed, is there a legal basis that would oblige banks to cease such financing?

The answer is – there is not, at least there is not any known national or supranational hard law that would set forth such obligation. Nevertheless, the intention that lies behind adoption of the Paris Agreement as well as the current EU legislative proposals oriented towards the aim of strengthening the bank resilience to climate change suggest that banks must scale up their efforts in order to reduce GHG emissions. In addition to that, the Paris Agreement stressed as one of its goal the necessity to make the finance flows towards low GHG emissions and climate-resilient development. How should financial institutions answer to those

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6 By way of comparison, between 1986 and 2017 there were in total 720 cases initiated in the US jursidiction, while from 2017 until 15 April 2022 there were already 680 cases initiated. In the other jurisdictions, the rise is even more evident: between 1994 and 2017 there were altogether 137 cases initiated, while in the last five years there were 242 cases recorded. See Sabin Center for Climate Change Climate Litigation Chart available at: [http://climatecasechart.com/search/], Accessed 15 April 2022

7 By way of example, on the global level (excluding US jurisdiction) there were in total 461 reported cases initiated against the governments, while 99 against other stakeholder, see *Ibid.*

8 *Ibid.*

9 *E.g. see* judgement of the The Hague district court in the case C/09/571932 *Milieudefensie et al. v Royal Dutch Shell* [2021] ECLI:NL:RBDHA:2021:5337, Sabin Center, *op. cit.,* note 6

10 Sabin Center, *op. cit.*, note 6

11 *E.g.* see *ClientEarth v Belgian National Bank, ibid.,* Lawsuit was initiated on 13 April 2021 before the Brussels court of first instance against the Belgian National Bank for purchasing of bonds issued by the direct GHG emitters, available at: [http://climatecasechart.com/non-us-case/clientearth-v-belgian-national-bank/], Accessed, 15 April 2022

requirements is not specified. Even so, the largest EU banks are finding their way to align with the mentioned objectives primarily by setting the stricter conditions for providing credit lines to carbon intensive sector or by ceasing completely financing of projects that contribute to climate change.[12]

The purpose of this paper is to determine what is the prospect of success in a climate change litigation against banks? Can they really be held liable for merely doing their job? In order to answer those questions, author of this paper will give an insight with regard to the meaning and the scope of climate change litigation, determine where exactly banks and climate change meet and can the legal arguments, already used in climate change litigation against the biggest direct GHG emitters, also be used in the possible climate change litigation against banks.

2. SETTING THE SCENE: MEANING AND THE SCOPE OF THE CLIMATE CHANGE LITIGATION

Scholars and experts with the interest in legal aspects of climate change have strongly contributed to determination of the meaning and the scope of climate change litigation.[13] Solana, for example, understands climate change litigation as "any case of an adversarial nature that has climate change as a central issue and that is presented before a judicial authority or an administrative body with regulatory enforcement powers and the authority to issue binding decisions."[14] Setzer *et. al.* identify climate change litigation with "an issue of law or fact regarding the science of climate change and/or climate change mitigation and adaptation policies or efforts as a main or significant issue."[15] Peel and Osofsky, on the other hand, argue that "notions of climate change litigation may extend beyond cases that are centrally 'about' climate change to ones where climate change is one of many is-

[12] BNP Paribas, for example, publicly announced that it will reduce its support for activities with the highest GHG emissions and that will firmly support the energy transition of its retail, corporate and investment customers by issuing dedicated loans. Bank Santander decided to eliminate all exposure to thermal coal mining worldwide by 2030. Similarly, Société General committed to progressively reduce to zero its exposure to the thermal coal sector, at the latest in 2030 for companies with thermal coal assets located in EU or OECD countries and 2040 elsewhere, while UniCredit Group SpA has committed to fully exiting thermal coal mining projects by 2023. The latter bank also decided not support the companies involved in the deforestation of rainforests. Deutsche Bank AG publicly announced that it will subject the provision of financial services to the availability of credible diversification plans for all clients depending more than 50% on coal. See, *inter alia*: [www.banktrack.org], Accessed 15 April 2022

[13] Peel, J.; Lin, J., *Transnational Climate Litigation: the Contribution of the Global South*, The American Journal of International Law, Vol 113, No. 4, 2019, p. 686

[14] Solana, J., *Climate Change Litigation as Financial Risk*, Green Finance, Vol. 2, No. 4, p. 345

[15] Setzer, J.; Higham, C.; Jackson, A.; Solana, J., *Climate Change Litigation and Central Banks*, Legal Working Paper, European Central Bank, No. 21, 2021, p. 5

sues in the litigation, or where addressing climate change is a clear motivation for, or consequence of, bringing a case but is not part of the legal arguments put to the court".[16]

In order to fully understand these various definitions, it is necessary to ascertain the meaning of the substance of climate change litigation. The starting point should be, therefore, defining the notion of "climate change" and determining the requirements that arise from climate change law and policies.

2.1. THE CONCEPT OF CLIMATE CHANGE

The United Nations Framework Convention on Climate Change in 1992 (UNFCCC)[17] is the first legal document containing the internationally accepted definition of the climate change. Pursuant to the UNFCCC, climate change means such change in climate that is caused by human activity that directly or indirectly alters the composition of global atmosphere.[18] It is understood from the remaining text of the UNFCCC that the global atmosphere can be altered by increasing concentration of GHG, which ultimately leads to global warming. [19] Although the document does not specify what kind of human activity leads to this atmospheric pollution, the conclusions of climate change scientist and experts presented in the World Climate Conference held in 1979, upon which the UNFCCC is built, pointed out to gasses emitted from industrial activities, burning of forests and grasslands, as well as ploughing and over-grazing, resulting in dust being lifted up into the atmosphere.[20] Those activities, performed on a large scale, can significantly alter the climate with detrimental effects not only on nature itself, but also on human health, wealth, political stability and world peace.[21]

Definition given in the UNFCCC and conclusions from the World Climate Conference suggest that climate change should be viewed as phenomenon that only refers to atmospheric pollution (*i.e.* GHG emissions) which is exclusively caused by human activity and which inevitably leads to global warming. Therefore, climate

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16 Peel, J.; Osofsky, M., *Climate Change Litigation*, Annual Review of Law and Social Science, vol. 16, 2020, p. 23

17 The United Nations Framework Convention on Climate Change, United Nations, Treaty Series, Vol. 1771, adopted on 9 May 1992, entered into force on 21 March 1994 (UNFCCC)

18 Art. 1(2) of the UNFCCC

19 *E.g.* par. 2 of the Preamble to the UNFCCC

20 World Climate Conference - Extended Summaries of Papers Presented at the Conference, World Meteorological Organization, Geneva, 1979, p. 102, available at: [https://library.wmo.int/doc_num.php?explnum_id=6320], Accessed 15 April 2022

21 *Ibid.* p. 6

change should not be mistaken for purely environmental hazards such as air, water and soil pollution (*e.g.* toxic emissions, hazardous waste or oil spill accidents).

2.2. Obligations arising from climate change law and policies

The above-given illustrative differentiation is in line with what is known in academic discourse as *climate exceptionalism* – regulatory differentiation of environmental and climate change issues.[22] Climate exceptionalists suggest that the climate change is and should be regulated under the specific area of law, i.e. climate law[23], which is different and independent from environmental law.[24] Namely, the purpose of environmental law is *prevention* of immediate negative impacts of human behaviour on the environment[25], while the purpose of the climate law is *adaptation* to the adverse impact of climate change and *mitigation* of human activity attributable to future adverse impacts of climate change phenomenon.[26] It is the course of action, therefore, that differentiates these two areas of laws.[27]

Mitigation measures aim to stabilize concentration of the GHG in the atmosphere by reducing and limiting their emissions in order to achieve net zero carbon emissions by 2050.[28] By way of example, mitigation measure is setting the cap of own GHG emissions. Adaptation measures, on the other hand, are measures that can help to increase the ability to adapt to the adverse impacts of climate change.[29] The content of adaptation measures is not so obvious, nonetheless, those could be any measure created in the adaptation process which is defined as "the process of adjustment to actual or expected climate and its effect",[30] "the efforts aimed at

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22 Hilson, C., *It's All About Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law*, Journal of Environmental Law, Vol. 25, No. 3, 2013, p. 361

23 Odozor, C.; Odeku, K. O., *Explaining the Similarities and Differences between Climate Law and Environmental Law*, Journal of Human Ecology, Vol. 45, No. 2, 2014, p. 128

24 *Ibid*., pp. 128-129; Hilson, *loc. cit.,* note 22

25 Odozor; Odeku, *op. cit*., note 23, p. 129. *E.g.* German Act on the Prevention of Harmful Effects on the Environment Caused by Air Pollution, Noise, Vibration and Similar Phenomena, as last amended on 11 August 2009, available at: [https://www.bmuv.de/fileadmin/Daten_BMU/Download_PDF/Luft/bimschg_en_bf.pdf], Accessed 15 April 2022

26 Odozor; Odeku, *op. cit*., note 23, p. 129

27 Although the above described exceptionality approach is plausible, it cannot be denied that climate change is an issue of the environment. Climate change litigations so far demonstrate that judicial bodies are willing to derive climate change accountability from purely environmental law.

28 Art. 2(1)(a) and Art. 4(1) of the Paris Agreement. *See* Mayer, B., *Climate Change Adaptation and the Law: Is there Such a Thing?*, in: Mayer, B.; Zahar, A. (eds.): Debating Climate Law, Cambridge University Press, Cambridge, 2021., p. 1

29 Art. 2(2) of the Paris Agreement

30 Peel, J.; Osofsky, H., *Rights Turn in Climate Change Litigation?*, Transnational Environmental Law, Vol. 7., No. 1, 2018, p. 44

reducing exposure and vulnerability to physical events that climate change makes more likely"[31], or "any measure that seeks to reduce the harm caused by climate change"[32]. It could be concluded that adaptation measures mainly focus on climate change risk management. Against this backdrop, climate change litigation *stricto sensu* should refer only to legal proceedings in which the legal argument is based on proving the climate related detrimental effects of (i) activities that increase the GHG in such extent which already causes or will inevitably cause the atmospheric pollution (failure to mitigate) and/or (ii) poor or non-existing climate change risk management (failure to adapt).

However, it is worth to mention that publicly available databases of climate change litigations include so-called "incidental" litigations[33] with climate change as only peripheral issue, which is in line with broader definition of climate change litigation given by Peel and Osofsky.[34] This type of litigation includes *e.g.* the request for injunction against environmental activists attempting to disrupt the operations of an airport for the purpose of organizing climate change awareness event (*Heathrow Airport Ltd. and Another v. Garman and Others*)[35] or greenwashing cases (*Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France*).[36] Those cases, in which the main legal argument focuses on issues other than failure to mitigate and failure to adapt in the context of climate change science, but in any way incidentally touch the climate change, could be seen as a climate change litigation in a broader sense.[37]

3. WHAT BANKS GOT TO DO WITH CLIMATE CHANGE?

When thinking about private subjects that can fail to mitigate or fail to adapt and, therefore, be subject of the climate change litigation, most of us will picture natural gas plants, coal power plants and any other fossil fuel facility. They are, indeed,

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31 Mayer, B., *Climate Change Adaptation and the Law*, p. 19, available at: [https://benoitmayer.com/wp-content/uploads/2021/03/Climate-Change-Adaptation-and-the-Law.pdf], Accessed 15 April 2022

32 *Ibid.,* p. 14

33 Ganguly, G.; Setzer, J.; Heyvaert, V.*, If at First You Don't Succeed: Suing Corporations for Climate Change*, Oxford Journal of Legal Studies, Vol. 38, No. 4, 2018, p. 843

34 See *supra 2. Setting the scene: meaning and the scope of the climate change litigation*

35 See judgement of the High Court of Justice, the United Kingdom [2007] EWHC 1957 (QB), available at: [http://climatecasechart.com/non-us-case/heathrow-airport-ltd-another-v-joss-garman-others/], Accessed 15 April 2022

36 See lawsuit initiated by Greenpeace France on 2 March 2022 before the Tribunal Judiciaire de Paris, available at: [http://climatecasechart.com/non-us-case/greenpeace-france-and-others-v-totalenergies-se-and-totalenergies-electricite-et-gaz-france/], Accessed 15 April 2022

37 Cf. Setzer; Higham; Jackson; Solana, *loc. cit.,* note 15

the largest source of the atmospheric pollution.[38] But to maintain the existing ones and to create new carbon intensive projects, money is indispensable. According to Fossil Fuel Finance Report 2022[39], as of conclusion of the Paris Agreement, global banks have steered 4.6 trillion USD into fossil fuel projects, with 742 billion USD investments in 2021 alone.[40] The mentioned data generally would not be considered as problematic since banks' core business is providing banking and financial services, such as lending, investments, issuance of guarantees and advisory services. However, the Paris Agreement should be seen as the game changer in this regard as it paved the way for structural changes in financial decision-making and banking business agenda, going in divestment direction.[41]

3.1. Mitigating and adapting the adverse impacts of climate change within the banking sector

The Paris Agreement binds the agreeing states to strengthen the global response to the detrimental climate change by "making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".[42] In order to determine the more precise content of this objective, it should be read together with the Paris Agreement primary goal of limiting the global average temperature to well below 2°C above pre-industrial levels. Having this in mind, it should be concluded that the mentioned objective could be achieved by ensuring prudent financing of carbon intensive sector and by redirecting finance to low emissions technologies.[43]

The impact of finance flows on climate change was recognized long before the adoption of the Paris Agreement. As of 2001, GHG Protocol serves the private sector to account their GHG emissions.[44] GHG Protocol differentiates Scope 3

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38 Heeds, R., *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010,* Climatic Change, Vol. 122, 2014, pp. 229–241

39 BankTrack *et al.*, *Fossil Fuel Finance Report 2022*, available at: [https://www.bankingonclimatechaos.org//wp-content/themes/bocc-2021/inc/bcc-data-2022/BOCC_2022_vSPREAD.pdf], Accessed 15 April 2015

40 *Ibid.* p. 3

41 Köppl, A.; Stagl, S., *A Plea for a Paradigm Shift in Financial Decision-Making in the Age of Climate Change and Disruptive Technologies*, SUERF Policy Note, Issue No 45, 2018, p. 2, available at: [https://www.researchgate.net/publication/328693170_A_plea_for_a_paradigm_shift_in_financial_decision-making_in_the_age_of_climate_change_and_disruptive_technologies], Accessed 15 April 2022

42 Art. 2(1)(c) of the Paris Agreement

43 Köppl, Stagl, *op. cit.*, note 41, p. 3

44 GHG Protocol Corporate Accounting and Reporting Standard, 2001, World Business Council for Sustainable Development and World Resources Institute, available at: [https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf], Accessed on 15 April 2022

GHG emissions which are considered as a consequence of the activities of the company, but which occur from sources not owned or control by the company[45], *i.e.* emissions that occur along the value chain of the organization.[46] These are, by way of example, banking activities such as lending, investment and advisory services, that are directed towards the carbon intensive sector.[47] As GHG Protocol provides the indirect GHG emitters with a toolkit to calculate their indirect emission, banks have a mechanism to calculate and, consequently, to limit their carbon exposure.

Having in mind the Paris Agreement objective regarding the desirable direction of finance flows and considering that banks are already identified as a potential indirect GHG emitters whose indirect emission can be calculated, it can be concluded that banks are required to do their part in achieving carbon neutral world by 2050. In this regard, the banks should both mitigate and adapt to the adverse effect of climate change. With regard to mitigation measures, banks could set the cap of both their direct and indirect GHG emission; tighten the conditions for financing the carbon intensive sector (e.g. by setting higher interest rates or by obliging the client to guarantee the carbon offset)[48]; completely cease to finance the carbon intensive sector; steer the finance flows towards carbon neutral industries or even perform the carbon offset themselves. With regard to adaptation measures, banks could perform the climate change due diligence prior to providing a credit lines or use the specific financial instruments such as climate derivatives.[49]

Against this backdrop, it can be concluded that banks have unique, two-folded role in the climate change arena. They could be a key factor for achieving the Paris Agreement goals, while on the other hand they can obstruct them by continuing recklessly financing carbon intensive sector.

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45 *Ibid.,* p. 25

46 Furrer, B.; Hamprecht, J.; Hoffmann V. H., *Much Ado About Nothing? How Banks Respond to Climate Change*, Business & Society, Vol. 51, No. 1, 2012, p. 80

47 GHG Protocol, Technical Guidance for Calculating Scope 3 Emissions, Supplement to the Corporate Value Chain (Scope 3) Accounting & Reporting Standard, 2013, World Business Council for Sustainable Development and World Resources Institute, pp. 136-152, available at: [https://ghgprotocol.org/sites/default/files/standards/Scope3_Calculation_Guidance_0.pdf], Accessed 15 April 2022. See also: Teubler, J.; Kühlert M., *Financial Carbon Footprint: Calculating Banks' Scope 3 Emissions of Assets and Loans*, Wuppertal Institute for Climate, Environment and Energy, 2020, available at: [https://epub.wupperinst.org/frontdoor/deliver/index/docId/7587/file/7587_Teubler.pdf], Accessed 15 April 2022

48 A carbon offset means reduction in GHG emissions or compensating for emissions by *e.g.* planting of trees.

49 See: Little, R. L. *et al.*, *Funding Climate Adaption Strategies with the Climate Derivatives*, Climate Risk Management, Vol. 8, 2015, pp. 9-15

3.2. Identifying and conceptualizing the climate change litigation risk for banking sector

Since it can be argued that banks are required to mitigate and to adapt to the adverse impacts of climate change, it is indisputably that failure to do so could amount to certain degree of the climate change litigation risk against the banks. Notwithstanding the outcome, such litigation represents both reputational and financial risks for banks.[50]

Central Banks and Supervisors Network for Greening the Financial System (NGFS) has already detected that banks can be exposed to the risk of climate change litigation *stricto sensu* if they provide financing for carbon intensive sector that is not aligned with the Paris Agreement goals.[51] Namely, plaintiffs can initiate litigations against banks seeking injunctive measures (e.g. to stop providing such finance or to reduce it).[52] It is worth to mention that the US banks, for example, have already been prosecuted for lending money or approving loan guarantees to carbon intensive sector, before the adoption of the Paris Agreement. Those claims were based primarily on federal environmental laws seeking prior consulting and environmental assessment in order to consider the substantial impacts of the financed project on human health and environment.[53] The adoption of the Paris Agreement provoked initiation of similar litigations in Europe. By way of example, it is worth to mention the pending litigation against UK Export Finance's decision to provide a loan for construction of liquefied natural gas project that will allegedly result in total combustion emissions of 4.3 billion tonnes of CO_2, more than the total annual emissions for all 27 countries within the EU.[54] Specific climate change litigation was initiated before the Dutch and the Polish National Contact Points for the OECD Guidelines for Multinational Enterprises against

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50 Solana, *op. cit.*, note 14, pp. 354-356

51 Central Banks and Supervisors Network for Greening the Financial System, *Climate-related litigation: Raising awareness about a growing source of risk*, 2021, p. 7, available at: [https://www.ngfs.net/sites/default/files/medias/documents/climate_related_litigation.pdf], Accessed 15 April 2022

52 Giabardo, C. V., *Climate Change Litigation and Tort Law: Regulation Through Litigation?*, Diritto & Processo, University of Perugia Law School Yearbook, 2019, p. 374

53 *See*: *Center for Biological Diversity et al. v Export-Import Bank of the US*, No. 16-15946, initiated in 2012, available at: [http://climatecasechart.com/case/center-for-biological-diversity-v-export-import-bank/], Accessed 15 April 2022; *Chesapeake Climate Action Network, et al. v Export-Import Bank of the US*, No. 13-1820(RC), initiated in 2013, available at: [http://climatecasechart.com/case/chesapeake-climate-action-network-v-ex-im-bank-of-the-us/], Accessed 15 April 2022 and *Friends of the Earth, Inc., et al. v Spinelli, et al.*, No. 02-4106, initiated in 2002, available at: [http://climatecasechart.com/case/friends-of-the-earth-v-watson/], Accessed 15 April 2022

54 See *Friends of the Earth v UK Export Finance*, No. CO/3206/2020, initiated in 2020, available at: [http://climatecasechart.com/non-us-case/friends-of-the-earth-v-uk-export-finance/], Accessed 15 April 2022

two banks for financing carbon intensive sector without prior consideration of the adverse impact of financed projects under the mentioned soft law instrument.[55]

Second type of detected risk of climate change litigation *stricto sensu* refers to failure to disclose and manage climate related risks. The plaintiffs could, following the example of climate change litigations against Commonwealth Bank of Australia, seek the access to internal documents that relate to the bank's involvement with fossil fuel projects or seek the banks to create a detailed report with information on their current direct and indirect GHG emissions and on plans to mitigate those emissions.[56] With regard to EU banks, this claims could be potentially supported by bank's internal acts, national law transposing e.g. Non-Financial Reporting Directive[57] or international soft law such as the OECD Guidelines for Multinational Enterprises.[58]

The last group of identified risks are connected to climate change litigation in the broad sense. These could be breaching of fiduciary duties of bank's management board by continuing to decide to finance intensive fossil fuel projects or by avoiding to plan the strategies to address the climate change risks.[59] Another climate change litigation risk could arise from breaching of contract relating to green financial products.[60] Mentioned risks will exponentially grow by the rise of the new climate oriented EU regulation regarding the corporate sustainability due diligence[61] and transparency.[62] Finally, as banks are, especially recently, prone to pub-

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55 See *BankTrack, et al. v ING Bank*, available at: [http://climatecasechart.com/non-us-case/banktrack-et-al-vs-ing-bank/], Accessed 15 April 2022 and *Development Yes Open-Pit Mines NO v Group PZU S.A.*, available at: [http://climatecasechart.com/non-us-case/development-yes-open-pit-mines-no-v-group-pzu-sa/], Accessed 15 April 2022

56 See *Abrahams v Commonwealth Bank of Australia*, available at: [http://climatecasechart.com/non-us-case/abrahams-v-commonwealth-bank-of-australia-2021/], Accessed 15 April 2022

57 Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1

58 *Infra.*

59 See *Ewan McGaughey et al v Universities Superannuation Scheme Limited,* available at: [http://climatecasechart.com/non-us-case/ewan-mcgaughey-et-al-v-universities-superannuation-scheme-limited/], Accessed 15 April 2022

60 Central Banks and Supervisors Network for Greening the Financial System, *op. cit.* note 51, p. 7

61 Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final (Proposal of the EU Corporate Sustainability Due Diligence Directive)

62 European Banking Authority, *EBA advises the Commission on KPIs for transparency on institutions' environmentally sustainable activities, including a green asset ratio*, available at: [https://www.eba.europa.eu/eba-advises-commission-kpis-transparency-institutions%E2%80%99-environmentally-sustainable-activities], Accessed 15 April 2022

licly announce their climate related goals[63], they can also be exposed to a liability risk arising from misleading advertisement or greenwashing (climate-washing).[64]

4. CAN BANKS BE LIABLE FOR CONTRIBUTING TO CLIMATE CHANGE BY SIMPLY DOING THEIR JOB?

Although there are various climate related litigation risks that could arise within the banking sector, the purpose of this paper is to determine whether EU banks can be held liable for financing the carbon intensive projects. As stated above, this activity has already been recognized as climate change litigation risk for banks, but unlike other identified risks, this risk does not arise from specific regulation that would oblige banks to cease with funding of carbon intensive sector. Nonetheless, Roger Cox, attorney at law who represented the plaintiffs (NGOs) in the first EU based successful climate change litigation against a corporation – *Milieudefensie v. Royal Dutch Shell*, recently prophetically declared that "the next step is to start also litigating against financial institutions who make these emissions and fossil fuel projects possible".[65]

In anticipation of this potential wave of litigation, it is necessary to ascertain are there plausible legal arguments that would support such claims against banks. In order to do so, this Section will focus on the relevant climate related case law and will test potential banking liability against the arguments that, more or less successfully, supported the claims against the direct GHG emitters.

4.1. Brief overview of private climate change litigation case law

When thinking about how to successfully hold a private entity liable for climate change, the question that imposes itself is: how to prove that heatwaves in Spain or rising of sea levels in the Netherlands are caused by global warming? Furthermore, how to prove that global warming is the consequence of the anthropogenic pollution? And if we manage to overcome these obstacles, the following question would be how to attribute those heatwaves and rise of sea levels to an activity or omission of a specific corporation?

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63 See note 12

64 For more information and examples see Climate Social Science Network, *Climate-Washing Litigation: Legal Liability for Misleading Climate Communications*, 2022, available at: [https://www.cssn.org/wp-content/uploads/2022/01/CSSN-Research-Report-2022-1-Climate-Washing-Litigation-Legal-Liability-for-Misleading-Climate-Communications.pdf], Accessed 15 April 2022

65 CNBC, *Governments and Big Oil were first. The next wave of climate lawsuits will target banks and boards*, 2021, available at: [https://www.cnbc.com/2021/11/11/cop26-climate-campaigners-to-target-banks-after-shell-court-ruling.html], Accessed 15 April 2022

This illustrative example gives an insight to the biggest hurdle in the private climate change litigation – multi-tier climate change causality.[66] Recent developments in the climate change science, resolved some of the problems regarding the causal nexus, as they led on global consensus on anthropogenic climate change. Advancement in climate science have even enabled to trace the GHG emissions in the specific percentage to the specific emitter.[67] These findings have been increasingly used by the plaintiffs in their litigations against the direct emitters.[68] The national courts in the EU took so far the opposite approaches regarding the mentioned causality issues. They either applied strict causality theories of tort law or took much more liberal, holistic approach to determine the climate related liability of a corporation by invoking the universally accepted human rights, legal principles and supranational soft law.

German court followed the strict causality approach in the landmark climate change case *Lliuya v. RWE AG*. In a nutshell, Mr Lliuya, Peruan farmer from Huarazu, lodged in 2015 several claims against RWE arguing that its GHG emissions contributed to global warming that eventually caused melting of the glacial lake near Huarazu. Mr Lliuya argued that RWE should bear the costs of applied measures to prevent damages arising from a flood risk, proportionately to its global GHG emission calculated by the climate science in the amount of 0.47%. The Court dismissed the claims considering that there is no sufficient causal nexus between RWE AG's GHG emissions and a supposed flood risk, with the following elaboration:

"The pollutants, which are emitted by the defendant, are merely a fraction of innumerable other pollutants, which a multitude of major and minor emitters are emitting and have emitted. Every living person is, to some extent, an emitter. In the case of cumulative causation, only the coaction of all emitters could cause the supposed flood hazard (...) Even the emissions of the defendant, as a major greenhouse gas emitter, are not so significant in the light of the millions and billions of emitters worldwide that anthropogenic climate change and therefore the supposed flood risk of the glacial lake would not occur if the defendant's particular emissions were not to exist".[69]

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66 Duffy, M., *Climate Change Causation: Harmonizing Tort Law & Environmental Law*, Temple journal of science, technology & environmental law, Vol. 28, No. 2, 2009, p. 189

67 For more *see* note 38

68 Ganguly; Setzer; Heyvaert, *op. cit.,* note 33, p. 851

69 Decision of the District Court Essen in the case *Luciano Lliuya v RWE AG*, No. 2 O 285/15, 15 December 2016, available at: [http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/], Accessed 15 April 2022

Indeed, holding RWE AG liable for a glacial flood risk in Peru could lead to absurd situations in which practically everyone who takes flights in Europe can be held liable for melting down of the lake at the opposite side of the world. On the other hand, without a proper discouragement, the biggest direct GHG emitters could continue to cause anthropogenic pollution with no backlash. *A fortiori*, indirect GHG emitters such as banks could also continue recklessly fund these direct emitters and in that way, facilitate further pollution. It should be concluded, then, that if the litigation is based solely on the traditional mechanisms of a tort law, due to unique features of climate change litigations, they are sure to fail. However, as some other examples show, these legal obstacles are sometimes prevailed by innovative approaches in a form of judicial activism or by the use of tort-based mechanisms that are not used solely for reparation of damages.

The sheer example of such judicial activism is the judgment of The Hague District Court, the Netherlands, in the case *Milieudefensie et al. v. Royal Dutch Shell*. This landmark judgment switched the course of the private climate change litigation in Europe. As the first European judgment that determined corporate liability for a climate change, it opened the floodgate for a new wave of private climate change litigation across the Europe. What lied at the core of the dispute was whether the Royal Dutch Shell, as a parent company of Shell group, has the obligation to mitigate the adverse impacts of climate change by reducing (more progressively) the CO_2 emissions of the Shell group's entire energy portfolio. The Shell did not deny that its GHG emissions indeed contribute to global warming, but, similar as the reasoning of the German court, it denied the possibility to establish the strong causal nexus between its actions and climate change, as the climate change cannot be attributable solely to the Shell. However, the Court accepted the claim and, on the basis of the Dutch Civil Law, ordered Shell to reduce the entire volume of Shell group CO_2 emissions in the amount that corresponds to the last calculation of percentage to which the global GHG emissions must be reduced in order to achieve the Paris Agreement goals, provided by the climate change science. The Court derived this conclusion from the tort law provisions according to which the tortious act implies violation of duty of care and proper social conduct. The meaning of these two standards is not specified under the Dutch law. Nonetheless, the Court interpreted the mentioned standards by invoking universally accepted human rights enshrined in the international human rights conventions, specifically the right to life and the right to respect for private and family life. The Court, namely, held that Articles 2 (right to life) and 8 (right to respect for private and family life) of the European Convention of Human Rights (ECHR) offer protection against the serious consequences of climate change. This approach corresponds to *reflex effect* doctrine that same Court invoked in the prior *Urgenda* cli-

mate change case against the Dutch government. Pursuant to the *reflex effect* doctrine, all international law obligations that cannot be directly invoked by citizens, serve to interpretation of national legal standards, such as "duty of care" or "proper social conduct".[70] Howbeit, unlike in *Urgenda* case, the Court, in the *Milieudefensie* case, needed to enhance this elaboration by invoking the soft law instruments under which the companies as well should respect human rights, since the Shell as a private entity, is not duty bearer of human rights under the international human rights convention. The Dutch court, therefore, applied liberal holistic approach in legal interpretation and overcame the necessity to establish the sufficient causation between Shell actions and climate change. In that way, it held Shell responsible for merely contributing to global warming:

"This issue, the not-disputed responsibility of other parties and the uncertainty whether states and society as a whole will manage to achieve the goals of the Paris Agreement, do not absolve RDS of its individual responsibility regarding the significant emissions over which it has control and influence. There is also broad international consensus that each company must independently work towards the goal of net zero emissions by 2050 (see legal ground 4.4.34). Due to the compelling interests which are served with the reduction obligation, RDS must do its part with respect to the emissions over it has control and influence. It is an individual responsibility that falls on RDS, of which much may be expected."[71]

The Dutch court judgment in *Milieudefensie* was received with mixed opinions in the academic circle. While one praised the conclusions in the judgment as "revolutionary and groundbreaking"[72] and supported its innovative approach[73] considering it as "a vehicle for speeding up and enforcing the obligations negotiated within the UNFCCC process"[74], the others implied that judgment as this leads to a dikastocracy.[75] Nevertheless, beyond this debate, the constitutionalization of

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70 Judgement of the Den Haag district court in the case *Urgenda Foundation v The State of The Netherlands*, ECLI:NL:RBDHA:2015:7196, 24 June 2015, confirmed by the judgment of the Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, 20 December 2019

71 See note 9

72 Spijkers, O., *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, Chinese Journal of Environmental Law, Vol. 5, 2021, p. 242; *see* also Nollkaemper, A., *Shell's Responsibility for Climate Change, an International Law Perspective on a Groundbreaking Judgment*, available at: [https://verfassungsblog.de/shells-responsibility-for-climate-change/], Accessed 15 April 2022

73 Peel, J.; Markey-Towler, R., *Recipe for Success? Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases*, German Law Journal, Vol. 22, p. 1494

74 Macchi, C.; van Zeben, J., *Business and human rights implications of climate change litigation: Milieudefensie et al. v Royal Dutch Shell*, Review of European, Comparative & International Environmental Law, Vol. 30, No. 3, 2021, p. 414

75 Spijkers, *op. cit.,* note 72, p. 237

private climate change litigation caused a domino effect in the EU jurisdictions. By way of example, *Milieudefensie* judgment gave an impulse for private climate change litigations against direct GHG emitters in Germany on the same or similar grounds, i.e. on national tort law and the Paris Agreement basis, enhanced by invoking of human rights arguments.[76]

4.2. Possible legal basis for holding EU banks liable for indirect emissions of GHG

Although the relevant case law deals with the direct GHG emitters, it gives valuable insight of possible legal basis for holding banks, as indirect GHG emitters, liable for climate change in the future proceedings.

In the following chapter, it shall be examined whether the climate change litigation against banks has prospect of success if built upon arguments arising from tort law, human rights regime and soft law. The hypothetical question is: if a bank financed the coal power plant construction that was not aligned with the Paris Agreement goals and, consequently, released an excessive amount of GHG emissions and caused climate harm (*e.g.* flood), could the bank be held liable for facilitating the climate harm?

4.2.1. *Tort-based approach*

Banks' lending activity is recognized as an indirect GHG emission when it is steered to a carbon intensive sector. The climate change science has already developed methodology for calculating the carbon footprints of banking lending portfolios.[77] In those new circumstances, where banks are aware of potential harm of their lending activities, it can be argued, at least intuitively, that banks are acting tortious every time they are financing carbon intensive sector or projects whose direct GHG emissions are not aligned with the Paris Agreement goals. This intuitive conclusion, however, is not enough to determine their tort liability for merely lending the money.

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[76] See *Deutsche Umwelthilfe (DUH) v Bayerische Motoren Werke AG (BMW),* availabe at: [http://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-bmw/], Accessed 15 April 2022*, Deutsche Umwelthilfe (DUH) v Mercedes-Benz AG*, available at: [http://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/], Accessed 15 April 2022, *Barbara Metz et al. v Wintershall Dea AG*, available at: [http://climatecasechart.com/non-us-case/barbara-metz-et-al-v-wintershall-dea-ag/], Accessed 15 April 2022

[77] *Supra*

National jurisdictions within the EU have adopted different approaches and different tort law theories for determining tort law liability.[78] Analysis of all those peculiarities goes well beyond the scope of this paper. Nonetheless, establishing causal nexus is a common feature of tort law liability[79] and, as already shown, the biggest obstacle for holding the direct GHG emitters liable for climate harm. The causal nexus is even more dubious between the indirect GHG emitter and climate harm.

Determination of causal nexus, as a prerequisite for tort liability, is performed in two phases: determining factual causation[80] and determining legal causation[81]. In all European countries, factual causation is determined under the *condicio sine qua non* test or equivalence theory (analogous to common law "but for" test)[82] pursuant to which the cause is only that of several circumstances without which the damage could not have occurred.[83] The test requires determination of whether absent the defendant's actions, the harm would have occurred.[84] Application of the *condicio sine qua non* test in a hypothetical climate change proceedings initiated against a bank for financing the construction of coal power plant would hardly lead to a conclusion of factual causation between the performed lending and climate harm. Namely, under the *condicio sine qua non* test, the bank could be potentially held liable for climate harm only and only if without the bank's financial assistance, the coal power plant construction could not be realized.[85] This means that the claimant must prove that the financial assistance of a bank was indispensable for realization of the project, that the project would not have gone forward but for bank's financial assistance. Nevertheless, if it is evident that such project will occur regardless of the bank's involvement (i.e. the project owner provided most of its

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78 Infantino, M.; Zervogianni, E., *Summary and Survey of the Results* in: Infantino, M.; Zervogianni, E. (eds.) Causation in European Tort Law, Cambridge University Press, Cambridge, 2017, p. 601

79 Spitzer, M.; Burtscher, B., *Liability for Climate Change: Cases: Challenges and Concepts*, Journal of European Tort Law, Vol. 8., No. 2., 2017, p. 155-156

80 Infantino; Zervogianni, *op. cit.,* note 78, p. 590

81 *Ibid.*

82 *Ibid.,* p. 601

83 *Ibid.*

84 Duffy, M. *op. cit.,* note 66, p. 188

85 *E.g.* in Order Denying Defendants' Motion for Summary Judgment, No. C 02-4106 JSW, rendered in the case *Friends of the Earth, Inc. v. Spinelli*, US District Court for The Northern District of California concluded, by applying "but for" test that plaintiffs have sufficiently demonstrated causation: "Plaintiffs submit evidence demonstrating a stronger link between the agencies' assistance and the energy-related projects. For example, ExIm has stated that it "supports export sales that otherwise would not have gone forward." (...) And OPIC has stated that when it determines which projects to support, it evaluates them "to ensure they would not have gone forward but for OPIC's participation.", available at: [http://climatecasechart.com/case/friends-of-the-earth-v-watson/], Accessed 15 April 2022

own funding or is prepared to obtain funding from other sources, including other banks if a defendant bank's money is unavailable), then the bank could not be held liable under the *condicio sine qua non* causality test.[86] *Condicio sine qua non* test, therefore, demands a strong link between the performed lending and the climate harm itself, which is hard or even impossible to establish.

If in any case factual causation could be established, legal causation is furthermore required for attributing the tortious act to a specific alleged tortfeasor. The most common theory used in the continental law is *the adequacy theory* pursuant to which the defendant action or omission must be adequate cause of the plaintiff's harm[87], it must typically cause the harm[88] that occurred. This means that if multiple human actions led to a damage, the cause of the damage will only be the one that is closest to the damage.[89] By way of our hypothetical example, pursuant to *the adequacy theory*, bank could not be liable for climate harm in a form of flood, as flooding is not typical and regular consequence of lending activity.

Against this backdrop, it can be concluded that under the current conditions of the prevailing *condicio sine qua non* test and the *adequacy theory* within the continental law jurisdictions, successful climate change litigation against EU banks, based solely on tort law, seems pretty much far-fetched. Croatia follows this continental law approach and accepts *the adequacy theory* developed through the court practice.[90] However, as the law does not prescribe the process of determination of causal nexus, it can be argued that there is enough "manoeuvring space" to introduce new causation theories. Indeed, some argue that for combating climate change in the judicial arena, tort law should be redefined.[91]

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86 *E.g.* US Court of Appeals for The Ninth Circuit in its Opinion, No. 16-15946, as of 28 June 2018, by applying "but for" test concluded: "Plaintiffs did not offer a sufficient basis to determine that there was a reasonable probability the Projects would be halted if the Ex-Im Bank's funding was vacated. The district court highlighted that funding from the Ex-Im Bank constituted a relatively small percentage of the costs of the Projects and that the Projects had already begun before securing Ex-Im Bank approval and had made substantial progress to that point. The district court also noted the large financial resources available to the principals behind the Projects. The district court noted that another LNG project."; available at: [http://climatecasechart.com/case/center-for-biological-diversity-v-export-import-bank/], Accessed 15 April 2022

87 Infantino; Zervogianni, *op. cit.,* note 78, p. 603

88 Klarić, P., *Uzročna veza kod odgovornosti za štetu u medicini*, Zbornik radova aktualnosti zdravstvenog zakonodavstva i prakse, II. znanstveni skup, 2011, p. 143

89 Klarić, P.; Vedriš, M., *Građansko pravo, Opći dio, stvarno, obvezno i nasljedno pravo*, *XIV. izmijenjeno i dopunjeno izdanje*, Narodne novine, 2014, p. 595

90 Gorenc, V. (ur), Komentar Zakona o obveznim odnosima, Narodne novine, Zagreb, 2014, p. 1704

91 Giabardo, C. V., *op. cit.*, note 52, p. 382; *see* also Hinteregger, M., *Civil Liability and the Challenges of Climate Change: A Functional Analysis*, Journal of European Tort Law, Vol. 8, No. 2, 2017, p. 260

With regard to possible re-defining of the tort law for establishing climate change tort liability, certain common law legal theories should be addressed, having in mind that it is not unusual for continental law to accept common law solutions.[92] By way of example, tort liability for indirect GHG emissions could be inferred from the *secondary liability theory* that has been developed within the framework of copyright and trademark law. Namely, pursuant to this theory, the defendant could be held liable for tortious act even if he did not directly commit it.[93] The defendant will be held liable if he somehow facilitated or encouraged tortious act. As Bartholomew and Tehranian simply explained: "(...) an indirect participant A may encourage direct participant B to throw rocks during a riot. One of the rocks thrown by B injures victim C. Even though A does not throw any rocks himself, A is subject to liability to C as a contributory tortfeasor."[94] Under this theory, the contributor shall be held liable only if his/her contribution is substantial and only if he/she had actual and sufficient knowledge that direct tortfeasor's conduct constituted a breach of duty.[95] However, such contributory act will not constitute contributory infringement if it is universally accepted that it regularly serves for legitimate, unobjectionable purposes.[96] Under this theory, banks could be seen as indirect tortfeasors for facilitating the direct tort. It is, however, true that the bank's lending activity regularly serves for non-infringing purposes. On the other side, it can be argued that, non-critical and reckless funding of carbon intensive sector could be considered as an indirect, contributory tort. This especially having in mind that under the Paris Agreement financial institutions are invited to do their part for achieving its goals. Furthermore, in the present conditions, it is impossible for banks to ignore the climate change science that is developed to the point that it can determine the exact share of a bank's client in a global contribution of GHG and the carbon footprint of bank's lending portfolio.[97]

Further to the above-mentioned solutions for possible future re-defining of the tort law, it is worth to mention that EU law is also doing its part with regard to tort-based climate change litigation. Civil liability for climate change could be re-

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92 *E.g.* defective product liability first appeared in the US before being developed in the European countries – *see* Baretić, M., Odgovornost za neispravan proizvod in: Kuzmić, M.; Šumelj, A. (eds.), Zakon o obveznim odnosima : najznačajnije izmjene, novi instituti, Inžinjerski biro, Zagreb, 2005, p. 222

93 Bartholomew, M.; Tehranian, J., *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 Berkeley Tech. L.J. 1363, Vol. 21, No. 4, 2006, p. 1366

94 *Ibid.*

95 *Ibid*., p. 1367

96 Powell, C. D., *The Saga Continues: Secondary Liability for Copyright Infringement Theory, Practice and Predictions,* Akron Intellectual Property Journal, Vol. 3, No. 1, p. 193

97 *Cf.* Giabardo, op. *cit.,* note 52, p. 377

sorted in the future EU Corporate Sustainability Due Diligence Directive[98], as the proposal of this Directive introduces civil liability of big corporations[99], including banks[100], for damages that occurred as the result of failing to take appropriate measures to prevent or to mitigate adverse human rights and environmental impacts of their business. However, it is unclear whether this civil liability regime would be incorporated into the existing national tort law regimes (and, therefore, be affected with the same obstacles regarding the causation), or the Member States would be required to re-define national tort law regimes for the purpose Directive transposition. If adopted with the proposed text, the Directive will hardly ensure the level-playing field with regard to climate change liability due to its limited scope of application.[101]

4.2.2. *Rights-based approach*

As the tort law contains obvious obstacles for successful climate change litigation, it was necessary to find another route to prosecute climate change harm. The idea of basing climate change lawsuits solely or additionally on human rights is not a new thing.[102] Indeed, it is becoming more and more evident that detrimental effects of climate change are substantially affecting human rights.[103] Even the Paris Agreement itself bashfully declared that states, as agreeing parties, should respect human rights when addressing climate change.[104] This human rights reference should not be neglected as it, at least, indicates that the Paris Agreement should be interpreted by reference to existing international human rights law, following the principle of systemic integration that arises from the Vienna Convention on the Law of Treaties.[105,106] Howbeit, only recently has human rights-based climate change litigation achieved success. While successful rights-based litigation against a state is not a surprise, as only the states are duty-bearers of human rights obliga-

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98 European Banking Authority, *op. cit.,* note 62

99 Art. 2 of the Proposal of the EU Corporate Sustainability Due Diligence Directive

100 Art. 3(a)(iv) of the Proposal of the EU Corporate Sustainability Due Diligence Directive

101 *See* note 102, *see* also: Euractiv, *LEAK: EU due diligence law to apply only to 1% of European companies,* available at: [https://www.euractiv.com/section/economy-jobs/news/leak-eu-due-diligence-law-to-apply-only-to-1-of-european-companies/], Accessed 15 April 2022

102 Peel, Osofsky, *op. cit.,* note 30, p. 46

103 *Ibid.,* p. 40

104 Par. 11 of the Paris Agreement Preambule

105 Vienna Convention on the Law of Treaties, United Nations, Treaty Series, Vol. 1155, adopted on 23 May 1969, entered into force on 27 January 1980

106 Savaresi, A., *Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages* in: Duyck, S.; Jodoin. S., Johl A. (eds.), Routledge Handbook of Human Rights and Climate Governance, Routledge, London, 2017, p. 18

tions[107], holding a corporation liable for climate change based on human rights violations arguments, as in *Milieudefensie* judgment, is an indeed unexpected novelty. Nevertheless, the *Milieudefensie* judgment is in line with the new tendencies of clarifying corporate responsibility with regard to human rights[108] and of growing recognition that the corporations as well should act in a way that ensures the respect of human rights deriving from international law[109].

In the *Milieudefensie* judgment, the court invoked right to life and right to respect for private and family life enshrined both in the ECHR and in the International Covenant on Civil and Political Rights (ICCPR) as interpretative tools for holding corporation liable in the climate change context. The court acknowledged that although these human rights cannot be directly applied in the private dispute, they offer a protection against the detrimental consequences of climate change.[110] Such conclusion of the court is plausible, having in mind that both right to life and right to respect of private and family life are, *rationae materiae*, the most suitable for addressing the climate change adverse impact. Namely, pursuant to the developed Strasbourg *acquis*, the right to life implies guarantee of protection from environmental or industrial disasters that represent the risk to human lives[111], while the right to respect of private and family life includes protection from unsafe or disruptive environmental conditions[112]. In addition, Human Rights Committee, body that monitors implementation of the ICCPR by its States parties, declared that climate change constitutes a serious threat "to the ability of present and future generations to enjoy the right to life".[113]

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107 Savaresi, A.; Auz, J, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, Climate Law, Vol. 9, 2019, p. 247

108 *Ibid.,* p. 259

109 See Ratner, S. R., *Corporations and Human Rights: A Theory of Legal Responsibility*, The Yale Law Journal
Vol. 111, No. 3, 2001, pp. 443-545; or BankTrack, *Human Rights, Banking Risks, Incorporating Human Rights Obligations in Bank Policies*, p. 9, available at: [https://www.banktrack.org/download/human_rights_banking_risks_1/1_0_070213_human_rights_banking_rrisks.pdf], Accessed 15 April 2022

110 Judgment in Case C/09/571932 *Milieudefensie v Royal Dutch Shell*, [2021] ECLI:NL:RBDHA:2021:5337, paras. 4.4.9.-4.4.10.

111 Council of Europe, Registry of the ECtHR, *Guide on Article 2 of the European Convention on Human Rights*, 2021, pp. 12-13, available at: [https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf], Accessed 15 April 2022

112 Council of Europe, Registry of the ECtHR, *Guide on Article 8 of the European Convention on Human Rights*, 2021, pp. 42-43, available at: [https://www.echr.coe.int/documents/guide_art_8_eng.pdf], Accessed 15 April 2022

113 Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 2018, p. 14., available at: [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf], Accessed 15 April 2022

The *Milieudefensie* judgment is an example of constitutionalization of climate change litigation that can be expected to rise in the future. Namely, unlike tort law, human rights are transnational and unified with regard to their meaning and the scope, at least in the EU territory, as all EU members are parties to the ECHR. Therefore, the attempts of the replication of *Milieudefensie* rights-based arguments against other direct GHG emitters could be expected, especially in the EU. But if there is a tendency of holding direct GHG emitters liable for climate change based on human rights arguments, could banks also be held liable for financing the businesses that evidently hurt climate, i.e. for facilitating the direct violation of human rights?

It is considered that banks can indirectly complicit in violation of human rights committed by their clients by enable them to operate through opening bank accounts or through funding.[114] Indirect complicity implies that banks "do not directly contribute to the violation of human rights, but rather support, in a general way, the ability of the perpetrator to carry out systematic human rights violations".[115] Based on this argument, banks have already been called in for facilitating violation of labour rights, environmental rights, or even for crimes against humanity.[116] Hence, it does not come as a great surprise that banks have already been prosecuted for human rights violations in relation to their lending activity. By way of example, in *In re South African Apartheid Litigation* case, several banks, including Commerzbank and Deutsche Bank AG, were prosecuted for aiding and abetting violations of international law and human rights by financially supporting apartheid regime.[117] In *Arab Bank* case, the mentioned bank was prosecuted before US court for providing financial services to terrorist's organizations that sponsored attacks in Israel.[118] Both of the cases were eventually dismissed – latter for procedural reasons (even though the bank was at first found liable for deliberate support of terrorist activities), while former under the conclusion that the funding provided by banks is not sufficiently connected to the primary violation of international law.[119]

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114 Foley Hoag LLP and the United Nations Environment Programme Finance Initiative, *Banks and Human Rights: A Legal Analysis*, 2015, p. 29, available at: [https://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf], Accessed 15 April 2022

115 Wettstein, F., *The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy*, Journal of Business Ethics, Vol. 96, No. 1, 2010., p. 36

116 BankTrack, *op. cit.*, note 109

117 For more information on the case see: Gubbay, I., *Towards Making Blood Money Visible, Lessons Drawn from the Apartheid Litigation* in: Bohoslovsky, J. P.; Černič, J. L. (eds.), Making Sovereign Financing and Human Rights Work, 2014, pp. 337-356

118 Foley Hoag LLP and the United Nations Environment Programme Finance Initiative, *op. cit.* note 112, pp. 29-30

119 *Ibid.*, pp. 30-31

The former failure to establish liability for human rights violation does not mean that banks can disregard human rights. Under the UN Guiding Principles on Business and Human Rights (UNGPs)[120], international soft law instrument, all corporations, including banks, should refrain from any conduct that could harm universally recognized human rights. To be more precise, banks should, pursuant to UNGPs, avoid both causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; as well as seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business.[121] As it is explained in the UNGPs, "activities are understood to include both actions and omissions; and its business relationships are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services."[122] Although the UNGPs is not legally binding, it has a significant power of authority over the EU corporations, especially since EU Commission officially declared in 2011 that it expects all European enterprises to meet the corporate responsibility to respect human rights, as defined in the UNGPs.[123]

Another valuable soft law instrument that attaches human rights to corporate responsibility are the OECD Guidelines for Multinational Enterprises (OECD Guidelines)[124] that draws upon the UNGPs and, same as the UNGPs, recognize the importance of ensuring respect of human rights within corporations' activities. The OECD Guidelines declare that corporations should prevent or mitigate adverse human rights impacts that are directly linked to their business operations, even if they do not contribute to those impacts.[125] The corporations could meet this requirement by using their leverage to influence the entity with whom the business relationship is established (e.g. client) causing the adverse human rights

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120 United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Project, Respect and Remedy" Framework*, 2011, available at: [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf], Accessed 15 April 2022

121 *Ibid*., Principle 13

122 *Ibid.,* Commentary to Principle 13

123 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681 final, Brussels, 25 October 2011, p. 14, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011DC0681&from=EN], Accessed 15 April 2022

124 OECD, OECD Guidelines for Multinational Enterprises, 2011, available at [https://www.oecd.org/daf/inv/mne/48004323.pdf], Accessed 15 April 2020

125 *Ibid.*, part IV, par. 3

impact to prevent or mitigate that impact.[126] In addition to that, the OECD Guidelines require corporations to take a due account on environmental impacts of their business.[127] Although they serve only as a guidance for responsible business conduct, the significance of the OECD Guidelines is reinforced by possibility to report non-compliance before the National Contact Points (NCPs) established by the governments of the adhering parties. NCPs, however, act only as *sui generis* mediation and advisory bodies, as they do not have mandate for imposing sanctions or any other punitive measure for failure to comply with the OECD Guidelines. [128]

Although the UNGPs and the OECD Guidelines do not refer to climate change issues, having in mind close interplay between the climate change and human rights, it could be ascertained that banks should, regardless, follow those guidelines and consider adverse impacts on human rights arising from their lending activities in the context of climate change. Both instruments have already served for upholding *Milieudefensie* judgment against Shell.[129] On the other hand, NCPs are increasingly dealing with climate-related reports against corporations.[130]

5. CONCLUSION

It is undeniable that banks could contribute to the adverse impacts of climate change by merely performing their core activities. Lending and investments are already recognized as "indirect GHG emissions" as they, if steered to carbon intensive sector, could facilitate GHG emissions of the direct polluters. Banks, therefore, have key role in achieving the Paris Agreement goal of "making finance consistent with a pathway towards low greenhouse gas emissions and climate-resilient development." On the other hand, banks could contribute to the failure of reaching the mentioned goal by providing reckless funding towards companies that produce the significant carbon footprint. One way of preventing such outcome could be initiating climate change litigations against bank. Climate change litigation is in exponential rise, especially since the adoption of the Paris Agreement. The recent wave of such litigations targeted energy companies, i.e. the direct

126 *Ibid.*, part IV, par. 43

127 *Ibid.*, part VI

128 OECD, *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises*, p. 9, available at: [https://mneguidelines.oecd.org/Structures-and-procedures-of-NCPs-for-the-OECD-guidelines-for-multinational-enterprises.pdf], Accessed 15 April 2022

129 *Supra*

130 *See* note 50. Also, see Seck, S., *Climate Change, Corporate Social Responsibility, and the Extractive Industries*, 2018, p. 15, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3244047], Accessed 15 April 2022

GHG emitters. The litigations were mostly based on a tort law and were mostly unsuccessful. The ones that did succeed were further developed through invoking of necessity to protect human rights violated by climate change adverse impacts and through a framework set up by soft law. We can anticipate that the same argument will be used in the expected climate change litigations against indirect GHG emitters, such as banks. Namely, it is already recognized that banks are exposed to climate change litigation risks that arise from their lending activities. However, as we have seen from the above analysis *supra*, unless a significant re-definition of the tort law takes place, chances of success against the banks are very low, primarily due to impossibility to establish the causal nexus between indirect emissions and climate harm. Such redefinition could take place in form of introduction of new mechanisms introduced elsewhere, such as some sort of no-fault liability mechanism, or in a form of applying non-traditional tort law theories on causation, like common law secondary liability theory.

Additionally, as the established climate-related case law shows, there is an increase in the use of human rights based claims against the corporations as well, even though corporations are not duty holders in the regard of human rights. So far, human rights arguments have been used only supplementary to the arguments arising from tort law. Same arguments could be invoked against the banks as well. It would not be the first time that the banks were prosecuted for their role in the violation of human rights, albeit outside the climate change context. However, as in the case of tort law argumentation, the application of human rights in the context of banking activities still largely depends on wide discretion of judicial bodies and their activism as invoking human rights in private disputes is still a novel approach. Additionally, the alternative venue for rights-based climate change litigations against banks could be a specific procedure before NCPs under the soft law OECD Guidelines.

As this basic analysis has shown, climate change litigation with the goal of holding banks responsible for contribution to climate change by their lending activities seems unlikely to succeed. Yet, it does not diminish the risk of appearance of such claims against the banks in the near future. Indeed, it could be expected that such litigations shall appear, but mostly as a method of applying additional pressure to the banks to align their business and policies with the Paris Agreement goals.

REFERENCES

BOOKS AND ARTICLES

1. Baretić, M., *Odgovornost za neispravan proizvod* in: Kuzmić, M.; Šumelj, A. (eds.), Zakon o obveznim odnosima : najznačajnije izmjene, novi instituti, Inžinjerski biro, Zagreb, 2005, pp. 220-276
2. Bartholomew, M.; Tehranian, J., *The Secret Life of Legal Doctrine: The Divergent Evolution of Secondary Liability in Trademark and Copyright Law*, 21 Berkeley Tech. L.J. 1363, Vol. 21, No. 4, 2006, pp. 1364-1419
3. Busch, T.; Judick, L. *Climate change—that is not real! A comparative analysis of climate-sceptic think tanks in the USA and Germany*, Climatic Change, Vol 164, No. 18, issue 1-2, 2021
4. Duffy, M., *Climate Change Causation: Harmonizing Tort Law & Environmental Law*, Vol. 28, No. 2, 2009, pp. 185-242
5. Furrer, B.; Hamprecht, J.; Hoffmann V. H., *Much Ado About Nothing? How Banks Respond to Climate Change*, Business & Society, Vol. 51, No. 1, 2012, pp. 62-88
6. Ganguly, G.; Setzer, J.; Heyvaert, V., *If at First You Don't Succeed: Suing Corporations for Climate Change*, Oxford Journal of Legal Studies, Vol. 38, No. 4, 2018, pp. 841-868
7. Giabardo, C. V., *Climate Change Litigation and Tort Law: Regulation Through Litigation?*, Diritto & Processo, University of Perugia Law School Yearbook, 2019, pp. 361-382
8. Gorenc, V. (ur), *Komentar Zakona o obveznim odnosima*, Narodne novine, Zagreb, 2014
9. Gubbay, I., *Towards Making Blood Money Visible, Lessons Drawn from the Apartheid Litigation* in: Bohoslovsky, J. P.; Černič, J. L. (eds.), Making Sovereign Financing and Human Rights Work, 2014, pp. 337-356
10. Heeds, R., *Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854–2010,* Climatic Change, Vol. 122, 2014, pp. 229–241
11. Hilson, C., *It's All About Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law*, Journal of Environmental Law, Vol. 25, No. 3, 2013, pp. 359-370
12. Hinteregger, M., *Civil Liability and the Challenges of Climate Change: A Functional Analysis*, Journal of European Tort Law, Vol. 8, No. 2, 2017, pp. 238-260
13. Infantino, M.; Zervogianni, E., *Summary and Survey of the Results* in: Infantino, M.; Zervogianni, E. (eds.) Causation in European Tort Law, Cambridge University Press, Cambridge, 2017
14. Klarić, P., *Uzročna veza kod odgovornosti za štetu u medicini*, Zbornik radova aktualnosti zdravstvenog zakonodavstva i prakse, II. znanstveni skup, 2011, pp. 137-148
15. Klarić, P.; Vedriš, M., *Građansko pravo, Opći dio, stvarno, obvezno i nasljedno pravo*, *XIV. izmijenjeno i dopunjeno izdanje*, Narodne novine, Zagreb 2014
16. Köppl, A., Stagl, S., A Plea for a Paradigm Shift in Financial Decision-Making in the Age of Climate Change and Disruptive Technologies, SUERF Policy, No. 45, 2018, [https://www.researchgate.net/publication/328693170_A_plea_for_a_paradigm_shift_in_financial_decision-making_in_the_age_of_climate_change_and_disruptive_technologies], Accessed 15 April 2022

17. Little, R. L.; Hobday, A. J.; Parslow, J.; Davis, C. R.; Grafton, R. Q., *Funding Climate Adaptation Strategies with the Climate Derivatives*, Climate Risk Management, Vol. 8, 2015, pp. 9-15
18. Macchi, C.; van Zeben, J., *Business and human rights implications of climate change litigation: Milieudefensie et al.v Royal Dutch Shell*, Review of European, Comparative & International Environmental Law, Vol. 30, No. 3, 2021, pp. 409-415
19. Mayer, B., *Climate Change Adaptation and the Law: Is there Such a Thing?*, in: Mayer, B.; Zahar, A. (eds.): Debating Climate Law, Cambridge University Press, Cambridge, 2021
20. Odozor, C.; Odeku, K. O., *Explaining the Similarities and Differences between Climate Law and Environmental Law*, Journal of Human Ecology, Vol. 45, No. 2, 2014, pp. 127-136
21. Peel, J.; Lin, J., *Transnational Climate Litigation: the Contribution of the Global South*, The American Journal of International Law, Vol 113, No. 4, 2019, pp. 679-726
22. Peel, J.; Markey-Towler, R., *Recipe for Success?: Lessons for Strategic Climate Litigation from the Sharma, Neubauer, and Shell Cases*, German Law Journal, Vol. 22, pp. 1484–1498
23. Peel, J.; Osofsky, H., *Rights Turn in Climate Change Litigation?*, Transnational Environmental Law, Vol. 7, No. 1, 2018, pp. 37-67
24. Peel, J.; Osofsky, M., *Climate Change Litigation*, Annual Review of Law and Social Science, vol. 16, 2020, pp. 21–38
25. Powell, C. D., *The Saga Continues: Secondary Liability for Copyright Infringement Theory, Practice and Predictions, Akron Intellectual Property Journal*, Vol. 3, No. 1, pp. 189-210
26. Ratner, S. R., *Corporations and Human Rights: A Theory of Legal Responsibility*, The Yale Law Journal, Vol. 111, No. 3, 2001, pp. 443-545
27. Savaresi, A., *Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages* in: Duyck, S.; Jodoin. S., Johl A. (eds.), Routledge Handbook of Human Rights and Climate Governance, Routledge, London, 2018
28. Savaresi, A.; Auz, J, *Climate Change Litigation and Human Rights: Pushing the Boundaries*, Climate Law, Vol. 9, 2019, pp. 244-262
29. Seck, S., *Climate Change, Corporate Social Responsibility, and the Extractive Industries*, 2018, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3244047], Accessed 15 April 2022
30. Setzer, J.; Higham, C.; Jackson, A.; Solana, J., *Climate Change Litigation and Central Banks*, Legal Working Paper, European Central Bank, No. 21, 2021
31. Solana, J., *Climate Change Litigation as Financial Risk*, Green Finance, Vol. 2, No. 4, pp. 343–372
32. Spijkers, O., *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*, Chinese Journal of Environmental Law, Vol. 5, 2021, pp. 237–256
33. Spitzer, M.; Burtscher, B., *Liability for Climate Change: Cases: Challenges and Concepts*, Journal of European Tort Law, Vol. 8, No. 2, 2017, pp. 137-177
34. Wettstein, F., *The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy*, Journal of Business Ethics, Vol. 96, No. 1, 2010., pp. 33-47

EU LAW

1. Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L 330/1
2. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681 final, Brussels, 25 October 2011
3. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final
4. Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final

LIST OF REGULATIONS

1. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5
2. Guiding Principles on Business and Human Rights
3. International Covenant on Civil and Political Rights
4. OECD Guidelines for Multinational Enterprises
5. Paris Agreement, United Nations, Treaty Series, Vol. 3156, adopted on 12 December 2015, entered into force on 4 November 2016
6. The United Nations Framework Convention on Climate Change, United Nations, Treaty Series, Vol. 1771, adopted on 9 May 1992, entered into force on 21 March 1994
7. Vienna Convention on the Law of Treaties, United Nations, Treaty Series, vol. 1155, adopted on 23 May 1969, entered into force on 27 January 1980

LIST OF NATIONAL REGULATIONS, ACTS AND COURT DECISIONS

1. *Abrahams v Commonwealth Bank of Australia*, [http://climatecasechart.com/non-us-case/abrahams-v-commonwealth-bank-of-australia-2021/], Accessed 15 April 2022
2. BankTrack, et al. v ING Bank [http://climatecasechart.com/non-us-case/banktrack-et-al-vs-ing-bank/], Accessed 15 April 2022
3. *Barbara Metz et al. v Wintershall Dea AG*, [http://climatecasechart.com/non-us-case/barbara-metz-et-al-v-wintershall-dea-ag/], Accessed 15 April 2022
4. Case 21/8/C *ClientEarth v Belgian National Bank*, [http://climatecasechart.com/non-us-case/clientearth-v-belgian-national-bank/], Accessed 15 April 2022
5. Case C/09/571932 *Milieudefensie et al. v Royal Dutch Shell* [2021], The Hague District Court ECLI:NL:RBDHA:2021:5337

6. Case *Greenpeace France and Others v. TotalEnergies SE and TotalEnergies Electricité et Gaz France* [2022], [http://climatecasechart.com/non-us-case/greenpeace-france-and-others-v-totalenergies-se-and-totalenergies-electricite-et-gaz-france/], Accessed 15 April 2022
7. Case *Heathrow Airport Ltd. and Another v Garman and Others,* judgement of the High Court of Justice, the United Kingdom, [2007] EWHC 1957 (QB), [http://climatecasechart.com/non-us-case/heathrow-airport-ltd-another-v-joss-garman-others/], Accessed 15 April 2022
8. Case No. 02-4106 *Friends of the Earth, Inc., et al. v Spinelli, et al.*, [http://climatecasechart.com/case/friends-of-the-earth-v-watson/], Accessed 15 April 2022
9. Case No. 16-15946 (9th Cir. 2018), *Center for Biological Diversity et al. v Export-Import Bank of the US* United States Court of Appeals for the Nine Circuit [http://climatecasechart.com/case/center-for-biological-diversity-v-export-import-bank/], Accessed 15 April 2022
10. Case No. 2 O 285/15, *Luciano Lliuya v RWE AG*, Decision of the District Court Essen in [2016], [http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/], Accessed 15 April 2022
11. Case No. CO/3206/2020 *Friends of the Earth v UK Export Finance*, [http://climatecasechart.com/non-us-case/friends-of-the-earth-v-uk-export-finance/], Accessed 15 April 2022 [http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/], Accessed 15 April 2022
12. Case *Urgenda Foundation v The State of The Netherlands*, [2015], Judgement of the Den Haag district court in the case ECLI:NL:RBDHA:2015:7196, confirmed by the judgment of the Supreme Court of the Netherlands, [2019], ECLI:NL:HR:2019:2007
13. *Chesapeake Climate Action Network, et al. v Export-Import Bank of the US*, No. 13-1820(RC), [http://climatecasechart.com/case/chesapeake-climate-action-network-v-ex-im-bank-of-the-us/], Accessed 15 April 2022
14. *Deutsche Umwelthilfe (DUH) v Bayerische Motoren Werke AG (BMW),* [http://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-bmw/], Accessed 15 April 2022
15. *Deutsche Umwelthilfe (DUH) v Mercedes-Benz AG*, [http://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/], Accessed 15 April 2022
16. *Development Yes Open-Pit Mines NO v Group PZU S.A.*, [http://climatecasechart.com/non-us-case/development-yes-open-pit-mines-no-v-group-pzu-sa/], Accessed 15 April 2022
17. German Act on the Prevention of Harmful Effects on the Environment Caused by Air Pollution, Noise, Vibration and Similar Phenomena, as last amended on 11 August 2009, BGBl. I p. 2723
18. *Ewan McGaughey et al v Universities Superannuation Scheme Limited,* [http://climatecasechart.com/non-us-case/ewan-mcgaughey-et-al-v-universities-superannuation-scheme-limited/], Accessed 15 April 2022

WEBSITE REFERENCES

1. BankTrack,
   [www.banktrack.org], Accessed 15 April 2022
2. BankTrack *et al.*, *Fossil Fuel Finance Report 2022*,
   [https://www.bankingonclimatechaos.org//wp-content/themes/bocc-2021/inc/bcc-data-2022/BOCC_2022_vSPREAD.pdf], Accessed 15 April 2022
3. BankTrack, *Human Rights, Banking Risks, Incorporating Human Rights Obligations in Bank Policies*, [https://www.banktrack.org/download/human_rights_banking_risks_1/1_0_070213_human_rights_banking_rrisks.pdf], Accessed 15 April 2022
4. Central Banks and Supervisors Network for Greening the Financial System, Climate-related litigation: Raising awareness about a growing source of risk, 2021, [https://www.ngfs.net/sites/default/files/medias/documents/climate_related_litigation.pdf] Accessed on 15 April 2022
5. Climate Social Science Network, *Climate-Washing Litigation: Legal Liability for Misleading Climate Communications*, 2022,
   [https://www.cssn.org/wp-content/uploads/2022/01/CSSN-Research-Report-2022-1-Climate-Washing-Litigation-Legal-Liability-for-Misleading-Climate-Communications.pdf], Accessed 15 April 2022
6. CNBC, *Governments and Big Oil were first. The next wave of climate lawsuits will target banks and boards*, 2021
   [https://www.cnbc.com/2021/11/11/cop26-climate-campaigners-to-target-banks-after-shell-court-ruling.html], Accessed 15 April 2022
7. Council of Europe, Registry of the ECtHR, *Guide on Article 2 of the European Convention on Human Rights*, 2021,
   [https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf], Accessed 15 April 2022
8. Council of Europe, Registry of the ECtHR, *Guide on Article 8 of the European Convention on Human Rights*, 2021,
   [https://www.echr.coe.int/documents/guide_art_8_eng.pdf], Accessed 15 April 2022
9. Euractiv, *LEAK: EU due diligence law to apply only to 1% of European companies,* [https://www.euractiv.com/section/economy-jobs/news/leak-eu-due-diligence-law-to-apply-only-to-1-of-european-companies/], Accessed 15 April 2022
10. European Banking Authority, *EBA advises the Commission on KPIs for transparency on institutions' environmentally sustainable activities, including a green asset ratio*, 2021,
    [https://www.eba.europa.eu/eba-advises-commission-kpis-transparency-institutions%E2%80%99-environmentally-sustainable-activities], Accessed15 April 2022
11. Foley Hoag LLP and the United Nations Environment Programme Finance Initiative, *Banks and Human Rights: A Legal Analysis*, 2015, [https://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf], Accessed 15 April 2022
12. *GHG Protocol Corporate Accounting and Reporting Standard*, 2001, World Business Council for Sustainable Development and World Resources Institute,
    [https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf], Accessed 15 April 2022

13. GHG Protocol, *Technical Guidance for Calculating Scope 3 Emissions, Supplement to the Corporate Value Chain (Scope 3) Accounting & Reporting Standard*, World Business Council for Sustainable Development and World Resources Institute, pp. 136-152, 2013, [https://ghgprotocol.org/sites/default/files/standards/Scope3_Calculation_Guidance_0.pdf] Accessed 15 April 2022
14. Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, 2018, [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf], Accessed 15 April 2022
15. Mayer, B., *Climate Change Adaptation and the Law*, [https://benoitmayer.com/wp-content/uploads/2021/03/Climate-Change-Adaptation-and-the-Law.pdf], Accessed 15 April 2022
16. Nollkaemper, A., *Shell's Responsibility for Climate Change, an International Law Perspective on a Groundbreaking Judgment*, 2021 [https://verfassungsblog.de/shells-responsibility-for-climate-change/], Accessed 15 April 2022
17. OECD, *OECD Guidelines for Multinational Enterprises*, 2011, [https://www.oecd.org/daf/inv/mne/48004323.pdf], Accessed 15 April 2020
18. OECD, *Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises*, 2018, [https://mneguidelines.oecd.org/Structures-and-procedures-of-NCPs-for-the-OECD-guidelines-for-multinational-enterprises.pdf], Accessed 15 April 2022
19. Sabin Center for Climate Change Climate Litigation Chart available at [http://climatecasechart.com/search/], Accessed 15 April 2022
20. Seck, S., *Climate Change, Corporate Social Responsibility, and the Extractive Industries*, 2018, [file:///C:/Users/avargek/Downloads/SSRN-id3244047_stamped.pdf], Accessed 15 April 2022
21. Teubler, J.; Kühlert M., *Financial Carbon Footprint: Calculating Banks' Scope 3 Emissions of Assets and Loans, Wuppertal Institute for Climate, Environment and Energy*, 2020, [https://epub.wupperinst.org/frontdoor/deliver/index/docId/7587/file/7587_Teubler.pdf], Accessed 15 April 2022
22. United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Project, Respect and Remedy" Framework*, 2011, [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf], Accessed 15 April 2022
23. Working Group II contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, *Climate Change 2022 Impacts, Adaptation and Vulnerability, Summary for Policymakers*, 2022, [https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf], Accessed 15 April 2022
24. *World Climate Conference - Extended Summaries of Papers Presented at the Conference*, World Meteorological Organization, Geneva, 1979, [https://library.wmo.int/doc_num.php?explnum_id=6320], Accessed 15 April 2022