



COMMONWEALTH
Climate and Law Initiative

The emergence of foreseeable biodiversity-related liability risks for financial institutions

A gathering storm?

Commonwealth Climate and Law Initiative

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Executive summary

Key takeaways

- *Financial supervisors and their regulated entities are under increasing pressure to consider the financial risks associated with the loss of biodiversity and ecosystem services at both a macro- and micro-economic level. Recent economic literature identifies liability as a key category of foreseeable financial risk associated with biodiversity loss. However, it does not provide further guidance on the nature and extent of litigation and legal risks that should be considered in determining the potential materiality of relevant risks for a given financial actor or system.*
- *This report complements and extends the economic literature by proposing a framework by which biodiversity-related liability risks should be considered by financial sector supervisors and participants in their broader assessment of biodiversity-related financial risks.*
- *Consistent with the emerging nature of biodiversity-related financial risk assessment, this report takes a forward-facing view of potential liability exposures. It recognises that biodiversity-related liability exposure is not limited to prevailing categories of 'environmental' law claims. Rather, it draws analogies from legal developments on other dynamic risk issues such as climate change to propose an extended framework of potential exposures under environmental, commercial, tort and other laws.*
- *The framework provides a holistic perspective on the spectrum of biodiversity-related liability risks that should be considered as part of a broader analysis of related financial risk exposures, and provides general commentary on the circumstances and actors where it is likely to present heightened concerns. In doing so, it provides a foundation for further analysis of the materiality of relevant biodiversity-related liability risks in the unique context of each financial institution and system.*

Biodiversity-related liability exposure as a financial risk

There is growing concern among central banks, regulators and financial market participants about the financial risks associated with a loss of biodiversity and ecosystem services. Biodiversity-related liability and litigation are increasingly flagged as relevant issues, both in their own right, and as mechanisms for the transmission of discrete physical and market-based risks across economic systems.

However, the extent of these liability risks and their financial materiality to individual market actors, sectors and economies has yet to be examined in detail.

This report extends the economic literature by proposing a framework by which institutions should consider the magnitude of liability exposures within their broader analysis of the foreseeable financial risks associated with biodiversity.

The materiality of biodiversity-related liability risks

The magnitude of liability exposure as a biodiversity-related financial risk, and whether it is material to any given financial institution, system or economy, can be summarised as a function of three factors:

- (a) the nature and breadth of potential liability exposures (causes of action);
- (b) the transmission mechanisms within and between the real economy and the financial sector; and
- (c) legal and market dynamics in the jurisdiction.

The primary focus of this report is on factor (a). Section 3 proposes a broad framework of legal exposures that should be considered in a biodiversity context. In doing so, it expands beyond a traditional 'environment and planning' or conservation-based view of the intersection of biodiversity and the law to consider the emerging commercial law consequences of related physical or ecological and economic transition risks.

Section 4 addresses factor (b), and suggests that there are three avenues by which such claims may impact on the financial sector: direct impacts as defendants in litigation, indirect second order impacts of biodiversity litigation involving defendants in the real economy through credit, investment and underwriting risks, and third order indirect impacts through systemic risks if biodiversity-related liability risk is of a sufficient magnitude across sectors or geographies.

Section 5 offers preliminary observations on factor (c), the legal and market dynamics in the jurisdiction, which are necessarily unique to each financial system and its actors.

Understanding the range of potential liability risks set out above will enhance the position of financial institutions to identify, price and mitigate these direct and indirect impacts, and for financial regulators to integrate these risks into their supervisory activities under their financial stability mandates.

Framework of liability exposures

The framework positions potential liability risks within accepted categories of financial risk associated with environmental issues: physical or ecological risks, and economic transition risks. It also proposes a separate, additional category of 'misrepresentation' risks, recognising the significance of such exposures in law and the criticality of disclosure in enabling the efficient functioning of markets.

The framework sets out three high level categories and 10 sub-categories of biodiversity-related liability risks.

1. **Liability risks arising from physical or ecosystem impacts of biodiversity**
 - A. Direct impact through failure to prevent biodiversity loss or ecosystem consequences
 - B. Indirect enablement through failure to prevent biodiversity loss or ecosystem consequences
 - C. Failure to manage or adapt to biodiversity-related physical risks or ecosystem dependencies
 - D. Failure to comply with regulatory requirements associated with biodiversity loss or ecosystem protection
 - E. Financier or advisor liability for investee conduct under 1A-1D above
2. **Liability risks arising from the transition to a sustainable or regenerative economy**
 - A. Failure to manage or adapt to biodiversity-related economic transition risks from policy, regulation, technology or shifts in stakeholder preferences
 - B. 'Anti' biodiversity regulation claims disputing the validity or application of biodiversity-related regulation

3. *Liability risks arising from misrepresentation of biodiversity risks or ecosystem impacts*

- A. Market misrepresentation of material biodiversity-related risks in mandatory securities or other regulatory filings
- B. Promotional misrepresentation or 'greenwashing' of biodiversity-related impacts or credentials in advertising or promotion
- C. Financier, advisor or auditor liability for investee or client misrepresentations under 3A-3B above.

The framework is summarised in Figure 1.

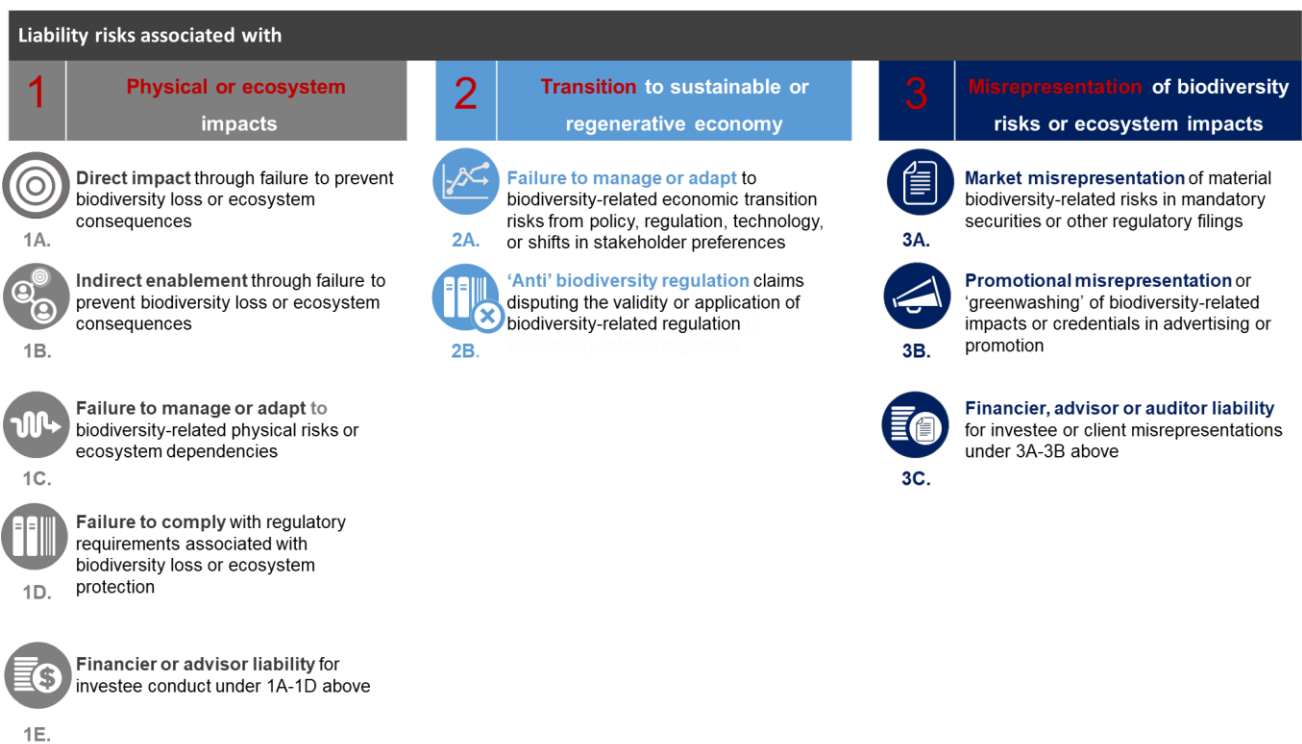


Figure 1: Summary framework of biodiversity-related liability risks

Entity-level impacts and systemic contagion

An analysis of biodiversity-related claims in the framework suggests there are three avenues by which such claims may impact on the financial sector: direct impacts as defendants in litigation, and indirect second order impacts of biodiversity litigation involving defendants in the real economy through credit, investment and underwriting risks, as well as third order indirect impacts through systemic risks if biodiversity-related liability risk is of a sufficient magnitude across sectors or geographies (see Figure 2)

Financial institutions and their supervisors will need to grapple with the first and second order exposures by which liability acts as a mechanism for the transfer of physical and economic transition risk across markets. They will also have to deal with third order indirect impacts through systemic risks, for example, building such risks into the stress testing scenarios and capital adequacy requirements for banks, insurers and pension funds.

Legal and market dynamics in the jurisdiction

The magnitude of biodiversity-related liability risks cannot be measured precisely without consideration of the unique characteristics of the legal framework and economy within which an institution operates. Financial supervisors should consider the legal and market variables unique to the jurisdiction as they consider potential biodiversity-related liability risks to regulated entities and broader systemic impacts.

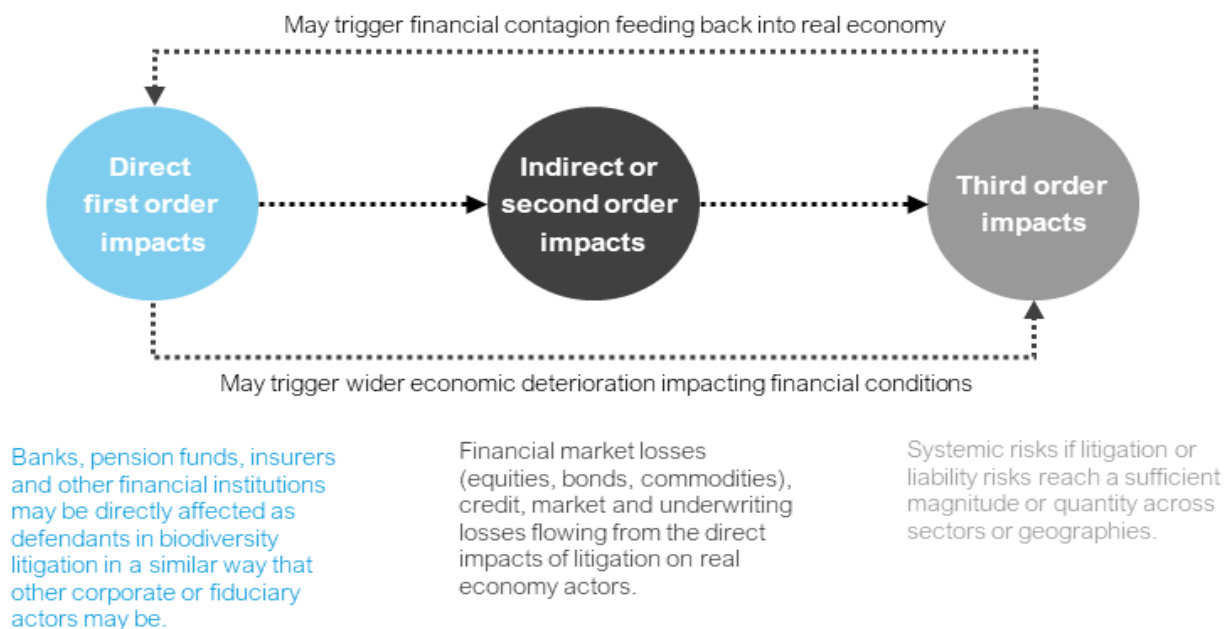


Figure 2: Avenues by which legal claims impact financial institutions

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1. Introduction

Market supervisors are accelerating their focus on biodiversity

In May 2020, the Network for Greening the Financial System (NGFS) published guidance for central banks and supervisors on how to integrate environmental risks, including risks from biodiversity loss and ecosystem services, into prudential supervision.¹ In the guidance, the coalition of 66 central banks and supervisors called for greater understanding of the transmission and materiality of these environmental risks:

NGFS Recommendation 1 – Supervisors are recommended to determine how climate-related and environmental risks transmit to the economies and financial sectors in their jurisdictions and identify how these risks are likely to be material for the supervised entities.²

As a subset of these environmental risks, biodiversity risks are increasingly receiving attention within financial and other business quarters. NGFS member De Nederlandsche Bank (DNB) has published qualitative³ and quantitative⁴ reports on biodiversity risks to the Dutch financial sector, and has established a biodiversity working group under the DNB Sustainable Finance Platform to explore the relationship between biodiversity and the financial sector.⁵ The significance of biodiversity as a macro- and micro-prudential issue has subsequently been reinforced by the peak sustainability forum for global insurance supervisors and regulators, the 38-member Sustainable Insurance Forum, in its next three year work plan.⁶

Key takeaway

Legal exposures are a recognised category of biodiversity-related financial risk. In assessing the nature and materiality of those risks institutions should consider broader biodiversity-related liability risks, not merely litigation risks.

We can trace the rise in the analysis of biodiversity-related financial risks. Since the Bank of England Prudential Regulatory Authority published its landmark 2015 report on the potential impacts on the insurance sector of the physical, transition and liability risks arising from climate change,⁷ there has been exponential growth in the literature and practice of risk assessment and management of these climate-related financial risks, with convergence around the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD). There is an emerging literature attempting a similar assessment and categorisation of financial risks related to biodiversity loss and ecosystem services. The NGFS 2020 guidance on this point follows the TCFD characterisation of climate-related risks: physical and transition risks, with liability risks as a subset of these.

This report focuses on one form of biodiversity-related risk: liability risks. The objective is to provide an analysis of biodiversity-related liability risks to enhance the understanding of financial regulators and other stakeholders, including supervisors and counsel of financial institutions, and enable them to take action which fully considers and embeds the range of biodiversity-related risks (based on the framework provided) into regulatory and supervisory processes. It makes recommendations based on the key findings on biodiversity-related risks (including liability risks), sets out a framework of biodiversity-related liability risks to business and provides some initial observations on the potential impact and materiality of these liability risks on financial institutions and the financial sector.

In characterising the loss of biodiversity and ecosystem services through a financial or economic lens, we do not intend to promote the commodification of nature or undermine the intrinsic value of biodiversity. The costs of biodiversity loss disproportionately affect indigenous and local communities, yet there are inequalities of access to courts and legal solutions for these communities compared with the financial and business communities. This report sits within the economic literature, but recognises the importance of these rights-based and nature-centred approaches and viewpoints.

What is meant by 'liability risk' and what is the relationship to 'biodiversity litigation'?

Liability risk and litigation are often used interchangeably as references to 'legal risk' in an informal context, yet they are different. In general terms, in 'biodiversity litigation', parties who suffer or apprehend loss or injury associated with biodiversity preservation or loss seek to employ legal strategies for compensation, to hold others accountable for the loss, or to drive preventative action.⁸ This may include litigation against public or private actors for breach of statute, common or civil law, seeking outcomes ranging from compensatory damages through to declarations. The law is often employed in pursuit of strategic outcomes. Although most biodiversity litigation to date has focussed on the protection of individual sites or species, claimants may take a more holistic view and look to bring high profile court cases in attempts to tackle the rapidly accelerating biodiversity loss.

Biodiversity-related 'liability risks' are broader than litigation. Liability risk is not confined to court orders for damages. It includes, for example, regulatory fines and enforcement, or a determination outside the courtroom of who is legally responsible. Liability risks affect entities beyond the direct claimants and defendants to any litigation as risk travels through economic relationships, particularly in the form of credit risks for banks and underwriting risk for insurers, and potentially as third order systemic risks. An analysis of the types of claims in biodiversity litigation will help to understand biodiversity-related liability risks.

Given the distinction of litigation and liability risks, this report focuses on liability in its widest definition. While litigation provides some evidence of liability, the report conceives liability beyond the limits of litigation. Financial regulators, institutions and businesses should consider the conceivable range of biodiversity-related liability risks, not merely litigation risks.

Scope and contribution

Historically, 'biodiversity litigation' has been the province of environmental compliance, planning or human rights law. However, the evolution of biodiversity from a purely 'environmental' or 'ethical' issue to one that presents foreseeable financial risks means that relevant actions or inactions may trigger liability within a broad range of commercial laws. Therefore, this report considers potential liability under actual and conceivable extensions across commercial causes of action, as well as under traditional 'environmental' areas of law. This range of liabilities is consolidated across a universal framework of claims. Nonetheless, the report does not cover the entire field of potential claims or risks. Rather, it promotes a broad and rich understanding of the liability risk landscape as a necessary foundation for meaningful analysis of the entity-level or jurisdictional-level materiality of biodiversity-related liability risks.

It shows how litigation and liability can be both a *driver* and a *consequence* of biodiversity-related issues. It is a consequence where, for example, claims arise from a direct action, or failure, that results in biodiversity loss (framework category 1A). It could be a driver where there are successful 'anti-biodiversity regulation' claims that wind back biodiversity protections or overturn administrative decisions made to protect biodiversity (category 2B).

The framework and conclusions identify and methodically categorise potential claims. This is a key foundation for further assessment, and ultimately the efficient pricing, of the financial risks associated with biodiversity-related liabilities. Understanding the breadth of the liability landscape is essential for meaningful consideration of questions such as: *What is the potential for liability to become a material financial risk associated with biodiversity loss? Which sectors in a given economy are materially exposed? Which companies in those sectors are materially exposed, both in the real economy and in the financial services sector? How should such risks be factored into financial modelling, insurance assessments, credit risk analysis, scenario analysis, stress testing and prudential regulation?*

The legal analysis at this stage reflects the nascency of the economic literature to which it relates. However, the accelerating focus on this area reinforces the importance of financial supervisors, and the banks, insurers, pension funds and other similar investment vehicles that they regulate, to take a forward-looking view of biodiversity-related liability risks.

The law is rich with examples of how prevailing legal norms can be applied and adapted to emerging socio-economic concerns, from tobacco and asbestos to more recent catalysts like cyberattack, #MeToo and climate change. Adopting this strategy, we apply prevailing legal norms to actual and conceivable biodiversity-related liability claims. A failure to anticipate, manage and efficiently price such liability risks could be disruptive, not only to the corporations that find themselves as defendants in this litigation, but to financial services sector participants more broadly, particularly those in the insurance industry, which could in turn affect financial stability if the risks arise at a significant scale.

The report proceeds as follows:

- Section 2 – Context: The financial risks associated with actions, inactions, impacts and dependencies on biodiversity
- Section 3 – A framework of biodiversity-related liability risks: factor (a)
- Section 4 – Entity-level impacts and systemic contagion: factor (b)
- Section 5 – Preliminary observations on legal and market variables in the jurisdiction: factor (c)
- Section 6 - Conclusion

A more detailed framework is set out in the Appendix.

2. Context: The financial risks associated with actions, inactions, impacts and dependencies on biodiversity

The identification of 'liability' as a risk category associated with biodiversity is not in itself novel. For example, in 2019 the OECD proposed a typology of biodiversity risks: ecological, liability, regulatory, reputational, market and financial risks.⁹ This section provides a brief overview of the issues of financial materiality, financial risk and sectors impacted by biodiversity-liability risks, to prepare the ground for the framework of biodiversity-related liability risks and the observations about the foreseeability of those risks.

Why is loss of biodiversity a financial issue?

Biodiversity is the 'variability among living organisms from all sources including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are a part'.¹⁰ Financial markets are accelerating their understanding of the macro- and micro-economic risks associated with a loss of biodiversity and ecosystem services¹¹ provided to humans.¹²

The OECD explains that these risks 'manifest themselves primarily through the dependency and impact on biodiversity of business and financial organisations (especially investors, lenders and insurers).' ¹³ Ecosystem services serve as the strongest indicator of the biodiversity dependencies of businesses, including financial organisations. ¹⁴ The two-way relationship of impacts and dependences between business and biodiversity is demonstrated by the recent briefing paper by Accounting for Sustainability (A4S) (Figure 3).

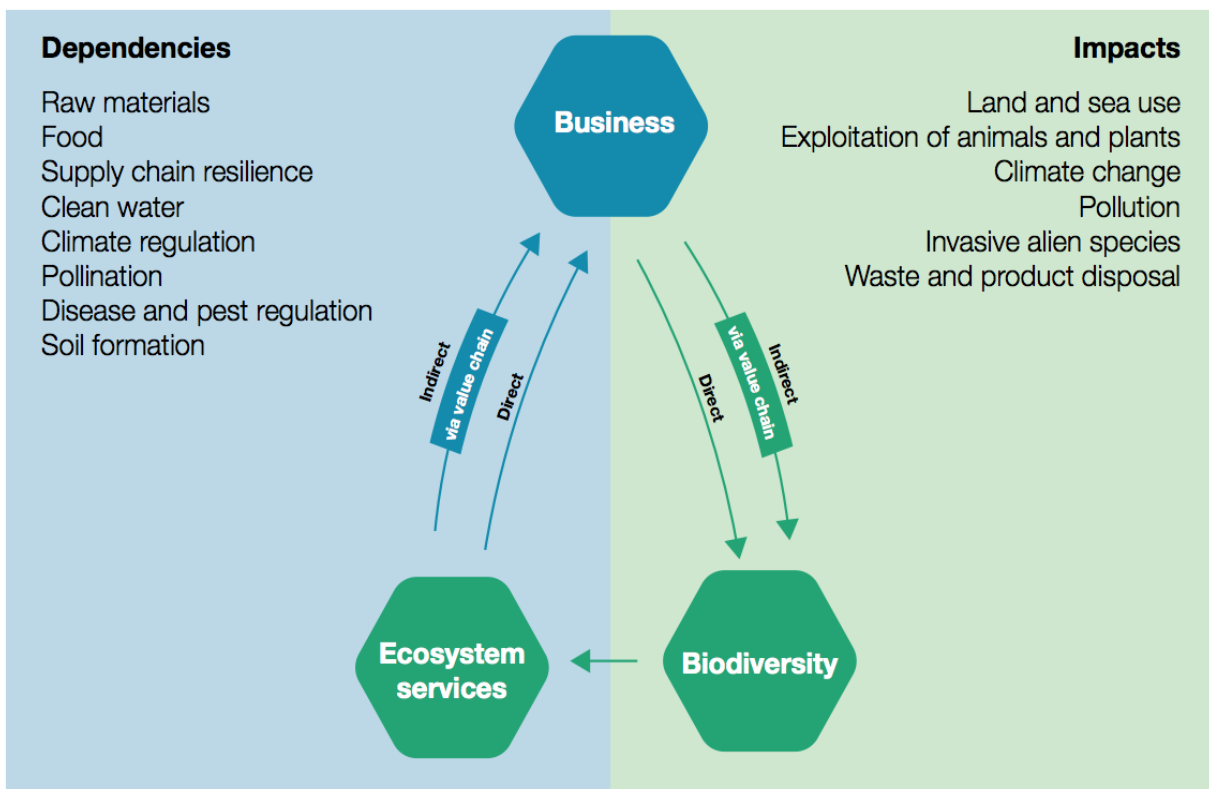


Figure 3: Biodiversity dependencies and impacts. Source: Accounting for Sustainability (A4S), Briefing for Finance: Biodiversity (22 May 2020)

What kinds of financial risk does biodiversity present for real economy and financial market actors?

The actions, inactions, impacts and dependencies of business and government on biodiversity and ecosystem services in turn create financial risks. As illustrated in Figure 4, A4S offers categories to describe the nature of those financial risks, in a similar although not identical approach to that taken in other leading studies by the OECD and the DNB.¹⁵

The primary impacts of these physical, regulatory, liability (including legal), market and reputational risks of biodiversity – from supply chain disruption and increased cost of materials, to asset impairment and loss of access to capital – transmit to the financial system.



Figure 4: Biodiversity-related financial risks. Source: A4S, *Briefing for Finance: Biodiversity* (22 May 2020)

In addition to *direct* liability or other financial risks that participants in the financial sector face alongside actors in the real economy, they may face *indirect* impacts from market losses on their holdings of equities, bonds and commodities, in credit defaults and in underwriting activities.¹⁶ If participants in the financial sector suffer biodiversity-related financial losses of a sufficient correlation and magnitude, these become systemic risks which could lead to financial contagion affecting financial market stability, in turn feeding back to the real economy through credit tightening.¹⁷ This risk through the financial sector is explored in more detail in section 4 in relation to liability risks specifically.

For which sectors is biodiversity a key impact or dependency?

As early as 2004, nine sectors were identified as facing high biodiversity risk: construction and building materials, electricity, food and drug retailers, food producers and processors, forestry and paper, leisure and hotels, mining, oil and gas, and utilities.¹⁸ Other sectors that have since been identified as high risk include primary industries such as farming, fishing, livestock, infrastructure and other extractives¹⁹ and secondary industries such as ecotourism.²⁰

More recent research suggests that biodiversity risks may be financially material for *all* business sectors.²¹ By way of illustration, annual global food production worth US\$235 to \$577 billion is at risk as a result of the loss of bee and butterfly pollinators,²² while US\$36 billion in annual tourism based around coral reefs is at risk even under 'best case scenario' levelling of global warming at 1.5°C above pre-industrial averages, which would result in the death of 70-90% of coral reefs within the next two decades. The OECD estimates that ecosystem services provide benefits to society and the economy worth US\$125-140 trillion annually, which is roughly one and a half times the value of global GDP.²³ In the face of rapidly accelerating loss of biodiversity, this year (2020) the World Economic Forum identifies biodiversity loss as one of the top five risks to the global economy over the next 10 years.²⁴

Are entities disclosing these biodiversity risks?

Corporate disclosures on biodiversity, if any, tend to be contained in sustainability reports rather than mainstream financial filings and almost exclusively focus on biodiversity goals rather than risks.²⁵ One reason for this low business action may be that biodiversity risks often do not manifest as one off events like some other environmental problems, but are rather cumulative or gradual onset.²⁶

Research suggests there are four reasons businesses currently take action on biodiversity issues: taking advantage of economic opportunities; enhancing relationships with stakeholders; addressing ethical concerns and setting examples of good corporate behaviour; and complying with legal or non-regulatory requirements (which is a very narrow compliance-focussed view of risk).²⁷ While the business case for impact assessment and risk management of biodiversity often acknowledges that litigation may arise pursuant to relevant laws and regulations, there is little focus on the range of liability risks.

From biodiversity risk to biodiversity-related liability risks

As with climate-related liability risks, biodiversity-related liability risks are a product and function of all the other relevant risks, both physical (ecological) or economic-transition based. This was recently acknowledged in the NGFS report, which identified 'increased litigation' as a 'transmission channel' of the physical and economic transition risks associated with 'environmental risks other than climate change'.²⁸ The most recent DNB report on biodiversity risks recognises that liability risks create operational risks for financial institutions, though focus their analysis on physical, transition and reputational risks.²⁹

Despite recognising liability risks as a category of biodiversity-related financial risk, the reports of OECD, NGFS, DNB and others do not otherwise specifically analyse the nature or materiality of the relevant risks.

Meanwhile, the emerging recognition of the economic and financial risks associated with loss of biodiversity and ecosystem services means that the universe of potential claims will extend to consequences under commercial law for actors in the real economy, financial markets and government, not just immediate 'environmental' cases. In other words, financial loss, or the potential for that loss, is itself a driver and consequence of 'biodiversity litigation'. Accordingly, an examination of the kinds of financial risks associated with biodiversity is a foundational input to consideration of the range of litigious claims and liability exposures that may arise.

This report extends the prevailing economic literature by considering the nature and extent of the 'liability exposures' to which it refers. In doing so below, we summarise the categories proposed in previous seminal reports on financial risks associated with biodiversity, and apply those categories as an input to our consideration of the nature of claims that may arise.

The resulting framework provides a key foundation from which financial regulators, financial institutions, and businesses can assess the potential materiality of entity-level, jurisdiction-, sector- and industry-specific liability risks, in their unique context.

3. A framework of biodiversity-related liability risks: factor (a)

This section sets out a new typology of biodiversity-related liability risks. We develop the framework via a holistic approach that combines both a top-down analysis of an initial review of existing cases, and a bottom-up analysis of potential claims.

We identify potential claimants and defendants and causes of action through an analysis of the five key drivers of biodiversity loss set out by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES): changes in land and water use, exploitation of organisms, climate change, pollution, and invasive alien species.³⁰

From there, we consider the biodiversity and ecosystem consequences, and the potential types of impacts and loss that could arise due to these ecosystem consequences.

Claims are expected as a consequence of the losses suffered from the human, ecological and financial impacts of these drivers of biodiversity loss, while strategic claims are expected as claimants seek to stop the key drivers of biodiversity loss.

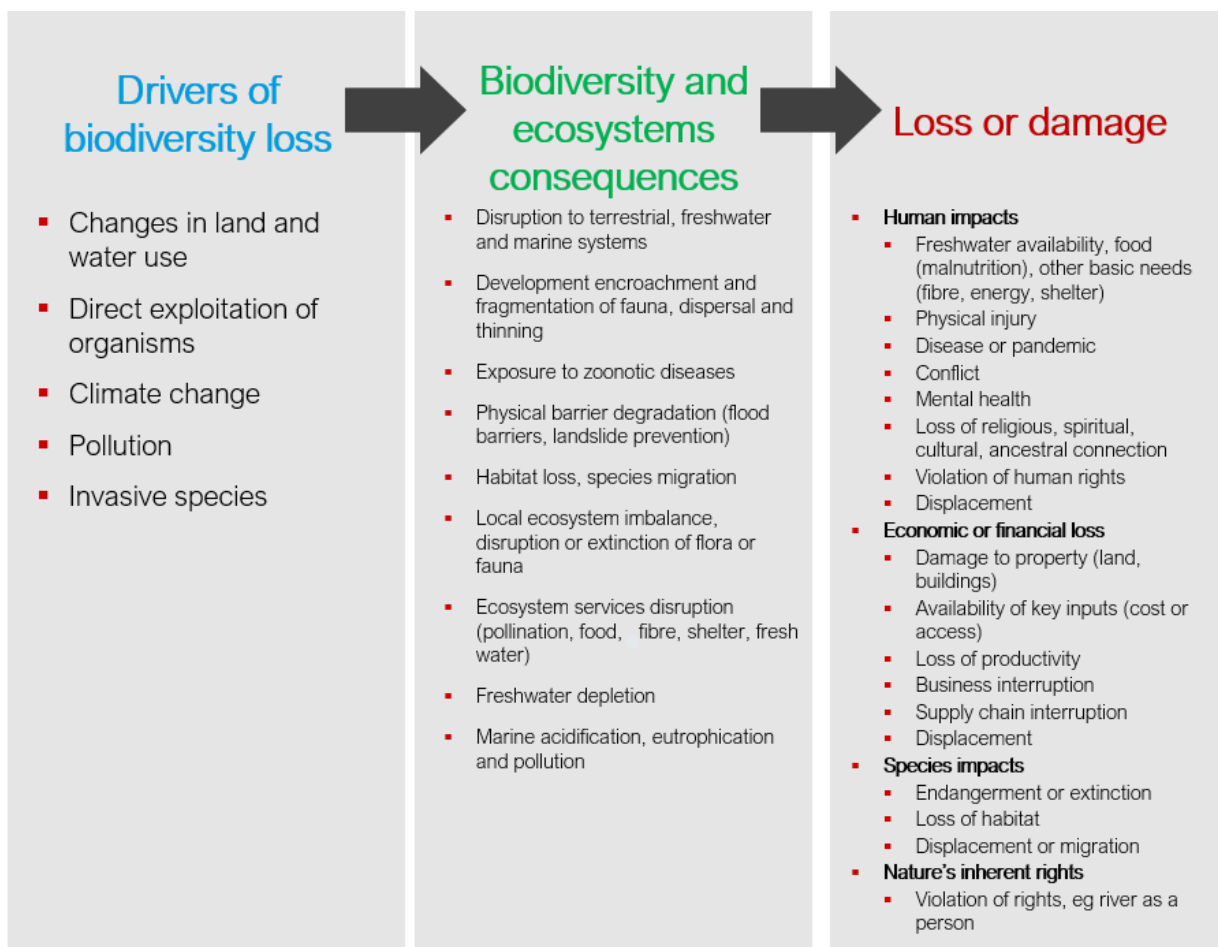


Figure 5: Analysis underlying the framework of biodiversity-related liability risks

This report illustrates the breadth of claims that should be considered in responding to calls by central banks and financial regulators to assess the materiality of the liability risks category of biodiversity-related financial risks. In doing so, it does not purport to cover the field of existing or potential biodiversity-related cases nor seek to catalogue the laws governing any given biodiversity issue or of any particular jurisdiction. Moreover, this report does not limit its examination to liability claims against central banks, nor regulated banking, insurance or other financial sector entities per se, although such exposures do feature within the framework.

Of course, a liability landscape may be categorised in a myriad of different ways. For example, a typology of biodiversity-related claims could be developed by category of defendant (eg, government, banks, or company directors), by ecosystem consequence (eg, desertification, riverine eutrophication), by cause of action (eg, tort, contract) or by damage claimed or apprehended (eg, physical injury, supply chain interruption, species extinction).³¹ However, for the purposes of this report, we have conceptualised liability risks in a manner that corresponds directly with the predominant categorisation of environmentally-related financial risks, as either physical (ecological) or economic transition (market-based) in complexion. We also propose a separate, additional category for 'misrepresentation' claims, recognising the significance of such exposures in law, and the criticality of disclosure in enabling the efficient functioning of markets.

Set out below are the three high level categories and 10 sub-categories of biodiversity-related liability risks.

1. ***Liability risks arising from physical or ecosystem impacts of biodiversity***
 - A. Direct impact through failure to prevent biodiversity loss or ecosystem consequences
 - B. Indirect enablement through failure to prevent biodiversity loss or ecosystem consequences
 - C. Failure to manage or adapt to biodiversity-related physical risks or ecosystem dependencies
 - D. Failure to comply with regulatory requirements associated with biodiversity loss or ecosystem protection
 - E. Financier or advisor liability for investee conduct under 1A-1D above
2. ***Liability risks arising from the transition to a sustainable or regenerative economy***
 - A. Failure to manage or adapt to biodiversity-related economic transition risks from policy, regulation, technology or shifts in stakeholder preferences
 - B. 'Anti' biodiversity regulation claims disputing the validity or application of biodiversity-related regulation
3. ***Liability risks arising from misrepresentation of biodiversity risks or ecosystem impacts***
 - A. Market misrepresentation of material biodiversity-related risks in mandatory securities or other regulatory filings
 - B. Promotional misrepresentation or 'greenwashing' of biodiversity-related impacts or credentials in advertising or promotion
 - C. Financier, advisor or auditor liability for investee or client misrepresentations under 3A-3B above.

The framework of potential exposures, including a discussion of potential plaintiffs, defendants and areas of law relevant to each sub-category, is set out in Figure 6 below. A more detailed version of the framework, with extended discussion and illustrative case examples, is set out in the Appendix.

In proposing this framework, we have not been confined to existing examples of 'biodiversity-related' claims. Such litigation, to date, has often focussed on single species or local impacts. There is an increasing understanding in the literature of the systemic implications of biodiversity; both the ecological risks and the risks to business from the transformative change required to address the drivers of biodiversity loss. The IPBES 2019 Global Assessment Report and the increased prominence of post-2020 global framework under the Convention of Biological Diversity are both noteworthy. It follows that biodiversity litigation could be expected to increasingly focus on systemic, interconnected and global issues, such as the impacts of deforestation in a protected area on both local species or ecosystems *and* global climate change and biodiversity loss.

Similarly, we have not limited the relevant categories of claim to prevailing (or additional) 'environmental' or 'conservation' laws. Rather, we have drawn parallels to legal developments in response to other 'emerging' or 'novel' issues such as climate change, cyber attack and #MeToo, where claimants have utilised causes of action under a broad range of prevailing commercial and administrative laws.

The increase in sophistication and quantity of strategic climate change-related claims, in particular, may provide the most salient indication of the likely direction of travel for broader biodiversity-based claims. It is anticipated that NGOs and community groups will shift their focus towards biodiversity and take inspiration and lessons learned from what was previously 'novel' subject matter for corporations, securities and consumer protection statutes. Claims relating to physical, localised biodiversity impacts may in fact face lower procedural and evidentiary hurdles than those seeking to attribute liability for climate change-related physical impacts, which are hampered by the spatial and temporal disconnect between the emissions and their harm.

To highlight a few examples of such 'commercial' claims, sub-category 1C covers the myriad possible claims by corporations, shareholders, creditors, regulators, or individuals against corporations, directors, officers, governments or individuals for a failure to manage biodiversity-related physical risks or ecosystem dependencies or adapt to the loss of biodiversity or ecosystem services. By way of practical illustration, this category may enliven claims in areas of law such as:

- breach of fiduciary or statutory duty against directors or officers where corporations with business models dependent on ecosystem services suffer financial loss when physical risks arise;
- negligence against plant or infrastructure owners by neighbours for damage resulting from a failure to adapt the infrastructure to the physical impacts of biodiversity loss; or
- negligence or breach of contract against engineers for negligent professional services that do not take account of the physical risks associated with loss of ecosystem services.

Recognising the critical role that financial institutions play in allocating capital to and underwriting risks of economic activities that harm biodiversity, sub-category 1E reflects that financiers and advisors may be the target of litigation where their investee companies engage in acts or omissions that could result in claims under sub-categories 1A to 1D. For example, lenders, statutory guarantors, underwriters or investors may be sued by corporations, shareholders, creditors, regulators, NGOs or individuals for:

- breach of fiduciary duty, prudential laws or due diligence requirements for financing activities harmful to biodiversity; or
- breach of governing documents or policies of public sector financial institutions for financing activities harmful to biodiversity.

Liability risks associated with	
1	Physical or ecosystem impacts
	<p>Direct impact through failure to prevent biodiversity loss or ecosystem consequences <i>Claims by corporations, individuals, NGOs, government or nature in its own right against corporations, directors, officers, governments or individuals alleging (for example)</i></p> <ul style="list-style-type: none"> - negligence or nuisance resulting in ecological, human or economic losses from adverse biodiversity impacts - a breach of human rights law for the human impacts of biodiversity loss resulting from the defendant's actions - a breach of financial crime statutes for proceeds derived from engaging in activities such as illegal deforestation, poaching, or illegal, unreported and unregulated fishing <p><i>Excludes breach of regulatory obligation under 1D below.</i></p>
1A.	
	<p>Indirect enablement through failure to prevent biodiversity loss or ecosystem consequences <i>Claims by corporations, individuals, NGOs, government or nature in its own right against corporations, directors, officers, governments, government agencies or individuals alleging (for example)</i></p> <ul style="list-style-type: none"> - negligence or nuisance by governments or landowners that fail to prevent adverse biodiversity impacts (including those occasioned by third parties) - a breach of human rights law for the human impacts of biodiversity loss enabled by government or corporate defendants' action/inaction - a breach of constitutional law in respect of government actions or statutory provisions that threaten biodiversity or ecosystems services - administrative / judicial review alleging inadequate consideration of biodiversity and ecosystem services in government or regulatory decision-making <p><i>Excludes breach of regulatory obligation under 1D below.</i></p>
1B.	
	<p>Failure to manage or adapt to biodiversity-related physical risks or ecosystem dependencies <i>Claims by corporations, shareholders, creditors, regulators, or individuals against corporations, directors, officers, governments or individuals alleging (for example)</i></p> <ul style="list-style-type: none"> - breach of fiduciary duty against directors or officers where corporations with business models dependent on ecosystem services suffer financial loss when physical risks arise - negligence against plant or infrastructure owners by neighbours for damage resulting from a failure to adapt the infrastructure to the physical impacts of biodiversity loss - negligence or breach of contract against engineers for negligent professional services that do not take account physical risks associated with loss of ecosystem services
1C.	
	<p>Failure to comply with regulatory requirements associated with biodiversity loss or ecosystem protection <i>Civil or criminal claims by regulators, prosecutors, NGOs or individuals against corporations, directors, officers, government agencies or individuals alleging (for example)</i></p> <ul style="list-style-type: none"> - failure to comply with biodiversity or environmental statutes - failure to comply with legal obligations requiring due diligence on biodiversity-related issues (either within business fencelines or across supply chains) (eg the French duty of vigilance law)
1D.	
	<p>Financier or advisor liability for investee conduct under 1A-1D above <i>Claims by corporations, shareholders, creditors, regulators, NGOs or individuals against lenders, statutory guarantors, underwriters or investors (under primary or accessorial liability provisions) alleging (for example)</i></p> <ul style="list-style-type: none"> - breach of fiduciary duty, prudential laws or due diligence requirements for financing activities harmful to biodiversity - 'tenders' liability' under statute or environmental tort for biodiversity-related impacts caused or unremediated by borrowers - breach of governing documents or policies of public sector financial institutions for financing activities harmful to biodiversity
1E.	
2	Transition to sustainable or regenerative economy
	<p>Failure to manage or adapt to biodiversity-related economic transition risks from policy, regulation, technology, or shifts in stakeholder preferences <i>Claims by corporations, shareholders, creditors, regulators, or individuals against corporations, directors, officers, governments or individuals alleging (for example)</i></p> <ul style="list-style-type: none"> - breach of fiduciary or statutory duty against directors or officers where corporations with business models dependent on land or ecosystem services suffer loss when transition risks arise - breach of contract by party seeking to avoid obligations where evolving market norms in the transition to a sustainable or regenerative economy disrupt contractual performance - breach of contract by insurers on scope of policy indemnities
2A.	
	<p>'Anti' biodiversity regulation claims disputing the validity or application of biodiversity-related regulation <i>Claims by corporations, individuals, or industry associations or 'astro-turf' NGOs against governments or government agencies alleging (for example)</i></p> <ul style="list-style-type: none"> - administrative / judicial review alleging inadequate regard to biodiversity considerations in government or regulatory decision-making - biodiversity-related regulations are invalid, ultra vires (illegal), unconstitutional, or do not apply to the claimant
2B.	
3	Misrepresentation of biodiversity risks or ecosystem impacts
	<p>Market misrepresentation of material biodiversity-related risks in mandatory securities or other regulatory filings <i>Claims by shareholders, beneficiaries, securities or prudential regulators or market participants against corporations, directors and officers, pension fund trustees or other market participants alleging (for example)</i></p> <ul style="list-style-type: none"> - misleading disclosures in financial filings in breach of securities or prudential laws - a breach of financial market regulations expressly requiring disclosures of sustainability risks - a breach of disclosure rules on stock or commodities exchanges
3A.	
	<p>Promotional misrepresentation or 'greenwashing' of biodiversity-related impacts or credentials in advertising or promotion <i>Claims by states, corporations, individuals, NGOs or consumer regulators against corporations or financial market participants alleging (for example)</i></p> <ul style="list-style-type: none"> - a breach of consumer laws for misrepresenting biodiversity or ecosystem impacts or credentials, of either the company or product (labelling, advertising, materials data sheets etc) - a breach of financial product regulations expressly requiring disclosures of sustainability impacts - a breach of OECD Guidelines for Multinational Enterprises
3B.	
	<p>Financier, advisor or auditor liability for investee or client misrepresentations under 3A-3B above <i>Claims by corporations, creditors, regulators, or individuals against financiers or corporate advisors alleging (for example)</i></p> <ul style="list-style-type: none"> - a breach of prudential regulations placing strict liability for underwriters for misrepresentations in prospectus documents of material biodiversity-related financial risks - Negligence or breach of contract claim against professional advisors for misrepresentations of material biodiversity-related risks in audited, verified or assured documents
3C.	

Figure 6: Framework of biodiversity-related liability risks

4. Entity-level impacts and systemic contagion: factor (b)

Liability exposures have both direct and transmitted financial consequences

The categories of biodiversity claims in the framework suggest there are three avenues by which such claims may impact on the financial sector: direct impacts, and indirect second and third order impacts by which liability acts as a mechanism for the transfer of physical and economic transition risk across markets.

Direct first order impacts arise where the financial services actor is a defendant or plaintiff. Banks, pension funds, insurers and other financial institutions may be directly affected as defendants in biodiversity litigation in a similar way that other corporate or fiduciary actors may be.

Indirect or second order impacts arise through financial market losses (equities, bonds, commodities), credit market losses, and underwriting losses associated with the direct impacts of litigation on real economy actors.³² Financial institutions and their supervisors will need to grapple with the second order impacts of biodiversity litigation involving defendants in the real economy. Institutional investors may face a diminution in the value of their equities due to the financial, reputational and strategic impacts of litigation (or in the regulatory outcomes such litigation may drive) on real economy sectors or individual investees.

Credit risks may arise through an increase in non-performing loans. Credit and underwriting losses suffered by financial services entities may be particularly acute where the risks of biodiversity litigation have not been efficiently priced into relevant products (eg financial lines of insurance).

Third order impacts may arise in the form of systemic risks, if liability is of a sufficient magnitude or quantity across sectors or geographies. This could trigger financial contagion of market losses, credit and insurance tightening and drag in the real economy.³³ If litigation catalyses a disorderly shift in real economic activity, the macro-economic impacts, such as loss of taxation revenue or a decrease in economic growth, could lead to indirect transmission through to financial institutions. In turn this could lead to an increase in capital regulatory pressures, credit risk rating reviews, or insurance tightening for specific sectors, activities or geographies.

Key takeaway

Financial regulators and financial institutions should assess the foreseeable direct, indirect second order and third order financial impacts of biodiversity-related liability risks.

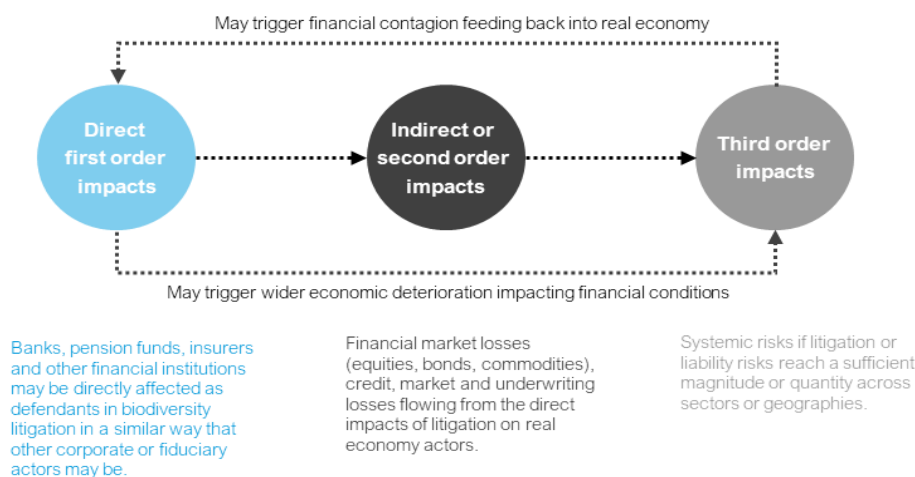


Figure 7: Avenues by which legal claims impact financial institutions

5. Preliminary observations on legal and market dynamics in the jurisdiction: factor (c)

The magnitude of biodiversity-related liability risks cannot be measured precisely without consideration of the unique characteristics of the legal framework and economy within which an institution operates.³⁴ Even beyond these jurisdictional dynamics, uncertainty, complexity, socio-political ambiguities³⁵ and valuation issues³⁶ are well-recognised problems in assessing risk. As a complex problem that may be traceable to multiple interacting natural and human sources, biodiversity risk is particularly difficult, compounded with the additional behavioural element of litigation as potential claimants decide if, when, who and how to sue.

Recognising those limitations, we offer the following preliminary observations on the legal and market variables that may be relevant to consideration of the magnitude and materiality of biodiversity-related liability exposures for any given financial market participant, sector or economy. They will be relevant in both an absolute and relative sense – both to the scale of exposure, and as to which categories of claim are deployed from within the broad framework set out in section 3 above. Financial supervisors should consider each of these jurisdictional variables as they consider potential exposures to regulated entities, as well as broader systemic impacts.

- **Reactive, compliance-based vs strategic approach to risk management:** All else being equal, the risk of liability is heightened by a reactive or compliance-based approach to biodiversity, rather than one that is strategic and transition-focused. Biodiversity-related financial risks should already be assessed and, where material, managed and disclosed, under existing frameworks and processes. It is therefore significant to note that, despite this mounting scientific evidence of an accelerating loss of biodiversity and ecosystem services and their economic implications, biodiversity risk is not yet widely integrated into corporate or investment governance, risk management, strategy and disclosure.³⁷
- **Trajectory of global biodiversity loss:** All else being equal, if there is a delay to action to conserve biodiversity, this increases the probability of category one claims seeking damages for the physical and ecological impacts of biodiversity loss. As losses build and materialise from the gradual onset, cumulative and interconnected effects of loss of biodiversity and ecosystem services, there will likely be an increase in claims that seek to recoup losses and attribute responsibility. In an alternate scenario, where there is swift transition towards sustainable and regenerative economy that tackles biodiversity loss, there are likely to be more securities fraud claims for market actors misrepresenting their own preparedness in the transition.
- **Shifts in institutional investor preferences:** Recent years have seen the emergence of a pattern of litigation for a failure to disclose *climate change*-related financial risks. This phenomenon has grown in parallel with the increasing materiality of the issue to investors, and moves towards standardisation of disclosure frameworks (particularly the TCFD and SASB). If investors indicate biodiversity risks are increasingly material and if initiatives such as the Task Force on Nature-related Financial Disclosures (TNFD)³⁸ move biodiversity disclosures beyond voluntary reporting, biodiversity-related disclosure litigation may follow a similar path.

- **Legal framework:** There are features of the applicable legal framework the presence or absence of which could be 'facilitative conditions' for liability exposure. These include:
 - the adequacy of environmental regulation or enforcement;
 - the maturity of legal systems and facilitative court access arrangements;
 - costs regimes and availability of litigation funding;
 - standing and interlocutory hurdles;
 - judicial independence; and
 - the availability of avenues for administrative and judicial appeal.
- **Social and economic context:** Similarly, there are features of the relevant economy that could be 'facilitative conditions' for liability exposure. These include:
 - accelerated biodiversity loss if the COVID-19 economy recovery preferences growth at all costs over a 'build-back green' approach;
 - jurisdictions with bountiful natural resources;
 - jurisdictions with significant agriculture, mining, infrastructure or construction industries; and
 - jurisdictions with significant population growth pressures.

Whilst many variables and uncertainties remain, the above factors could be used as high-level proxies for the jurisdictional dynamics of liability risk, which, taken together, may be indicative of a higher degree of exposure.

For example, a bank with a large commercial loan book (a) in sectors that have the greatest biodiversity impacts or dependencies on ecosystem services; and (b) in jurisdictions with bountiful natural assets but minimal biodiversity-related legislation or enforcement, would likely, all else being equal, be exposed to larger biodiversity-related liability risks.

Key takeaway

Financial supervisors should consider the legal and market variables unique to the jurisdiction as they consider potential biodiversity-related liability risks to regulated entities and broader systemic impacts.

6. Conclusion

There is growing concern among central banks, regulators and financial market participants about the financial risks associated with a loss of biodiversity and ecosystem services. Biodiversity-related liability and litigation are increasingly flagged as relevant issues, both in their own right, and as mechanisms for the transmission of discrete physical and market-based risks across economic systems.

However, the extent of these liability risks and their financial materiality to individual market actors, sectors and economies has yet to be examined in detail.

This report extends the economic literature by proposing a framework by which institutions should consider the magnitude of liability exposures, within their broader analysis of the foreseeable financial risks associated with biodiversity.

The magnitude of liability exposure as a biodiversity-related financial risk, and whether it is material to any given financial institution, system or economy, may be summarised as a function of three factors:

- (a) the nature and breadth of potential liability exposures (causes of action);**
- (b) the transmission mechanisms within and between the real economy and the financial sector; and**
- (c) legal and market dynamics in the jurisdiction.**

This report takes the first step in unpacking the nature and extent of biodiversity-related liability risks. Its primary contribution is a framework that systematically categorises the breadth of potential exposures. This framework is built around three categories: the physical risks of biodiversity, the economic transition, and misrepresentations. The categories proposed extend beyond a traditional 'environment and planning' or 'conservation'-based view of the intersection of biodiversity and the law to consider the emerging commercial law consequences associated with the failure to adequately assess, manage or disclose relevant ecological and economic transition risks.

This holistic approach to liability exposures provides the necessary foundation for institutions to consider the magnitude (and materiality) of litigation risk as they action the recommendations of the NGFS, WEF, A4S, OECD and others to consider biodiversity-related financial risks to regulated entities and systems.

Understanding the range of potential liability risks set out above will enhance the position of financial institutions to identify, price and mitigate these direct and indirect impacts, and for financial regulators to integrate these risks into their supervisory activities under their financial stability mandates.

"Development of the [case] law ... does not come like a bolt out of a clear sky. Invariably the clouds gather first, often from different quarters, indicating with increasing obviousness what is coming"

Lord Justice Nicholls, Re Spectrum Plus Ltd (in liq) [2005] 2 AC 680, [33].

Notes and references

- ¹ Network for Greening the Financial System (NGFS), *Guide for Supervisors: Integrating climate-related and environmental risks into prudential supervision* (May 2020).
- ² NGFS, *supra* note 1, 4.
- ³ Guan Schellekens and Joris van Toor, De Nederlandsche Bank (DNB), *Values at Risk? Sustainability risks and goals in the Dutch financial sector* (2019).
- ⁴ Joris Van Toor et al, DNB, *Indebted to Nature: Exploring biodiversity risks for the Dutch financial sector* (June 2020).
- ⁵ Platform voor Duurzame Financiering, *Biodiversity Opportunities and Risks for the Financial Sector*, The Sustainable Finance Platform, Working Group Biodiversity (June 2020).
- ⁶ Author interview with Sustainable Insurance Forum Chair Geoff Summerhayes, 12 June 2020.
- ⁷ Bank of England Prudential Regulation Authority, *The impact of climate change on the UK insurance sector* (September 2015); Mark Carney, Bank of England, *Breaking the Tragedy of the Horizon – Climate Change and Financial Stability*, Speech given at Lloyd's of London (September 2015).
- ⁸ See OECD, *Biodiversity: Finance and the Economic and Business Case for Action*, report prepared for the G7 Environment Ministers' Meeting, 5-6 May 2019, 37-38.
- ⁹ *Ibid.* *Ecological risks* are the direct physical risks of biodiversity and the impacts on ecology and dependencies. Most are operational risks arising from resource dependence, scarcity, or quality, including declining natural resources, diminishing feedstock and disruption of business operations due to resource supply issues. *Regulatory risks* come from government policies that seek to influence biodiversity-related behaviour with the use of policy instruments wielding positive and negative incentives. *Reputational risks* may arise from pressure mounted by shareholders, investors, consumers, agents and contractors, consultants (eg, auditors), policy makers, civil society (eg, NGOs) and other potential stakeholders because of biodiversity risks. With the emergence of state and non-state sustainability initiatives and policies, reputational forces are on the rise, leading to more imminent public pressure, embarrassment, and outright shaming. *Market risks* may arise from consumer behaviour, purchaser preferences or supplier decisions influenced by biodiversity policies, principles, and practices. Like reputational risks, market risks increase with the proliferation of sustainability initiatives such as certifications and other standardisation schemes, especially as they increasingly educate and involve others (consumers, suppliers) in decision-making, for instance through purchasing power and the supply chain. *Financial risks* are those relating to monetary stakes associated with biodiversity risks, such as higher insurance premiums. See also earlier classifications of biodiversity risks by F&C Asset Management Plc (formerly ISIS Asset Management) and Earthwatch Institute, *Is Biodiversity Risk a Material Risk for Companies?* (London: 2004); PricewaterhouseCoopers and the World Economic Forum, *Biodiversity and Business Risk: A Global Risks Network Briefing* (Cologne/Geneva: World Economic Forum, 2010)
- ¹⁰ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), Glossary – Biodiversity < <https://ipbes.net/glossary/biodiversity>> (accessed 12 June 2020).
- ¹¹ Ecosystem services are classified into four categories: provisioning services (the products we get from ecosystems, for instance freshwater and fibre), regulating services (ecosystem regulation of natural processes that affect us, for instance floods, disease and water purification), supporting services (services supporting other ecosystem services we rely on, for instance soil formation and nutrient recycling) and cultural services (benefits that are not necessarily material but still mean much to us, for instance spiritual experience, aesthetics, and art and design: Millennium Ecosystem Assessment, *Ecosystems and human well-being: synthesis*, (Island Press, Washington, D.C., 2005)
- <<http://www.millenniumassessment.org/documents/document.356.aspx.pdf>> (accessed 10 June 2020).
- ¹² See, eg, the Catalogue of Assessments on Biodiversity and Ecosystem Services, developed and maintained by IPBES: <<https://ipbes.net/catalogue-assessments-0>>. See also IPBES (2019): *Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*. S. Díaz, J. Settele, E. S. Brondizio E.S., H. T. Ngo, M. Guèze, J. Agard, A. Arneeth, P. Balvanera, K. A. Brauman, S. H. M. Butchart, K. M. A. Chan, L. A. Garibaldi, K. Ichii, J. Liu, S. M. Subramanian, G. F. Midgley, P. Miloslavich, Z. Molnár, D. Obura, A. Pfaff, S. Polasky, A. Purvis, J. Razzaque, B. Reyers, R. Roy Chowdhury, Y. J. Shin, I. J. Visseren-Hamakers, K. J. Willis, and C. N. Zayas (eds.). IPBES secretariat, Bonn, Germany. 56 pages.
- ¹³ OECD *supra* note 8; See also World Business Council for Sustainable Development, *Effective Biodiversity and Ecosystem Policy and Regulation: Business Input to the COP10 of the Convention on Biological Diversity* (Conches-Geneva: World Business Council for Sustainable Development, 2011).
- ¹⁴ DNB, *supra* note 4, 14; McKinsey & Company, *McKinsey Global Survey Results: The Next Environmental Issue for Business* (McKinsey & Company, 2010).
- ¹⁵ See OECD *supra* note 8 and text at note 9. The DNB Sustainable Finance Platform biodiversity working group categorises biodiversity risks to financial institutions specifically according to the following categories: physical risks (credit and investment risk), systemic risks (market risk and legal liability risk), transition risks (regulatory risk) and reputational risks: Platform voor Duurzame Financiering, *supra* note 5, 10-12.
- ¹⁶ For a discussion on how financial institutions are affected by biodiversity-related risks, see Platform voor Duurzame Financiering, *supra* note 5, 10-13.
- ¹⁷ For a description of how *climate-related* physical and economic transition risks translate to financial stability risks, see NGFS *supra* note 1, 12.
- ¹⁸ F&C Asset Management Plc *supra* note 9.
- ¹⁹ PricewaterhouseCoopers *supra* note 9.
- ²⁰ FAO, *The State of the World's Biodiversity for Food and Agriculture*, J. Bélanger & D. Pilling (eds.) (Rome: FAO Commission on Genetic Resources for Food and Agriculture Assessments, 2019).
- ²¹ Jessica Dempsey, 'Biodiversity Loss as Material Risk: Tracking the Changing Meanings and Materialities of Biodiversity Conservation' (2013) 45 *Geoforum* 41, 41.
- ²² IPBES (2019) *supra* note 12, [A.3] 11.
- ²³ OECD *supra* note 8.
- ²⁴ World Economic Forum, *Global Risks Report 2020* (January 2020). See also AXA Investment Managers, *Biodiversity crisis: The role of investors in resolving species extinction* (September 2019).
- ²⁵ P Addison, J Bull and E Milner-Gulland, 'Using conservation science to advance corporate biodiversity accountability' (2018) 33(2) *Conservation Biology* 307; O Boiral, 'Accounting for the unaccountable: biodiversity reporting and impression management' (2016) 135 *Journal of Business Ethics* 751; R Adler et al, 'United Nations decade on biodiversity: A study of the reporting practices of the Australian mining industry' (2017) 30 *Accounting, Auditing & Accountability Journal* 1711.
- ²⁶ Dempsey *supra* note 21.
- ²⁷ Olivier Boiral and Iñaki Heras-Saizarbitoria, 'Corporate Commitment to Biodiversity in Mining and Forestry: Identifying Drivers from GRI Reports' (2017) 162 *Journal of Cleaner Production* 153. A 2010 survey by McKinsey shows that many businesses see biodiversity more as a business opportunity rather than as a risk: McKinsey & Company, *McKinsey Global Survey Results: The Next Environmental Issue for Business* (McKinsey &



Company, 2010). See also See Thomas Smith, Lucy Beagley, Joseph Bull, EJ Milner-Gulland, Matt Smith, Francis Vorhies and Prue F.E. Addison, 'Biodiversity Means Business: Reframing Global Biodiversity Goals for the Private Sector' (2020) 13(1) *Conservation Letters* 12690.

²⁸ NGFS supra note 1.

²⁹ DNB, supra note 4.

³⁰ IPBES (2019) supra note 12.

³¹ The CCLI and its partner organisations undertake research and analysis of these alternate angles to assess risks and exposures in the context of a particular entity, sector or jurisdiction.

³² NGFS supra note 1, 20.

³³ NGFS supra note 1, 20.

³⁴ Several measurement metrics and accounting methodologies exist for biodiversity risks generally, see OECD supra note 8.

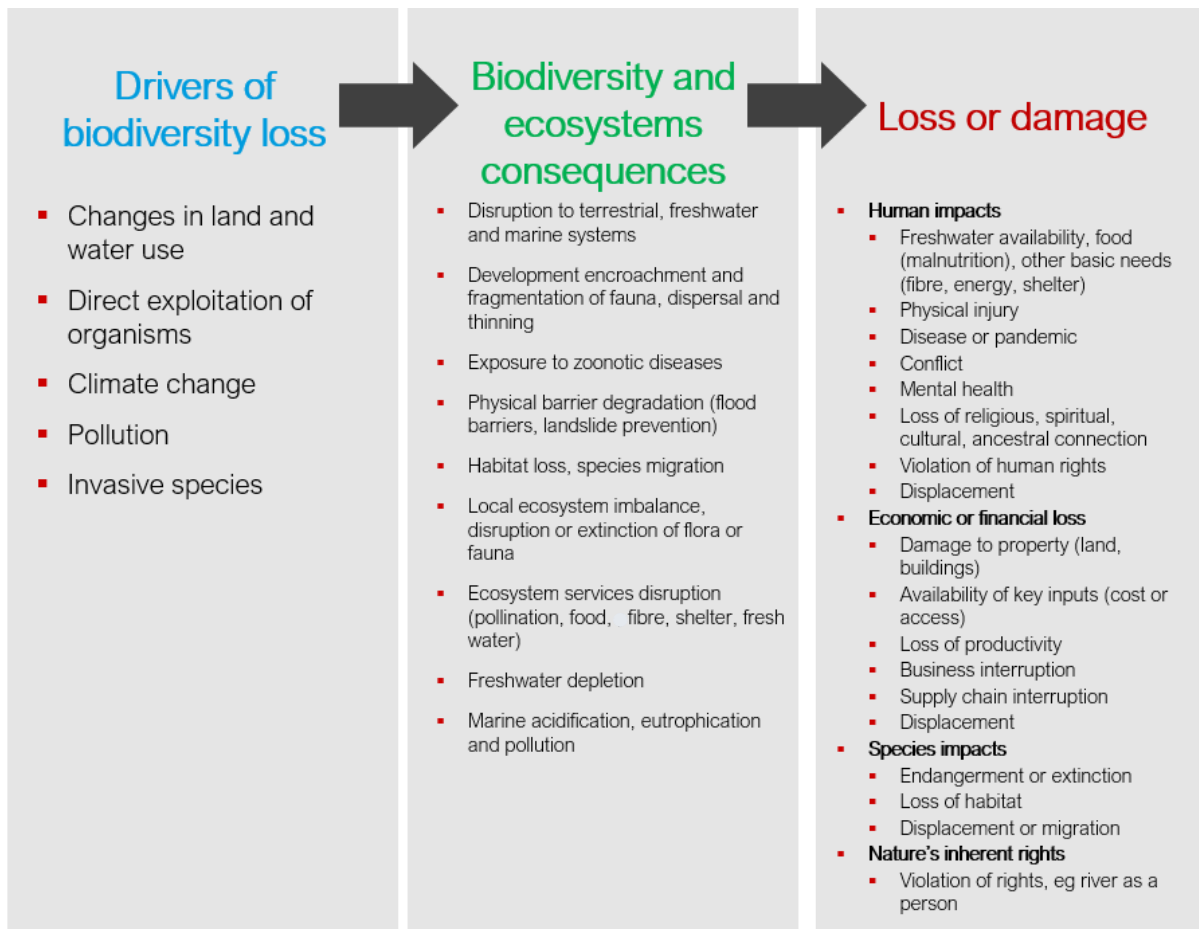
³⁵ PricewaterhouseCoopers and the World Economic Forum supra note 9; Ortwin Renn, Andreas Klinke and Marjolein van Asselt, 'Coping with Complexity, Uncertainty and Ambiguity in Risk Governance: A Synthesis' (2011) 40(2) *Ambio* 231; Andreas Klinke and Ortwin Renn, 'Adaptive and Integrative Governance on Risk and Uncertainty' (2012) 15(3) *Journal of Risk Research* 273.

³⁶ Alliance for Corporate Transparency Project, *2019 Research Report: An analysis of the sustainability reports of 1000 companies pursuant to the EU Non-Financial Reporting Directive* (2019), 105.

³⁷ OECD supra note 8, 37, 41.

³⁸ The Informal Working Group for the TNFD was launched in July 2020: <https://tnfd.jmwarner.tech/>.

Appendix – Detailed framework of biodiversity-related liability risks and claims



Category one – Liability risks arising from physical risks or ecosystem impacts of biodiversity

1	Liability risks associated with physical or ecosystem impacts of biodiversity
Guiding question	<i>Who will sue whom and how to seek compensation for loss or damage or to prevent future loss or damage from the biodiversity and ecosystems consequences of the drivers of biodiversity loss?</i>
Description	This category covers general liability claims for loss and damage caused by the adverse impacts on biodiversity or ecosystem services. It includes claims not just for causing, enabling or financing biodiversity loss and the ecosystems consequences, but also where the defendant fails to manage the foreseeable impacts of biodiversity loss and ecosystems consequences, such as supply chain

1	Liability risks associated with physical or ecosystem impacts of biodiversity	
	<p>disruption or loss of key inputs. The losses for which claimants seek compensation may be second order impacts, such as breaches of human rights or economic losses to business. The causes of action may not even directly relate to the biodiversity harms, for example breach of financial crime provisions. The claims may go beyond the emblematic individual or NGO claim against a government or corporation, and may extend to industry against industry or government against government. Claims against governments for a failure to protect biodiversity may relate to their inaction (such as an inadequacy or failure to enforce protected areas legislation), or a positive action (such as climate regulations that the claimant alleges harm biodiversity, eg, land use for bioenergy).</p>	
 1A.	Direct impact through failure to prevent biodiversity loss or ecosystem consequences	
Potential claimants	<ul style="list-style-type: none"> ▪ Corporations ▪ Individuals (including youth, Indigenous and First Nations peoples) ▪ Communities/NGOs ▪ Government ▪ Nature in its own right 	
Potential defendants (including direct, first order impacts for financial institutions)	<ul style="list-style-type: none"> ▪ Corporations, directors and officers ▪ Government or its instrumentalities/agencies (federal, state/provincial, local/municipal) ▪ Individuals 	<div style="display: flex; align-items: center;"> <div> <p>Case spotlight</p> <p>A retired shrimper and environmental activist Diane Wilson sued Formosa, alleging that its Port Comfort plant had illegally discharged thousands of plastic pellets and other pollutants into Lavaca Bay and other nearby waterways in Texas. The lawsuit was settled in December 2019 for US\$50 million, the largest amount in US history involving a private citizen's lawsuit against an industrial polluter under federal clean air and water laws. Under the settlement, Formosa also agreed to comply with 'zero discharge' of all plastics in the future, and to clean up existing pollution. Additional violations by Formosa will result in more money being paid into the settlement fund: <i>San Antonio Bay Estuarine Waterkeeper v Formosa Plastics Corp., Texas</i>, Case 6:17-cv-47).</p> </div> </div>
Example causes of action	<ul style="list-style-type: none"> ▪ Tort (negligence, nuisance, failure to warn, defective design) ▪ Breach of international human rights law (including child's rights, cultural rights) ▪ Breach of domestic human rights law ▪ Breach of constitutional rights ▪ Breach of environmental or planning statute ▪ Breach of consumer protection laws ▪ Breach of nature's inherent rights ▪ Breach of OECD Guidelines for Multinational Enterprises ▪ Breach of financial crime statute ▪ Breach of bilateral or regional trade agreements 	
Example claims	<p>Claims for negligence or nuisance against businesses that cause adverse biodiversity impacts brought by citizens, NGOs, states or sub-national governments seeking compensation for damages caused by or costs incurred due to ecological, human and economic losses.³⁹</p> <p>Claims against businesses that cause adverse biodiversity harm brought by citizens or NGOs seeking to injunct or halt biodiversity harms being perpetrated by businesses.⁴⁰</p>	

1	Liability risks associated with physical or ecosystem impacts of biodiversity	
	<p>Claims by prosecution authorities for breaches of financial crime statutes against individuals or corporations, for proceeds derived from engaging in activities such as illegal deforestation, poaching, or illegal, unreported and unregulated fishing</p> <p>Claims for breach of human rights law for the human impacts of biodiversity loss resulting from the defendant's actions</p> <p>Claims by one state against another state seeking compensation for damages caused by or costs incurred due to ecological, human and economic losses caused by the adverse biodiversity impacts of the defendant state's actions or inactions.</p>	
At risk sectors	<ul style="list-style-type: none"> ▪ Agriculture ▪ Mining ▪ Utilities and power generation ▪ Oil and gas ▪ Industrials (chemicals, plastics, manufacturing) ▪ Government 	
Preliminary observations on direction of travel	<p>Claims likely to increase in sophistication and quantity.</p>	<p>Case spotlight</p> <p>The Canadian government sued Canadian Forest Products Ltd for costs of restoration and loss after a fire swept through the Stone Creek area in the interior of British Columbia damaging 1491 hectares of government-held forest in a region where tenure holders are licensed to log. The parties did not dispute the fact that the fire was largely the fault of the defendant, a major licensee on the property. The plaintiff claimed damages against the defendant for three categories of loss: (1) expenditures for suppression of the fire and restoration of the burned-over areas; (2) loss of stumpage revenue from trees that would have been harvested in the ordinary course (harvestable trees); and (3) loss of trees set aside for various environmental reasons (non-harvestable or protected trees) in sensitive areas as established by government of British Columbia. The trial judge awarded \$3,575,000, which was upheld on final appeal to the Supreme Court: <i>British Columbia v. Canadian Forest Products Ltd.</i> [2004] 2 SCR 74.</p>
Preliminary observations on materiality for financial institutions	<ul style="list-style-type: none"> ▪ First order – Financial institutions are less likely to be the defendant of these claims, as the majority of biodiversity impacts are via financing or enabling biodiversity harms. ▪ Second order – Increasing risk of credit, investment and underwriting exposure to defendants. ▪ Third order – Potential for systemic risk if significant judgments against defendants spark a wave of litigation. 	



1B.

Indirect enablement through failure to prevent biodiversity loss or ecosystem consequences

Potential claimants	<ul style="list-style-type: none"> ▪ Corporations ▪ Individuals (including youth, Indigenous and First Nations peoples) ▪ Communities/NGOs ▪ Government ▪ Nature in its own right
Potential defendants (including direct, first order impacts for financial institutions)	<ul style="list-style-type: none"> ▪ Government or its instrumentalities/agencies (federal, state/provincial, local/municipal) ▪ Corporations ▪ Directors and officers ▪ Individuals

1	Liability risks associated with physical or ecosystem impacts of biodiversity	
Example causes of action	<ul style="list-style-type: none"> ▪ Tort (negligence, nuisance) ▪ Breach of international human rights law (including child's rights, cultural rights) ▪ Breach of domestic human rights law ▪ Breach of constitutional rights ▪ Breach of environmental or planning statute ▪ Administrative law judicial review of decisions under environmental or planning statutes ▪ Breach of consumer protection laws ▪ Breach of nature's inherent rights ▪ Breach of OECD Guidelines for Multinational Enterprises 	
Example claims	<p>Claims against states, government agencies, landowners for a failure to prevent biodiversity harms brought by citizens, NGOs, representative Indigenous groups or sub-national governments against their own or other states in breach of existing legislation or legal doctrines e.g. negligence or nuisance.⁴¹</p> <p>Claims against states or corporations by citizens or NGOs, on the basis that a breach of human rights law for the human impacts of biodiversity loss was enabled by government or corporate defendants' action or inaction.⁴²</p> <p>Claims against governments or regulators by citizens or NGOs for inadequate consideration of biodiversity and ecosystem services in decision-making.⁴³</p> <p>Constitutional actions against governments in respect of actions or statutory provisions that threaten biodiversity or ecosystems services.⁴⁴</p>	
At risk sectors	<ul style="list-style-type: none"> ▪ Government ▪ Agriculture ▪ Fashion ▪ Financial sector 	<div style="text-align: center;"> <p>Case spotlight</p> </div> <p>Twenty-five Colombian youth aged 7 to 26 years old brought an action against the Colombian government, Colombian municipalities, and some corporations, claiming rights to healthy environment, life, health, food and water. The youths filed a constitutional claim alleging climate change and the government's failure to reduce deforestation and facilitate compliance with a target for net-zero deforestation within the Colombian Amazon by the year 2020, in line with the Paris Agreement and the National Development Plan 2014-2018, threatened their fundamental rights. While a lower court ruled against them, the Supreme Court allowed their appeal, acknowledging that the 'fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem'. The court also recognised the Colombian Amazon as a 'subject of rights,' hence entitled to protection, conservation, maintenance, and restoration. The Court ordered the government to formulate and implement action plans to address deforestation in the Amazon: <i>Future Generations v. Ministry of the Environment (Dejusticia)</i> (Corte Suprema de Justicia, STC4360-2018, 5 April 2018)</p>
Preliminary observations on direction of travel	Claims likely to increase in sophistication and quantity.	
Preliminary observations on materiality for financial institutions	<ul style="list-style-type: none"> ▪ Second order – Increasing risk of credit, investment and underwriting exposure to corporate, director and officer defendants; lower risk of exposure to government defendants. ▪ Third order – Potential for systemic risk if significant judgments against defendants spark a wave of litigation. 	
<p>1C.</p>	Failure to manage or adapt to biodiversity-related physical risks or ecosystem dependencies	
Potential claimants	<ul style="list-style-type: none"> ▪ Corporations (shareholders derivatively) 	

1	Liability risks associated with physical or ecosystem impacts of biodiversity	
	<ul style="list-style-type: none"> ▪ Shareholders ▪ Creditors ▪ Corporate or prudential regulators ▪ Individuals 	
Potential defendants (including direct, first order impacts for financial institutions)	<ul style="list-style-type: none"> ▪ Directors and officers ▪ Corporations ▪ Individuals ▪ Government agencies 	
Example causes of action	<ul style="list-style-type: none"> ▪ Corporate law breach of directors' duty ▪ Trust law breach of duty ▪ Tort (negligence, public trust doctrine) ▪ Breach of contract ▪ Nuisance (damage to property) 	 <p>Case spotlight</p> <p>In early 1988, Kelby signed 'Confection Sunflower Production' contract No. 242 with Red River Commodities (RRC). RRC agreed to purchase 250,000 pounds from Kelby at a floor price of 11.25 cents per pound, and Kelby agreed to 'plant a minimum of 250 acres to cover contracted lbs'. Because of drought, Kelby grew and delivered only 75,084 pounds. In December 1988, RRC sued Kelby for his failure to deliver the contracted balance of 174,916 pounds: <i>Red River Commodities, Inc. v. Eidsness (Kelby)</i> {459 N.W. 2d 805 (1990)}</p>
Example claims	<p>Breach of fiduciary duty claims by shareholders against directors or officers where corporations with business models dependent on biodiversity or ecosystem services suffer financial loss due to foreseeable physical risks arising from biodiversity loss (eg loss of pollination services) against which reasonable precautions were not taken.</p> <p>Claims by creditors against directors of insolvent companies relating to the approval of dividend where corporations with business models dependent on biodiversity or ecosystem services go insolvent due to physical risks arising from biodiversity loss.</p> <p>Claims against plant or infrastructure owners by neighbours or other third parties where damage is caused by the failure of the corporation, infrastructure owner or government agency to adapt their plant or infrastructure to the physical impacts of biodiversity loss (eg physical barrier degradation).</p> <p>Claims against engineers or other advisers for negligent professional services that do not take account foreseeable physical risks associated with loss of biodiversity or ecosystem services (eg in design specifications).</p> <p>Breach of contract claims where there is performance interruption due to the materialisation of biodiversity-related physical risks or ecosystem impact, analogous to the contractual disputes over frustration and force majeure beginning to be seen in relation to the physical impacts of climate change.</p>	
At risk sectors	<ul style="list-style-type: none"> ▪ Agriculture/aquaculture ▪ Banks, insurers, investors ▪ Fashion ▪ Logistics ▪ Mining and resources (water dependency) ▪ Pharmaceuticals ▪ Private or public sector plant or infrastructure owners ▪ Professional services (engineers) 	
Preliminary observations on direction of travel	<p>May see high profile strategic litigation.</p>	

1	Liability risks associated with physical or ecosystem impacts of biodiversity	
Preliminary observations on materiality for financial institutions	<ul style="list-style-type: none"> ▪ First order – Financial institutions may be targeted as defendants. ▪ Second order – Increasing risk of credit, investment and underwriting exposure to corporate, director and officer defendants. 	<div style="text-align: center;"> <p>Case spotlight</p> </div> <p>On 12 November 2019, Telstra and NBN Co made the decision to temporarily suspend disconnection activities under the Migration Plan for their regulated telecommunications infrastructure in Australia. This followed the declaration of 'catastrophic' fire danger and a week-long state of emergency in NSW, and significant and widespread fires occurring across Queensland. This decision was made to minimise risks to front-line staff, and to protect existing lines of communication for affected customers. Telstra advised the government regulator the ACCC that it considered the bushfires constituted a Force Majeure Event under the Migration Plan and was not in breach for its inability to perform. This position was accepted by the ACCC, thus avoiding litigation. https://www.accc.gov.au/regulated-infrastructure/communications/industry-reform/telstras-migration-plan/force-majeure-event-nsw-qld-vic-and-sa-bushfires-deferral-of-disconnection-of-customnet-spectrum-services</p>



1D.

Failure to comply with regulatory requirements associated with biodiversity loss or ecosystem protection

Potential claimants	<ul style="list-style-type: none"> ▪ Regulators or prosecutors ▪ NGOs ▪ Individuals
Potential defendants (including direct, first order impacts for financial institutions)	<ul style="list-style-type: none"> ▪ Corporations ▪ Directors and officers ▪ Government instrumentalities ▪ Individuals
Example causes of action	<ul style="list-style-type: none"> ▪ Breach of environmental or planning statutes, including species and protected areas legislation ▪ Breach of due diligence obligations e.g. French duty of vigilance law
Example claims	<p>Claims against individuals and corporations for failure to comply with environmental statutes</p> <p>Claims against individuals for failure to comply with legal obligations requiring due diligence on biodiversity-related issues, either within business fencelines or across supply chains, including the new French duty of vigilance law requiring companies to prevent environmental damages in connection with their operations.⁴⁵</p> <p>Claims against government or its instrumentalities/agencies (federal, state/provincial, local/municipal) by citizens, regulators, and NGOs for failure to comply with environmental statutes.⁴⁶</p> <p>Claims by individuals or NGOs against government or regulators that attempt to scale back biodiversity protection in alleged breach of international commitments or conventions.</p>
At risk sectors	<ul style="list-style-type: none"> ▪ Agriculture ▪ Mining ▪ Industrials ▪ Fashion
Preliminary observations on direction of travel	Likely to be more 'routine' cases rather than high profile claims.

1	Liability risks associated with physical or ecosystem impacts of biodiversity	
<p>Preliminary observations on materiality for financial institutions</p>	<ul style="list-style-type: none"> ▪ Unlikely to lead to significant first, second or third order exposures in short to medium term. 	<div style="text-align: center;"> <p>Case spotlight</p> </div> <p>Spanish NGOs SEO/Birdlife and Coordinadora Monte-Alduide challenged the environmental approval granted to an open-pit mining project proposed by Magnesitas mining company in the Zilbeti Forest in Spain. The beech forest is located in the Monte Alduide area designated a Natura 2000 site under the EU Habitat Directive that guarantees the conservation of the most threatened species and ecosystems of Europe. The Court rejected the argument that it the mining project only affected a small proportion of the protected area in related to its total size. The regional court found that the impacts affected the conservation objectives of the Special Area for Conservation - what was important was the integrity of the entire area. This was upheld on appeal to the Supreme Court in 2017. <i>Coordinadora Monte-Alduide v Gobierno de Navarra and Magnesitas Navarras S.A</i> (Sentencia No 000266/2015, affirmed 2017 by Supreme Court).</p>
<div style="display: flex; align-items: center; justify-content: center;"> <p>Financier or advisor liability for investee conduct under 1A-1D above</p> </div> <p style="font-size: small; margin-top: 5px;">1E.</p>		
<p>Potential claimants</p>	<ul style="list-style-type: none"> ▪ Corporations (shareholders derivatively) ▪ Shareholders ▪ Creditors ▪ Securities regulators ▪ NGOs ▪ Individuals 	
<p>Potential defendants (including direct, first order impacts for financial institutions)</p>	<ul style="list-style-type: none"> ▪ Lenders or other statutory guarantors ▪ Underwriters or investors, including multilateral development banks, export credit agencies, sovereign wealth funds 	
<p>Example causes of action</p>	<ul style="list-style-type: none"> ▪ Breach of fiduciary duty ▪ Breach of prudential laws ▪ Breach of due diligence and environmental impact assessment requirements ▪ Breach of governing documents or policies 	<div style="text-align: center;"> <p>Case spotlight</p> </div> <p>In June 2020, the NGO Inclusive Development International brought a claim against the International Finance Corporation (IFC) alleging its investment in an proposed limestone and cement factory in the Kendeng mountains of Central Java, Indonesia, breaches the due diligence requirements of its environmental and social performance policy. The IFC holds a significant equity stake in Raiffeisen Bank International, the Austrian-based bank that provides general corporate lending to the project proponent Heidelberg Cement. The NGO lodged the complaint to the Compliance Advisor Ombudsman on behalf of affected communities who allege the project will threaten species and endemic wildlife and flora, and contribute to the destruction of delicate ecosystem and habitat that the local communities depend on for their subsistence and livelihoods. https://www.inclusivedevelopment.net/wp-content/uploads/2020/06/Redacted-CAO-Complaint-HeidelbergCement.pdf</p>
<p>Example claims</p>	<p>Claims against public or private banks, investors or insurers for financing investees that engage in activities harmful to biodiversity that could ground claims under 1A, 1B, 1C, 1D</p>	

1	Liability risks associated with physical or ecosystem impacts of biodiversity
	<p>Claims for breach of fiduciary duty, prudential laws or due diligence requirements for financing activities harmful to biodiversity</p> <p>Claims against public sector financial institutions for breach of governing documents or internal policies relating to the environment or biodiversity</p> <p>'Lenders' liability' under statute or environmental tort for biodiversity-related impacts caused or unremediated by borrowers</p>
At risk sectors	<ul style="list-style-type: none"> ▪ Banks, insurers, investors ▪ Public sector international financial institutions
Preliminary observations on direction of travel	Likely to see strategic claims.
Preliminary observations on materiality for financial institutions	<ul style="list-style-type: none"> ▪ First order – Financial institutions may be targeted as defendants in turn creating reputational risks. ▪ Second and third order exposures less significant at this early stage.

Category two – Liability risks arising from transition to sustainable or generative economy

2	Liability risks associated with transition to sustainable or regenerative economy
Guiding question	<i>Who will sue whom and how to seek compensation for loss or damage or to prevent future loss or damage due to changes in policy, regulation, technology and stakeholder preferences in response to the biodiversity and ecosystems consequences of the drivers of biodiversity loss?</i>
Description	This category covers claims that arise due to transition to a more sustainable and regenerative economy which cause loss. The scenario draws parallels to Kodak's bankruptcy as it missed the technological advances in the transition to digital, essentially is there a possibility of a biodiversity transition 'Kodak moment'? It includes claims where corporations, officers or defendants failure to manage biodiversity-related economic transition risks or contractual parties dispute how to manage losses brought about by the disruptions of policy, regulatory, technological and stakeholder preferences to shift towards the protection of biodiversity. It also includes litigation that arises in response to policy or regulation, attempting to wind back its biodiversity protection by challenging its validity or application to an individual case.
 2A.	Failure to manage or adapt to biodiversity-related economic transition risks from policy, regulation, technology, or shifts in stakeholder preferences
Potential claimants	<ul style="list-style-type: none"> ▪ Corporations (shareholders derivatively) ▪ Shareholders ▪ Creditors ▪ Corporate or prudential regulators ▪ Individuals

2 Liability risks associated with transition to sustainable or regenerative economy	
<p>Potential defendants (including direct, first order impacts for financial institutions)</p>	<ul style="list-style-type: none"> Directors and officers Corporations Government agencies Individuals
<p>Example causes of action</p>	<ul style="list-style-type: none"> Corporate law breach of directors' duty Trust law breach of duty Tort (negligence, public trust doctrine) Breach of contract <div style="background-color: #2c3e50; color: white; padding: 10px; margin-top: 10px;"> <div style="display: flex; align-items: center;"> <p style="margin: 0;">Case spotlight</p> </div> <p style="font-size: 0.8em; margin-top: 5px;"> In 2017, the US SEC brought a claim against Rio Tinto and its former CEO and CFO. The complaint essentially alleged that the company and its officers has engaged in securities fraud contrary to the <i>Securities Act</i> and <i>Securities Exchange Act</i>. This was alleged on the basis that the officers had failed to inform the market of a significant impairment in the value of Mozambique coal assets, which it had acquired for US\$3.7b, when undertaking a US\$5.5b capital raising. The coal assets had been acquired 'on the central assumption that it could profitably mine, transport and sell more than 40 million tonnes of coal per year by barging ... down the Zambezi River to a port on the Indian Ocean'. Rio Tinto subsequently faced a series of setbacks in relation to the project, from the quality and volume of the deposit, the availability of rail logistics, and the Mozambique government's rejection of its application for a permit to barge the coal down the Zambesi. The latter decision was primarily due to the unique biodiversity value and environmental sensitivity of the river and its surrounds. The asset was eventually sold two years after its acquisition for US\$50 million. The case remains on foot in the United States District Court. <i>SEC v Rio Tinto Plc et al</i>, US District Court, Southern District of New York, no. 17-07994 </p> </div>
<p>Example claims</p>	<p>Breach of fiduciary or statutory duty claims by shareholders against directors or officers where corporations with business models dependent on biodiversity or ecosystem services suffer financial loss due to foreseeable regulatory, market or financial risks arising from society's responses to the biodiversity crisis (eg loss of market access due to tariffs or import bans brought in to conserve biodiversity).</p> <p>Claims by creditors against directors of insolvent companies relating to the approval of dividend where corporations with business models dependent on biodiversity or ecosystem services go insolvent due to economic transition risks (eg land intensive businesses affected by an increase in protected areas).</p> <p>Contractual disputes with claims by party against party seeking to avoid or repudiate obligations where evolving market norms in the transition to a sustainable or regenerative economy disrupt contractual performance.</p> <p>Contractual disputes between insured and insurer on the scope of policy indemnities relating to coverage for losses from the materialisation of biodiversity-related physical or economic transition risks.</p>
<p>At risk sectors</p>	<ul style="list-style-type: none"> Agriculture Fisheries Financial institutions Mining Industrials (eg plastics manufacturing – stewardship for products at end of life)
<p>Preliminary observations on direction of travel</p>	<p>Likely to increase with an increase in biodiversity-related economic transition risks generally.</p>

2	Liability risks associated with transition to sustainable or regenerative economy	
Preliminary observations on materiality for financial institutions	<ul style="list-style-type: none"> ▪ First order – Financial institutions may be targeted as defendants. ▪ Second and third order exposures less significant at this early stage. 	
 2B.	‘Anti’ biodiversity regulation claims disputing the validity or application of biodiversity-related regulation	
Potential claimants	<ul style="list-style-type: none"> ▪ Corporations ▪ Individuals ▪ Industry associations ▪ ‘Astro-turf’ NGOs 	<div style="text-align: center;">  <p>Case spotlight</p> </div> <p>A Canadian company filed for judicial review to set aside an emergency order to protect the Western Chorus Frog under Canada’s Species at Risk Act. The applicant claimed that the order paralyses land development activities that have already been authorised under a certificate from the Minister of Sustainable Development, Environment and the Fight against Climate Change. The court dismissed the application: <i>Groupe Maison Candiac Inc. v Attorney General of Canada</i>.</p>
Potential defendants (including direct, first order impacts for financial institutions)	<ul style="list-style-type: none"> ▪ Governments ▪ Governmental decision-makers (agencies, regulators) 	
Example causes of action	<ul style="list-style-type: none"> ▪ Judicial review under administrative law ▪ Breach of constitutional laws ▪ Breach of bilateral or regional trade agreements 	
Example claims	<p>Claims against governments or regulators for inappropriate consideration of biodiversity and ecosystem services in decision-making, brought by corporations or ‘astro-turf’ organisations under planning, environmental and administrative laws.</p> <p>Claims against sub-national, national, supra-national governments and their regulators, by companies, property owners, trade associations or states materially impacted by biodiversity protection regulations or regulatory actions, challenging the validity or application of particular laws or administrative decisions, or seeking exemptions from regulation.</p>	
At risk sectors	<ul style="list-style-type: none"> ▪ Government. 	
Preliminary observations on direction of travel	More likely as routine litigation than high-profile strategic claims.	
Preliminary observations on materiality for financial institutions	<ul style="list-style-type: none"> ▪ Second-order – although liability risk exposures are low, a successful claim challenging the validity of biodiversity regulation could in turn create physical or transition risks to actors in real economy or financial institutions, to which the financial sector could be exposed. ▪ Third order – successful claims challenging the validity of biodiversity regulations could then in turn increase systemic risks. 	


Category three – Liability risks arising from misrepresentation of biodiversity risks or ecosystems impacts

3	Liability risks associated with misrepresentation of biodiversity risks or ecosystem impacts
Guiding question	<i>Who will sue whom and how to seek compensation for loss or damage due to misrepresentations relating to the biodiversity and ecosystems consequences of the drivers of biodiversity loss?</i>
Description	Recognising that the law places specific weight on statements or representations, a variety of claims may be filed on the basis of statements about an entity's biodiversity risks or ecosystem impacts, not just the actions or failures in relation to those risks or impacts. This category covers such claims, from misleading disclosure claims under securities laws, to 'greenwashing' or misrepresentation claims under consumer laws. It also includes claims against investors or professional advisors in relation to investee or client misrepresentations.



3B.

Market misrepresentation of material biodiversity-related risks in mandatory securities or other regulatory filings

Potential claimants	<ul style="list-style-type: none"> ▪ Shareholders ▪ Beneficiaries ▪ Securities or prudential regulators ▪ Market participants 	 <p>Case spotlight</p> <p>Earth Island Institute, which publishes Earth Island Journal, has filed a first-of-its-kind lawsuit against ten consumer goods companies, including giants like Coca-Cola, PepsiCo, and Nestle, for their contribution to the plastic pollution crisis. Much of the plastic that is labelled 'recyclable' is false and misleading due to the inability of consumers to access facilities that will actually recycle the products. The claim also includes public nuisance, failure to warn and design defect claims which would be categorised under 1A: Earth Island Institute v Crystal Geyser Water Company cv-20-01218 (filed in Supreme Court of California, 26 February 2020)</p>
Potential defendants (including direct, first order impacts for financial institutions)	<ul style="list-style-type: none"> ▪ Corporations ▪ Directors and officers ▪ Pension fund trustees ▪ Market participants 	
Example causes of action	<ul style="list-style-type: none"> ▪ Misleading disclosure under securities or prudential laws ▪ Breach of sustainable finance disclosure regulations ▪ Breach of commodities exchange disclosure rules 	
Example claims	<p>Claims by shareholders or securities or prudential regulators for misleading disclosure in losses arising from a failure to disclose material physical and economic transition risks relating to biodiversity impacts and dependencies.</p> <p>Claims against financial market participants for breach of regulations requiring disclosures of sustainability risks and impacts, such as the EU Sustainable Finance Disclosure Regulation.</p> <p>Claims by market authorities or market participants for breach of disclosure rules on commodities exchanges where a failure to disclose large physical market positions results in market participants suffering financial loss arising from biodiversity-related physical or economic transition risks</p>	

3 Liability risks associated with <b style="color: red;">misrepresentation of biodiversity risks or ecosystem impacts	
At risk sectors	<ul style="list-style-type: none"> ▪ Agriculture ▪ Mining ▪ Industrials ▪ Financial services sector ▪ Commodities
Preliminary observations on direction of travel	<p>May follow upward trajectory of climate-related disclosure claims.</p> <div style="background-color: #2c3e50; color: white; padding: 10px;"> <p>Case spotlight</p> <p>In July 2020, a claim was filed in the Australian Federal Court claim has been filed in against the Commonwealth (Federal Government) and, notably, a number of its officers, on behalf of a retail purchaser of exchange-traded government bonds. Whilst the claim relates to a sovereign debt issuance, the general principles are likely to be of equal interest in private debt / equity capital markets. It alleges that the investor information statements issued in relation to the bonds are misleading or deceptive contrary to section 12DA(1) of the <i>ASIC Act</i>, and are promoted in breach of the Commonwealth's duty of utmost candour and honesty. This is alleged on the basis that the disclosures did not contain adequate information about the economic and fiscal risks associated with climate change, and associated credit risks. The claim further alleges that, in approving the disclosure documents, the Secretary to the Department of Treasury and the CEO of the Australian Office of Financial Management failed to discharge their statutory obligation to exercise due care and diligence under section 25(1) of the <i>Public Governance, Performance and Accountability Act 2013</i>. <i>O'Donnell v Commonwealth & Ors, Federal Court of Australia (Victorian Registry), VID482/2020</i>.</p> </div>
Preliminary observations on materiality for financial institutions	<ul style="list-style-type: none"> ▪ First order – Financial institutions may be targeted the defendants in these claims. ▪ Second order – Some risk of credit, investment and underwriting exposure to defendants. ▪ Third order – Potential for systemic risk less clear.
<p>3B.</p>	<p>Promotional misrepresentation or 'greenwashing' of biodiversity-related impacts or credentials in advertising or promotion</p>
Potential claimants	<ul style="list-style-type: none"> ▪ Corporates ▪ Individuals/NGOs ▪ Consumer regulators ▪ States
Potential defendants (including direct, first order impacts for financial institutions)	<ul style="list-style-type: none"> ▪ Corporations ▪ Financial market participants
Example causes of action	<ul style="list-style-type: none"> ▪ Breach of consumer law ▪ Breach of OECD Guidelines for Multinational Enterprises ▪ Breach of 'eco-labelling' or sustainable disclosure regulations ▪
Example claims	<p>Breach of consumer laws for misrepresenting biodiversity or ecosystem impacts or credentials, of either the company or product (labelling, advertising, materials data sheets, etc)</p>

3	Liability risks associated with misrepresentation of biodiversity risks or ecosystem impacts	
	<p>Breach of financial product regulations expressly requiring disclosures of sustainability impacts</p> <p>'Greenwashing' regulatory claims by regulators, consumers or NGOs against companies or financial service providers for failing to comply with specific 'eco-labelling' laws or general consumer laws or norms.</p>	
At risk sectors	<ul style="list-style-type: none"> ▪ Banks and other providers of retail financial products ▪ Agriculture ▪ Industrials ▪ Fashion ▪ Consumer goods 	
Preliminary observations on direction of travel	Likely to increase.	<div style="text-align: center;"> <p>Case spotlight</p> </div> <p>In December 2019, ClientEarth lodged a claim with the UK National Contact Point for the OECD Guidelines for Multinational Enterprises (NCP) (which sits within the UK's Department of Trade) alleging that oil giant BP's global 'Keep Advancing' and 'Possibilities Everywhere' advertising campaigns misled the public. This was alleged on the basis that the campaigns, with the slogan 'We're working to make energy cleaner' conveyed a misleading impression of the strength of BP's environmental credentials, when 96% of BP's annual energy portfolio spend remains on oil and gas. BP withdrew its campaign in February 2020, and announced that it would redirect resources previously earmarked for these kinds of 'corporate reputation advertising' to advocating for more progressive climate change policies. In June 2020 the NCP it released its initial assessment of the complaint, which it found to be material and substantial, despite the complaint not proceeding further due to BP's decision to end its campaign.</p>
Preliminary observations on materiality for financial institutions	<ul style="list-style-type: none"> ▪ First order – Financial institutions may be targeted the defendants in these claims. ▪ Second order – Some risk of credit, investment and underwriting exposure to defendants. ▪ Third order – Potential for systemic risk less clear. 	
<p>3C.</p>	Financier, advisor or auditor liability for investee or client misrepresentations under 3A-3B above	
Potential claimants	<ul style="list-style-type: none"> ▪ Corporations ▪ Creditors ▪ Corporate or prudential regulators ▪ Individuals 	
Potential defendants (including direct, first order impacts for financial institutions)	<ul style="list-style-type: none"> ▪ Banks or investors ▪ Auditors, lawyers or other professional advisors 	
Example causes of action	<ul style="list-style-type: none"> ▪ Breach of prudential regulations ▪ Tort (negligence) ▪ Breach of contract 	
Example claims	Claims against underwriting banks for misrepresentations of material biodiversity-related physical or economic risks contained in prospectus or capital market filings	

3	Liability risks associated with misrepresentation of biodiversity risks or ecosystem impacts	
	Claims in negligence or breach of contract against professional advisors such as accountants and lawyers for misrepresentations of material biodiversity-related risks in audited, verified or assured documents	
At risk sectors	<ul style="list-style-type: none"> ▪ Financial services ▪ Professional services 	
Preliminary observations on direction of travel	Claims may arise in response to claims under 3A and 3B above.	 <p>Case spotlight</p> <p>Cornerstone Research reports that the proportion of securities fraud claims filed in the United States in which auditors were named as defendants alongside their corporate clients was 6% in 2019. The figure has been as high as 24% (2015). <i>Cornerstone Research, Securities Class Action Settlements, 2019 Review & Analysis</i></p>
Preliminary observations on materiality for financial institutions	<ul style="list-style-type: none"> ▪ First order – Financial institutions may be targeted the defendants in these claims. ▪ Second order – Some risk of credit, investment and underwriting exposure to defendants. ▪ Third order – Potential for systemic risk less clear. 	

Appendix notes and references

- ³⁹ See, eg, *Daniel Aristabulus Sanda v PTTEP Australasia (Ashmore Cartier) Pty Ltd*, Federal Court of Australia, NSD1245/2016.
- ⁴⁰ See, eg, *Booth v Bosworth* [2000] FCA 1878; [2001] FCA 1453; *Resident Marine Mammals of the Protected Seascape Tanon Strait v Secretary Angelo Reyes*, G.R. No. 180771 (April 21, 2015) Supreme Court of the Philippines; *Okayay v Turkey Reports 2005-VII* (12 July), 43 EHRR 788 (2006).
- ⁴¹ See, eg, *Iowa Citizens for Community Improvement & Food and Water Watch v State of Iowa* (Iowa Supreme Court, Sup. Ct. No. 19-1644, October 17, 2019); *Ridhima Pandey v Union of India* (India, National Green Tribunal, March 2017)
- ⁴² See, eg, *Victoria Segovia v The Climate Change Commission* G.R. No. 211010 (March 7, 2017) Supreme Court of Manila; *Alvarez et al v Peru* (Peru, 2019), *Future Generations v Ministry of the Environment and others* (Colom Sup Ct, 110011-22-03-000-2018-00319-01, 5 April 2018); *MFHR v Greece* (European Commission of Social Rights, No 30/05, 6 December 2005).
- ⁴³ See, eg, *Mackay Conservation Group v Commonwealth of Australia* (Federal Court of Australia, NSD 33/2015, 2015).
- ⁴⁴ See, eg, see, eg, *Foreningen Greenpeace Norden & Natur og Ungdom v the Government of Norway* (Norway, Borgarting Court of Appeal, 24 February 2020).
- ⁴⁵ See, eg, *Booth v Bosworth* [2000] FCA 1878; [2001] FCA 1453; *Halton (Regional Municipality) v Vastis* [2008] O.J. No. 354.
- ⁴⁶ See, eg, *Northwest Environmental Advocates v U.S. Environmental Protection Agency* 537 F.3d 1006 (9th Cir. 2008).

About the Commonwealth Climate and Law Initiative

The Commonwealth Climate and Law Initiative (CCLI) is a research, education, and outreach initiative with projects in Canada, Australia, South Africa, the United Kingdom, Singapore, Hong Kong and India. CCLI research is at the forefront of the intersection of climate and biodiversity risks under existing companies and securities laws. The CCLI leverages the inter-disciplinary and cross-jurisdictional perspectives provided by its global experts from academia and the legal, accountancy, business and scientific communities.

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