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Connecting Climate Change and the Law

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TotalEnergies Sues Greenpeace Over Greenwashing Allegations

May 19, 2023

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On April 28, 2023, French multi-national energy company TotalEnergies filed a civil action in France against environmental activist group Greenpeace France and climate consulting group Factor-X alleging that a report issued by the organizations, which claimed that the company underreported its 2019 greenhouse gas (GHG) emissions, is knowingly false and misleading. Total is seeking an order from the French court to compel Greenpeace to withdraw the report and remove all references to Total from its website and in communications. Total also has asked the court to impose a penalty of €2,000 on Greenpeace for each day the allegations remain published and award symbolic damages of €1.

Greenpeace's report was **published in November 2022** and claimed that the oil company underestimated its GHG emissions, placing them at 455 million tons in 2019 when it supposedly emitted nearly 1.64 billion tons. According to the report, Total's reported Scope 1 GHG emissions also were inaccurate by a factor of almost 300%, estimating the energy company's direct GHG emissions as 160 million tons, rather than the 55 million tons reported.

In response, Total disputed the climate activists' conclusions and described their methodology as "dubious," asserting that the report double-counted emissions. The company also highlighted, among other arguments, that Greenpeace attributed to Total more than 8% of globally estimated 19 billion tons of GHG emissions in 2019 from the oil and gas sector, which is disproportionate to the energy company's 1.5% and 2% market share.

Total argues that its emissions reporting in 2019 was aligned with industry-specific methodologies in compliance with the global **Greenhouse Gas Protocol**. "To prevent double counting, this methodology is based on the highest volume of production or sales in the oil or gas value chain. In addition to this, all TotalEnergies' emissions reports are reviewed by Ernst & Young." In its release, Total also provided an explanation of its Scope 1, 2 and 3 GHG emissions calculation and reporting methodology, and observed that it "was among the first to apply the recommendations of the Task Force on Climate-related Financial Disclosure."

In a response statement, Greenpeace declared the lawsuit a tactic to discourage criticism in advance of Total's May 26 annual meeting.

Taking the Temperature: Climate-related litigation is becoming part of the litigation and enforcement landscape in Europe and elsewhere, and Total itself has been involved in

several actions. In December 2021, a number of French environmental activists commenced an action in France alleging greenwashing in connection with an advertising campaign "featuring wind turbines and renewable energy projects," which supposedly created a "misleading impression" regarding the company's climate commitments in light of its GHG emissions. The case was brought under the French national law implementing the European Union Unfair Commercial Practices Directive. In April, NGO Climate Action Germany prevailed in a consumer protection suit against Total, in which the Düsseldorf Regional Court ruled that the company must stop advertising its Thermoplus heating oil as "CO_2-compensated" and be specific about the carbon offset schemes the company is using to underpin its "carbon-neutral" claims. On the other side of the litigation ledger, Total secured the dismissal in February of a "Duty of Vigilance" case under the French Commercial Code brought by six French and Ugandan NGOs attempting to force the suspension of the company's pipeline project in Uganda and Tanzania.

We have frequently discussed the challenges confronting energy companies as they attempt to navigate a green transition characterized by the development of greater renewable energy supply while also operating at a time when energy from fossil fuels remains essential to supply global energy needs. Criticism has come from various quarters, including via shareholder resolutions, legal challenges filed by NGOs or suits against directors alleging a breach of fiduciary duties. We have also previously observed a global trend of accelerating filings of strategic climate litigation, particularly in Europe.

Brazilian Congress Approves Legislation Aiming to Stimulate Carbon Credit Markets

May 19, 2023

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On May 2, 2023, the Brazilian Senate **approved legislation** that amends rules relating to public forest concession contracts and, significantly, now allows the use and commercialization of carbon credits. The amendment, which is considered to be an important milestone in the regulation of Brazil's voluntary carbon market, was also **approved by the Brazilian Chamber of Deputies** on March 30. President Lula is expected to ratify the measure in the coming weeks.

Brazil's forest concession system was established in 2006 and provides a legal framework for the development of long-term sustainable timber production in the Amazon region. Under the framework, Brazilian public forest land can be leased to private enterprises for sustainable logging activities overseen by the Brazilian Forest Services (SFB). The scheme has had limited uptake to date, with a **2021 study** showing that forest concessions in the Amazon region cover only 1.6 million ha (Mha) of a potential area of 35 Mha. Concessionaires reportedly face challenges to make concessions profitable as they compete with cheap timber produced by illegal logging operations. It is hoped that by allowing concessionaires the ability to issue carbon credits, forest concessions will become more profitable and coopt private enterprise into President Lula's ongoing efforts to reduce Amazonian deforestation and **turn Brazil into a leader** on global environmental policy as well as a major destination for green investment.

Importantly, the proposed rule changes would allow Brazil's development bank (BNDES) to allow financial industry participants and fintechs to finance carbon credit operations with resources from the Brazilian National Fund on Climate Change. The financial sector has so far shown little interest in financing Brazilian forest concessions but the growing market for carbon credits may provide motivation for engagement with newly-issued concessions under the revised framework.

The development is also seen as a first step in Brazil regulating voluntary carbon credit markets. For years, policymakers have pushed for a regulated market that can be integrated into those operating in Europe, the U.S. and other jurisdictions. In 2022, the government of former president Bolsonaro made legislative proposals relating to a National System for Reducing Greenhouse-Gas Emissions (SINAIRE) but this has still not been implemented to date.

Taking the Temperature: As we have frequently reported, environmental policy has been high on President Lula's agenda with a focus on reactivating enforcement in order to reduce illegal deforestation in the Amazon region. Lula has also been active in seeking international financial support for environmental protection initiatives and scored a

notable success in May when President Biden pledged $500 million to the Amazon Fund. During Lula's state visit to China in April, carbon credits were reportedly on the agenda. China is one of the biggest buyers of carbon credits worldwide and has pledged to achieve net-zero emissions by 2060 despite continued heavy reliance on coal and oil.

The carbon offset market has grown rapidly in recent years as has scrutiny and criticism of some carbon credit schemes. Concerns have been raised that carbon credit projects in developing countries may, in some cases, disenfranchise local populations. For example, in 2022, the *Wall Street Journal* reported that only a small proportion of money raised via the sale of carbon credits and intended for rainforest preservation in Peru actually reached local communities.

At a more fundamental level, there are concerns that carbon credits do not provide real greenhouse gas mitigation unless they are tied to carbon-saving projects and may even reduce incentives for companies to actively work towards carbon reduction. According to a report published by the World Economic Forum, many carbon offset programs are not transparent due to their complexity and varying definitions of carbon credit quality. The World Economic Forum made five recommendations for organizations seeking to improve the carbon market, including setting scientifically aligned decarbonization pathways to provide credibility around using carbon credits, creating market transparency through corporate disclosures and adopting leading standards such as the Integrity Council's Voluntary Carbon Market.

As we have reported, various jurisdictions, including the U.S. and Australia, are independently reviewing existing carbon trading practices and considering further regulation. At COP-27 last year, John Kerry, the U.S. Special Presidential Envoy for Climate, announced the "Energy Transition Accelerator" (ETA), a billion-dollar carbon credit program designed to help private companies in wealthier countries support developing countries to reduce their reliance on fossil fuels. According to the announcement, "operating at the scale of national or subnational jurisdictions, the ETA will produce verified greenhouse gas emission reductions, which participating jurisdictions will have the option of issuing as marketable carbon credits." The European Union is currently formulating mandatory disclosure and certification rules for companies that use carbon credits. The proposal is based on companies conducting their own assessment of carbon removal in accordance with certain key criteria using methodologies prepared by the European Commission, and then submitting that assessment for independent verification through a certification scheme.

Climate Change Could Prompt Insurers To Drop Business Lines and Alter Investment Portfolios

May 19, 2023

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In April 2023, Goldman Sachs Asset Management (GSAM) published its **12th annual insurance survey**, which not surprisingly includes findings that the industry continues to be focused on the potential impact of climate change. GSAM collected responses from 343 Chief Investment Officers and Chief Financial Officers representing more than $13 trillion in global balance sheet assets — approximately half of the global insurance industry. The insurance sectors covered include life, property and casualty/non-life, multi-line and health.

Just over one-third of insurance executives stated that climate change could also affect their ability to insure for extreme weather events. According to the survey, 38% of respondents believe climate change will force them to exit certain business lines and approximately the same proportion expect that price increases in certain lines will be necessary to compensate for extreme weather events. Only 10% said climate change has no impact on the ability to insure for extreme weather events.

As expected, insurance companies in different regions reported different priorities but for those in EMEA and Asia, investment in green and impact bonds is a significant growing trend. Overall, close to 40% of respondents reported currently investing in green and impact bonds. Regionally, all insurers polled in Asia, 99% of those polled in EMEA, and 75% in the Americas said ESG and impact investing are either a primary consideration or one of several considerations.

90% of respondents cited ESG factors and impact investing as a consideration when constructing investment portfolios, driven by a variety of motivating factors, including current or future regulation, directives from boards of directors, risk mitigation, shareholder/creditor considerations, and customer considerations. But 64% of respondents found that access to reliable, standardized data remains a significant obstacle to taking ESG factors into account in making investment decisions, with 19% citing difficulties in identifying investments aligned with ESG objectives (19%). The industry relies heavily on third-party ESG data sources and scores, such as MSCI and Sustainlytics (66%). The use of scores provided by asset managers (24%) and internal scores (10%) has dropped since 2021.

Commenting on the findings, Valentijn Van Nieuwenhuijzen, Global Head of Sustainability for Public Investing at Goldman Sachs, said: “As ESG is becoming a core component in the portfolio strategy of asset owners, investors are shifting towards more climate aware and inclusive mandates.... In 2023, we expect a further shift towards climate transition and a pivot towards more engagement rather than exclusionary strategies, with ESG factors becoming more refined and further integrated in the portfolio management approach of clients.”

Taking the Temperature: In its Staff paper on nature-related risks and impacts for insurance, the European Insurance and Occupational Pensions Authority (EIOPA) observed that the industry is in the early stages of assessing ESG considerations for investment purposes. Going forward, however, the insurance industry could play an important role by supporting activities that reduce the risk of loss of biodiversity through nature-based investment solutions and by offering “nature-aligned” insurance products. EIOPA suggests that insurers can help reduce nature-related impacts through investment and underwriting activities while also mitigating risks to their investment portfolios.

As the GSAM report suggests, climate change considerations are impacting coverage decisions. For example, we have reported that Munich Re, the world’s largest reinsurer, announced that, as of April 1, 2023, it would no longer invest in or insure contracts or projects exclusively covering new oil and gas fields, new midstream oil infrastructure and new oil fired power plants. The announcement follows similar moves by Allianz, Swiss Re and Munich Re’s syndicate in Lloyd’s of London to cease underwriting traditional oil and gas activities.

At the same time, insurers are confronting pressure from “anti-ESG” factions in the U.S. as well as potential regulation. Recently, as we reported, Munich Re, Zurich and Hannover Re separately announced their exits from the Net-Zero Insurance Alliance (NZIA), with Munich Re citing “material antitrust risks” as a reason. Regulators, meanwhile are focusing on financial stability and resilience in the face of climate change. For example, the Bank of England released a report calling for updates to the existing regulatory capital frameworks for banks and insurers; Canada’s Office of the Superintendent of Financial Institutions released a new guideline on climate risk management applicable to insurers and financial institutions; and the New York Department of Financial Services has issued guidance for New York domestic insurers on managing the financial risks from climate change.

EPA Proposes Carbon Pollution Standards for Fossil Fuel-Fired Power Plants

May 19, 2023

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On May 11, 2023, the U.S. Environmental Protection Agency **issued a proposed rule** promulgating greenhouse gas (GHG) emissions standards for fossil fuel-fired power plants. The proposal, issued pursuant to Section 111 of the Clean Air Act, includes strengthening New Source Performance Standards for new fossil fuel-fired stationary combustion turbines and establishing emission guidelines for certain existing fossil fuel-fired stationary combustion turbines. The proposal would also establish emission guidelines for states to limit carbon pollution from existing fossil fuel-fired power plants.

In an **announcement** accompanying the proposal, the EPA stated that in developing the proposed carbon pollution standards, the EPA "considered a range of technologies including [carbon capture and storage], utilizing low-GHG hydrogen, and adopting highly efficient generation technologies." The agency acknowledged that certain technologies are more effective for different types of power plants, and therefore, the proposal establishes standards "for different subcategories of power plants according to unit characteristics such as their capacity, their intended length of operation, and/or their frequency of operation."

The agency estimates that the proposed rule would "avoid up to 617 million metric tons of total carbon dioxide (CO_2) through 2042" and "deliver up to $85 billion in climate and public health benefits over the next two decades." Expected health benefits, according to the EPA, include the prevention of roughly 1,300 premature deaths, over 800 visits to the hospital and emergency room, over 300,000 asthma attacks, 38,000 missed school days, and 66,000 missed workday. Even as it issued the proposal, however, the EPA also acknowledged the power sector's progress to date in reducing emissions, stating: "The proposed standards build on the momentum already underway in the power sector to move toward a cleaner future. Since 2005, the power sector has **reduced carbon dioxide emissions 36 percent** while continuing to keep pace with growing energy demand."

Taking the Temperature: The EPA's proposed rule is the latest in a series of moves by the Biden Administration to address climate change. Other actions include securing passage through Congress of the Inflation Reduction Act; implementing a Department of Labor rule on ESG investing; vetoing efforts to overturn the rule; and pledging $500 million to combat deforestation in the Brazilian Amazon region. The EPA's latest

proposal comes against the backdrop of anticipated litigation challenging the rule, particularly in light of the Supreme Court's 2022 decision in *West Virginia v. EPA*, where the Court held that a prior EPA regulation exceeded the agency's powers. That prior regulation, which sought to implement a "generation shifting" approach that would have required power plants to transition to renewable energy sources, did not constitute a "best system of emission reduction," as required under the Clean Air Act. Perhaps anticipating another challenge, the EPA's proposal states that, as required by Section 111 of the Clean Air Act, its proposed standards and emission guidelines "reflect the application of the best system of emission reduction that, taking into account costs, energy requirements, and other statutory factors, is adequately demonstrated" to improve the emissions performance of the sources. We will continue to monitor developments, including the EPA's issuance of a final rule and any ensuing litigation challenges.