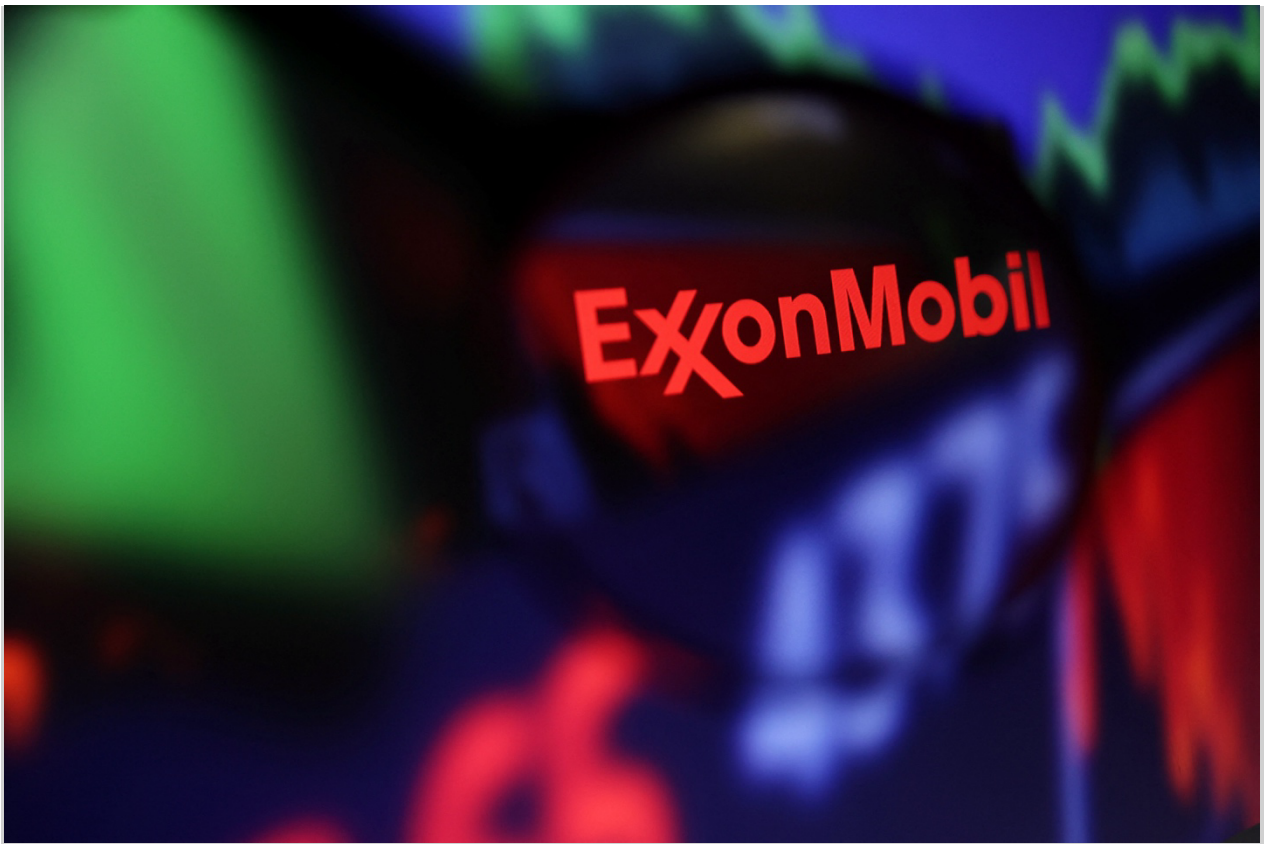
I. Exxon files lawsuit against investors' climate proposal

By Sabrina Valle
Reuters, January 22, 2024



Exxon Mobil logo and stock graph are seen through a magnifier displayed in this illustration taken September 4, 2022. REUTERS/Dado Ruvic/Illustration *Acquire Licensing Rights*

HOUSTON, Jan 21 (Reuters) - Exxon Mobil Corp (XOM.N), opens new tab on Sunday filed a complaint in a Texas court seeking to prevent a climate proposal by activist investors from going to a vote during the company's shareholder meeting in May.

This is the first time Exxon is seeking to exclude a shareholder proposal by filing a complaint in court. The case was assigned to a judge with a track record of ruling in favor of conservative causes.

Exxon says the investors are "driven by an extreme agenda" and that their repeated proposals do not serve investors' interests or promote long-term shareholder value.

Investors led by U.S. activist investment firm Arjuna Capital and shareholder activist group Follow This are asking Exxon and other oil majors to adopt tighter climate targets.

They want Exxon to set so-called Scope 3 targets to reduce emissions produced by users of its products. Exxon is the only one among the five Western oil majors which does not have such targets.

Follow This in the past two years made similar proposals in shareholder meetings of different oil majors. It received a 28% approval in a 2022 voting, and 10% last year. Exxon claims shareholders have already rejected scope 3 targets so it wants to exclude the proposal from its proxy statement.

Arjuna and Follow This were not available for comment on the lawsuit on Sunday night.

1. JURISDICTION

Exxon is asking a court in the U.S. District Court for the Northern District of Texas to exclude the Scope 3 proposal in its proxy statement.

Cases from Spring, Texas, where Exxon is based, are usually addressed by the court for Southern District. The complaint was filed to the Northern court on Sunday around 5 p.m.

The case has been assigned to U.S. District Judge Reed O'Connor, an appointee of Republican former President George W. Bush in Fort Worth. O'Connor has a track record of ruling in favor of conservative litigants challenging laws and regulations governing guns, LGBTQ rights and healthcare.

In 2018, the judge declared Democratic former President Barack Obama's signature healthcare law, the Affordable Care Act known as Obamacare, unconstitutional. The U.S. Supreme Court later upheld the law.

Exxon says Arjuna and Follow This pursue a strategy to "become shareholders solely to campaign" for changes "calculated to diminish the company's existing business."

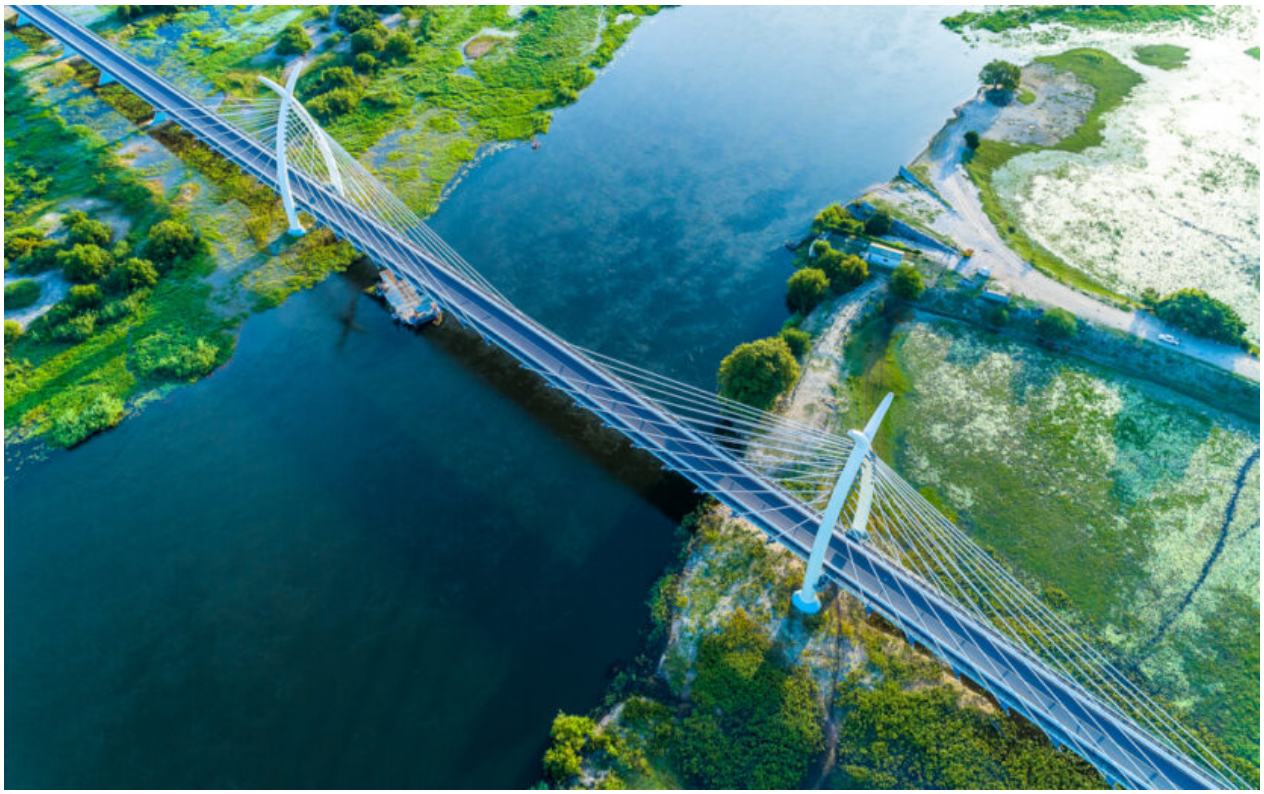
Follow This said last year that investing in the energy transition and setting a Paris-aligned medium-term target covering Scope 3 is of shareholders' best interest. Goals would prevent risks of losing access to capital markets, of facing policy interventions and incurring in losses associated with stranded assets, it said.

Exxon is seeking relief by March 19. Its proxy statement needs to be filed by April 11, in time for its annual shareholder meeting on May 29.

Reporting by Sabrina Valle; additional reporting by Nate Raymond; Editing by Richard Chang and Christian Schmollinger

ANALYSIS | INVESTEMENT TREATY NEWS JANUARY 13, 2024 | JONATHAN BONNITCHA, SUZY NIKIÈMA, & TAYLOR ST JOHN

How Investment Laws Can Become Powerful tools for Sustainable FDI Governance



A growing number of policy-makers are concerned about their countries' national investment laws. Many developing countries rewrote their investment laws between 1980 and 2010, often in ways that aligned them more closely with outdated IIAs. As a result, such laws pose many of the same legal risks and policy concerns as old-style IIAs. Some laws include especially risky provisions, such as

- **advance consent to international arbitration.** Many developing countries include provisions in their investment laws that could be interpreted as providing consent to investor–state arbitration, undermining the role of domestic courts in interpreting the law and settling disputes arising from its application in line with the overall domestic legal system, while also creating a risk of costly arbitration cases. However, there is no evidence that providing consent to arbitration in an investment law has any effect on FDI flows, and, to our

knowledge, no developed country has ever provided advance consent to arbitration through an investment law.
- **tax incentives**. Research has shown that many fiscal incentives, particularly profit-based incentives, are ineffective—they do not increase sustainable FDI flows but have real costs. Rather than granting fiscal incentives in investment law, reviewing and consolidating them in general tax codes can improve their transparency and administration.

Beyond concerns about risky provisions, investment laws warrant reconsideration because they are versatile policy tools. In the past, they were redesigned to meet new challenges and opportunities, and they can once again be redesigned as powerful tools for governments seeking to align their investment policy with sustainable development or other policy goals. For instance, investment laws can be instrumental in implementing new norms or policies in business and human rights, climate finance, and the global minimum tax. This paper makes two recommendations for policy-makers concerned about investment laws and seeking to rethink them in order to address their countries' challenges.

First, clarify what functions an investment law is intended to perform and how these functions relate to its broader objectives. A crucial first step in any reform process is to identify the high-level policy objectives that an investment law intends to achieve, for example, promoting sustainable development.

Investment laws currently perform a variety of functions, including

- governing the admission and approval of new FDI
- conferring and administering investment incentives
- facilitating investment
- guaranteeing legal protection of FDI
- establishing or specifying a system for managing investor–state disputes
- specifying the obligations and responsibilities of MNEs
- monitoring and overseeing foreign investments.

However, investment laws should not necessarily seek to perform all these functions. Some functions, such as the conferral of investment incentives, are more appropriately governed by general tax codes, as argued above, and are better omitted from investment laws entirely. Whether other functions should be performed by the investment law or by laws of general application, supplemented by sector-specific regulations, depends on the country context and policy-makers' objectives. The key is to recognize that investment laws can

perform many different functions, clarify the functions the law in question is intended to perform, and ensure that the performance of selected functions aligns with the law's higher-order objectives.

Second, ensuring that the content of investment laws is consistent with their objectives and functions. After policy-makers have decided on the objectives and functions the law should serve, the crucial question is: How to design the law's content to best perform the given functions? For instance, general language requiring MNEs to conduct themselves sustainably has not been as effective as reiterating that any MNEs' business activity is directly subject to relevant environmental laws and approval processes, including the environmental and social impact assessment regime contained in other domestic law instruments.

Several countries have decided not to have an investment law. Policy-makers who decide to have an investment law may wish to consider a series of questions as they (re)design their laws. For instance, "How will this law interface with our laws of general application?" and "What is the best institutional structure for the administration or enforcement of the investment law?" The questions we suggest policy-makers ask and answer are the same across countries, but the answers may vary, as there is no single best-practice model for an investment law.

In conclusion, poorly designed investment laws can pose risks to governments, while well-designed ones can serve as powerful tools for governments to align their investment policies with their national sustainable development objectives.

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PRESS RELEASE, EUROPEAN COMMISSION, 17 November 2023 Luanda

EU and Angola sign first-ever Sustainable Investment Facilitation Agreement

The EU and Angola signed today a Sustainable Investment Facilitation Agreement (SIFA), the first EU agreement of its kind, during the EU-Angola Business Forum in Luanda. It responds to Angola's ambition to diversify its economy beyond the oil and gas sectors, which historically attracted most foreign investment.

The agreement, with its commitments to improve business climate and sustainability across the economy, is expected to attract new EU investment to sectors where Angola's potential is currently untapped. The EU-Angola Business Forum confirmed opportunities for investments notably in green energy, agri-food value chains, digital innovation, fisheries, logistics, and critical raw materials.

The main objective is to increase sustainable investment by EU businesses in Angola, while Angolan businesses will benefit from facilitation measures and from improved linkages between foreign investors and domestic suppliers.

In a nutshell, the EU Angola SIFA will make it easier to attract and expand investments by focusing on:

- Enhancing transparency and predictability of investment-related measures, for example by publishing all investment laws and conditions and promoting the use of single information portals for investors
- Simplifying investment authorisation procedures and fostering e-government
- Facilitating interactions between investors and the administration, establishing focal points and stakeholder consultations

The EU-Angola SIFA also integrates environmental, climate and labour rights commitments in the EU-Angola relationship through dedicated provisions, including:

- Commitment not to weaken environmental or labour laws and standards for the sake of attracting investment
- Commitment on the effective implementation of international labour and environmental agreements, including the Paris Agreement
- Promotion of corporate social responsibility and responsible business practices
- Strengthening of bilateral cooperation on investment-related aspects of climate change and gender equality

The EU will provide technical support to assist in the implementation of the EU-Angola SIFA, helping to improve Angola's investment climate for foreign and local investors, including for

small and medium-sized enterprises. A new, regional €2.8 million programme by the EU with UNCTAD will help Angola identify priority implementation needs, which will be followed by dedicated actions aimed at promoting trade and investment in the country and implementing SIFA commitments.

Today's deal reinforces the EU's bilateral relationship with Angola, while representing a strong signal of the EU's ambition to deepen its engagement with the African continent, in line with the Global Gateway. By improving the domestic regulatory framework, the SIFA will help attracting more sustainable investment to Angola, which is also the ambition of the Global Gateway and its projects.

These developments correspond to the Commission's commitment, in its 2021 Trade Policy Review, to "propose a new sustainable investment initiative to partners or regions in Africa and the Southern Neighbourhood" who share the same ambition. This initiative will help to enhance sustainable trade and investment links between both continents and within Africa itself - thus meeting key objectives for the EU-Africa relationship.

Next steps

After the signature of the Agreement, the EU and Angola will notify each other on the completion of their respective internal procedures, including, for the EU side, the consent of the European Parliament.

Background

Angola is the EU's 6th African investment destination, covering 7% of EU foreign direct investments in the continent, amounting to €14.1 billion stock in 2021. Angola's investment stock in the EU amounted to € 3.5 billion in 2021. The EU is Angola's main trade and investment partner.

On 18 November 2022, the EU and Angola concluded negotiations on a Sustainable Investment Facilitation Agreement (SIFA). On 9 October 2023, the Council of the European Union adopted a decision authorising the signature of this Agreement.

More Information

Text of the EU-Angola Sustainable Investment Facilitation Agreement

Factsheet on the EU-Angola Sustainable Investment Facilitation Agreement

Factsheet on Investment facilitation in Africa

EU-Angola trade negotiations

NEWS ARTICLE, 3 April 2023, Brussels, European Commission, Directorate-General for Trade

OECD members agree to EU initiative to modernise export credits

On 31 March, OECD countries reached an agreement in principle on an EU initiative to modernise export credit rules to better support the green transition. The deal to update the Arrangement on Officially Supported Export Credits will provide streamlined terms and conditions so that government-backed export finance can better meet the needs of exporters in an increasingly competitive landscape, while avoiding market distortions. At the same time, the outcome widens the scope of green and climate-friendly transactions benefitting from extra incentives in the form of more flexible financial terms and conditions.

The agreement foresees an expansion of the scope of green or climate-friendly projects eligible for longer repayment terms (i.e. eligible under the 'Climate Change Sector Understanding' or CCSU). These would include projects related to environmentally sustainable energy production; CO_2 capture, storage, and transportation; transmission, distribution and storage of energy; clean hydrogen and ammonia; low emissions manufacturing; zero and low-emission transport; and clean energy minerals and ores.

The financial terms are to be amended in several ways. The maximum repayment term will be increased from 18 to up to 22 years for climate-friendly and green transactions and from 8.5 and 10 years to up to 15 years for most other projects. Moreover, the minimum premium rates that export credit agencies are obliged to charge for their insurance cover will be reduced for longer repayment periods. Finally, further flexibilities regarding the schedule of repayments over the life of the financial package provided will be introduced.

Next steps

This reform is expected to come into effect later this year, once the participants complete their formal internal decision-making processes and agree to the new Arrangement text. The Participants to the Arrangement are the EU, Australia, Canada, Japan, Korea, New Zealand, Norway, Switzerland, Türkiye, the United Kingdom, and the United States.

Background

In June 2019, the EU initiated the modernisation and put a first broad proposal on the table at the OECD, following which the Participants agreed to modernise the Arrangement in 2020. Today’s announcement is thus the culmination of more than two years of negotiations. The modernisation was needed because the financial terms of the Arrangement were outdated and were no longer adapted to market needs in a changing, global financial landscape.

The main purpose of the Arrangement on Officially Supported Export Credits is to provide a framework for the orderly use of officially supported export credits by fostering a level playing field to encourage competition among exporters. This would be based on quality and prices of goods and services exported rather than on the most favourable officially supported financing package.

Governments provide officially supported export credits through Export Credit Agencies (ECAs) in support of national exporters. Such support takes the form of either 'official financing support' or 'pure cover support', such as export credit insurance or guarantee cover.

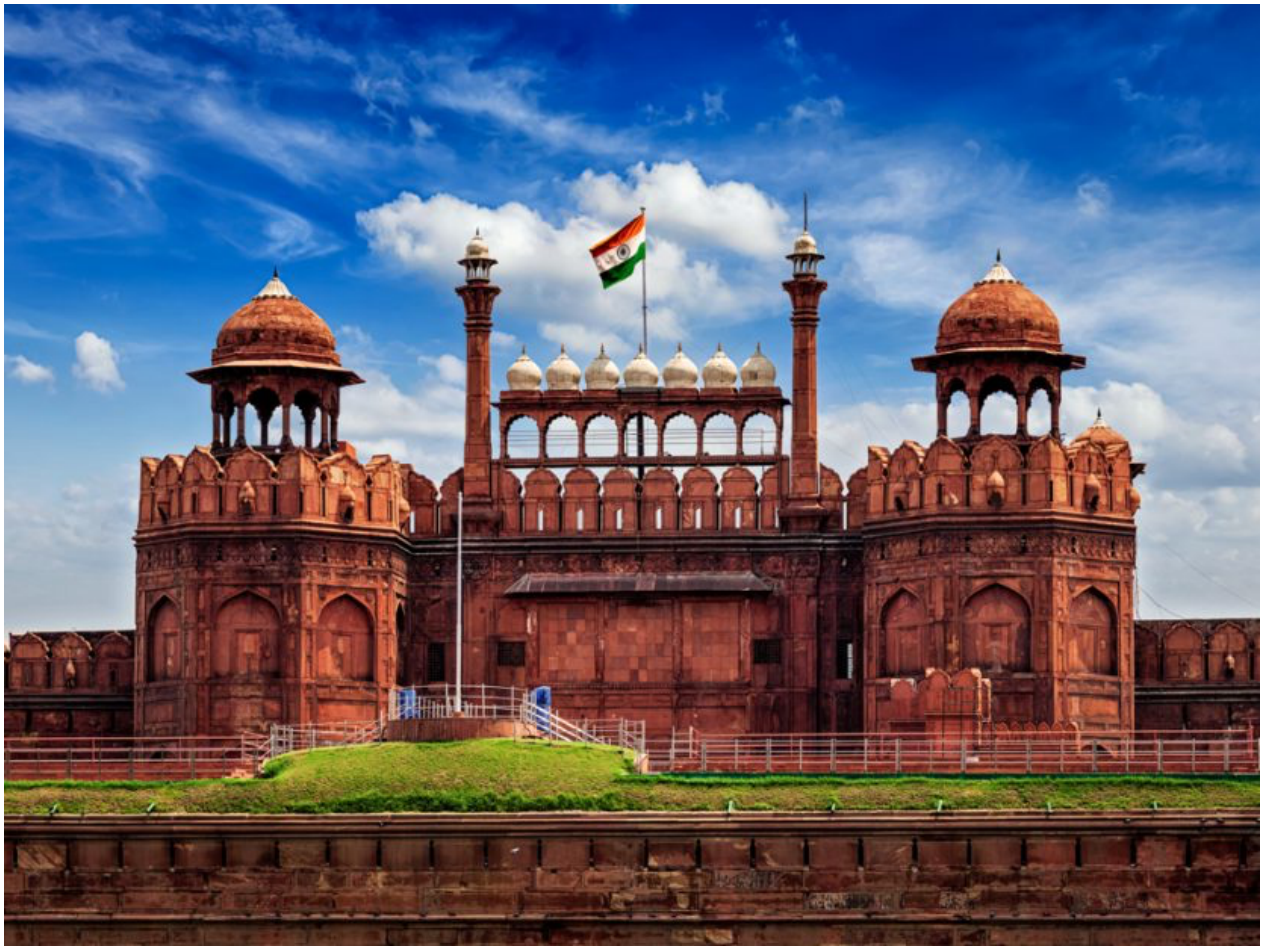
For more information

Participants' statement

OECD Export Credits page

ANALYSIS | INVESTMENT TREATY NEWS JULY 1, 2023 | HARSHAD PATHAK & SHANTANU SINGH

Deconstructing India's Evolving Approach Toward International Investment Agreements



2. 1. Introduction

India's approach toward the negotiation of international investment agreements (IIAs) has recently been subjected to significant scrutiny. Despite signing its first BIT in 1994, with the United Kingdom, India witnessed the gradual development of international investment law jurisprudence silently. However, this changed in 2011, when India received its first adverse award in *White Industries v. India*, which determined the Indian courts' delay in enforcing a commercial arbitration award in breach of India's treaty obligation to provide effective means of asserting claims and enforcing rights in relation to investments.[1] This outcome was criticized and led the government to review its BIT program, including a review of the existing model BIT 2003.

During this review process, the government did not initially intend to remove a protected investor's access to investment treaty protection. However, when it approved the revised text of the model BIT in 2015, it decided to terminate most of its BITs.[2] This approach was hardly isolated. But India's disenchantment did not extend to the system of international investment law. The government also affirmed its intention to renegotiate new treaties—including with Switzerland, Tajikistan, the Kyrgyz Republic, Turkmenistan, Oman, Qatar, Belarus, Thailand, Zimbabwe, Armenia, and Morocco[3]—based on its revised model BIT 2015. India was keen to reimagine its relationship with the system of international investment law but not withdraw from it.

Since then, India's attempts to negotiate an IIA have yielded limited success. India could conclude new BITs only with Brazil, Belarus, and Kyrgyzstan, none of which are yet in force. India's FTA negotiations with the United Kingdom, Australia, the European Union (EU), and Canada, including for an investment chapter, are ongoing. In the meantime, the interim FTAs with Australia, Mauritius, and the United Arab Emirates (UAE), do not contain provisions for the protection of foreign investment. And, while Article 12.1 of the FTA with the UAE states that the parties "agree to finalise a new agreement [to replace the India-UAE BIT 2013] by June 2022," no such agreement is yet in place.

India's lack of progress naturally invited criticism. In 2021, a Parliamentary Committee in India found "the number of BITs/Investment Agreements signed post 2015 and the number under negotiations as inadequate [and] not commensurate with the growth of India's interest in this domain and [her] rising stature in global affairs." This article aims to contextualize and address this criticism, analyze the factors that may influence India's current (and future) treaty negotiations, and in doing so, map India's evolving approach towards IIAs.

3. 2. What Motivates India's "Approach" Toward IIAs?

The expression "India's approach toward IIAs" is misleading. It wrongly assumes that India's negotiations are guided by a uniform set of factors, such as the model BIT 2015, that set the goalposts for assessing their success. However, this assumption lacks nuance. As the Government of India had itself informed the Parliament in 2017, its "approach to investment treaties/agreements differs from country to country and attempts are made to reach mutually agreed position during the negotiations."[4]

But what factors influence the differences in India's approach while negotiating an IIA? The authors categorize their response into two sets: external factors and those internal to the country's polity.

4. 2.1. External Factors

First, the mainstream perceptions of international law operate with a political assumption that there must be some distance between state practice and law. This also extends to the system of international investment law, in which the contents of IIAs and the processes by which they are concluded are presumed to be objective and unrelated to state politics. However, this view does not stand up to historical and jurisprudential scrutiny. Ample ink has been spilled to establish that a state's decision to conclude IIAs is a by-product of its political and economic standing—or lack thereof for the former colonies—in the post-colonial global order.[5]

Unsurprisingly, India's acceptance of investment treaties from 1994 was equally triggered by an economic crisis in 1991 and the consequent liberalization reforms. This was in contrast to India's previous resistance to the creation of an international law regime that facilitated an "absolute protection of private property" and required a state to provide its foreign investors more than national treatment.[6] Thus, it is natural that India's recovery from the economic crisis and a consolidation of its political standing would also impact its negotiation prowess, pace, and strategy in relation to IIAs. This contextualizes India's reluctance to conclude an IIA without being convinced of its benefits. This understanding is affirmed by the statements made in relation to India's ongoing FTA negotiations. As a news report concerning the India–EU FTA negotiation states: "The current government is not in a hurry to sign trade deals. India is an economic power and is set to become a developed country in the next 25 years. Today, it negotiates from its strength." A similar sentiment was reportedly echoed by India's Minister for Commerce and Industry, in relation to the ongoing India–UK FTA negotiations, stating that the FTA "has to be a win-win for both countries."

Second, India's conclusion of BITs post-1994 was premised on an untested belief that this was a necessary step for developing states to compete for foreign investment. But this belief has now come under intense scrutiny. In mid-2022, the Committee on External Affairs noted that a study commissioned by the Ministry of Finance's Department of Economic Affairs (DEA) had concluded that "a relationship between investment and signing a particular treaty cannot be established." Likewise, an internal note prepared by the Ministry of Commerce stated that "while IIAs may be a desirable objective,

they are neither necessary nor sufficient for promoting FDI."[7] This was consistent with emerging academic studies[8] and the documented experience of countries such as Ecuador and South Africa.

The authors do not take any definitive position on this issue. But the government's doubts about the capacity of IIAs to attract foreign investment adds another wrinkle to the discourse. Given these doubts, one would reasonably expect that "rational policy-makers would try to assess whether the treaties were in fact useful to attract investment based on a rigorous and balanced search of available information," and assess "alternative ways of attracting foreign investment."[9] And this was reflected in global trends: since 2017, the number of effective terminations of BITs has begun to outpace the number of new treaties signed.

Third, these considerations are, however, also countervailed by reasons that reinforce the utility of IIAs. For instance, policy reforms have failed to attract sufficient foreign investment in India's upstream natural gas industry, and potential investors are demanding both increased protection from expropriation and neutral arbitration of disputes. Simultaneously, India's own identity as a perennial recipient of foreign investment is changing. As one scholar notes, "many developing countries today such as India have become huge exporters of capital… Thus, India cannot look at the investment regime purely from a capital-importing country-perspective – something that it could do two decades back."[10] Accordingly, despite its doubts and a lack of progress, India remains a keen participant in the negotiation of IIAs.

Fourth, India's vision of a model IIA must also adapt to the identities and expectations of the other negotiating state. This is best illustrated by the varied approaches to ISDS that India is required to consider during the ongoing negotiations. On the one hand, Australia has avoided ISDS provisions in its recent FTAs, which include the Regional Comprehensive Economic Partnership Agreement (2020) and the Australia-UK FTA (2021). This mirrors the India–Brazil BIT 2020, and therefore, should appeal to India. On the other hand, while the UK did not include ISDS provisions in its recent FTAs with Australia and Japan,[11] the House of Lords nevertheless recommended that there is "a strong case for including [ISDS] provisions in an agreement with India." This will likely make the negotiation with the United Kingdom challenging.

A similar predicament is expected with regard to the EU's proposed text on an Investment Protection Agreement (IPA), which envisages the establishment of a permanent tribunal of first instance comprising 15 judges (Article 3.9) and an

appeal tribunal (Article 3.10). None of India's existing IIAs (or any model BITs) include such a mechanism, thus requiring India to consider the (dis)advantages of the EU proposal for the first time before finalizing any agreement.

Understandably, notwithstanding the content of the model BIT 2015, these considerations preclude a monolithic approach toward IIAs. How the Government of India may approach a particular negotiation would be contingent on its perceived political strength, perceptions about the efficacies of IIAs, identity as an exporter or importer of capital, and the identity of the other negotiating party. Significantly, these are also corroborated by a further set of internal factors relating to India's polity.

5. 2.2. Internal Factors

Within the Indian system, an important but often under-discussed consideration has been the mandate of the negotiating government department. Prior to the 2015 model BIT, India's engagement in IIAs was led concurrently by the Finance Ministry's DEA and the Department of Industrial Policy & Promotion (DIPP; now the DPIIT) at the Ministry of Commerce.[12] While the DEA negotiated the stand-alone BITs signed by India, the DIPP took the lead in negotiating investment liberalization chapters in the FTAs that India was signing at the time.[13]

This division of competencies had practical consequences. First, while the stand-alone BITs negotiated by the DEA ensured protection only after the fact of an investment, that is, in the "post-establishment" phase, the investment liberalization chapters negotiated by the DIPP went beyond India's BITs by also ensuring non-discriminatory treatment in the right of establishing an investment, or the so-called "pre-establishment" phase; Second, unlike BITs, the investment liberalization chapters scheduled the sector-wise market access commitments that India would provide to investors of the FTA parties, thus partly "freezing" India's autonomous investment liberalization policy.[14] So, in the India–Singapore CECA, a positive-list approach was followed by listing sectors where non-discriminatory treatment would be ensured for foreign investors; in the CEPAs signed with Korea and Japan, India followed a negative-list approach, enlisting sectors where no obligation to ensure non-discrimination would apply.

This disjointed approach to negotiating IIAs was noted in the internal note prepared by the Ministry of Commerce. It acknowledged the need to address this split competence regarding investment negotiations and suggested that

the pre- and post-establishment approach should be merged.[15] Indeed, the latter was among the considerations in India's internal consultations in the lead-up to the release of the model BIT in 2015.[16] With the release of the 2015 model BIT, the mandate for negotiating IIAs, however, regardless of whether they were stand-alone BITs or located as investment chapters in FTAs, was allocated fully to the DEA in order "to ensure convergence between trade and investments issues."[17]

This marked an important shift since the model BIT was concerned only with investment protection in the post-establishment phase and would act as the text on which the DEA would base negotiations. The reform process, however, left unclear how issues concerning investment liberalization, including pre-establishment phase issues, would be dealt with in negotiations and by whom. At the same time, the DIPP began to undertake measures to liberalize foreign investment. This included abolition of an investment regulatory board in 2017, introduction of standard procedure for easier approval of foreign investment by individual Ministries, and the gradual liberalization of sectoral limits on FDI.

Yet another issue left unresolved was how commitments made in the FTAs' Trade in Services chapters negotiated by the Ministry of Commerce would fit within India's new approach toward doing IIAs. Since the supply of services through commercial presence (i.e., mode-3 supply) had an overlapping relationship with investments, India's FTA practice till then had been to use "Services-Investment Linkage" provisions to address explicitly how and which investment protection obligations in the FTA's investment chapters would apply to the supply of services via commercial presence (India–Singapore CECA (2005), Article 7.24; India–Korea CEPA (2009), Article 6.23; India–Japan CEPA (2011), Article 83.3, and India–Malaysia CECA (2011), Article 10.3.). Amidst the shift in competencies, the role of the External Affairs Ministry's has remained somewhat the same. As it told the Parliamentary Committee in its reply concerning the lack of progress on negotiating BITs, the Ministry plays a limited role by facilitating negotiations and coordinating with Indian Missions abroad. The responsibility to lead negotiations and conclude them still lies with the DEA.

What have these changes meant for India's negotiation outcomes? As mentioned before, the success of the model BIT has been limited. Since India's BITs with Brazil, Kyrgyzstan, and Belarus were negotiated based on the 2015 model BIT, they deal only with post-establishment protection. FTAs done with the UAE, Mauritius, and Australia do not feature any commitments on investment liberalization other than those made in Trade in Services chapters

concerning service supply through commercial presence. Even there, India's interim ECTA with Australia explicitly prohibits the parties from initiating a dispute against any decision or requirement pursuant to their foreign investment frameworks.[18]

Based on the above information, India's negotiation strategy in FTA negotiations going ahead may face several challenges. For instance, the text proposed by the EU indicates that India would need to negotiate on commitments concerning investment liberalization. These include prohibition of performance requirements, non-discriminatory treatment and market access—subjects that feature in neither the 2015 model BIT nor the recent FTAs negotiated by India. FDI-related reforms undertaken internally by the DIPP show a clear preference for autonomous liberalization rather than locking in of sector-specific commitments in FTAs, thus further complicating India's position in negotiations with the EU. Moreover, the text proposed by the EU on commitments concerning trade in services diverges significantly from the WTO's General Agreement on Trade in Services. This is due to its structure and the manner in which the regulation of services supplied through commercial presence has been subsumed within the broader concept of investment, much like the EU–Canada CETA.[19] This approach is unlike any adopted by India in past FTAs and "key divergences" on these matters are already appearing in ongoing negotiations.

6. 3.Conclusion

If India's approach and engagement with IIAs can be distinguished into phases,[20] with the new IIAs being negotiated and concluded, India is poised to enter a new phase. While much of the commentary so far has focused on the prospects of the 2015 model BIT, shifting attention toward the external and internal factors that influence India's strategy helps better explain its strengths and limitations. Admittedly, India negotiates today from a position of economic strength and carries a marked experience in dealing with IIAs. This approach is also motivated by seeking opportunities for its own investors and a renewed penchant for doing FTAs, many of which now deal with investment liberalization and protection.

Simultaneously, internal reforms undertaken alongside the 2015 model BIT have had their own influence. The number of BITs concluded since then has not matched India's global stature, as the Parliamentary Committee was quick to note. And, unlike previous FTAs, India's recent trade deals have not featured investment liberalization or its protection. Accordingly, future FTAs with the UK, EU, and Canada are likely to indicate a shift in India's approach

to doing IIAs. And therein lies the struggle in defining India's evolving approach toward IIAs. If the published proposed texts are indicative, the success of India's negotiations will require a moderation of expectations and a constant adjustment of strategy. Ultimately, as the global discourse surrounding the (in)efficacies of IIAs evolves, so, too, must India's approach.

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II. Notes

[1] *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (30 November 2011) paras. 4.4.4–4.4.6.

[2] Parliament of India, Lok Sabha, Unstarred Question No. 169, answered by the Minister of State in the Ministry of Commerce and Industry, Government of India (17 July 2017).

[3] Parliament of India, Lok Sabha, Unstarred Question No. 169, answered by the Minister of State in the Ministry of Commerce and Industry (17 July 2017); Parliament of India, Rajya Sabha, Unstarred Question No. 2927, answered by the Minister of State in the Ministry of Finance (28 March 2017).

[4] Parliament of India, Lok Sabha, Unstarred Question No. 1754, answered by the Minister of State in the Ministry of Finance (10 March 2017).

[5] See generally Gathii, J. (1998). International law and eurocentricity. *European Journal Of International Law* 9(184); Bonnitcha, J., Skovgaard Poulsen, L. N., & Waibel, M. (2017). *The political economy of the investment treaty regime*. Oxford University Press, 20–22; Miles, K.

(2013). *The origins of international investment law*. Cambridge University Press, 19–47.

[6] Rajput, A. (2017). *Protection of foreign investment in India and investment treaty arbitration*. Kluwer, 19; see also Ranjan, P. (2019). *India and bilateral investment treaties*. Oxford University Press, chapter 4.

[7] Department of Industrial Policy & Promotion, Ministry of Commerce, Government of India, Note on *"International Investment Agreements between India and Other Countries"* (on file with authors), p. 5.

[8] Hallward-Driemeier, M. (2003). *Do bilateral investment treaties attract foreign direct investment? Only a bit … and they could bite* (Policy research working paper No. 3121). World Bank; Singh, J., Shreeti, V., & Urdhwareshe, P. (2021). *The impact of bilateral investment treaties on FDI inflows into India: Some empirical results* (Working paper 391). Indian Council for Research on International Economic Relations.

[9] Skovgaard Poulsen, L. N. (2015). *Bounded rationality and economic diplomacy*. Cambridge University Press, 31–32.

[10] Ranjan, *supra* note 6, at 38.

[11] Ranjan, P. (2022). Emerging trends in investor-state dispute settlement in new free trade agreements. *Global Trade and Customs Journal*, *17*(7/8), 333–334.

[12] Skovgaard Poulsen, *supra* note 9; 152; Ostřanský, J., & Pérez Aznar, F. (2021). Investment treaties and national governance in India: Rearrangements, empowerment, and discipline. *Leiden Journal of International Law*, *34*(2).

[13] Department of Industrial Policy & Promotion Note, *supra* note 7, 2-3.

[14] Ibid.

[15] Ibid, p. 22.

[16] Garg, S., Tripathy, I. G., & Roy, S. (2016). The Indian model bilateral investment treaty: Continuity and change. In K. Singh & B. Ilge (Eds.), *Rethinking BITs: Critical issues and policy choices*. Madhyam, 73–75.

[17] Office Memorandum dated 28 December 2015, F. NO. 26/5/2013-IC, Investment Division, Department of Economic Affairs, Ministry of Finance, Government of India.

[18] India–Australia Economic Cooperation and Trade Agreement (2022), Annex 8D.

[19] See Descheemaeker, S.. (2016). Ubiquitous uncertainty: The overlap between trade in services and foreign investment in the GATS and EU RTAs. *Legal Issues of Economic Integration*, *43*(3), 265.

[20] See Ranjan, *supra* note 6.

I. La directive « CSRD » et sa mise en application

Greenly, 12 janvier 2024

Directive CSRD : actualités, contenu et conseils

Ines Gendre, Content Manager chez Greenly

Présentée par la Commission européenne en 2021, la Corporate Sustainability Reporting Directive (CSRD) vise à harmoniser le reporting extra-financier réalisé par nos entreprises. Plus spécifiquement, elle doit améliorer la disponibilité et la qualité des données rendues publiques.

Mais le sujet préoccupe : selon une étude publiée fin 2023 par BakerTilly, 51 % des répondants étaient inquiets quant à l'entrée en vigueur de la CSRD. D'ailleurs, 64 % de ces mêmes répondants envisageaient de contacter ou avaient déjà contacté des organismes externes pour les aider.
Mais qu'est-ce que la directive CSRD exactement ? Qui est concerné ? Quand ? Comment se préparer à l'exercice de reporting ?
Greenly vous dit tout.

Qu'est-ce que la CSRD (Corporate Sustainability Reporting Directive) ?

Directive CSRD, définition

La Corporate Sustainability Reporting Directive (dite CSRD ou "Directive sur les rapports de développement durable des entreprises" en français) est une réglementation européenne. Son objectif consiste à instaurer un reporting extra-financier uniformisé à l'échelle de l'Union européenne. Pour ce faire, le reporting extra-financier devra répondre à de nouvelles normes : les European Sustainability Reporting Standards (ESRS).
Pour la petite histoire, la CSRD a été initiée par la Commission européenne en avril 2021. Publiée le 16 décembre 2022 au Journal Officiel de l'UE, elle est supposée soutenir l'ambition du Pacte Vert pour l'Europe (European Green Deal) : la neutralité carbone 2050.
La mise en œuvre de la CSRD témoigne, en outre, des nouveaux besoins des acteurs financiers. Et pour cause : ces derniers font face à de nouvelles obligations en matière de reporting ESG, eux aussi.

En ce sens, le reporting CSRD vient prêter main forte à la taxonomie européenne et au règlement encadrant la finance durable (SFDR - Sustainable Finance Disclosure). **Un arsenal législatif et réglementaire, dont l'ambition est de créer une finance neutre en carbone, grâce à des investissements dits "durables".**
La directive CSRD est fondée sur le principe de double matérialité, qui considère à la fois :

- les incidences de l'activité sur le climat ;
- l'impact du changement climatique sur l'activité.

Pour cette raison, le reporting extra-financier doit être alimenté de données pouvant faire l'objet d'une comparaison. En effet, la CSRD a pour objectif d'améliorer la qualité, la fiabilité et l'accessibilité de l'information à destination des investisseurs souhaitant opérer des évaluations et des comparatifs.
D'ailleurs, la Commission européenne a créé une plateforme (European Single Access Point - ESAP), qui centralise toutes les informations financières et de durabilité.
Dans la pratique, cette directive contribuera aussi certainement à lutter contre le greenwashing.

Le reporting extra-financier : de la NFRD à la CSRD

Comparé au reporting financier, le reporting extra-financier inclut trois dimensions supplémentaires :

- l'impact de l'activité sur le climat ;
- les risques climatiques pesant sur l'entreprise ;
- la manière dont l'organisation gère ces problématiques.

Jusqu'à aujourd'hui, les déclarations de performance extra-financière des sociétés européennes étaient encadrées par la NFRD (Non Financial Reporting Directive). Dans la pratique, la NFRD avait été appliquée en France via la Déclaration de Performance Extra-Financière (DPEF). **Jugée insuffisamment ambitieuse, cette dernière sera remplacée dès 2024 par la fameuse directive (UE) 2022/2464 - dite « CSRD ».**
Les principaux changements sont les suivants :

1. **le format digital devient obligatoire** (publication au format électronique unique européen xHTML) ;
2. **le champ d'application s'étend** (le nombre d'entreprises concernées par le reporting passe de 11 600 à près de 50 000) ;

3. **l’information sera vérifiée** par un commissaire aux comptes ou un organisme indépendant ;
4. **le reporting CSRD repose désormais sur le principe de la double matérialité** (les performances environnementale et financière deviennent indissociables) ;
5. **les informations seront communiquées dans une section nouvellement dédiée** du rapport de gestion.

Le principe de double matérialité

Attention : l'analyse de double matérialité constitue sans doute l'un des plus gros défis à relever pour les entités concernées. Selon une étude parue en novembre 2023, seules 16 % des entreprises en ont déjà réalisé une. Or, il s'agit d'un exercice essentiel dans le cadre de la CSRD.
L'analyse de double matérialité permet de rendre compte :

- **de la matérialité d'impact** (dite vision “Outside-in”, c'est-à-dire l'impact de l'entreprise sur les personnes et l'environnement) ;
- **de la matérialité financière** (dite vision “Inside-Out”, c'est-à-dire l'impact des questions sociales et environnementales sur les opportunités et risques financiers pour l'entreprise).

Outre le fait d'identifier les enjeux, l’analyse de double matérialité permettra à l'entreprise de les hiérarchiser et de définir les indicateurs adéquats. Chaque entreprise soumise à la CSRD devra produire une matrice de double matérialité, afin d'illustrer sa logique de priorisation des ESRS et des critères ESG.

Qui est concerné par la directive CSRD ?

La directive CSRD s'adresse aux sociétés financières et non-financières concernées par la directive Comptable et la directive Transparence. Les entreprises soumises à la CSRD sont :

- **les sociétés cotées sur les marchés règlementés européens**, y compris les PME cotées (les micro-entreprises identifiées par la directive Comptable sont exclues) ;
- **les autres grandes entreprises européennes**, cotées ou non, excédant deux des trois seuils définis (250 salariés, 40 millions d'euros de chiffre d’affaires et/ou 20 millions d'euros de total au bilan) ;

- **les sociétés non-européennes** dont les filiales ou succursales réalisent au sein de l'Union européenne un chiffre d'affaires supérieur à 150 millions d'euros.

Si la société mère établit un reporting consolidé, les filiales peuvent être exemptées de reporting. Certaines informations devront malgré tout être fournies par l'entité exemptée. En outre, les grandes sociétés cotées ne peuvent bénéficier de ce dispositif.

Les PME (Petites et Moyennes Entreprises) bénéficieront quant à elles d'obligations de reporting allégées. Par ailleurs, la taille des filiales et succursales européennes sera également prise en compte. De même, les entreprises non-européennes seront seulement tenues de communiquer des informations relatives à leurs impacts socio-environnementaux.

À ce jour, près de 50 000 sociétés sont identifiées comme concernées par la directive CSRD.

Si les micro-entreprises et les PME non cotées ne sont pas tenues de procéder à la publication de ce rapport, elles peuvent toutefois le faire sur la base du volontariat.

Pour rappel, les micro-entreprises sont les entités respectant les critères suivants :

- effectif égal ou inférieur à 10 salariés ;
- chiffre d'affaires annuel ou total de bilan ne dépassant pas 2 000 000 €.

Quand s'applique la CSRD ?

La CSRD est entrée en vigueur le 1er janvier 2024. Pour les premières entreprises concernées, le premier reporting portera donc sur l'exercice de l'année 2024. Il devra être publié le 1er janvier 2025.

Pour l'ensemble des acteurs concernés, la publication du premier reporting CSRD interviendra aux dates suivantes :

- **le 1er janvier 2025** (pour l'exercice 2024) pour les entreprises européennes comme non européennes déjà soumises au reporting NFRD ;
- **le 1er janvier 2026** (pour l'exercice 2025) pour les grandes entreprises européennes et les sociétés non européennes cotées sur un marché règlementé européen non soumises à la NFRD ;

- **le 1er janvier 2027** (pour l'exercice 2026) pour les PME européennes et non européennes cotées. Petite subtilité : ces PME bénéficieront d'un délai de deux ans supplémentaires sous réserve de justification ;
- **le 1er janvier 2028** (pour l'exercice 2027) pour les entreprises non-européennes dont le chiffre d'affaires européen excède 150 M€ via une filiale ou succursale.

Ci-après un tableau récapitulatif du calendrier de la CSRD.

Entrée en application	Entreprises concernées
1er janvier 2024 (publication en 2025)	Entreprises européennes et non européennes déjà soumises au reporting NFRD (c salariés et comptabilisant plus de 40 millions d'euros de chiffres d'affaires et/ou 20 mill
1er janvier 2025 (publication en 2026)	Entreprises européennes cochant au moins deux de ces critères : 250 salariés, 4(chiffre d'affaires et/ou 20 millions d'euros de bilan. Les sociétés non européennes c règlementé européen sont concernées, elles aussi.
1er janvier 2026 (publication en 2027)	PME européennes et non européennes cotées sur un marché règlementé eu entreprises).
1er janvier 2028 (publication en 2029)	Grandes entreprises non européennes dont le chiffre d'affaires européen excède 150 succursale localisée au sein de l'Union européenne.

Site de l'Autorité des marchés financiers, 17 janvier 2023

La nouvelle directive CSRD sur le reporting de durabilité des sociétés

La directive européenne NFRD (*Non Financial Reporting Directive*) qui encadre aujourd'hui les déclarations de performance extra-financière des sociétés européennes sera bientôt remplacée par une nouvelle directive, plus ambitieuse : la directive (UE) 2022/2464, dite « CSRD » (*Corporate Sustainability Reporting Directive*), qui s'appliquera progressivement à compter du 1er janvier 2024.
Afin d'accompagner les sociétés dans l'application de cette nouvelle directive, l'AMF souhaite en rappeler les principales dispositions.

1. Sommaire

2. Principales dispositions de la CSRD

Le renforcement des exigences de *reporting* de durabilité des sociétés est un élément clé du Pacte Vert pour l'Europe. L'objectif principal de la CSRD est d'harmoniser le *reporting* de durabilité des entreprises et d'améliorer la disponibilité et la qualité des données ESG publiées. Ces évolutions permettront par exemple de répondre aux besoins d'information des acteurs financiers, eux-mêmes soumis à des obligations de *reporting* ESG.
La CSRD modifie quatre textes européens existants : la directive Comptable, la directive Transparence, la directive Audit et le règlement Audit. Les principaux changements introduits en comparaison de la directive NFRD de 2014 sur la publication d'informations non financières sont :

- Un champ d'application élargi : un nombre significativement plus important de sociétés seront concernées par les obligations de *reporting*, et en particulier toutes les sociétés (sauf micro-entreprises) cotées sur les marchés réglementés européens (*cf. section suivante « sociétés concernées »*).
- Un renforcement et une standardisation des obligations de *reporting* : en s'appuyant sur des normes européennes harmonisées, les sociétés devront publier des informations détaillées sur leurs risques, opportunités et impacts matériels en lien avec les questions sociales, environnementales et de gouvernance, selon un principe de « double

matérialité ». Ces normes de *reporting* seront adoptées via des actes délégués (*cf. encadré ci-dessous*).
- Une localisation unique : le *reporting* de durabilité sera publié dans une section dédiée du rapport de gestion.
- Un format digital imposé : le rapport de gestion sera publié dans un format électronique unique européen xHTML. Des balises (ou tags) seront insérées dans le *reporting* de durabilité et seront définies dans une nouvelle taxonomie digitale fixée par acte délégué.
- Une vérification obligatoire de l'information par un commissaire aux comptes ou un organisme tiers indépendant (au choix des Etats), dans un premier temps avec un niveau d'assurance « modérée ». Un passage au niveau d'assurance « raisonnable » pourrait être requis à compter de 2028. Par ailleurs, les auditeurs devront appliquer des standards d'assurance et les règles encadrant leurs missions seront renforcées par la directive et le règlement Audit.

Encadré : de nouvelles normes de reporting de durabilité

La CSRD prévoit la création de normes de *reporting* de durabilité détaillées, dites normes « ESRS » (*European Sustainability Reporting Standards*) permettant d'encadrer et d'harmoniser les publications des sociétés. Ces normes, qui seront progressivement adoptées par voie d'actes délégués, sont de plusieurs types :

- Des normes « universelles », applicables à l'ensemble des sociétés quel que soit leur secteur d'activité. Elles couvrent les enjeux transversaux ainsi que l'ensemble des thématiques socio-environnementales. Ces normes figureront dans un acte délégué dont l'adoption est prévue en juin 2023.
- Des normes sectorielles, qui feront l'objet d'un second acte délégué dont l'adoption est prévue en juin 2024.
- Des normes spécifiques pour les PME cotées sur les marchés règlementés, également prévues pour figurer dans l'acte délégué de juin 2024.

La Commission européenne a mandaté l'EFRAG – le groupe consultatif européen sur l'information financière - pour la préparation de ces normes. L'EFRAG a ainsi publié le 23 novembre 2022 douze projets de normes correspondant au premier acte délégué. Ces projets seront revus par la Commission européenne avant leur adoption.

3. Sociétés concernées par les nouvelles obligations de *reporting*

L'obligation de publier un *reporting* de durabilité en application de la CSRD s'applique de manière progressive. Elle concerne les sociétés financières et non-financières dans le champ d'application de la directive Comptable et de la directive Transparence et qui correspondent aux catégories suivantes :

- Toutes les sociétés cotées sur les marchés règlementés européens, à l'exception des microentreprises telles que définies par la directive Comptable. Sont donc concernées les PMEs cotées. Toutefois, les PME bénéficient d'obligations de *reporting* allégées (normes spécifiques).

- Toutes les autres grandes entreprises européennes, c'est-à-dire, selon la directive Comptable, les sociétés, cotées ou non, au-dessus de deux des trois seuils suivants : 250 salariés ; 40 M€ de chiffre d'affaires et 20 M€ de total de bilan.
- Par le biais de leur(s) filiale(s) ou succursale(s) européenne(s), certaines sociétés non-européennes pour autant que leur chiffre d'affaires réalisé dans l'UE soit supérieur à 150 M€. Des critères de taille au niveau des filiales et succursales européennes sont également à prendre en compte. Toutefois, ces sociétés non-européennes doivent uniquement fournir des informations relatives à leurs impacts socio-environnementaux (et non celles liées à leurs risques et opportunités).

Lorsqu'un *reporting* de durabilité consolidé est établi par la société mère d'un groupe, les sociétés filiales peuvent bénéficier d'une exemption de *reporting*. Des informations minimales sont toutefois à fournir par la filiale exemptée (déclaration d'exemption, renvoi vers le rapport consolidé, etc.). Cette exemption ne s'applique pas aux grandes sociétés cotées.

4. Calendrier d'application

La directive CSRD a été publiée au journal officiel de l'Union européenne le 16 décembre 2022. Elle entrera progressivement en application à compter du 1er janvier 2024. Il est en effet prévu une entrée en application différée pour certaines catégories d'entreprises.
Le tableau ci-dessous détaille ce calendrier :

Catégories d'entreprises	**Exercice de référence**	**Premier reporting en :**
Grandes entreprises européennes et non européennes vérifiant les seuils de la NFRD Entités d'intérêt public européennes (au sens de la directive Comptable - qui comprennent les sociétés européennes cotées sur un marché réglementé européen) et sociétés non européennes cotées sur un marché règlementé européen, qui satisfont les deux critères suivants : • >500 salariés • >40M€ CA et/ou >20M€ de total de bilan	2024	2025
Autres grandes entreprises européennes et non-européennes Toutes les autres sociétés européennes qui satisfont au moins deux des critères suivants : • >250 salariés • >40M€ CA • >20M€ de total de bilan	2025	2026

Catégories d'entreprises	Exercice de référence	Premier reporting en :
Toutes les sociétés non-UE cotées sur un marché règlementé UE qui satisfont deux des trois critères mentionnés ci-dessus.		
PME cotées sur marché règlementé européen Toutes les PME UE et non-UE cotées sur un marché règlementé européen, sauf les microentreprises (Microentreprise : société ne dépassant pas deux des critères suivants : 10 salariés, 250K€ de total de bilan, 700K€ de CA).	2026 – possibilité de reporter à 2028*	2027 – possibilité de reporter à 2029*
Autres grandes entreprises non-européennes Sociétés non européennes ayant un chiffre d'affaires européen supérieur à 150M€ et une filiale ou succursale basée dans l'Union européenne.	2028	2029

** Pendant une période transitoire de deux ans, jusqu'en 2028, les PME cotées sur les marchés règlementés ont la possibilité de ne pas appliquer les exigences de reporting de la CSRD, pour autant qu'elles indiquent brièvement dans leur rapport de gestion les raisons pour lesquelles elles s'en abstiennent.*

5. Textes de référence

Commission européenne	Directive (UE) 2022/2464 du 14 décembre 2022(directive CSRD), publiée au Journal officiel de l'UE le 16 décembre 2022 applicable à compter du 1er janvier 2024.
EFRAG	Projets de normes de *reporting* de durabilité (ESRS) – avis technique de l'EFRAG, publié le 23 novembre 2022. *L'EFRAG présente sur cette page les premiers projets de normes de reporting (normes « universelles »), qui seront adoptées en juin 2023 par la Commission européenne.*

Directive CSRD : le décret d'application est publié !

Par Muriel Féraud-Courtin, Arnaud Raynouard / 10 janvier 2024

Deloitte, société d'avocats, 10 janvier 2024

Le **décret n° 2023-1394 du 30 décembre 2023** a été publié au Journal Officiel le 31 décembre 2023.
Il vient compléter l'**ordonnance n°2023-1142 du 6 décembre 2023** qui a transposé la directive CSRD en droit français.

Le texte apporte principalement deux précisions, l'une concernant les entreprises assujetties, l'autre visant le contenu et les modalités de révélation de l'information en matière de durabilité. Ces dispositions sont complétées par diverses mesures de coordination.

Champ d'application

En premier lieu, le décret vient établir ce qui était très attendu, à savoir les catégories de sociétés et de groupes de sociétés qui seront concernés par les obligations créées par la directive CSRD dès 2025 pour l'établissement de leurs comptes sociaux 2024.

Deux hypothèses entrent dans le champ d'application de ces obligations : les grandes entreprises et les sociétés consolidantes.

Sont ainsi concernées les **grandes entreprises** au sens de l'**article L 230-1 du code de commerce**.

Ces entreprises, qui étaient jusqu'alors soumises à l'obligation de fournir une déclaration de performance extra-financière, sont celles qui, à la date de clôture de deux exercices consécutifs sur la base des derniers comptes annuels arrêtés, franchissent les seuils suivants :

- Bilan total : 20 m€
- Chiffre d'affaires net : 40 m€
- Nombre moyen de salariés employés au cours de l'exercice : 250

Sont également visées les **sociétés consolidantes ou combinantes d'un grand groupe** établies au sein de l'Union européenne au sens de l'**article L 230-2 du code de commerce**, à savoir celles qui à la date de clôture de deux exercices consécutifs sur la base des derniers comptes annuels arrêtés franchissent les seuils suivants :

- Bilan total : 24 m€
- Chiffre d'affaires net : 48 m€
- Nombre moyen de salariés employés au cours de l'exercice : 250

Le texte précise également les modalités de calcul de chacun de ces seuils (article 4).

Contenu de la déclaration obligatoire

Le second apport du décret est le détail des *informations en matière de durabilité* qui doivent figurer dans une section distincte du rapport de gestion des entreprises entrant dans le champ d'application de l'ordonnance.

Ces informations, est-il indiqué, permettent de comprendre les incidences de l'activité de la société sur les enjeux de durabilité, ainsi que la manière dont ces enjeux influent sur l'évolution de ses affaires, de ses résultats et de sa situation. Les enjeux de durabilité comprennent les enjeux environnementaux, sociaux et de gouvernement d'entreprise (article 5).

Enfin, le décret modifie le code de commerce pour adapter ses dispositions notamment pour ce qui concerne la Haute Autorité de l'Audit, la profession de commissaire aux comptes et les organismes tiers indépendants et auditeurs des informations en matière de durabilité (articles 9 à 11).

Une application échelonnée pour les autres catégories d'entreprises

L'application des dispositions du décret, complété par deux arrêtés (**Arrêté du 28 décembre 2023 portant modification du titre II du livre VIII du code de commerce** et **arrêté du 28 décembre 2023 pris en application de l'article 37 de l'ordonnance n° 2023-1142 du 6 décembre 2023**), est échelonnée puisque si certaines d'entre elles sont applicables aux exercices sociaux ouverts à compter du 1er janvier 2024 comme indiqué ci-dessus, d'autres entreprises ne seront soumises à cette obligation d'information que graduellement :

- Exercices sociaux ouverts au 1er janvier 2025 pour les autres grandes entreprises (pour une première publication en 2026)
- Exercices sociaux ouverts au 1er janvier 2026 pour les PME cotées (pour une première publication en 2027)
- Exercices sociaux ouverts au 1er janvier 2028 pour les entreprises étrangères dépassant le seuil de chiffre d'affaires européen qui est fixé à 250 m€ par le décret (pour une première publication en 2029)

Tags : Corporate Sustainability Reporting Directive (CSRD), Directive CSRD

Le tribunal compétent en matière de devoir de vigilance en France

I. Devoir de vigilance : vers une option de compétence ?

AFFAIRES | Compliance
CIVIL | Procédure civile

Une ordonnance du juge de la mise en état près le Tribunal judiciaire de Nanterre du 11 janvier 2021 consacre une option de compétence entre les juridictions civiles et consulaires.

par Philippe Métais et Élodie Valette, White & Case LLPle 17 février 2021

TJ Nanterre, ord., 11 févr. 2021, n° 20/00915

La loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (la « loi Vigilance ») oblige notamment les sociétés françaises de plus de 5 000 salariés (en leur sein et dans leurs filiales en France) ou 10 000 salariés (en leur sein et dans leurs filiales en France et à l'étranger) à publier un plan de vigilance destiné à prévenir les risques d'atteintes graves aux droits humains et aux libertés fondamentales, à la santé et à la sécurité des personnes ainsi qu'à l'environnement, pouvant résulter de ses activités et de celles des sociétés qu'elle contrôle et de ses sous-traitants ou fournisseurs habituels. Toutes les sociétés par actions sont concernées (SA, SAS et SCA) dès lors qu'elles franchissent les seuils en nombre de salariés en fonction de la localisation des filiales de la société mère. Les risques à prendre en considération, dans le cadre de l'élaboration du plan de vigilance, sont ceux des activités de la société mère et des sociétés qu'elle contrôle, d'une part, et ceux liés aux activités de ces sociétés avec des sous-traitants ou des fournisseurs, d'autre part.

Compte tenu du caractère récent de la loi Vigilance, de nombreuses interrogations subsistent, qu'elles soient processuelles ou qu'elles portent sur le fond du devoir de vigilance (le périmètre des entreprises concernées, les mécanismes de sanction judiciaire prévus, la compétence d'attribution, la compétence territoriale et la loi applicable au litige, l'intérêt à agir, l'appréciation des manquements allégués au devoir

de vigilance, etc., feront nécessairement l'objet d'âpres discussions devant les juridictions ; v. P. Métais et E. Valette, Stratégie contentieuse et devoir de vigilance, D. Avocats 2020. 235). Sur la question de la compétence d'attribution, si la Cour d'appel de Versailles a récemment donné une solution en la matière, le juge de la mise en état près le tribunal judiciaire de Nanterre, à la lumière d'une décision récente consacrant l'option de compétence d'un demandeur non commerçant dès lors que les faits reprochés sont en lien direct avec la gestion d'une société (Com. 18 nov. 2020, n° 19-19.463, D. 2020. 2342), pourrait renverser les certitudes.

II. Acte I : L'affirmation de la compétence du tribunal de commerce

Dans le cadre de l'une des premières actions judiciaires, initiée le 29 octobre 2019 à l'encontre d'un grand groupe français, plusieurs associations et ONG ont assigné en référé devant le Président du Tribunal judiciaire de Nanterre la société mère d'un grand groupe français, sur le fondement de la loi Vigilance, pour non-respect de ses obligations en matière de vigilance dans le cadre de projets pétroliers menés en Ouganda et en Tanzanie par une de ses filiales et ses sous-traitants. Plus précisément, les requérantes demandaient que cesse « le trouble manifestement illicite résultant de la méconnaissance par la société T… de ses obligations en matière de vigilance » et que lui soit enjoint « d'établir et publier un ensemble de mesures dans son plan de vigilance […] propres à prévenir les risques identifiés dans la cartographie des risques et prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement » dans le cadre des projets pétroliers précités.

Le Président du Tribunal judiciaire de Nanterre statuant en référé, par deux ordonnances en date du 30 janvier 2020 (TJ Nanterre, ord. réf., 30 janv. 2010, nos 19/02833 et 19/02833, D. 2020. 970 , note N. Cuzacq), s'était déclaré incompétent et avait renvoyé l'affaire devant le Tribunal de commerce de Nanterre statuant en référé. La Cour d'appel de Versailles, par deux arrêts attendus du 10 décembre 2020 (Versailles, 10 déc. 2020, nos 20/01692 et 20/01693, Dalloz actualité, 11 janv. 2021, note P. Métais et E. Valette) a confirmé cette lecture en considérant qu'« est caractérisée l'existence d'un lien direct entre le plan de vigilance, son établissement et sa mise en œuvre, et la gestion de la société commerciale dans son fonctionnement, critère nécessaire et suffisant pour que la compétence du juge consulaire puisse être retenue ». Les associations et ONG concernées ont d'ores et déjà annoncé qu'elles entendaient former un pourvoi en cassation.

III. Acte II : L'affirmation d'une option de compétence entre tribunal judiciaire et tribunal de commerce

Dans le cadre d'une autre action judiciaire initiée le 28 janvier 2020 à l'encontre de ce même groupe français, d'autres associations et des collectivités territoriales sollicitaient du Tribunal judiciaire de Nanterre, sur le fondement des articles L. 225-102-4 du code de commerce et 1252 du code civil qu'il enjoigne à la multinationale de mettre son plan de vigilance en conformité avec la loi et d'aligner sa trajectoire d'émissions de gaz à effet de serre avec l'Accord de Paris.

Par une ordonnance du 11 février 2021 (TJ Nanterre, ord. JME, 11 févr. 2021, n° 20/00915), le juge de la mise en état près le Tribunal judiciaire de Versailles a rejeté l'exception d'incompétence matérielle dont il était saisi considérant que « la plénitude de juridiction du tribunal judiciaire combinée à l'absence de

prévision d'une compétence exclusive du tribunal de commerce ainsi que l'engagement direct de la responsabilité sociale de la SE T… très au-delà du lien effectivement direct avec sa gestion prise en lien avec la qualité de non-commerçant des demanderesses fondent à leur bénéfice un droit d'option, qu'elles exercent à leur convenance, entre le tribunal judiciaire, qu'elles ont valablement saisi, et le tribunal de commerce ».

Selon le juge de la mise en état versaillais, si « l'élaboration et la mise en œuvre du plan de vigilance sont en lien direct avec la gestion de la SE T…, critère qui fonde la compétence du tribunal de commerce », pour autant « ce constat ne commande pas à lui seul l'incompétence du tribunal judiciaire, la loi ne précisant pas que la compétence définie par l'article L. 721-3 du code de commerce, en particulier en 2°, soit exclusive […] ».

Et le juge de la mise en état de poursuivre son raisonnement en se référant à l'arrêt *Uber* rendu par la Cour de cassation le 18 novembre 2020 (préc.) aux termes duquel la chambre commerciale a considéré que, « si la compétence des juridictions consulaires peut être retenue lorsque les défendeurs sont des personnes qui n'ont ni la qualité de commerçant ni celle de dirigeant de droit d'une société commerciale dès lors que les faits qui leur sont reprochés sont en lien direct avec la gestion de cette société, […] toutefois, lorsque le demandeur est un non-commerçant, il dispose du choix de saisir le tribunal civil ou le tribunal de commerce et qu'ayant constaté que les demandeurs n'avaient pas la qualité de commerçant, il en déduit qu'ils disposaient d'une option de compétence leur permettant de saisir valablement le juge civil d'une action en concurrence déloyale dirigée contre une société commerciale et deux de ses salariés ».

Le juge de la mise en état applique cette solution aux faits de l'espèce et retient un droit d'option de compétence au profit des demanderesses.

Un appel à l'encontre de cette ordonnance est d'ores et déjà annoncé, de sorte qu'une nouvelle décision de la Cour d'appel de Versailles est attendue.

Il sera observé que ces deux séries de décisions ont toutes été rendues dans le cadre d'actions préventives en cessation de l'illicite, sur le fondement de l'article L. 225-102-4, II, du code de commerce. Une telle action qui peut être mise en œuvre dans un délai de trois mois à compter de la mise en demeure de se conformer aux obligations de vigilance adressée à l'entreprise visée et qui tend à voir enjoindre à cette dernière, le cas échéant sous astreinte, de les respecter. Ce premier mécanisme judiciaire intervient donc avant l'intervention d'un quelconque dommage.

La loi Vigilance instaure également un second mécanisme, lequel intervient une fois le dommage survenu : l'action en responsabilité, sur le fondement de l'article L. 225-102-5 du code de commerce, qui suppose la démonstration d'une faute (manquement au devoir de vigilance), d'un dommage (conséquence d'« atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement ») et d'un lien de causalité entre le non-respect du devoir de vigilance et la survenance du dommage.

En la matière, la Cour d'appel de Versailles, dans ses deux arrêts du 10 décembre 2020 (préc.), relevait « que l'examen du respect de l'obligation d'établissement et de mise en œuvre du plan de vigilance par une

société commerciale, qui peut faire l'objet d'une injonction en application du texte litigieux, n'est pas celui de ses manquements éventuels qui ne pourraient être reprochés et appréciés que sur le fondement de la responsabilité de l'entreprise à laquelle se consacre l'article L. 225-102-5, grâce à une action en réparation dont la cour n'est pas saisie. La compétence pour juger chacune de ces deux actions qui répondent à leur propre logique et reposent sur des fondements juridiques distincts, l'une tendant à obtenir une injonction de faire, l'autre tendant à obtenir réparation, peut donc être différente ».

IV. Au-delà de la question de compétence

Au-delà de la question de la juridiction compétente pour connaître des actions préventives et en responsabilité, « tous les recours devront être suivis de près pour en analyser la portée » (rapport du Conseil général de l'économie, évaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères des entreprises donneuses d'ordre, janv. 2020).

En tout état de cause, les enjeux induits par la loi Vigilance – mais également l'obligation de procéder à une déclaration de performance extrafinancière ou encore les préoccupations sociétales et environnementales que la loi Pacte a fait entrer dans le droit des sociétés – se révèlent être à la fois un nouvel outil de communication pour les entreprises et une nouvelle source de responsabilité des acteurs sociaux.

Le législateur européen pourrait par ailleurs donner naissance à une réglementation contraignante sur le devoir de vigilance des donneurs d'ordre vis-à-vis de leurs sous-traitants en matière de droits humains et d'environnement (cette annonce a eu lieu lors d'une conférence en ligne organisée par le groupe de travail du Parlement européen sur la responsabilité des entreprises) d'ici 2021. Le projet d'initiative législative, adopté le 27 janvier 2021, appelle la Commission à présenter de façon urgente une législation européenne exigeant que les entreprises respectent les normes en matière de droits de l'homme et d'environnement dans leurs chaînes de valeur. Le Parlement européen doit se prononcer sur ce sujet lors de la session plénière prévue le 8 mars 2021.

V. Devoir de vigilance : quel tribunal compétent ?

AFFAIRES
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La mise en cause d'une entreprise pour manquement à son devoir de vigilance relève du tribunal de commerce.

par Philippe Métais et Élodie Valettele 11 janvier 2021

Versailles, 10 déc. 2020, n° 20/01692
Versailles, 10 déc. 2020, n° 20/01693

La loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (la « loi Vigilance ») a instauré, pour chaque société qui emploie au moins cinq mille salariés elle-même et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français, ou au moins dix mille salariés elle-même et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français ou à l'étranger, l'obligation d'élaborer, publier et mettre en œuvre un plan de vigilance destiné à prévenir les risques d'atteintes graves aux droits humains et aux libertés fondamentales, à la santé et à la sécurité des personnes ainsi qu'à l'environnement, pouvant résulter de ses activités et de celles des sociétés qu'elle contrôle et de ses sous-traitants ou fournisseurs habituels.

Il sera rappelé que la loi Vigilance a édicté deux séries de dispositions visant à assurer le respect effectif du devoir de vigilance et à sanctionner les éventuels manquements et défaillances des sociétés assujetties :

• l'action préventive en cessation de l'illicite, sur le fondement de l'article L. 225-102-4, II, du code de commerce, qui peut être mises en œuvre dans un délai de trois mois à compter de la mise en demeure de se conformer aux obligations de vigilance adressée à l'entreprise visée et qui tend à voir enjoindre à cette dernière, le cas échéant sous astreinte, de les respecter. Ce premier mécanisme judiciaire intervient donc avant l'intervention d'un quelconque dommage ;

• l'action en responsabilité, sur le fondement de l'article L. 225-102-5 du code de commerce, qui suppose la démonstration d'une faute (manquement au devoir de vigilance), d'un dommage (conséquence

d'« atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement ») et d'un lien de causalité entre le non-respect du devoir de vigilance et la survenance du dommage. Ce second mécanisme judiciaire intervient une fois le dommage survenu.

Le rapport du Conseil général de l'économie (CGE) portant sur l'évaluation de la mise en œuvre de la loi n° 2017-339 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre remis au ministère de l'Économie et des Finances le 21 février 2020 dresse un premier bilan mitigé de son application.

Les premières mise en demeure ont été adressées et les premières actions judiciaires ont été initiées sur le fondement de la loi Vigilance.

Le 10 décembre 2020, la cour d'appel de Versailles, en confirmant les ordonnances rendues par le président du tribunal judiciaire de Nanterre statuant en référé, juge que la mise en cause d'une entreprise pour manquement à son devoir de vigilance relève du tribunal de commerce.

Dans le cadre de l'une des premières actions judiciaires, initiée le 29 octobre 2019 à l'encontre d'un grand groupe français, des associations et ONG sollicitaient du président du tribunal judiciaire de Nanterre statuant en référé qu'il ordonne des actions urgentes pour faire cesser le trouble manifestement illicite résultant de la méconnaissance par l'entreprise visée de ses obligations en matière de vigilance et, à titre subsidiaire, qu'il lui enjoigne, sous astreinte, d'établir et de publier un ensemble de mesures dans son plan de vigilance propres à prévenir les risques identifiés dans la cartographie des risques et prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement résultant notamment des activités de l'entreprise visée, de ses filiales et de leurs sous-traitants dans la conduite de projets et de mettre en œuvre ce plan de vigilance.

Par deux ordonnances du 30 janvier 2020 (ord. TJ Nanterre, réf., 30 janv. 2010, n° 19/02833, D. 2020. 970 , note N. Cuzacq), le président du tribunal judiciaire de Nanterre s'est déclaré incompétent au profit du tribunal de commerce de Nanterre pour connaître d'une action en cessation de l'illicite engagée sur le fondement de l'article L. 225-102-4, II, du code de commerce. Ainsi, après avoir relevé que « les dispositions de l'article L. 225-102-4, sur lesquelles les associations fondent leur action, sont inscrites dans le code de commerce, dans son titre II portant dispositions particulières aux diverses sociétés commerciales, dans le chapitre V concernant les sociétés anonymes et plus particulièrement la section 3 relative aux assemblées d'actionnaires », le président ajoute que le plan de vigilance « est au cœur de la vie sociale, avec une éventuelle incidence sur le pacte social dès lors que ces informations sont soumises à ses organes décisionnels » et que « la mise en œuvre du plan de vigilance implique l'organisation (actions d'atténuation, de prévention et d'alerte) et le fonctionnement de la société (suivi des mesures et évaluation de leur efficacité) soit par un contrôle de ses filiales, soit par l'influence exercée sur ses sous-traitants », avant de conclure que « le plan de vigilance et son compte rendu de mise en œuvre font ainsi partie intégrante de la gestion de la société », de sorte qu'« au regard des obligations incombant aux sociétés commerciales au titre du devoir de vigilance, l'élaboration et la mise en œuvre du plan de vigilance participent donc directement du fonctionnement de ces sociétés ». Le président s'était ainsi déclaré

incompétent au profit du tribunal de commerce de Nanterre statuant en référé pour connaître de la demande d'injonction sous astreinte relative à la mise en œuvre du plan de vigilance.

Quelques jours avant l'instauration de la première période d'urgence sanitaire, les associations et ONG ont interjeté appel des ordonnances susvisées en ce qu'elles ont renvoyé les affaires devant le tribunal de commerce de Nanterre statuant en référé. Dans le cadre des débats en cause d'appel, elles sollicitaient de la cour d'appel l'infirmation des ordonnances et formulaient une demande d'évocation au regard de l'urgence et de la portée de l'affaire, s'agissant de la première application de la loi Vigilance.

La cour d'appel de Versailles prend tout d'abord soin de rappeler que seule l'application d'une règle spéciale peut justifier une dérogation à la compétence de droit commun du tribunal judiciaire et qu'en l'occurrence, l'article L. 225-102-4, II, du code de commerce, qui donne à la juridiction compétente le pouvoir connaître d'une action en cessation de l'illicite, n'édicte aucune règle spéciale.

C'est au terme d'une démonstration en deux étapes fondée sur l'application des dispositions de l'article L. 721-3, 2° et 3°, du code de commerce – selon lesquelles les tribunaux de commerce connaissent des contestations relatives aux sociétés commerciales et de celles relatives aux actes de commerce entre toutes personnes – que la cour décide d'une compétence des juges consulaires pour connaître de l'action en cessation de l'illicite engagée sur le fondement de l'article L. 225-102-4, II, du code de commerce.

La démonstration d'un lien direct entre le plan de vigilance, son établissement et sa mise en œuvre, d'une part, et la gestion de la société commerciale dans son fonctionnement, d'autre part

La cour se réfère à l'insertion des dispositions relatives à la loi Vigilance dans le code de commerce « dans le titre II portant sur les sociétés commerciales, au chapitre V concernant les sociétés anonymes et dans la section 3 relatives aux assemblées des actionnaires ». Elle relève également que le plan de vigilance et le compte rendu de sa mise en œuvre figurent en annexe du rapport annuel de gestion, que le plan de vigilance intégré au rapport de gestion est présenté à l'assemblée générale des actionnaires, par les organes de gestion, le conseil d'administration ou le directoire. Selon la cour, « l'intégration de ces enjeux sociaux et environnementaux à l'activité commerciale […] a nécessairement une incidence sur le fonctionnement de l'entreprise ». Elle ajoute, par référence à la loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (loi Pacte), que le fonctionnement de la société et donc sa gestion sont concernés par le plan de vigilance.

La qualification du plan de vigilance d'acte de gestion d'une société commerciale exclut l'exercice de l'option de compétence prévue à l'article L. 721-3, 3°, du code de commerce au profit des juges civils.

Il sera rappelé que la Cour de cassation juge de manière séculaire (Civ. 8 mai 1907, DP 1911. 1. 222 ; Cass., req., 1er juill. 1908, DP 1909. 1. 11 ; Civ. 6 mai 1930, DH 1930. 363 ; Civ. 22 juin 1943, DC 1944. Jur. 83) qu'en cas de litige entre deux parties dont l'une seulement est commerçante ou à propos d'un acte qui n'est commercial que pour l'une d'elles, la partie non commerçante dispose d'une option et peut saisir soit le tribunal de commerce, soit le tribunal civil compétent.

En l'occurrence, dès lors que c'est la société assujettie « qui établit et met en œuvre un plan de vigilance relatif à [son] activité et [celle] de l'ensemble des filiales ou sociétés qu'elle contrôle », le plan de vigilance ne saurait avoir ni la nature d'acte civil ni celle d'acte mixte.

Enfin, la cour d'appel déboute les associations de leur demande d'évocation considérant au visa de l'article 88 du code de procédure civile qu'il n'est pas de bonne justice de priver l'entreprise visée du bénéfice du double degré de juridiction.

Au préalable, elle relève que l'urgence dont se prévalent les associations n'est plus caractérisée dans la mesure où le plan de vigilance objet de la mise en demeure ayant donné lieu à la mise en œuvre de l'action préventive en cessation de l'illicite a été amendé puisque deux autres plans ultérieurs ont été publiés sans qu'ils aient fait l'objet de mises en demeure.

On pouvait légitimement s'interroger sur le point de savoir si, à la lumière de ces décisions, le tribunal de commerce, plutôt que le tribunal judiciaire, sera également compétent pour connaître d'une action en responsabilité sur le fondement de l'article L. 225-102-5 du code de commerce. À cet égard, la cour d'appel de Versailles a pris soin de relever « que l'examen du respect de l'obligation d'établissement et de mise en œuvre du plan de vigilance par une société commerciale, qui peut faire l'objet d'une injonction en application du texte litigieux, n'est pas celui de ses manquements éventuels qui ne pourraient être reprochés et appréciés que sur le fondement de la responsabilité de l'entreprise à laquelle se consacre l'article L. 225-102-5, grâce à une action en réparation dont la cour n'est pas saisie. La compétence pour juger chacune de ces deux actions qui répondent à leur propre logique et reposent sur des fondements juridiques distincts, l'une tendant à obtenir une injonction de faire, l'autre tendant à obtenir réparation, peut donc être différente ». Il n'est donc pas exclu que ces deux actions puissent relever de la compétence de juridictions différentes.

D'autres questions « stratégiques » préoccupent les professionnels du droit. Le périmètre des entreprises concernées, les mécanismes de sanction judiciaire prévus, la compétence d'attribution, la compétence territoriale et la loi applicable au litige, l'intérêt à agir, l'appréciation des manquements allégués au devoir de vigilance, etc., feront nécessairement l'objet d'âpres discussions devant les juridictions (P. Métais et E. Valette, Stratégie contentieuse et devoir de vigilance, D. Avocats 2020. 235).

Le législateur européen pourrait par ailleurs donner naissance à une réglementation contraignante sur le devoir de vigilance des donneurs d'ordre vis-à-vis de leurs sous-traitants en matière de droits humains et d'environnement (cette annonce a eu lieu lors d'une conférence en ligne organisée par le groupe de travail du Parlement européen sur la responsabilité des entreprises) d'ici 2021.

Au niveau national, on observera que la loi Pacte a généralisé un mouvement législatif incitant les entreprises à être plus attentives à leur environnement sociétal. Si les prémices de ce mouvement visaient essentiellement les grandes sociétés – avec l'obligation de mettre en place et en œuvre un devoir de vigilance ou encore de procéder à une déclaration de performance extrafinancière – les changements apportés au droit commun des sociétés par la loi Pacte doivent conduire chaque groupement, quelle que soit sa forme ou sa taille, à s'interroger sur l'opportunité mais aussi les risques liés aux enjeux sociaux et

environnementaux. Ces enjeux sont à la fois un nouvel outil de communication pour les entreprises et une nouvelle source de responsabilité des acteurs sociaux.

Pour reprendre les termes du rapport du Conseil général de l'économie : « tous les recours devront être suivis de près pour en analyser la portée ».

VI. Les premiers pas du devoir de vigilance appliqué aux contentieux climatiques

16 novembre 2023
Jacques Bouyssou

La loi n° 2017-399 du 27 mars 2017 a instauré, en France, un devoir dit de « vigilance » s'imposant aux plus grandes entreprises en matière environnementale, sociale et de gouvernance. Le régime codifié aux articles L. 225-102-4 et 5 du Code de commerce, impose aux sociétés employant au moins 5 000 salariés en France – maison mère et filiales confondues – ou 10 000 salariés dans le monde, notamment, d'établir et mettre en œuvre un « plan de vigilance ». Le non-respect de ces obligations est susceptible d'engager la responsabilité des sociétés en cause.

L'Union européenne s'inspire de cette loi pour l'élaboration d'une directive européenne relative au devoir de vigilance des entreprises en matière de développement durable[1]. Cette directive est en cours de négociation entre les Etats membres après l'adoption par le Parlement européen du projet de directive le 1er juin 2023[2]. Ce devoir de vigilance peut fournir un support aux actions climatiques alors que la montée en puissance des contentieux climatiques en France et dans le monde illustre la mobilisation de la société civile. L'Observatoire Alerion des Contentieux Climatiques analyse les premières décisions du juge français sur le devoir de vigilance qui, à ce stade, portent sur des questions procédurales et préliminaires.

1. Compétence exclusive du Tribunal judiciaire de Paris

Jusqu'à l'adoption de la loi n° 2021-1729 le 22 décembre 2021 qui a attribué une compétence exclusive au Tribunal judiciaire de Paris pour toutes les actions relatives au devoir de vigilance fondées sur les nouveaux articles du Code de commerce, la compétence des tribunaux judiciaires se heurtait à la compétence des tribunaux de commerce, le forum naturel de la vie des affaires.

Dans l'affaire *TotalEnergies SE*, le Tribunal judiciaire de Nanterre, s'était déclaré à raison incompétent au profit du Tribunal de commerce au motif que l'élaboration du plan de vigilance et sa mise en œuvre font partie intégrante de la gestion de la société[3]. La Cour d'appel de Versailles avait approuvé l'approche retenue par les premiers juges et rejeté la qualification d'acte mixte[4], qualification qui aurait permis un choix entre les juridictions civiles et commerciales. La Chambre commerciale de la Cour de cassation a cassé l'arrêt d'appel en déclarant que « *le demandeur non commerçant qui entend agir à cette fin dispose, toutefois, en ce cas, du choix de saisir le tribunal civil ou le tribunal de commerce* ». Toutefois, la Haute juridiction a confirmé la position des juges de première instance en considérant que « *l'établissement et la mise en œuvre d'un tel plan présentent un lien direct avec la gestion de cette société* ».

Le législateur a tranché définitivement la question de la compétence en octroyant une compétence exclusive au Tribunal judiciaire de Paris[5].

2. Les limites de l'action en référé

L'article L. 225-102-4 du Code de commerce permet au demandeur d'intenter soit une action en référé soit une action au fond pour que la société ayant manqué à ses obligations soit enjointe de les respecter.

Dans l'affaire *Total – Ouganda*, le juge des référés du Tribunal judiciaire de Paris s'est interrogé sur le point de savoir si l'action en référé était adaptée pour contrôler le respect de l'obligation d'émettre un plan de vigilance en matière de droits humains et libertés fondamentales, de santé et sécurité des personnes ainsi que d'environnement[6].

Après avoir jugé les demandeurs irrecevables pour défaut de mise en demeure préalable, le juge des référés a exprimé, dans un *obiter dictum* bienvenu, des réserves quant à la possibilité pour le juge de l'évidence de contrôler l'émission d'un plan de vigilance. La juridiction des référés a ainsi précisé que « *les griefs et les manquements reprochés à la société TotalEnergies SE du chef de son devoir de vigilance, au cas présent, doivent faire l'objet d'un examen en profondeur des éléments de la cause excédant les pouvoirs du juge des référés* ».

Cette solution précise le cadre procédural dans lequel pourra s'exercer l'action fondée sur le devoir de vigilance. Elle révèle ainsi les difficultés auxquelles les demandeurs feront face en saisissant le juge des référés dès lors que l'objet du litige porte sur la conformité du plan de vigilance et non sa

simple publication par la société en cause. Un observateur suggère que les demandeurs pourraient, tout à la fois, présenter une demande au fond portant sur la conformité du plan de vigilance d'une société et une demande en référé visant à suspendre les mesures prises par la société[7].

3. L'exigence d'une mise en demeure

L'article L. 225-102-4, II du Code de commerce prévoit, avant la saisine du juge, que la société en cause soit mise en demeure d'exécuter ses obligations au titre de son devoir de vigilance.

« II.-Lorsqu'une société mise en demeure de respecter les obligations prévues au I n'y satisfait pas dans un délai de trois mois à compter de la mise en demeure, la juridiction compétente peut, à la demande de toute personne justifiant d'un intérêt à agir, lui enjoindre, le cas échéant sous astreinte, de les respecter. »

En l'absence d'un décret d'application précisant certains aspects du contentieux relatif au devoir de vigilance, le Tribunal judiciaire de Paris a établi des exigences, exposées ci-dessous, sur cette mise en demeure dans les affaires *Total – Ouganda**[8]***, *Total – Climat**[9]***, *Suez**[10]*** et *EDF**[11]***.

Préalable obligatoire

En premier lieu, la mise en demeure est appréciée comme un préalable obligatoire à toute saisine du juge. A défaut de mise en demeure préalable, la demande des requérants est irrecevable. Dans l'affaire *EDF*, le Juge de la mise en état du Tribunal Judiciaire de Paris a précisé que cette condition vise à instaurer un dialogue entre les requérants et la société visée, afin qu'elle puisse prendre en compte les remarques à l'égard de son plan de vigilance et le faire évoluer en conséquence[12].

Identité d'objet entre la mise en demeure et l'assignation

En deuxième lieu, la mise en demeure et l'assignation doivent avoir le même objet. Ainsi, l'assignation doit viser les mêmes griefs soulevés par la mise en demeure et notamment le même plan de vigilance.

Par exemple dans l'affaire *Total-Ouganda**[13]***, les demandeurs avaient mentionné dans leur assignation, la versions la plus récente du plan de vigilance correspondant à l'année 2021, alors que

les mises en demeure portaient sur une version antérieure correspondant à l'année 2019. Cela a conduit le Juge de la mise en état à conclure que le défendeur n'avait pas été mis en demeure au regard du plan de vigilance faisant l'objet de sa saisine.

Le caractère complet de la mise en demeure

En troisième lieu, la mise en demeure doit être suffisamment spécifique quant à l'objet des griefs qui sont reprochés à la société en cause. *Dans l'affaire Total-Climat[14], le Juge de la mise en état a considéré que la mise en demeure adressée par les demandeurs était imprécise en ce qu'elle enjoignait à Total Energies une liste de mesures « sans préjudice d'autres mesures qui pourront être identifiées ». Ainsi, pour être conformes, les mises en demeures doivent être suffisamment précises sur les griefs en cause pour servir de base à une discussion entre les parties prenantes avant la saisine du tribunal.*

4. L'articulation entre l'article 1252 du Code civil et l'article L. 225-102-4 du Code de commerce

L'article 1252 du Code civil prévoit la possibilité de demander au juge français de prescrire des mesures propres à prévenir ou faire cesser un dommage en matière écologique. La question s'est donc posée de l'articulation entre ce texte et l'article L. 225-102-4 du Code de commerce qui permet au juge d'enjoindre une société à respecter ses obligations dans le cadre du devoir de vigilance.

Dans l'affaire *Total – Climat**[15]***, le Tribunal judiciaire a été saisi de deux demandes, une fondée sur l'article L. 225-102-4 du Code de commerce visant à obtenir une injonction pour que Total Energies publie son plan de vigilance, et, une autre fondée sur l'article 1252 du Code civil visant à « *publier et mettre en œuvre* » des actions pour la réduction d'émissions de gaz à effet de serre.

Total Energies a soulevé un incident relatif à la recevabilité de la demande fondée sur l'article 1252 du Code civil. Reprenant l'argumentation du défendeur, le Juge de la mise en état a déclaré la demande irrecevable en considérant que les deux demandes poursuivaient le même objet, et qu'en se fondant sur l'article 1252 du Code civil les demandeurs tentaient de contourner l'obligation de mise en demeure prévue à l'article L. 225-102-4 du Code de commerce. Qualifiant les dispositions du Code de commerce de « spéciales », le juge relève qu'elles dérogent aux dispositions d'ordre général du Code civil.

Cette solution est contestée par certains auteurs qui s'interrogent sur l'application exclusive de l'article L. 225-102-4 du Code de commerce à la question du devoir du vigilance, notamment en raison de la référence de l'article L.225-102-5 du même code aux articles 1240 et 1241 du Code civil concernant le préjudice écologique[16].

En tout état de cause, à suivre la décision du Juge de la mise en état dans l'affaire *Total Energies*, il n'est pas possible de se fonder sur l'article 1252 du Code civil pour veiller au respect du devoir de vigilance.

5. La qualité à agir des défendeurs

Selon l'article L. 225-102-4 du Code de commerce, la responsabilité de l'établissement du plan de vigilance incombe à la société mère du groupe, les filiales contrôlées au sens de l'article L. 233-3 du Code de commerce en sont exemptes. L'obligation repose donc sur la société mère même si les filiales peuvent de leur propre gré mettre en place un plan de vigilance. En conséquence, seulement la société mère ou la société à l'origine d'un plan ce vigilance déterminé peuvent être attraites en justice.

Dans l'affaire Suez**[17]**, la défenderesse, une filiale du groupe Suez, alléguait qu'elle n'avait pas édicté le plan de vigilance en cause et que celui-ci avait été élaboré par son actionnaire unique. Le Juge de la mise en état, ayant constaté que le plan de vigilance ne mentionnait pas précisément quelle société du groupe Suez était à son origine, a considéré que « la qualité à défendre de la [filiale] (…) n'est pas établie ».

Il en ressort, qu'il doit y avoir une identité entre la société émettrice du plan de vigilance objet de l'assignation et la société qui est assignée.

6. L'intérêt à agir des demandeurs

Le moyen tenant à l'irrecevabilité des demandes en raison du manque d'intérêt à agir des associations et collectivité territoriales requérantes a été soulevé à plusieurs reprises. Si dans certaines affaires, le juge n'a pas statué sur ce moyen, dans l'affaire *Total – Climat**[18]***, le Juge de la mise en état du Tribunal judiciaire de Paris a précisé – à nouveau dans un *obiter dictum* – que certains demandeurs ne justifiaient pas d'un intérêt à agir.

Le juge parisien s'est référé à l'article 1248 du Code civil – spécifique à la réparation du préjudice écologique – pour interpréter les termes « *toute personne justifiant d'un intérêt à agir* » de l'article L. 225-102-4 du Code de commerce.

L'article 1248 du Code civil détermine les catégories de personnes qui peuvent déclencher une action en réparation du préjudice écologique, à savoir: « *l'Etat, l'Office français de la biodiversité, les collectivités territoriales et leurs groupements dont le territoire est concerné, ainsi que les établissements publics et les associations agréées ou créées depuis au moins cinq ans à la date d'introduction de l'instance qui ont pour objet la protection de la nature et la défense de l'environnement* ».

Ainsi, le Juge de la mise en état a déclaré irrecevables les demandes de certaines associations n'ayant pas été créées ou agréées depuis cinq ans. De même, il a jugé irrecevables les demandes de certaines collectivités territoriales – dont les villes de Paris et New York – en considérant qu'elles peuvent seulement agir « *lorsque leur territoire est concerné par le préjudice écologique* ».

* * *

Ces premières décisions concernant la juridiction compétente, les exigences liées à la mise en demeure préalable, ainsi que la qualité et l'intérêt à agir des parties prenantes, sont venues apporter des précisions bienvenues sur les conditions de l'action. Ces débats portant sur des questions formelles mettent en lumière la complexité des questions de fond que le juge devra résoudre.

I. TABLEAU DES PRINCIPALES AFFAIRES PORTANT SUR LE DEVOIR DE VIGILANCE

Décisions judiciaires

- Tribunal judiciaire Nanterre, ord., 30 janvier 2020, n° 19/02833, TotalEnergies SE
- Versailles, 10 décembre 2020, n° 20/01692, TotalEnergies SE
- Cass. com., 15 décembre 2021, n° 21/11.882, TotalEnergies SE
- Tribunal judiciaire Paris, 30 novembre 2021, n° 20/10246, EDF
- Paris, Pôle 5, ch. 11, 17 mars 2023, n° 22/00749, EDF
- Tribunal judiciaire Paris, 1er juin 2023, n° 22/07100, SUEZ SA

- Tribunal judiciaire Paris, 28 février 2023, n° 22/53942 et n° 22/53943, TotalEnergies SE (Total – Ouganda)
- Tribunal judiciaire Paris, 6 juillet 2023, n° 22/03403, TotalEnergies SE (Total – Climat)

Affaires en cours devant le Tribunal judiciaire de Paris

- Tribunal judiciaire Paris, assignation du 23 mars 2022, YVES ROCHER
- Tribunal judiciaire Paris, assignation du 22 décembre 2021, GROUPE LA POSTE
- Tribunal judiciaire Paris, assignation du 3 mars 2021, CASINO
- Tribunal judiciaire Paris, assignation du 29 juillet 2022, IDEMIA

Mises en demeure

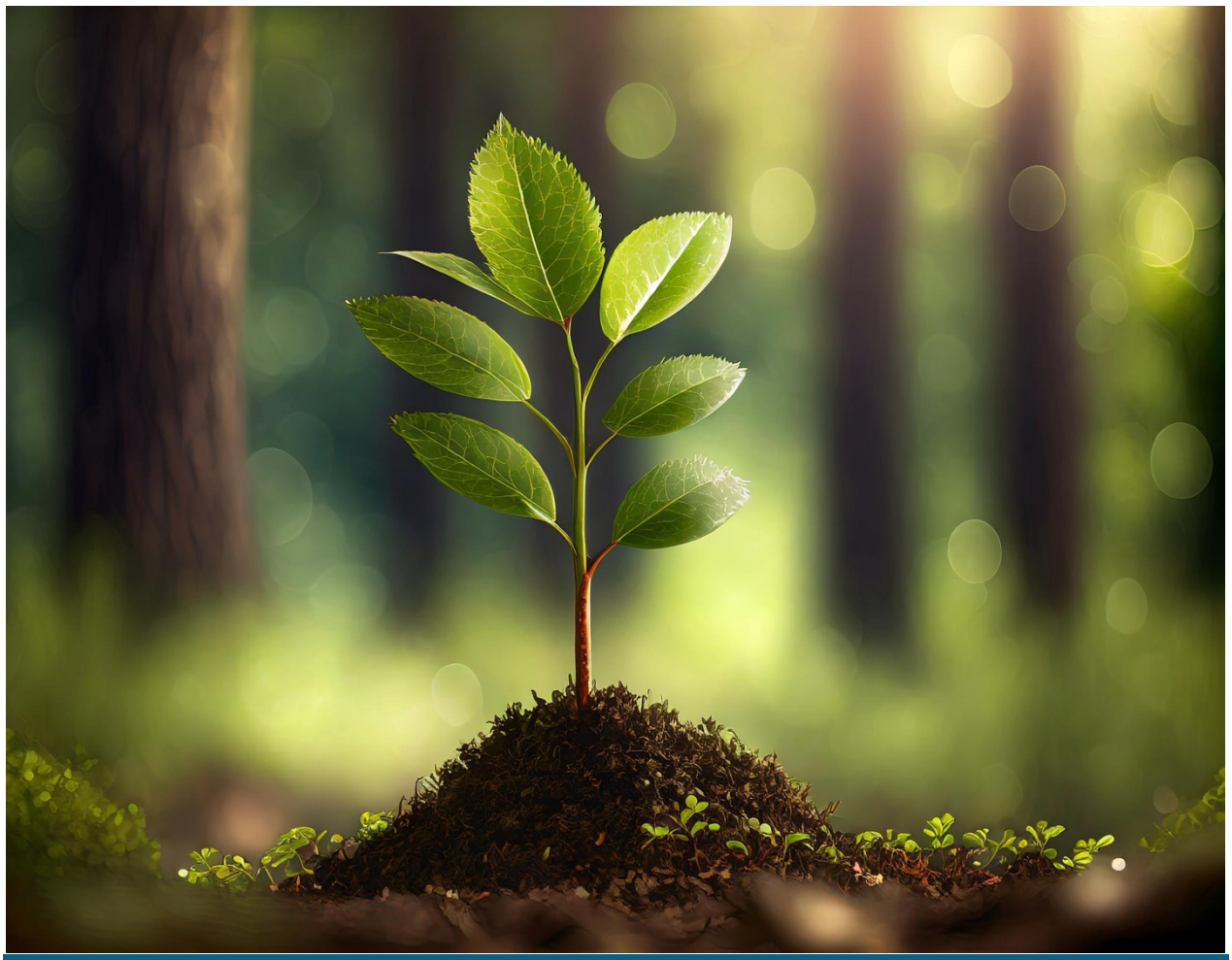
- La société TELEPERFORMANCE a été mise en demeure le 18 juillet 2019
- La société XPO LOGISTICS a été mise en demeure le 1er octobre 2019
- La société TOTALENERGIE a été mise en demeure le 14 mars 2022
- La société MCDONALD'S a été mise en demeure le 30 mars 2022
- Les sociétés Danone, Auchan, Carrefour, Casino, Lactalis, Les Mousquetaires, Picard Surgelés, Nestlé France et McDonald's France ont été mises en demeure le 28 septembre 2022
- La société BNP PARIBAS a été mise en demeure le 17 octobre 2022
- La société BNP PARIBAS a été mise en demeure le 26 octobre 2022

- [1] Proposition de directive du Parlement européen et du Conseil sur le devoir de vigilance des entreprises en matière de durabilité et modifiant la directive (UE) 2019/1937, 23 février 2022.
- [2] Amendements(1) du Parlement européen, adoptés le 1er juin 2023, à la proposition de directive du Parlement européen et du Conseil sur le devoir de vigilance des entreprises en matière de durabilité et modifiant la directive (UE) 2019/1937.

- [3] Tribunal judiciaire Nanterre, ord., 30 janvier 2020, n° 19/02833, TotalEnergies SE.
- [4] R. Dumont, « Devoir de vigilance des sociétés mères et compétence des tribunaux : la Cour de cassation et le législateur rendent concomitamment deux solutions différentes », *Recueil Dalloz*, Dalloz, 2022, p. 826.
- [5] L'article L. 211-21 du Code de l'organisation judiciaire dispose que « *le tribunal judiciaire de Paris connaît des actions relatives au devoir de vigilance fondées sur les articles L. 225-102-4 et L. 225-102-5 du code de commerce* ».
- [6] Tribunal judiciaire Paris, 28 février 2023, n° 22/53942 et n° 22/53943, TotalEnergies SE (Total – Ouganda).
- [7] A. Lecourt, « Nouvelles précisions sur l'action en responsabilité découlant du manquement à la vigilance climatique », *RTD com*, Dalloz, 2023, p. 369
- [8] Tribunal judiciaire Paris, 28 février 2023, n° 22/53942 et n° 22/53943, TotalEnergies SE (Total – Ouganda).
- [9] Tribunal judiciaire Paris, 6 juillet 2023, n° 22/03403, TotalEnergies SE (Total – Climat).
- [10] Tribunal judiciaire Paris, 1er juin 2023, n° 22/07100, SUEZ SA.
- [11] Tribunal judiciaire Paris, 30 novembre 2021, n° 20/10246, EDF.
- [12] Tribunal judiciaire Paris, 30 novembre 2021, n° 20/10246, EDF.
- [13] Tribunal judiciaire Paris, 28 février 2023, n° 22/53942 et n° 22/53943, TotalEnergies SE (Total – Ouganda).
- [14] Tribunal judiciaire Paris, 6 juillet 2023, n° 22/03403, TotalEnergies SE (Total – Climat).
- [15] Tribunal judiciaire Paris, 6 juillet 2023, n° 22/03403, TotalEnergies SE (Total – Climat).
- [16] J.-B. Barbièri, « Devoir de vigilance, la porte se referme », *Dalloz actualité*, Dalloz, 13 juillet 2023
- [17] Tribunal judiciaire Paris, 1er juin 2023, n° 22/07100, SUEZ SA.
- [18] Tribunal judiciaire Paris, 6 juillet 2023, n° 22/03403, TotalEnergies SE (Total – Climat).

VII. Création d'une chambre des contentieux émergents – devoir de vigilance et responsabilité écologique à la CA de Paris

18/01/2024 - mise à jour : 18/01/2024



Le 15 janvier 2024, lors de l'audience solennelle de rentrée, la cour d'appel de Paris a annoncé la mise en place, au sein de son pôle économique, d'une chambre dédiée aux contentieux émergents, en charge des litiges sur le devoir de vigilance et la responsabilité écologique (ordonnance de roulement du 5 janvier 2024 - chambre 5-12), montrant ainsi l'importance que la cour accorde à ces affaires.

Le 30 novembre 2023, les enjeux judiciaires de la responsabilité sociétale des entreprises (RSE) avaient par ailleurs été abordés de façon liminaire lors de la session inaugurale du Conseil de justice économique, dont un des thèmes principaux était : « quelle justice face aux enjeux sociétaux, environnementaux et de gouvernance ? ».

Cette chambre sera en charge des contentieux transversaux mettant en jeu des questions environnementales. Elle sera notamment compétente pour statuer en appel sur les

décisions rendues par le tribunal judiciaire dans les litiges relatifs au devoir de vigilance fondés sur les articles L. 225-102-4 et L. 225-102-5 du code de commerce, ainsi que sur les litiges portant sur la publication d'informations en matière de durabilité par les entreprises (nouvelle directive européenne « CSDD » en cours de publication).

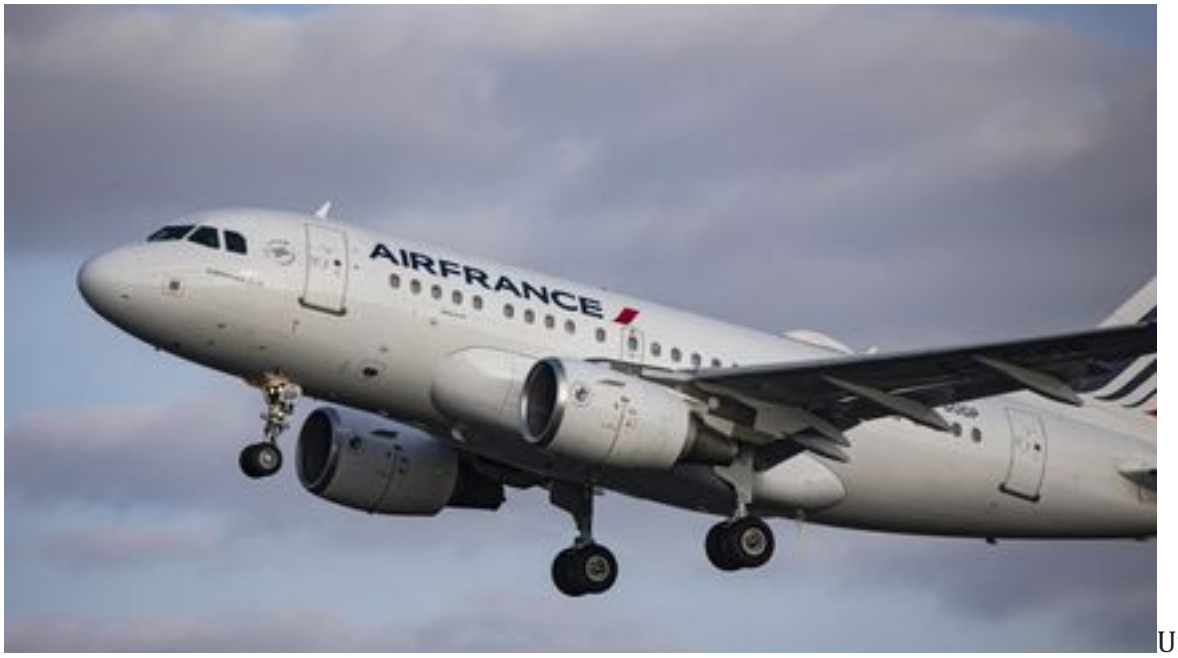
La France qui a été pionnière en étant le premier pays à promulguer une loi sur le devoir de vigilance (Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre) le sera également avec la création de cette chambre à compétence transversale.

Les premières affaires jugées par la chambre 5-12, actuellement présidée par Madame Hébert-Pageot, se tiendront au premier semestre 2024.

22 associations européennes de défense des consommateurs portent plainte contre 17 compagnies aériennes pour "greenwashing" et "pratiques commerciales trompeuses"

Air France - KLM ou encore Lufthansa figurent parmi les compagnies visées par la plainte, a appris jeudi France Inter via un communiqué de l'UFC-Que Choisir. 18 pays sont représentés.

Article rédigé parFrance Info - France Inter
Radio France
Publié le 22/06/2023 07:17
Temps de lecture : 2 min



Un avion Air France en avril 2022 (illustration). (NICOLAS ECONOMOU / AFP)

22 associations de 18 pays différents déposent plainte auprès de la Commission européenne contre 17 compagnies aériennes pour "greenwashing" et "pratiques commerciales trompeuses envers les consommateurs", a appris jeudi 22 juin France Inter via un communiqué de l'UFC-Que Choisir.

>> **Salon du Bourget : le Gullhyver, ce prototype d'avion décarboné pour répondre aux enjeux climatiques**

Plus précisément, derrière cette plainte on retrouve l'UFC-Que Choisir, la CLCV et 20 autres associations de 18 pays, membres du Bureau européen des unions de consommateurs (BEUC). Parmi les compagnies visées par la plainte se trouvent Air France - KLM ou encore Lufthansa. La plainte est déposée alors que se tient actuellement le Salon International de l'Aéronautique et de l'Espace au Bourget.

1. Acheter la neutralité du vol, "une allégation mensongère"

L'analyse menée par le BEUC et ses membres, publiée jeudi, souligne *"une multitude d'allégations trompeuses utilisées par les compagnies aériennes à destination des consommateurs"*. Parmi ces allégations, le fait de *"sous-entendre que le transport aérien peut-être 'durable', 'écoresponsable' et 'vert'"*. Les associations estiment qu'*"aucune des stratégies déployées par le secteur de l'aviation n'est actuellement en mesure de limiter les émissions de gaz à effet de serre"*.

Autre allégation notamment pointée du doigt par l'analyse du BEUC, le fait d'*"inciter à payer un supplément au moment de l'achat du billet d'avion pour 'compenser' les émissions de CO2 d'un vol*", alors que *"les avantages climatiques de ces compensations sont très critiquées"*.

Citée par le communiqué, Marie-Amandine Stévenin, présidente de l'UFC-Que Choisir déclare : *"Alors qu'il n'est plus à démontrer que le transport aérien contribue de manière significative et croissante aux émissions de gaz à effet de serre, il est inadmissible que les compagnies aériennes puissent se targuer d'œuvrer pour le climat"*.

>> **Crise climatique : nouveaux carburants, hydrogène, sobriété... L'avion propre a-t-il du plomb dans l'aile ?**

Un avis partagé par Romain Morizot, ingénieur aéronautique et membre du collectif "Pensons l'aéronautique de demain". Contacté par France Inter, il explique que *"ce qui est problématique sur les compagnies aujourd'hui, c'est que vous pouvez acheter la neutralité de votre vol. Cette allégation est mensongère et*

trompeuse par rapport aux solutions qui existent aujourd'hui et qui sont très faibles par rapport aux émissions du secteur dans son ensemble".

2. Rembourser les consommateurs incités à souscrire des options

Pour le président de la CLCV, Jean-Yves Mano, *"les mauvaises allégations vertes envahissent désormais l'univers commercial et le secteur aérien représente un cas d'école"*. Il affirme que ces allégations *"doivent cesser pour la protection des consommateurs"* et souhaite que les *"pouvoirs publics doivent agir avec fermeté"*.
Via cette plainte, les 22 associations espèrent qu'une *"enquête à l'échelle européenne [sera] lancée sur les pratiques de ces compagnies aériennes et du secteur dans son ensemble"*, mais aussi qu'une *"décision contraignante et commune [sera] prise par les autorités de protection de consommateurs concernées"*.
Par *"décision contraignante"*, les associations souhaitent l'interdiction d'utiliser *"toute allégation visant à faire croire aux consommateurs que prendre l'avion est une pratique respectueuse de l'environnement"* mais aussi que *"les compagnies remboursent les consommateurs ayant été incités par ces allégations trompeuses, à souscrire des options supplémentaires, pour limiter leur impact environnemental"*.
De son côté, Air France affirme avoir arrêté à l'automne dernier de proposer de financer les compensations, mais propose encore de contribuer au financement de la recherche sur les carburants durables.

Greenwashing : les fabricants de bouteilles en plastique visés par une plainte d'associations de consommateurs au niveau européen

Ces associations, dont la CLCV, ont signalé aux autorités européennes "des allégations commerciales trompeuses sur la recyclabilité des bouteilles d'eau de grandes marque".

Article rédigé parMarie Dupin
Radio France
Publié le 07/11/2023 06:47Mis à jour le 07/11/2023 11:09
Temps de lecture : 3 min

Dans une usine de bouteilles en plastique. Photo d'illustration. (HAZEM BADER / AFP)

Plusieurs associations de consommateurs, dont la CLCV en France, déposent mardi 7 novembre une plainte administrative contre les principaux fabricants de bouteilles plastiques pour greenwashing auprès des autorités européennes de protection des consommateurs, annonce la CLCV dans un communiqué transmis à franceinfo. En 2021, la CLCV avait déjà porté plainte contre Volvic pour greenwashing et *"cette plainte a permis d'initier une action au niveau européen"*, explique l'association de protection des consommateurs.

à lire aussi Recyclage : le retour de la consigne pour les bouteilles en plastique est-il une idée en carton ?

Le Bureau européen des unions de consommateurs (Beuc), l'organisation européenne des consommateurs et ses organisations membres de 13 pays* ont signalé aux autorités européennes *"des allégations commerciales trompeuses sur la recyclabilité des bouteilles d'eau de grandes marques, comme Coca-Cola HBC, Danone et Nestlé Waters"*, explique le communiqué.
Les associations, qui rappellent que les consommateurs européens boivent en moyenne 118 litres d'eau par an, dénoncent notamment la présence de la mention "100% reçyclable" sur les bouteilles d'eau, *"un terme ambigu dont dépend de nombreux facteurs tels que les infrastructures de collecte disponibles et l'efficacité du processus de tri*". Et de rappeler les chiffres : le taux de recyclage des bouteilles seules en PET, est estimé à seulement 55% dans l'UE, et les chances qu'elles servent à fabriquer une nouvelle bouteilles sont d'environ 30%.
Les associations pointent aussi l'utilisation de visuels, des logos verts ou des images de nature qui véhiculent *"une idée fausse de neutralité"*. Elles rappellent également que la bouteille d'eau en plastique n'est jamais *"100% recyclée"* comme c'est parfois indiqué, ne serait-ce que parce que la législation européenne interdit de recycler les bouchons, sans parler de l'étiquette, et du plastique vierge ajouté au cours du processus de recyclage.

Des pratiques d'écoblanchiment ?

Selon les associations, *"de telles allégations ne sont pas conformes aux règles de l'Union européenne"*. Le 15 octobre 2021, la CLCV *"avait déjà identifié l'allégation '100% recyclable' sur des bouteilles de la marque Volvic"* et avait *"porté plainte pour pratiques commerciales trompeuses devant le tribunal judiciaire de Paris".* Cette plainte auprès de la Commission européenne doit permettre qu'une enquête soit menée et que soient interdites ces pratiques des industriels de l'eau qui *"induisent les consommateurs en erreur"*.
"Les entreprises proposent trop d'allégations vertes qui induisent le consommateur en erreur,

notamment sur le recyclage, explique ainsi Jean-Yves Mano, le Président de la CLCV. *Le gouvernement français a produit des textes réglementaires très faibles sur ce sujet ces dernières années. Les associations de consommateurs doivent donc agir ensemble au*
niveau européen."
La circularité sans fin des bouteilles en plastique est une belle histoire qu'aiment raconter ceux qui en tirent profit, mais cette belle histoire est une fiction, à laquelle les associations de consommateurs veulent mettre un point final. Car les milliards de déchets plastiques qui peuplent désormais nos mers et nos rivières, au premier rang desquels les bouteilles, sont, eux, bien réels.

**Note : Les membres du BEUC participant à cette action sont : VKI (Austria); Асоциация Активни потребители (Bulgaria); CLCV (France); Kuluttajaliitto – Konsumentförbundet (Finland); EKPIZO and KEPKA (Greece); Tudatos Vásárlók Egyesülete (Hungary); Altroconsumo (Italy); Consumentenbond (Netherlands); DECO (Portugal), Spoločnosť ochrany spotrebiteľov (S.O.S.)*
(Slovakia); Zveza potrošnikov Slovenije (Slovenia); OCU (Spain).

"Greenwashing" : les eurodéputés trouvent un accord pour interdire les allégations environnementales trompeuses

Le texte vise à protéger le consommateur, interdisant les expressions imprécises si elles ne sont pas accompagnées de preuves détaillées.

Article rédigé parfranceinfo avec AFP
France Télévisions
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Le bâtiment du Parlement européen à Strasbourg (Bas-Rhin), le 9 mai 2022. (LUDOVIC MARIN / AFP)

"Produit vert", "biodégradable", "neutre pour le climat", "100% naturel"... Les eurodéputés ont donné, mercredi 17 janvier, leur feu vert final pour interdire les allégations environnementales *"génériques"*, vagues et trompeuses sur les étiquettes et publicités. Ils ont également voté en faveur d'exigences plus importantes sur les labels.

Réunis en séance plénière à Strasbourg, les eurodéputés ont entériné par 593 voix (21 contre, 14 abstentions) l'accord trouvé entre les Etats-membres et le

Parlement européen en septembre sur cette législation. Le texte approuvé devra être transposé par les Etats dans les deux ans.
Il vise à protéger le consommateur, interdisant les expressions imprécises si elles ne sont pas accompagnées de preuves détaillées. La législation interdit aussi les allégations d'impact environnemental neutre ou positif, fondées uniquement sur la compensation des émissions carbone. Cette compensation revient souvent à planter des arbres, une pratique inefficace par rapport à la réduction directe des émissions de CO2.

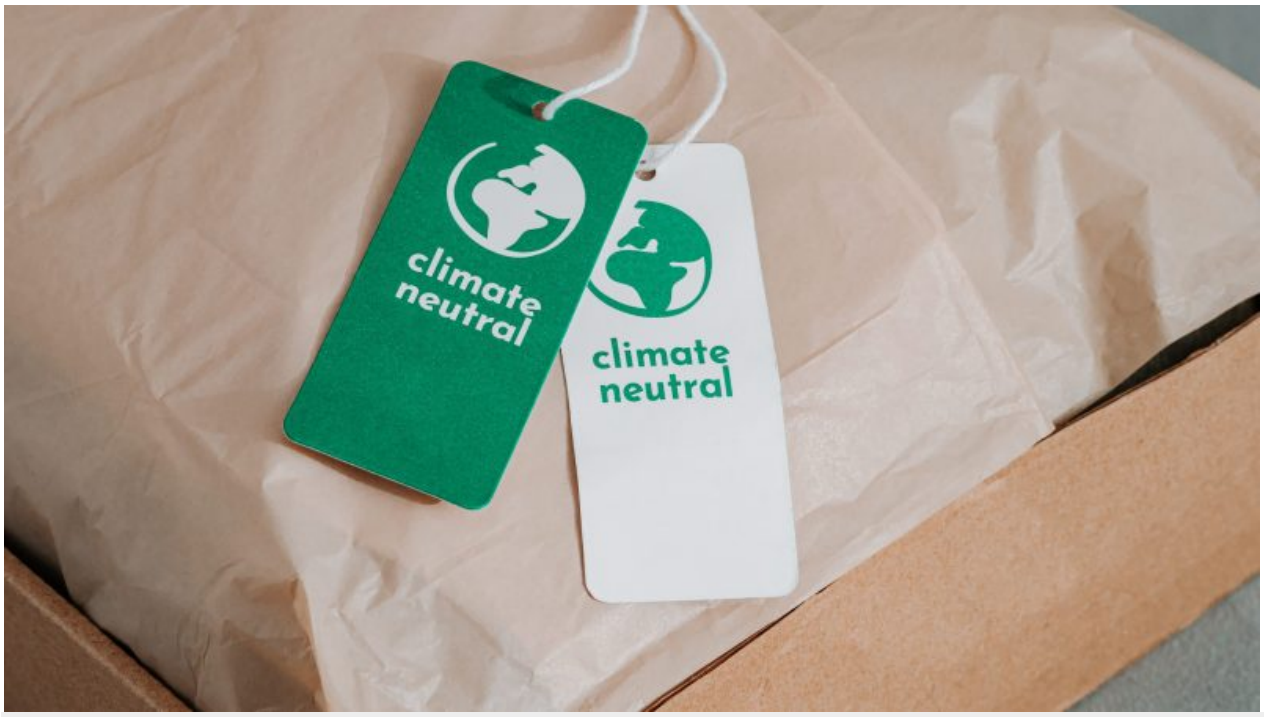
3. Des mesures contre "l'obsolescence précoce"

Les promesses de futures performances environnementales devront, elles, s'accompagner d'un plan réaliste et examiné de façon indépendante. Seuls les labels de durabilité fondés sur des systèmes de certification approuvés ou établis par les autorités seront autorisés.
Pour lutter contre *"l'obsolescence précoce"*, le texte prévoit l'interdiction des affirmations non étayées sur la durée de vie alléguée du produit, ou le fait de présenter un bien comme réparable alors qu'il ne l'est pas, ou difficilement. La législation bannit aussi les incitations à remplacer plus tôt que nécessaire les "consommables", des cartouches d'encre d'imprimante par exemple.
La coalition d'ONG environnementales Ecos (Environmental Coalition on Standards) a salué l'adoption du texte, tout en estimant qu'il *"repose fortement sur une surveillance étroite du marché, qui reste aujourd'hui lacunaire"*.
Elle appelle les Etats-membres et eurodéputés à accélérer leurs négociations sur un second projet de législation plus ambitieux contre le *greenwashing*, c'est-à-dire la promotion d'une prétendue responsabilité écologique à des fins commerciales.

I. L'UE interdit les allégations environnementales reposant sur des systèmes de compensation carbone

Par : Patrick Greenfield | The Guardian | translated by Claire Lemaire

19/1/24



Cette législation intervient dans un contexte d'inquiétude quant à l'impact environnemental des systèmes de compensation des émissions de carbone, qui ont souvent été utilisés pour justifier l'étiquetage de produits comme étant « neutres en carbone ». [Shutterstock/Fascinadora]

Les allégations selon lesquelles un produit a un impact « neutre » ou « positif » sur l'environnement grâce à des systèmes de compensation des émissions seront interdites d'ici 2026 dans l'UE, dans le cadre d'une législation visant à lutter contre les allégations environnementales trompeuses. *The Guardian*, média partenaire d'Euractiv, fait le point.

Mercredi (17 janvier), les membres du Parlement européen ont voté en faveur de l'accord provisoire qui avait été trouvé plus tôt avec le Conseil de l'UE sur la directive sur les allégations environnementales.

Avec cette directive, l'utilisation sans preuve de termes tels que « respectueux de l'environnement », « naturel », « biodégradable », « neutre pour le climat » ou « écologique » est interdite, et l'utilisation des systèmes de compensation du carbone pour justifier ce type d'affirmations est totalement interdite.

En vertu de la nouvelle directive sur les allégation environnementales, seuls les labels de durabilité utilisant des systèmes de certification approuvés seront autorisés dans l'Union européenne.

Cette législation intervient dans un contexte d'inquiétude quant à l'impact environnemental des systèmes de compensation des émissions de carbone, qui ont souvent été utilisés pour justifier l'étiquetage de produits comme étant « neutres en carbone », ou pour laisser entendre que les consommateurs pourraient prendre l'avion, acheter de nouveaux vêtements ou manger certains aliments sans participer à l'aggravation de la crise climatique.

« Cette nouvelle législation met fin à la publicité mensongère pour des produits prétendument respectueux de l'environnement et permet ainsi aux consommateurs de faire des choix durables », a déclaré Anna Cavazzini, eurodéputée écologiste et présidente de la commission du Marché intérieur et de la protection des consommateurs (IMCO) du Parlement européen.

« Je suis particulièrement satisfaite que les allégations telles que 'neutre pour le climat' ou 'positif pour le climat', qui sont basées sur la compensation des émissions de CO2, aient été complètement interdites sur le marché intérieur », a-t-elle expliqué.

« Les investissements des entreprises dans des projets de protection du climat sont les bienvenus et, bien entendu, ils peuvent toujours être communiqués. Toutefois, il ne faut plus donner l'impression que la plantation d'arbres dans la forêt tropicale rend la production industrielle d'une voiture, l'organisation d'une Coupe du monde de football ou la production de produits cosmétiques climatiquement neutres », a-t-elle averti. *« Cette tromperie appartient désormais au passé. C'est un grand succès pour l'environnement, le climat et les consommateurs. »*

4. Deux ans pour appliquer les nouvelles règles

La directive fait suite à des mois de négociations sur la manière dont les allégations environnementales seront règlementées dans l'Union européenne. La directive doit encore recevoir l'approbation finale du Conseil avant de pouvoir être publiée au Journal officiel de l'UE. Ensuite, les États membres disposeront de deux ans pour la transposer dans leur droit national.

En janvier, *The Guardian* a publié une enquête conjointe sur les compensations de carbone des forêts approuvées par le principal organisme de certification mondiaux et utilisées par les grandes entreprises dans le cadre de leurs engagements en matière de développement durable. Cette enquête a révélé que plus de 90 % des compensations provenant d'un large échantillon de projets n'avaient en réalité aucune valeur.

En amont, les ONG de défense de l'environnement avaient exprimé leur inquiétude quant aux déclarations fondées sur les compensations, notamment dans le cas de la Coupe du monde 2022 au Qatar, qui avait été annoncée comme un évènement « neutre en carbone ».

« Cet accord est un grand pas vers des pratiques commerciales plus honnêtes et des consommateurs européens mieux informés. L'Union européenne prend l'initiative de lutter contre le greenwashing *»*, a déclaré Lindsay Otis, experte politique des marchés mondiaux du carbone chez Carbon Market Watch.

« Il a été démontré que les affirmations relatives à la neutralité carbone sont incompréhensibles pour les consommateurs, et elles doivent cesser. Aujourd'hui marque la fin des publicités farfelues et sans fondement qui disent aux consommateurs européens qu'ils peuvent prendre des vols neutres en carbone, porter des vêtements neutres en carbone et manger des aliments neutres en carbone. »

Cet article a été publié à l'origine dans The Guardian et est republié ici avec l'autorisation de son auteur.

Extraits des motifs de la directive de base

2022/0092 (COD) Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information (Text with EEA relevance) THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission, After transmission of the draft legislative act to the national parliaments, Having regard to the opinion of the European Economic and Social Committee,1

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) In order to contribute to the proper functioning of the internal market, taking as a base a high level of consumer protection and environmental protection, and to make progress in the green transition, it is essential that consumers can make informed purchasing decisions and thus contribute to more sustainable consumption patterns. This implies that traders have a responsibility to provide clear, relevant and reliable information. Therefore, specific rules should be introduced in Union consumer law to tackle unfair commercial practices that mislead consumers and prevent them from making sustainable consumption choices, such as practices associated with the early obsolescence of goods, misleading environmental claims ("greenwashing"), misleading information about the social characteristics of products or traders' businesses ("social washing"), or nontransparent and non-credible sustainability labels. Those rules would enable competent national bodies to effectively address such practices. Ensuring that environmental claims are fair, understandable and reliable will allow traders to operate on a level playing field and will enable consumers to choose products that are genuinely better for the environment than competing products. This will encourage competition towards more environmentally sustainable products, thereby reducing the negative impact on the environment.

(…)

(3) In order for consumers to be empowered to take better-informed decisions and thus stimulate the demand for, and the supply of, more sustainable goods, they should not be misled about a product's environmental or social characteristics or circularity aspects, such as durability, reparability or recyclability, through the overall presentation of the products. Article 6(1) of Directive 2005/29/EC should therefore be amended by adding environmental and social characteristics and circularity aspects to the list of the main characteristics of a product in respect of which the trader's practices can be considered misleading, following a case-by-case assessment. Information provided by traders on the social characteristics of a product throughout its value chain can relate for example to the quality and fairness of working conditions of the involved workforce, such as adequate wages, social protection, work environment safety and social dialogue; to the

respect for human rights; to equal treatment and opportunities for all, such as gender equality, inclusion and diversity; to contributions to social initiatives; or to ethical commitments, such as animal welfare. Environmental and social characteristics of a product should be considered to have a broad meaning, including environmental and social aspects, impacts and performance.

(…)

(7) Sustainability labels can relate to many aspects and it is essential to ensure their transparency and credibility. Therefore, the displaying of sustainability labels which are not based on a certification scheme, or which have not been established by public authorities should be prohibited by including such practices in the list in Annex I to Directive 2005/29/EC. Before displaying a sustainability label, the trader should ensure, that according to the publicly available terms of the certification scheme, it meets minimum conditions of transparency and credibility, including the existence of an objective monitoring of compliance with the requirements of the scheme. Such monitoring should be carried out by a third party whose competence and independence from the scheme owner and the trader is ensured based on international, Union or national standards and procedures, for example by demonstrating compliance with relevant international standards, such as ISO 17065 "Conformity assessment — Requirements for bodies certifying products, processes and services" or through the mechanisms provided for in Regulation (EC) No 765/2008. The displaying of sustainability labels remains possible without a certification scheme when such labels are established by a public authority, or in case of additional forms of expression and presentation of food in accordance with Article 35 of Regulation (EU) No 1169/2011. Examples of sustainability labels established by public authorities are logos awarded when complying with the requirements of Regulation (EC) No 1221/2009 (EMAS) or Regulation (EC) No 66/2010 (EU Ecolabel). Some certification marks, as defined in Article 27 of Directive 2015/2436/EC, can also operate as sustainability labels if they promote a product, process or business with reference to, for example, its environmental or social characteristics or both. The trader should display such certification marks only if they are established by public authorities or based on a certification scheme. (…) Voluntary marketbased and public standards for green and sustainable bonds do not primarily target retail investors and are subject to specific legislation. For these reasons, these standards should not be considered sustainability labels according to this Directive. Public authorities should, as far as possible and in compliance with Union law, promote measures to facilitate access to sustainability labels for small and medium-sized enterprises.

(…)

(12a) Marketing across the Member States of goods as being identical when, in reality, they have a significantly different composition or characteristics may mislead consumers and cause them to take a transactional decision that they would not have taken otherwise. Such marketing practices are expressly addressed in Article 6(2)(c) of Directive 2005/29/EC, introduced by Directive (EU) 2019/2161 that entered into application on 28 May 2022. The Commission will assess and report in 2024 on the application of Directive (EU) 2019/2161, including Article 6(2)(c) of Directive 2005/29/EC and whether those cases should be subject to more stringent requirements, including prohibition in Annex I. The new provisions against greenwashing practices in this Directive also apply to such practices where versions of the same product are marketed as being identical in

different Member States despite their significant differences in the meaning of Article 6(2)(c) of Directive 2005/29/EC.

(13) (…) . It could be the case that certain products on the market are required to comply with certain legal requirements while other products in the same product category do not. For example, fish products produced using EU-mandated sustainable fishing methods would be allowed to advertise compliance with EU legal requirements, where fish products offered on the EU market and of third country origin need not to comply with them.

(14) In order to improve the welfare of consumers, the amendments to Directive 2005/29/EC should also address several practices associated with early obsolescence, including planned early obsolescence practices, understood as a commercial policy involving deliberately planning or designing a product with a limited useful life so that it prematurely becomes obsolete or non-functional after a certain period of time or after a predetermined intensity of use. Purchasing products that are expected to last longer than they actually do causes consumer detriment. Furthermore, early obsolescence practices have an overall negative impact on the environment in the form of increased waste and use of energy and materials. Therefore, addressing information related to early obsolescence practices is also likely to reduce the amount of waste, contributing to a more sustainable consumption.

(…)

(16) Commercial communications for a good containing a feature introduced to limit its durability is a commercial practice detrimental to consumers and the environment as they encourage the sale of such goods which leads to higher costs for consumers and unnecessary use of resources, waste production and greenhouse gas emissions. Any such commercial communication should therefore be prohibited when information on the feature and its effects on the durability of the good are available to the trader. Examples of such a feature could be software which stops or downgrades the functionality of the good after a particular period of time, or a piece of hardware which is designed to fail after a particular period of time. It could also be a design or manufacturing flaw which, although not introduced as a feature for that purpose, leads to the premature failures of the good, if it is not fixed once information about the existence and effects of this feature has become available to the trader. In the context of this provision, commercial communications include communications designed to promote, directly or indirectly, the goods. The manufacturing of goods and making them available on the market do not constitute a commercial communication. This prohibition is aimed to cover mainly the traders who are the producers of the goods as they are the ones determining the durability of the goods. Therefore, in general, when a good is identified as containing a feature to limit the durability, the producer of that good is expected to be aware of that feature and its effect on the durability of that good. Nevertheless, traders who are not the producers of the goods, such as the sellers, can be targeted by this provision where reliable information is available to them about the feature and its effects on durability, such as a statement from a competent national authority or information provided by the producer. Therefore, as soon as such information is available to the trader, such prohibition should apply irrespective of whether the trader is actually aware or unaware of that information, for example by neglecting it. (…)

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Agenda item 4
First global stocktake

First global stocktake

Proposal by the President

Draft decision -/CMA.5

Outcome of the first global stocktake

The Conference of the Parties serving as the meeting of the Parties to the Paris Agreement,

Recalling Article 2, paragraph 1, of the Paris Agreement, which provides that the Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty,

Also recalling Article 2, paragraph 2, of the Paris Agreement, which provides that the Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances,

Further recalling, as provided in Article 14, paragraph 1, of the Paris Agreement, that the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall periodically take stock of the implementation of the Paris Agreement to assess the collective progress towards achieving the purpose of the Agreement and its long-term goals, and that it shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science,

Recalling, as provided in Article 14, paragraph 3, of the Paris Agreement, that the outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of the Agreement, as well as in enhancing international cooperation for climate action,

Also recalling decisions 19/CMA.1, 1/CMA.2, 1/CMA.3 and 1/CMA.4,

Underlining the critical role of multilateralism based on United Nations values and principles, including in the context of the implementation of the Convention and the Paris Agreement, and the importance of international cooperation for addressing global issues,

including climate change, in the context of sustainable development and efforts to eradicate poverty,

Acknowledging that climate change is a common concern of humankind and that Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to a clean, healthy and sustainable environment, the right to health, the rights of Indigenous Peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity,

Recognizing the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change,

Also recognizing the critical role of protecting, conserving and restoring water systems and water-related ecosystems in delivering climate adaptation benefits and co-benefits, while ensuring social and environmental safeguards,

Noting the importance of ensuring the integrity of all ecosystems, including in forests, the ocean, mountains and the cryosphere, and the protection of biodiversity, recognized by some cultures as Mother Earth, and *also noting* the importance of 'climate justice', when taking action to address climate change,

Underlining the urgent need to address, in a comprehensive and synergetic manner, the interlinked global crises of climate change and biodiversity loss in the broader context of achieving the Sustainable Development Goals, as well as the vital importance of protecting, conserving, restoring and sustainably using nature and ecosystems for effective and sustainable climate action,

I. Context and cross-cutting considerations

1. *Welcomes* that the Paris Agreement has driven near-universal climate action by setting goals and sending signals to the world regarding the urgency of responding to the climate crisis;

2. *Underlines* that, despite overall progress on mitigation, adaptation and means of implementation and support, Parties are not yet collectively on track towards achieving the purpose of the Paris Agreement and its long-term goals;

3. *Reaffirms* the Paris Agreement temperature goal of holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

4. *Underscores* that the impacts of climate change will be much lower at the temperature increase of 1.5 °C compared with 2 °C and *resolves* to pursue efforts to limit the temperature increase to 1.5 °C;

5. *Expresses serious concern* that 2023 is set to be the warmest year on record and that impacts from climate change are rapidly accelerating, and *emphasizes* the need for urgent action and support to keep the 1.5 °C goal within reach and to address the climate crisis in this critical decade;

6. *Commits* to accelerate action in this critical decade on the basis of the best available science, reflecting equity and the principle of common but differentiated responsibilities and respective capabilities in the light of different national circumstances and in the context of sustainable development and efforts to eradicate poverty;

7. *Underscores* Article 2, paragraph 2, of the Paris Agreement, which stipulates that the Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances;

8. *Emphasizes* that finance, capacity-building and technology transfer are critical enablers of climate action;

9. *Reaffirms* that sustainable and just solutions to the climate crisis must be founded on meaningful and effective social dialogue and participation of all stakeholders, including Indigenous Peoples, local communities and governments, women, and youth and children, and *notes* that the global transition to low emissions and climate-resilient development provides opportunities and challenges for sustainable development and poverty eradication;

10. *Underlines* that just transitions can support more robust and equitable mitigation outcomes, with tailored approaches addressing different contexts;

11. *Recognizes* the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, as provided for in the Convention and the Paris Agreement;

12. *Welcomes* the conclusion of the first global stocktake and *expresses appreciation and gratitude* to those involved in the technical dialogue thereunder, and to the co-facilitators for preparing the synthesis report[1] and other outputs of the technical assessment component;

13. *Welcomes* the high-level events convened under the first global stocktake and *takes note* of the summary thereof;

14. *Welcomes* the Sixth Assessment Report of the Intergovernmental Panel on Climate Change and *expresses appreciation and gratitude* to those involved in preparing the reports in the sixth assessment cycle for their excellent work and dedication to continuing their work during the extraordinary circumstances of the coronavirus disease 2019 pandemic;

15. *Notes with alarm and serious concern* the following findings of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change:

(a) That human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming of about 1.1 °C;

(b) That human-caused climate change impacts are already being felt in every region across the globe, with those who have contributed the least to climate change being most vulnerable to the impacts, and, together with losses and damages, will increase with every increment of warming;

(c) That most observed adaptation responses are fragmented, incremental, sector-specific and unequally distributed across regions, and that, despite the progress made, significant adaptation gaps still exist across sectors and regions and will continue to grow under current levels of implementation;

16. *Notes* the following findings of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change:

(a) That mitigation efforts embedded within the wider development context can increase the pace, depth and breadth of emissions reductions, as well as that policies that shift development pathways towards sustainability can broaden the portfolio of available mitigation responses and enable the pursuit of synergies with development objectives;

(b) That both adaptation and mitigation financing would need to increase manyfold, and that there is sufficient global capital to close the global investment gap but there are barriers to redirecting capital to climate action, and that Governments through public funding and clear signals to investors are key in reducing these barriers and investors, central banks and financial regulators can also play their part;

(c) That feasible, effective and low-cost mitigation options are already available in all sectors to keep 1.5 °C within reach in this critical decade with the necessary cooperation on technologies and support;

17. *Notes with concern* the pre-2020 gaps in both mitigation ambition and implementation by developed country Parties and that the Intergovernmental Panel on Climate Change had

[1] FCCC/SB/2023/9.

earlier indicated that developed countries must reduce emissions by 25–40 per cent below 1990 levels by 2020, which was not achieved;

II. Collective progress towards achieving the purpose and long-term goals of the Paris Agreement, including under Article 2, paragraph 1(a–c), in the light of equity and the best available science, and informing Parties in updating and enhancing, in a nationally determined manner, action and support

A. Mitigation

18. *Acknowledges* that significant collective progress towards the Paris Agreement temperature goal has been made, from an expected global temperature increase of 4 °C according to some projections prior to the adoption of the Agreement to an increase in the range of 2.1–2.8 °C with the full implementation of the latest nationally determined contributions;

19. *Expresses appreciation* that all Parties have communicated nationally determined contributions that demonstrate progress towards achieving the Paris Agreement temperature goal, most of which provided the information necessary to facilitate their clarity, transparency and understanding;

20. *Commends* the 68 Parties that have communicated long-term low greenhouse gas emission development strategies and *notes* that 87 per cent of the global economy in terms of share of gross domestic product is covered by targets for climate neutrality, carbon neutrality, greenhouse gas neutrality or net zero emissions, which provides the possibility of achieving a temperature increase below 2 °C when taking into account the full implementation of those strategies;

21. *Notes with concern* the findings in the latest version of the synthesis report on nationally determined contributions that implementation of current nationally determined contributions would reduce emissions on average by 2 per cent compared with the 2019 level by 2030 and that significantly greater emission reductions are required to align with global greenhouse gas emission trajectories in line with the temperature goal of the Paris Agreement and *recognizes* the urgent need to address this gap;

22. *Notes* the findings in the synthesis report on nationally determined contributions that greenhouse gas emission levels in 2030 are projected to be 5.3 per cent lower than in 2019 if all nationally determined contributions, including all conditional elements, are fully implemented and that enhanced financial resources, technology transfer and technical cooperation, and capacity-building support are needed to achieve this;

23. *Notes with concern* the findings of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change that policies implemented by the end of 2020 are projected to result in higher global greenhouse gas emissions than those implied by the nationally determined contributions, indicating an implementation gap, and *resolves* to take action to urgently address this gap;

24. *Notes with significant concern* that, despite progress, global greenhouse gas emissions trajectories are not yet in line with the temperature goal of the Paris Agreement, and that there is a rapidly narrowing window for raising ambition and implementing existing commitments in order to achieve it;

25. *Expresses concern* that the carbon budget consistent with achieving the Paris Agreement temperature goal is now small and being rapidly depleted and *acknowledges* that historical cumulative net carbon dioxide emissions already account for about four fifths of the total carbon budget for a 50 per cent probability of limiting global warming to 1.5 °C;

26. *Recognizes* the finding in the Synthesis Report of the Sixth Assessment Report of the Intergovernmental Panel on Climate Change,[2] based on global modelled pathways and assumptions, that global greenhouse gas emissions are projected to peak between 2020 and at the latest before 2025 in global modelled pathways that limit warming to 1.5 °C with no or limited overshoot and in those that limit warming to 2 °C and assume immediate action, and *notes* that this does not imply peaking in all countries within this time frame, and that time frames for peaking may be shaped by sustainable development, poverty eradication needs and equity and be in line with different national circumstances, and *recognizes* that technology development and transfer on voluntary and mutually agreed terms, as well as capacity-building and financing, can support countries in this regard;

27. *Also recognizes* that limiting global warming to 1.5 °C with no or limited overshoot requires deep, rapid and sustained reductions in global greenhouse gas emissions of 43 per cent by 2030 and 60 per cent by 2035 relative to the 2019 level and reaching net zero carbon dioxide emissions by 2050;

28. *Further recognizes* the need for deep, rapid and sustained reductions in greenhouse gas emissions in line with 1.5 °C pathways and *calls on* Parties to contribute to the following global efforts, in a nationally determined manner, taking into account the Paris Agreement and their different national circumstances, pathways and approaches:

(a) Tripling renewable energy capacity globally and doubling the global average annual rate of energy efficiency improvements by 2030;

(b) Accelerating efforts towards the phase-down of unabated coal power;

(c) Accelerating efforts globally towards net zero emission energy systems, utilizing zero- and low-carbon fuels well before or by around mid-century;

(d) Transitioning away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade, so as to achieve net zero by 2050 in keeping with the science;

(e) Accelerating zero- and low-emission technologies, including, inter alia, renewables, nuclear, abatement and removal technologies such as carbon capture and utilization and storage, particularly in hard-to-abate sectors, and low-carbon hydrogen production;

(f) Accelerating and substantially reducing non-carbon-dioxide emissions globally, including in particular methane emissions by 2030;

(g) Accelerating the reduction of emissions from road transport on a range of pathways, including through development of infrastructure and rapid deployment of zero- and low-emission vehicles;

(h) Phasing out inefficient fossil fuel subsidies that do not address energy poverty or just transitions, as soon as possible;

29. *Recognizes* that transitional fuels can play a role in facilitating the energy transition while ensuring energy security;

30. *Welcomes* that over the past decade mitigation technologies have become increasingly available, and that the unit costs of several low-emission technologies have fallen continuously, notably wind power and solar power and storage, thanks to technological advancements, economies of scale, increased efficiency and streamlined manufacturing processes, while recognizing the need to increase the affordability and accessibility of such technologies;

[2] Intergovernmental Panel on Climate Change. 2023. *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*. Geneva: Intergovernmental Panel on Climate Change. Available at https://www.ipcc.ch/report/ar6/syr/.

31. *Emphasizes* the urgent need for accelerated implementation of domestic mitigation measures in accordance with Article 4, paragraph 2, of the Paris Agreement, as well as the use of voluntary cooperation, referred to in Article 6, paragraph 1, of the Paris Agreement;

32. *Also emphasizes* the urgent need to strengthen integrated, holistic and balanced non-market approaches in accordance with Article 6, paragraph 8, of the Paris Agreement, in the context of sustainable development and poverty eradication, in a coordinated and effective manner, including through mitigation, adaptation, finance, technology transfer and capacity-building, as appropriate;

33. *Further emphasizes* the importance of conserving, protecting and restoring nature and ecosystems towards achieving the Paris Agreement temperature goal, including through enhanced efforts towards halting and reversing deforestation and forest degradation by 2030, and other terrestrial and marine ecosystems acting as sinks and reservoirs of greenhouse gases and by conserving biodiversity, while ensuring social and environmental safeguards, in line with the Kunming-Montreal Global Biodiversity Framework;

34. *Notes* the need for enhanced support and investment, including through financial resources, technology transfer and capacity-building, for efforts towards halting and reversing deforestation and forest degradation by 2030 in the context of sustainable development and poverty eradication, in accordance with Article 5 of the Paris Agreement, including through results-based payments for policy approaches and positive incentives for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests, while reaffirming the importance of incentivizing, as appropriate, non-carbon benefits associated with such approaches;

35. *Invites* Parties to preserve and restore oceans and coastal ecosystems and scale up, as appropriate, ocean-based mitigation action;

36. *Notes* the importance of transitioning to sustainable lifestyles and sustainable patterns of consumption and production in efforts to address climate change, including through circular economy approaches, and *encourages* efforts in this regard;

37. *Recalls* Article 3 and Article 4, paragraphs 3, 4, 5 and 11, of the Paris Agreement and *requests* Parties that have not yet done so to revisit and strengthen the 2030 targets in their nationally determined contributions as necessary to align with the Paris Agreement temperature goal by the end of 2024, taking into account different national circumstances;

38. *Recalls* Article 4, paragraph 4, of the Paris Agreement, which provides that developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets, and that developing country Parties should continue enhancing their mitigation efforts and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances;

39. *Reaffirms* the nationally determined nature of nationally determined contributions and Article 4, paragraph 4, of the Paris Agreement and *encourages* Parties to come forward in their next nationally determined contributions with ambitious, economy-wide emission reduction targets, covering all greenhouse gases, sectors and categories and aligned with limiting global warming to 1.5 °C, as informed by the latest science, in the light of different national circumstances;

40. *Notes* the importance of aligning nationally determined contributions with long-term low greenhouse gas emission development strategies, and *encourages* Parties to align their next nationally determined contributions with long-term low greenhouse gas emission development strategies;

41. *Notes* the capacity challenges of the least developed countries and small island developing States related to preparing and communicating nationally determined contributions;

42. *Urges* Parties that have not yet done so and *invites* all other Parties to communicate or revise, by the sixth session of the Conference of the Parties serving as the meeting of the

Parties to the Paris Agreement (November 2024), their long-term low greenhouse gas emission development strategies referred to in Article 4, paragraph 19, of the Paris Agreement towards just transitions to net zero emissions by or around mid-century, taking into account different national circumstances;

B. Adaptation

43. *Emphasizes* the importance of the global goal on adaptation of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal referred to in Article 2 of the Paris Agreement;

44. *Recognizes* the increasing adaptation planning and implementation efforts being undertaken by Parties towards enhancing adaptive capacity, strengthening resilience and reducing vulnerability, as set out in national adaptation plans, adaptation communications and nationally determined contributions, as appropriate, and *welcomes* that 51 Parties have submitted national adaptation plans and 62 Parties have submitted adaptation communications to date;

45. *Recognizes* the significant efforts of developing country Parties in formulating and implementing national adaptation plans, adaptation communications and nationally determined contributions, as appropriate, including through their domestic expenditure, as well as their increased efforts to align their national development plans;

46. *Also recognizes* the significant challenges developing country Parties face in accessing finance for implementing their national adaptation plans;

47. *Notes with appreciation* the contribution of relevant UNFCCC constituted bodies and institutional arrangements, including the Adaptation Committee, the Least Developed Countries Expert Group and the Nairobi work programme on impacts, vulnerability and adaptation to climate change, to the efforts referred to in paragraph 45 above;

48. *Notes* that there are gaps in implementation of, support for and collective assessment of the adequacy and effectiveness of adaptation, and that monitoring and evaluation of outcomes is critical for tracking the progress and improving the quality and awareness of adaptation action;

49. *Acknowledges* that establishing and improving national inventories of climate impacts over time and building accessible, user-driven climate services systems, including early warning systems, can strengthen the implementation of adaptation actions, and *recognizes* that one third of the world does not have access to early warning and climate information services, as well as the need to enhance coordination of activities by the systematic observation community;

50. *Recalls* the United Nations Secretary-General's call made on World Meteorological Day on 23 March 2022 to protect everyone on Earth through universal coverage of early warning systems against extreme weather and climate change by 2027 and *invites* development partners, international financial institutions and the operating entities of the Financial Mechanism to provide support for implementation of the Early Warnings for All initiative;

51. *Calls for* urgent, incremental, transformational and country-driven adaptation action based on different national circumstances;

52. *Recognizes* that climate change impacts are often transboundary in nature and may involve complex, cascading risks that require knowledge-sharing and international cooperation for addressing them;

53. *Emphasizes* that the magnitude and rate of climate change and associated risks depend strongly on near-term mitigation and adaptation actions, that long-term planning for and accelerated implementation of adaptation, particularly in this decade, are critical to closing adaptation gaps and create many opportunities, and that accelerated financial support for developing countries from developed countries and other sources is a critical enabler;

54. *Recognizes* the importance of the iterative adaptation cycle for building adaptive capacity, strengthening resilience and reducing vulnerability and *notes* that the adaptation cycle is an iterative process, consisting of risk and impact assessment; planning; implementation; and monitoring, evaluation and learning, recognizing the importance of means of implementation and support for developing country Parties at each stage of the cycle;

55. *Encourages* the implementation of integrated, multi-sectoral solutions, such as land-use management, sustainable agriculture, resilient food systems, nature-based solutions and ecosystem-based approaches, and protecting, conserving and restoring nature and ecosystems, including forests, mountains and other terrestrial and marine and coastal ecosystems, which may offer economic, social and environmental benefits such as improved resilience and well-being, and that adaptation can contribute to mitigating impacts and losses, as part of a country-driven gender-responsive and participatory approach, building on the best available science as well as Indigenous Peoples' knowledge and local knowledge systems;

56. *Notes* that ecosystem-based approaches, including ocean-based adaptation and resilience measures, as well as in mountain regions, can reduce a range of climate change risks and provide multiple co-benefits;

57. *Recalls* that, as provided in Article 7, paragraphs 10–11, of the Paris Agreement, each Party should, as appropriate, submit and update an adaptation communication, and that the adaptation communication shall be, as appropriate, submitted and updated periodically, as a component of or in conjunction with other communications or documents, including a national adaptation plan, a nationally determined contribution as referred to in Article 4, paragraph 2, of the Paris Agreement and/or a national communication, and that Parties may, as appropriate, also submit and update their adaptation communication as a component of or in conjunction with the reports on impacts and adaptation as stipulated in Article 13, paragraph 8, of the Paris Agreement;

58. *Also recalls* that the guidance on adaptation communications is to be reviewed in 2025;

59. *Calls on* Parties that have not yet done so to have in place their national adaptation plans, policies and planning processes by 2025 and to have progressed in implementing them by 2030;

60. *Requests* the secretariat to prepare a regular synthesis report on adaptation information provided by Parties in their biennial transparency reports, adaptation communications and nationally determined contributions;

61. *Stresses* the importance of global solidarity in undertaking adaptation efforts, including long-term transformational and incremental adaptation, towards reducing vulnerability and enhancing adaptive capacity and resilience, as well as the collective well-being of all people, the protection of livelihoods and economies, and the preservation and regeneration of nature, for current and future generations, in the context of the temperature goal referred to in Article 2 of the Paris Agreement, and that such efforts should be inclusive in terms of adaptation approaches and taking into account the best available science and the worldviews and values of Indigenous Peoples, to support achievement of the global goal on adaptation;

62. *Calls on* Parties to enhance their adaptation efforts in line with what is needed to achieve the goal in Article 2, paragraph 1(b), of the Paris Agreement and the global goal on adaptation, taking into account the framework for the global goal on adaptation referred to in decision -/CMA.5;[3]

63. *Urges* Parties and *invites* non-Party stakeholders to increase ambition and enhance adaptation action and support, in line with decision -/CMA.5,[4] in order to accelerate swift

[3] Draft decision entitled "Glasgow–Sharm el-Sheikh work programme on the global goal on adaptation referred to in decision 7/CMA.3" proposed under agenda item 8(a) of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its fifth session.

[4] As footnote 3 above.

action at scale and at all levels, from local to global, in alignment with other global frameworks, towards the achievement of, inter alia, the following targets by 2030, and progressively beyond:

(a) Significantly reducing climate-induced water scarcity and enhancing climate resilience to water-related hazards towards a climate-resilient water supply, climate-resilient sanitation and access to safe and affordable potable water for all;

(b) Attaining climate-resilient food and agricultural production and supply and distribution of food, as well as increasing sustainable and regenerative production and equitable access to adequate food and nutrition for all;

(c) Attaining resilience against climate change related health impacts, promoting climate-resilient health services, and significantly reducing climate-related morbidity and mortality, particularly in the most vulnerable communities;

(d) Reducing climate impacts on ecosystems and biodiversity and accelerating the use of ecosystem-based adaptation and nature-based solutions, including through their management, enhancement, restoration and conservation and the protection of terrestrial, inland water, mountain, marine and coastal ecosystems;

(e) Increasing the resilience of infrastructure and human settlements to climate change impacts to ensure basic and continuous essential services for all, and minimizing climate-related impacts on infrastructure and human settlements;

(f) Substantially reducing the adverse effects of climate change on poverty eradication and livelihoods, in particular by promoting the use of adaptive social protection measures for all;

(g) Protecting cultural heritage from the impacts of climate-related risks by developing adaptive strategies for preserving cultural practices and heritage sites and by designing climate-resilient infrastructure, guided by traditional knowledge, Indigenous Peoples' knowledge and local knowledge systems;

64. *Affirms* that the framework for the global goal on adaptation includes the following targets in relation to the dimensions of the iterative adaptation cycle, recognizing the need to enhance adaptation action and support:

(a) Impact, vulnerability and risk assessment: by 2030 all Parties have conducted up-to-date assessments of climate hazards, climate change impacts and exposure to risks and vulnerabilities and have used the outcomes of these assessments to inform their formulation of national adaptation plans, policy instruments, and planning processes and/or strategies, and by 2027 all Parties have established multi-hazard early warning systems, climate information services for risk reduction and systematic observation to support improved climate-related data, information and services;

(b) Planning: by 2030 all Parties have in place country-driven, gender-responsive, participatory and fully transparent national adaptation plans, policy instruments, and planning processes and/or strategies, covering, as appropriate, ecosystems, sectors, people and vulnerable communities, and have mainstreamed adaptation in all relevant strategies and plans;

(c) Implementation: by 2030 all Parties have progressed in implementing their national adaptation plans, policies and strategies and, as a result, have reduced the social and economic impacts of the key climate hazards identified in the assessments referred to in paragraph 6 (a) above;

(d) Monitoring, evaluation and learning: by 2030 all Parties have designed, established and operationalized a system for monitoring, evaluation and learning for their national adaptation efforts and have built the required institutional capacity to fully implement the system;

65. *Also affirms* that efforts in relation to the targets referred to in paragraphs 63–64 above shall be made in a manner that is country-driven, voluntary and in accordance with national circumstances, take into account sustainable development and poverty eradication, and do not constitute a basis for comparison between Parties;

C. Means of implementation and support

1. Finance

66. *Recalls* Articles 2, 4 and 9, paragraphs 1–4, of the Paris Agreement;

67. *Highlights* the growing gap between the needs of developing country Parties, in particular those due to the increasing impacts of climate change compounded by difficult macroeconomic circumstances, and the support provided and mobilized for their efforts to implement their nationally determined contributions, highlighting that such needs are currently estimated at USD 5.8–5.9 trillion for the pre-2030 period;[5]

68. *Also highlights* that the adaptation finance needs of developing countries are estimated at USD 215–387 billion annually up until 2030, and that about USD 4.3 trillion per year needs to be invested in clean energy up until 2030, increasing thereafter to USD 5 trillion per year up until 2050, to be able to reach net zero emissions by 2050;[6]

69. *Notes* that scaling up new and additional grant-based, highly concessional finance, and non-debt instruments remains critical to supporting developing countries, particularly as they transition in a just and equitable manner, and *recognizes* that there is a positive connection between having sufficient fiscal space, and climate action and advancing on a pathway towards low emissions and climate-resilient development, building on existing institutions and mechanisms such as the Common Framework;

70. *Also recognizes* the role of the private sector and *highlights* the need to strengthen policy guidance, incentives, regulations and enabling conditions to reach the scale of investments required to achieve a global transition towards low greenhouse gas emissions and climate-resilient development and *encourages* Parties to continue enhancing their enabling environments;

71. *Recalls* that developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention and that other Parties are encouraged to provide or continue to provide such support voluntarily;

72. *Also recalls* that as part of a global effort developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies, and taking into account the needs and priorities of developing country Parties, and that such mobilization of climate finance should represent a progression beyond previous efforts;

73. *Reiterates* that support shall be provided to developing country Parties for the implementation of Article 4 of the Paris Agreement, in accordance with Articles 9–11 of the Paris Agreement, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions;

74. *Also reiterates* the urgency to support the implementation of the Paris Agreement in developing countries;

[5] Standing Committee on Finance. 2021. *First report on the determination of the needs of developing country Parties related to implementing the Convention and the Paris Agreement*. Bonn: UNFCCC. Available at https://unfccc.int/topics/climate-finance/workstreams/determination-of-the-needs-of-developing-country-parties/first-report-on-the-determination-of-the-needs-of-developing-country-parties-related-to-implementing.

[6] United Nations Environment Programme. 2023. *Adaptation Gap Report 2023: Underfinanced. Underprepared.* Nairobi: United Nations Environment Programme. Available at http://www.unep.org/resources/adaptation-gap-report-2023; International Renewable Energy Agency. 2023. *World Energy Transitions Outlook 2023: 1.5°C Pathway.* Abu Dhabi: International Renewable Energy Agency. Available at https://www.irena.org/Publications/2023/Mar/World-Energy-Transitions-Outlook-2023; International Energy Agency. 2023. *World Energy Investment 2023*. Paris: International Energy Agency. Available at https://www.iea.org/reports/world-energy-investment-2023.

75. *Emphasizes* the ongoing challenges faced by many developing country Parties in accessing climate finance and encourages further efforts, including by the operating entities of the Financial Mechanism, to simplify access to such finance, in particular for those developing country Parties that have significant capacity constraints, such as the least developed countries and small island developing States;

76. *Welcomes* recent progress made by developed countries in the provision and mobilization of climate finance and *notes* the increase in climate finance from developed countries in 2021 to USD 89.6 billion and the likelihood of meeting the goal in 2022, and *looks forward* to further information on the positive progress;

77. *Notes* the efforts of developed country Parties to make progress in at least doubling adaptation finance from 2019 levels by 2025;

78. *Welcomes* the pledges made by 31 contributors during the second replenishment of the Green Climate Fund, resulting in a nominal pledge of USD 12.833 billion to date, and *encourages* further pledges and contributions towards the second replenishment of the Fund, welcoming the progression over the previous replenishment;

79. *Welcomes* the pledges made to date for the operationalization of the funding arrangements, including the Fund, referred to in decisions -/CP.28[7] and -/CMA.5[8] amounting to USD 792 million, for the Adaptation Fund amounting to USD 187.74 million and the pledges to the Least Developed Countries Fund and the Special Climate Change Fund amounting to USD 179.06 million, and *commends* the efforts of the President of the Conference of the Parties at its twenty-eighth session in this regard;

80. *Notes with deep regret* that the goal of developed country Parties to mobilize jointly USD 100 billion per year by 2020 in the context of meaningful mitigation actions and transparency on implementation was not met in 2021, including owing to challenges in mobilizing finance from private sources, and *welcomes* the ongoing efforts of developed country Parties towards achieving the goal of mobilizing jointly USD 100 billion per year;[9]

81. *Notes with concern* that the adaptation finance gap is widening, and that current levels of climate finance, technology development and transfer, and capacity-building for adaptation remain insufficient to respond to worsening climate change impacts in developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change;

82. *Recognizes* the importance of the operating entities of the Financial Mechanism and the Adaptation Fund in the climate finance architecture, *welcomes* the new pledges to the Fund made at this session, *urges* all contributors to fulfil their pledges in a timely manner and *invites* the contributors to ensure the sustainability of the resources of the Fund, including the share of proceeds;

83. *Strongly urges* the operating entities of the Financial Mechanism to make full use of their current replenishment, *calls on* multilateral development banks and other financial institutions to further scale up investments in climate action and *calls for* a continued increase in the scale, and effectiveness of, and simplified access to, climate finance, including in the form of grants and other highly concessional forms of finance;

[7] Decision entitled "Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4" adopted under agenda item 8(g) of the Conference of the Parties at its twenty-eighth session.

[8] Decision entitled "Operationalization of the new funding arrangements, including a fund, for responding to loss and damage referred to in paragraphs 2–3 of decisions 2/CP.27 and 2/CMA.4" adopted under agenda item 10(g) of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its fifth session.

[9] See https://www.auswaertiges-amt.de/blob/2631906/4eee299dac91ba9649638cbcfae754cb/231116-deu-can-bnrief-data.pdf.

84. *Notes* the diversity of definitions of climate finance in use by Parties and non-Party stakeholders in the context of aggregate accounting of and reporting on climate finance and *takes note* of decision -/CP.28;[10]

85. *Urges* developed country Parties to fully deliver, with urgency, on the USD 100 billion per year goal through to 2025, in the context of meaningful mitigation actions and transparency on implementation, noting the significant role of public funds, and *calls on* developed country Parties to further enhance the coordination of their efforts to deliver on the goal;

86. *Recognizes* that adaptation finance will have to be significantly scaled up beyond the doubling as per decision 1/CMA.3, paragraph 18, to support the urgent and evolving need to accelerate adaptation and build resilience in developing countries, considering the need for public and grant-based resources for adaptation and exploring the potential of other sources, and *reiterates* the importance of support for progress in implementing developing countries' national adaptation plans by 2030;

87. *Welcomes* the operationalization of the funding arrangements, including the Fund, referred to in decisions -/CP.28[11] and -/CMA.5,[12] and the pledges of USD 792 million to the Fund and *commends* the efforts of the President of the Conference of the Parties at its twenty-eighth session in this regard;

88. *Urges* developed country Parties to continue to provide support and *encourages* other Parties to provide, or continue to provide support, on a voluntary basis, for activities to address loss and damage[13] in line with decisions -/CP.28[14] and -/CMA.5;[15]

89. *Invites* financial contributions with developed country Parties continuing to take the lead to provide financial resources for commencing the operationalization of the Fund referred to in decisions -/CP.28[16] and -/CMA.5;[17]

90. *Recognizes* the importance of making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development for the achievement of Article 2 of the Paris Agreement and that this goal is complementary to, and no substitute for, Article 9 of the Paris Agreement, which remains essential for achieving mitigation and adaptation goals in developing countries;

91. *Also recognizes* the need for further understanding of Article 2, paragraph 1(c), of the Paris Agreement, including its complementarity with Article 9 of the Paris Agreement, and *notes* the limited progress towards making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development;

92. *Decides* to continue and strengthen the Sharm el-Sheikh dialogue between Parties, relevant organizations and stakeholders to exchange views on and enhance understanding of the scope of Article 2, paragraph 1(c), of the Paris Agreement and its complementarity with Article 9 of the Paris Agreement referred to in decision 1/CMA.4 until 2025 and *takes note* of decision -/CMA.5;[18]

93. *Recognizes* the transition to a mode of work to enable the development of a draft negotiating text for the setting of the new collective quantified goal on climate finance for

[10] Draft decision entitled "Matters relating to the Standing Committee on Finance" proposed under agenda item 8(b) of the Conference of the Parties at its twenty-eighth session.

[11] As footnote 7 above.

[12] As footnote 8 above.

[13] This paragraph is without prejudice to any future funding arrangements, any positions of Parties in current or future negotiations, or understandings and interpretations of the Convention and the Paris Agreement.

[14] As footnote 7 above.

[15] As footnote 8 above.

[16] As footnote 7 above.

[17] As footnote 8 above.

[18] Decision entitled "Matters relating to the Standing Committee on Finance" adopted under agenda item 10(a) of the Conference of the Parties serving as the meeting of the Parties at its fifth session.

consideration by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its sixth session;

94. *Also recognizes* that the deliberations related to the scale and elements of the new collective quantified goal on climate finance could take into consideration the urgent need to, inter alia, support implementation of current nationally determined contributions and national adaptation plans, increase ambition and accelerate action, taking into account the evolving needs of developing country Parties, and the potential for mobilizing finance from a wide variety of sources, instruments and channels, recognizing the interlinkages between the different elements of the new collective quantified goal on climate finance;

95. *Underscores* the importance of reforming the multilateral financial architecture, inter alia, multilateral development banks, *acknowledges* the updated vision statement by the World Bank to create a world free of poverty on a livable planet and by the multilateral development banks to strengthen collaboration for greater impact, and *calls on* their shareholders to expeditiously implement that vision and continue to significantly scale up the provision of climate finance in particular through grants and concessional instruments;

96. *Emphasizes* the role of governments, central banks, commercial banks, institutional investors and other financial actors with a view to improving the assessment and management of climate-related financial risks, ensuring or enhancing access to climate finance in all geographical regions and sectors, and accelerating the ongoing establishment of new and innovative sources of finance, including taxation, for implementing climate action and thus enabling the scaling down of harmful incentives;

97. *Decides* to establish the xx dialogue on implementing the global stocktake outcomes;

98. *Also decides* that the dialogue referred to in paragraph 97 above will be operationalized starting from the sixth session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and conclude at its tenth session (2028) and *requests* the Subsidiary Body for Implementation to develop the modalities for the work programme at its sixtieth session (June 2024) for consideration by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its sixth session;

99. *Decides* to convene a xx high-level ministerial dialogue at its sixth session on the urgent need to scale up adaptation finance, taking into account the adaptation-related outcomes of the global stocktake, and to ensure the mobilization by developed country Parties of the adaptation support pledged;

100. *Urges* developed country Parties to prepare a report on the doubling of the collective provision of climate finance for adaptation to developing country Parties from 2019 levels by 2025, in the context of achieving a balance between mitigation and adaptation in the provision of scaled-up financial resources, recalling Article 9, paragraph 4, of the Paris Agreement,[19] for consideration by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its sixth session;

2. Technology development and transfer

101. *Underlines* the fundamental role of technology development and transfer, endogenous technologies and innovation in facilitating urgent adaptation and mitigation action aligned with achieving the goals of the Paris Agreement and sustainable development;

102. *Welcomes* the progress of the Technology Mechanism, which is comprised of the Technology Executive Committee and the Climate Technology Centre and Network, including through its first joint work programme, for 2023–2027, in supporting technology development and transfer through policy recommendations, knowledge-sharing, capacity-building and technical assistance;

103. *Highlights* the persistent gaps and challenges in technology development and transfer and the uneven pace of adoption of climate technologies around the world and *urges* Parties to address these barriers and strengthen cooperative action, including with non-Party stakeholders, particularly with the private sector, to rapidly scale up the deployment of

[19] See decision 1/CMA.3, para. 18.

existing technologies, the fostering of innovation and the development and transfer of new technologies;

104. *Highlights* the importance of predictable, sustainable and adequate support for implementing the mandates of the Technology Mechanism and for supporting national designated entities and of the delivery on the Climate Technology Centre and Network resource mobilization and partnership strategy for 2023–2027 as referred to in decision -/CMA.5;[20]

105. *Encourages* the Technology Executive Committee, the Climate Technology Centre and Network and the operating entities of the Financial Mechanism to enhance the involvement of stakeholders as they take action to strengthen the linkages between the Technology Mechanism and the Financial Mechanism;

106. *Emphasizes* the importance of ensuring the availability of and access to enhanced financial and capacity-building support for developing countries, in particular the least developed countries and small island developing States, for implementing and scaling up prioritized technology measures, including those identified in technology needs assessments, technology action plans and long-term low greenhouse gas emission development strategies that align with national circumstances;

107. *Encourages* inclusive international cooperation on research, development and demonstration as well as innovation, including in hard-to-abate sectors, with a view to strengthening endogenous capacities and technologies and fostering national systems of innovation in line with the findings of the Intergovernmental Panel on Climate Change;

108. *Recognizes* that achieving the long-term goals of the Paris Agreement requires the rapid and scaled-up deployment and adoption of existing clean technologies and accelerated innovation, digital transformation and development, demonstration and dissemination of new and emerging technologies, as well as increased access to those technologies, supported by appropriate enabling frameworks and international cooperation;

109. *Notes* the Technology Mechanism initiative on artificial intelligence for climate action, the aim of which is to explore the role of artificial intelligence as a technological tool for advancing and scaling up transformative climate solutions for adaptation and mitigation action in developing countries, with a focus on the least developed countries and small island developing States, while also addressing the challenges and risks posed by artificial intelligence, as referred to in decision -/CMA.5;[21]

110. *Decides* to establish a technology implementation programme, supported by, inter alia, the operating entities of the Financial Mechanism, to strengthen support for the implementation of technology priorities identified by developing countries, and to address the challenges identified in the first periodic assessment of the Technology Mechanism,[22] and *invites* the Subsidiary Body for Implementation at its sixty-first session (November 2024) to take into account the technology implementation programme in its consideration of the Poznan strategic programme on technology transfer, with a view to recommending a draft decision on the matter for consideration and adoption by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its sixth session;

3. Capacity-building

111. *Underlines* the fundamental role of capacity building in taking urgent climate action aligned with the goals of the Paris Agreement and *appreciates* the contributions made in this regard under institutional arrangements under the Paris Agreement, such as the Paris Committee on Capacity-building;

112. *Welcomes* the progress made in capacity-building at individual, institutional, and systemic levels since the adoption of the Paris Agreement, including through the work under

[20] Decision entitled "Enhancing climate technology development and transfer to support the implementation of the Paris Agreement" adopted under agenda item 11 of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its fifth session.

[21] As footnote 8 above.

[22] See decision 20/CMA.4, para. 8.

the Paris Committee on Capacity-building, the Capacity-building Initiative for Transparency and the Action for Climate Empowerment agenda;

113. *Recognizes* best practices in capacity-building, notably multi-stakeholder engagement, enhancing ownership by beneficiary countries, and sharing experiences and lessons learned, particularly at the regional level;

114. *Acknowledges* that developing country Parties continue to have persistent gaps in capacity and urgent needs for effectively implementing the Paris Agreement, including related to skills development, institutional capacity for governance and coordination, technical assessment and modelling, strategic policy development and implementation and capacity retention and *recognizes* the urgent need to address these gaps and needs that are constraining effective implementation of the Paris Agreement;

115. *Encourages* enhanced coherence and cooperation in the provision of effective capacity-building support, including, but not limited to, by facilitating collaboration platforms and capitalizing on the exchange of knowledge, country-led shared experiences and best practices;

116. *Recognizes* the role of the Local Communities and Indigenous Peoples Platform in strengthening the capacity of Indigenous Peoples and local communities to effectively engage in the intergovernmental process under the Paris Agreement and *calls on* Parties to meaningfully engage Indigenous Peoples and local communities in their climate policies and action;

117. *Requests* the Paris Committee on Capacity-building to identify, in coordination with Parties, other constituted bodies and programmes and relevant stakeholders, current activities for enhancing the capacity of developing countries to prepare and implement nationally determined contributions, and *also requests* the secretariat to facilitate the sharing of knowledge and good practices for the preparation and implementation of nationally determined contributions, including through workshops;

118. *Encourages* developing country Parties to identify their capacity-building support needs and to report thereon, as appropriate, in their biennial transparency reports as part of the information referred to in decision 18/CMA.1;

119. *Also encourages* the Paris Committee on Capacity-building to consider new activities, including those related to adaptation, Article 6 of the Paris Agreement and the enhanced transparency framework under the Paris Agreement in deciding on its future annual focus areas;

120. *Requests* the operating entities of the Financial Mechanism and the Adaptation Fund to further enhance support for capacity-building in developing countries and to provide updates thereon in their annual reports to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and *encourages* Parties to further enhance support for capacity-building, including through international cooperation;

D. Loss and damage

121. *Recalls* Article 8 of the Paris Agreement, in which Parties recognize the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage, and according to which Parties should enhance understanding, action and support, including through the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, as appropriate, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change;

122. *Recognizes* the importance of particularly vulnerable developing countries and segments of the population that are already vulnerable owing to geography, socioeconomic status, livelihood, gender, age, minority status, marginalization, displacement, or disability, as well as the ecosystems that they depend on, in responding to loss and damage associated with climate change impacts;

123. *Stresses* the importance of promoting coherence and complementarity in all aspects of action and support for averting, minimizing, and addressing loss and damage associated with climate change impacts;

124. *Recognizes* advancements in international efforts to avert, minimize and address loss and damage associated with climate change impacts, including extreme weather events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change, including the progress of work made under the Executive Committee of the Warsaw International Mechanism and its expert groups, technical expert group and task force; the establishment of the Santiago network for averting, minimizing and addressing loss and damage associated with the adverse effects of climate change and progress in its operationalization, including the selection of its host; progress in the areas referred to in Article 8, paragraph 4, of the Paris Agreement; and as a result of ongoing efforts to enhance understanding, action and support with respect to loss and damage associated with climate change impacts;

125. *Also recognizes* national efforts to respond to loss and damage associated with climate change impacts, including in relation to comprehensive risk management, anticipatory action and planning, recovery, rehabilitation and reconstruction, actions to address the impacts of slow onset events policymaking and planning for displacement and planned relocation, and mechanisms for channelling funding, including at the local level and for those who are on the frontline of climate change, to support activities relevant to averting, minimizing and addressing loss and damage associated with climate change impacts;

126. *Acknowledges* that climate change has already caused and will increasingly cause losses and damages and that, as temperatures rise, the impacts of climate and weather extremes, as well as slow onset events, will pose an ever-greater social, economic and environmental threat;

127. *Recognizes* that improved understanding of how to avoid and respond to the risk of low-likelihood or high-impact events or outcomes, such as abrupt changes and potential tipping points, as well as more knowledge, support, policy and action are needed to comprehensively manage risks of and respond to loss and damage associated with climate change impacts;

128. *Acknowledges* the significant gaps, including finance, that remain in responding to the increased scale and frequency of loss and damage, and the associated economic and non-economic losses;

129. *Expresses deep concern* regarding the significant economic and non-economic loss and damage associated with the adverse effects of climate change for developing countries, resulting, inter alia, in reduced fiscal space and constraints in realizing the Sustainable Development Goals;

130. *Recognizes* the need for urgent and enhanced action and support for averting, minimizing and addressing loss and damage associated with climate change impacts, including under the Warsaw International Mechanism, including its expert groups, technical expert group and task force and the Santiago network and as part of other relevant cooperation efforts;

131. *Calls on* Parties and relevant institutions to improve coherence and synergies between efforts pertaining to disaster risk reduction, humanitarian assistance, rehabilitation, recovery and reconstruction, and displacement, planned relocation and migration, in the context of climate change impacts, as well as actions to address slow onset events, in order to make progress in averting, minimizing and addressing loss and damage associated with climate change impacts in a coherent and effective manner;

132. *Recalls* that, in the context of the enhanced transparency framework, each interested Party may provide, as appropriate, information related to enhancing understanding, action and support, on a cooperative and facilitative basis, to avert, minimize and address loss and damage associated with climate change impacts;

133. *Requests* the Executive Committee of the Warsaw International Mechanism to prepare, building on the work of its expert groups, technical expert group and task force,

voluntary guidelines for enhancing the collection and management of data and information to inform the preparation of biennial transparency reports;

134. *Also requests* the secretariat to prepare on a regular basis a synthesis report, for consideration by the Executive Committee of the Warsaw International Mechanism, on information on loss and damage provided by Parties in their biennial transparency reports and, as appropriate, in other national reports under the Paris Agreement, with a view to enhancing the availability of information on loss and damage, including for the purpose of monitoring progress in responding thereto at the national level;

135. *Encourages* interested developing country Parties to seek technical assistance through the Santiago network for undertaking the actions referred to in paragraph 130 above;

E. Response measures

136. *Recognizes* the importance of maximizing the positive and minimizing the negative economic and social impacts of the implementation of response measures;

137. *Recalls* Article 4, paragraph 15, of the Paris Agreement, which states that Parties shall take into consideration in the implementation of the Paris Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties;

138. *Recognizes* that significant efforts have been undertaken to assess and address the positive and negative socioeconomic impacts of response measures by Parties and non-Party stakeholders domestically and by the forum on the impact of the implementation of response measures and its Katowice Committee of Experts on the Impacts of the Implementation of Response Measures under the six-year workplan of the forum and its Katowice Committee on Impacts;

139. *Notes with appreciation* the progress of the Katowice Committee on Impacts in supporting the work of the forum;

140. *Notes* that just transition of the workforce and the creation of decent work and quality jobs, and economic diversification are key to maximizing the positive and minimizing the negative impacts of response measures and that strategies related to just transition and economic diversification should be implemented taking into account different national circumstances and contexts;

141. *Underscores* the social and economic opportunities and challenges that arise from the efforts to achieve the Paris Agreement temperature goal;

142. *Notes* that further efforts are needed to strengthen the work of the forum and its Katowice Committee on Impacts;

143. *Encourages* Parties to consider developing, in consultation with technical experts, practitioners and other stakeholders, as appropriate, methodologies and tools, including modelling tools, for assessing and analysing the impacts of the implementation of response measures, with a view to minimizing the negative and maximizing the positive impacts of response measures, with a particular focus on the creation of decent work and quality jobs and on economic diversification;

144. *Also encourages* Parties to develop more national case studies involving the assessment and analysis of the impacts of the implementation of response measures to enable an exchange of experience among Parties on such studies;

145. *Further encourages* Parties, as appropriate, to establish capacity-building partnerships and networks for increasing the number of developing countries that are developing and using methodologies and tools for assessing the impacts of the implementation of response measures;

146. *Encourages* Parties, in their efforts to diversify their economies, to pursue relevant policies in a manner that promotes sustainable development and the eradication of poverty, taking into account national circumstances;

147. *Also encourages* Parties to provide detailed information, to the extent possible, on the assessment of the economic and social impacts of the implementation of response measures;

148. *Requests* the forum and its Katowice Committee on Impacts to intensify efforts to implement the recommendations outlined in relevant decisions of the Conference of the Parties, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, including by enhancing cooperation among Parties, stakeholders, external organizations, experts and institutions and by enabling the exchange of information, experience and best practices among Parties with a view to increasing their resilience to these impacts;

149. *Also requests* the forum and its Katowice Committee on Impacts in performing their functions to implement in line with the best available science and take into account different national circumstances;

150. *Notes* that the global transition to low-emissions and climate resilient development provides opportunities for and poses challenges to sustainable development, economic growth and eradication of poverty;

151. *Welcomes* the adoption of decision -/CMA.5[23] on the work programme on just transition pathways referred to in the relevant paragraphs of decision 1/CMA.4;

152. *Reconfirms* that the objective of the work programme on just transition pathways shall be the discussion of pathways to achieving the goals of the Paris Agreement outlined in Article 2, paragraph 1, in the context of Article 2, paragraph 2;

III. International cooperation

153. *Reaffirms* its commitment to multilateralism, especially in the light of the progress made under the Paris Agreement and *resolves* to remain united in the pursuit of efforts to achieve the purpose and long-term goals of the Agreement;

154. *Recognizes* that Parties should cooperate on promoting a supportive and open international economic system aimed at achieving sustainable economic growth and development in all countries and thus enabling them to better to address the problems of climate change, noting that measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade;

155. *Notes* that the Sixth Assessment Report of the Intergovernmental Panel on Climate Change states that international cooperation is a critical enabler for achieving ambitious climate action and encouraging development and implementation of climate policies;

156. *Recognizes* the importance of international collaboration, including transboundary cooperation, for contributing to progress towards the goals of the Paris Agreement;

157. *Also recognizes* that international cooperation is critical for addressing climate change, in the context of sustainable development and poverty eradication, particularly for those who have significant capacity constraints, and enhancing climate action across all actors of society, sectors and regions;

158. *Acknowledges* the important role and active engagement of non-Party stakeholders, particularly civil society, business, financial institutions, cities and subnational authorities, Indigenous Peoples, local communities, youth and research institutions, in supporting Parties and contributing to the significant collective progress towards the Paris Agreement temperature goal and in addressing and responding to climate change and enhancing ambition, including progress through other relevant intergovernmental processes;

[23] Draft decision entitled “Work programme on just transition pathways referred to in the relevant paragraphs of decision 1/CMA.4” proposed under agenda item 5 of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its fifth session.

159. *Welcomes* current international cooperative efforts and voluntary initiatives for enhancing climate action and support by Parties and non-Party stakeholders, including through the sharing of information, good practices, experiences, lessons learned, resources and solutions;

160. *Also welcomes* the leadership and efforts of the high-level champions in supporting the effective participation of non-Party stakeholders in the global stocktake;

161. *Urges* Parties and non-Party stakeholders to join efforts to accelerate delivery through inclusive, multilevel, gender-responsive and cooperative action;

162. *Encourages* international cooperation and the exchange of views and experience among non-Party stakeholders at the local, subnational, national and regional levels, including conducting joint research, personnel training, practical projects, technical exchanges, project investment and standards cooperation;

163. *Also encourages* Parties and non-Party stakeholders to enhance cooperation on the implementation of multilateral environmental conventions and agreements, particularly their work under the Rio Conventions, to facilitate the achievement of the purpose and long-terms goals of the Paris Agreement and the Sustainable Development Goals in a synergistic and efficient manner;

IV. Guidance and way forward

164. *Recalls* Article 4, paragraph 2 of the Paris Agreement, which states that each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve, and that Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions;

165. *Also recalls* Article 4, paragraph 9, of the Paris Agreement, which states that each Party shall communicate a nationally determined contribution every five years in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement and be informed by the outcomes of the global stocktake;

166. *Further recalls* that pursuant to paragraph 25 of decision 1/CP.21, Parties shall submit to the secretariat their next nationally determined contributions at least 9 to 12 months in advance of the seventh session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (November 2025) with a view to facilitating the clarity, transparency and understanding of these contributions;

167. *Recalls* Article 3 and Article 4, paragraph 3, of the Paris Agreement, and reaffirms that each Party's successive nationally determined contribution will represent a progression beyond the Party's current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances;

168. *Also recalls* decision 4/CMA.1, paragraphs 7 and 13, which state that, in communicating their second and subsequent nationally determined contributions, Parties shall provide the information necessary for clarity, transparency and understanding contained in annex I to decision 4/CMA.1, as applicable to their nationally determined contributions, and that, in accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall account for their nationally determined contributions in accordance with the guidance contained in annex II to decision 4/CMA.1;

169. *Further recalls* decision 4/CMA.1, paragraph 4(c) of its annex I, which notes that Parties shall provide information on how the preparation of their nationally determined contributions has been informed by the outcomes of the global stocktake;

170. *Encourages* Parties to communicate in 2025 their nationally determined contributions with an end date of 2035, pursuant to paragraph 2 of decision 6/CMA.3;

171. *Invites* all Parties to put in place new or intensify existing domestic arrangements for preparing and implementing their successive nationally determined contributions;

172. *Emphasizes* the critical role of the full implementation of the enhanced transparency framework under the Paris Agreement;

173. *Recalls* that Parties shall submit their first biennial transparency report and national inventory report, if submitted as a stand-alone report, at the latest by 31 December 2024 and *urges* Parties to make the necessary preparations for ensuring timely submission thereof;

174. *Also recalls* paragraph 7 of decision 18/CMA.1 and paragraph 73 of decision 1/CMA.4, which recognize the importance of the provision of increased support, in a timely, adequate and predictable manner, to developing country Parties for implementing the enhanced transparency framework under the Paris Agreement;

175. *Further recalls* Article 15, paragraph 1, of the Paris Agreement and recognizes the role of the Paris Agreement Implementation and Compliance Committee in facilitating implementation of and promoting compliance with the provisions of the Paris Agreement in a transparent, non-adversarial and non-punitive manner that pays particular attention to the respective national capabilities and circumstances of Parties;

176. *Emphasizes* the importance of Action for Climate Empowerment for empowering all members of society to engage in climate action and for the consideration of the outcomes of the first global stocktake;

177. *Encourages* Parties to take into account the good practices and opportunities identified during the technical dialogue of the first global stocktake in enhancing their actions and support;

178. *Also encourages* Parties to implement climate policy and action that is gender-responsive, fully respects human rights, and empowers youth and children;

179. *Affirms* that consideration will be given to the outcome of the review of the enhanced Lima work programme on gender and its gender action plan, including to the application of this outcome mutatis mutandis in considering the outcomes of the first global stocktake;

180. *Welcomes* the outcomes of and the informal summary report on the 2023 ocean and climate change dialogue and encourages further strengthening of ocean-based action, as appropriate;

181. *Requests* the Chair of the Subsidiary Body for Scientific and Technological Advice to hold an expert dialogue on mountains and climate change at its sixtieth session (June 2024);

182. *Also requests* the Subsidiary Body for Implementation, at its sixtieth session, to hold an expert dialogue on children and climate change to discuss the disproportionate impacts of climate change on children and relevant policy solutions in this regard, engaging relevant United Nations entities, international organizations and non-governmental organizations in this effort;

183. *Encourages* the scientific community to continue enhancing knowledge on and addressing knowledge gaps in adaptation and availability of information on climate change impacts, including for monitoring and progress, and to provide relevant and timely inputs to the second and subsequent global stocktakes;

184. *Invites* the Intergovernmental Panel on Climate Change to consider how best to align its work with the second and subsequent global stocktakes and *also invites* the Intergovernmental Panel on Climate Change to provide relevant and timely information for the next global stocktake;

185. *Encourages* the high-level champions, the Marrakech Partnership for Global Climate Action and non-Party stakeholders, as appropriate, to consider the outcomes of the first global stocktake in their work on scaling-up and introducing new or strengthened voluntary efforts, initiatives and coalitions;

186. *Invites* the relevant work programmes and constituted bodies under or serving the Paris Agreement to integrate relevant outcomes of the first global stocktake in planning their future work, in line with their mandates;

187. *Requests* the Chairs of the subsidiary bodies to organize an annual global stocktake dialogue starting at their sixtieth sessions (June 2024) to facilitate the sharing of knowledge

and good practices on how the outcomes of the global stocktake are informing the preparation of Parties' next nationally determined contributions in accordance with the relevant provisions of the Paris Agreement and *also requests* the secretariat to prepare a report for consideration at its subsequent session;

188. *Encourages* the relevant operating entities of the Financial Mechanism and the constituted bodies under or serving the Paris Agreement to continue to provide, within their mandates, capacity-building support for the preparation and communication of the next nationally determined contributions;

189. *Invites* organizations in a position to do so and the secretariat, including through its regional collaboration centres, to provide capacity-building support for the preparation and communication of the next nationally determined contributions;

190. *Also invites* Parties to present their next nationally determined contributions at a special event to be held under the auspices of the United Nations Secretary-General;

191. *Decides* to launch, under the guidance of the Presidencies of the fifth, sixth and seventh sessions of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, a set of activities ("Road map to Mission 1.5") to significantly enhance international cooperation and the international enabling environment to stimulate ambition in the next round of nationally determined contributions, with a view to enhancing action and implementation over this critical decade and keeping 1.5 °C within reach;

192. *Recalls* paragraph 15 of decision 19/CMA.1, and *decides* that consideration of refining the procedural and logistical elements of the overall global stocktake process on the basis of experience gained from the first global stocktake shall commence at the sixtieth sessions of the subsidiary bodies and conclude at the sixth session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement;

193. *Invites* Parties and non-Party stakeholders to submit via the submission portal[24] by 1 March 2024 information on experience and lessons learned in relation to conducting the first global stocktake and requests the secretariat to prepare a synthesis report on the submissions in time to inform the refinement referred to in paragraph 192 above;

194. *Decides* pursuant to paragraph 8 of decision 19/CMA.1 that the information collection and preparation component of the second global stocktake shall start at the eighth session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (November 2026) and its consideration of outputs component will conclude at the tenth session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement;

195. *Takes note* of the estimated budgetary implications of the activities to be undertaken by the secretariat referred to in this decision;

196. *Requests* that the actions of the secretariat called for in this decision be undertaken subject to the availability of financial resources.

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[24] https://www4.unfccc.int/sites/submissionsstaging/Pages/Home.aspx.

COP28 Agreement Signals "Beginning of the End" of the Fossil Fuel Era

13 December 2023

United Nations Climate Change, UN Climate Press Release

UN Climate Change News, 13 December 2023 – The United Nations Climate Change Conference (COP28) closed today with an agreement that signals the "beginning of the end" of the fossil fuel era by laying the ground for a swift, just and equitable transition, underpinned by deep emissions cuts and scaled-up finance.

In a demonstration of global solidarity, negotiators from nearly 200 Parties came together in Dubai with a decision on the world's first 'global stocktake' to ratchet up climate action before the end of the decade – with the overarching aim to keep the global temperature limit of 1.5°C within reach.

"Whilst we didn't turn the page on the fossil fuel era in Dubai, this outcome is the beginning of the end," said UN Climate Change Executive Secretary Simon Stiell in his closing speech. "Now all governments and businesses need to turn these pledges into real-economy outcomes, without delay."

The global stocktake is considered the central outcome of COP28 – as it contains every element that was under negotiation and can now be used by countries to develop stronger climate action plans due by 2025.

The stocktake recognizes the science that indicates global greenhouse gas emissions need to be cut 43% by 2030, compared to 2019 levels, to limit global warming to 1.5°C. But it notes Parties are off track when it comes to meeting their Paris Agreement goals.

The stocktake calls on Parties to take actions towards achieving, at a global scale, a tripling of renewable energy capacity and doubling energy efficiency improvements by 2030. The list also includes accelerating efforts towards the phase-down of unabated coal power, phasing out inefficient fossil fuel subsidies, and other measures that drive the transition away from fossil fuels in energy systems, in a just, orderly and equitable manner, with developed countries continuing to take the lead.

In the short-term, Parties are encouraged to come forward with ambitious, economy-wide emission reduction targets, covering all greenhouse gases, sectors and categories and aligned with the 1.5°C limit in their next round of climate action plans (known as nationally determined contributions) by 2025.

Helping countries strengthen resilience to the effects of climate change

The two-week-long conference got underway with the World Climate Action Summit, which brought together 154 Heads of States and Government. Parties reached a historic agreement on the operationalization of the loss and damage fund and funding arrangements – the first time a substantive decision was adopted on the first day of the conference. Commitments to the fund started coming in moments after the decision was gaveled, totaling more than USD 700 million to date.

There was more progress on the loss and damage agenda with an agreement also reached that the UN Office for Disaster Risk Reduction and the UN Office for Project Services will host the secretariat of the Santiago Network for Loss and Damage. This platform will catalyze technical assistance to developing countries that are particularly vulnerable to the adverse effects of climate change.

Parties agreed on targets for the Global Goal on Adaptation (GGA) and its framework, which identify where the world needs to get to in order to be resilient to the impacts of a changing climate and to assess countries' efforts. The GGA framework reflects a global consensus on adaptation targets and the need for finance, technology and capacity-building support to achieve them.

Increasing climate finance

Climate finance took center stage at the conference, with Stiell repeatedly calling it the "great enabler of climate action."

The Green Climate Fund (GCF) received a boost to its second replenishment with six countries pledging new funding at COP28 with total pledges now standing at a record USD 12.8 billion from 31 countries, with further contributions expected.

Eight donor governments announced new commitments to the Least Developed Countries Fund and Special Climate Change Fund totaling more than USD 174 million to date, while new pledges, totaling nearly USD 188 million so far, were made to the Adaptation Fund at COP28.

However as highlighted in the global stocktake, these financial pledges are far short of the trillions eventually needed to support developing countries with clean energy transitions, implementing their national climate plans and adaptation efforts.

In order to deliver such funding, the global stocktake underscores the importance of reforming the multilateral financial architecture, and accelerating the ongoing establishment of new and innovative sources of finance.

At COP28, discussions continued on setting a 'new collective quantified goal on climate finance' in 2024, taking into account the needs and priorities of developing countries.

The new goal, which will start from a baseline of USD 100 billion per year, will be a building block for the design and subsequent implementation of national climate plans that need to be delivered by 2025.

Looking ahead to the transitions to decarbonized economies and societies that lie ahead, there was agreement that the mitigation work programme, which was launched at COP27 last year, will continue until 2030, with at least two global dialogues held each year.

Event participation and inclusivity

World leaders at COP28 were joined by civil society, business, Indigenous Peoples, youth, philanthropy, and international organizations in a spirit of shared determination to close the gaps to 2030. Some 85,000 participants attended COP28 to share ideas, solutions, and build partnerships and coalitions.

The decisions taken here today also reemphasize the critical importance of empowering all stakeholders to engage in climate action; in particular through the action plan on Action for Climate Empowerment and the Gender Action Plan.

Strengthening collaboration between governments and key stakeholders

In parallel with the formal negotiations, the Global Climate Action space at COP28 provided a platform for governments, businesses and civil society to collaborate and showcase their real-world climate solutions.

The High-Level Champions, under the Marrakech Partnership for Global Climate Action, launched their implementation roadmap of 2030 Climate Solutions. These are a set of solutions, with insights from a wide range of non-Party stakeholders on effective measures that need to be scaled up and replicated to halve global emissions, address adaptation gaps and increase resilience by 2030.

The conference also saw several announcements to boost the resilience of food and public health systems, and to reduce emissions related to agriculture and methane.

Looking ahead

The negotiations on the ‘enhanced transparency framework’ at COP28 laid the ground for a new era of implementing the Paris Agreement. UN Climate Change is developing the transparency reporting and review tools for use by Parties, which were showcased and tested at COP28. The final versions of the reporting tools should be made available to Parties by June 2024.

COP28 also saw Parties agree to Azerbaijan as host of COP29 from 11-22 November 2024, and Brazil as COP30 host from 10-21 November 2025.

The next two years will be critical. At COP29, governments must establish a new climate finance goal, reflecting the scale and urgency of the climate challenge. And at COP30, they must come prepared with new nationally determined contributions that are economy-wide, cover all greenhouse gases and are fully aligned with the 1.5°C temperature limit.

“We must get on with the job of putting the Paris Agreement fully to work,” said Stiell. “In early 2025, countries must deliver new nationally determined contributions. Every single commitment – on finance, adaptation, and mitigation – must bring us in line with a 1.5-degree world.”

“My final message is to ordinary people everywhere raising their voices for change,” Stiell added. “Every one of you is making a real difference. In the crucial coming years your voices and determination will be more important than ever. I urge you never to relent. We are still in this race. We will be with you every single step of the way.”

“The world needed to find a new way. By following our North Star, we have found that path,” said COP28 President, Dr. Sultan Al Jaber during his closing speech. “We have worked very hard to secure a better future for our people and our planet. We should be proud of our historic achievement.”

More information

Other notable announcements at COP28: UN Climate Change tracked climate action announcements made at COP 28 here.

Read the full **global stocktake** decision text here.

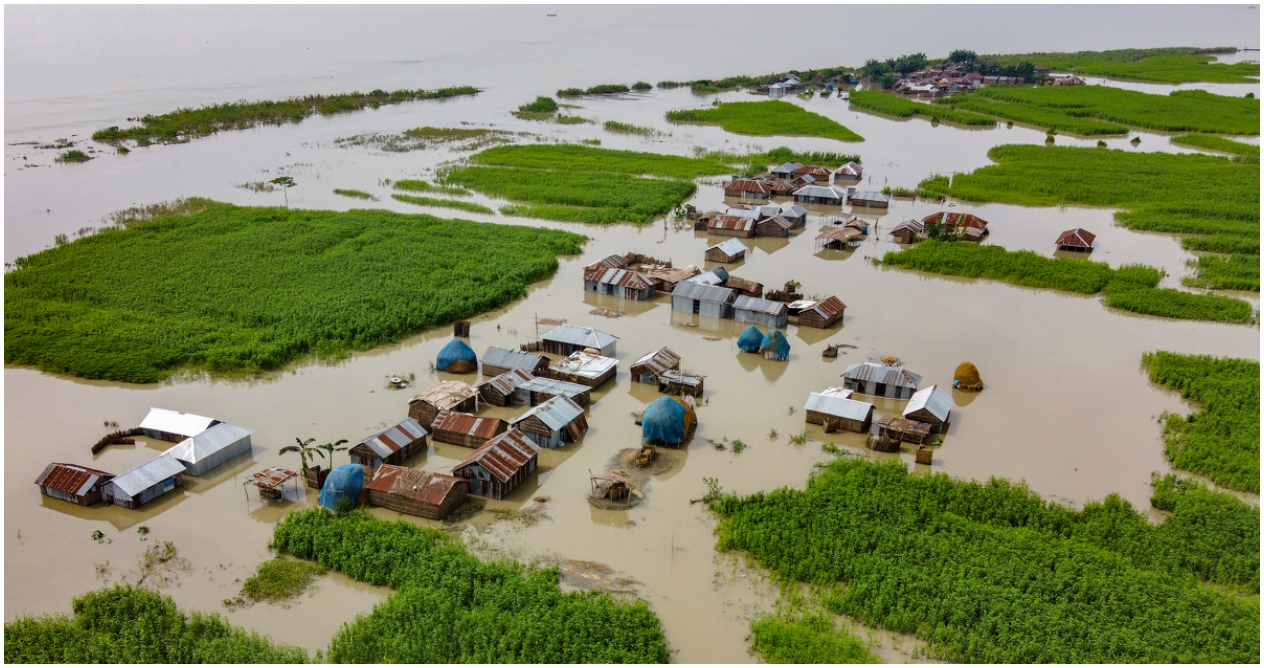
Read a transcript of Simon Stiell’s **closing speech** here.

Arabic press release available here.

For **media enquiries**, please contact press@unfccc.int

COP 28 : le fonds sur les pertes et préjudices devient opérationnel

Actu-environnement.com ; Gouvernance | 30.11.2023 | N. Gorbatko



© Abdul Momin *Inondation dans le nord du Bangladesh.*

C'est la première bonne nouvelle de la COP 28 : le texte de mise en œuvre du fonds sur les pertes et dommages a été adopté ce jeudi, sous les applaudissements. Le principe de ce fonds, qui aidera à dédommager les pays vulnérables durement touchés par les événements climatiques extrêmes, avait été annoncé lors de la COP 27, mais de nombreux blocages sur ses paramètres – forme, gestionnaires, contributeurs… – perduraient.

Des groupes de travail, incluant des représentants français, se sont attelés à la tâche ces derniers mois afin de rapprocher les points de vue avant l'ouverture de la COP, et la ministre de la Transition énergétique, Agnès Pannier-Runacher, a coprésidé une session plénière sur le sujet, le 31 octobre dernier, avec son confrère bengali. Comme prévu, ce fonds sera hébergé à titre provisoire, pendant quatre ans, par la Banque mondiale, mais sera géré par un secrétariat indépendant.

Les associations saluent ce premier signal fort, mais elles soulignent que le texte comporte encore quelques lacunes. « *À ce stade, il n'y a aucune obligation de contribuer au fonds pour les pays historiquement les plus émetteurs, ni de cible*

financière à atteindre », remarque par exemple, Gaïa Febvre, responsable des politiques internationales au Réseau Action Climat.

Les premiers contributeurs sont connus

Ce vote a cependant permis aux premiers contributeurs de se faire connaitre, à commencer par les Émirats arabes unis, qui verseront 100 millions de dollars. L'Allemagne a annoncé participer à la même hauteur, le Royaume-Uni de 75 millions de dollars, le Japon de 10 millions de dollars et les États-Unis de 17,5 millions de dollars. La France n'a pas encore précisé la contribution qu'elle envisageait d'apporter. Son président, Emmanuel Macron, l'évoquera sans doute à son arrivée, vendredi 1er décembre ou le lendemain, mais il mentionnera également peut-être la nécessaire recherche de nouveaux types de ressources, comme les droits de tirages spéciaux du Fonds monétaire international (FMI) ou le fléchage de certaines taxes carbone. La France aimerait aussi associer à cette démarche d'autres pays, hors Union européenne, comme la Chine, peu enclins jusqu'à présent à se montrer généreux.

« *Bien que ces soutiens soient utiles pour lancer les activités du fonds, il est important de reconnaître que les coûts de reconstruction résultant des effets dévastateurs des catastrophes climatiques s'élèvent à des centaines de milliards de dollars par an*, rappelle pour sa part Harjeet Singh, chef de la stratégie politique mondiale du Climate Action Network International. *Les pays riches, compte tenu de leur responsabilité historique nettement plus élevée, doivent faire davantage à une échelle proportionnelle à leur impact sur les émissions de chaleur de la planète*. »

Observations from COP28 on the Loss and Damage Fund

by Emma Shumway|Published December 20, 2023

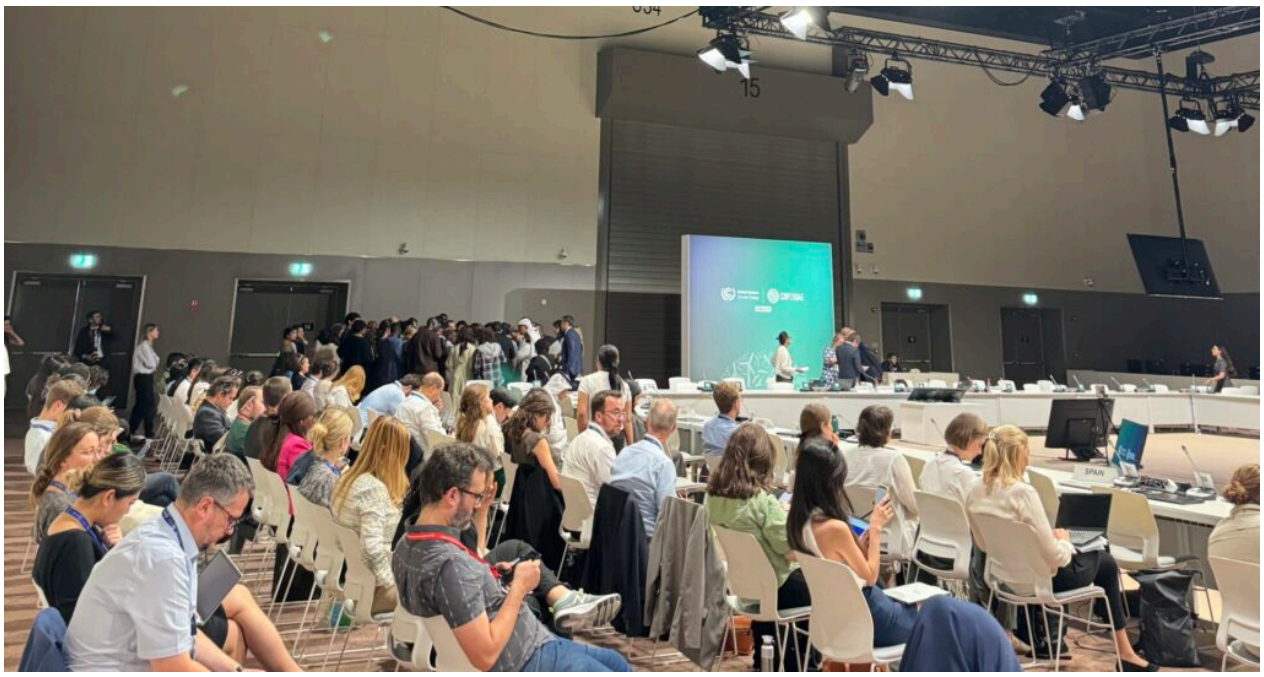
www.blogs.law.columbia.edu

Negotiations at the 28th meeting of the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP28) in Dubai, UAE, wrapped up early last week. Much has been written about the "UAE Consensus" that was adopted on the final day of COP28 and met with mixed reviews. There was, however, an important decision reached on day one of the two-week meeting regarding operationalization of the Loss and Damage Fund. While the decision represents an important–and long overdue–step forward, there remains much work to be done.

While there is no formal UN definition of loss and damage, it is generally understood to encapsulate climate change impacts that cannot be addressed by mitigation or adaptation efforts. For developing countries and small island states, the consequences of stronger storms, rising sea levels, increasing temperatures and other climate-related phenomena will be difficult to endure, and the countries who will likely suffer the most are often the least responsible for climate change. The concept of a Loss and Damage Fund through which Parties provide monetary aid to those in need implicitly acknowledges this inequity.

Despite the fact that countries are already suffering losses due to climate change, the road to a Loss and Damage Fund has been relatively long. The formal concept of Loss and Damage originated in 2013 at COP19 in Warsaw, Poland, with the establishment of the Warsaw International Mechanism for Loss and Damage (WIM). WIM is the constituted body created to "address loss and damage associated with impacts of climate change, including extreme events and slow onset events, in developing countries that are particularly vulnerable to the adverse effects of climate change." In 2019, at COP25 in Madrid, Spain, Parties established the technical arm of WIM, the Santiago Network, to catalyze technical assistance for loss and damage. In 2021, at COP26 in Glasgow, Scotland, in response to increasing calls for financing, the Glasgow Dialogue was established to facilitate discussions surrounding the funding of loss and damage activities. The following year at COP27 in Sharm El Sheikh, Egypt, Parties agreed to establish a Loss and Damage fund and

a Transitional Committee to make recommendations for operationalization at COP28. The Transitional Committee met five times in 2023 prior to submitting a report to the COP for consideration.


Negotiators huddle in the back at WIM Loss and Damage Informal Consultations.

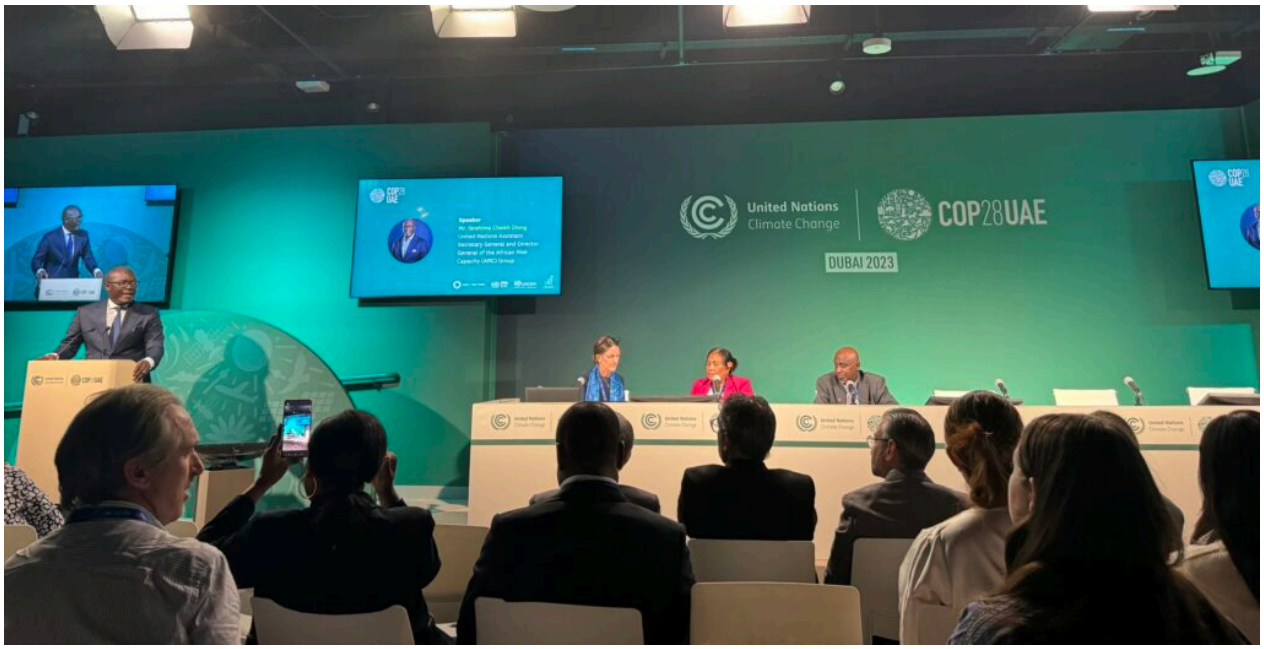
A decade after its first introduction, Parties finally operationalized the Loss and Damage Fund on the first day of COP28. During the opening plenary, the COP adopted a decision (FCCC/CP/2023/L.1) based on the recommendations of the Transitional Committee. Key elements of the decision included the creation of a new and independent secretariat and governing board, the designation of the World Bank as interim trustee and fund host for a four-year period, and the approval of the Governing Instrument of the fund which provides factors to be considered in allocating resources. In the same session where the decision was adopted, several Parties made notable funding pledges including $100 million from the UAE, $100 million from Germany, £60 million from the UK, $17.5 million from the US pending Congressional approval, $10 million from Japan, and €225 million from the EU.

Operationalizing the loss and damage fund is a major breakthrough and, given its quick completion on the first day of COP28, it has been the focus of much positive press. However, it is important to acknowledge the weaknesses of the loss and damage decision as well. Developing countries have expressed doubts regarding

both the long-term financing of the fund as well as the World Bank's role as interim trustee.

On the decision to use the World Bank as interim fund host for a period of four years, at COP27 proponents included the US and EU who argued that using a pre-existing trustee would allow for immediate operationalization of the Fund, while opponents included the G77 and China Group who argued for an independent, stand-alone fund free from any bias. In the eyes of the delegates of some developing countries on the ground at COP28, the World Bank has a history of charging unjust interest on loans to developing countries, which is not a novel critique. Moreover, the six largest World Bank shareholders are the US, Japan, China, Germany, the UK, and France, which does not necessarily create the impression of impartiality—68 organizations sent a letter opposing the World Bank selection on these grounds.

At a COP28 side event entitled, "Minimizing and Addressing Loss and Damage with Locally Led Adaptation and Risk-Transfer Financing Solutions," hosted by the Joint Sustainable Development Goals (SDG) Fund, panelists acknowledged these critiques of the World Bank and pointed to the independence of the loss and damage board as a means for small island and developing country delegations to provide oversight over the World Bank's role in the Loss and Damage Fund.



Panelists speak at loss and damage side event.

When it comes to long-term financing, while the pledges of numerous donor Parties made headlines at COP28, the reality is that these are one-time donations that will eventually run out, yet there is no expiration date for the climate change-induced losses suffered by developing countries. This problem was the topic of conversation amongst delegates on the ground and potential solutions to the lack of permanent funding were discussed at multiple side events, including “International Climate Solidarity Levies: Innovative Funding Source for the New Loss and Damage Response Fund” hosted by the International Centre for Climate Change and Development, Innovative Finance Foundation, and Oxford Climate Policy, which advocated for national taxes imposed on aviation as a source of Loss and Damage funding. At the previously mentioned Joint SDG Fund event, a tax on aviation fuel and insurance were among possible solutions floated as well. We may see calls to establish a replenishment cycle and/or a long-term funding source from Parties and advocates in the coming weeks, and climate finance in general is likely to take center stage at COP29 next year.

In sum, operationalizing the Loss and Damage Fund is a key step in providing developing countries with the necessary support as the impacts of climate change become increasingly dire, but further steps are needed to ensure the longevity and effectiveness of this fund. While it is important to celebrate wins in the COP consensus process, it is equally important to remember that we are just getting started.

$700m pledged to loss and damage fund at Cop28 covers less than 0.2% needed

Money offered so far falls far short of estimated $400bn in losses developing countries face each year

Nina Lakhani *in Dubai*
@ninalakhani
Guardian, Wed 6 Dec 2023 17.00 CET

Wealthy countries most responsible for the climate emergency have so far pledged a combined total of just over $700m (£556m) to the loss and damage fund – the equivalent of less than 0.2% of the irreversible economic and non-economic losses developing countries are facing from global heating every year.

In a historic move, the loss and damage fund was agreed at the opening plenary of the first day the Cop28 summit in Dubai – a hard-won victory by developing countries that they hoped would signal a commitment by the developed, polluting nations to finally provide financial support for some of the destruction already under way.

But so far pledges have fallen far short of what is needed, with the loss and damage in developing countries estimated by one non-governmental organisation to be greater than $400bn a year – and rising. Estimates for the annual cost of the damage have varied from $100bn-$580bn.

The $100m pledge by the United Arab Emirates, the Cop28 host country, was matched by Germany – and then slightly topped by Italy and France, which both promised $108m. The US, which is historically the worst greenhouse gas emitter – and the largest producer of oil and gas this year – has so far pledged just $17.5m, while Japan, the third largest economy behind the US and China, has offered $10m.

Harjeet Singh, the head of global political strategy at Climate Action Network International, a coalition of almost 2000 climate groups, said: “The initial pledges of $700m pale in comparison to the colossal need for funding, estimated in the hundreds of billions annually. The over 30-year delay in establishing this fund, coupled with the meagre contributions from affluent nations, particularly the US, the biggest historical polluter, signals a persistent indifference to the plight of the developing world.”

Other pledges include Denmark at $50m, Ireland and the EU both with $27m, Norway at $25m, Canada at less than $12m and Slovenia at $1.5m.

The loss and damage funds should be new and additional – and come as grants not loans, according to climate justice experts. Yet in most cases, the nature and timing of the pledged money remain unclear as few countries have released further details.

The UK's £60m ($75m) pledge is neither new nor or additional, campaigners point out, and was taken from an existing and recently downgraded climate finance pledge.
The agreement was only a first step in establishing the loss and damage funding arrangements. Details are now being discussed within the global stocktake (GST) negotiations – which will play a major role in how or even if the world can keep the hope of limiting planet warming to 1.5C alive.

The GST is a core component of the Paris accords, a broad and detailed assessment to monitor implementation and evaluate collective progress. The outcome will be used by countries to guide and upgrade their own five-year climate plans, which is why developing countries are pushing for strong and clear guidance on how much nations need to contribute to loss and damage, as well as the phase-out of fossil fuels.

Julie-Anne Richards from the Loss and Damage Collaboration, a global network of researchers, lawyers, policymakers and activists, said: "The growing loss and damage is the clearest indication that the Paris agreement isn't working, and countries have not been stepping up."

The first draft text on the GST was published on Tuesday. The draft included important language on the scale of loss and damage – and connected the future need with climate mitigation and funding for adaptation. The final text will most probably come in the next few days.

Mohamed Adow, the director of the climate and energy thinktank Powershift Africa, said: "With the loss and damage fund established here it may seem like that story is over and countries can pat themselves on the back with a job well done. However, the bill for loss and damage will only increase if adaptation is not sufficiently funded and emissions are not urgently cut – they are part of the same puzzle being negotiated within the global stocktake discussions."

"It's like balancing scales. If rich nations invest more in adaptation and mitigation, it will keep the loss and damage costs in check," he added.

The draft, at the moment, is very long and some climate experts have warned that details important to developing countries could get squeezed out. “The current language is good. We cannot afford to lose it,” said Singh.

Lien Vandamme, a senior campaigner at the Centre for International Environmental Law, said: “On the premise of getting the loss and damage fund up and running as soon as possible to reach communities, developed countries pushed through a flawed structure … yet the millions promised for the loss and damage fund at Cop28 are a drop in the ocean of what is needed. This speaks to the hypocrisy we’ve seen in these discussions and the limitations of treating finance for loss and damage as charity rather than an obligation.”

“Hundreds of billions of public, grants-based, new and additional money is needed, and we cannot call this loss and damage fund a success as long as this is lacking,” she added.