



University
of Glasgow

FSJ Project Policy Brief
2/2022



Combating Ocean Biodiversity Loss Through Corporate and Financial Law

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September 2022

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Executive Summary

One of the primary limitations of this intervention as currently designed is the difficulty of accessing up-to-date information on which specific banks currently finance private fishing companies like P&P - it is hoped that those who would be interested in engaging with this intervention might have better access to such information.

Trawling activities are widely recognised as the most destructive fishing practice around the world with severe impacts on ocean biodiversity. Yet, banks continue to enable these practices through finance. To combat this, a litigation against directors of Dutch banks, claiming a violation of directors' duties, has been designed. The legal and socio-economic landscape of the Netherlands lends credence to arguments that such an intervention can be successful and have systemic effects capable of reducing ocean biodiversity loss (OBL).

1. The Problem: OBL and the Role of Banks

Ocean biodiversity is declining at an alarming rate.¹ Notwithstanding the effects of climate change, pollution, invasive species, resource extraction, etc. on OBL², evidence points to the commercial fishing industry as being the largest contributor through its unsustainable overfishing and bottom-trawling practices.³

Trawling activities, in particular, have notable effects on OBL with clear links to overfishing, bycatch, and the destruction of critical habitats from its sustained contact with the seabed.⁴ Due to its widespread use within the commercial fishing industry, efforts to mitigate OBL must seek to curtail trawling practices. Thus, the aim of the intervention is to decrease the impact of commercial fishing on OBL by making finance less accessible to fisheries engaging with and relying upon trawling.

Financial institutions play an essential, enabling, and interconnected role in the operation of seafood businesses.⁵ As evidence points to the reliance of fishing companies on loan finance,⁶ the proposed intervention should have significant impact on mitigating OBL as it addresses **every** fishery engaging in trawling and their corresponding financiers.

The intervention is illustrated in the report through the **example** of ING and Rabobank who have previously financed Dutch fishing giant Parlevliet & van der Plas (P&P), one of the largest operators of trawler vessels,⁷ and who rely significantly upon debt financing.

1. Our Shared Seas, 'Habitat and Biodiversity Loss' (2022) <<https://oursharedseas.com/threats/threats-habitat-and-biodiversity/#Notes>> accessed 11 May 2022

2. 'UN Report: Nature's Dangerous Decline 'Unprecedented'; Species Extinction Rates 'Accelerating'' (UN, 6 May 2019) <<https://www.un.org/sustainabledevelopment/blog/2019/05/nature-decline-unprecedented-report/>> accessed 11 May 2022

3. Our Shared Seas (n 1)

4. 'Fish and Overfishing - Our World in Data' <<https://ourworldindata.org/fish-and-overfishing#how-much-of-the-seafloor-is-trawled>> accessed 2 April 2022

5. Jean-Baptiste Jouffray et al., 'Leverage points in the financial sector for seafood sustainability' (2019) 5(10) *Science advances* eaax3324. 4.

6. *ibid*

7. 'About Parlevliet & Van Der Plas' <<https://www.pp-group.nl/en-us/about-parlevliet-van-der-plas>> accessed 1 May 2022

2. The Proposed Solution: A litigation Strategy Against Bank Directors

As derivative claims in the EU are rare and not permitted in the Netherlands, the most effective approach is the inquiry proceedings before the Enterprise Chamber within Article 2.8.2. Dutch Civil Code (DCC). As such, the following claim can be brought by, for example, minority shareholders to address mismanagement through interim and final measures:

"The Management and Supervisory board of the respective Dutch bank(s) mismanaged affairs under Article 2:355 DCC by improperly performing their duty of care (Article 2:8 DCC) and to act in the interest of the company and its affiliated enterprises (Article 2:129(5) DCC) because they failed to properly consider the increasing non-financial and financial risks on the long-term success and sustainability of the bank when providing finance to P&P and similar trawler companies."

The Key Argument

As P&P's activities and physical assets are contributing to OBL and climate change, P&P will face transition, reputational and litigation risks as their assets will become stranded due to regulatory, market, and societal shifts. Consequently, P&P's exposure to these risks, as recognised by the Biodiversity Pledge⁸ and the Dutch Central Bank⁹, leads to financial risk for Dutch banks financing them.

Increasing the Chances of the Claim's Success

This claim uses authoritative national soft law, notably the Dutch Corporate Governance Code and the Dutch Banking Code, as well as international legal instruments like OECD Guidelines, to enhance the scope of the intervention.

8 '11 More Financial Institutions Signed the Finance for Biodiversity Pledge' (Finance for Biodiversity, 9 December 2020) <<https://www.financeforbiodiversity.org/11-more-financial-institutions-sign-the-finance-for-biodiversity-pledge/>> accessed 11 May 2022

9 Joris van Toor et al, 'Indebted to nature: Exploring biodiversity risks

Supportive Forces for a Claim Under the Dutch Legal System

Firstly, the stakeholder corporate governance approach and long-term focus for companies in the Netherlands - enshrined in national soft laws and landmark cases such as *ASMI*, *Fortis*, and *AkzoNobel* - show that shareholders in the Netherlands are increasingly concerned about environmental matters.

Secondly, the Dutch legal and social context strongly support initiatives to resolve climate change and sustainability issues, increasing the chance of a successful case. The Netherlands presents strong and increasing public and investor concerns about the ocean as a lowland country.¹⁰ The landmark *Urgenda* case shows that Dutch courts are amenable to the concerns of climate-related litigations.¹¹ As claims against bank directors are rare, there is currently no better avenue for litigation than the Netherlands as a pioneer on environmental decisions.

Thirdly, the nature of the Enterprise Chamber proceedings facilitates the claim with the unique power of its investigators to access financial information – ideally for substantiating the financial link between specific banks and bottom-trawling fishing companies, strong pressure from media attention on such a case, and inexpensive costs for similar interventions in the future.¹²

3. Systemic Effects on Financial Actors and Fishing Companies: A Theory of Change

By targeting bank directors, the decision-making process itself is affected, creating various sustainable systemic effects throughout the financial market. The intervention shifts OBL risks from being understood as an externality to the financial market to being an internalised risk for financial undertakings and transactions.

10 Chuka Nwanazia, 'The effect of climate change on the Netherlands: what's going to happen?' (Dutch Review, 15 March 2022) <<https://dutchreview.com/expat/effects-of-climate-change-in-the-netherlands/>> accessed 29 April 2022

11 J Setzer and H Higham, Global trends in climate change litigation, LSE (2021), 18

12 WJL Calkoen, 'The One-tier Board in the Changing and Converging World of Corporate Governance' (Instituut voor Ondernemingsrecht, nr. 85, Kluwer 2012), section 4.6.3

Addition of OBL to the Pool of Recognised Financial Risks

The intervention will demonstrate to targeted directors how their decisions to finance bottom-trawling companies exposes the bank to financial risks.



In the event of a successful case:

* By conferring direct liability on bank directors for failing to consider sustainability-linked financial risks (namely, litigation risks and nature-related physical, transition, and liability risks) in their investment decisions, directors are forced to reassess their investment decisions to avoid liability.

In the event of an unsuccessful case:

* First, having a claim being heard in court, even if unsuccessful, would establish a legal framework for future similar claims, increasing their chances of success. Moreover, it would also have a significant impact on stakeholders' awareness of the relationship between banks and OBL.

* Second, as a lawsuit or a rumour about a potential lawsuit leads to reputation loss, which could drop the banks' share prices or affect their customers switching to other providers, bank directors would be compelled to avoid OBL-related litigation.¹³



Individual targeted banks' exposure to such risks will be a 'wake-up call' for directors of other banks and insurance companies providing financial services to bottom-trawling fishing companies to adjust their decisions to avoid litigation and nature-related risks and ensure operational efficiency.¹⁴

13 Javier Solana, 'Climate Change Litigation as Financial Risk' (2020) 2 Green Finance 344, 358

14 OECD, 'Biodiversity: Finance and the Economic and Business Case for Action' (2019), 39

External Reinforcements to Responsible Decision-making

- 1) Responsible investment choices and products will be rewarded with enhanced market reputation and increased share prices as they would appeal to investors and customers with sustainable financial preferences.¹⁵
- 2) The intervention could trigger a reaction from insurance companies to raise insurance premia to reflect the increase of litigation against directors¹⁶ which, in turn, is a counter-effect of possible increasing operational costs to the banks. Changes in insurance coverages and bank insurability¹⁷ can trigger negative shocks to banks' stock prices as their investors learn about increasing financial risks resulting from changing insurance coverage.¹⁸ Such coverage changes will eventually make insurance unaffordable for policyholders, leading to litigation and liability costs to be fully borne by banks.

Effects on the Fishing Industry

Stricter financing requirements by banks for fishing companies will have knock-on effects on the macroeconomy, such as disruption of business activities and value chains, stranded assets, and volatility in raw material prices.¹⁹

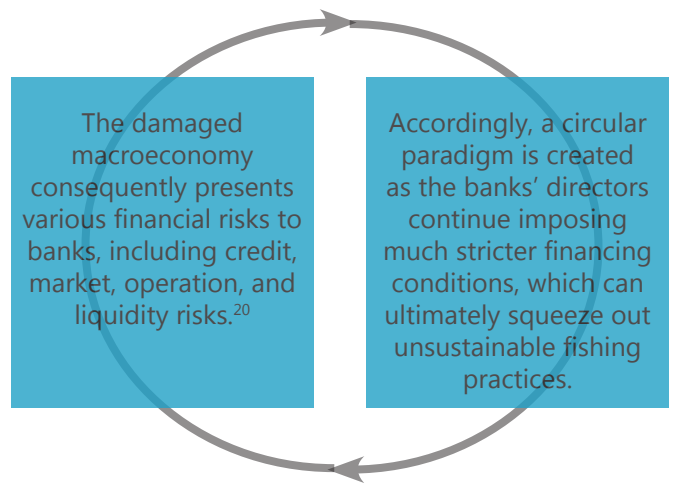
15. Ali Raza and others, 'Customer Expectations of Corporate Social Responsibility Initiatives and Customer Loyalty: A Mediating Role of Service Quality' (2018) 20(6) IOSR Journal of Business and Management 1

16. Solana (n 13), 350

17. Janis Sarra and Elizabeth (Lisa) DeMarco, 'Climate-Related Legal Risks for Financial Institutions: Executive Brief' (CCLI 2021) 2

18. Zhihong Chen, Oliver Zhen Li and Hong Zou, 'Directors' and Officers' Liability Insurance and the Cost of Equity' (2016) 61 Journal of Accounting and Economics 100, 109

19. Toor (n 9), 13



The litigation will provide a successful precedent incentivising further similar claims. An increased number of filed cases against other banks' directors could advance the stated consequences further.

4. Conclusion

As OBL continues to worsen, it is imperative to act swiftly to curtail harmful investments which exacerbate OBL and its impacts on climate change. Implementing the intervention will set an important precedent for assessing directors' duties in biodiversity-related litigation, paving the way for further litigation, and reducing financial flows to the commercial fishing industry - particularly those that engage in overfishing and bottom-trawling activities. The report also seeks to define how much evidence the court requires to prove that investing in trawling companies is a harmful investment for stakeholders.

It should be noted that this intervention was designed based on information available to the authors in May 2022. Parties interested in accessing the full report can contact Dr Javier Solana at (javier.solana@glasgow.ac.uk), who can in turn enable contact with the authors.

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20. Grant Rudgley and Nina Seega, 'Handbook for Nature-Related Financial Risks: Key Concepts and A Framework for Identification' (2021) University of Cambridge Institute for Sustainability Leadership, 26-27

21. Solana (n 13), 360

