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Climate Change Litigation: The Case For Better Disclosure And Targets

October 6, 2021

(***Editor's Note:*** *This paper was authored by members of the Sustainable Finance team within S&P Global Ratings and reflects discussions held by the S&P Global Sustainable Finance Scientific Council on Sept. 9, 2021.)*

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Key Takeaways

- The volume of climate change-related litigation against companies and governments worldwide appears to be growing.
- Climate change attribution science is strengthening and could increasingly contribute to judgments against heavy emitters.
- We believe climate-related judgments may ultimately have financial and reputational consequences for affected issuers.
- While to date climate litigation has not had a material credit impact, it is one of many potential levers that could make transition and physical risk crystalize sooner for issuers globally.
- In this paper, we explore in case study form the current state of climate litigation globally and suggest ways in which the potential financial and reputational risks associated with this emerging issue could be identified and managed.

The Appetite (And Success) For Climate Litigation Cases Is Arguably Growing

As the effects of climate change are realized and the global push toward decarbonization accelerates, various stakeholders--including nongovernmental organizations, investors, and communities--are increasingly turning to litigation according to some scholars on the topic. Indeed, the number of climate change-related court cases filed globally nearly doubled between 2017 and 2020, with more than 1,800 cases filed in 40 countries as of May 2021, three-quarters of which were lodged in the U.S., primarily related to corporate entities and governments (Setzer & Higham 2021). While many cases have failed or been delayed by procedural or COVID-19-related issues, there have been a number of significant rulings that may have wide-ranging implications, including the landmark case in May 2021, Milieudefensie et al., v. Royal Dutch Shell.

Climate Change-Related Court Cases Worldwide Nearly Double Between 2014 And 2020

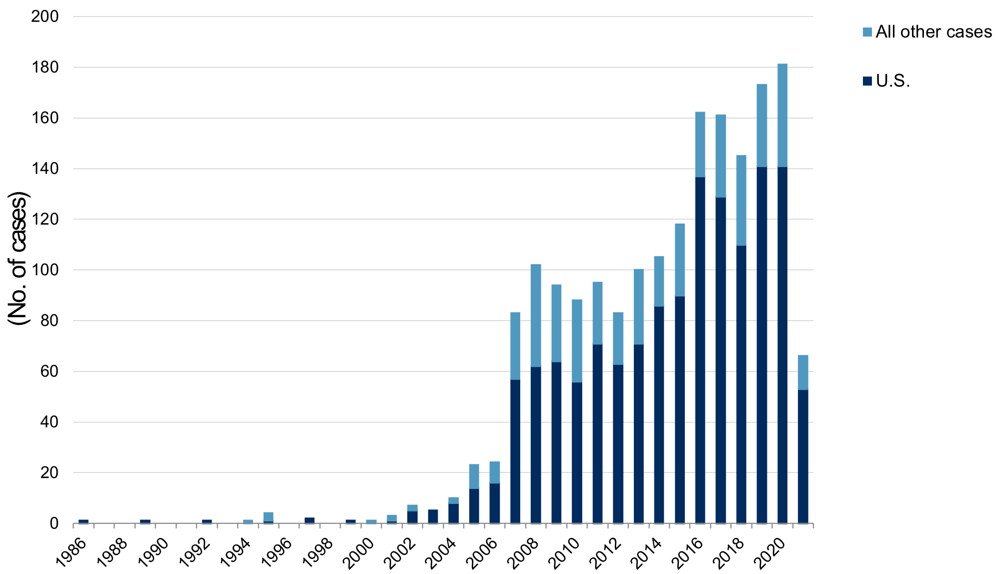

Figure 1.1 in Setzer and Higham (2021), "Global trends in climate change litigation: 2021 snapshot," London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science

We believe the volume of climate litigation may continue to grow, as may the impact of associated juridical decisions in the policies, commitments, finances--and even business models--of defendant organizations. Investors are likely aware of the growing body of climate litigation and how it could affect the value-at-risk in their portfolios. Indeed, court orders for issuers to decarbonize more quickly or large pecuniary awards to pay for adaptation or mitigation efforts could result in greater reputational and financial risk as well as testing the issuers' strategic planning capabilities. That said, the cases are jurisdiction specific, none have yet resulted in awarded damages, and many have yet to be heard on their merits and therefore have outcomes that are inherently uncertain. To help provide some insight, here we explore rulings that could have wide-ranging implications for how different stakeholder groups view the risk of climate change litigation.

Based on our analysis of these cases, we see three key attributes of an entity that could elevate its risk of being exposed to climate change-related litigation:

- Climate impacts highly attributable to the entity's operations.
- Decarbonization plans viewed to be incomplete or inadequate by stakeholders.
- Disclosure practices viewed as insufficient, substandard, or greenwashing.

In the future, prudent risk management could increasingly include analyzing portfolios for issuers whose operations display one or more of these attributes.

Climate Change Attribution Science Grows In Prominence

As climate change impacts emerge, climate change attribution science--which aims to attribute shares of emissions and the associated harmful climate effects to responsible parties with research and modelling--may play an increasingly important role in courtrooms across the globe.

IPCC Projects Extreme Impacts From Physical Climate Risks, Even Under The Best-Case Emissions Scenario

In August 2021, the Intergovernmental Panel on Climate Change (IPCC) released its sixth assessment report (or AR6), opining in stark terms that the world is not moving quickly or effectively toward staving off the harshest impacts of climate change. Among other findings, the report projects that global temperatures will reach 1.5 degrees C above 1850-1900 levels by the year 2040 under even the best-case emissions scenario. Still, this stepwise temperature rise will cause an increase in extreme and unprecedented impacts from physical climate risks, such as storms, heat waves, wildfires, and floods.

Though climate cases typically proceed under a variety of legal theories, the one element that unites many climate cases is causation—in other words, a plaintiff may have to prove the defendant committed harmful environmental acts that had climate-related repercussions, said harm experienced by the plaintiff could not have happened if the climate-related events did not occur, and, such climate impacts were mainly caused by one environmental act and not many.

To date, according to Setzer and Highan (2021):

- 58% of recorded climate cases resulted in some form of climate action, such as improved policies, new climate commitments, or investment toward climate mitigation;
- 32% favored the defendant; and
- 10% had no discernable impact.

Because of increased public awareness of advances in climate science, past cases, even successful ones, have mainly come to fruition because of the now intuitive causal link between high greenhouse gas (GHG) emissions and climate change. Nevertheless, we believe as attribution science matures, the percentage of cases linking defendants to climate change may rise.

Legal scholarship, including a 2020 note in the Columbia Journal of Environmental Law (see Burger et al., 2020), posits that the current state of climate change attribution science is likely sufficient for establishing causal connections for some types of legal adjudications. Yet, climate attribution scientists still face the task of strengthening the causal link between certain actions, such as emissions, to worsened climate change. There is a growing body of scientific literature, including the latest IPCC report referenced above, demonstrating that the physical impacts of climate change, such as warming temperatures, rising sea levels, and the increasing frequency and severity of extreme weather, can be attributed to anthropogenic climate change (that is, caused by human activity)--and we are seeing some of the repercussions from climate change right now.

In a courtroom setting by contrast, attributing past or future impacts from climate change to specific defendants is a complex task because today's science is relatively new and poorly funded compared with other fields of climate change.

Research by the Nature Portfolio demonstrates that more attention and funding to three key areas of research may address the evidentiary shortfall (Smith et al., 2021):

- Attribution of climate change impacts to individual emitters;
- The foreseeability of climate change impacts resulting from future emissions; and
- Research disentangling the social and physical drivers of climate risk.

Nevertheless, as the datasets that support climate attribution science become more robust, and the experience of the science continues to improve, scientists may be more able to definitively tie extreme weather events to climate change such as floods, droughts, and storms. This may encourage future climate-related litigation, one of many levers that could make transition and physical risks crystalize sooner.

Playing The Blame Game

With the world's least wealthy populations also generally the most vulnerable to the impacts of climate change, the ability to sue for damages incurred because of climate-driven events could be one of the few routes available to seek recourse. The UN Human Rights Council estimates that 21.5 million people are displaced by sudden onset weather every year (UNHCR, 2016) and the World Bank estimates that three regions (Latin America, sub-Saharan Africa, and Southeast Asia) will generate 143 million more climate migrants by 2050, or 2.8% of the population of these areas (Rigaud et al., 2018). Currently, there appears to be a lack of formal legal protections and frameworks for climate refugees, potentially leaving litigation as one of the few mechanisms available for them to seek recourse. Thus, we believe that absent formal inclusion in refuge and asylum frameworks more broadly, this stakeholder group may bring more climate change-related lawsuits as attribution science becomes more robust.

Thus, we believe that issuers considered by certain stakeholders to have heavily contributed to anthropogenic climate change through direct and indirect GHG emissions, may face increased exposure to climate change litigation as the science of attribution evolves.

Case Study: Luciano Lliuya v. RWE AG (The Juaraz Case)

In 2015, Saul Luciano Lliuya, a Peruvian farmer who lives in Huaraz, Peru, went to German court to sue RWE, Germany's largest electricity generation company. Mr. Lliuya alleged in his suit that RWE's GHG emissions contributed to climate change, which was causing a glacial melt into a nearby lake that was a threat to the land he (and others) lived on and farmed.

After initially having the case dismissed (in part because the court found that no "linear causal chain" was established between RWE and the threat to Mr. Lliuya's land and livelihood), the case was granted an appeal in 2017. The appeals court deemed the case admissible. It was moved into the evidentiary phase where, among other things, Mr. Lliuya and counsel will have the opportunity to argue causation, presumably using attribution science.

While the case is on hold because of the global COVID-19 pandemic and has yet to be heard on its merits, we believe the issue of whether a private company could be held liable for climate change-related damages suffered in a location and by a plaintiff completely remote from the company's operations or jurisdiction of incorporation is significant and may serve as a bellwether for future litigation. Notably, the plaintiff in this case is claiming only EUR 20,000 in damages, an amount we believe has already been eclipsed many times over by the costs to RWE associated with defending the case likely because of the negative implications that could result from a judgment in the plaintiff's favor.

Status Of Country Efforts Worldwide To Achieve Net Zero Or Carbon Neutrality

Country	Target year
Achieved	
Suriname	--
Bhutan	--
In Law	
Germany	2045
Sweden	2045
European Union	2050
Japan	2050
U.K.	2050
France	2050
Canada	2050
Spain	2050
Denmark	2050
New Zealand	2050
Proposed Legislation	
South Korea	2050

Status Of Country Efforts Worldwide To Achieve Net Zero Or Carbon Neutrality (cont.)

Country	Target year
Ireland	2050
Chile	2050
Fiji	2050
In Policy Document	
Finland	2035
Austria	2040
Iceland	2040
U.S.	2050
South Africa	2050
Italy	2050
Brazil	2050
Switzerland	2050
Argentina	2050
Norway	2050
Colombia	2050
Portugal	2050
Costa Rica	2050
China	2050
Indonesia	2050
Target Under Discussion	
Mexico	2050
The Netherlands	2050
Belgium	2050
Pakistan	2050
Bangladesh	2050
Peru	2050
Ethiopia	2050
Ecuador	2050
Lebanon	2050
Niger	2050
Greece	2050
Romania	2050
Croatia	2050
Myanmar	2050
Sudan	2050
Mali	2050

Status Of Country Efforts Worldwide To Achieve Net Zero Or Carbon Neutrality (cont.)

Country	Target year
Guyana	2050
Belize	2050

Note: This table is not exhaustive. Source: "Net Zero Tracker," The Energy and Climate Intelligence Unit.

In response to the enactment of national targets (or the lack thereof), companies have increasingly adopted net zero targets of their own. The Energy and Climate Intelligence Unit and Oxford Net Zero found that as of early 2021, 21% of the world's largest 2,000 publicly listed companies have set net zero commitments (Black et al. 2021). Notably, this figure includes a number of electric utilities, energy companies, and extractive industrial companies (including Royal Dutch Shell, Rio Tinto, Duke Energy, and the Southern Company). These companies historically, and to varying degrees presently, rely on emissions-intensive products and processes to sustain their operations.

While setting net zero targets is a first step, assessing their efficacy and scope remains a challenge because many targets fail to cover Scope 1, 2, and 3 emissions and often do not cover the entirety of the organization's operations. Furthermore, some organizations, which have made net-zero-by-2050 commitments, do not disclose any interim targets and do not exclude the use of offsets, potentially leading to issues of credibility among investors and other stakeholders (Black et al., 2021).

Collectively, the lack of adequate disclosure and partial net zero commitments may expose companies and countries to legal challenges regarding the effectiveness of their net zero commitments. The case studies that follow describe key litigation pending in European courts that may herald further action against both corporates and sovereigns with incomplete or inadequate net zero targets. Though different in their jurisdictions and underlying claims, the corporate and sovereign cases below and the Shell case above are examples of courts mandating more aggressive emissions-reduction policies. These rulings could motivate similar legal claims in other jurisdictions seeking more aggressive, transparent, and effective emissions-reductions commitments and may serve as an effective check and balance mechanism for determining the efficacy of such commitments.

Case Studies

Corporate: Milieudefensie Et Al., v. Royal Dutch Shell

In 2019, several Dutch NGOs and more than 17,000 Dutch individuals filed suit against Royal Dutch Shell, asking the court to recognize Shell's failure to reduce its GHG emissions as an unlawful act under tort law and to force the company to reduce its CO2 emissions by a net 45% relative to 2019 levels by year-end 2030. At the trial, Shell argued it already had a net zero by 2050 commitment and therefore they believed this action was superfluous.

The court ultimately rejected that argument, describing Shell's transition strategy and associated targets as "intangible, undefined, and non-binding plans for the long term (2050)." A ruling in favor of the claimants was issued in May 2021. The court found that Shell owes a duty of care to reduce its CO2 emissions across its entire global range of activities, including Scope 3 emissions associated with the end use of its fossil fuel product portfolio, and granted the claimants' request ordering the company to reduce its CO2 emissions by a net 45% relative to 2019 levels by year-end 2030. Shell has announced its intention to appeal the ruling, which is binding while on appeal, meaning the company must adhere to the lower court's ruling while the case is pending appeal. While the case is a single judgment of the Hague District Court in the Netherlands (and is on appeal), it serves as an example for legal action against corporates that we believe others may attempt to replicate in more jurisdictions.

Corporate: Australasian Centre for Corporate Responsibility (ACCR) v. Santos Limited

In August 2021, ACCR filed suit against Santos, Australia's largest domestic gas supplier over its claims alleging Santos misrepresents the impacts of its product in contributing to climate change and claims the company's net zero by 2040 plan is misleading. The ACCR alleges in the suit that those claims, made by the company in its 2020 annual report, violate both corporate and consumer law. While this case is in early stages, we highlight it as a clear example of the veracity of corporate net zero targets being challenged in a court of law. We believe an unfavorable ruling for Santos may be incentive for more lawsuits with similar claims in Australia and elsewhere.

Sovereign: Neubauer Et Al., v. Germany

In early 2020, a group of German youths filed suit against the German government challenging KSG, Germany's Federal Climate Protection Act, which targets a 55% GHG reduction from 1990 levels by 2030. The claimants argued that the goal set forth in the law was insufficient to meet the Paris Agreement's goal of limiting the global temperature rise to "well below" 2 degrees C and that failure was a violation of several parts of German Basic Law designed to protect human dignity and rights.

In April 2021, the German Federal Constitutional Court ruled parts of the KSG as incompatible with fundamental rights because the law had not allocated necessary emissions cuts prior to 2030, had not set out emissions-reductions goals beyond 2030, and that therefore meeting the GHG objective would require disproportionate curtailments of the claimants' civil rights. The German legislature was given until the end of 2022 to set provisions for GHG reduction targets for 2031 onward.

The Other Side Of The Coin: Litigation To Stop Decarbonization Efforts

As more countries adopt net zero legislation and further integrate decarbonization into policy and law, certain corporates relying on fossil fuel-intensive business models have begun to push back. At least 13 cases have been identified (excluding U.S. cases) where an entity or its investors have filed motions challenging decarbonization initiatives in direct conflict with their business models (Setzer and Higham, 2021).

Case Studies: Uniper v. Netherlands And RWE v. Kingdom Of The Netherlands

In December 2019, the Netherlands passed a law to implement the phaseout of coal by 2030, with article 2 of the law prohibiting coal-fired electricity generation. Under the law, plants built in the 1990s must close by 2025 and newer plants have until 2030 to cease operations.

German energy companies RWE and Uniper have invested in coal-fired power plants located in the Netherlands. Both filed suits against the government of the Netherlands arguing in part that such a law violates the Energy Charter Treaty, which is designed to protect foreign investments in energy and allows foreign investors to claim compensation through arbitration for unfair losses due to government action.

While both cases were filed recently and therefore have not yet been tried, we believe the outcomes could be harbingers for further climate critical litigation in the region. If the plaintiffs are successful and the court awards them large damages payable by the Netherlands, it could have a chilling effect on other countries looking to pass aggressive decarbonization laws. Conversely, if the Netherlands prevails, we believe it could embolden more laws aimed at decarbonization both in the Netherlands and farther afield.

Transparency On Trial

Investors, regulators, customers, and other key stakeholders are increasingly calling for transparency into companies' and nations' climate-related risks and opportunities. Corporate reporting has increased rapidly in response, with 90% of S&P 500 companies publishing a sustainability report in 2020, up from only 20% in 2011 (Governance & Accountability Institute, 2020). Increasingly, companies, especially in Europe, are using an integrated reporting framework whereby they disclose sustainability-related information with traditional financial disclosures in the same document. The U.S. Securities and Exchange Commission also recently announced a proposal for new rules on mandatory climate change disclosures (SEC, 2021). The trends seem to indicate that the volume of sustainability-related disclosures will likely continue to grow over time. At the same time, stakeholders are increasingly asking for high-quality disclosures that highlight significant financial exposures in the face of climate change.

To this end, there is a growing body of litigation worldwide that cites securities laws in an attempt to compel issuers of securities to be more transparent about climate-related risks and opportunities.

The litigation features a wide range of legal arguments, ranging from, among other things:

- Fraud or misrepresentation that the issuer knew about climate-related risks, and chose not to disclose them because they reasonably believed it would lower the valuation of their securities offerings; to
- Allegations that an issuer has not done enough to measure, and then disclose, its climate risks.

More rarely, but notably, there are even so-called greenwashing claims, which allege that companies' marketing materials falsely paint a rosy picture of an issuer's climate risks and strategic positioning. The case study below highlights an example of legal challenges directly related to an issuer's climate-related disclosure (or lack thereof).

Case Study: O'Donnell v. Commonwealth

In mid-2020, a student at La Trobe University in Victoria filed suit on behalf of other retail purchasers of Australian government bonds seeking an injunction against the promotion of Australian government bonds until the government discloses more information to investors on the risks it faces due to climate change. The suit alleges that the efficacy of the government's response to climate change will have material impacts on the country's economy and thus, its sovereign credit risk and standing in international capital markets. The claim alleges the failure to disclose these risks in the investors' information statement is a breach of the government's duty of disclosure and the misleading disclosure provisions of Australian securities legislation. The claim also alleges two public officers breached their statutory duty of care and diligence (similar to a company directors' duty) in signing off on the allegedly misleading disclosures. While this case is still pending, it is indicative of increasingly high expectations for transparency and disclosure facing issuers regarding climate change-related issues. The relief sought in this case, namely a court injunction against promoting bond offerings, highlights the potential linkage between poor climate-related disclosures and market access. The case is pending.

Asset managers are not immune to claims of greenwashing either. It was recently reported that Deutsche Bank AG's asset management arm, DWS Group, is under investigation by the SEC and federal prosecutors for overstating its ESG and sustainability claims, specifically how it applied its sustainable investing criteria to its investments and exactly what proportion of assets were covered, in practice, by the sustainable investing criteria (Kowsmann et al., 2021). We do not have insights on the status of these reported investigations into DWS Group or their merit, but more broadly, as the number of ESG-labelled offerings from asset managers grows along with demand, we believe that stakeholders such as regulators and investors will continue to demand more transparency around sustainable investing product claims in an effort to separate the substance and impact of products from mere marketing and puffery.

As disclosures by companies, governments, and issuers come under greater scrutiny from investors and other stakeholders, we expect this to become a growing litigious area, especially for those issuers with aggressive climate-related external messaging that could be viewed as misleading. In our view, the adoption of standardized global reporting frameworks for climate-related issues, like the Task Force on Climate-related Financial Disclosures (TCFD), could serve to temper issuers' exposure to litigation of this type. Crucially, standardized reporting frameworks can help stakeholders, such as investors and regulators, understand and comparatively analyze an issuer's governance and strategy framework for managing its climate exposure as well as any quantitative value-at-risk forecasting or scenario analysis that could impact the valuation of its securities.

As climate change continues to gather pace, bringing more extreme and variable (and unpredictable) weather events throughout the globe, we believe a greater number of companies, countries, and issuers could face a rising number of courtroom challenges to their strategies or perceived (or realized) lack of efforts for dealing with climate change. Successful or not, such cases may not only serve to raise awareness about the impacts of climate change but could also shine the spotlight on those with inadequate climate disclosure or operations attributable to climate change, adding strength to global decarbonization efforts.

To date, we are not aware of any scenario where this type of litigation has had a material impact on any issuer's creditworthiness; however, we expect the rise of climate litigation may be one of many mechanisms by which transition and physical risks crystalizes for issuers, carrying with it potential for reputational and financial risks.

Note: The authors would like to acknowledge the contribution of Ellie Mulholland & Alex Cooper of the Commonwealth Climate Law Initiative to this paper.

Related Research And Criteria

S&P Global Ratings research

- Global Reinsurers Grapple With Climate Change Risks, Sept. 23, 2021
- Keeping The Lights On: U.S. Utilities’ Exposure To Physical Climate Risks, Sept. 16, 2021
- The Leaders Climate Change Summit: A Decisive Decade to Cut Emissions, May 4, 2021
- Sustainability-linked bonds in 'rapid growth' as more firms tap ESG debt market, June 23, 2021
- Environmental, Social, And Governance: How Sustainability-Linked Debt Has Become A New Asset Class, April 28, 2021
- Damage Limitation: Using Enhanced Physical Climate Risk Analytics In The U.S. CMBS Sector, Feb. 19, 2021
- Sustainable Debt Markets Surge as Social And Transition Financing Take Root, Jan. 27, 2021
- Environmental, Social, And Governance: Stakeholder Capitalism: Aligning Value Creation With Protection Of Values, Jan. 19, 2020
- Better Data Can Highlight Climate Exposure: Focus On U.S. Public Finance, Aug. 24, 2020
- Scenario Analysis Shines A Light On Climate Exposure: Focus On Major Airports, Nov. 5, 2020
- Water Conflicts are Heightening Geopolitical and Social Tensions Globally, July 7, 2020

External Research

- Burger, M., Wentz, J., & Horton, R. (2020). The Law and Science of Climate Change Attribution. Columbia Journal of Environmental Law, 45(1).
- Energy & Climate Intelligence Unit And Oxford Net Zero (2021) Fifth of world's largest companies now have net zero target (accessed Aug. 19, 2021).
- Governance & Accountability Institute (2021) Russell 1000 Research Report (accessed Aug. 19,

2021).

- U.S. Securities And Exchange Commission (2021) Public Input Welcome On Climate Change Disclosures (accessed Aug. 19, 2021).

Citations (in order of appearance)

- Setzer J. and Higham C. (2021), "Global trends in climate change litigation: 2021 snapshot." London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.
- Burger, M., Wentz, J., and Horton, R. (2020), "The Law and Science of Climate Change Attribution," Columbia Journal of Environmental Law, 45(1), doi: 10.7916/cjel.v45i1.4730.
- Stuart-Smith, R., Otto, F., Saad A., Lisi G., Minnerop, P., Lauta, K., Zwieten K., Wetzer, T. (2021), "Filling the evidentiary gap in climate litigation," Nature Climate Change, 11, 651-655. Doi: 10.1038/s41558-021-01086-7
- Riguaud, K., Sherbinin, A., Jones, B., Bergmann, J., Clement, V., Ober, K., Schewe J., Adamo S., McCusker S., and Midgley A., 2020, "Groundswell, Preparing for internal climate migration," World Bank. https://openknowledge.worldbank.org/handle/10986/29461
- UNHCR, 2016, "Frequently asked question on climate change and disaster displacement."
- London School of Economics. "Climate Change Laws of the World."
- Energy and Climate, Intelligence Unit. 2021, "https://eciu.net/netzerotracker."
- Black, R., Cullen K., Fay B., Hale T., Lang, J., Mahmood S., and Smith S., 2021, "Taking Stock: The global assessment of net zero targets," Energy and Climate, Intelligence Unit and Oxford Net Zero.
- Governance & Accountability Institute (G&A) Inc., 2020, "65% of the Russel 1000 Index Publishing Sustainability Reports in 2019."
- U.S. Securities and Exchange Commission (SEC), 2021, "Public Input Welcomed on Climate Change Disclosures."
- Kowsmann,P., Ramey, C., Michaels, D. 2021. "U.S. Authorities Probing Deutsche Bank's DWS Over Sustainability Claims".WSJ.