

# ESG DISPUTES OUTLOOK 2024

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**London Dispute Resolution and ESG Partner Sarah Ellington and Associate Lauren Satill consider five key trends to look out for in 2024:**

## **1. Increased Focus on Value Chain Due Diligence**

*2024 will see a continued and heightened emphasis on global value chain due diligence, spearheaded by the EU Corporate Sustainability Due Diligence Directive (“CSDDD”) recently agreed by EU institutions. With legislative proposals in some other jurisdictions stalled, due diligence complaints before the OECD National Contact Points are also set to continue, especially against financial institutions which currently fall outside of the scope of CSDDD.*

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## **2. Continued Focus on Advertising “Sustainable” Products**

*Environmental groups are increasingly turning to the courts and other official bodies to challenge whether sustainability claims made by certain industries can be supported. Such industries are still in a transition phase with a growth in production/use planned prior to the wholesale adoption of “greener” technologies and/or where the adoption of “sustainable” practices is adopted only in relation to a small proportion of a company’s business. In 2023, the fossil fuels and airline industry came under particular scrutiny. 2024 may well see a widening of the sectors affected by this trend. The 2023 updates to the OECD Guidelines for Multinational Enterprises contain new recommendations for enterprises to align with internationally agreed goals on climate change and biodiversity and may also perhaps facilitate related complaints.*

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## **3. Growth of Class Actions outside of the UK**

*Over the last decade or so, there have been continued attempts to bring class actions in the UK against UK parent companies relating to alleged human rights abuses within their extraterritorial supply chains and/or operations of their extraterritorial subsidiaries. In many of these cases, the defendant company challenged the jurisdiction of the English courts. In the last couple of years, however, we have seen an increasing number of 'ESG' class actions being brought outside of the UK, a trend which seems set to continue in 2024.*

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## 4. More ESG Regulation

*Whereas a number of litigation cases to date have relied on existing, broad regulation, such as competition rules or consumer protection regulation to argue a breach of legal duties in the presentation of environmental and social claims or the execution of policies, there is an increasing move towards legislative bodies passing more targeted sustainability regulation, which has the potential to make such cases easier to bring in the coming years. This is, of course, in addition to the new civil liability offences to be introduced as part of CSDDD (although these will not immediately apply to financial institutions).*

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## 5. More Settlements

*The research undertaken by the US Sabin Center for Climate Change Law, including through its climate change litigation database, demonstrates that there is still steady growth in the number of "climate change litigation" cases being filed, as well as an increased diversity in the types of claims being filed. We also note that, as available decisions expand (increasing certainty over likely outcomes) and the ability of settlements to address issues more holistically than may be possible with a judicial decision is better understood, more cases are being settled before the issuance of a formal complaint or proceedings.*

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"2024 will see a continued and heightened emphasis on global value chain due diligence."

## 1. INCREASED FOCUS ON VALUE CHAIN DUE DILIGENCE

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## European Legislation

In December 2023, EU institutions reached an agreement on the long-awaited CSDDD. It builds on existing due diligence legislation (for example in France and Germany), widening the scope of due diligence and reporting requirements and, additionally, incorporating a directly enforceable duty to those who may be adversely affected by a failure to follow the requirements of the directive.

It is anticipated that the CSDDD will come into force in 2025 and that it will allow a two year grace period for companies to ensure compliance. This is likely to be a long and complex endeavour for most companies, who will therefore need to start taking steps in 2024 to ensure that they are ready when the time comes to produce their first reports (if they have not already done so).

The EU has also recently released draft value chain guidance to help companies ensure compliance with value chain reporting under the Corporate Sustainability Reporting Directive (“CSRD”). This guidance will not only be helpful for companies to better understand what is necessary for compliance with the CSRD but also help form a good foundation for future compliance with the CSDDD.

## OECD Guidelines for Multinational Enterprises

Financial institutions are (at least for the time being) excluded from the CSDDD requirements. However, we expect financial institutions to continue to be held to due diligence requirements set out in voluntary standards, such as the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. For example, in 2023, a complaint was made to the Swiss National Contact Point (“NCP”) regarding a Swiss bank’s alleged failure to conduct sufficient human rights due diligence into its investment in a hotel chain in Cambodia which had allegedly terminated the employment of a union representative.

The Swiss NCP found there to be a business relationship and direct link between the Swiss bank and a hotel chain that it had invested in, meaning that the complaint is eligible for further consideration, with an investigatory and negotiation phase due in 2024.

## Forest risk commodities legislation in the UK

At COP28, the UK Government set out the details of its plans to ban the importation of products of illegal deforestation by organisations with a turnover of over £50m (including soya, cocoa, palm oil, beef and leather products). As this legislation will only cover the products of illegal deforestation, there has been criticism that it will encourage exporting countries to simply lift legal protections of forests to mitigate the economic impacts. Whilst the Forest Risk Commodity regime was first set out in the Environment Act in 2021, these new details must be set out in the secondary legislation necessary to give it effect. That legislation is planned to be passed early 2024.

## Modern Slavery Act

Whilst in recent years, there have been discussions about amending the UK Modern Slavery Act, for example, to include specific mandatory reporting topics and the ability to issue financial penalties, 2023 saw these discussions sidelined. With elections set to take place in 2024, it seems unlikely any amendments to this act will be seen in the short-term.

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## 2. CONTINUED FOCUS ON ADVERTISING “SUSTAINABLE” PRODUCTS

*Environmental groups are increasingly turning to the courts and other official bodies to challenge whether sustainability claims made by certain industries can be supported. Such industries are still in a transition phase with a growth in production/use planned prior to the wholesale adoption of “greener” technologies and/or where the adoption of “sustainable” practices is adopted only in relation to a small proportion of a company’s business. In 2023, the fossil fuels and airline industry came under particular scrutiny. 2024 may well see a widening of the sectors affected by this trend. The 2023 updates to the OECD Guidelines for Multinational Enterprises contain new recommendations for enterprises to align with internationally agreed goals on climate change and biodiversity and may also perhaps facilitate related complaints.*

**"The fossil fuels and airline industry came under particular scrutiny."**

In 2023, the UK Advertising Standards Authority (“ASA”) found that three airlines (Air France, Lufthansa and Etihad) did not comply with requirements to ensure that environmental claims were clear and supported by a high level of substantiation. These findings followed earlier decisions against Shell, Petronas and Repsol as they had omitted to give a sufficiently balanced account of their position in the green transition journey.

The ASA had identified a number of adverts for further investigation using an AI tool, which searches for online adverts that might break the ASA rules. This proactive approach by the ASA, following its own research into how consumers are likely to perceive environmental messages in 2022, indicate that further similar investigations and findings can be expected to follow in 2024.

The Australian Securities and Investments Commission commenced court proceedings against three funds last year, alleging that their funds damaged market integrity and competition as a result of failing to comply with marketing rules in relation to their “ethical” funds. Continued scrutiny can be expected in 2024, when Australia is also expected to introduce mandatory climate risk disclosure for large companies. The Australian Government has proposed a three-year moratorium on greenwashing litigation brought by private entities to allow companies an opportunity to comply with the incoming disclosure requirements. If this proposal is accepted, greater emphasis will be placed on the role of public entities such as the Australia Securities and Investments Commission in initiating greenwashing proceedings.

Litigation also continues against KLM in the Netherlands, which was given permission to proceed by the Dutch court last year, alleging that KLM’s advertising misled the public by giving the impression that the airline is tackling climate change, despite its plans for an increase in air traffic growth, as well as challenging carbon offset marketing. The case is largely based on EU consumer regulation.

Complaints were also filed against Virgin Atlantic and British Airways at the UK National Contact Point (a government body that has powers to investigate alignment with the (non-binding) OECD Guidelines for Multinational Enterprises). These complaints allege that the airlines are in breach of guidelines that require them to provide adequate, verifiable and timely information on environmental impacts, to continually seek to improve environmental performance and to provide consumers with clear information sufficiently adequate to make informed decisions, as well as breach of a number of other external standards. An Initial Assessment (detailing whether the NCP considers that the complaint falls within its procedural rules) is expected in 2024.

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## 3. GROWTH OF CLASS ACTIONS OUTSIDE OF THE UK

*Over the last decade or so, there have been continued attempts to bring class actions in the UK against UK parent companies relating to alleged human rights abuses within their extraterritorial supply chains and/or operations of their extraterritorial subsidiaries. In many of these cases, the defendant company challenged the jurisdiction of the English courts. In the last couple of years, however, we have seen an increasing number of 'ESG' class actions being brought outside of the UK, a trend*

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The long-standing and ongoing case against Thai sugar company Mitr Phol, alleging involvement in forced evictions in Cambodia, will continue into 2024. The claim has been stayed on a number of occasions to allow the claimants to obtain further evidence, including through applications against a multinational, The Coca-Cola Company, in the US.

In December 2023, the South African High Court refused to allow a case against Anglo American to proceed before the South African High Court, relating to alleged historic lead poisoning in Zambia. The court found that allowing such a historical claim would set an untenable precedent going forward. The claimants are expected to appeal in 2024.

In December 2023, a claim was also filed in the High Court of Kenya against US parent company Del Monte following alleged killings and assaults on pineapple plantations in Nairobi.

A claim was brought against Dyson in the UK last year with respect to allegations of conditions of forced labour occurring in a factory producing Dyson products in Malaysia. As covered in our article on the matter, the court held that, for several reasons, including the novelty of the legal issue and the availability of class actions in Malaysia, the UK was not the appropriate jurisdiction in which to hear the claim. The court's decision was based, in part, on Dyson's undertakings to submit to the jurisdiction of the Malaysian Courts and cover certain costs associated with filing in Malaysia.

The case brought against BHP in the UK courts relating to the Fundão Dam disaster will, however, be heard in the UK. Whilst at first instance, the court decided that the claimants would have sufficient access to remedy in Brazil, the Court of Appeal later held that not all claimants would have sufficient access to remedy in Brazil and the case could therefore go ahead in the English courts. An application for permission for a further appeal to the Supreme Court was rejected by the Court of Appeal in November 2023.

Of course, class actions in parent companies' place of incorporation still persist. 2023 also saw a claim filed with the Superior Court of DC in the USA against US chocolate multinationals, Mars, Mondelez and Cargill for allegedly failing to end child labour on cocoa plantations in Ghana.

Several other class actions based on parent company or supply chain liability also remain ongoing in the UK courts.  
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## 4. MORE ESG REGULATION

*Whereas a number of litigation cases to date have relied on existing, broad regulation, such as competition rules or consumer protection regulation to argue a breach of legal duties in the presentation of environmental and social claims or the execution of policies, there is an increasing move towards legislative bodies passing more targeted sustainability regulation, which has the potential to make such cases easier to bring in the coming years. This is, of course, in addition to the new civil liability offences to be introduced as part of CSDDD (although these will not immediately apply to financial institutions).*

**"There is an increasing move towards legislative bodies passing more targeted sustainability regulation."**

The end of 2023 saw the UK Financial Conduct Authority publish the UK Sustainability Disclosure Requirements and investment labels, following a consultation launched in Autumn 2023. The rules impose minimum thresholds for the use of specific sustainability-related labels (in effect from 31 July 2024) and contain a further proposal for guidance on the anti-greenwashing rule (which remains under consultation until 26 January 2024 and will come into effect on 31 May 2024). The draft anti-greenwashing guidance focusses on a number of aspects which are common across other industry and regulatory guidance, including that claims should be: correct and capable of being substantiated; clear and presented in a way that can be understood; and complete – they should not omit or hide important information and comparisons should be fair and meaningful.

The European Commission published a proposal for a regulation on ESG ratings in June 2023. The regulation is likely to capture ratings produced for a commercial purpose, requiring providers to be authorised by the European Securities and Markets Authority. In broad terms, ratings providers will need to show that ratings are set independently from other business activities and that the individuals setting ratings have the necessary knowledge and experience, as well as keeping specific records and being subject to complaints processes. The European Council and European Parliament are expected to adopt their respective negotiating positions in 2024.

**"There is still steady growth in the number of 'climate change litigation' cases being filed, as well as an increased diversity in the types of claims being filed."**

The European Commission consultation, seeking feedback on potential changes to the Sustainable Finance Disclosure Regulation ("SFDR") closed in December 2023. The consultation focussed on issues such as difficulties with data collection and the need to strengthen incentives for the achievement of positive impacts on social issues. Our participation in discussions, including with National Advisory Boards from various member states, indicates that the outcomes (expected to be published in 2024) will result in more guidance and more support for SMEs, rather than any relaxation of the rules. Where more clarity is provided on application, it is also to be expected that national authorities are likely to be more ready and willing to enforce them.

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## 5. MORE SETTLEMENTS

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We expect this trend to continue further in 2024, the cases and complaints you see reported are the tip of the iceberg. Much more is going on behind the scenes, often resulting in more stringent policies and independent monitoring of progress, with the potential to either ensure issues are swiftly dealt with at an early stage (for example through operational-level grievance redress mechanisms) or to be more easily evidenced in future proceedings.

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Contact the authors if you would like to find out more about getting your business ready for the impact of these developments in 2024 and beyond.

## KEY CONTACTS



**SARAH ELLINGTON**

PARTNER • LONDON

T: +44 20 3314 6317

[SEllington@wfw.com](mailto:SEllington@wfw.com)



**LAUREN SATILL**

ASSOCIATE • LONDON

T: +44 20 7155 2794

[LSatill@wfw.com](mailto:LSatill@wfw.com)

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