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# 2023 ICC Progress Report on Sustainable Antitrust
## *"Taking the Chill Out of Climate Action"*

COP28, ICC venue

Maurits Dolmans
Cleary Gottlieb Steen & Hamilton LLP December 8, 2023

clearygottlieb.com

# Overview

- 2021: The promise of GFANZ and the Net Zero Alliances
- 2022: The backlash – Political (mis)use of antitrust
- 2023: Renewed hope in various jurisdictions
  - A “traffic light system” for Sustainability Agreements
- The uncertain situation in the US and China, and elsewhere
- “No new (unabated) fossil fuel agreements should be allowed
  - Climate change risks are vastly underestimated
  - Benefits of “no new (unabated) fossil fuel agreements” are huge

# 2021: The promise of GFANZ and the Net Zero Alliances

- Collective Action to address market failures and regulatory failure
- Fiduciary duty

**Membership and entry criteria**

GFANZ membership will be channelled exclusively through the entry criteria and process of the **Race to Zero** campaign. For financial sub-sector alliances, entry to

**5. Phase down & out of fossil fuels**

a. Race to Zero notes that “fossil fuel phase down and out” does not refer to a single universal date for all entities and sectors, but should instead be aligned to a global, science-based, just transition. For example, the IEA 2021 Net Zero scenario envisions an immediate halt on building new coal plants and a phaseout of coal-fired electricity generation by 2030 in OECD countries and 2040 in non-OECD countries, as well as no new oil and gas fields.

b. Race to Zero members must restrict the development, financing, and facilitation of new fossil fuel assets in line with appropriate scenarios (see above). **Across all scenarios, this includes no new coal projects**.

https://climatechampions.unfccc.int/wp-content/uploads/2021/04/GFANZ.pdf
https://climatechampions.unfccc.int/wp-content/uploads/2022/06/EPRG-interpretation-guide-2.pdf

# But 2022:  the backlash of Political (mis)use of antitrust

**ERIC SCHMITT**
**MISSOURI ATTORNEY GENERAL**

## Missouri Attorney General Leads 19 State Coalition in Launching Investigation into Six Major Banks Over ESG Investing

Oct 19, 2022, 11:16 AM by AG Schmitt

“The Net-Zero Banking Alliance is a massive worldwide agreement by major banking institutions, overseen by the U.N., to starve companies engaged in fossil fuel-related activities of credit on national and international markets. Missouri farmers, oil leasing companies, and other businesses that are vital to Missouri’s and America’s economy will be unable to get a loan because of this alliance,” **said Attorney General Schmitt.** “We are leading a coalition investigating banks for ceding authority to the U.N., which will only result in the killing of American companies that don’t subscribe to the woke, climate agenda. These banks are accountable to American laws - we don’t let international bodies set the standards for our businesses.”

https://ago.mo.gov/home/news/2022/10/19/missouri-attorney-general-leads-19-state-coalition-in-launching-investigation-into-six-major-banks-over-esg-investing

# 2022 Effects of the antitrust backlash:
# GFANZ dropped Race to Zero, and NZ alliances suffered

FORBES > MONEY

## Insurers Leave U.N. Climate Alliance Over ESG Pushback And Antitrust Claims

intelligent insurer

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## Allianz, AXA, QBE, Sompo resign: industry net zero initiative on brink of collapse

26-05-2023

## ESG Watch: Is it curtains for Mark Carney's green alliance, or just teething problems?

By Mike Scott

April 26, 2023 11:34 AM GMT+1 · Updated 7 months ago

Aa

## GFANZ 'Quiet Quits' Race to Zero

By ESG Investor

28th October 2022

## Mark Carney-led GFANZ Drops Requirement for Race to Zero Commitment for Members

Mark Segal | October 28, 2022

## Insurers flee climate alliance after ESG backlash in the U.S.

By Tommy Wilkes, Alexander Hübner and Tom Sims

May 26, 2023 10:02 AM GMT+1 · Updated 4 months ago

# 2022: Consumers pay the price (instead of the polluters)

## State Farm General Insurance Company®: California New Business Update

State Farm General Insurance Company®, State Farm's provider of homeowners insurance in California, will cease accepting new applications including all business and personal lines property and casualty insurance, effective May 27, 2023. This decision does not impact personal auto insurance. State Farm General Insurance Company made this decision due to historic increases in construction costs outpacing inflation, rapidly growing catastrophe exposure, and a challenging reinsurance market.

Fitch, S&P:

Reinsurance withdrawal

Reinsurers' estimates of their exposure to natural catastrophe risk--and therefore physical climate risk--could be underestimated by 33%-50%, which is 91% of the sector's buffer above the 'AA' capital requirement.

TWSJ: Climate risk is becoming uninsurable. Better forecasting can help.

# ICC 2023 Report:  The trend is improving

# 2023: Renewed hope
# EU Guidelines on Sustainability Agreements

- 519. … individual production and consumption decisions can have negative effects ('negative externalities'), for example on the environment, that are not sufficiently taken into account by the economic operators or consumers that cause them. This type of market failure can be mitigated or cured by collective action, primarily through public policies or (sector- specific) regulation, and secondarily through cooperation agreements between undertakings that promote sustainable production or consumption.
- 520. Where such market failures are addressed by appropriate regulation, for example, mandatory Union pollution standards, pricing mechanisms, such as the Union's Emissions Trading System ('ETS'), or taxes, additional measures by undertakings, for example through cooperation agreements, may be unnecessary. However, cooperation agreements may address residual market failures that are not or not fully addressed by public policies and regulation.

# 2023: Renewed hope
# UK 2023 Green Agreements Guidance

1.8 … the CMA recognises that there are circumstances where collaboration between competitors may be needed to protect or enhance environmental sustainability. Possible examples include:

- where a business that acts first by itself to promote environmental sustainability could sustain a competitive disadvantage compared with its rivals. … for example (i) where an individual business might be disadvantaged by switching to a more sustainable but costlier input if its competitors do not do so, or (ii) where a supplier is deterred from switching its supply to a more sustainable product because customers may not immediately understand or value it, making the risks to a business switching to it alone greater. These are forms of 'first mover disadvantage' and may mean that no business has the incentive to switch without some form of collaboration, resulting in a 'coordination failure' that collaboration could overcome;
- where businesses may individually lack the resources and capabilities to achieve more environmentally sustainable outcomes but could achieve them collectively. …

# A traffic light system for Sustainability Agreements

# Examples of sustainability cooperation -- generally allowed under Guidelines

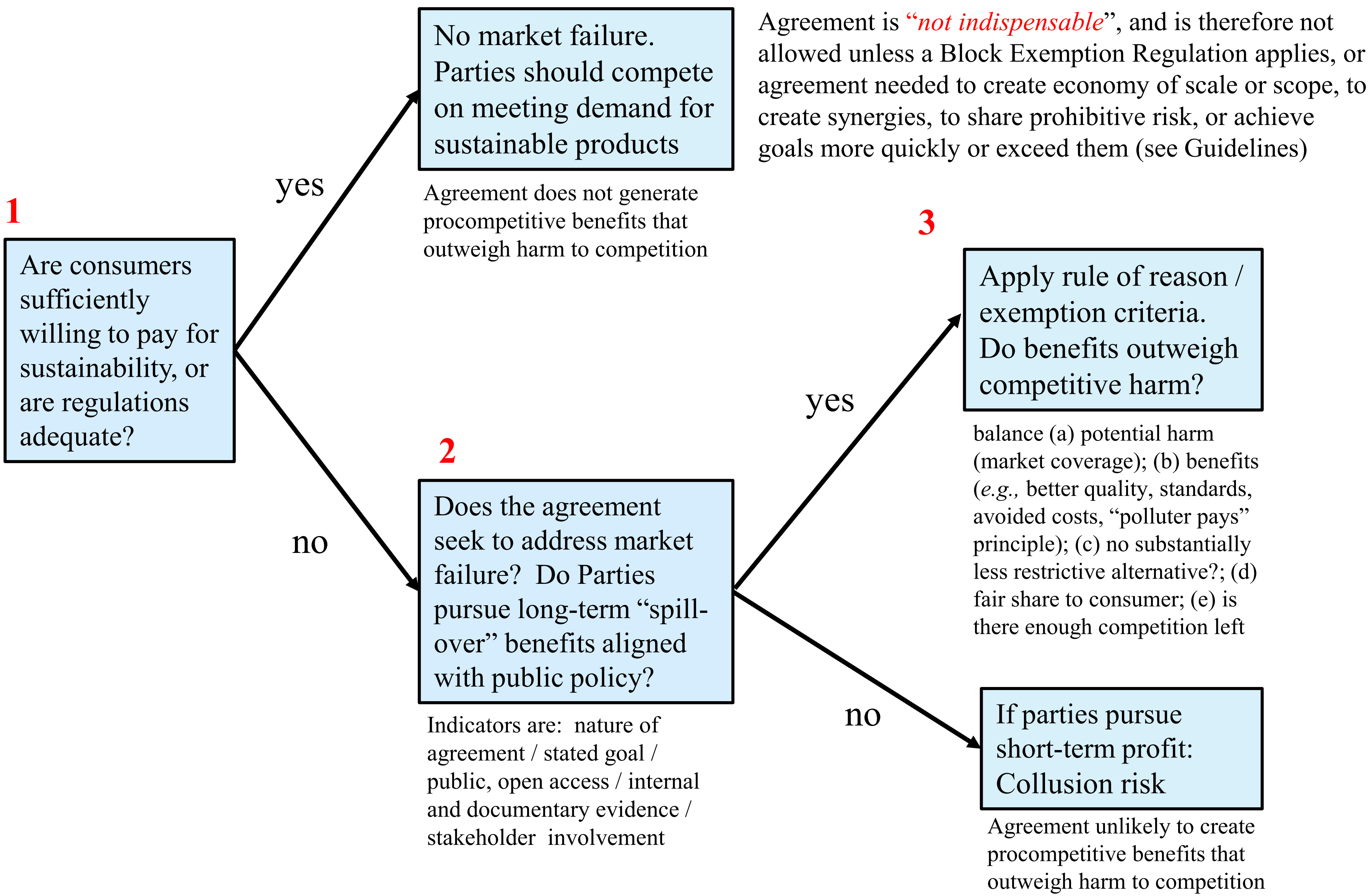
- Coordinated internal initiatives – limiting printing, waste, etc
- Joint lobbying on sustainability / joint policy advertising
- Industry-led training program
- Agreements to comply with laws and regulations
- Voluntary codes of conduct
- Emissions targets leaving implementation free
- Standards meeting "soft safe harbour" criteria
- Objective lists of (un)sustainable practices, suppliers, inputs
- Joint R&D (pre-competitive or within block exemption)
- Activist shareholder coordination (like macro stewardship initiatives) so long as no hub-and-spoke exchange

# Examples of sustainability cooperation that may need *ad hoc* assessment under Guidelines

Agreements to:

- Phase out of unsustainable input / products / practices
- Binding joint codes of conduct for supply chains
- Joint purchasing of sustainable / new input
- Joint production of sustainable / new products
- Activist shareholder joint divestment
- Agreements not to finance / insure high-emissions activities, unabated coal/fossil fuels
  - "no new unabated coal projects"
  - "no new fossil fuel fields"

# Decision Tree for assessing restrictions in climate/sustainability agreements




Maurits Dolmans / Wanjie Lin , Cleary Gottlieb

# Examples of sustainability cooperation -- not allowed (unless exceptional justification)

- Price fixing / output limitations
- Market allocation
- Agreements to pass on cost of emission reductions, or costs of emissions trading rights
- Limiting innovation
- Agreeing not to go beyond existing regulation
- Undermining regulation (*Adblue* case)
- Information exchanges not necessary for legitimate goals (on prices, volumes, future competitive plans, etc)

# What about the US?
# Rule of reason: market failure as justification

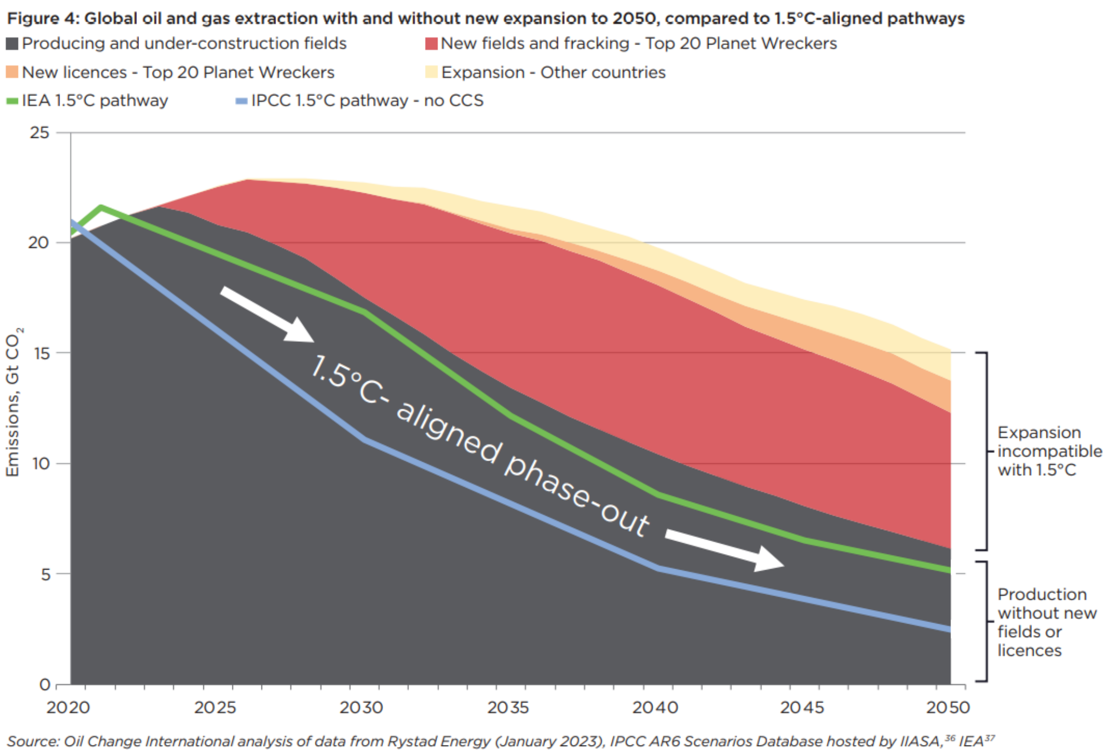
*"procompetitive justification analysis entails three steps. First, the defendant must identify a specific cause of market failure. ... high transaction costs, free-rider problems, downstream market power, information asymmetries, or another well-established cause of market failure ... Second, the defendant must prove that the relevant market actually failed (or would have failed) absent the challenged restraint. ... Third, the defendant must prove that the challenged restraint actually alleviated the market failure."*

Prof. John Newman, "Procompetitive Justifications in Antitrust Law" (2019) 94 INDLJ 501, 506

Dolmans, Hollis, Lin: "Sustainability and Net Zero climate agreements – a transatlantic perspective", [2023] CLPD

## “No New Fossil Fuel Agreements” should be allowed

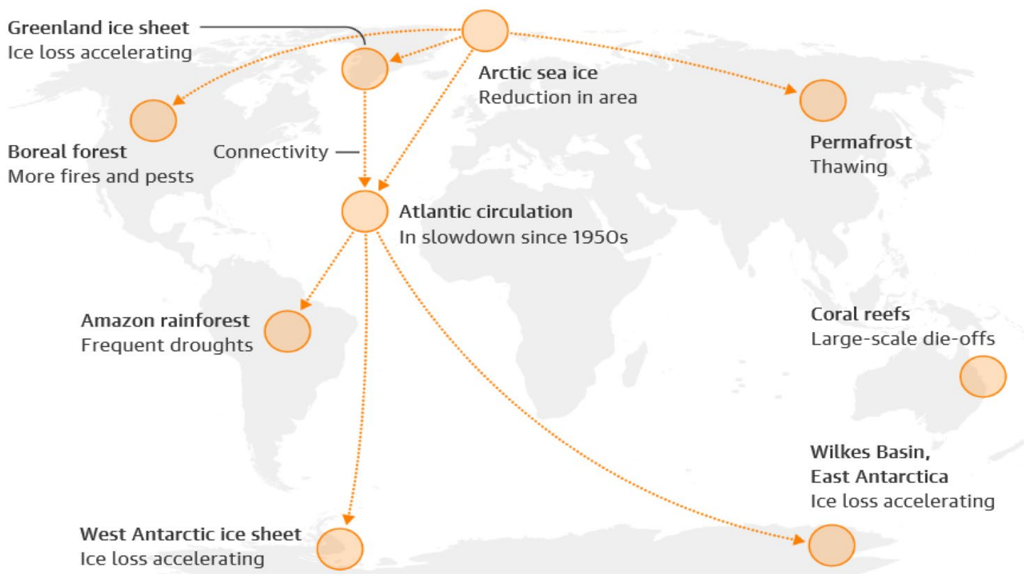
# The carbon budget leaves no room for new fossil fuels




In fact, this is already outdated: See Assessing the size and uncertainty of remaining carbon budgets | Nature Climate Change 30-10-2023

# Climate risks are underestimated

**Scientists' warning: a cascade of climate tipping points is possible**




Guardian graphic. Source: Lenton et al, Nature, 2019

Stiglitz and Stern: "it is generally agreed there is extreme risk — we know there are some really extreme events that could occur — and we know we cannot pretend (i.e., act as if) we know the probabilities. Nordhaus's work doesn't appropriately take into account either extreme risk or deep uncertainty."

Ketcham: Oct 2023: *"when idiot savants do climate economics"*

# Climate risks are underestimated

"current techniques exclude many of the most severe impacts we can expect from climate change, such as tipping points and second order impacts – they simply do not exist in the models. The consequence of this is that the results emerging from the models are far too benign, even implausible in some cases."

" … we expect 50% GDP destruction – somewhere between 2070 and 2090 depending on how you parameterise the distribution. It is worth a moment of reflection to consider what sort of catastrophic chain of events would lead to this level of economic destruction."

UK Institute of Actuaries: *"The Emperor's New Climate Scenarios*"

Pension funds have a fiduciary duty to correct the erroneous predictions they have given their members.

Carbon Tracker: *Loading the DICE Against Pensions*,

# Potential Benefits of “no new coal” agreements are huge

Table 3: The Great Carbon Arbitrage.

| | | |
|---|---|---|
| Present value of benefits of phasing out coal (in trillion dollars) | | 114.04 |
| Present value of costs of phasing out coal (in trillion dollars) | | 29.03 |
| | Opportunity costs | 0.05 |
| | Investment costs | 28.98 |
| Carbon arbitrage (in trillion dollars) | | 85.01 |
| Carbon arbitrage relative to world GDP (%)* | | 1.3 |
| Carbon arbitrage (in dollars) per tonne of coal production | | 136 |
| Carbon arbitrage (in dollars) per $tCO_2$ | | 60 |
| Total coal production prevented (Giga Tonnes) | | 623.62 |
| Total emissions prevented ($GtCO_2$) | | 1425.55 |
| Further temperature increase – on top of 1.1 $°C$ already observed – prevented ** | | 2.14 |

Tobias Adrian, Patrick Bolton, and Alissa M. Kleinnijenhuis, “The Great Carbon Arbitrage”, IMF Working Paper 22/107, May 2022

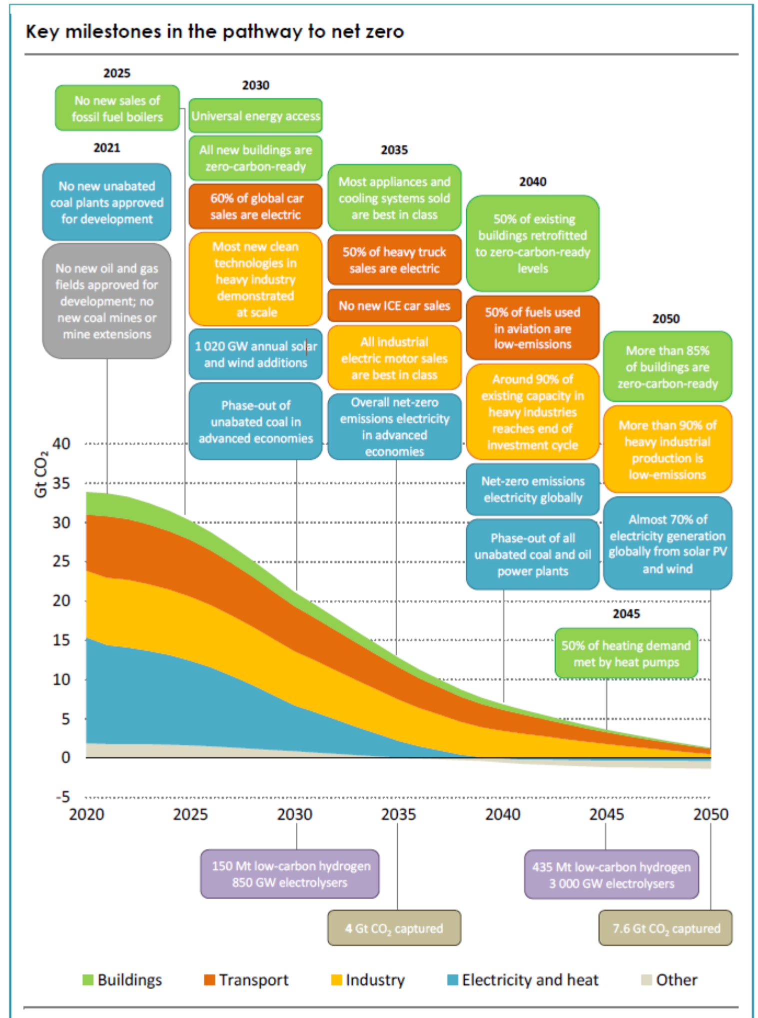
# And we do not need new fossil fuels
# IEA "Net Zero by 2050 – A Roadmap for Global Energy"

IEA key milestone:
"*No new long-lead time upstream oil and gas projects are needed in the NZE Scenario, neither are new coal mines, mine extensions or new unabated coal plants*"

⇒ No or few banks and insurance companies will forego funding or insuring new unabated fossil fuel projects unless all of them do so.

⇒ Net Zero Agreements are necessary to resolve market failure

(May 2021)



# Conclusion

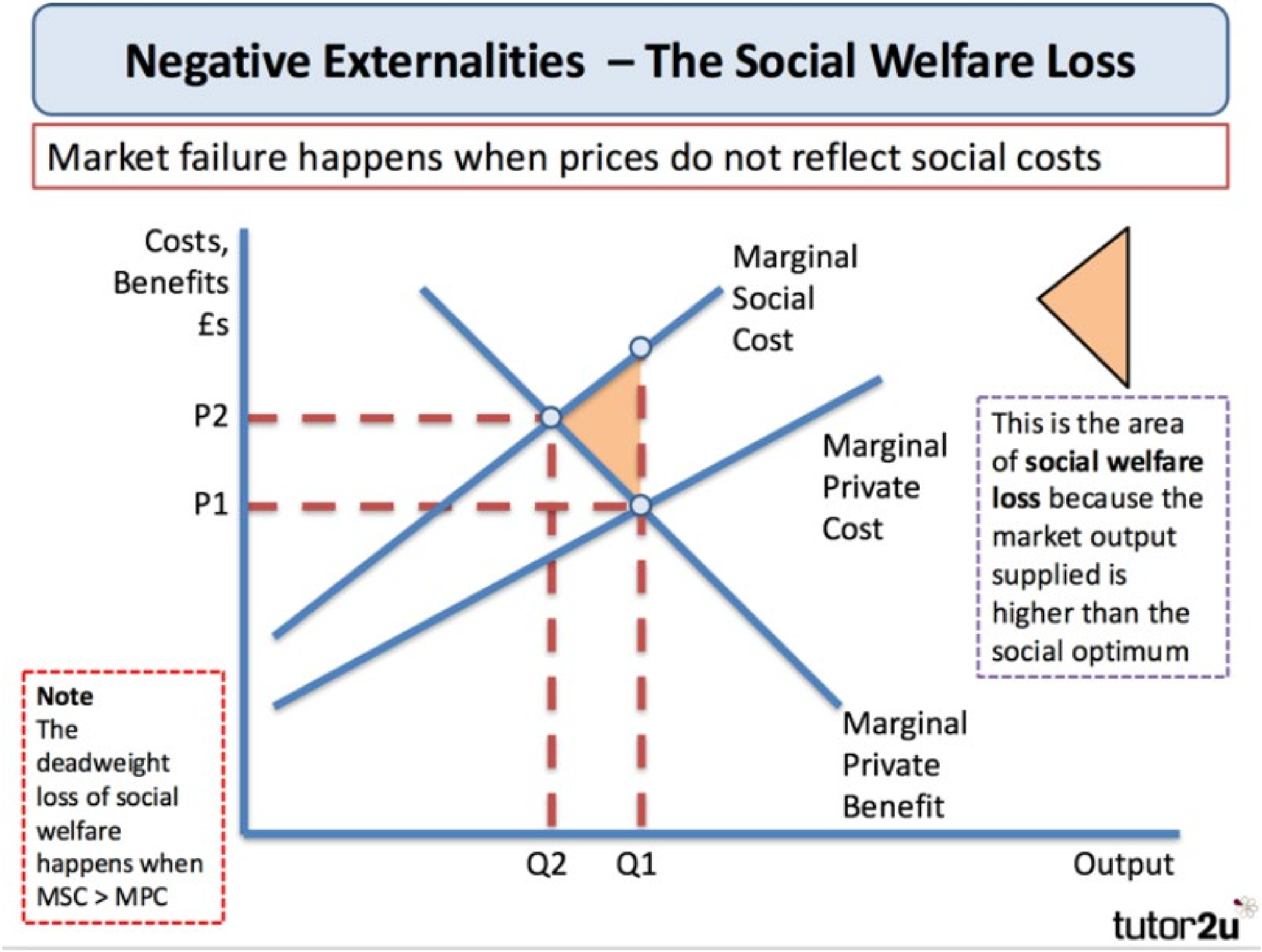
- ICC Report shows antitrust policy is moving towards integrating sustainability goals
  - This enables "local" sustainability agreements in, for instance, EU and UK
- But serious roadblocks continue in the US
  - The law and precedents seem to enable sustainability cooperation
  - But there are political roadblocks and threats
- That hampers worldwide sustainability agreements like "no new coal" agreements
- The damage from new fossil fuels could be disastrous
  - Climate risks have been underestimated
  - Actuarial studies suggest it could be as much as 50% of GDP
- And the benefits of "new now fossil fuel" agreements could be huge
  - A "coal phase-out" could have a net benefit for the world of $85 trillion
  - The costs should not fall on the Global South, and there should be compensation
- We need to advocate in the US and elsewhere to enable these worldwide agreements

# Thank you

# Overview

- Externalities and market failure leading to climate change
  - Cost to society and to our companies
    - Disclosures and reporting
    - Risk for other financed, insured, owned assets
    - Litigation and long-term risk (stranded assets, regulatory risk)
    - Fiduciary duties
- Private sector cooperation as a solution to collective action problem
- Antitrust analysis of cooperation (EU, UK, US)
  - Permitted agreements,
  - Exemptible agreements
  - What not to do
  - The US situation
- Conclusion:
  - cooperation is necessary and, in many cases, allowed

# Cost of climate crisis is not included in price/ROI



- one reason why JFTC may not have seen many cooperation agreements, is because people think that it serves little purpose to ask the JFTC for approval of agreements that are risky in the US.
- This is confirmed by the experience in the EU and UK. The ICC Report on Antitrust and Sustainability updated today gives examples of cases approved by antitrust authorities in Europe. They tend to be "local" agreements, without much if any effect in the US. The more international agreements like the "Net Zero" agreements are not submitted for approval, since companies know that they may be approved in the EU and UK, but could be attacked (for political reasons) in the US.
- It would be great if Japanese policy could more clearly join the trend towards creating more room for sustainability cooperation (subject to conditions of course). If the JFTC joined the momentum, that could help resolve the problem of US antitrust policy. Once that is solved, I think we can see more effective and justified sustainability agreements – also in Japan.
- Do you think the JFTC would be willing to consider further comments along these lines? If so, I would be very grateful if you could keep Simon and me informed of the deadline for comments and the comment contact details.

# "This is a Big Big Deal": Climate Leaders Praise California's Lawsuit to Hold Big Oil Accountable

Published: Sep 18, 2023

NEW YORK – After Governor Gavin Newsom and Attorney General Rob Bonta announced Friday that California is suing Big Oil for more than 50 years of deception, cover-up, and damage, climate leaders across the country have shared their support.

## "The fifth-largest economy on earth is suing the five biggest oil companies for their climate lies.

## This is a big big deal."

*Bill McKibben, environmentalist and founder, 350.org*

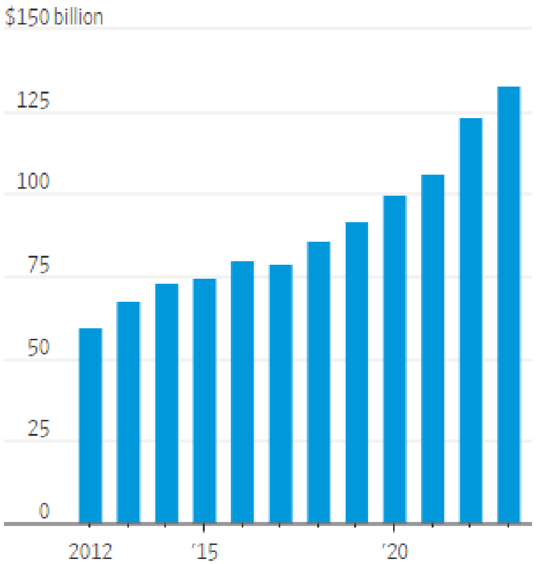
https://www.gov.ca.gov/2023/09/18/this-is-a-big-big-deal-climate-leaders-praise-californias-lawsuit-to-hold-big-oil-accountable/

# First signs of existential risks:

## State Farm General Insurance Company®: California New Business Update

State Farm General Insurance Company®, State Farm's provider of homeowners insurance in California, will cease accepting new applications including all business and personal lines property and casualty insurance, effective May 27, 2023. This decision does not impact personal auto insurance. State Farm General Insurance Company made this decision due to historic increases in construction costs outpacing inflation, rapidly growing catastrophe exposure, and a challenging reinsurance market.

**Global insured average annual catastrophe-loss estimates**

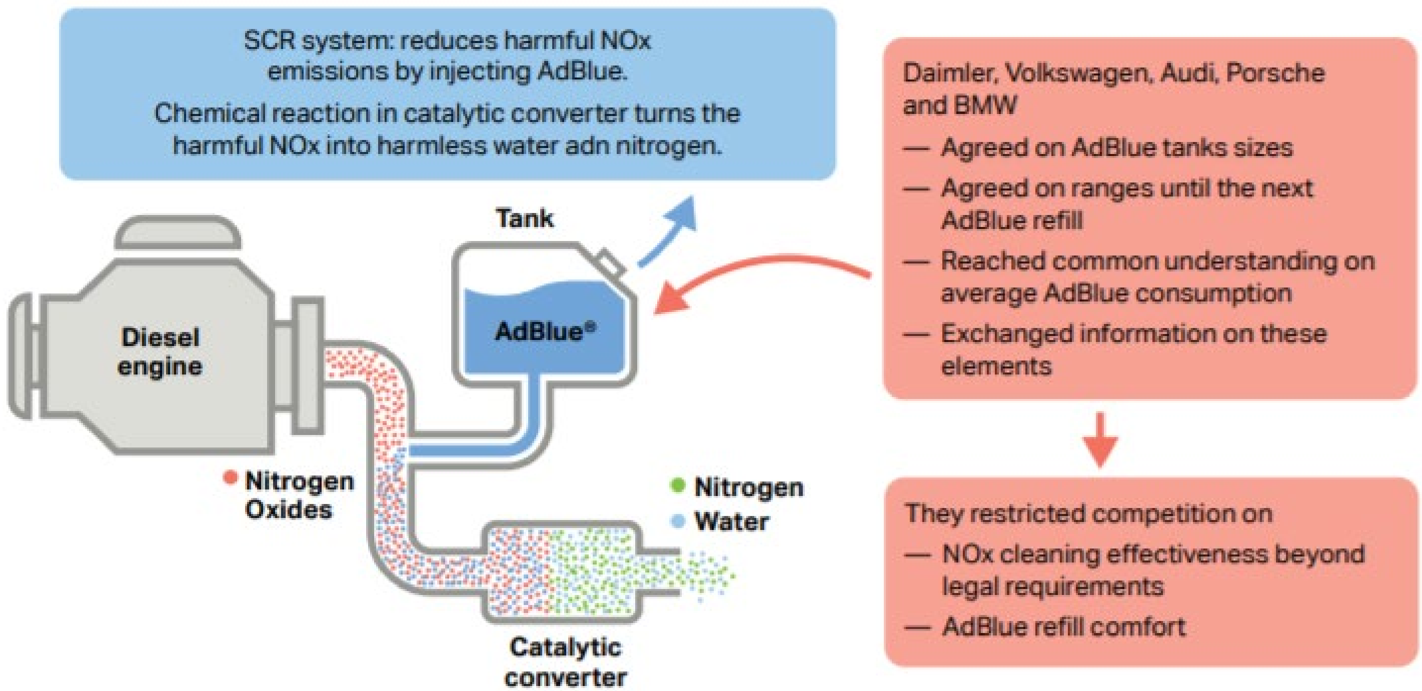



Source: Verisk Analytics

TWSJ: Climate risk is becoming uninsurable. Better forecasting can help (30/10/2023).

# Example of action against greenwashing collusion: *AdBlue*

**Figure 1 - The Commission's Findings In AdBlue Cartel**




*Source: European Commission*

See also "*Colluding Against Environmental Regulation*" (Jorge Ale-Chilet, Cuicui Chen, Jing Li and Mathias Reynaert) TSE Working Paper 1204, April 2021

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Tobias Adrian, Patrick Bolton, and Alissa M. Kleinnijenhuis, "The Great Carbon Arbitrage", IMF Working Paper 22/107, May 2022

# Dutch Corporate Governance Code, principle 1.1.

*The management board is responsible for the continuity of the company and its affiliated enterprise and for sustainable long-term value creation by the company and its affiliated enterprise. The management board takes into account the impact the actions of the company and its affiliated enterprise have on people and the environment and to that end weighs the stakeholder interests that are relevant in this context. The supervisory board monitors the management board in this regard*

See also the Dutch *Shell Climate* case (on appeal).

Also: 2014 Cancun case and Article 2:8 Civil Code

- See also the French Loi Pacte 2019 (Article 1833 French Code Civil); Afep-Medef, Corporate Governance Code of Listed Companies, 2018.
- In the EU, this is reflected in regulation including the Corporate Sustainability Reporting Directive, and the Corporate Sustainability Due Diligence Directive (CSDDD).

# Section 172 of the UK Companies Act 2006

**172 Duty to promote the success of the company**

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

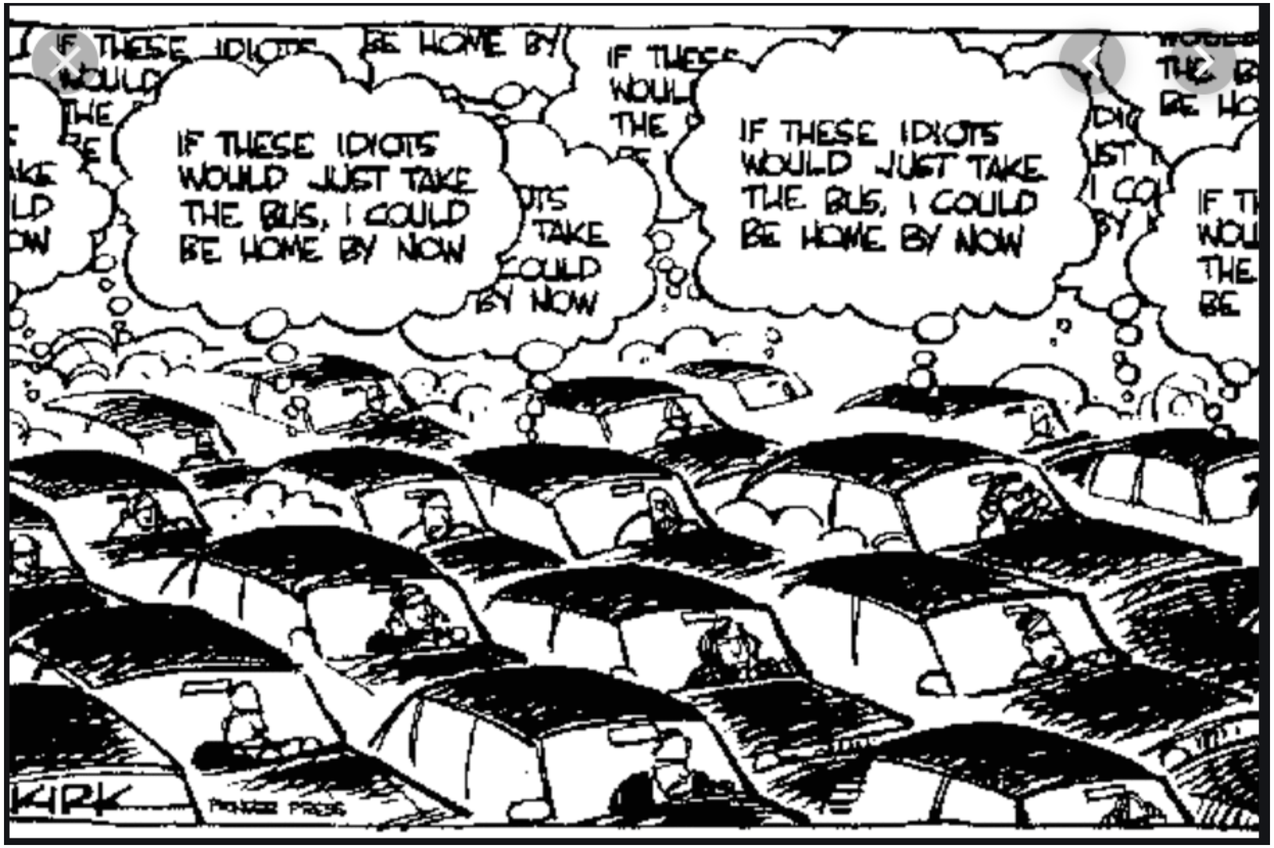
(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

**UK Court (Shell case)**

it is for the directors to determine how best to promote the success of a company for the benefit of its members. "Marginal review" -- *balancing* of multiple factors

# Collective action problems require cooperation




*Ajit Niranjan, The Guardian:*

Banks pumped more than $150bn in to companies running ‘carbon bomb’ projects in 2022