COMMONWEALTH Climate and Law Initiative

Climate and business in the courtroom: International trends in climate litigation against companies, directors and pension fiduciaries

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Diálogos Futuro Sustentavel, Climate & Litigation, Brasília, 9 May 2019

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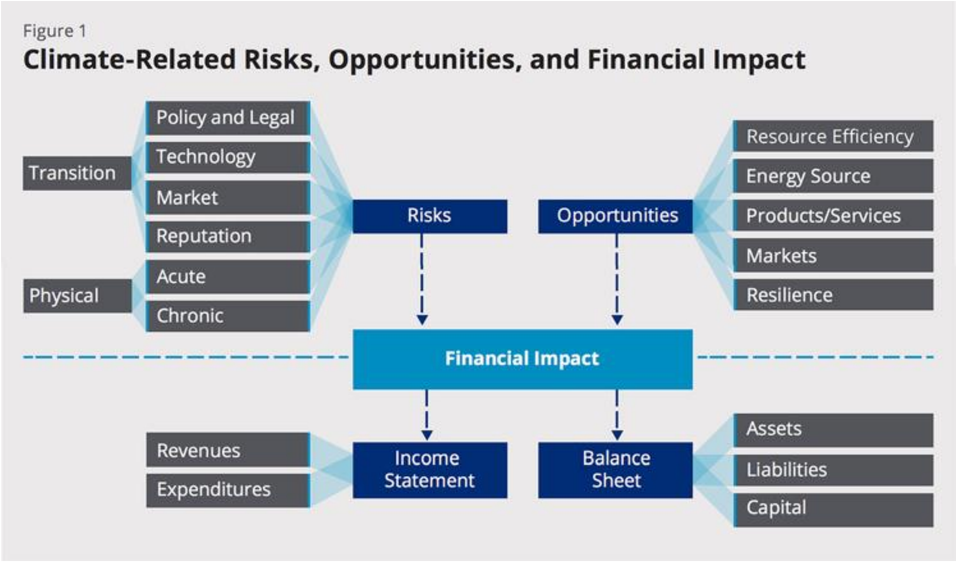
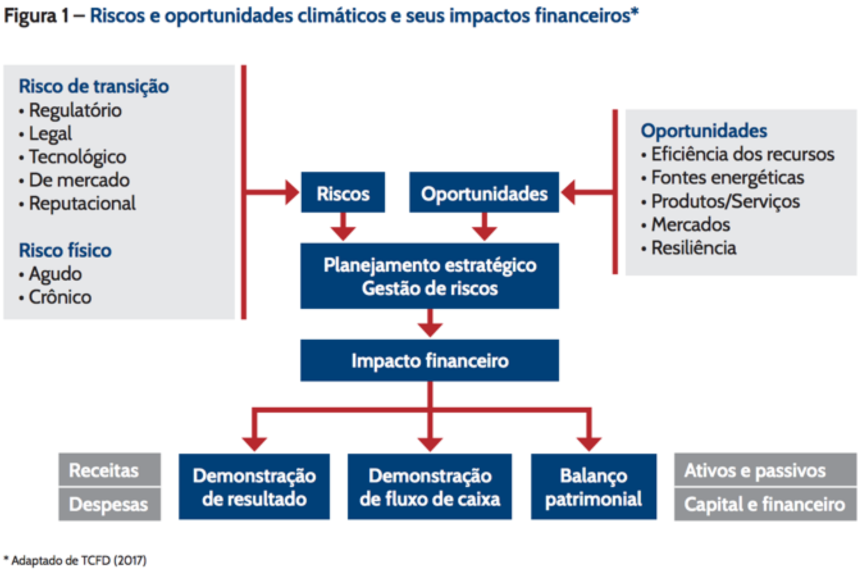
Moving beyond an ‘ethical’ or ‘environmental’ lens

- ➢ The climate science is overwhelming
- ➢ The Paris Agreement sets the goal posts
- ➢ Climate change is a financial risk and financial stability issue
- ➢ Transition risks + physical risks + liability risks





Source: English: TCFD recommendations (2017).
Portuguese: FEBRABAN, Recomendações da TCFD/FSB sobre divulgação de informações financeiras relacionadas às mudanças climáticas (2018).

The direction of travel is clear

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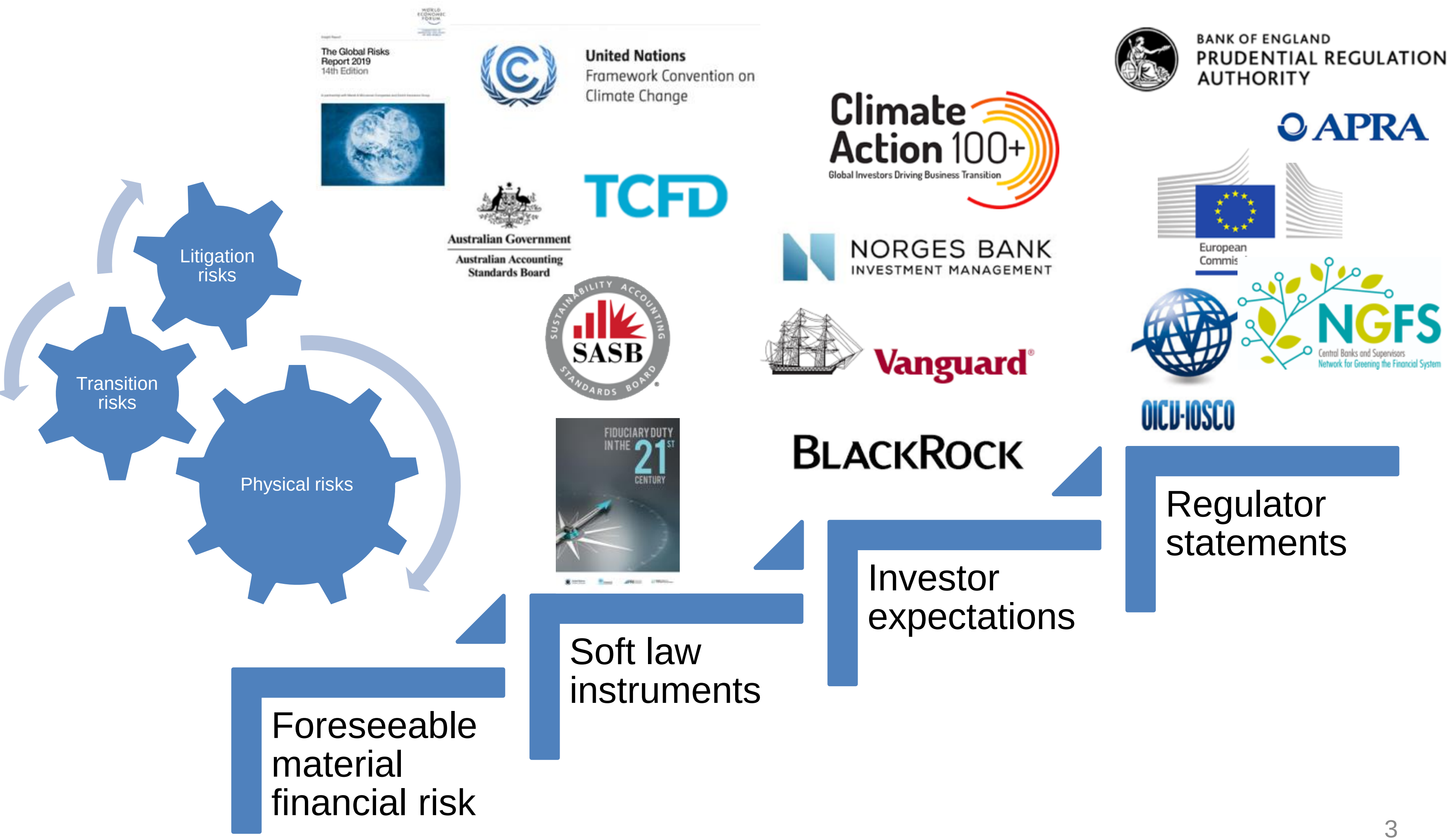
The standards of conduct demanded by directors' duties are flexible in response to changing norms



Directors' duties and climate risk

Duties of trust and loyalty

Duties of care, skill and diligence

Disclosure obligations

High-level proxies for assessing liability exposure

Materiality of the climate risk (industry, geography and peer-relative exposures)

Directors' obligations and defences under law

Procedural and evidentiary considerations

Source: CCLI, Country Reports - Directors' Duties and Climate Risk: Australia, Canada, South Africa, and the United Kingdom (2018)

TCFD recommendations and climate litigation

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Concerns about companies and directors being exposed to liability for TCFD climate risk disclosures are misplaced.

Brazil’s insurance industry - Rio declaration on climate risk transparency (May 2018)

TCFD Supporters in Brazil:

- B3
- BRAM - Bradesco Asset Management S.A. DTVM,
- Brazilian Insurance Confederation (CNseg)
- BTG Pactual S.A.
- Centrais Elétricas Brasileiras S/A — Eletrobras
- CPFL Energia
- Duratex S.A.
- Ekatu
- FEBRABAN - Brazilian Federation of Banks
- Fibria Celulose S.A.
- GranBio Investimentos
- Itaú
- Natura Cosméticos S.A.
- Superintendência de Seguros Privados (SUSEP)
- Vale S.A.

Source: CCLI, Concern’s misplaced: Will compliance with the TCFD recommendations really expose companies and directors to liability risk? (2017)

Example: Fiduciary duty and the TCFD

Australian proceedings in which 23 year old member claims breach of statutory and equitable duties by pension fund trustee regarding climate change risks.

McVeigh v Retail Employees Superannuation Pty Limited [2019] Federal Court of Australia 14 (17 January 2019) Perram J

[6] Presumably, in due course, the Respondent [pension fund] will argue that whether it [invests in businesses with large carbon footprints] or not is not germane to the financial performance of the fund to which he will respond that the fund will not perform very well if its investments are under water.

International trends in climate litigation involving business

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Claims against energy majors are increasing in number and sophistication.

New York, California, Colorado, Virginia and Rhode Island v energy majors (US)

We are now seeing industry against industry.

Pacific Coast Federation of Fisherman's Associations, Inc v Chevron (US)

New York Attorney-General's claim against Exxon Mobil is the 'turning point' for climate disclosure litigation.

New York Attorney-General v Exxon Mobil (US)

But the investors got there first.

Ramirez v Exxon Mobil (US)

The strength of the financial evidence is increasing.

ClientEarth v Enea (Poland)

The first 'climate bankruptcies' are being litigated.

Williams (derivative as PG&E) v Earley (US); *York County v Rambo* (PG&E debt underwriters)

Q&A