
CLIMATE CHANGE LITIGATION

Managing environmental, social and governance litigation risk

November 2022

CLIMATE CHANGE LITIGATION - A GROWING THREAT

Climate change related legal action is a real and growing threat for businesses across Asia Pacific and the world.

According to the Grantham Research Institute, there are currently:

2801 climate laws and policies

and

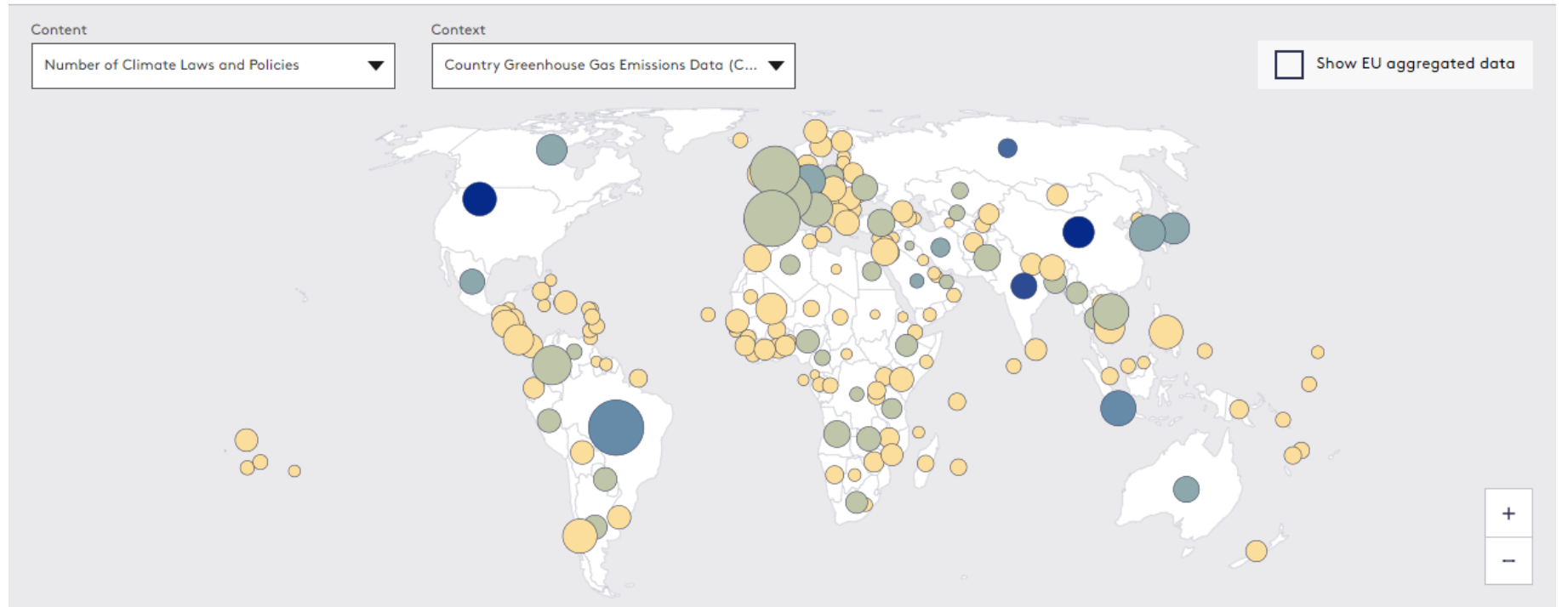
2089 climate change litigation cases.

Businesses across the globe are subject to increasingly stringent disclosure requirements relating to environmental, social and governance issues and will be held accountable for misstatements and false representations.

Claimants are using litigation as a tool to encourage businesses to adopt climate friendly policies and abandon policies that are deemed to be incompatible with climate change mitigation.

The potential cost (both financial and reputational) for governments, businesses, insurers and consumers is significant.

Image: <https://climate-laws.org/>



Number of Climate Laws and Policies



The **size** of the circle represents the number of climate laws and policies. The larger the circle, the higher the number of climate laws and policies. [Grantham Research Institute](#)

Country Greenhouse Gas Emissions Data (CAIT 2016) (MtCO₂e)



The **colour** of the circle represents Carbon dioxide emissions from the use of fossil fuel and the manufacture of cement, land-use change, and forestry (MtCO₂e). The darker the circle, the higher the emissions. [World Resources Institute](#)



THE LITIGATION LANDSCAPE

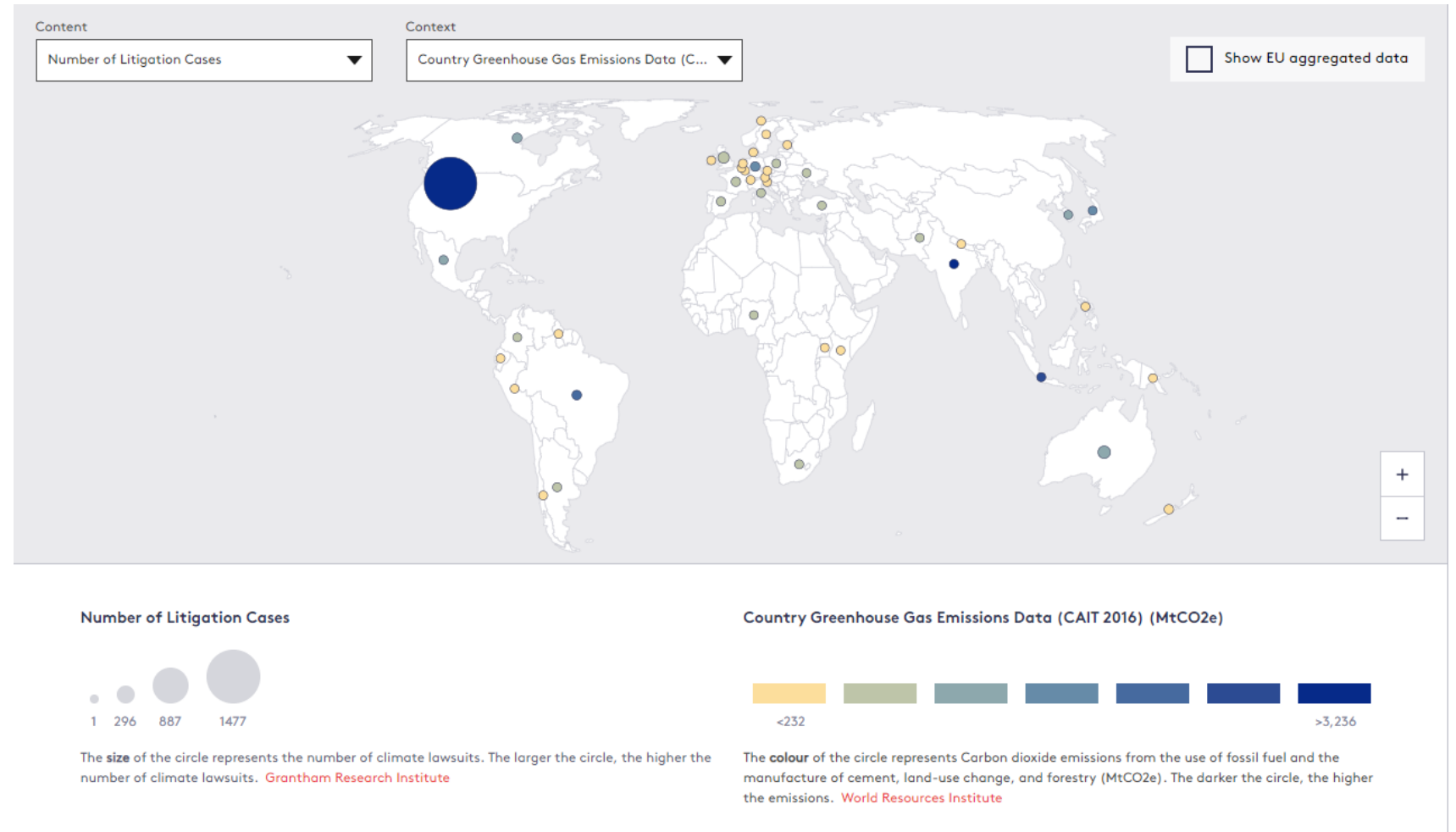
The risk of legal action is multi-faceted. Environmental, social and governance issues are increasingly high profile and have the capacity for global reach.

Legal action has moved beyond the solely punitive or remedial (to right a wrong) but has become strategic (intended to bring about broader change or increase ambition).

Potential challenges include claims relating to:

- fair transition to net zero;
- inadequate/inaccurate disclosure;
- underweight targets;
- failing to deliver results;
- greenwashing;
- inadequate (re)investment;
- (in)direct investment in carbon intensive industry;
- alleged breaches of fiduciary duty; and
- disingenuous business practices.

Image: <https://climate-laws.org/>



A TOOL TO COMPEL COMPLIANCE

Climate litigation refers to using a legal system to compel a corporation, government or other party to take responsibility for climate impact and alter behaviours that the claimant argues are harmful to the climate.

Climate litigation is a subset of environmental litigation which extends to other human activities that harm the environment but that are not specifically climate linked (e.g. damage caused by an oil spill).

The ability for litigation to inform “the outcome and ambition of climate governance” has been recognised by the Intergovernmental Panel on Climate Change Working Group III.

Approximately 25% of all climate change related legal cases were filed between 2020 and 2022. Whilst the majority of these cases (1,426 of 2,002 ongoing cases) were filed in the United States of America, the number of claims brought in other parts of the world is rising.^[1]

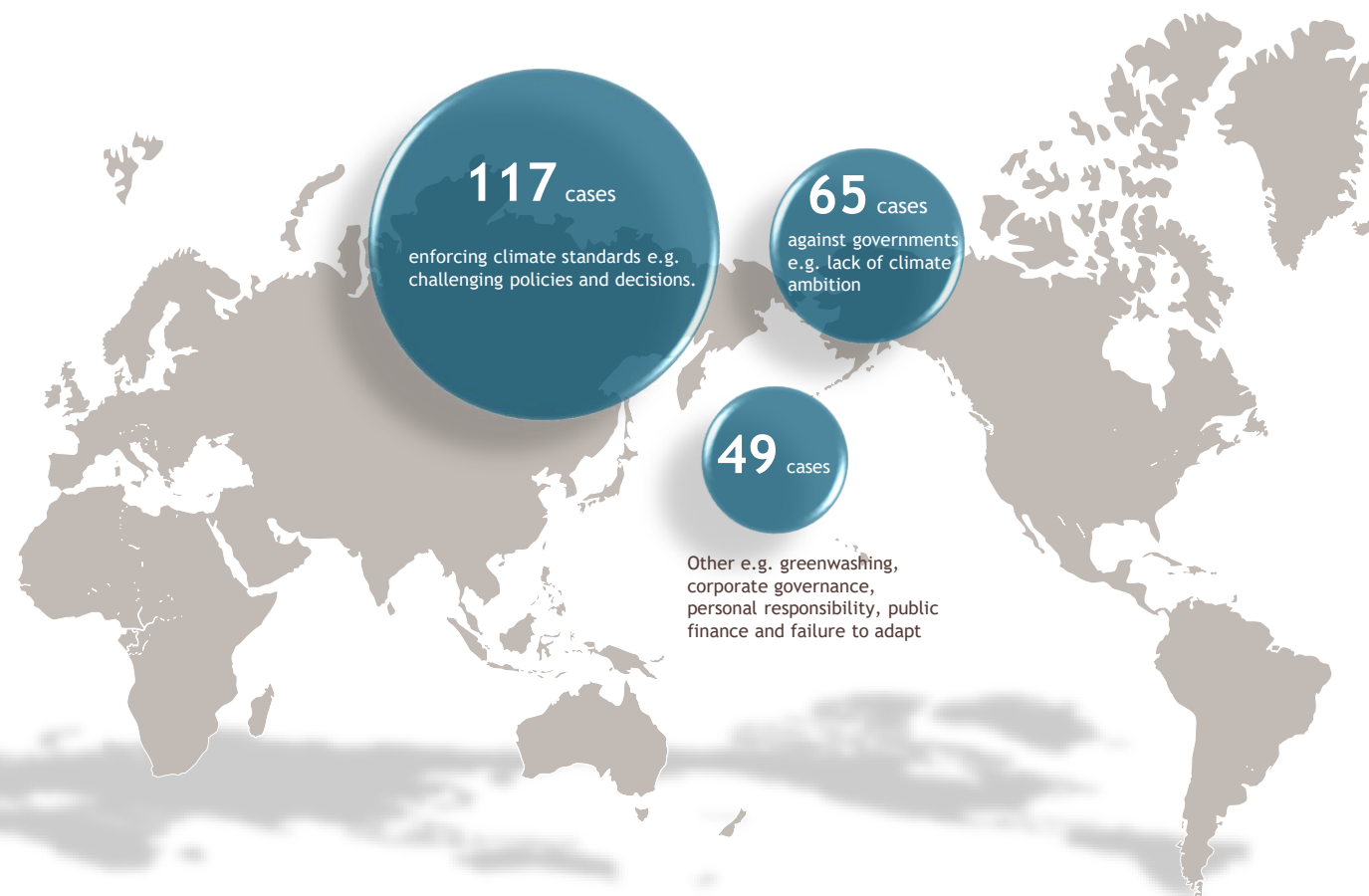
Climate related litigation is not just confined to fossil fuel companies. Other sectors being targeted include agriculture, transport and finance.

Whilst environmental related litigation is both complex and costly, it is not just the outcome that is important. The activism and attention that environmental litigation generates can be just as (if not more) significant as a court judgment for ‘win’ or ‘lose’.



Other than fossil fuels, the sectors most targeted in climate litigation cases are food, agriculture, transport, plastics and finance.^[1]

During the period May 2021 - May 2022...^[1]



[1] Setzer J and Higham C (2022) Global Trends in Climate Change Litigation: 2022 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.



ACCOUNTABILITY, CREDIBILITY AND HUMAN RIGHTS

“...recently filed complaints confirm the shift in emphasis... from cases concerned primarily with the disclosure of climate-related information to cases focused on questions about what prudent financial management means in the context of the transition to a low-carbon economy.”

Setzer J and Higham C (2022) *Global Trends in Climate Change Litigation: 2022 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.

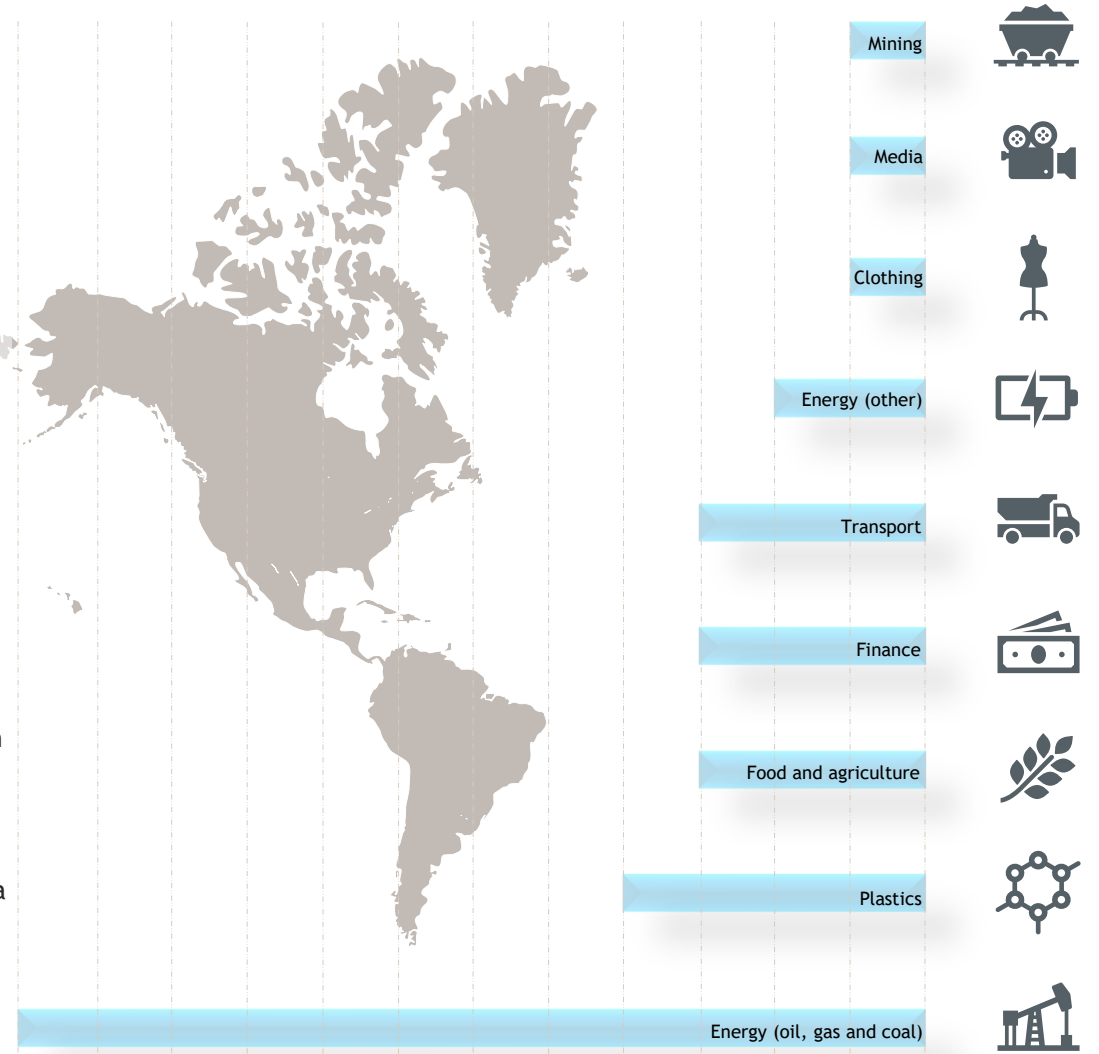
The majority of climate change cases are brought by non-governmental organisations or individuals, whilst the majority of defendants are government departments. There is however a growing number of cases against corporates (and not only in the energy sector).

The sectors most commonly targeted by climate litigation appear to be linked with consumer choices and issues that impact lifestyle or life quality. Increasing inflation, rising taxes and interrupted supplies of goods such as energy and food may further exacerbate this trend.

Over the past two years, the number of climate change cases having a strategic purpose has increased significantly. These cases aim to deliver more ambitious climate-related goals, for example by influencing policies, enforcing standards, challenging the use of public funds or challenging the credibility or accuracy of climate-related disclosure.

Climate change litigants often seek to identify and attribute personal responsibility to key decision makers and managers and hold them publicly accountable for policies, actions and omissions that create or sustain climate risk. In so doing, they aim to encourage others to adopt an active role towards addressing climate risk and implementing effective climate mitigation strategies.

The relationship between climate change litigation and human rights is complex. In October 2021, the United Nations Human Rights Council (UNHCR) passed a watershed resolution that recognised the right to a healthy environment. At the same time, the UNHCR appointed its first Special Rapporteur on the promotion and protection of human rights in the context of climate change whose report (expected in May 2023) is expected to cover themes such as: climate change displacement; loss and damage; fair transition; human rights and climate change; and climate change litigation.



Proportion of climate cases by sector



HOW WILL CLIMATE CHANGE LITIGATION IMPACT ASIA?

Climate change litigation as a class of action is still new. We expect however that climate related legal action will grow exponentially over the coming years, in particular as the United Nations strives to achieve net zero by 2050.

Litigation relating to the environment (including climate change) as a class is special because it has the potential to transcend borders - geographical, legal, political, economic and cultural.

The protection of the environment, climate risk management and climate risk mitigation are issues that have the capacity to impact all people, all over the globe. The reach of key actors such as governments and multi-nationals extends far beyond individual countries or states - not least in terms of cross-border trading and fair transition towards carbon neutrality. Furthermore, as institutions such as the European Court of Human Rights and the International Criminal Court become more involved in climate change litigation, the implications may be wide-reaching.

On what basis are litigants pursuing climate-related legal action?

- A duty of care owed under domestic tort law.
- A statutory duty of care under domestic law.
- Human rights violations, including the right to life and the right to private and family life (Articles 2 and 8 of the European Convention of Human Rights).
- Greenwashing.
- Compensation claims.
- Fiduciary duty / corporate governance.
- Strategic lawsuit against public participation ('SLAPP' cases).
- Fair transition / stranded assets.
- Constitutionality of green taxes.
- Breaches of a country's United Nations national determined contributions.
- Liability for extraterritorial emissions.

Examples of direct and indirect outcomes of climate change litigation

increased scrutiny /
adverse publicity

reputational risk

increased insurance
premiums

project delay /
force majeure

ratings downgrades

key person
resignations

legal costs and
compensation

changes to law
or policy

reduced liquidity /
higher capital costs

supply chain risk

cross-default risk

accounting and
legal disclosure

In May 2021, the District Court of The Hague gave a ground-breaking judgment, confirming that a multi-national energy company had a corporate duty of care and due diligence obligations under national tort law to reduce emissions in line with the Paris Agreement. The decision was also grounded in human rights duties owed under international and European law. The case is subject to appeal.



UNDERSTANDING CLIMATE CHANGE LITIGATION RISK

The volume and range of climate-related litigation is likely to increase significantly as the United Nations targets net zero 2050. The litigant pool is also likely to expand to cover additional sectors and actors (governments, institutions, industry bodies, corporates and individuals).

The scale of litigation risk is fluid and has the potential for global reach. As the myriad of national and international rules and regulations relating to climate change evolves, businesses must adapt to potentially fast-changing regulatory requirements relating to issues such as:

- ❑ regulation;
- ❑ due diligence, disclosure and reporting;
- ❑ third party verification / audit;
- ❑ data and confidentiality;
- ❑ portfolio and asset management;
- ❑ divestment of black, grey and brown assets and interests;
- ❑ force majeure claims;
- ❑ insurance and indemnities;
- ❑ rating, listing and trading of securities; and
- ❑ corporate governance.

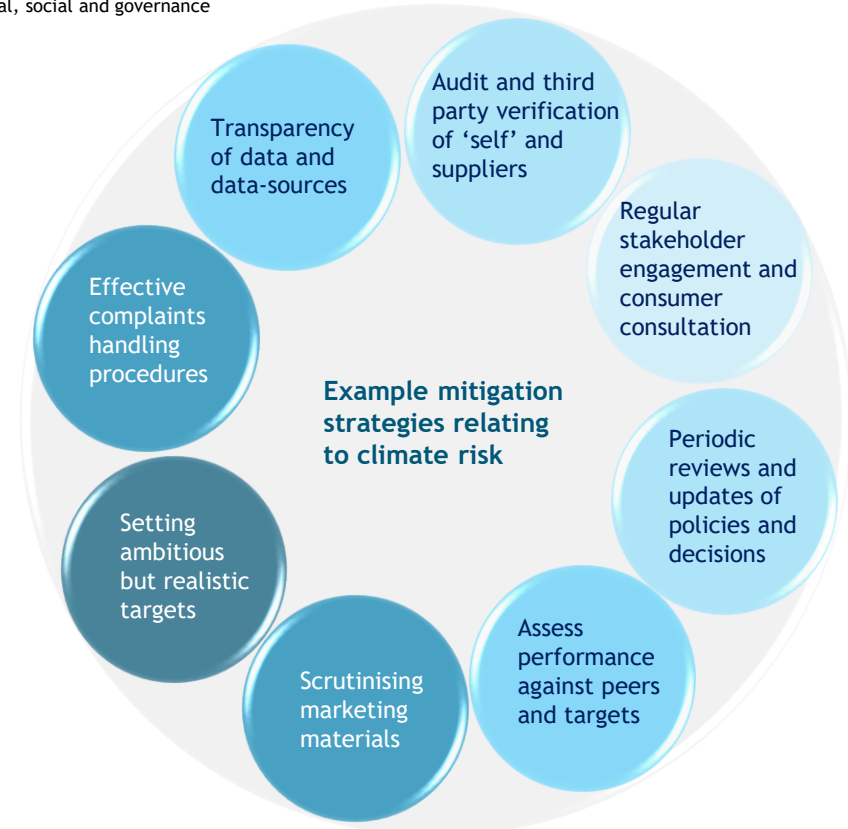
It is not unusual in climate-related litigation for actions to be brought by a claimant group comprising individuals and non-governmental organisations. Collective action has the advantage of spreading the cost of litigating, pooling resources and maximising publicity.

Claimants in climate-related cases are often highly, personally motivated and seek to bring about change not necessarily by 'winning' a legal case in a courtroom but by rallying the court of legal opinion as a means of influencing public and boardroom policies.

But climate-related litigation does not just pose legal and financial risks. Climate change is an emotive and high-profile topic that has the capacity to trigger civil unrest, political instability and economic uncertainty. The resulting turbulence can also take a long time to settle e.g. re-establishing supply chains or repairing damaged infrastructure. Recovering from reputational damage can also be extremely difficult due to social media.

Businesses must implement effective mitigation strategies as part of their day to day operations and implement ESG* stress testing to take into account climate-related risk.

* environmental, social and governance



MANAGING CLIMATE CHANGE LITIGATION RISK

Crucially, businesses must ensure that marketing materials and other communications are not misleading. This message is not new. However, unlike an audit of year-end, financial statements (where established conventions apply as to how information is both presented and examined), the rules and regulations relating to ESG disclosure are still evolving.

When it comes to climate risk disclosure, transparency and clarity are key.

Until such time as standards across different industries and different entities are consistent (or are at least comparative), businesses are recommended to voluntarily adopt stricter standards to the extent that they have the financial means and other available resources to do so.



“Climate-related financial disclosure is of paramount importance for transparent and sustainable capital markets.”

Laura M Cha, Chairman, Hong Kong Exchanges and Clearing Limited



UNDERSTANDING GREENWASHING

In short, greenwashing means making unsubstantiated or misleading claims relating to environmental performance.

Greenwashing does not only mean making a statement that is inaccurate or untrue. Greenwashing can also include selective disclosure or presenting information in a way that is unclear or open to interpretation.

A sub-set of greenwashing is climate-washing. Whilst these terms may be used interchangeably, climate-washing relates to issues that specifically address climate change.

The aim of greenwashing litigation and climate washing litigation is to hold a business (and its management team) accountable for the impact of that business on the environment or the climate.

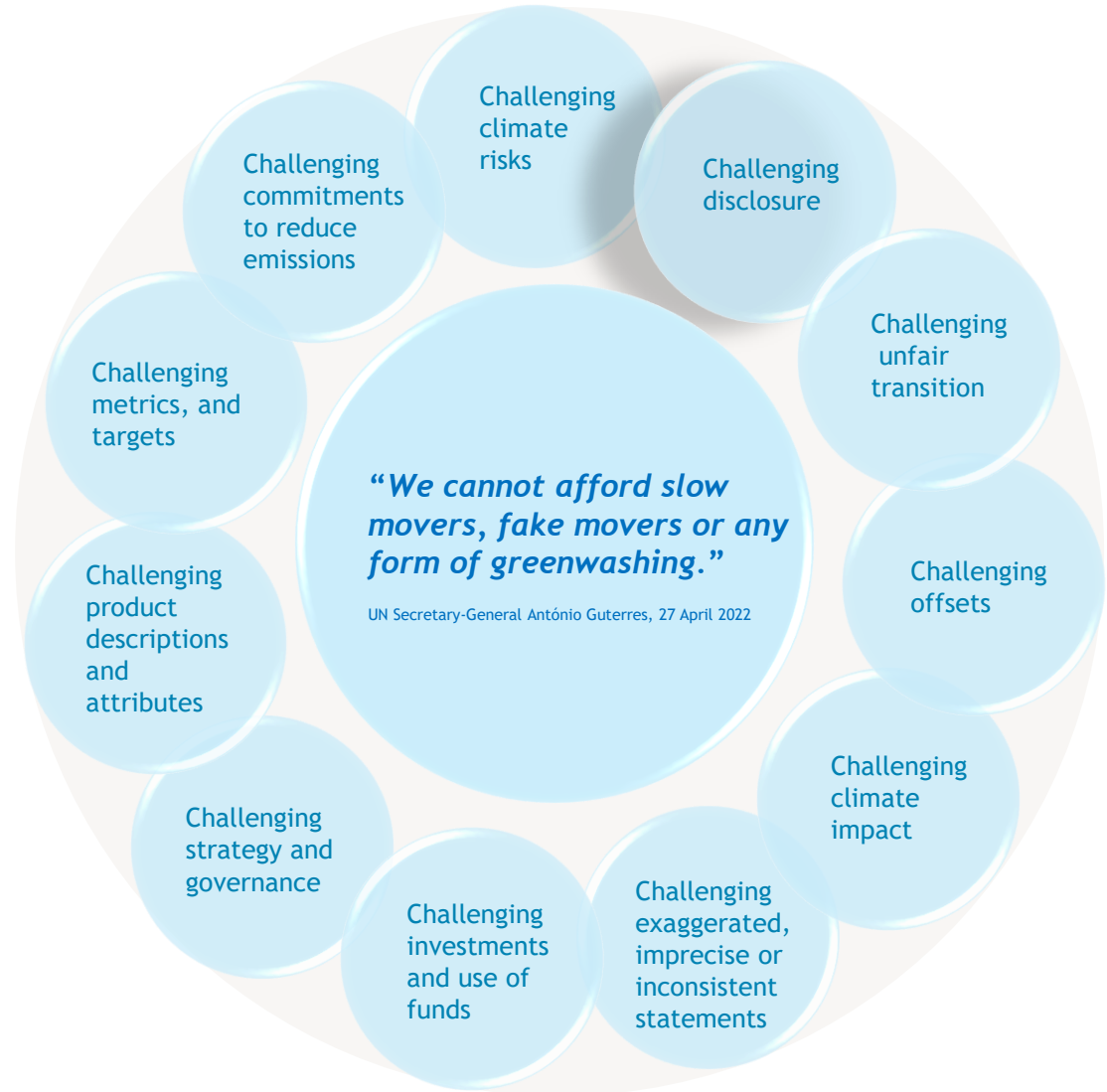
As carbon (and carbon offsets) becomes commoditised, the need for clear, precise and up to date information from credible sources about sustainable performance has never been greater.

Greenwashing and climate-washing cases serve as important checks and balances, on a range of environmental and climate related issues.

Some examples of climate-washing claims are shown in the graphic opposite.

“Governments have the lion’s share of responsibility to achieve net-zero emissions by mid-century. Especially the G20. But we also urgently need every business, investor, city, state and region to walk the talk on their net-zero promises.”

UN Secretary-General António Guterres, 31 March 2022



MANAGING GREENWASHING RISK IN CHINA

“When our government says something, it is something that has to be achieved,”

Wang Zhongying, Deputy Director General, Energy Research Institute of China's National Development and Reform Commission

Sustainable investments and green finance are a key part of China's commitment to peak carbon emissions by 2030 and to reach net zero emissions by 2060. The challenge for China, as for every other country, is to ensure that suitable mechanisms are in place to prevent greenwashing. China's ability to demonstrate that it is achieving its carbon reduction targets depends, in part, upon it developing a system that can accurately and objectively measure and verify the green credentials of a particular enterprise, project or portfolio.

As mentioned in our client alert *“China's National Carbon Market - A Guide for Investors”* dated August 2022, carbon emissions reduction has become an integral part of onshore policy for achieving economic and social prosperity - not only as a means to reduce exposure to climate related shocks and carbon taxes imposed on exports but as a tool to strengthen corporate governance and resilience and deliver economic growth.

Currently, the biggest difference between China and the European Union as regards green taxonomy lies in technical screening standards. With effect from 1 June 2022, that gap narrowed following publication of the Guidance for Enterprise ESG Disclosure by Beijing based think tank, China Enterprise Reform and Development Society developed in collaboration with various onshore companies. Pursuant to such guidance, metrics (118 in total) set under primary, secondary and tertiary indicators, aim to provide a qualitative and quantitative assessment of ESG credentials and performance with a strong focus on regulatory compliance. Whilst it is non-binding, the guidance is expected to appeal to onshore enterprises as a means of accessing favourable financing terms, including lower interest rates available to borrowers under the People's Bank of China's carbon reduction facility.

China's Ministry of Ecology and Environment is increasing efforts to investigate alleged improprieties and audit carbon related data. With effect from February 2022, onshore enterprises that are classified as: (i) emission-control enterprises; (ii) enterprises subject to mandatory cleaner production audits; (iii) listed enterprises; or (iv) bond-issuing enterprises that have previously been found to have violated ecological or environmental laws, must prepare annual and interim environmental disclosure reports which must be uploaded to a formal environmental information disclosure platform.

Whilst there is no formal timetable in place, China is expected to take further steps to eliminate greenwashing, including:

- increasing the minimum threshold of proceeds generated from green bond issuances to be invested in green projects above 70%;
- further revisions of the rules relating to the issuance of green bonds to bring them more closely in line with the updated Green Bond Principles published on 29 July 2022; and
- expanding the scope of mandatory environmental disclosure/reporting requirements.

The 'top-down' regulatory approach onshore is well-suited to effecting change and quickly. Elsewhere an abundance of competing voluntary disclosure standards and definitions on environmental issues has also slowed progress. The Common Ground Taxonomy* is testament to China's recognition that a more standardised approach towards green classification/ratings will help facilitate the capital flows necessary to finance the transition to a low carbon economy.

“We need to ensure net-zero commitments are ambitious and credible, and that they align with the highest standards of environmental integrity and transparency.”

UN Secretary-General António Guterres, 27 April 2022

* The Common Ground Taxonomy (CGT) analyses the similarities and differences between green taxonomy in the European Union and in Mainland China in the context of green objectives, eligibility criteria for green classification and ceiling thresholds for emissions. The CGT aims to ensure interoperability of green taxonomies as between the European Union and Mainland China.



CLIMATE LITIGATION RISKS FOR FINANCIAL INSTITUTIONS

As noted in our previous publications, financial institutions have a pivotal role to play towards delivering net-zero, not least in mobilising capital at scale for application towards climate mitigation projects and in developing markets to trade carbon offsets.

The key question is whether financial institutions are prepared for the risks relating to climate litigation; not only the impact that climate litigation may have on their customers but the impact on the financial institution of being associated with customers that are subject to climate related claims. Such secondary impact is not only financial but reputational and raises questions about the suitability of the policies that financial institutions have in place and the robustness of internal compliance and risk management. Regulators, stakeholders and customers have little tolerance or patience for financial institutions that (knowingly or unknowingly) fail to spot the warning signs (even if they can only be seen clearly with the benefit of 20:20 hindsight).

Examples of actions that financial institutions can take to mitigate their exposure to climate related risks:

- keep ESG policies under review and regularly update them;
- actively review portfolios from a climate risk perspective;
- seek to divest potential climate related exposures;
- review insurance policy coverage in relation to climate related losses;
- re-evaluate credit ratings and risk weighting criteria to take account of climate related risks;
- re-evaluate pricing methodologies to take account of climate related risks;
- keep Scope 3 emissions under review and ensure that climate related disclosures are accurate and regularly updated;
- align climate risk management and reporting practices with recommendations published by the Task Force on Climate-related Financial Disclosures;
- assess the extent to which there is scope to enter into new climate positive/mitigating customer and supplier relationships
- ensure internal policies are regularly updated to prioritise climate positive/mitigating outcomes;
- take into account climate related issues when acting as trustee and when selling or promoting financial products or dealing with intermediaries;
- recognise that exposure to climate related risks is not necessarily limited to compliance with applicable laws and regulations but also to ‘softer’ obligations such as those arising under international treaties; and
- prepare for increased scrutiny from regulators, stakeholders and customers and the requirement to objectively justify climate related disclosures, policies and decisions.

“If banks do not meet the targets they have announced or follow the climate strategy they have communicated, they expose themselves to litigation and reputational risks.”
“The threat of legal cases following greenwashing must be taken seriously,”

Keynote speech by Anneli Tuominen, Member of the Supervisory Board of the ECB, at the 9th Conference on the Banking Union - 22 September 2022



THE ROAD AHEAD...

The majority of climate-related claims,^[1] including those that seek to challenge the green credentials of a business, never reach the substantive phases of the judicial process. Potential claimants face a number of barriers, not least the cost associated with bringing an action.

As the world rallies to achieve net zero, the scrutiny relating to green claims and green ambitions will continue to intensify. As a result, the reputational and financial risks associated with greenwashing will also increase.

Support for climate action requires a robust accountability framework aligned with best practice. Whilst the transition to a carbon neutral economy must be implemented fairly, commitments to reduce carbon emissions should be ambitious. Commitments that lack ambition and claims that are misleading or untrue will be held to account. Businesses will also face mounting pressure to justify pricing and profit margins.

Following the landmark resolution of the United Nations Human Rights Council that recognised the right to a healthy environment, increasingly sophisticated and organised groups of claimants will push the boundaries of international laws, including on the grounds of human rights. Regardless of whether the courts rule in favour of such claimants, the effectiveness of their strategy as a means to influence policy and galvanise public interest has already been seen. See opposite for some examples.

Whilst legislators and regulators grapple to strike the right balance, non-governmental organisations, investors and consumers will continue to apply pressure on businesses to reduce emissions and to account for their actions and inactions. In particular, we anticipate an increase litigation relating to personal responsibility (emanating from either alleged breaches of statutory or fiduciary duty, or from the tort of negligence), emissions removal and biodiversity.

When it comes to managing climate change litigation risk, voluntary adherence to environmental, social and governance best practice is the only way to stay ahead of the curve.

“Greenhouse gas emissions keep growing. Global temperatures keep rising. And our planet is fast approaching tipping points that will make climate chaos irreversible.”

United Nations Secretary General Antonio Guterres - COP27 United Nations climate summit, November 2022

Examples of climate change litigation cases that have the capacity to influence decision-making without a full hearing

Stop Cambo - a challenge against the approval of a new oilfield. After the filing of the case, a major fossil fuel company and a major private equity sponsor withdrew from the project, citing weaknesses in the economics.

SkeenaWild Conservation Trust v. Government of Canada - a challenge against the approval of a liquified natural gas project. After the filing of the case, a major fossil fuel company withdrew from the project, citing changes in market conditions.

Kang et al. v. KSURE and KEXIM - a challenge by indigenous people of the Tiwi Islands against a new marine pipeline proposed to run through a protected marine habitat. After the filing of the case, Kexim reported delays to its decision-making process as regards the project.

[1] Setzer J and Higham C (2022) Global Trends in Climate Change Litigation: 2022 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



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