



## Climate litigation

Key concepts, risks and compliance strategies

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# Introduction

Climate litigation cases have more than doubled since 2015, bringing their total number to [over 2'200 worldwide](#). Most claims are brought against governments, but there is a recent rise in cases brought against companies (including financial institutions) and their directors. In this report, we unpack the key concepts necessary to explain climate litigation and enable organisations to integrate climate and sustainability into their risk management and legal compliance strategies

## Understanding climate litigation

Climate litigation takes different forms. Empowered by the developments in climate attribution science, availability of funding, evolving regulatory standards, increasing climate commitments and awareness, concerned citizens of all ages are taking judicial action to advance the content and application of climate law.

### Definition

Cases brought before administrative, judicial and other investigatory bodies, financial supervisory authorities, and ombudsman schemes that raise issues related to climate change

### Greenwashing

Cases may be directly linked to the respondent's actions and behaviour, or may focus more indirectly on their published climate-related information, with the respondent being sued for failure to disclose information or misleading or exaggerated statements (i.e. greenwashing).

### Types of litigants

Cases can be brought by governments, businesses, NGOs or individuals; and they can be brought against governments, corporations or their directors.

### Direct or Indirect scope?

Climate change may be central to the case or incidental in a case the primary target of which is, for example, air pollution, deforestation, or land conversion.

### Motivations

Cases can pursue private interests (of investors or customers, for instance), or constitute strategic litigation designed to advance climate policies, drive change by key actors, and influence public debate.

### Risks or Impacts?

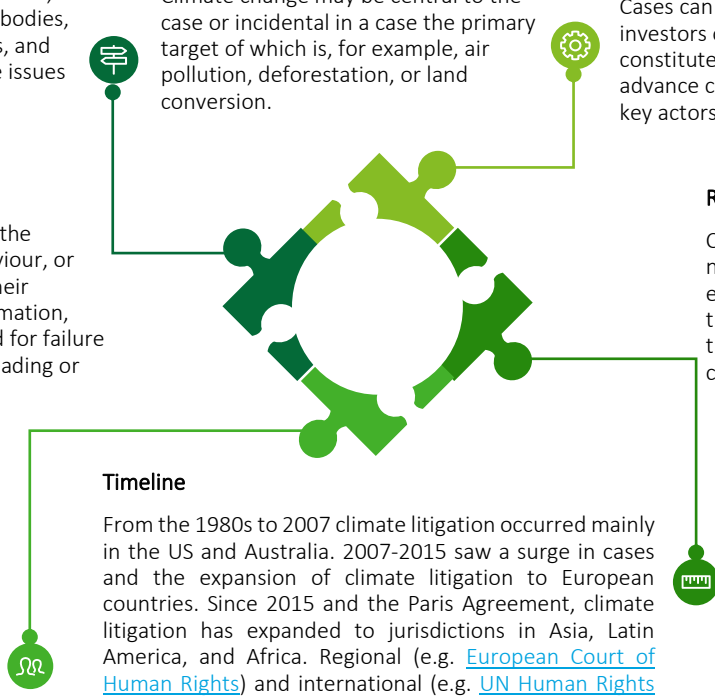
Cases can argue that the respondent is neglecting either the risks they are exposed to because of climate change, or the direct and indirect external impacts that the respondent itself has on the climate and the environment.

### Timeline

From the 1980s to 2007 climate litigation occurred mainly in the US and Australia. 2007-2015 saw a surge in cases and the expansion of climate litigation to European countries. Since 2015 and the Paris Agreement, climate litigation has expanded to jurisdictions in Asia, Latin America, and Africa. Regional (e.g. [European Court of Human Rights](#)) and international (e.g. [UN Human Rights Committee](#), [International Court of Justice](#)) bodies have also been receiving claims.

### Ex post or Ex ante?

Cases can be lodged before a certain event to prevent an action (e.g. building new fossil fuel infrastructure), or after the event to seek changes and reparations.



## Key concepts – unpacking important terms

### The Polluter Pays Principle (PPP)

- Legal action to protect the environment has a centuries-long history. Cases relating to nuisances of noise, waste, waterways, or air pollution are the antecedents of climate litigation, establishing the PPP.
- The PPP underscores liability for the harmful consequences of lawful polluting activities. It has inspired decades of environmental rule-making, according to which the polluter had to pay compensations.
- Today, greenhouse gas emissions are considered as a form of pollution. Climate laws and regulation use PPP as a basis to make polluters pay, for instance, [a carbon tax](#) or [plastic tax](#).
- Some climate litigation cases use the developing climate-attribution science to try and determine the causal links between a polluter or its financial enabler, and the physical or economic consequences of climate change.

### Net zero alliances

- Groups of companies that collectively pledge to decarbonise their balance sheet, investment and insurance portfolios by 2050 (e.g. [NZBA](#), [NZAM](#), [NZAOA](#), or [NZIA](#)).
- Some companies such as Munich Re have joined and [then left](#) such alliances, citing fear of being exposing to [antitrust risks](#).

### Shareholder primacy

- [The idea](#) notably formulated by Milton Friedman (1912-2006), that the only social responsibility of business is to use its resources and engage in activities designed to increase its profits.
- Shareholder primacy has not always been the norm. For instance, during [the genesis](#) of modern investor-owned corporations in 17th century Europe, promoting public interests went hand in hand with being granted the privilege of engaging in profitable business.
- Early interpretations of corporate social responsibility (CSR) in the 20th century in support of labour rights, women's rights, indigenous rights, and the environment started to challenge this idea. Cooperative institutions (e.g. the UN Global Compact) and legally non-binding instruments (e.g. the UN Principles for Responsible Investment) were developed.
- Today, some climate cases challenge the narrower interpretation of shareholder primacy and demand the incorporation of Environmental, Social and Governance (ESG) considerations into longer-term business strategies.

### Double materiality

- Double materiality requires to consider an organisation's external impacts, in addition to traditional financial materiality matters.

- Double materiality is increasingly embedded in regulatory frameworks (e.g. in the [EU](#) and Switzerland).
- It can be conceptually linked to [stakeholder capitalism](#), which aims to take into account and balance the (potentially unaligned) interests of multiple stakeholders, including investors, clients, employees, suppliers, local communities, and the environment.
- Risks and impacts are linked, as adverse external impacts can turn into material financial risks through reputation and litigation risks.

## Case highlights - examples from recent climate litigation across the globe

### US Securities and Exchange Commission (SEC)

- The SEC charged [Goldman Sachs Asset Management](#) for failing to follow its policies and procedures involving ESG investments (leading to a USD 4 million fine).
- [BNY Mellon Investment Adviser](#) also charged for misstatements and omissions concerning ESG considerations (leading to a USD 1.5 million fine).

### Latin America

- [The Supreme Court of Mexico](#) is due to decide whether young people are allowed to seek justice by challenging the slow pace of the country's clean energy policy.
- In Brazil, courts will hear a case against the national development bank ([BNDDES](#)) and its investment arm, alleging climate inaction.

### UK

In February 2023 the first climate litigation seeking to hold the directors of a major carbon emitter personally liable was recorded against [Shell UK](#). ClientEarth brought the lawsuit in its capacity as a shareholder.

### Switzerland

- The European Court of Human Rights heard [the KlimaSeniorinnen](#) case on 29 March 2023.
- Indonesian villagers filed a climate case against [Holcim](#) in the Canton of Zug.

### European Union (EU)

- A commercial bank, [BNP Paribas](#), was sued for the first time in the world in France on the grounds that its loans to oil and gas companies breached a legally-binding duty to ensure its activities do not harm the environment. Three NGOs filed the lawsuit under France's corporate duty of vigilance law.
- Under the Investor-State Dispute Settlement Mechanism, the Italian government was ordered to pay EUR 250 million to UK-based [Rockhopper Exploration](#) in 2022 after placing a moratorium on new oil and gas projects within 12 nautical miles of its coast. This compensated the company not only for its initial investment but also for the loss of future profits.

### Asia Pacific

- Forty-seven of the world's biggest fossil fuel firms were the focus of [the first formal inquiry](#) undertaken by the Philippines human rights institution in 2022.
- A member of the Australian pension fund [REST](#) (Retail Employees Superannuation Trust) took it to court in 2018 for failing to disclose climate risk information and plans to address those risks, ultimately forcing REST to incorporate climate considerations in their investments and to implement a 2050 net-zero target.

# Managing climate litigation risk

## Why integrate climate litigation in enterprise risk management frameworks?

No sector or geography is immune from potential climate litigation. Over time, climate litigation has seen an expansion not only in geography but also in scope. Major carbon emitters and their financial enablers especially face the biggest litigation risks.

Peer benchmarking: Climate cases against peers may have repercussions for the company, in terms of defining best market practices, stakeholder expectations, and compliance and [reputational risks](#).

Widened scope of responsibility for directors: Ensuring good governance, managing risks and enhancing the business resilience is increasingly related to how a company and its directors address climate change.

No certainty that insurance companies will cover climate litigation costs going forward: Companies and their directors often assume that liability insurance such as Directors' and Officers' (D&O), Errors and Omissions (E&O) and Professional Indemnity (PI), will provide coverage. However, proposed exclusion clauses, such as the Lloyd's Market Association [model climate change exclusion clause](#), and the Chancery Lane Project's [Connor Clause](#), suggest otherwise.

No certainty that lawyers or law firms will advise or represent clients that are actively working against the 1.5°C goal or incompatible with that goal (see the new [guidance](#) of the Law Society of England and Wales).

### The Bank of England's 2021 Climate Biennial Exploratory Scenario (CBES)

In the context of its [stress-testing exercise](#) for largest banks and insurers operating in the UK, the Bank of England included a module on climate litigation risk. The results showed that:

- Some liability insurance products are exposed to climate-related litigation.
- Specialist insurance policies covering corporate Directors' and Officers' (D&O) liabilities were the most likely to pay out. These policies are vulnerable to claims of greenwashing, breach of fiduciary duties, and claims related to indirect financing of carbon emissions.
- Several insurers noted that they often also cover insured parties' legal defence costs and that whether litigation against them is ultimately unsuccessful, such defence costs could be sizeable.

Deloitte recommends a [four-step approach](#) to capture climate litigation risk in an Own Risk and Solvency Assessment (ORSA) for the insurance sector.

## Suggested four-step approach to climate litigation risk management

### 1. Governance and Risk identification

- Is climate litigation risk management integrated into the company's governance? This includes ensuring that the directors and senior management are aware of the risks and actively involved in managing them.
- What financial and reputational risks does the company face due to climate litigation?
- What type of civil lawsuits and criminal charges does the organisation face due to its climate-related disclosures, business practices and activities, and compliance with regulatory and policy expectations?
- What are the impacts of climate litigation on company peers?

### 2. Double materiality assessment

- Does the company regularly monitor the external impacts it has on ESG topics, as well the impacts of the evolving ESG landscape on the company?
- Which ESG risks are material to the organisation and to its relevant stakeholders, including shareholders, employees, suppliers, consumers, local communities, NGOs and the environment?
- What are the expectations of the company's various stakeholders on climate-related issues?

### 3. Transition to net zero

- Has the company pledged to transition to net-zero? Is it a member of a net-zero alliance?
- Did it set intermediary targets and calculate its scope 1, 2 and 3 emissions?
- Does the company have a science-based transition plan? If yes, what steps is the company taking to realistically follow this plan? How are the targets and steps being publicly communicated?

### 4. Adaptation

- Are the climate litigation risks of the company and its directors covered under liability insurance policies?
- What are the carbon offsetting policies of the organisation, and how credible are these policies?
- What are the climate-related adaptation measures the company is funding, incentivising or executing?
- What are the transformative business opportunities linked to mitigating emissions and adapting to climate change (e.g. tax incentives, green financing, new products and services)?

## Improving compliance strategies

Regulatory compliance: Climate and more broadly sustainability regulations are on the rise. Keeping track of this rapidly expanding legal landscape and taking steps to achieve compliance requires a diligent strategy.

Patchwork approach to international climate regulations: Climate and sustainability regulations may differ widely according to jurisdiction. The EU's sustainability regulations are generally considered to be the most progressive, with far-reaching impacts also for non-EU headquartered companies, including in matters such as [sustainability reporting](#), [supply chain due diligence](#), [tax transparency](#), [circular economy](#), and [sustainable finance](#).

National and local governments may also enact inconsistent regulations over time. This has been the case for instance in the US, with a patchwork of [federal](#) and [State](#) rules around the inclusion of ESG investment funds in company-sponsored retirement savings plans.

Consequences of losing a climate case: If a respondent loses the case, it may be required to [reduce its greenhouse gas emissions](#); provide adequate compensation for climate-related damages [either as a direct or an indirect payment](#) (which could, for example, be allocated to environmental compliance programmes or to city protection); or fulfil non-financial remedies such as the modification of business practices or activities, the withdrawal of a given project or increased transparency. Importantly, there is a move from administrative fines to criminal responsibility, as epitomised by the proposed new crime of [ecocide](#).

### Sustainability-related litigation is the future

- Examining 623 sustainability-related cases recorded globally between 1990 and 2022, the World Business Council for Sustainable Development ([WBCSD](#)) observed:
- More litigation involving supply chains. There is an increase in sustainability-related litigation against companies due to their subsidiary companies and suppliers.
- Policy and regulatory frameworks: there is an increase in litigation citing pre-emptive due diligence requirements related to reporting or maintaining a 'standard of care'.
- Soft laws are entering the courts. Most due diligence-related cases are based on 'soft law' sources, for example recommendations or guidelines which do not have full legally binding force, such as the OECD Guidelines.

Wider ESG litigation is increasingly complementing more narrowly focused climate litigation. ESG topics are becoming closely related to companies' social and legal licence to operate.



## Suggested four-step approach to improve compliance strategies

### 1. Regulatory gap analysis

- Considering company operations, locations, size, industry, global value chain, products and services, which climate and sustainability regulations are applicable to the company?
- What are the timeline for compliance and consequences of non-compliance of these regulations?
- What are the gaps in compliance with these regulations and how can these gaps be closed?

### 2. Compliance strategy definition

- How are climate and sustainability data being collected? How are these data interpreted and communicated? How are the roles and responsibilities distributed to achieve regulatory compliance?
- How does the company track climate and sustainability regulations and cases, prioritise action areas and define its key performance indicators (KPIs)?
- Has the company engaged external advisers and what is their involvement in building the strategy?

### 3. Compliance strategy execution

- Does the company have an early warning monitoring tool to facilitate the detection and thorough investigation of possible non-compliance claims and misconduct? .
- How will the company follow-up on these investigations and prepare for potential investigation by external parties into the sustainability claims it made?

### 4. Assurance

- Does the law require limited or reasonable assurance to be obtained for compliance in line with a selected standard? If not, should the company seek assurance nonetheless to enhance its credibility?
- Has the company assessed the processes, systems and control activities for the KPIs or sustainability disclosures in scope of its corporate-level responsibility?

# Conclusion

Human-caused climate change and nature loss are era-defining challenges, so much so that a working group of the International Union of Geological Sciences proposed in 2019 to name the Anthropocene a new geological epoch.

Mitigating and adapting to climate change and addressing broader sustainability issues will require profound changes to the way we live, govern ourselves, and practise business and commerce. If policymakers do not enact adequate laws and standards, and companies do not apply these quickly and forcefully, individual constituents of society will increasingly turn to the courts to protect their own interests, those of their children and descendants, as well as the planet itself.

Major societal changes generally involve a mix of top-down changes in law and policy, and bottom-up changes from civil society, the private sector and judicial action. The climate movement has earned its place as one of the chief global social movements of our time, and legal action is one of its most effective tools.

As we have explored in this report, we expect climate and sustainability-related litigation to have an increasing impact and influence on the way organisations govern themselves, set their strategy, manage their risks, choose targets, and measure their progress against these targets.

## Deloitte's Climate & Sustainability experience

At Deloitte we feel we must do our part to contribute to the discussion on climate change and sustainability and advance efforts to address the challenges. We also want to support our clients on their sustainability journey. We hope this article contributes to our clients' efforts to position themselves as market leaders in their sustainability transformation. Climate litigation considerations should play an important role in this, factoring into risk and opportunity assessments, including, but not limited to, compliance risk.

Our Sustainability Team in Switzerland has been at the forefront of cutting-edge transparency efforts. For instance, we have been supporting the [WWF's Sustainable Financial Regulations \(SUSREG\)](#) project since 2021. Some of our collaborative activities in this capacity included contributing to the development of the [2022 SUSREG Annual Report](#) and the [SUSREG global tracker](#) for sustainable financial regulations (covering banking and insurance activities in 44 jurisdictions).

We are a diverse team of regulatory, financial, audit, industry, and technical (science and engineering) experts. Our offerings match our capabilities and expertise, and cover sustainability reporting, assurance, consultancy, tax and risk advisory.

To help our clients steer their journey, we have developed innovative enablers, such as our ESG Regulatory Tool which tracks ESG regulations and facilitates companies' regulatory impact assessments. More information on our services can be found [here](#).

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