

ESG litigation webinar series

Global trends in climate litigation

Speakers



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What will we discuss today?

-  Introduction
-  Global trends in climate litigation
-  Legislative developments
-  Categories of climate change litigation
-  Litigation risk vectors
-  Key future risks
-  Risk management

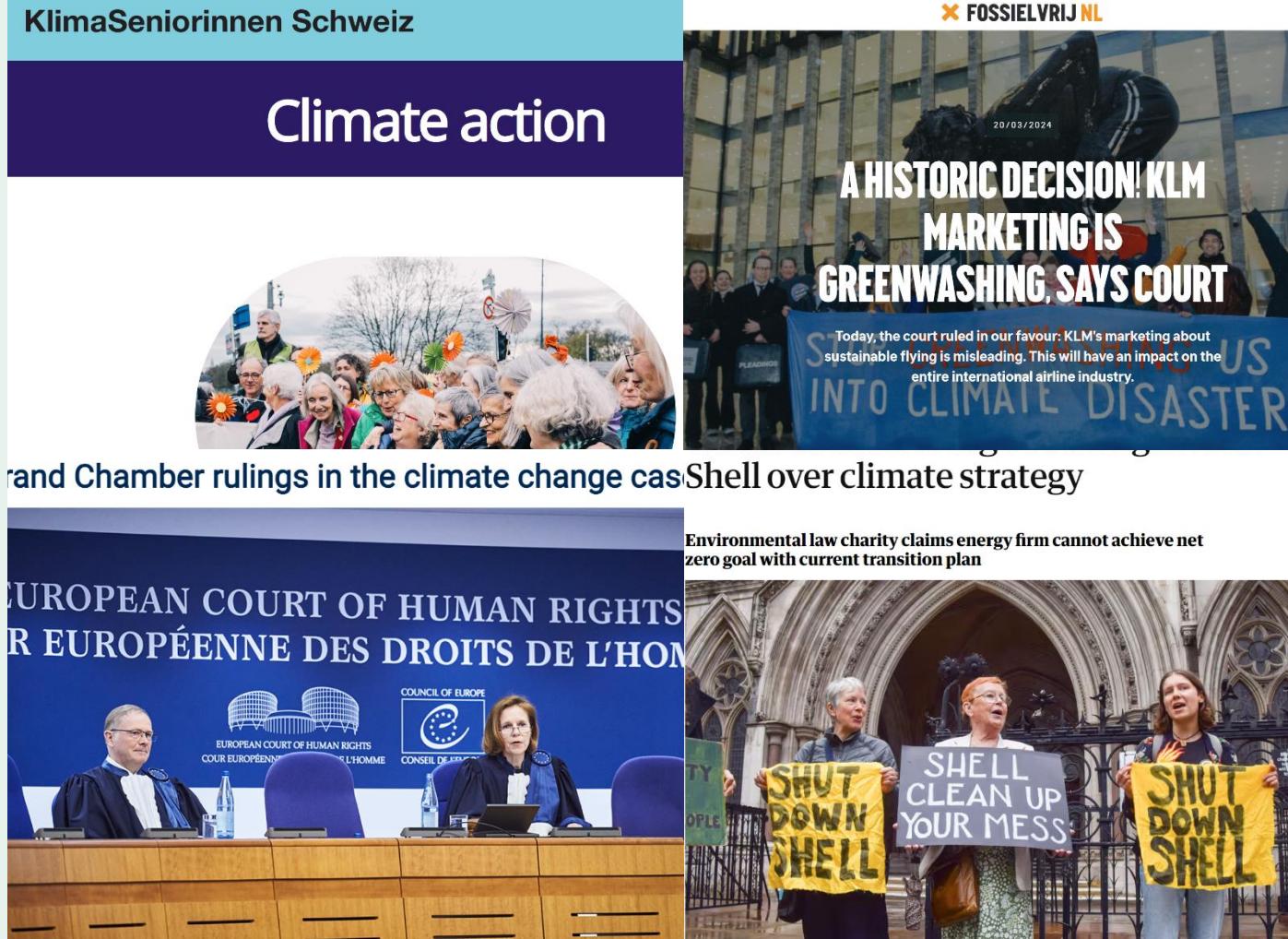


Global trends in climate litigation

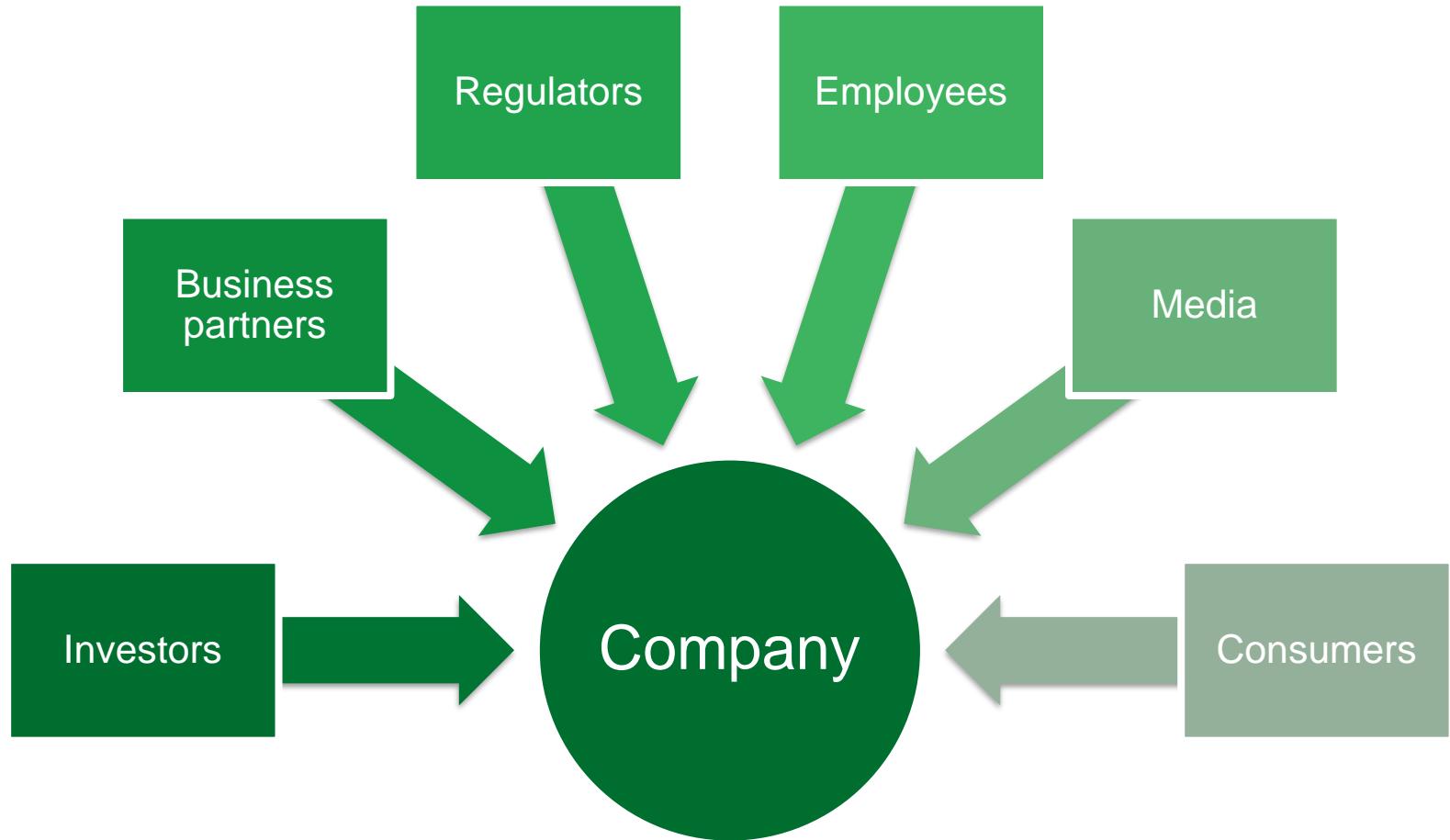




ESG litigation in the spotlight



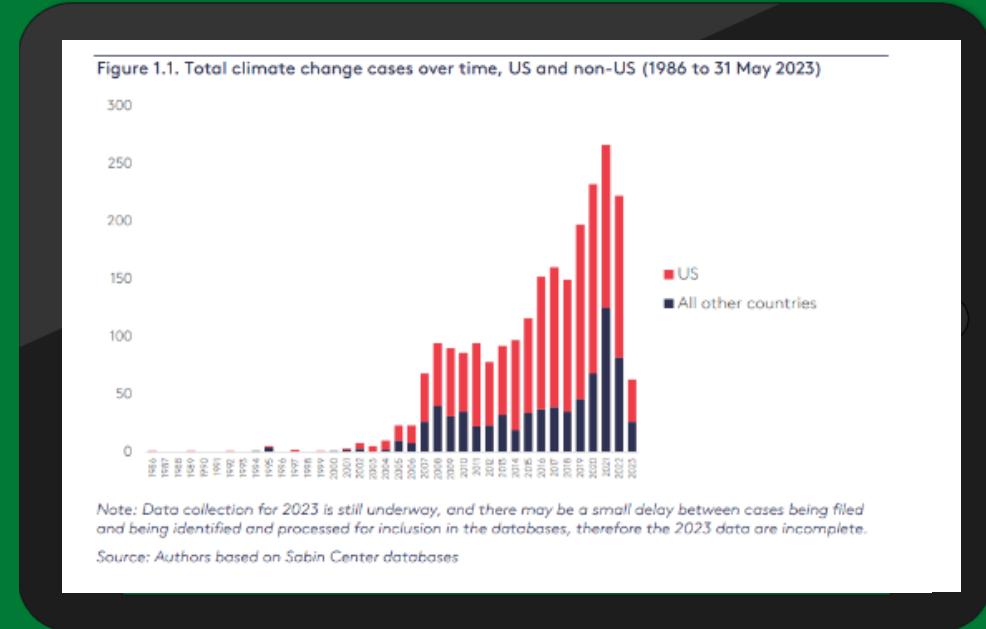
Climate litigation from all angles





Global trends in climate change litigation: 2023 snapshot – 29 June 2023

- ▶ Report from LSE/Grantham Research Institute



...more than

2,341 cases

have been captured in the Sabin Center's climate litigation databases.

around

2/3

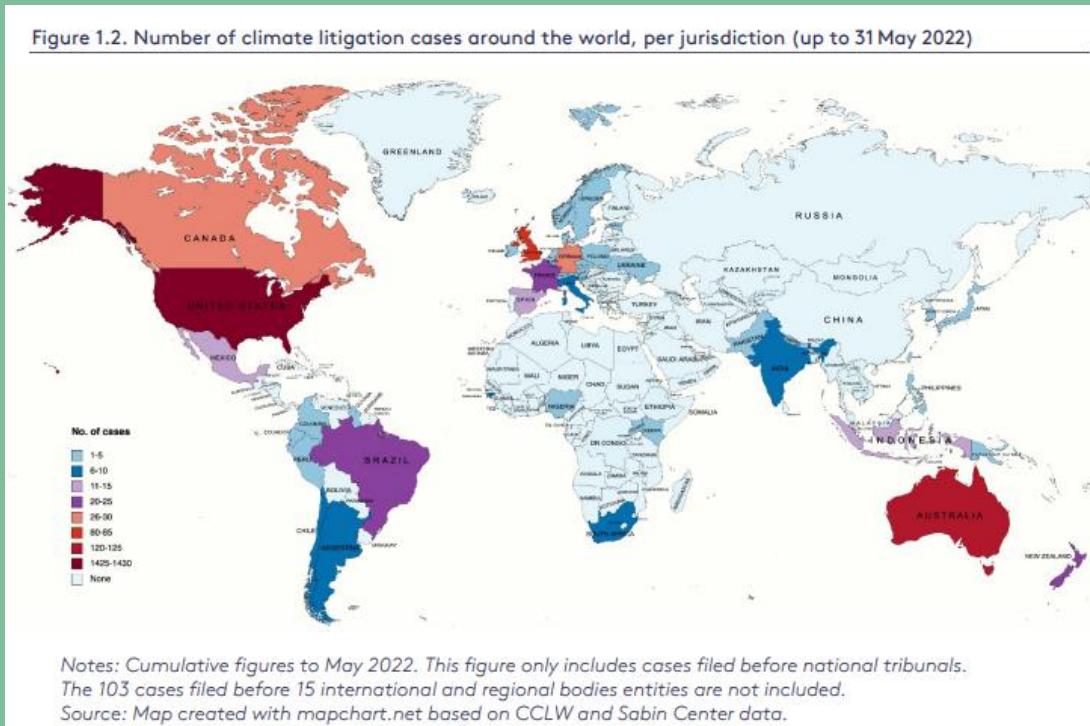
of these cases (1,557) have been filed since 2015, the year of the Paris Agreement.

Of these,

190

were filed in the last 12 months.'

ESG is a global challenge!



Mulyono (Indonesia) v Holcim (Suisse)



Lliuya (Peru) v RWE (Germany)

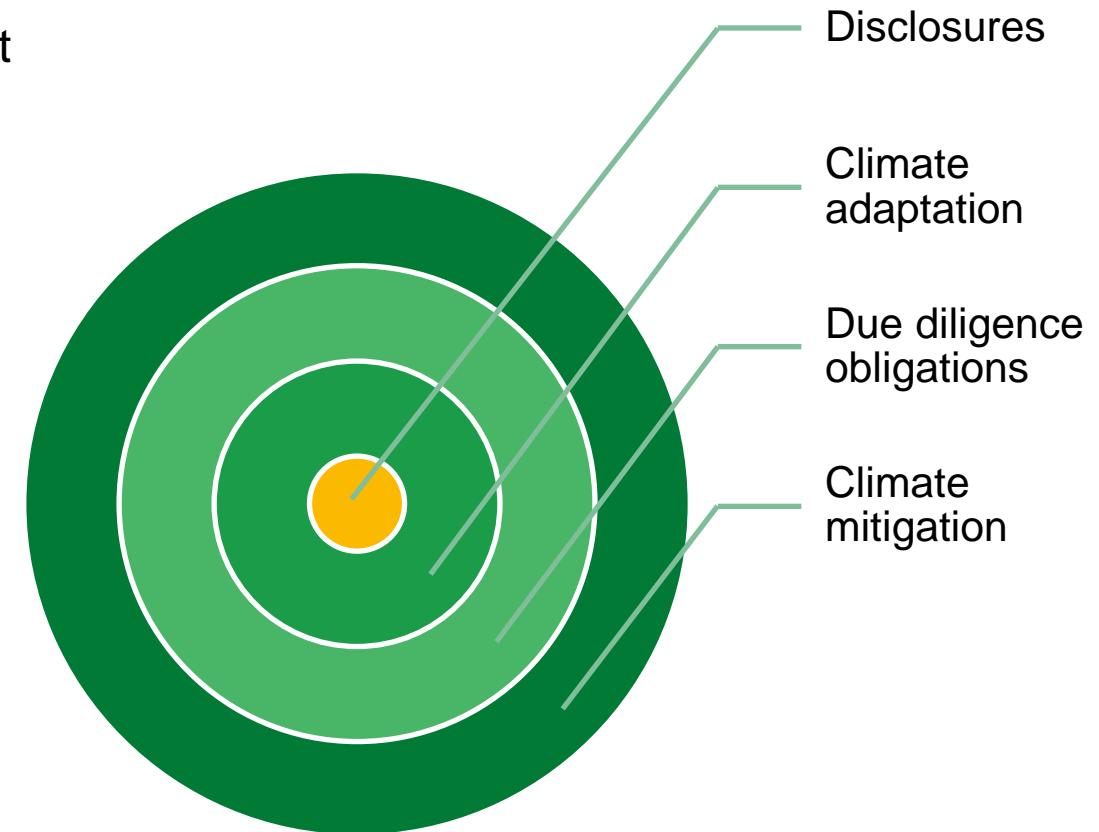


Legislative developments



Global legal framework: big 4 of ESG

- **Global:** UN Principles, Treaties, Paris Climate Agreement and COPs
- **EU:** CSRD (with extra territorial effect) and CSDDD
- **UK:** Change in climate-related disclosure listing rules and transition plan disclosures, UK Green Taxonomy
- **US:** Climate related disclosure rules by SEC
- **Asia-Pacific/China:** proposals for disclosure ESG governance and strategy
- **Japan/Hong Kong/Singapore/Australia:** proposal mandatory climate-related disclosure

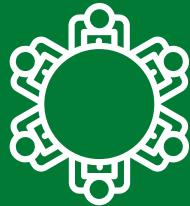


Overview of significant legal instruments*

Kind of obligation	Already applicable	Passed (applicable from)	Proposal / bill / draft
Due diligence (incl. reporting)	<ul style="list-style-type: none"> – EU: Timber Regulation – EU: Conflict Minerals Regulation – International/EU Nagoya (biopiracy) – France: <i>Loi de vigilance</i> – EU: Battery Regulation (Feb 2024) – Norway: Transparency Act – Germany: Supply Chain Due Diligence Act – Switzerland: Conflict minerals, child labour (FY 2023) 	<ul style="list-style-type: none"> – EU: Deforestation Regulation (Dec 2024) 	<ul style="list-style-type: none"> – UN Treaty – EU: Corporate Sustainability Due Diligence Directive (CSDDD) – EU: Forced Labour Products Regulation – EU: Battery Regulation – Belgium – Mexico – Netherlands: sustainable business act (supply chain)
Reporting only	<ul style="list-style-type: none"> – EU: Non-Financial Reporting Directive (NFRD) – EU: Corporate Sustainability Reporting Directive (CSRD) – California: Transparency in Supply Chain Act – UK: Modern Slavery Act – Australia: Modern Slavery Act – Switzerland: similar to NFRD 	<ul style="list-style-type: none"> – Canada: Fighting Against Forced Labour and Child Labour in Supply Chains Act (2024) 	<p>*NON-EXHAUSTIVE EXAMPLES</p>

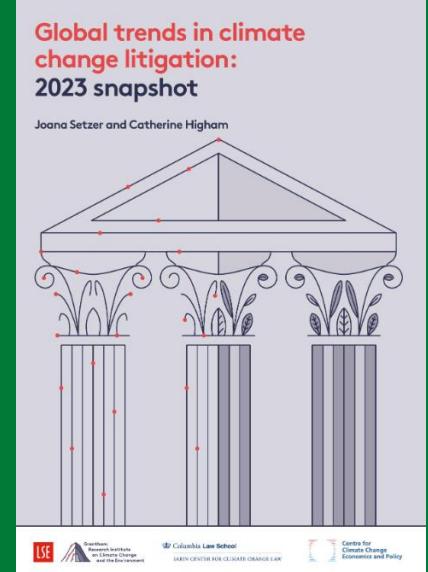
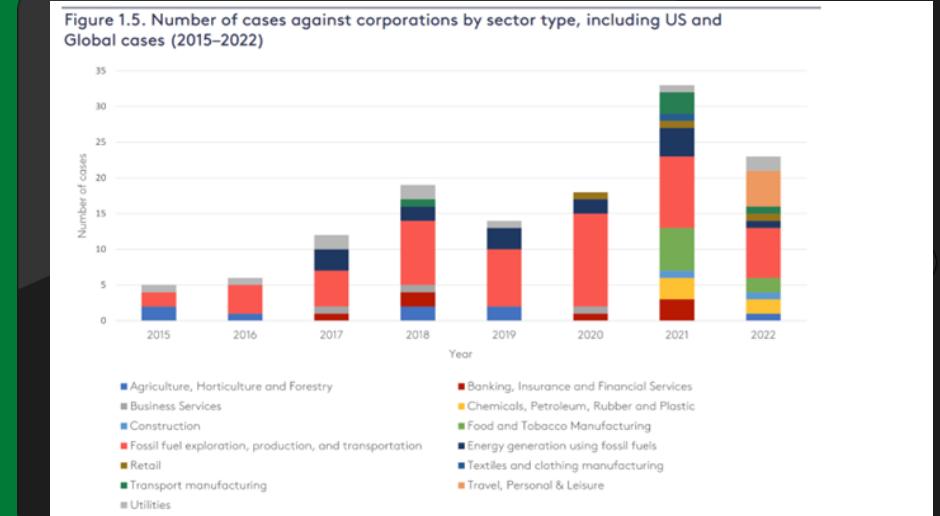
Categories of climate change litigation





Corporate climate change litigation: Categories

- **Specific dynamics:** ESG litigation impacts via media
 - a) reputation of company, b) consumer preference of its products and c) its stock value
- **Categories of climate change litigation:**
 - Injunction: RDS, Total, Wintershall, VW, BMW, Daimler
 - Greenwashing: KLM, Santos, TotalEnergies, NY v Exxon/RDS/BP, Australian Centre for Corporate Responsibility v Santos Ltd
 - Shareholder actions: ENEA, RDS UK
 - Investment/finance: ING, ABP, REST, CBA, BNP Paribas, BNB/ECB, VW (lobby)
 - Insurance coverage disputes: Steadfast, AIG
 - Project litigation: environmental litigation against specific projects
 - Damages claims: Carbon Majors US, RWE, Holcim
- **Stakeholder engagement from all sides:**
 - Public campaigns: sponsorships, PR/advert, advocacy, university funds
 - Shareholders (Follow This, Engine1, Say On Climate, CA100+, As You Sow, ShareAction)



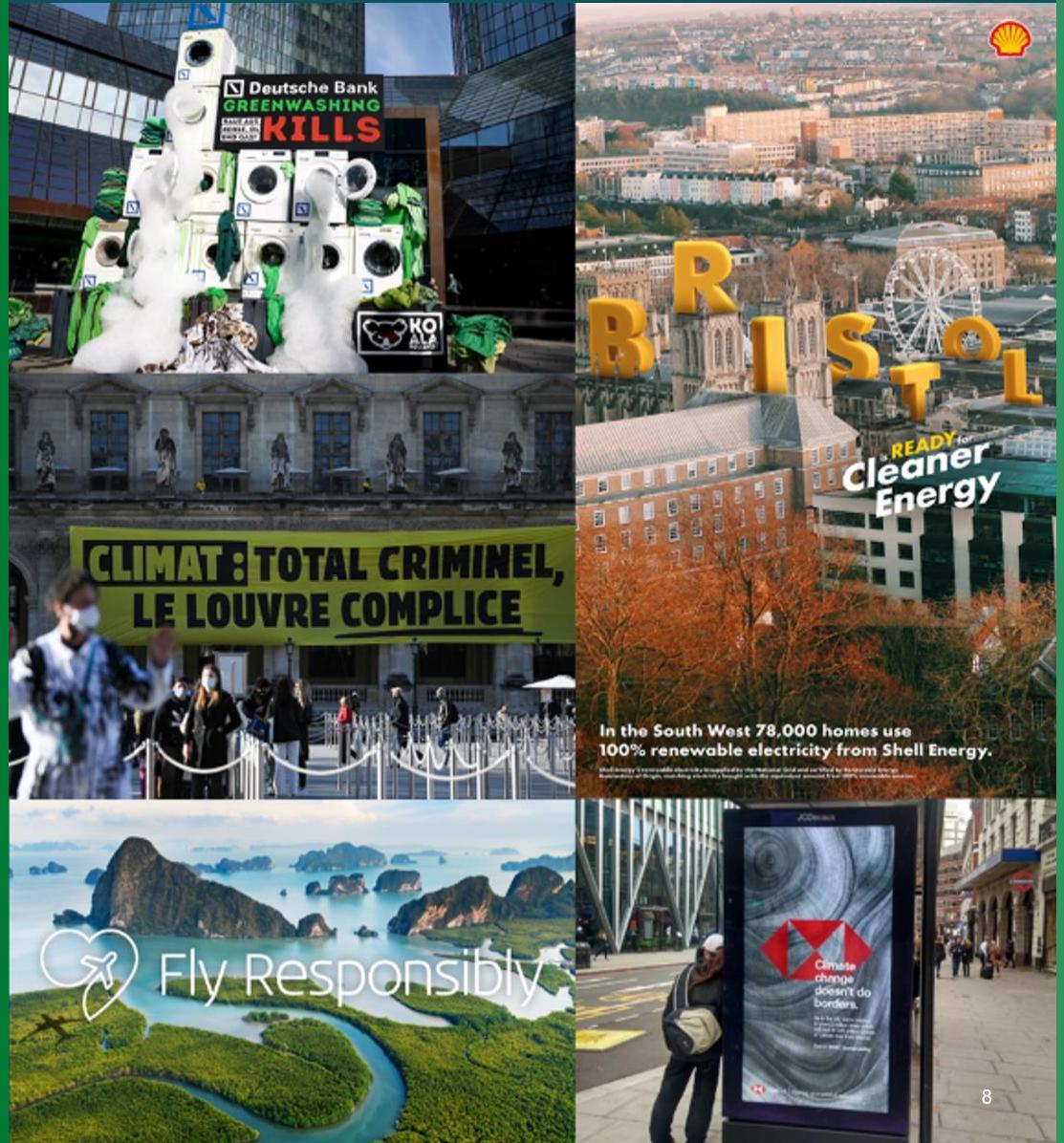
Injunction: Milieudefensie v RDS (NL)

- May 2021: The Hague District Court orders RDS to cut scope 1, 2 & 3 emissions by 45% by 2030, relative to 2019, across the RDS group (1100+ subsidiaries globally)
- Based on Urgenda: tort in combination with UN Principles, Paris Climate Agreement and Human Rights Treaty
- RDS “must do more than monitoring developments in society and complying with the regulations.” RDS’s existing climate strategy lacked ambition, specificity and enforceability
- Critically scope 3 (customer emissions) is included in the judgment, which requires “a change of policy” from the company that could “curb the potential growth of the RDS group”
- Appeal Hearings April 2024: the defense is that it is not up to judge but to legislator. Important role of RDS in energy transition.
- Impact Swiss Granny Judgment?



Greenwashing litigation

- **Greenwashing in financial market**
Source: *Taxonomy regulation, SFDR, NFRD, CSRD and CSDDD*
- **Greenwashing in consumer communication/unfair commercial practice**
Source: *European Commission's 'anti-greenwashing' proposal to reform the Unfair Commercial Practices Directive (March 2022)*
- **Greenwashing in financial reporting**
Source: *CSRD and CSDDD*



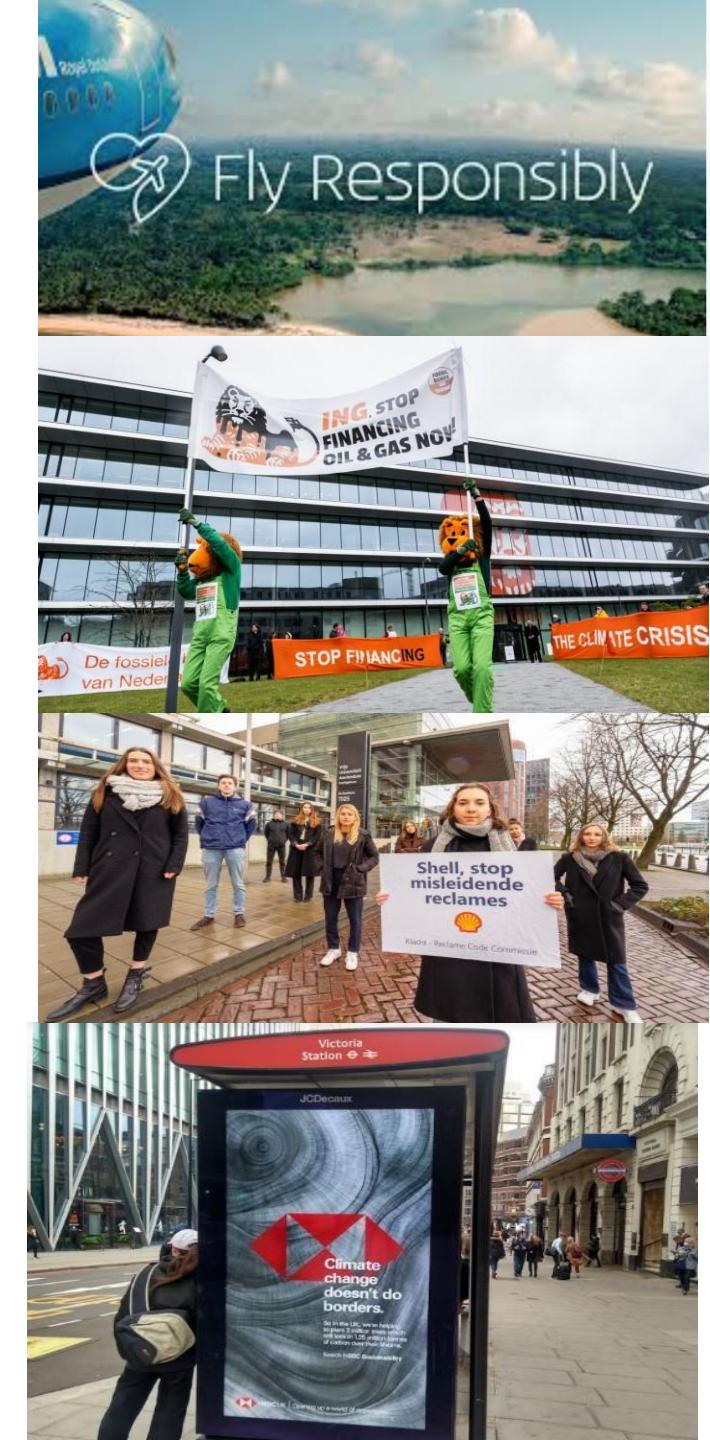
Greenwashing: financial (regulatory)

- **BNY Mellon** became the first asset manager to be fined for ESG misstatements in May 2022, with the US SEC fining it \$1.5m for misstatements and omissions about its ESG integration
- **DWS Group (Deutsche Bank)** is being investigated by the US SEC, German BaFin regulators and the German public prosecutor for allegedly misleading investors as to the role its sustainability criteria play in its investments, with a ‘dawn raid’ on DWS’s offices
- The **US SEC** is also investigating **Goldman Sach’s** asset management arm over whether funds marketed as ‘green’ or ‘ESG’ actually fit those criteria
- Australian regulator **ASIC** stated it’s ‘ready to litigate greenwashing claims’



Greenwashing: misleading advertising

- **Fossielvrij v KLM** – In March 2024, the court of Amsterdam ruled that the advertisements of KLM are misleading from consumer law perspective (on basis of national consumer communication guidelines)
- **BankTrack v ING Bank** – In 2017, a group of NGOs brought a complaint against ING for failing to set climate goals and disclose the indirect product emissions of companies and processes which it financed. The final statement by the National Contact Point held that ING is obliged under the OECD Guidelines for Multinational Enterprises to set climate goals that are aligned with the Paris Agreement
- **Clemens Kaupa/VU Law Clinic, Greenpeace Netherlands, ReclameFossielVrij v RDS**
 - misleading advertising complaints against RDS for its CO2 compensation schemes 'Drive CO2 Neutral'. After RDS lost, it changed scheme to 'CO2 Compensation', which experts qualified as 'dodgy'. CvB ruled that this is an absolute claim that can't be substantiated
- **AdFree Cities v HSBC (ASA)** – the UK Advertising Standards Authority ruled that advertisements by HSBC were misleading, since consumers would not expect that HSBC, alongside its environmentally beneficial work, would be involved in financing carbon-intensive businesses
- **NGO European Citizen Initiative 'Ban Fossil Fuel Advertising & Sponsorships'**



ACCR v Santos Ltd (Australia)



- ACCR proceedings against Santos alleging breach of Australian Corporations Act & Consumer law for misleading conduct relating to 'clean energy' claims
- First court case against veracity of target 'netzero by 2040', role of CCS & blue hydrogen
- Expanded in 2022: blue hydrogen increases emissions, depends on offsets to be procured
- Alleged misleading of investors and consumers



Shareholder Actions

Defendant targets:

- Company
- Directors

Main mechanisms for bringing claims (UK):

- Against company
 - Sections 90 and 90A Financial Services and Markets Act 2000
- Against directors – Companies Act 2006
 - Key case → Shell
 - Derivative action
 - High profile



Investment/finance litigation

- **Milieodefensie v ING:** demand to lower its carbon footprint and refuse clients who are highly polluting
- Legal action in combination with public campaign with blockages of main roads Amsterdam

Climate activists block Amsterdam highway in protest against ING

By Reuters

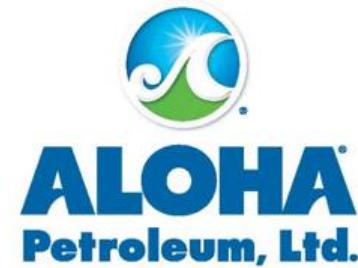
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January 19, 2024



Disputes about coverage physical risks climate change

- **Aloha Petroleum v AIG Insurance (US):** Legal action by Hawaii local governments for climate change damages (redress, adaptation costs) & injunctive relief due to sea level rise, extreme weather
 - Aloha seeks coverage for \$880k in defence costs at AIG
 - AIG has refused coverage invoking ‘qualified pollution exclusion’, Aloha invokes ‘products hazards’ clause.
 - Similar to:
 - Everest Premier Insurance v Gulf Oil (pending)
 - Lloyd’s LMA5570 model climate change exclusion clause relevant here
- Extreme weather events (causing business disruption): Stephens Ranch Citi, Limburg Netherlands



Damages claims

The real risk!

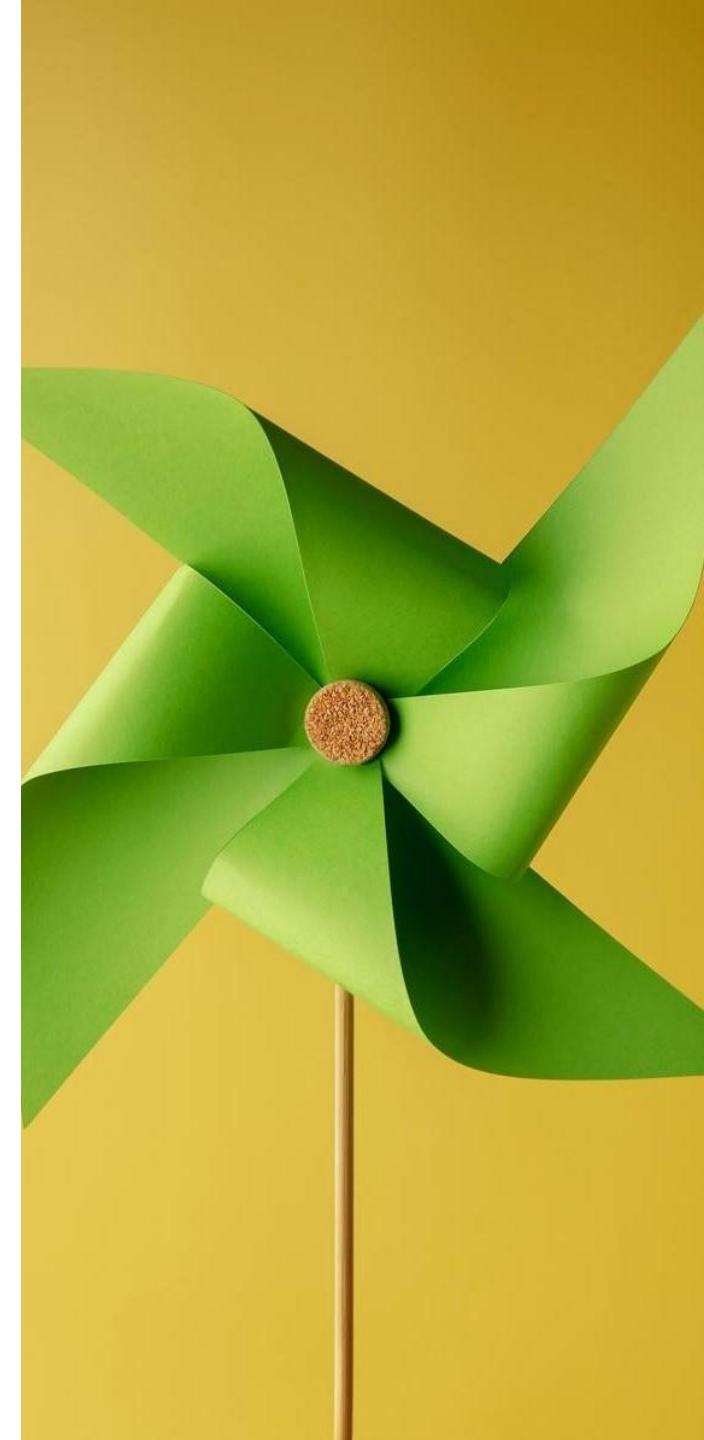
Elements:

- Cause of action
- Breach of duty
- Damage
- Causative connection

Developing areas for group litigation and class actions, e.g., the Representative Actions Directive

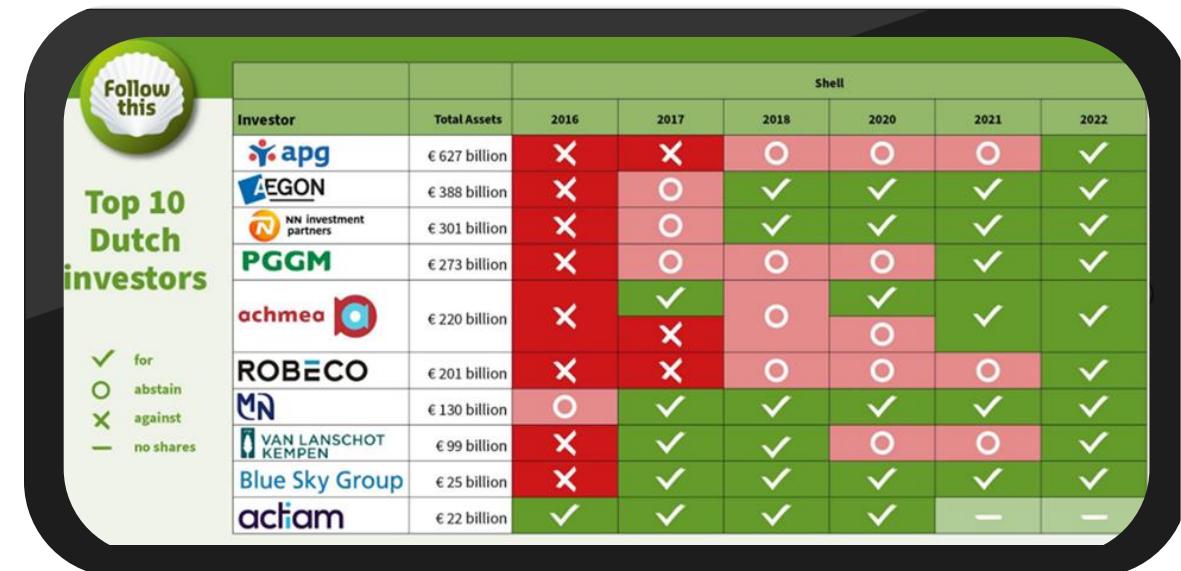
Causation

- Factually plausible (localised incident)
- Diffuse causes → potentially very big problem
- Adjusting approaches to causation and burden of proof



Shareholder activism: going Dutch

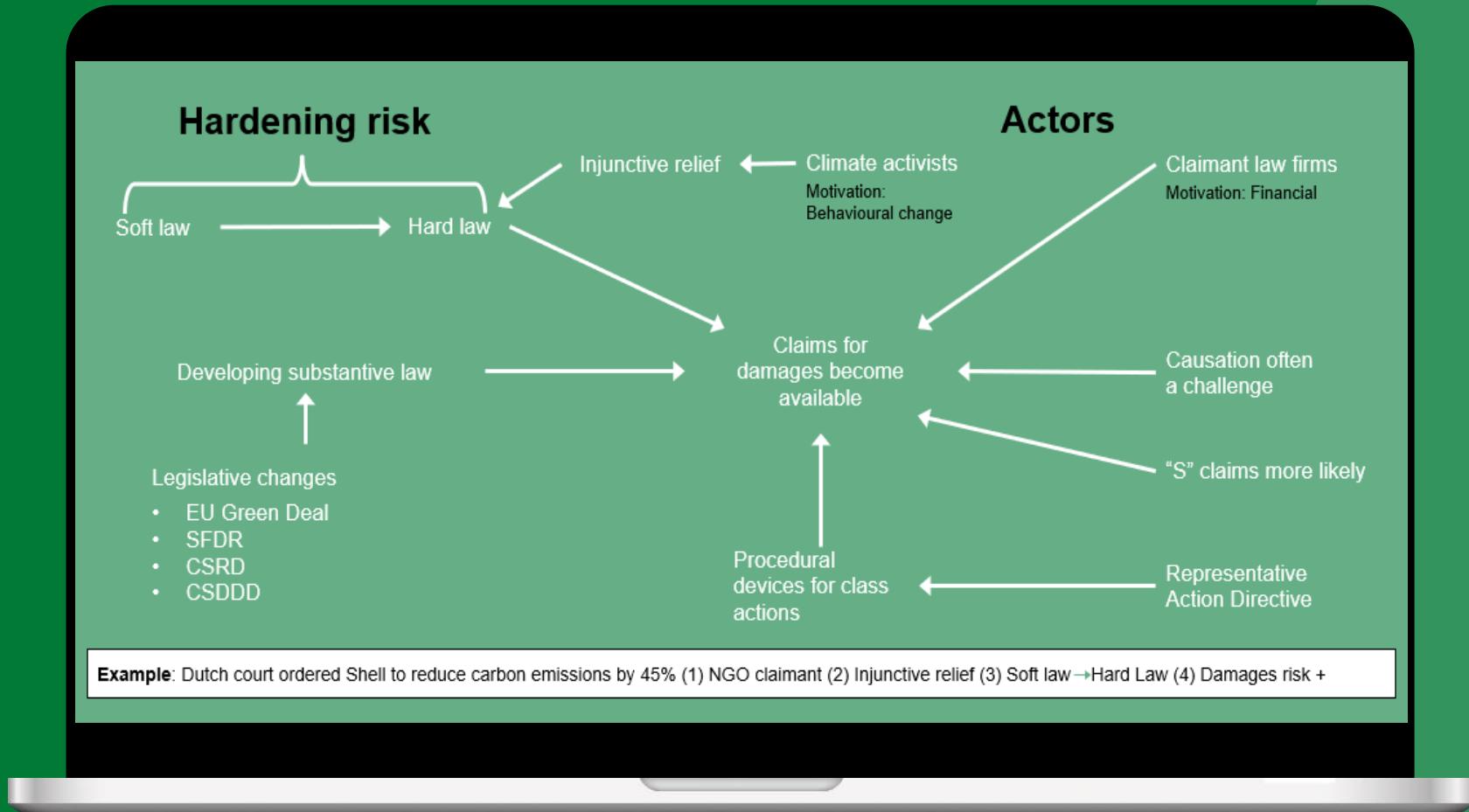
- NGOs use a range of tools to influence climate policy of private actors (buying shares)
- Dutch trend: Since 2016 Dutch NGO Follow This! Shareholders change the world has managed to table proposed resolutions at EGMs of e.g. Shell, BP and Chevron
- Most of these resolutions have been voted down, but increase of support (2,7 % in 2016 to 20% in 2023 and 25% in 2024)
- One can observe companies taking more climate action after such resolutions have been put to a vote, even when these have not been adopted



Litigation risk vectors

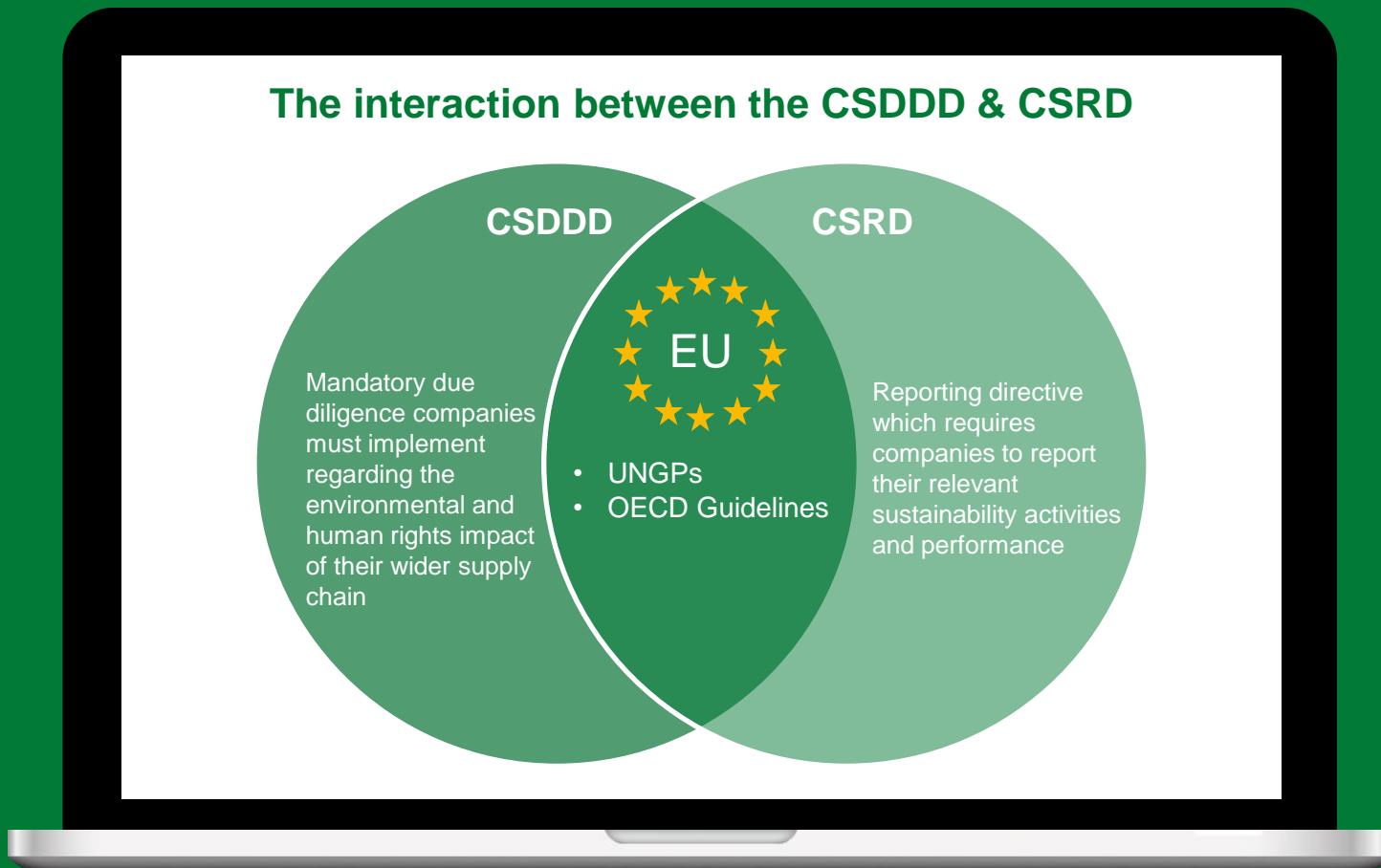


Increasing ESG litigation risk





The due diligence twins: Reporting and due diligence





Corporate Sustainability Reporting Directive (CSRD): Board responsibility for correct reporting

The only reporting obligation is to be correct about sustainability

Important in this respect is:

1. (the role of) the management board and supervisory board
2. the most important actual and potential negative effects of activity of company
3. an assurance about the way the company reports about the information
 - If important information is missing this needs to be reported in assurance the statement
 - **RISK:** Misleading information to shareholder(s) → liability and securities claims

Experts: golf aan klimaatclaims dreigt voor bedrijfsleven

Nieuwe rapportageverplichting kan leiden tot bestuurlijke aansprakelijkheid

Rutger Bielem en Orla McDonald
Amsterdam

Experten waarschuwen voor miljardclaims en bestuurlijke aansprakelijkheid bij de invoering van de nieuwe Europese meldingsrichtlijn CSRD. Beurzennoteerde bedrijven moeten per 2024 gaan rapporteren over hun impact op het klimaat en de leefomgeving.

De nieuwe rapportageverplichting, voluit de Corporate Sustainability Reporting Directive, gaat gelden voor bijna vijftigduizend Europese bedrijven en is onderdeel van de EU-klimaatplannen. Vanaf volgend jaar moeten beurzennoteerde bedrijven gedetailleerd publiceren over hun prestaties op het gebied van duurzaamheid, sociale omstandigheden en bestuur (oftewel ESG, wat staat voor environment, social and governance). De rest van de grote en middelgrote bedrijven volgt stapsgewijs vanaf 2025.

'Dit is een mijlpaal in het ondernemingsrecht', zegt Bart Adriaan de Ruijter, partner corporate litigation bij advocatenkantoor CMS. De nieuwe regels maken straks onder meer duidelijk hoeveel CO₂ een bedrijf uitstoot en hoe groot het risico is op kinderarbeid in de toeleveringsketen. Al die gedetailleerde informatie geeft maatschappelijke organisaties munitie voor klimaatacties. 'De voormalige advocaat-generaal Jaap Spier waarschuwde jaren geleden al voor klimaatclaims, dat zien we nu ook daadwerkelijk ontstaan.'

Bestuurdersaansprakelijkheid wordt daarbij een belangrijk thema, zegt De Ruijter. Wie bewust het klimaat in gevaar brengt en in zijn

klimaatplannen onvoldoende maatregelen treft om dat te voorkomen, kan opeens opeen roekeloosheid verwezen worden. Verzekering dekt dat niet.' Ook accountants die de uitgebreidere klimaatrapportages goedkeuren, lopen een vergoed risico op beroepsaansprakelijkheidsclaims.

Het aantal duurzaamheidsprocessen is vijf jaar tijd meer dan verdubbeld, aldus een rapport van de Verenigde Naties dat afgelopen week werd gepubliceerd. Liepen er in 2017 nog honderd zaken, in 2022 waren dat er meer dan tweeduizend. Het gaat om zaken zoals die van milieuorganisatie

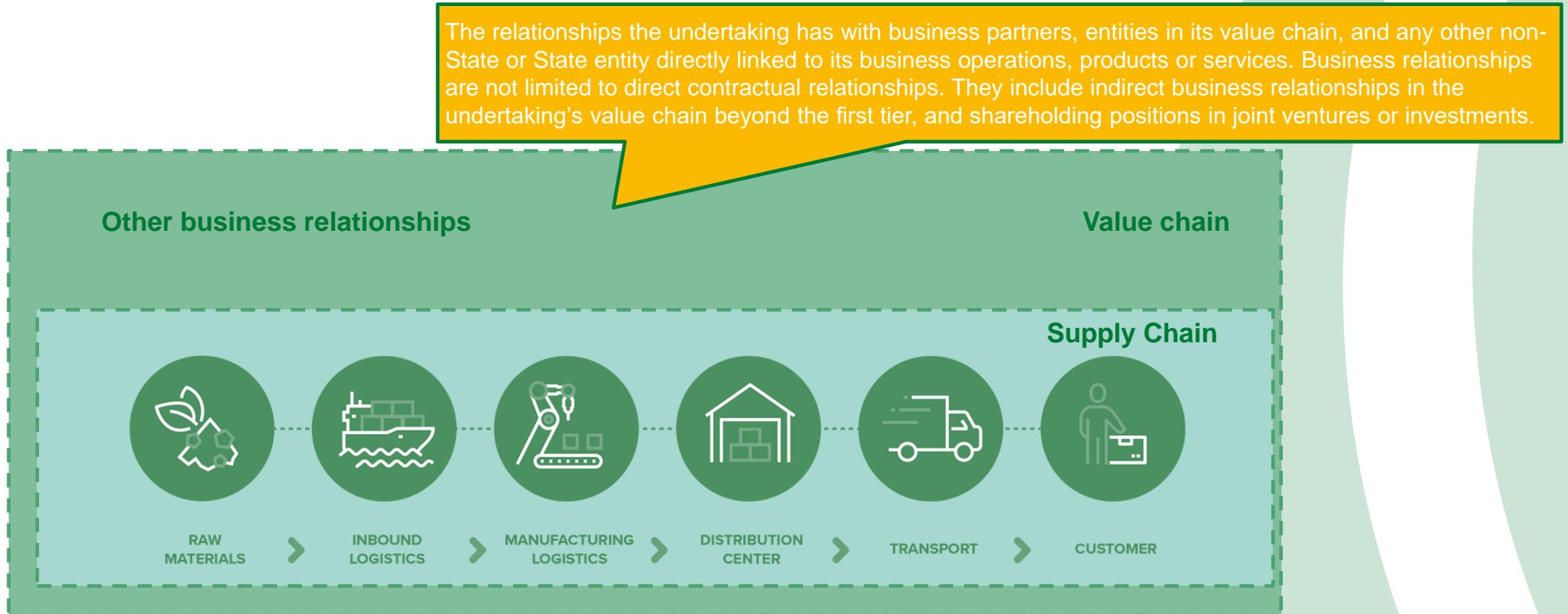
De verplichting tot rapporteren gaat gelden voor bijna vijftigduizend Europese bedrijven

defensie tegen Shell, dat na de uitspraak in de broekgaszaak moet verminderen. Nu gaat ook om claims, zoals de financiële compensatie die 1.600 omwonenden van Tula nu eisen van de staalgigant. De CSRD kan tot verregaander rechtszaken leiden', aldus De Ruijter.

Claims komen vaak uit onverwacht. Zo heeft het Indonesisch eiland Pulau een zaak aangespannen tegen het cementbedrijf Holcim over de stijgende zeespiegel. De Ruijter: 'Je kan niet meer droog in Europa zitten en geen bescherming voor de schade die je elders veroorzaakt.'

Vervolg op pagina 3

Value chain vs. supply chain



Corporate Sustainability Due Diligence Directive (CSDDD): a step change in litigation risk

- Companies within scope must identify actual and potential “adverse human rights impacts” and “adverse environmental impacts” for them and their value chain
- Companies must prevent or mitigate such harms
- Article 22: Parties – including ex European – can sue for damages for such breaches; NGOs will also have standing
- Companies not “liable if the damage was caused only by its business partners”
- Applicability expected from 2027 to 2029 depending on company size – litigation provisions not immediately operative
- Provision on directors’ duties removed from final text



CSDDD will harden ESG class action risk

European Council adopted on 15 March 2024

- Will further encourage transnational torts – claims filed in Europe for conduct outside of Europe (working conditions)
- Ex Europeans can sue if impacted by adverse human rights effects/environmental effects (e.g., fair wage)
- Companies are responsible for their value chain (some protective measures available)

(iii) the plans of the group, *including implementing actions and related financial and investment plans*, to ensure that ~~its~~ business model and strategy *are* compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement *and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119 (European Climate Law)* and where relevant, the exposure of the group to coal, oil and gas-related activities;

(b) a description of the *time-bound* targets related to sustainability matters set by the group, *including where appropriate absolute greenhouse gas emission reduction targets at least for 2030 and 2050, a description* ~~of~~ *of the progress* ~~the group has made~~ *towards achieving* ~~those~~ *targets, and a specification of whether the group's targets related to environmental matters are based on conclusive scientific evidence;*

(e) a description of:
(i) the due diligence process implemented *by the group* with regard to sustainability matters, *and where applicable in line with EU requirements on undertakings to conduct a due diligence process;*

(iii) any actions taken *by the group*, and the result of such actions, to prevent, mitigate, *remediate or bring an end to* ~~actual or potential adverse impacts;~~

European confirmation duty of care

ECHR 9 April 2024 (Klimaseniorinnen/Schweiz)



Article 8 EHRM includes the right to effective protection by the State authorities from the serious adverse effects of climate change on lives, health, well-being and quality of life



Climate Law Experts: monumental principal step forward



Key future risks





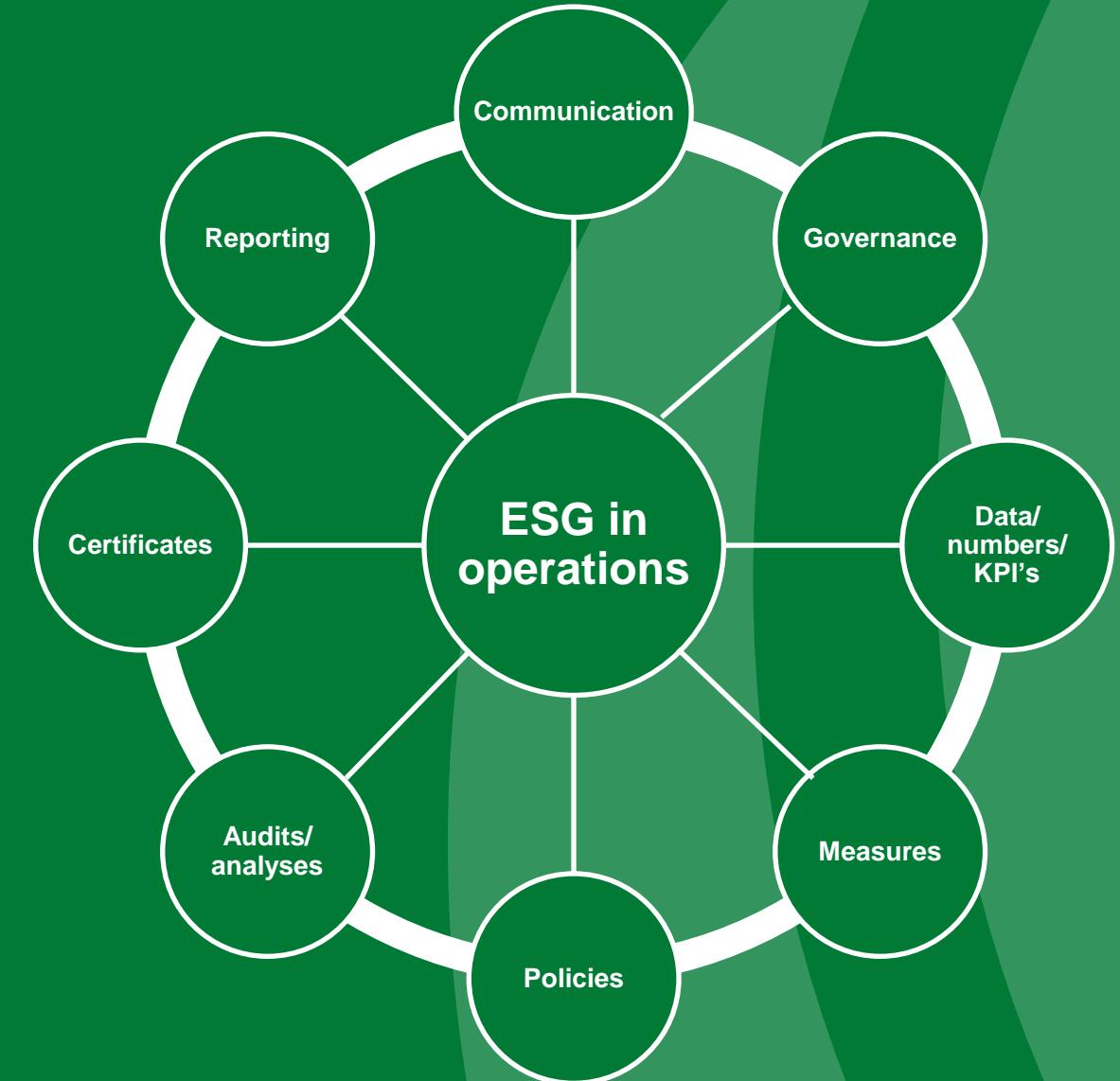
Looking ahead: Future trends



- Globalisation climate litigation (acceleration climate change events one to five years as driver)
- CSDDD: Increase supply chain liability
- CSRD: Misleading information claims and Securities litigation
- Higher business disruption risk: activist/climate change events
- Insurability
- New types of climate litigation: biodiversity, ocean protection, extreme weather events
- AI and technology can facilitate

Is pro-active risk management possible?

- **Governance:** establish multidisciplinary team with specialist expertise in climate impact, (crisis & market) communication, legal and stakeholder management (internal and external)
- **Marketing and communication plan & governance:** pro-active marketing & communication plan to avoid greenwashing and crisis management when occurs
- **Climate policy and plan:** Formulate and secure a sound and credible climate policy with regard to the footprint of the company and its cooperation partners (scope 1-3)
- **Contract and insurance management:** Monitor, as part of business operations, risk management regarding climate risks in contracts and insurance
- **Knowledge:** Monitor factual and legal developments in climate and environmental policy
- **Stakeholder engagement:** Where appropriate, engage proactively with environmental organizations and competent bodies active in your company's sector and environment to influence public opinion and (regional) policies



Keep up-to-date with us

CMS Green Globe



Interactive website



Country reports regarding trends with respect to regulating sustainability/ green claims



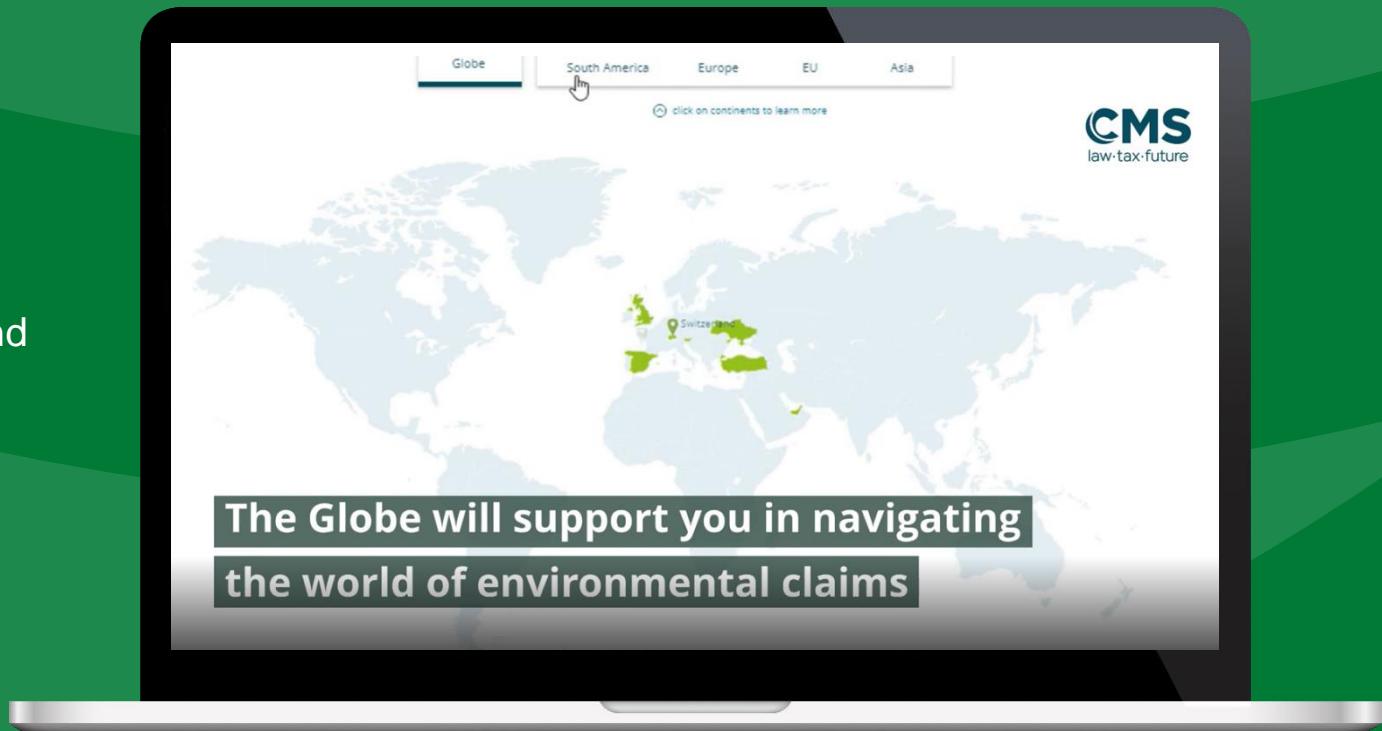
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