

ESG Litigation Roadmap

What You Need to Know

Fall 2020

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EXECUTIVE SUMMARY

Followers of the financial press will not have failed to note the prominence of Environmental, Social, and Governance (ESG) developments in recent years, whether through regulatory proposals, statements from asset managers concerning ESG, or industry/sector changes. As such, much has been written about the movement away from a shareholder economy toward a stakeholder economy, and the need to “build back better” as part of COVID-19 economic renewal packages.

However, to date, less has been written about the rise in global ESG litigation matters. A wealth of literature analyzes climate change litigation, but ESG matters address a much broader range of issues than just climate change, including:

- Environmental issues such as biodiversity degradation and long-term availability of resources (including water)
- Social issues such as supply-chain issues (including modern slavery and working conditions at supplier locations) and diversity in the workplace
- Governance issues such as corporate reporting and audit and assurance

Given the breadth of ESG matters and the range of litigation, this report does not aim to provide a complete survey of this area (if such a survey were even possible).

Instead, this report identifies:

- Risks associated with ESG litigation
- A taxonomy for ESG litigation (which is not intended to be a definitive taxonomy, but rather to provide a means to undertake a high-level survey of ESG litigation)
- Examples of litigation in accordance with the proposed taxonomy
- Certain trends, based on our survey of ESG litigation
- Best practices for directors and senior managers to consider in order to mitigate the risk of and manage ESG litigation

ESG litigation has the potential to profoundly impact a company and its ongoing viability. Large-scale ESG litigation matters go to the heart of a company’s business purpose, reputation, corporate values, approach to risk management, and relationships with investors, suppliers, customers, employees, and other stakeholders.

To date, ESG litigation has largely focused on climate change litigation or catastrophic environmental events. However, as our report highlights, while climate change will continue to have an important influence in relation to ESG litigation, the breadth of ESG litigation is much broader. In particular, the impact of COVID-19 has sharpened the focus on social issues, such as diversity issues and social conditions at supply-chain partners. Increasingly, these claims are directed at the level of parent companies and/or at individual directors themselves. This drives demand on a company’s “look-through” capabilities, including enhanced oversight/governance and data and systems to provide timely information across operational areas, business models, and supply chains.

Further, as ESG continues to grow in importance, the number of ESG litigation matters will become self-perpetuating. ESG-related disclosures will likely trigger claims based on public reporting (or the absence of public reporting) and as companies continue to commit to voluntary standards, “soft law” fora will continue to prove to be popular low-cost alternatives to formal proceedings.

For these reasons, directors and senior managers should reflect on whether they collectively have the necessary understanding of ESG matters and/or are able to access the necessary expertise. Using this knowledge and expertise, directors and senior managers should consider their corporate strategy and whether such strategy addresses both internal and external pressures related to lower-carbon goals, should ensure that the company implements robust risk-management frameworks (including in relation to public disclosures), and consider establishing a corporate structure in which appropriate resources exist at a local subsidiary level. Further, directors and senior managers may benefit from engaging in public discourse over ESG-related regulation and public policy, using organizations such as the World Business Council of Sustainable Development (WBCSD), to better understand the direction of travel and identify opportunities to share best practices and improve the quality of existing and new regulation.

INTRODUCTION

At the start of this year, WBCSD considered and provided recommendations for boards in relation to ESG matters and the modernization of governance. In his foreword to a report on modernizing governance, Philippe Joubert, Founder and CEO of Earth on Board, Senior Advisor and Special Envoy for Energy and Climate for WBCSD, noted that “if we are to effectively handle the existential challenges of climate change and other sustainability problems we face, then we must reclaim with the upmost urgency the role of the board of directors as the lead body with the responsibility of guiding the company to success.”

The report on the modernizing of governance focused on addressing Philippe Joubert’s urgent challenge through the establishment of governance systems for the purpose of achieving sustainable value creation. However, in addressing that urgent challenge, the same report also acknowledges that “litigation is also on the rise with directors being challenged for not properly discharging their duty of care¹.”

While ESG matters present both challenges and opportunities, we anticipate that one of the challenges will be an increase in ESG-related litigation. As ESG issues become increasingly pervasive in company strategies, the global financial system, and commercial transactions, associated litigation very likely will also proliferate (with current trends supporting the rise in such litigation).

ESG-related litigation will be of particular relevance to, and require the attention of, boards of directors and senior management teams for the following reasons:

- ESG matters go to the heart of a company’s purpose and strategic direction. As such, material ESG litigation matters have the potential to impact objectives.
- Typically, ESG matters concern very high-profile events and therefore can impact the reputation and goodwill of a company. As such, these matters are “mission critical” in terms of relationships with employees, customers, business partners, and other stakeholders.
- ESG litigation can result in financial loss. This loss can occur directly, as a result of fines, damages, and expenses associated with the claim, as well as indirectly, given the time and level of management attention required to manage any such dispute, the loss of sales resulting from decline in custom, and the potential investment needed to adapt or change the company’s ESG strategy as a result of the litigation.
- ESG litigation can be an indication of systemic governance failures within a company that can result in limiting a company’s ability to continue its operations or absorb significant management time to resolve.

¹ The full report is available at <https://www.wbcasd.org/Programs/Redefining-Value/Business-Decision-Making/Governance-and-Internal-Oversight/Resources/Modernizing-governance-key-recommendations-for-boards-to-ensure-business-resilience>.

Market participants, regulators, and other stakeholders have given considerable attention to the opportunities and challenges presented by ESG factors, and the increasing legal and market-based obligations that compel companies to address and incorporate ESG issues into their strategy. However, ESG litigation risks have not — beyond generic references — been given the same level of scrutiny and analysis. While there are considerable and dedicated resources concerning climate change litigation, the totality of ESG factors extends well beyond climate change.

Furthermore, as this report is prepared as part of the series concerning the response to COVID-19, far from ESG matters dimming in their prominence, companies are being evaluated with greater scrutiny. Industry observers have not identified any diminution in ESG regulatory and market pressures for companies. As such, addressing ESG issues in a post-COVID-19 world will be highly relevant to board directors and senior management for the following reasons:

- The profound and global impact of COVID-19 as a major disrupting event appears to have prompted a rapid reappraisal of corporate risk and governance mechanisms to address such risks. In addition, potential long-term changes in consumer demands and behaviour may have material implications for many companies' corporate strategies.
- Many companies have been assessed against the simplistic “saints” and “sinners” measurement. Regardless of the appropriateness and fairness of this judgment, a number of companies are being evaluated by the general public and media against these measures, and the impact on reputation could be material to the company's long-term success.
- The geopolitical implications of COVID-19 have the potential to cause significant disruption and changes in the current economic model. In particular, we may see a reappraisal of supply chains (including the reshoring of supply chains and the development of more flexible supply chains); a reappraisal of remuneration for director and senior management teams to ensure they are aligned with ESG objectives; remuneration for typically low-paid employees who are regarded as “key workers”; changes in work locations and associated real estate demands; and the implications of further degradation of biodiversity in preventing any future pandemic.
- The widely adopted lockdown and shelter-at-home responses of national and state governments have accelerated an appreciation of the move toward a low- or no-carbon economy. Together with the acknowledged benefits of lower levels of air pollution, NGOs and other organizations may become more aggressive in pursuing governments and companies that are not aligned with the objectives of the Paris Agreement.

The broader societal movement for racial justice has likewise increased shareholder and market attention on diversity practices and corporate commitment to issues of social and racial justice. Even companies that are highly committed to diversity, and to supporting social and racial justice, are finding themselves exposed to litigation risk and shareholder activism.

All of these observations (and more) are likely to drive associated litigation risks, including those concerning insurance, force majeure events, employee arrangements and safety, relationships with commercial partners, existing and future financial transactions, and the development of significant infrastructure projects (particularly those based on a fossil-fuel economy). From a litigation perspective, we won't see the full fallout until a few years from now, but boards and senior management teams can consider if they are appropriately prepared by being aware of, and responsive to, the risks.

This report therefore seeks to set out:

- A categorization of the types of litigation relevant to companies, in particular, relevant to the board and senior management team of a company
- A review of ESG-related litigation, with examples in accordance with the above categorization

- Themes arising from ESG-related litigation
- Best practices for boards and senior management teams to consider in mitigating and addressing the risks of ESG-related litigation

ESG-RELATED LITIGATION

Categorization of ESG-Related Litigation

Any exercise in categorization is fraught with difficulty and likely to be contentious, both in terms of the categories that are chosen and the ones that are omitted. This report does not attempt to undertake a definitive survey of all ESG-related litigation or produce a final and comprehensive categorization. Rather, the categorization is intended to simplify how boards and senior management teams can assess the risks relevant to their company, and the steps they should consider to address such risks.

Based on our review, the key categories of ESG-related litigation are:

- ESG-related litigation that is directed at national governments or governmental organizations and has indirect effects on companies (Government ESG Litigation)
- ESG-related litigation that is directed at significant infrastructure projects. This litigation might involve companies, national governments / governmental organizations, or both (Infrastructure ESG Litigation)
- ESG-related litigation that concerns companies themselves. We see this divided across three categories:
 - ESG-related litigation that concerns companies and their operations (Company Operations ESG Litigation)
 - ESG-related litigation that concerns companies and their governance arrangements (Company Governance ESG Litigation)
 - ESG-related litigation associated with corporate reporting and disclosures (Corporate Disclosure ESG Litigation)
- ESG-related litigation against board directors concerning alleged breach of duty of care or duty of loyalty under state laws in the US (Fiduciary Duty ESG Litigation)
- ESG matters that are addressed through “soft law” and/or informal dispute resolution mechanisms, which typically target sectors, individual companies, or groups of companies (Informal ESG Disputes)

Examples of Government ESG Litigation

[See Appendix 1](#)

Examples of Infrastructure ESG Litigation

[See Appendix 2](#)

Examples of Company Operations ESG Litigation

[See Appendix 3](#)

Examples of Company Governance ESG Litigation

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Examples of Corporate Disclosure ESG Litigation

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Examples of Fiduciary Duty ESG Litigation

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Examples of Informal ESG Disputes

[See Appendix 7](#)

KEY THEMES FROM ESG LITIGATION REVIEW

ESG litigation matters vary widely given the broad range of factors that are included under the ESG umbrella. We expect this trend to continue as ESG permeates more corporate activity and as ESG-related regulations and market positions harden.

Nonetheless, this report identifies certain common themes among the examples of ESG litigation that we highlight. These include:

Climate change: We do not expect the trend of climate change litigation to dissipate anytime soon. As governments increasingly implement net-zero carbon targets and companies establish their own carbon-neutral or carbon-negative pledges, we can expect to see further disputes. Climate change-related litigation will cut across all of the defined categories of ESG litigation. Notably, we highlight:

- The increased focus on infrastructure projects and whether these projects are aligned with the Paris Agreement
- The risk to companies of claims alleging their contribution toward the effects of climate change
- Commercial disputes arising out of climate change events (e.g., insurance claims and claims related to potential force majeure events)

The use of “soft law” fora: A number of the examples that we highlight involve disputes outside of the traditional court forum. Due to the time and expense associated with traditional litigation proceedings, we can expect to see traditional litigation principally reserved for precedent-setting matters, matters of high value, or matters of particular commercial significance. Instead, community groups and NGOs are likely to continue to direct their efforts toward less formal dispute resolution mechanisms, particularly when costs are a concern and the relevant matter is high-profile and could lead to damage to a company’s reputation.

Workers’ rights and human rights: The focus on supply chains has brought much greater scrutiny to the working conditions of those in the supply chain. The human rights of those workers — and the communities that are impacted by the activities of the supply chain — have come to the fore. We have seen a considerable increase in regulations concerning modern slavery diligence, and a number of companies have adopted human rights policies. Further, connections are being made between climate change and human rights, and we have seen claims against large companies (in particular global brands — see below) for poor health and safety conditions in their supply chain, particularly for significant industrial accidents.

Diversification of ESG matters: As ESG matters continue to increase in importance, we can expect the range of underlying subjects of ESG litigation to diversify. We anticipate that COVID-19 and an increased focus on racial equality and social justice will accelerate the focus on social and governance issues (e.g., supply chain management; relationships with employees, contractors, and stakeholders; and governance of risk issues). As more focus is placed on social and governance issues, litigation risk will likely follow.

Global brands: Large multinationals (along with governments) continue to be the primary target of NGOs, activists, and similar organizations that are agitating for ESG-related claims. This focus is unsurprising given the global nature of multinational operations (including their supply chains). In addition, multinationals are seen to have significant resources to both afford these claims and — perhaps more important — a brand/reputation that needs to be protected. Claims against multinationals also highlight issues associated with group structures. The long-favored approach to corporate separateness under corporate law principles has been heavily scrutinized through the ESG lens (as per the examples of Company Governance ESG Litigation, for instance).

ESG disclosures: Public disclosures — whether through corporate reporting to regulatory agencies or other communications — are a fruitful source of litigation. We have highlighted examples of Corporate Disclosure ESG Litigation, Company Governance ESG Litigation, and Informal ESG Disputes that include claims concerning a failure to disclose ESG information, inadequately disclosing ESG information, allegations of greenwashing, and the risk of attracting responsibility for the activities of subsidiary entities as a result of overstating a parent company's capacity to supervise and control such entities in group reports.

BEST PRACTICES

We conclude this report with suggestions for how directors and senior leadership teams may seek to mitigate the risks of ESG litigation and also address such litigation when it arises.

The following best practices are intended to be practical but are necessarily general in nature. Directors and senior managers will need to consider their particular sector, their geographies of operation, the nature of their supply chains and operations, and any other relevant factors specific to their organization. Directors and senior managers may want to take advice from relevant professionals as part of such considerations.

Build out knowledge on material ESG topics

Consider building out the requisite ESG knowledge and resources that provide a company with the tools required for the management and strategic oversight of ESG matters and ESG risk. Some companies may want to revise their governance arrangements through line management to the senior management team and include appropriate ESG oversight at the board level. There are many ways to achieve this, for example, the addition of ESG matters to the responsibilities of the governance or risk committees of the board, or the identify one or more non-executive directors with responsibility for ESG matters.

Further, companies may want to consider their ESG data collection and ESG systems to support any build-out and extension of ESG knowledge. This would require investment and a clear corporate strategy that is aligned with their internal reporting and external disclosure models. If companies undertake external disclosure on ESG matters (whether compulsory or voluntary), then they will need to reflect on the reputational and related associated litigation risks that will arise from this approach and make assurances on its effectiveness. Such as approach will also place demands on compliance and audit functions (both internal and external).

Examine corporate arrangements

Consider corporate structures and whether local operations have the necessary resources and expertise to handle the ESG matters that may arise. Companies with subsidiaries or other affiliated company structures may look to contain risk within each entity by ensuring that any centralized services concerning ESG matters are limited to providing guidance and oversight, and do not purport to exercise control over, or management of, day-to-day local operations. Companies should also reflect on whether their public reports and statements accurately reflect this position (see more on this below).

Focus on any public disclosures

Treat public disclosures in relation to ESG matters as seriously as those deployed in respect of financial disclosures, and adapt similar processes. Consider taking independent auditing and verification steps, particularly for annual ESG-related reports and/or other material ESG disclosures. If regulation is likely to mandate future compulsory ESG disclosures (e.g., in respect of the Task Force on Climate-related Financial Disclosures),

companies may want to aim to prepare in advance by gathering the data and presenting the information internally. Such preparations can give a company time and space to improve performance and identify any issues ahead of mandated public disclosures. Also consider the inclusion of cautionary language with forward-looking statements to identify factors that might cause results to differ from those predicted in the forward-looking statements. This language can invoke safe harbor and bespeaks caution doctrine protections under certain circumstances. Also consider refraining from making assurances or firm projections of future results.

Conduct risk assessments

As the pandemic has shown, planning for every eventuality is impossible. However, companies can anticipate and mitigate ESG risks. One means of doing this is through the implementation of early-stage risk screening and incorporating ESG risks into the company's overall enterprise risk management (ERM) exercise. Notably, any such risk review will also want to consider supply chains and other key stakeholders. The deployment of specific ESG risk-management tools may also help to ensure that any review of the applicable risks remains dynamic.

Plan for the low-carbon / carbon-neutral economy

The momentum behind the shift to a low-carbon or carbon-neutral economy is unlikely to slow anytime soon. Examine the company's strategy in the context of a low-carbon / carbon-neutral economy to detect any areas or projects that pose particular risk in that environment. Consider whether these projects require change and/or the scope for legal challenge in light of climate change policies and targets.

Set achievable targets and commitments

In our experience, companies that establish targets or agree to standards or commitments they cannot meet face greater exposure to litigation risk and damage to their brand and reputation. Directors and senior management teams should carefully consider any targets and standards/commitments to ensure that the company has the capacity to meet its voluntary obligations.

Undertake public engagement

Corporations have a strong role to play in pushing for consistent ESG standards and reporting requirements, so consider engaging with public policymakers on approaches to ESG-related regulations. Furthermore, consider whether new concepts — such as reporting safe harbors — can be introduced and promoted. These new concepts may provide a measure of security and protection from litigation for companies making ESG disclosures if certain standards are followed or processes are undertaken.

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APPENDIX 1: GOVERNMENT ESG LITIGATION ([back to page 6](#))

State of the Netherlands v. Urgenda Foundation

On December 20, 2019, the Dutch Supreme Court upheld the Court of Appeal's ruling in the Urgenda Foundation case, determining that the Dutch State was required to reduce Dutch greenhouse gas (GHG) emissions by 25% by the end of 2020. This decision marked the final ruling in a series of cases dating back to 2015.

In 2015, the Urgenda Foundation (Urgenda), an environmental NGO, brought a case against the Dutch State, alleging that the national target for GHG emission reductions was insufficient. The Dutch target at that time was the EU-wide figure of 20% compared to 1990 levels. According to Urgenda, the climate change risks meant that the 20% target was insufficient, and only a decrease of at least 25% would be adequate.

At first instance, The Hague District Court agreed with Urgenda, and ordered emissions to be reduced by 25% by 2020 — a finding that was initially confirmed by The Hague Court of Appeal in 2018. Now, the Dutch Supreme Court has followed suit.

The Dutch Supreme Court confirmed this decision, and the Supreme Court judgment was based on the provisions of the UN Framework Convention on Climate Change and the European Convention on Human Rights (ECHR). Specifically, the Supreme Court found that there was broad scientific consensus that climate change could lead to significant damage to citizens worldwide, and that GHG emissions were the leading cause of climate change. As a result, it held that the Dutch State had direct obligations under Articles 2 and 8 of the ECHR (right to life, and right to respect for private and family life) to ensure that emissions were reduced in line with acceptable limits. In order to meet these obligations, the Supreme Court determined that a scientific consensus existed stating that temperatures should not rise by more than 2 degrees Celsius from pre-industrial levels.

The Dutch State had tried to argue that its 20% target was reasonable and that these issues, such as the percentage reduction of GHGs in the economy, were inherently political. However, the Supreme Court found these arguments unpersuasive. It determined that the Dutch State had failed to justify why a 20% target would be acceptable, given the "large degree of consensus in the scientific community on the need for developed countries to reduce emissions by at least 25% by the end of 2020" in order to stay below the 2-degree target, and upheld the Court of Appeal's ruling to implement the 25% target. Further, it determined that the Dutch Constitution requires the Dutch courts to apply the provisions of the ECHR, and therefore the breaches of Articles 2 and 8 that would result from the implementation of the 20% target led the matter to be justiciable.

APPENDIX 2: INFRASTRUCTURE ESG LITIGATION ([back to page 6](#))

R (Plan B Earth and Others) v. Secretary of State for Transport and Others

Heathrow Airport is the busiest two-runway airport in the world and handles 70% of the UK's scheduled long-haul flights. Arguably, the UK will not be able to sustain its position as a global hub unless it increases aviation capacity through the construction of a third runway at Heathrow. In 2015, the Airports Commission (established by the UK government in order to consider aviation capacity) concluded that there was a need for additional aviation capacity near London, and that the Heathrow scheme for a third runway was the most viable option. The UK government determined that it would use the Airports National Policy Statement (ANPS) to establish a framework through which an application could be made for development consent. In October 2016, the UK government confirmed that the third runway at Heathrow was the preferred option.

The UK government's decision attracted much criticism and was the subject of judicial review claims from a number of parties. Broadly, these claims related to ANPS's incompatibility with: (i) the Habitats Directive; (ii) the Strategic Environmental Assessment (SEA) Directive; and (iii) the UK government's commitments to combatting climate change. In the first instance, the ANPS was upheld and the claims for judicial review were dismissed. However, in the Court of Appeal (the Court), the claims succeeded on the UK government's failure to take account of its own climate change policies in making the ANPS (broadly, the claims concerning the Habitats and SEA Directives failed).

The Court noted that the UK government had established its commitment pursuant to domestic legislation (the Climate Change Act 2008) to reduce GHG emissions by 80% (from the 1990 levels) by 2050 (this target was recently elevated to a net-zero target by 2050). While this 80% target was considered ambitious at the time, it was not regarded as necessarily sufficient to meet the temperature targets under the Paris Agreement (i.e., to limit warming to well below 2 degrees Celsius and pursue efforts to limit warming to 1.5 degrees Celsius). Further, a number of ministers had made public statements to Parliament, after which it accepted that the goal of net zero would need to be enshrined in law.

In drawing up the ANPS, the responsible Secretary of State determined (on the basis of advice) that the UK government's commitments under the Paris Agreement were not relevant considerations. However, the Court determined that those commitments constituted UK government policy and therefore needed to be taken into account in the relevant Planning Act. On this basis (and on the basis of additional related considerations), the ANPS was considered unlawful, and the Court agreed to make a declaration in which the ANPS would have no legal effect "unless or until the Secretary of State decides to conduct a review." This review would need to take account of the UK government's Paris Agreement commitments.

The Court was at pains to emphasize that it was not determining (and was in no position to determine) whether a third runway should be constructed at Heathrow. The UK government is in a position to reconsider the ANPS in light of its climate change commitments (including the Paris Agreement), but the current government has confirmed that it has no plans to appeal the decision, effectively terminating the prospect of a third runway in the short- to medium-term (unless the airport operator is able to successfully appeal the Court's decision to the Supreme Court).

APPENDIX 3: COMPANY OPERATIONS ESG LITIGATION [\(back to page 6\)](#)

Saúl Luciano Lliuya v. RWE AG

In November 2015, Saúl Luciano Lliuya of Huaraz, Peru, filed a claim for declaratory judgement and damages against RWE AG (RWE), Germany's largest producer of electricity. Lliuya alleged that RWE had knowingly contributed to climate change with its company operations, resulting in substantial volumes of GHG emissions, which bore partial responsibility for melting glaciers near Huaraz and associated flood risks. Palcacocha, a glacier lake above Huaraz, has increased in volume at an accelerated rate since 2003. To prevent flood threats to Huaraz, Lliuya and local authorities have established flood protections at considerable cost. Lliuya therefore alleged that RWE's emissions were a nuisance and that he had incurred compensable costs to mitigate them. Acknowledging that RWE was only a partial contributor to the overall emissions responsible for climate change and the ensuing flood risk, Lliuya requested that RWE reimburse 0.47% of the costs incurred in building flood protections, the same percentage as the Institute of Climate Responsibility's estimate of RWE's contribution to global GHG emissions from 1751 to 2010.

The Court of first instance dismissed the claim, stating it was "impossible to identify anything resembling a linear chain of causation from one particular source of emission to one particular damage." However, following an appeal from Lliuya in January 2017, on November 30, 2017, the appellate court recognised the claim as admissible. The case is now in the evidentiary phase, with the court reviewing expert opinion on RWE's emissions, the contribution of these emissions to climate change, and the causal link to the impact on glaciers surrounding Palcacocha. The court's recognition that a private company may potentially be held liable for climate change-related damages due to its emissions demonstrates a development in the law in this area.

Isra Vision v. Institutional Shareholder Services

In March 2020, Isra Vision (the German industrial image processing company) successfully obtained a preliminary injunction in the Regional Court of Munich against the US proxy advisory firm Institutional Shareholder Services (ISS), preventing ISS from issuing Isra Vision a poor ESG rating. The dispute arose after ISS made a request to Isra Vision to participate in a sustainability review, to which Isra Vision did not respond. ISS nonetheless produced an ESG assessment of Isra Vision based on publicly available material, granting Isra Vision the worst rating (D-) in the assessment. According to media reports, in granting the injunction the court had reasoned that a mere lack of information could not justify a poor ESG rating of a company. Additionally, the court is reported to have stated that ISS's analysis criteria should be closely aligned with the specific business operations of Isra Vision (which was not the case in the rating prepared by ISS). The decision attracted considerable attention, being the first publicly known case in Germany in which a company was able to legally challenge an ESG rating.

McVeigh v. Retail Employees Superannuation Trust

In July 2018, Mark McVeigh, a pension fund member of Retail Employees Superannuation Trust (REST), filed a claim in Australia's Federal Court alleging that REST failed to provide information related to climate change business risks, contrary to the Corporations Act 2001 (the Act). Under the Act, super fund beneficiaries are entitled to request information in order to make an informed assessment of the fund's management and financial health. McVeigh had requested information concerning the fund's climate change business risks from REST, as well as the fund's response to such risks. In his claim, McVeigh alleged that the information provided by REST fell short of its obligations under the Act; he also sought an injunction requiring REST to provide the disputed information. In September 2018, McVeigh filed an amended complaint alleging that REST had violated the Superannuation Industry (Supervision) Act 1993, requiring (among other things) trustees to act with care and in the best interests of their beneficiaries. Among other arguments, McVeigh contended that a diligent superannuation trustee would have aligned its investment management and climate-risk related disclosure to beneficiaries with the recommendations of the Task Force on Climate-Related Disclosures.

Nestle USA, Inc. v. Doe

This case involves claims against Nestle and Cargill for allegedly aiding and abetting the violation of child labor laws in their overseas supply chain. Specifically, the petitioners claimed that they were enslaved and forced to work on cocoa farms in Côte d'Ivoire against their will, and that Nestle aided and abetted these violations by purchasing cocoa from these farms, and by providing the farms with funds, farming supplies, and training. Similar claims had been presented in other cases involving Chiquita Brands and RJR Nabisco. The issues presented to the US Supreme Court are whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute may overcome the extraterritoriality bar, and whether the judiciary has the authority under the Alien Tort Statute to impose liability on domestic corporations. The case will be argued during the October 2020 term.

APPENDIX 4: COMPANY GOVERNANCE ESG LITIGATION ([*back to page 6*](#))

In the UK, NGOs and claimant law firms have sought to bring class action lawsuits against the parent companies of large multinational entities (three notable cases have been brought such multinational companies with a significant UK presence, one of which included Unilever). The claims are standard negligence claims. However, they are unusual in that the claimants have sought to bring the claims against the parent companies, and all of the cases concern events in Africa involving certain African subsidiaries of said parent companies. The claimants say the relevant parent companies owe direct duties of care to them. The claimants argue that this duty exists because the large multinational enterprises have group Environment, Health and Safety (EHS) policies and procedures, and the group annual reports contain comments from an EHS matters discussion group. These claims are very fact-specific and some of the proceedings are ongoing.

APPENDIX 5: CORPORATE DISCLOSURE ESG LITIGATION ([back to page 6](#))

Claims by US State Attorneys General

In the US, State Attorneys General have sued companies for allegedly misleading shareholders by not appropriately disclosing the companies' understanding of climate change risks. This mirrors the approach adopted in relation to tobacco companies.

The Financial Reporting Council (FRC)

The FRC is the UK regulator relating to accountants, auditors, actuaries, and corporate governance.

A number of NGOs — most notably Client Earth — have been active in raising complaints about climate change reporting. In particular, Client Earth has made complaints against certain UK companies, including: EasyJet (an airline), Balfour Beatty (an engineering company), and Bodycote (a provider of heat treatment services and specialist thermal processes). The FRC's response has been to launch an industry-wide investigation into climate change reporting.

Greenwashing Claims

Since 2008, the US has seen increased activity by the Federal Trade Commission (FTC) in regulating allegedly false green claims. A number of consumer goods companies have been challenged under the Federal Trade Commission Act (the FTC Act) for misleading green statements, including Kmart (a US supermarket), Tender Corp (a manufacturer of moist wipes), and Dyna-E (a paper towel manufacturer). In each of these instances, the FTC challenged the companies' statements that their products were biodegradable. The FTC Act prohibits "unfair or deceptive acts or practices" and "unfair methods of competition" in commerce, and is supplemented by the FTC's Guides for the Use of Environmental Marketing Claims (also known as the Green Guides). Greenwashing claims have also been brought under state laws and under the federal Lanham Act, which prohibits companies from using advertising that misrepresents "the nature, characteristics, qualities or geographic origin" of goods and services sold.

Private Litigation Under the US Securities Laws

In 2012, following the Deepwater Horizon accident, plaintiffs successfully brought a class action suit against BP under the antifraud provisions in Section 10(b) of the Securities Exchange Act. The claims alleged that the company had made false statements in press releases, its annual reports, and sustainability reports about its safety program following several industrial accidents that had occurred years earlier. The statements had asserted that "BP America is in the midst of a comprehensive effort to improve its safety culture and to strengthen and standardize process safety and risk management programs at all BP-operated facilities." In fact, those systems were not in effect at contractor-owned facilities. Those statements and others formed the basis for the court's finding that the securities fraud claims were actionable.

In Massey Energy Co. Securities Litigation, the court permitted an investor suit against Massey Energy claiming that the company had committed securities fraud by misleading the market about its safety and compliance record and its commitment to safety. Following accidents in 2006 that resulted in the deaths of two miners, the company sought to restore its image and announced that it had a strong commitment to its miners' safety, and that it had begun to implement "safety improvement initiatives." The company stated in its periodic reports filed with the US Securities and Exchange Commission (SEC) that it put its miners' safety before production, and "a safe mine is a productive mine." Subsequently, in 2010, 29 miners died in an explosion in a company mine. Following the

accident, pervasive safety violations came to light that led to claims that the company's disclosures had been materially misleading.

In May 2020, a federal court in New York permitted an investor class action suit against Vale SA to proceed following another deadly mining accident. The company allegedly ignored red flags about safety violations while touting its commitment to health, safety, and the environment, and by specifically citing comprehensive safety and "sustainability reports." A 2019 dam breach at the mine killed 259 people, and the company's American depository shares lost a quarter of their value in the ensuing weeks. Investors brought suit under the antifraud provisions of the securities laws.

Historically, US courts have concluded that disclosures pertaining to matters of social policy or human capital management are nonactionable puffery — general statements about reputation, integrity, or compliance with workplace policies and ethical norms. These include recent cases involving Hewlett-Packard, CBS, Liberty Tax, and Wynn Resorts. However, some courts have reached a different conclusion.

SEC Enforcement Actions

Following the Deepwater Horizon accident, in addition to the private litigation noted above, BP also agreed to a settlement with the SEC and paid a US\$525 million penalty to settle charges of securities fraud. The SEC alleged that BP had made fraudulent public statements related to the flow rate of oil following the accident.

The SEC is currently pursuing claims against Volkswagen AG arising from alleged failure to make sufficient disclosures and risk disclosures regarding its vehicles' compliance with "clean diesel" emissions standards. The challenged disclosures were made in seven separate public securities offerings and a Rule 144A bond offering. The SEC is pursuing these claims notwithstanding the fact that Volkswagen has entered into settlements with federal and state regulators and private litigants in excess of US\$25 billion.

The SEC has prioritized enforcement of the Foreign Corrupt Practices Act (FCPA) and created a specialized unit within its Division of Enforcement to pursue FCPA claims. The FCPA prohibits companies with stock trading in the United States from bribing foreign officials to win government contracts or other business, and highlights the risk of lax governance processes for companies doing business in countries where corruption is common.

APPENDIX 6: FIDUCIARY DUTY ESG LITIGATION ([back to page 6](#))

Corporate directors in the US and in other jurisdictions have common law duties of care and of loyalty. The duty of care requires directors to act with a reasonable level of care consistent with the care that would be applied by a reasonable director similarly situated. In the US, directors of companies incorporated in Delaware and many other states enjoy the presumption that they have exercised reasonable care by means of the protections of the Business Judgment Rule, which deems reasonable directors' decisions made in good faith. As such, a claim against directors based on a breach of duty of care in Delaware requires a demonstration of intentional misconduct or bad faith on the part of the director. The duty of loyalty requires directors to refrain from self-dealing. It also requires directors to make good-faith efforts to implement an oversight program over the company's operations, and to monitor that oversight program. The seminal case *In re Caremark International Inc. Derivative Litigation* established that board members must ensure that that information and reporting systems that are reasonably designed to provide the board with sufficient information to make informed decisions are in place.

Historically, shareholders have faced difficulty in pursuing claims based on so-called *Caremark* claims, asserting inadequate oversight. Last year, however, the Delaware Supreme Court upheld a shareholder derivative suit (a suit brought by shareholders on behalf of the company alleging misconduct by its officers or directors) alleging that the board members breached the duty of loyalty by failing to exercise proper oversight. The case, *Marchand v. Barnhill*, was brought after the Blue Bell Creamery ice cream plants suffered a listeria outbreak. The outbreak caused three people to die, and the company shut down its operations, recalled all of its products, and dismissed one-third of its workforce. A shareholder brought suit against key executives and the board alleging breach of their duties of care and loyalty. The complaint adequately alleged that the company's board had failed to implement any systems to monitor the company's food safety performance or compliance. The Supreme Court emphasized that directors have a duty to exercise oversight, to obtain reasonable information, and to monitor the company's operational viability and legal compliance. The Supreme Court also noted that food safety is a key compliance issue for an ice cream company. Nonetheless, the company had no board committee overseeing food safety, no board process to address food safety issues, and no mechanism by which the board would be advised of food safety issues. As such, the complaint alleged facts to support a finding that the directors had breached their duty of loyalty.

In the US, the directors of companies such as Oracle, Qualcomm, and others have been the target of shareholder derivative lawsuits asserting breaches of the duty of care and loyalty based on alleged insufficient commitment to diversity at the board level and within the company, as well as alleged misleading disclosures regarding these companies' commitment to diversity and compliance with anti-discrimination laws. These cases are in the early stages, and similar claims against other public company boards are expected.

APPENDIX 7: INFORMAL ESG DISPUTES [\(back to page 6\)](#)

The Guidelines

Background

The Guidelines are a set of voluntary principles and standards for responsible business conduct in a global context. Such voluntary principles are stated as being consistent with applicable laws and internationally recognized standards and “promote positive contributions by enterprises to economic, environmental and social progress.”

The most recent version of the Guidelines was adopted in May 2011 by 42 governments (including all members of the OECD). Briefly, the Guidelines cover issues such as: (i) human rights; (ii) environment; (iii) employment; (iv) bribery; (v) disclosure of company information; (vi) supply chain management; and (vii) taxation.

Multinational Enterprises

The Guidelines do not include a precise definition of multinational enterprises and actually state that a precise definition is not required. Some factors that are used to describe multinational enterprises in the Guidelines are as follows:

- Multinational enterprises usually comprise companies in more than one country and are so linked that they may coordinate their operations in various ways
- One or more of these entities may be able to exercise a significant influence over the activities of others
- Ownership may be private, State, or mixed

The Guidelines are addressed to all entities within the multinational enterprise.

The Guidelines and the National Contact Points (NCP)

The Guidelines are not legally binding or enforceable for multinational enterprises, and observance of the principles are voluntary (although there may be some matters addressed in the Guidelines that are also addressed in certain national laws and regulations). However, the countries that adhere to the Guidelines (as noted above, this comprises all OECD member countries and certain non-member countries) are committed to promoting their observance through a unique dispute resolution mechanism.

This mechanism is reflected in the establishment of an NCP. An NCP is an agency established by an adhering government to implement the Guidelines.

The NCPs: (i) promote awareness of the Guidelines; and (ii) implement the complaint mechanism that is set out in the Guidelines. The NCPs’ second responsibility is of particular interest:

- Any interested party is entitled to file a complaint to an NCP under the Guidelines. An interested party may include an affected community, employees or trade unions, or an NGO.
- A complaint may be made if a multinational enterprise is considered to be violating the Guidelines.
- The complaint should provide details of the nature of the breach by the multinational enterprise and any supporting evidence.

Each NCP typically sets out its own procedures (including timing) for dealing with a complaint. A typical process may be as follows:

- *Initial assessment:* This comprises a desk-based review of the relevant complaint by the NCP, any response of the multinational, and any other information provided. At this stage, the NCP will determine if further consideration of the complaint is warranted.
- *Conciliation:* If the complaint is accepted, then the NCP will offer conciliation/mediation services. If this fails or one party declines, then the NCP will examine the complaint to consider whether it is justified.
- *Final statement:* In the event a mediated statement is reached, this will be published. Alternatively, the NCP will prepare a final statement of its conclusions as to whether the Guidelines have been breached or not.
- *Follow-up:* If the NCP has made recommendations, it will specify dates by which it will ask the parties to provide an update, and a further statement will be publicized reflecting the responses provided.

The NCP states that while it is flexible with respect to timing, it is committed to completing the handling of a complaint from receipt to final statement within one year (three months for the initial assessment, six months for conciliation, and three months for the final statement).

Examples

Examples of complaints concerning the Guidelines includes a complaint that was brought to the UK and Dutch NCPs against a number of UK-headquartered international banks concerning certain loans made by those banks in connection with the Sakhalin oil development project. The complainant alleged that the Sakhalin project developer was impacting the environment and the human rights of local communities and that the banks, as lenders, should seek to use their influence to change the behavior of the developer.

Other key points associated with complaints under the Guidelines:

- Complaints to NCPs represent an inexpensive and simple way for NGOs to bring a complaint against large multinational enterprises.
- Under the Guidelines and the NCPs' handling of complaints, information disclosed to any NCP is treated as public information. As such, any party participating in a dispute with the relevant NCP should operate on the assumption that any information submitted to the NCP (whether to support its case or otherwise) will be shared with the complainants and, potentially, made publicly available through any statement made by the NCP.

The complaint procedure is voluntary, and there are no monetary fines or similar remedies that the relevant NCP can impose. However, a negative finding in relation to an NCP complaint can lead to reputational harm and negative publicity. Further, stakeholders could take a close interest in the complaint and its outcome, and under the proposed EU Taxonomy, activities will not be regarded as green if there have been adverse findings under the Guidelines. Finally, participating in a complaint can take significant internal resources and involve material costs associated with external advisors (and there will be no recourse to the complainant for adverse costs).

Other Informal ESG Disputes

UN Guiding Principles on Business and Human Rights / UN Global Compact

A number of companies have endorsed these Guiding Principles and, as a result, annually report against this framework. Equally, companies can align with the UN Global Compact. In both instances, these are voluntary commitments made by companies.

There are examples of informal disputes involving the Guiding Principles:

- One company committed to both the Guiding Principles and the UN Global Compact. The company came under attack by NGOs, as there were claims that the company's activities were incompatible with global human rights principles. As a result, the company had to leave the UN Global Compact and was unable to fully report against the Guiding Principles.
- Following the collapse of a garment manufacturing plant in Bangladesh (in which more than 1,000 people died), an Accord on Fire and Building Safety was negotiated, including an Escalation Protocol that is intended to be followed prior to termination of a non-compliant supplier of garments. The Accord is intended to ensure basic health and safety standards and has been signed by a large number of Western clothing brands.

False Advertising

We have seen a significant rise in false advertising claims around greenwashing or similar complaints. As with the Guidelines, these are also inexpensive complaint mechanisms open to NGOs and campaign groups.

Examples of such disputes include:

- Following the settlement of a large environmental class action, Trafigura worked with its public relations team and placed an advertisement in the Dutch press (where it had been subject to significant criticism). Greenpeace brought a claim for 12 allegations of false advertising. Greenpeace lost on 11 instances, but won on one instance. The public response was that Trafigura "lost" this false advertising claim.
- Similar claims have been made against: (i) a UK fracking company as a result of advertising certain environmental benefits associated with fracking; and (ii) Ryanair in relation to climate change claims that it made in respect of its emissions.

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