

ESG LITIGATION: A PRIMER

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Environmental, Social, and Governance (“**ESG**”) considerations have gained substantial traction in recent years, influencing corporate strategies and investment decisions. Alongside this surge is the emergence of ESG litigation as a significant area of legal development. This article explores recent trends in ESG litigation, beginning with the notable *Woodpecker* case in South Korea, followed by an examination of other international cases and an analysis of their implications for Malaysia’s evolving legal landscape.

Global Rise of ESG Litigation

ESG litigation is on the rise globally, targeting both corporations and governments. A significant portion of these cases stems from legal activism, often driven by charitable organisations aiming to scrutinise a company’s ESG performance and compliance with regulations. As consumers, regulators, and investors seek to hold companies accountable for their claims about environmental and social impact, there has been a surge in corresponding litigation and enforcement actions, due to the increased awareness and heightened scrutiny of ESG-related issues and the third-party litigation funding.¹

At its core, ESG litigation refers to legal actions

against corporations based on their environmental impact, social practices, and governance structures. ESG litigation can arise from a wide array of disputes, including:

- **Environmental Issues:**

Violations of emissions standards, deforestation, pollution, and failure to meet climate commitments.

- **Social Concerns:**

Human rights abuses, labour law violations, or discriminatory practices in the workplace.

- **Governance Failures:**

Failure to meet transparency requirements, engagement in corruption or false reporting, or violations of fiduciary duties to shareholders.²

In 2023, over 230 new climate-related lawsuits were initiated. Many of these cases aimed to hold both companies and governments accountable for their climate commitments. However, the growth in the number of new cases slowed compared to previous years, possibly indicating a strategic shift toward concentrating litigation efforts on areas expected to yield a more significant impact.³

[1] <https://www.reuters.com/legal/legalindustry/how-litigation-funding-drives-progress-esg-agenda-2023-06-30/#:~:text=Litigation%20funding%20%E2%80%94%20the%20payment%20by,increase%20access%20is%20to%20justice>.

[2] <https://www.ibm.com/topics/environmental-social-and-governance>

[3] <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2024-snapshot/>

The *Woodpecker* Case: A Landmark Decision

In 2022, the *Woodpecker* case, being the first of its kind in Asia, became a pivotal moment in ESG litigation. The claim, brought by 62 babies and young children as plaintiffs, named an embryo as the lead plaintiff. They argued that South Korea's legally binding climate commitments were insufficient and unmet, violating their constitutionally guaranteed human rights.

Background

In 2021, South Korea made a legally binding commitment to reduce carbon emissions by 290 million tons by 2030 and to achieve net-zero carbon emissions by 2050. To meet this goal, the country needs to reduce emissions by 5.4% each year starting in 2023; however, they have so far failed to meet this target.

The claim is partially based on the Enforcement Decree of the Carbon Neutrality Act ("**Enforcement Decree**"), which requires South Korea's Nationally Determined Contribution ("**NDC**") to be set at 40% by 2030, compared to levels measured in 2018, as stated in Article 3, Paragraph 1 of the Enforcement Decree. The plaintiffs argue that Article 3(1) of the Enforcement Decree violates their constitutional rights. According to the plaintiffs, this target is insufficient to protect their lives and safety from climate disasters and is not aligned with the Paris Agreement. Consequently, the plaintiffs requested a constitutional review of the target set under the Enforcement Decree.

This case was merged with two other cases that went against the current NDC and its implementation plan.

Court's Decision

On 29 August 2024, South Korea's Constitutional Court ruled that much of the country's climate goals were unconstitutional, marking a landmark victory for young environmental activists. The court ruled that the government's limited climate targets violated the constitution, as they did "not sufficiently protect the basic rights of the people".

As a result, the National Assembly and the government of the Republic of Korea must now revise regulations related to the Framework Act on Carbon Neutrality and set new greenhouse gas reduction goals that consider the rights of future generations.

Implications of the *Woodpecker* Case

The trailblazing *Woodpecker* case may inspire similar litigation across the region. Other countries may look to this case as a precedent for holding governments accountable for environmental failures. This could lead to a wave of climate-related lawsuits in Asia, fostering a more robust legal framework for environmental protection.

The case also had the effect of heightening public awareness about the intersection of climate policy and constitutional rights. It has galvanised young activists and civil society organisations, encouraging them to advocate more vigorously for climate justice. This increased engagement could potentially lead to a more informed citizenry that demands accountability from both corporations and governments regarding their environmental practices.

While the primary focus of the case was on governmental obligations, it is foreseeable that it would also have implications for corporate accountability. Companies operating in South Korea, and across Asia, will likely face increasing scrutiny regarding their contributions to carbon emissions and their alignment with national targets. This could result in more robust ESG reporting and a greater emphasis on sustainability practices in the corporate sector.

As the global community grapples with the urgent need for climate action, the legal principles established in this case could inspire a new wave of advocacy and reform, prioritising the protection of future generations and the planet.



Indonesian Youths and Others v Indonesia

Of note in the region is an ongoing case filed in 2022 by 13 children, youth, and members of vulnerable groups from different parts of Indonesia, all of whom allege that they are affected by the Indonesian Government's response to climate change.⁴

Other Examples or Categories of ESG Litigation

1. Royal Dutch Shell (2021): A Climate Accountability Case

In a landmark ruling in 2021, the Hague District Court in the Netherlands ordered Royal Dutch Shell to reduce its carbon emissions by 45% by 2030, compared to 2019 levels. This decision stemmed from a lawsuit filed by the environmental group Milieudefensie, which argued that Shell's emissions were contributing significantly to climate change.⁵

This decision establishes a significant precedent for climate-related litigation globally and highlights the growing legal demands placed on corporations to match their business models with global climate goals.

The case is pending appeal.

2. ClientEarth (2023): A Derivative Action Case

Following the Royal Dutch Shell ruling, ClientEarth, which held shares in Shell Plc and was therefore a member of Shell, applied for permission to bring a derivative claim against Shell's directors under Section 260 of the Companies Act 2006. The claim concerned Shell's climate change risk management strategy and its response to the Royal Dutch Shell ruling.

In 2023, the United Kingdom High Court dismissed ClientEarth's application for permission on the grounds that it does not show a prima facie case for granting permission.⁶

The dismissal highlights the difficulty in holding corporate boards accountable for ESG-related risks. It shows that plaintiffs face challenges in meeting the high legal standards required to prove breaches of fiduciary duty in ESG cases. However, this does not deter future ESG litigation, rather it emphasises the need for stronger legal strategies. The case may also prompt regulators to clarify corporate directors' responsibilities regarding climate and ESG risk management.



[4] <https://climatecasechart.com/non-us-case/indonesian-youths-and-others-v-indonesia/#:~:text=The%20complaint%20alleges%20that%20Indonesia,the%20right%20to%20food%20and>

[5] <https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/> / <https://www.vizibl.co/blog/shell-faces-new-round-of-esg-litigation>

[6] <https://climatecasechart.com/non-us-case/clientearth-v-shells-board-of-directors/>

3. TotalEnergies (2022): A Human Rights Case

In March 2022, Greenpeace France, Friends of the Earth France, and Notre Affaire à Tous, supported by ClientEarth, filed a lawsuit against TotalEnergies, arguing that the company’s ‘reinvention’ ad campaign violates European consumer law as it misleads the public on the implications of its plans on the climate crisis.⁷ The plaintiffs argued that these projects violated human rights and environmental standards, claiming that TotalEnergies had a legal obligation to prevent harm. The environmental groups make four different complaints against TotalEnergies: failing to fight a disaster, involuntary homicide, unintentional injury to persons and destruction or damage of property belonging to a person likely to pose a danger to others.⁸

The ongoing litigation highlights the intersection of environmental accountability and social justice, emphasising the responsibility corporations have to uphold human rights in their operations.



4. Facebook (Meta) (2023): A Shareholders’ Case

In 2023, shareholders of Meta Platforms, Inc. filed a lawsuit alleging that the company’s management had failed to adequately address the social impacts of its algorithms, particularly concerning misinformation and hate speech. The shareholders argued that this negligence could lead to reputational damage and financial losses. The Delaware Court of Chancery dismissed the suit, rejecting the novel claim that directors’ fiduciary duties extend to the corporation and its stockholders as diversified equity investors.⁹

This case reflects a growing trend in which stakeholders are increasingly scrutinising the social dimensions of corporate governance, signalling a broader understanding of ESG factors.

Malaysia’s Legal and Regulatory Context

Malaysia has several key legal instruments, policies, and guidelines already in place that align with international ESG standards:

1. Environmental Protection Legislation

Malaysia’s *Environmental Quality Act 1974* serves as the primary legal framework for environmental protection in the country. This law, along with other regulations such as the *National Forestry Act 1984* and the *Wildlife Conservation Act 2010*, provides avenues for addressing environmental harm. However, environmental lawsuits have been relatively limited, and enforcement has historically been inconsistent.

2. Human Rights and Labour Law

Malaysia is a signatory to several international human rights conventions, including those of the International Labour Organisation (“ILO”). This has influenced domestic labour laws, such as the *Employment Act 1955*, which addresses worker rights, including those concerning forced labour, child labour, and fair wages. Allegations of labour rights abuses in industries such as palm oil and manufacturing have been significant concerns for the country, leading to

[7] <https://www.clientearth.org/latest/press-office/press/totalenergies-fails-to-stop-historic-net-zero-greenwashing-case-from-proceeding/>
 [8] <https://climatecasechart.com/non-us-case/greenpeace-france-and-others-v-totalenergies-se-and-totalenergies-electricite-et-gaz-france/>
<https://www.reuters.com/sustainability/environmental-groups-file-complaint-against-frances-totalenergies-over-climate-2023-10-02/>
 [9] <https://www.kramerlevin.com/en/perspectives-search/court-dismisses-stockholder-suit-against-meta-affirms-a-firm-specific-model-of-corporate-management.html#:~:text=Plaintiff%20brought%20suit%20against%20Meta,the%20interests%20of%20diversified%20investors./>
https://finance.yahoo.com/news/judge-dismisses-meta-shareholder-lawsuit-225812058.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAMPKLnCHdOjx7yJUDtkB6Oj_IHqageBJOogQ6xCzADre qzXicEFFDdZrG3wQQ-afNTJz0RBZi4y_Vzdn6wcbpHP2iPdNirF3_I5xTj5bp9g1P1XCIFwtayNBjJta3UI4lNXedyYvS8Tc2b0KUXrL53LfpUUKbj7shNs2SDdzzb

increased scrutiny from both domestic and international actors.

3. Corporate Governance Codes

The *Malaysian Code on Corporate Governance* (“**MCCG**”), updated in 2021, explicitly emphasises the need for companies to incorporate sustainability into their operations. The MCCG encourages listed companies to adopt ESG principles and requires greater transparency in reporting sustainability-related risks and opportunities. This provides a foundation for shareholders and stakeholders to challenge companies that fail to live up to these standards.

4. i-ESG Framework

In 2023, the Ministry of Investment, Trade, and Industry (“**MITI**”) published the *i-ESG Framework (Phase 1.0)* (“**Framework**”), which offers guidelines to support Malaysia’s manufacturing sector in achieving its ESG goals. The launch of the Framework signifies the start of the first phase of MITI’s plan (known as “Just Transition”, scheduled from 2024 to 2026) to encourage the adoption of ESG requirements and goals. It lays the groundwork for manufacturers to embark on their ESG journey, ensuring their readiness to shift towards and embrace the second phase, “Accelerating ESG Practices”, scheduled from 2027 to 2030.¹⁰

Ties to Global ESG Litigation Trends

Following Bursa Malaysia’s announcement of enhanced sustainability reporting requirements in the Main Market¹¹ and ACE Market Listing Requirements¹², along with the launch of the Bursa Malaysia ESG Reporting Platform, Malaysia’s exposure to ESG litigation is likely to increase as the global focus on corporate sustainability and accountability intensifies.

Several industries that are key to the Malaysian economy – such as palm oil production, manufacturing, and energy – are highly susceptible to ESG-related risks. These

industries often involve significant environmental impacts, as well as labour and human rights challenges. As seen in global cases like *Milieudefensie v Shell*, industries that operate in or impact developing countries are increasingly facing litigation based on their environmental and social practices. These trends raise the question of how Malaysia might face similar legal challenges, especially in industries central to its economy.

Environmental Concerns: The Palm Oil Industry

Malaysia is one of the world’s largest producers and exporters of palm oil, an industry frequently associated with deforestation, habitat destruction, and social issues, including poor working conditions and the displacement of indigenous communities.¹³ International pressure has mounted against the palm oil industry, with NGOs, governments, and investors demanding stricter adherence to sustainability standards. The *Woodpecker* case in South Korea highlights how environmental harm linked to ecological degradation can lead to significant litigation, not only in the country where the harm occurs but also in the home jurisdictions of the companies involved.



[10] <https://lh-ag.com/energy-projects-infrastructure-special-alert-miti-i-esg-framework-phase-1-0-whats-new/>

[11] https://www.bursamalaysia.com/sites/5bb54be15f36ca0af339077a/content_entry5ce3b5005b711a1764454c1a/63311b5d39fba20e04ba8e13/files/App_1_-_Main_LR_Sustainability_Amendments.pdf?1664168038

[12] https://www.bursamalaysia.com/sites/5bb54be15f36ca0af339077a/content_entry5ce3b5005b711a1764454c1a/63311db15b711a4de4c53410/files/App_1_-_ACE_LR_Sustainability_Amendments.pdf?1664169294

[13] <https://bursasustain.bursamalaysia.com/droplet-details/sustainability/practicing-human-rights-due-diligence-in-the-palm-oil-industry#:~:text=Category%3A%20Sustainability-,Concerns%20over%20labour%20rights%20abuse%20in%20Malaysia's%20palm%20oil%20sector,were%20subjected%20to%20forced%20labour.>



Malaysia's palm oil industry faces similar ESG risks. While the Roundtable on Sustainable Palm Oil ("RSPO") has been established to promote sustainability, enforcement of its standards remains a challenge.¹⁴ Should Malaysia fail to address environmental and social violations within its palm oil sector, it may become a target for litigation, either domestically or internationally. For example, local communities affected by deforestation or human rights abuses could initiate lawsuits similar to those seen in Nigeria, where affected communities sued multinational corporations for environmental degradation.¹⁵

Human Rights and Labour Issues in Malaysia

Labour rights remain a pressing ESG concern in Malaysia, particularly in industries such as manufacturing, agriculture, and construction. The country has faced scrutiny from international organisations and investors due to reports of forced labour, poor working conditions, and wage exploitation, particularly of migrant workers.¹⁶ ESG litigation, as seen in the *Nevsun Resources v Araya*¹⁷ case, has demonstrated that companies can be held accountable for human rights violations within their supply chains, even if these violations occur abroad.

In Malaysia, the rubber glove industry, a major player in the country's export economy, has faced allegations of forced labour and exploitation of migrant workers.¹⁸ Such

allegations have already resulted in significant financial and reputational damage, with companies being subjected to import bans by countries like the United States.¹⁹ If these issues persist, Malaysia's labour-intensive industries could be subject to further lawsuits, particularly if investors or foreign governments perceive these abuses as violations of international labour standards. Domestic courts may also start to play a larger role in holding companies accountable, as seen in other jurisdictions globally.

Corporate Governance: Increased Shareholder Activism

As Malaysian companies become increasingly exposed to international markets and foreign investments, they are also subject to the rising trend of shareholder activism that drives ESG litigation. Shareholders in Malaysia, particularly institutional investors, are beginning to emphasise ESG factors in their investment decisions.²⁰ The updated Malaysian Code on Corporate Governance requires greater transparency regarding ESG risks,²¹ and companies may face lawsuits if they fail to disclose these risks adequately, as seen in climate-related disclosure cases worldwide.

In the global context, cases like *Milieudefensie v Shell* demonstrate how shareholders and environmental groups can successfully hold corporations accountable for their failure to act on climate change or disclose climate-related risks. Malaysian corporations that fail to comply

[14] To obtain a Mareva Injunction, the applicant must demonstrate:

[15] To obtain a Mareva Injunction, the applicant must demonstrate:

[16] https://www.iseas.edu.sg/wp-content/uploads/2022/11/TRS2_23.pdf

[17] <https://www.escr-net.org/caselaw/2020/nevsun-resources-ltd-v-araya/>

[18] <https://www.voanews.com/a/east-asia-pacific-forced-labor-rising-malaysias-rubber-glove-factories-study-shows/6207942.html>

[19] <https://www.theguardian.com/global-development/2021/mar/30/us-bars-rubber-gloves-malaysian-firm-top-glove-evidence-forced-labour#:~:text=Top%20Glove%2C%20the%20world's%20largest,using%20forced%20and%20indentured%20labour.>

[20] https://www.ecgi.global/sites/default/files/working_papers/documents/esgfinal_1.pdf

[21] <https://www.sc.com.my/api/documentms/download.ashx?id=239e5ea1-a258-4db8-a9e2-41c215bdb776>



with increasing demands for transparency and sustainability reporting could face similar actions, especially if they are listed on international stock exchanges or have foreign investors with stringent ESG expectations.

Future of ESG Litigation in Malaysia

Malaysia is at a critical juncture in its journey towards ESG compliance. As environmental awareness grows among the public and legal frameworks continue to evolve, the country's businesses may increasingly find themselves facing ESG-related litigation. However, this also presents an opportunity for Malaysian corporations to proactively adopt stronger ESG policies, thereby improving their environmental and social footprints and reducing the risk of future lawsuits.

The country could also see its regulatory environment shift in response to international legal trends. As ESG litigation becomes more common globally, it is likely that Malaysia's legal system will follow suit, either through the introduction of new environmental and human rights laws or through judicial decisions that establish stronger precedents for corporate accountability. The *Woodpecker* case in South Korea serves as a reminder that courts in Asia are beginning to take a more active role in enforcing ESG standards, and Malaysia may follow a similar trajectory.

In conclusion, ESG litigation is not just a Western or European phenomenon but a global trend that will inevitably impact Malaysia. As Malaysian businesses and courts continue to integrate ESG principles into their operations and rulings, the country's approach to corporate responsibility will evolve. By learning from global examples and taking a proactive stance, Malaysia can navigate the challenges of ESG litigation while fostering sustainable economic growth.

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