

RESILIENCE

ESG – IMPLICATIONS FOR LIABILITY INSURERS

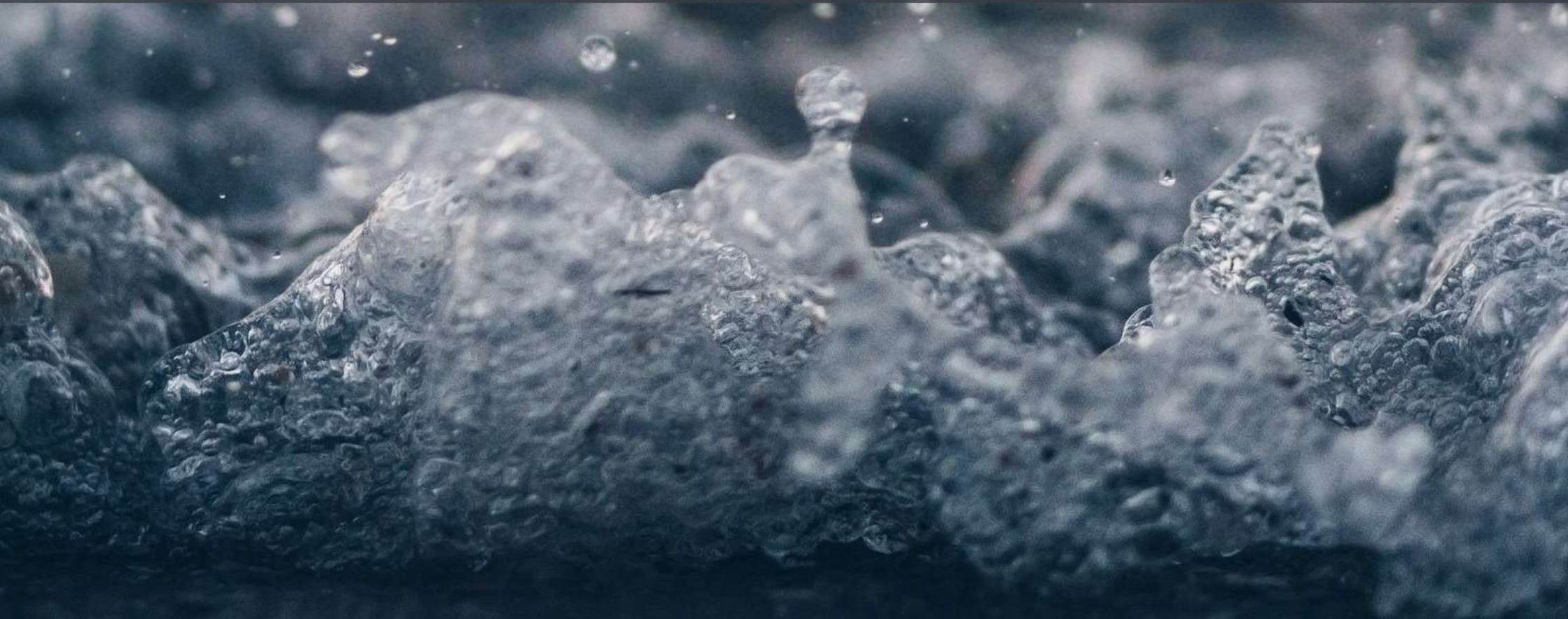
NIGEL BROOK

NEIL BERESFORD

AGENDA

- **What is ESG?**
- **Current focus on liability exposure for:**
 - Climate related risk
 - Plastic pollution
 - Greenwashing
 - Biodiversity loss
 - Supply chain liability

CLIMATE RELATED RISK



CLIMATE RISK



PHYSICAL

TRANSITION

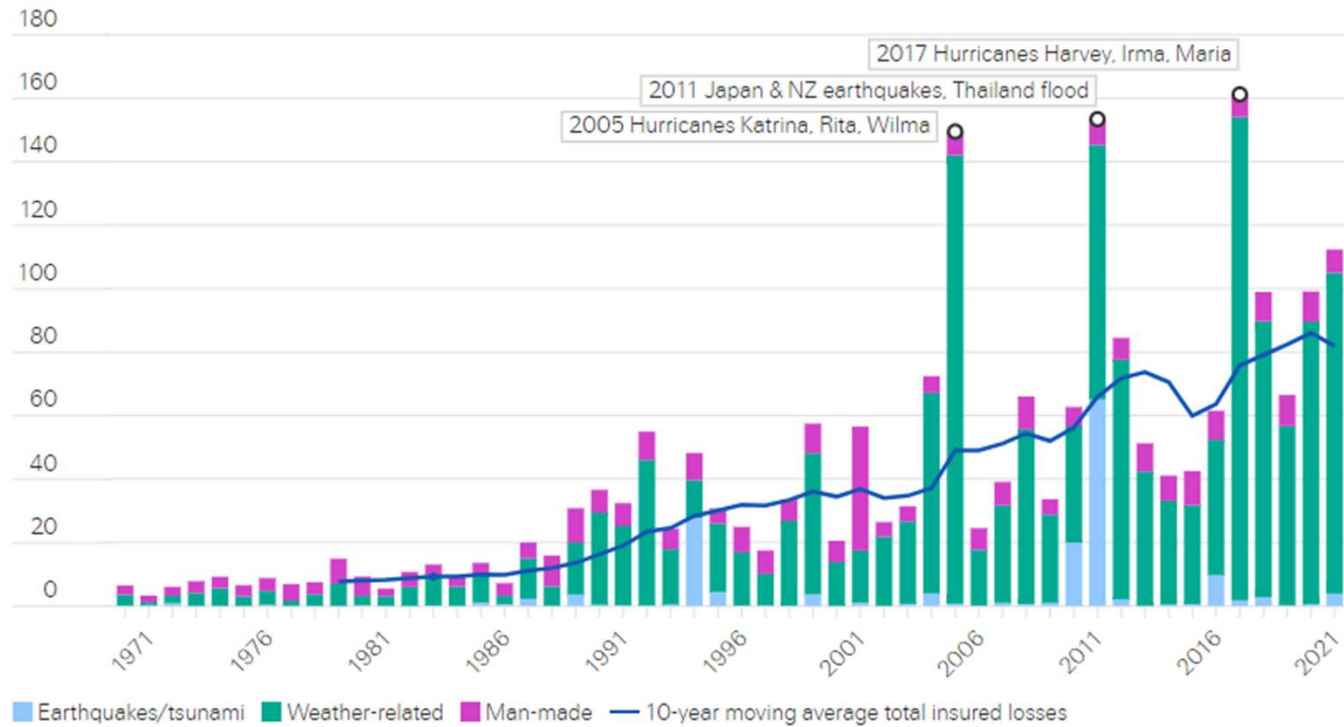
LIABILITY

PHYSICAL RISK

Figure 1: Insured losses since 1970

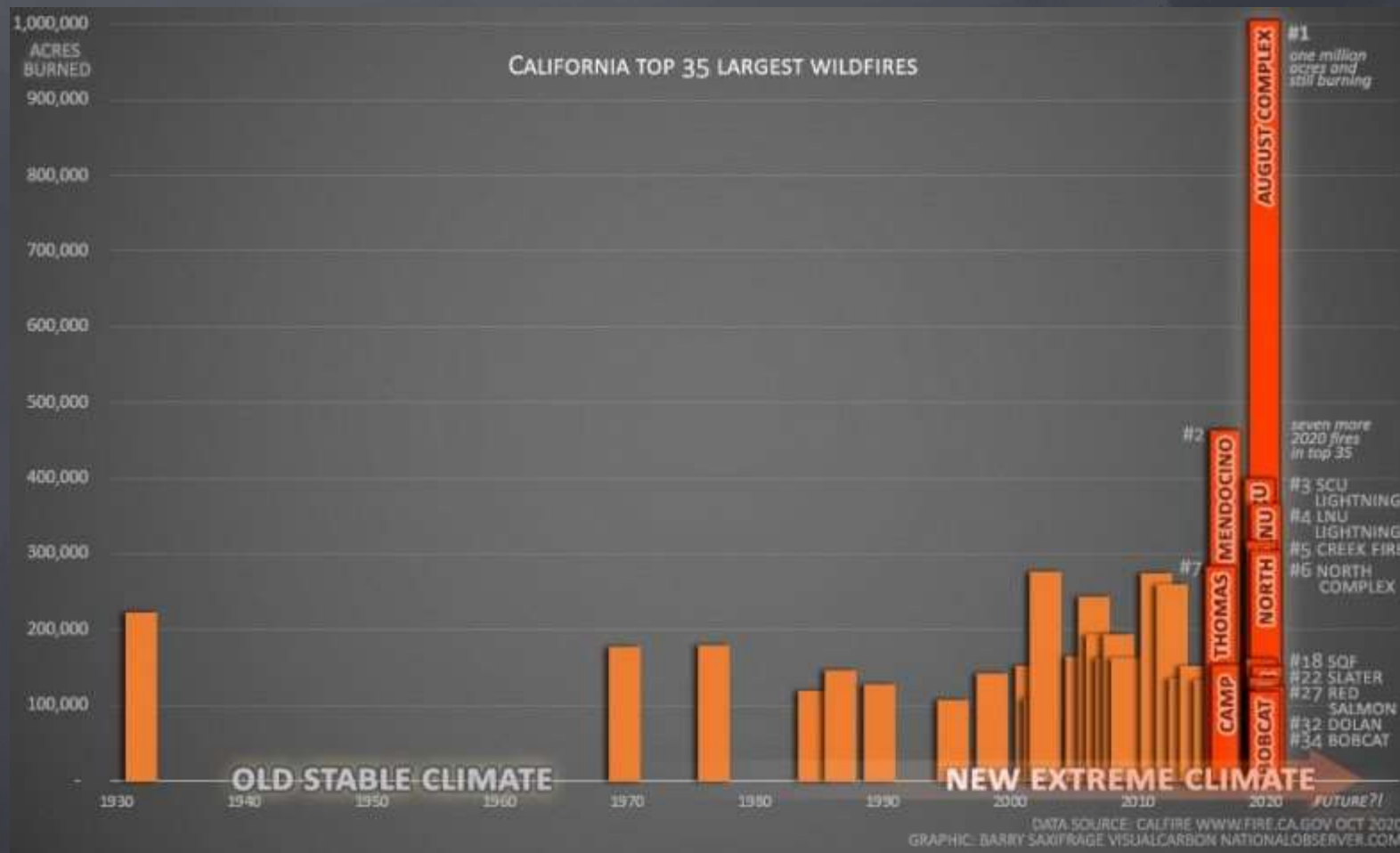
USD billion (in 2021 prices)

Rollover/touch chart for details

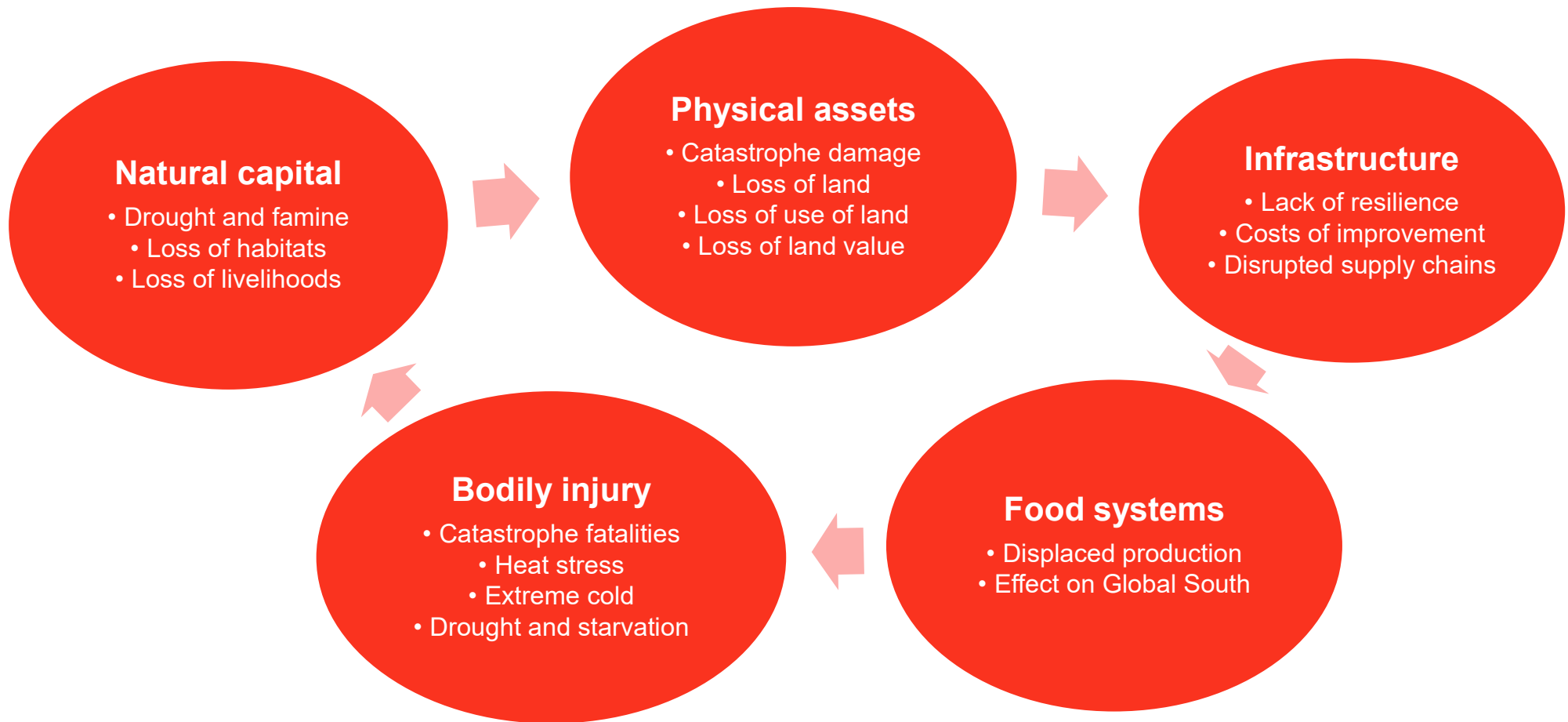


Source: Swiss Re Institute

CALIFORNIA WILDFIRES

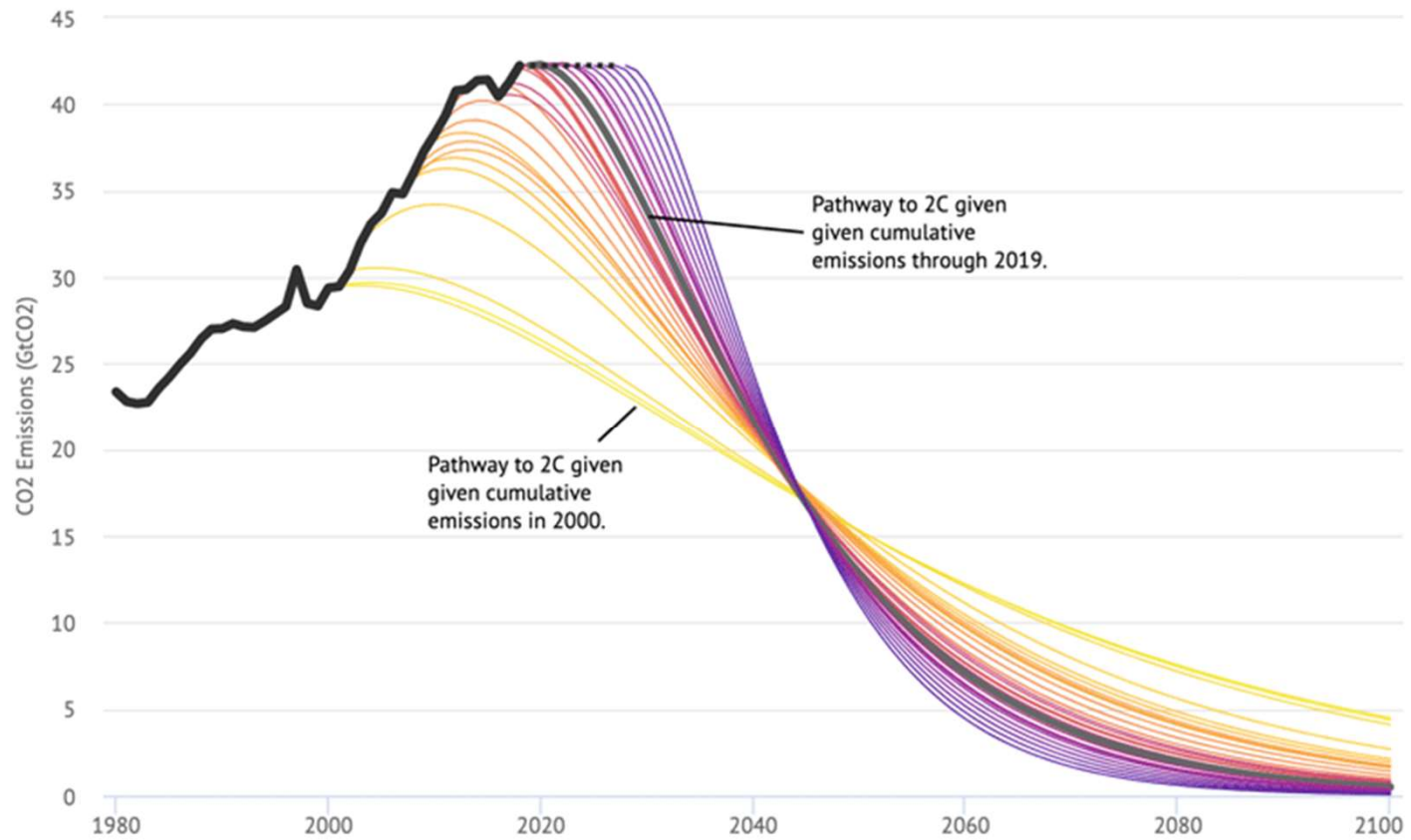


WIDER IMPLICATIONS OF PHYSICAL RISK

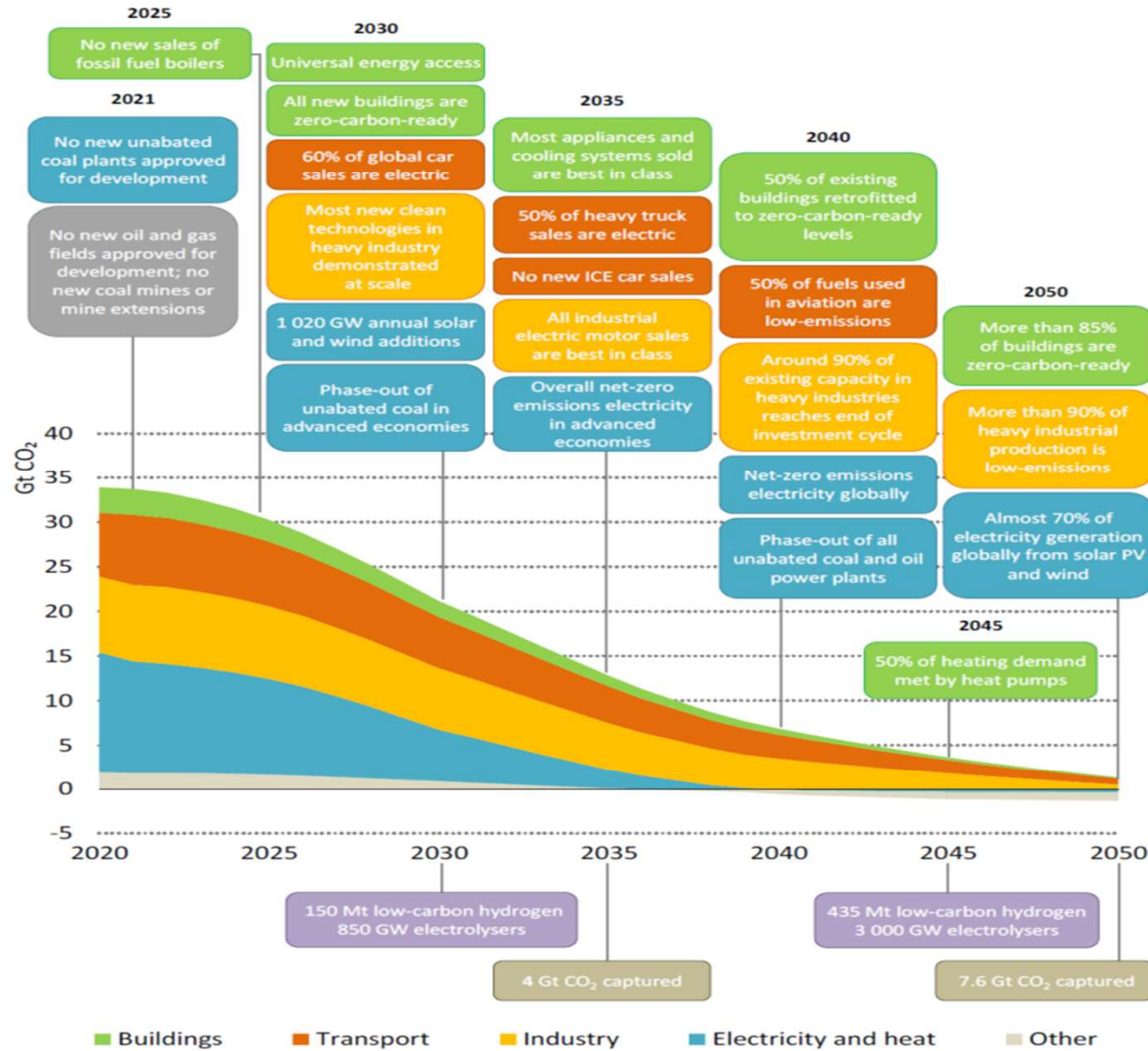


TRANSITION RISK

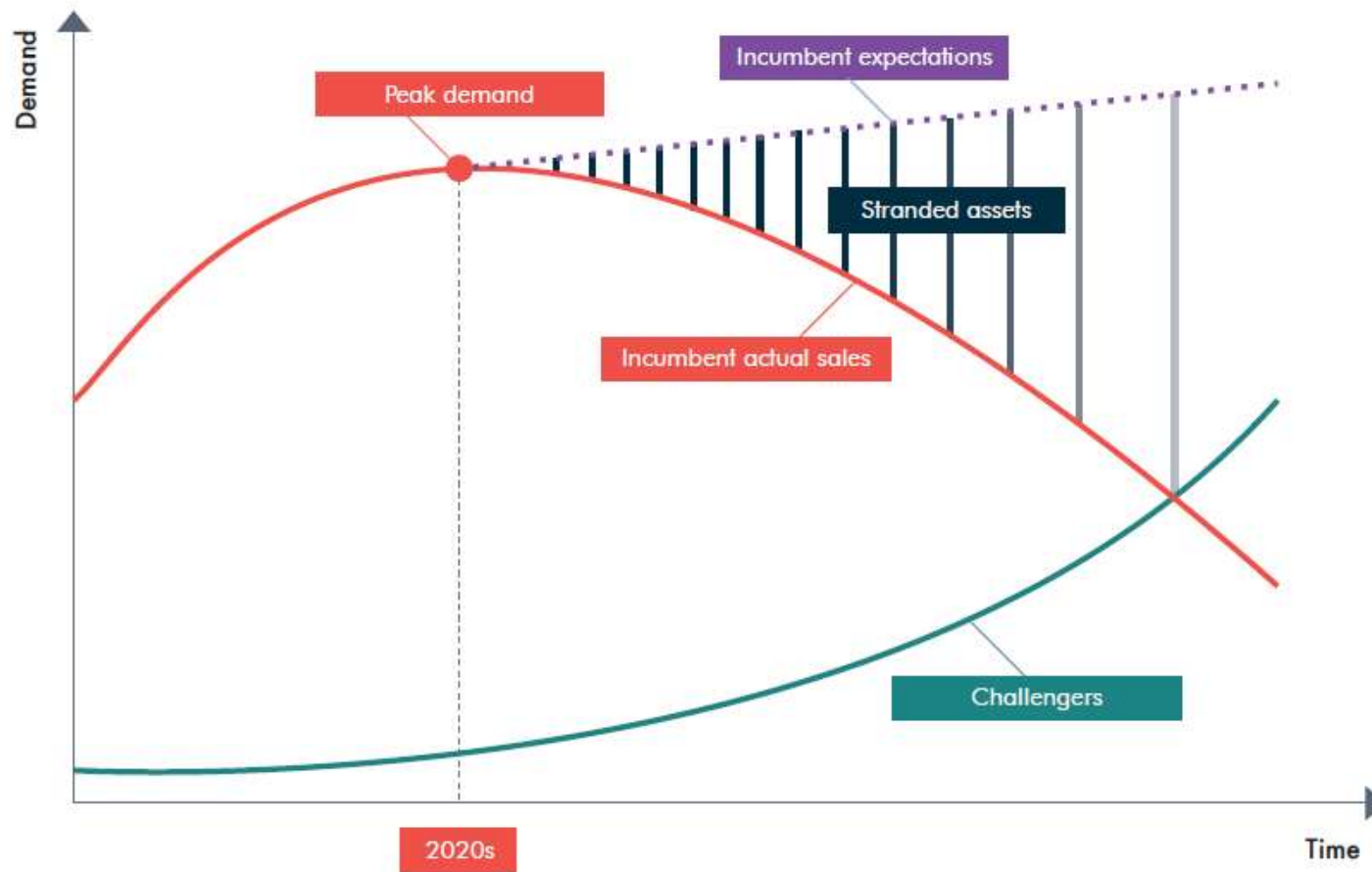
The later emissions peak the harder it is to limit warming below 2C



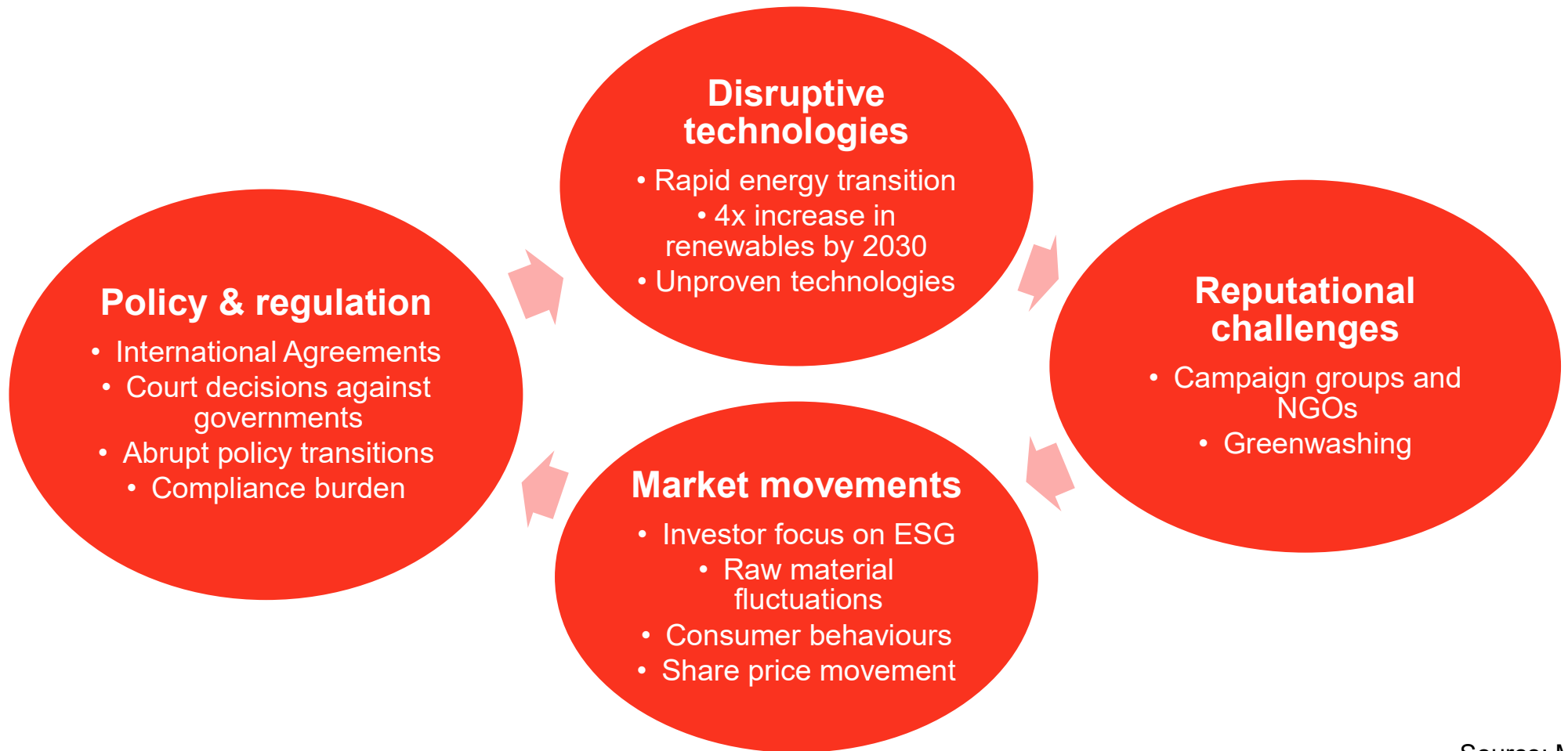
ENERGY PATHWAY TO NET ZERO



STRANDED ASSETS

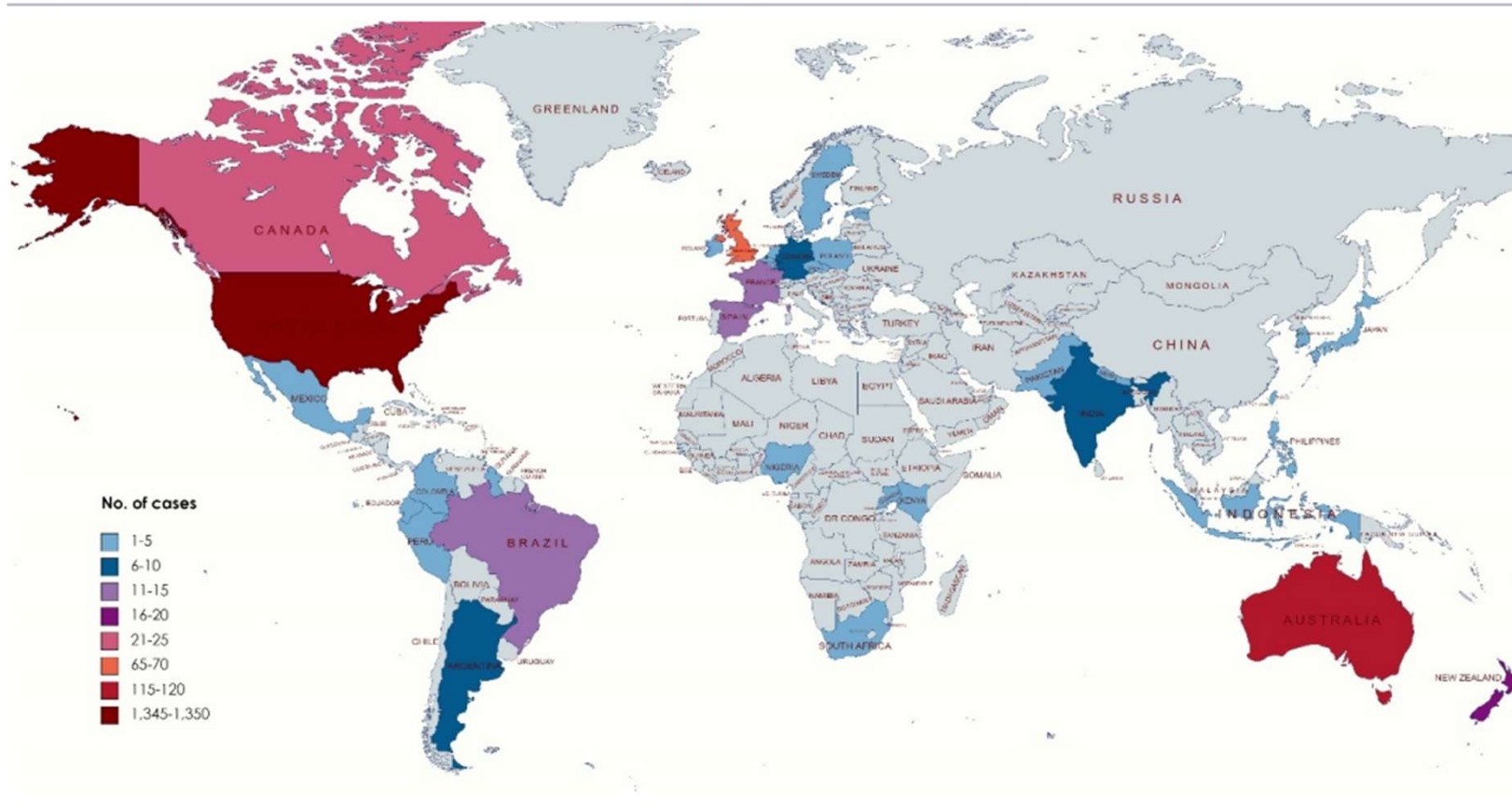


WIDER IMPLICATIONS OF THE TRANSITION



LIABILITY RISK

Figure 1.2. Number of cases around the world, per jurisdiction, to May 2021



Notes: Cumulative figures to May 2021. Map created with mapchart.net.

Source: Authors based on CCLW and Sabin Center data

CURRENT CLIMATE LITIGATION

1. Direct causal contribution

City of Oakland v BP; Pacific Coast Fishermen v. Chevron; Lliuya v RWE

2. Violation of fundamental rights

Milieudefensie v Shell; Greenpeace v BMW, Mercedes, VW; Agostinho

3. Greenwashing

ACCC v Goodyear; Frankfurt Prosecutor v Deutsche Bank

4. Negligent preparation

Various v PG&E

5. Directors' breach of fiduciary duties

ClientEarth v Directors of Shell; McVeigh v REST

6. Indirect causal contribution

Abrahams v CBA

CLIMATE AS A MULTIPLIER OF RISK

- Property and business interruption
 - Higher incidence of losses
 - Higher severity of losses
 - New risk mapping required
- Professional liability
 - Increased compliance burden
 - Desire to transfer losses to professional advisers
- D&O
 - New disclosure duties
 - Losses arising from management of transition
 - Greenwashing

CLIMATE AS A SOURCE OF NEW DUTIES

- General liability
 - Petroleum as a defective product
 - Breach of fundamental rights
 - Bodily injury claims
 - Mass subrogations?
- Advertising liability
 - Greenwashing
- D&O
 - New duties to consider Paris obligations?

RECOMMENDED WORDINGS CONTROL

Available defences	Occurrence wordings				Claims made wordings				Bermuda Form	
	Policy 1	Policy 2	Policy 3	Policy 4	Policy 5	Policy 6	Policy 7	Policy 8	Policy 9	Policy 10
Outside temporal scope	✓	✓	✗	✗	✗	✓	?	?	✗	?
No injury/damage	✗	✓	✓	✗	✗	✗	✗	✗	✗	✗
Excluded pollution	✗	✗	✗	✓	✓	✓	✓	✓	✗	✗
Excluded prior knowledge	✗	✗	✗	✓	✓	✗	✓	✗	✗	✗
Excluded deliberate act	✓	✓	✗	✗	✗	✗	✗	✗	✗	✗
Failure to mitigate defence	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗
Conclusion	Uninsured	Uninsured	Uninsured	Uninsured	Uninsured	Uninsured	Uninsured	Uninsured	Insured	?

PLASTICS LIABILITY



PLASTICS LIABILITY: AN OVERVIEW

- Human health harms
 - 4,000 chemicals associated with plastics
 - Most research on phthalates, bisphenols, flame retardants and PFAS
 - Exposure to micro- and nano-plastics
 - Chemicals released during manufacture and disposal
- Ecosystem service harms
 - Effects on aquatic and terrestrial ecosystems
 - Effects on food stocks
 - Threat to businesses which depend on natural resources
- Nature harms
 - Macroplastic effect on nature
 - Biodiversity threat arising from chemicals and MNPs
- Corporate wrongs
 - Greenwashing
 - Loss of shareholder value

PLASTICS LIABILITY: LIKELY CLAIMS ACTIVITY

Harms	Liability pathway	Likely claim activity	Likely claim severity
Human harms	Exposure causing injury to employees	Moderate: many strong precedents, but proof of causation will be difficult	High: very large pool of potential claimants
	Exposure causing injury to consumers	Low: some precedents, but proof of causation will be very difficult	
Economic and ecosystem service harms	Toxic accumulations in public infrastructure	Moderate: recent precedents in US, but elsewhere theories of liability and causation are underdeveloped	
Nature harms	Escape of harmful substances from plastics manufacture	Moderate: environmental regulators have extensive powers	Moderate: environmental incidents are often large but confined to location
Corporate wrongs	'Greenwashing' as a breach of consumer protection law	High: advertising regulators and NGOs have extensive powers	Moderate: fines and civil sanctions are large but on a smaller scale than mass injury or damage claims
	Loss of shareholder value resulting from a mismanaged transition to recycled plastics	High: many strong precedents, and environmental claims are already underway	High: Several companies manufacturing and using plastics have market caps above USD 100bn

GREENWASHING

CLYDE&CO



GREENWASHING: AN OVERVIEW

- Response to ESG pressure
- Misleading/ambiguous commitments
 - ACCR v Santos
 - Greenpeace v Total
 - ClientEarth v Shell
- Inadequate product attributes
 - ASA v Unilever
- Inadequate disclosures
 - Abrahams v Commonwealth Bank of Australia

BIODIVERSITY LOSS

Biodiversity

- importance
- Threats
- COP15; TNFD



VALUE CHAIN LIABILITY

- Due diligence requirements
- New EU Directive



QUESTIONS?



440

Partners

2500

Legal
professionals

4000

Total staff

50+

Offices and
associated offices
in 24 countries