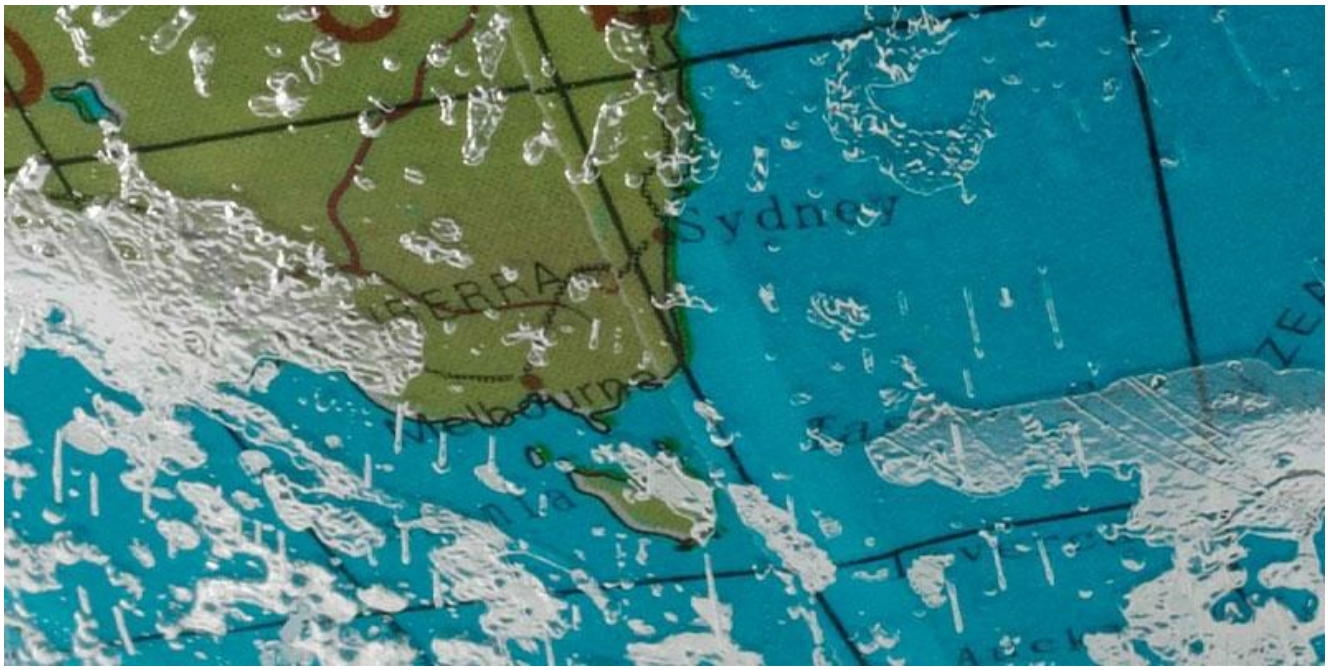


Litigation: a key driver for climate justice

Climate change litigation is ascending the corporate risk register. NGOs and individuals are increasingly using the courts to try to achieve their objectives, including to enforce corporate and government adherence to environmental regulations, sustainability targets and broader **ESG** (Environmental, Social and Governance) principles. Litigation also raises public awareness of climate change, environmental harms and other human rights infringements to encourage behavioural change. Spurred on by landmark judgments in the Netherlands, Germany, Norway, Italy, France, Ireland and the UK, climate change claims have now been filed in over 40 countries.[1]

Here, we look at the key types of climate change litigation that are on the rise in Europe. In doing so, we examine two key categories of climate change litigation in order to illustrate how the courts are being used to drive change.

This is a rapidly developing area, and corporates and governments need to remain abreast of the evolving litigation and reputational risk.

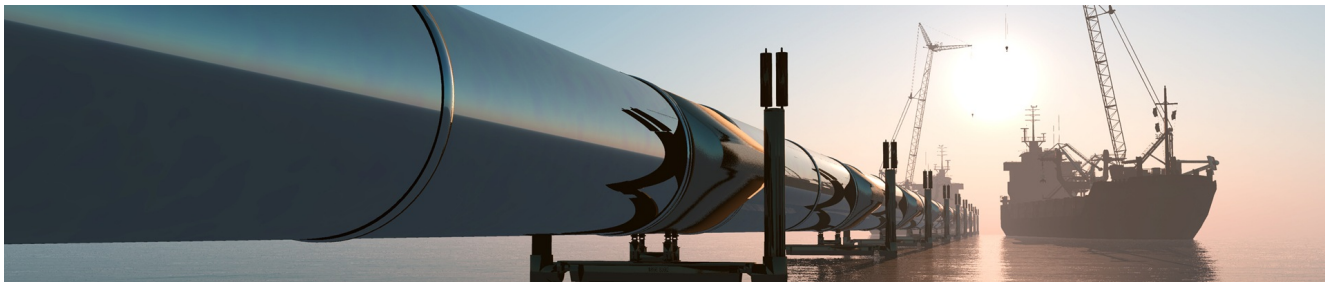
Human Rights and Judicial review claims

Claims brought by NGOs and environmental groups frequently do not seek damages. They are often brought against nation states or public sector defendants seeking injunctive or declaratory relief to prevent or stop climate-harming activities, or applications for judicial review of government decisions with potentially detrimental environmental consequences.

Some claims of this kind have been brought to enforce treaty obligations and human rights laws. A high-profile example of this type of climate change litigation is the *Urgenda Foundation case* in the Netherlands. There, an NGO and group of Dutch citizens succeeded in their claim against the Dutch Government for infringement of article 2 (right to life) and article 8 (right to family life) of the European Convention on Human Rights ("**ECHR**") on the basis that the Government had failed to pursue a more ambitious reduction of greenhouse gas emissions. The court ordered the Dutch Government to reduce emissions emitted in the Netherlands by at least 25% by the end of 2020.

The *Urgenda Foundation case* has led to a spate of similar claims internationally. For example, a claim filed in May 2021 by climate litigation charity Plan B against the UK Government alleges infringement of the right to life, right to family life and right to protection from discrimination in respect of these rights and freedoms under the ECHR as implemented by the Human Rights Act 1998 (UK). The claimants argue that these rights must be interpreted in the context of the UK's commitments under the Paris Agreement on Climate Change and that the Government has breached those human rights by failing to adequately implement the Paris Agreement domestically. The claim is led by three students in their early 20s but stated to be brought "on behalf of themselves and countless others". In January 2022 ClientEarth and Friends of the Earth filed a claim against the UK Government, seeking to judicially review its net zero strategy that had been published in October 2021. ClientEarth and Friends of the Earth argue that the strategy will illegally fail to deliver binding international commitments to reduce commissions

deliver binding international commitments to reduce commissions.



Vereniging Milieudefensie v Royal Dutch Shell

Urgenda is used as crowbar in further international climate change litigation with similar types of claims being brought against corporates, most notably in Vereniging Milieudefensie v Royal Dutch Shell plc (C/09/57193/HA ZA 19-379). In a high profile ruling in May 2021, The Hague District Court ordered Shell to cut its 2019 carbon emissions by 45% by 2030 (compared with 2019 levels). This was the result of a collective legal action brought by Friends of the Earth Netherlands (Milieudefensie) together with 17,000 co-plaintiffs and six other organisations.

According to the claimant, Milieudefensie, the company needs to contribute to the prevention of dangerous climate change via the corporate policy it determines for its group and its entire value chain, on the basis of a duty of care. This duty of care was substantiated with human rights articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR) and soft law instruments such as the UN Guiding Principles on Business and Human Rights (UNGP). The court ruled that RDS was responsible for its overall group policy and needs to observe a certain duty of care regarding emissions and climate change policies.

The Court ruled that Milieudefensie could not invoke the human rights under the ECHR directly, but in interpreting the specific duty of care

applicable in this context, the Court followed the UNGP. RDS appealed against this judgment. RDS emphasized that it takes all reasonable efforts to be CO2 neutral in 2050, but that it now needs to speed up this process.

Vereniging Milieudefensie & ors v Royal Dutch Shell plc C/09/571932 / HA ZA 19-379 is a turning point in history: it is the first time a judge has ordered a large corporation to comply with the Paris Agreement and it will have major consequences for other companies by forcing them to play their part in tackling the climate emergency. The oil company's sustainability policy was found to be insufficiently "specific" by the Dutch court and it was told it owed a duty of care. This unprecedented ruling will have wide implications for the energy industry, as well as for multinational companies in other sectors.

In France, environmental organizations like Notre Affaire à Tous are having lawsuits against the French government and French oil multinational Total. In this respect it is relevant that also in France there is already a tendency to hold the government accountable for its climate change obligations. On 3 February 2021, the Administrative Court of Paris issued a decision recognizing that France's inaction has caused ecological damage from climate change and awarded the plaintiffs the requested one euro for moral prejudice caused by this inaction. Furthermore in a landmark judgment of 1 July 2021, the highest administrative French court, Council of State (Conseil d'Etat), ruled that the French government had failed to take sufficient action to mitigate climate change and ordered it to take additional measures to redress that failure. "The Conseil d'État therefore instructs the government to take additional measures between now and March 31, 2022, to hit the target," the Council of State said. According to the claimants, the French municipality of Grande-Synthe and several associations, the government did not meet its obligations French municipality of Grande-Synthe and several associations had by admitting that its current measures were not enough to meet the climate goals by 2030 and refusing that it does not want to take

climate goals by 2050 and refusing that it does not want to take additional measures.

In the international context is relevant that claimants have long-used planning laws to challenge development with potential to cause environmental harm such as noise and water pollution; these same laws are now being used in an attempt to block projects on grounds they are likely to accelerate climate change. For instance, in *ClientEarth v Secretary of State*, environmental law charity ClientEarth sought judicial review of the UK Government's approval of Drax Power's (part of the Drax Group) development application in relation to building Europe's largest gas-fired generation plant. Despite the English High Court and Court of Appeal finding in favour of the Government, Drax Group announced in February 2021 that it would be suspending the expansion of the gas-fired generation plant and focusing on renewable power instead. Climate change activists have pointed to this outcome as achieving the objective of preventing the development even though the court found against ClientEarth.

Climate change litigation has also involved the corollary of the applications referred to above, i.e. where corporates seek judicial review where planning permission has been refused or withdrawn on the basis of climate-related concerns. For example, West Cumbria Mining sought judicial review of Cumbria County Council's decision to withdraw planning permission for the first development in several decades of a coal field in England. Such applications may become fewer in future because, as climate change awareness grows amongst consumers and investors, there is an increasing risk of reputational harm for those seeking to challenge such decisions.

Claims for Damages

Claims seeking damages for environmental harms are likely to increase significantly in the coming years. Pre-existing causes of action, such as the tort of nuisance or the tort of negligence, can be suitable for certain types of environmental claims against an alleged polluter. More novel are claims for breaches of company law.

Claimants may also seek damages for loss suffered by reason of breaches of company law, such as a failure to disclose climate change risk in respect of certain investments. Relatedly, there is a risk of claims against companies for deceptive 'greenwashing' marketing campaigns or misleading environmental impact claims. As the focus on sustainability and ESG issues intensifies, businesses will be scrutinised on their policies, making environmental claims fertile ground for future litigation. In the UK, several consumer organisations and financial bodies have recently published guidance in relation to environmental impact claims, for example on 21 May 2021, the Competition and Markets Authority (CMA) issued a consultation on its draft consumer protection law guidance for all businesses making environmental claims.

However, many damages claims will face significant hurdles in proving causation: demonstrating that the defendant caused the damage complained of. Multiple sources of emissions may have contributed to a specific incident that is said to have caused loss, and the burden of proving causation typically sits with the claimant. The growth and advances in attribution science i.e., the science of determining the causes of unusual climate trends and climate-related events, offers one possible solution for demonstrating causal links in climate change claims. In *Lliuya v RWE*, German Watch is spearheading a claim utilising attribution science to link RWE AG's emissions in Germany to its proportionate responsibility for melting of glaciers in Peru and the consequent need to build flood protections.

The courts may also choose to adopt a more flexible approach to causation. There is precedent in the UK, where the English courts developed the *Fairchild* principles, [2] in mesothelioma personal injury claims where scientific techniques were unable to determine, on the balance of probabilities (the required standard of proof), whether a defendant's conduct caused the claimant's cancer. Instead, the *Fairchild* principle – which the courts developed of their own volition – considers whether the defendant's conduct "materially increased the risk" of the injury. This more relaxed approach to causation has not been applied in climate change litigation to date, but it is a precedent which shows that the courts can develop creative solutions to difficulties with causation. Adoption of an equivalent, more flexible, approach for proving causation in climate change claims would have significant consequences for

defendants.

Changes to the substantive law could open up new avenues for claims and therefore increase the risk profile for corporates and public sector bodies. An example is the 2020 ruling of a UK coroner, who found that the 2013 death of Ella Adoo-Kissi-Debrah, a nine year old child who lived in London, was in part caused by air pollution. This is the first finding by a UK court that has causally linked personal injury (death) to pollution. This demonstrates that the law is evolving and developing, and future claimants will no doubt point to this finding to argue that polluters owe a common law duty of care to people potentially harmed by pollution. The courts have not yet made this finding, but the coroner's ruling is a step in this direction. Imposition of a duty of care of this type would open up the possibility of many more claims and would be a significant development for potential developments.

Climate change litigation risk – what next?

Climate change litigation encompasses a growing variety of claims against a range of defendants. Whether the claims are brought by NGOs who are seeking behavioural change or by claimant law firms and litigation funders seeking damages, the common theme is that they are not waiting for governmental or regulatory action: the claimants are pushing the boundaries, often successfully, which then encourages further claims. The most obvious targets are governments and companies with a significant carbon footprint or that contribute to other emissions or pollutants. Banks and financial institutions that arguably facilitate these activities are one step removed, but they also need to be aware of the developing legal risks.

An area of potential significant activity in the coming years is climate change class actions. The legal framework for European class actions is developing apace and there is a real risk of climate change class actions becoming mainstream. Collective actions have already been seen in jurisdictions such as the US and Australia with a well-established class action regime. Climate change class actions would potentially enable claims for personal injury, financial loss or damage to property caused by the consequences of climate change, such as intense floods, wildfires, rising sea levels, impacts on

agriculture and fisheries and air pollution. While claims such as those in *Lliuya v RWE* referred to above have been for a relatively small monetary amount (€ thousands), aggregating claims in the form of a class actions could potentially lead to claims for much greater amounts (€ millions or even billions). The risk of climate change litigation should, therefore, be on the radar of many corporates.

The expectation is that climate change litigation will significantly increase due to further government climate change policies (following, among other things, the Urgenda judgment) imposing stricter and more enforceable obligations on companies. In France and the Netherlands, the courts already ordered governments to take action in this respect. Besides this, there is also an increasing trend of soft law commitments (guidelines, codes of conduct, non-binding and binding declarations) that could indirectly create civil law obligations for companies.

The litigation threat is relevant for sectors, with production and logistic processes that impact climate change, such as airline, beef, cacao, dairy, palm oil, seafood, and steel industries.

Companies should be mindful of their role in the climate transition and their sustainability processes and put in place an adequate international risk assessment and crisis management process in order to tackle possible class actions at an early stage. The ESG umbrella is of course broader than climate change, and corporates involved in the supply chain of other potential contaminants such as microplastics should also be aware of the increasing litigation risk.

Kenny Henderson

Partner
London

Bart-Adriaan de Ruijter

Partner
Amsterdam

Key contact

Kenny Henderson

Partner
London

kenny.henderson@cms-cmno.com