

C L I F F O R D
C H A N C E



CLIMATE CHANGE LITIGATION
TACKLING CLIMATE CHANGE THROUGH THE COURTS

GROWING THE GREEN ECONOMY

OCTOBER 2019

CLIMATE CHANGE LITIGATION TACKLING CLIMATE CHANGE THROUGH THE COURTS

Litigation is becoming an important element of efforts to combat climate change, prompted by the growing public awareness of, and concern about, the risks that climate change poses and frustration about the slow pace of government action.

The number of climate change-related actions now stands at about 1,500 worldwide. Cases have recently proliferated due to the increasing number of national laws and regulations relating to climate change. The Paris Agreement—by highlighting the urgency of the issue and the extent of the necessary greenhouse gas (GHG) emissions cuts—has also played a critical role by providing a benchmark against which citizens can measure the adequacy of government action on climate change.

1,200 of the 1,500 recorded climate change actions have been filed in the United States.

Encouraged by these developments and the perceived increasing urgency of the issue, litigants have pursued climate change-related claims against corporations and businesses. These claims have been brought by a wide variety of litigants—governments, organisations, shareholders, and individuals—and have made a wide range of allegations. For example, some governments have made regulatory allegations related to corporate climate change disclosures, while some individuals have brought claims alleging damages related to global warming and the costs of adapting to climate disruption.

Litigation is also on the rise against governments with the goals of forcing cuts in GHG emissions or the adoption of far-reaching mitigation and adaptation strategies. Actions have also been pursued to hold governments accountable for alleged constitutional, human rights and statutory violations stemming from climate inaction.

What is climate change litigation?

Climate change litigation includes a broad range of proceedings that relate in some way to global warming. These actions have been brought not only before courts, but also before regulatory bodies and international bodies such as the InterAmerican Commission on Human Rights and the UN Human Rights Committee.

By far the greatest number of these cases—1,200—has been filed in the United States. A further 300 cases have been brought around the world, with the bulk of these claims being pursued in Europe and Asia-Pacific, including Australia (98 cases) and the United Kingdom (47 cases). Few cases have been pursued to date in Africa (five cases), although an increased interest in climate change litigation is anticipated in Africa and more generally in the Global South.

Climate change cases can be catalogued in many ways, for example, by the basis for the claim, the remedy sought or the jurisdiction in which the claim is pursued. A simple distinction that we draw here is between claims against corporations and those against governments and government entities.

Climate change actions against corporations

Climate change-related claims against corporations are on the rise. Litigation against corporations has been brought on a broad range of bases, including corporate, securities, tort, consumer protection and environmental law. Actions have predominantly involved either: (1) claims against energy and natural resources corporations alleging that the corporations contributed to climate change through their GHG emissions; or (2) claims alleging inadequate disclosure regarding climate change impacts and risk exposure.

Claims asserting corporate responsibility for climate change-related harm

Claims have been pursued in several jurisdictions against energy and fossil fuel companies alleged to be responsible for climate change. Plaintiffs have sought damages to compensate for the impacts of climate change and costs of protecting against future climate change, as well as, in some cases, injunctive relief ordering the corporation to reduce its GHG emissions.

There has been a raft of such claims in the United States, where plaintiffs—including states, cities and towns—have pursued securities claims, statutory claims, and common law claims against corporations. In *City of New York v. BP plc, et al.*, New York City filed a federal lawsuit against the five largest investor-owned fossil fuel producers seeking costs that the City had incurred and would continue to incur to protect itself and its residents from the impacts of climate change. The court dismissed the case in July 2018, holding that federal common law governed the City's claims and that the Clean Air Act displaced any federal common law claims. A federal district court in California reached the same conclusion in a similar case by the Cities of Oakland and San Francisco (*City of Oakland v. BP plc*). In *Rhode Island v. Chevron Corp.*, the State of Rhode Island filed a lawsuit seeking to hold 21 fossil fuel companies liable for the climate change harm that the State has suffered, or may suffer, in the future. The state seeks, amongst other things, compensatory damages, disgorgement of profits and equitable relief.

In the Netherlands, several environmental groups and individuals filed a case in April 2019 in the District Court of The Hague alleging that the climate change impacts of Shell's activities violate its duty of care under Dutch law, and that they also involve breaches of obligations under the ECHR that the plaintiffs assert are owed by Shell by virtue of its responsibility to respect human rights. In *Milieudefensie et al. v. Royal Dutch Shell plc.*, the plaintiffs request a ruling from the court that the company must reduce its emissions by net 45% by 2030 and net 72% by 2040 measured against 2010 levels, and to net zero by 2050.

In Germany, an appeals court has confirmed that a corporation could potentially be responsible for climate change impacts resulting from its GHG emissions. In *Lliuya v. RWE AG*, a Peruvian farmer brought an action against the German electricity producer, RWE AG, seeking declaratory judgment and damages. Lliuya asserted that RWE AG knowingly contributed to climate change through its GHG emissions and that it was partially responsible for the melting of mountain glaciers near his town of Huaraz in Peru. Lliuya claimed that RWE AG was liable for 0.47% of the total cost of mitigating the effects of installing flood protections, reflecting Lliuya's estimate of RWE AG's

contribution to global GHG emissions. The case is currently in an evidentiary phase analysing the factual basis of the plaintiff's claims.

Notably, while most of the claims that have been ruled on to date have not succeeded, the volume of climate change-related claims against corporations continues to increase and the jurisdictions in which they are pursued expanded.

Claims regarding disclosure of information about climate change impacts and risk exposure

Regulatory risks relating to corporate climate change disclosures

Investigations regarding climate change disclosures to investors are becoming increasingly common. Indeed, proposals to require reporting of certain climate change risks across several jurisdictions are likely to trigger even more actions in the future.

In the United States, State Attorneys General have been actively pursuing climate change claims against issuers. The most active regulator in this area has been the NY State Office of the Attorney General (**NYAG**), which has brought claims against, or investigated, at least seven corporations for climate change disclosures. Pursuant to New York's Martin Act, the NYAG has authority to investigate and remediate "fraudulent practices" in the securities markets.

In October 2018, the NYAG filed a high-profile complaint against Exxon Mobil alleging that Exxon misled investors about the risks that climate change regulations posed to its business. Specifically, the NYAG alleged that Exxon claimed to account for the likelihood of regulation of GHG emissions by including a "proxy cost" of carbon but did not apply the "proxy cost" as represented. According to the NYAG, Exxon did not apply the "proxy cost" because doing so would result in "massive" costs and "substantial write downs" of Exxon's assets. Instead, Exxon allegedly used an "alternative methodology" which allowed the company to report lower costs, avoid write downs, and continue to carry its hydrocarbon assets at valuations that were substantially inflated from the values Exxon would have reported if the higher "proxy cost" measure had been used. The Massachusetts Attorney General is also pursuing similar claims against Exxon.

The NYAG has also settled claims with other energy companies regarding allegations that the issuer failed to inform investors about risks. For example, in 2015, Peabody Energy settled with the NYAG and admitted that it had made market projections about the impact of potential climate change regulatory actions, even though Peabody stated in annual and periodic SEC filings that it could not predict the impact of these laws. Peabody's internal projections suggested that climate change regulation could have a significant impact on the company. As part of the settlement, Peabody filed revised shareholder disclosures with the U.S. Securities and Exchange Commission (**SEC**) that restated certain climate change risks.

The SEC has also been active in this area. In February 2010, the SEC published an Interpretive Release addressing disclosure obligations related to the economic impact of climate change. The SEC followed up this guidance with investigations of corporate

disclosures. For example, the SEC investigated Exxon's climate change disclosures and accounting practices. Its probe focused on how Exxon calculates the impact of climate change regulations, including what figures the company uses to account for the future costs of complying with regulations to curb greenhouse gases.

The SEC has also received petitions to investigate climate change disclosures by other companies. For example, on 14 March 2016, more than 30 investor groups promoting sustainable investments asked the SEC to investigate whether Enviva Partners LP—a wood pellet manufacturer—complied with the SEC's guidance on climate change disclosures. The letter also asked the SEC to monitor more closely companies' climate benefit claims; establish and enforce guidelines for those claiming climate benefits; and require companies to disclose the assumptions that underlie those claims. The SEC has received other similar petitions identifying purported material misstatements and omissions in regulatory filings by other companies and requesting guidance about claims of emissions levels and climate benefits.

Shareholder actions concerning corporate climate change disclosures

In the United States, claims against issuers have generally alleged that the issuer's disclosures are false and misleading. These claims have often been based on allegations derived from enforcement actions. For example, after the NYAG alleged in a June 2017 court filing that it had uncovered "significant evidence of potential materially false and misleading statements" regarding climate change, Exxon was sued by shareholders alleging that the corporation misled investors by failing to disclose risks posed to its business by climate change. Specifically, based on the NYAG allegations, shareholders alleged that "Exxon has long understood the negative effects of climate change and global warming and their relation to the worldwide use of hydrocarbons", and that "Exxon understood and appreciated that it was highly likely that it would not be able to extract all of its hydrocarbon reserves and that certain of those assets were 'stranded'. Yet Exxon publicly represented that none of its assets were 'stranded' because the impacts of climate change, if any, were uncertain and far off in the future." In August 2018, a United States District Court in Texas denied Exxon's motion to dismiss the claim, which argued that the plaintiffs were attempting to "manufacture" a claim out of allegations made by the NYAG. The case is now in discovery.

In Australia, shareholders of the Commonwealth Bank of Australia sued the bank, alleging that it violated the Corporations Act of 2001 via the issuance of its 2016 annual report, which failed to disclose climate change-related business risks—specifically including possible investment in the controversial Adani Carmichael coal mine. The bank had made no indication that it would report on these risks or disclose its plans for managing them in 2017. In *Abrahams v. Commonwealth Bank of Australia*, the shareholders asked the Federal Court of Australia for a declaration that the bank has violated the 2001 Act and for an injunction either "restraining the bank from continuing to fail to report" on climate change-related risks or requiring the bank to report on them.

Shareholders have also brought claims alleging that corporations have failed to adequately disclose climate change risks and that corporations are responsible for achieving climate change objectives.

Other potential claims against corporations

As acceptance of the idea that climate disruption impacts the enjoyment of human rights grows, corporations may face claims that their failure to cut emissions or otherwise pursue adequate adaptation and mitigation strategies represents a failure to respect human rights in accordance with the UN Guiding Principles on Business and Human Rights. Corporations may also face claims that they are accountable for human rights violations linked to climate change.

Activists are also using alternative dispute resolution mechanisms to bring claims against corporations. For example, NGOs, other entities and individuals may initiate complaint proceedings before National Contact Points under the OECD Guidelines for Multinational Enterprises, which contain chapters on human rights and on the environment. An example of a climate change-related case is the complaint brought by Oxfam, Greenpeace, Friends of the Earth NL *et al.* against ING Bank before the Dutch National Contact Point alleging that ING violated the MNE Guidelines through its failure to: (i) report levels of GHG emissions caused by its lending activities; and (ii) set itself a target of reducing GHG emissions in its lending. In an interim decision, the Dutch National Contact Point confirmed that the complaint merited further consideration and offered its “good offices” to facilitate a dialogue between the parties. That offer was accepted, and led to extensive dialogue, which resulted in a Final Statement published in April 2019.

Directors may also face claims alleging that they breached their fiduciary duties by failing to consider climate change. For example, claims could be pursued against directors for failing to pursue adequate emissions-reduction strategies or failing to enforce company policies regarding climate change or human rights. However, in at least some jurisdictions, these claims are unlikely to succeed because of the business judgement rule, which provides substantial protection for decisions made by directors.

Finally, corporations also face reputational risk related to climate change. In an environment of developing awareness about the dangers of climate disruption, corporations should be mindful of the potential consequences of being viewed as insufficiently responsive to the risks posed.

Climate change claims against governments

Actions against governments and public authorities are also increasing. These cases have been brought on several bases and include claims seeking to enforce climate change mitigation and adaptation commitments, to force more ambitious government action to curtail GHG emissions and to raise awareness of climate change issues.

Claims seeking state action, including on grounds of constitutional and human rights

One of the first claims to compel state action in relation to climate change was the 1999 rule-making petition filed by several environmental groups and individuals

Claims have been based largely on constitutional and human rights law, and administrative and planning law.

requesting the Environmental Protection Agency (**EPA**) to regulate GHG emissions under the Clean Air Act. The EPA had declined to regulate GHG emissions, which caused 12 states to join the petitioners to seek review in the United States Court of Appeals for the District of Columbia. That appeal led to the Supreme Court's landmark 2007 decision in *Massachusetts et al. v. Environmental Protection Agency*, which held that the Clean Air Act's "sweeping definition of air pollutant" included carbon and other GHG emissions. Consequently, the Clean Air Act authorised the EPA to regulate GHG emissions. Following the decision, the EPA introduced standards aimed at limiting emissions from power plants, motor vehicles and industrial facilities.

The links between climate change and adverse human rights impacts have been confirmed in various contexts. State obligations to mitigate and prevent adverse human rights impacts of climate change, as well as the responsibility of businesses to respect human rights, have been recognised by both international bodies and domestic courts.

For example, in *Urgenda Foundation v. Kingdom of the Netherlands*, a Dutch environmental group and hundreds of Dutch citizens succeeded in establishing that the government of the Netherlands has a duty under the Dutch constitution and the European Convention on Human Rights to take climate change mitigation measures given the "severity of the consequences of climate change and the risk of climate change occurring". The District Court of The Hague ruled that the government must reduce its GHG emissions by at least 25% compared to 1990 by 2020. The District Court's ruling was upheld by the Court of Appeal and a further appeal is underway in the Supreme Court.

In a highly publicised proceeding in the United States, *Juliana v. the United States*, 21 youth plaintiffs are pursuing a claim in federal court against the US government alleging violations of their constitutional rights to life, liberty and property through the government's failure to curb emissions. This case involves other claims, including a novel application of the public trust doctrine, and is ongoing in the courts.

It has also recently been reported that a group of Torres Strait Islanders submitted a petition to the United Nations Human Rights Committee alleging that the Australian government is violating their human rights through its failure to act on climate change. The complaint asserts that Australia's violations result from its failure to impose adequate targets for mitigating GHG emissions and its failure to provide sufficient funding for coastal defence and resilience measures on the islands. This petition represents the first claim filed against a State by residents of low-lying islands for failure to address climate change.

Claims based on constitutional, human and fundamental rights have also been pursued in multiple other jurisdictions, including Belgium, Canada, Colombia, France, Germany, Ireland, Norway, Pakistan and the United Kingdom.

Alongside other obligations, some plaintiffs have also invoked a State's international commitments to reduce its emissions as a basis for their claims. For example, in *Greenpeace Nordic Association and Nature and Youth v. Norway Ministry of Petroleum and Energy*, two NGOs sought a declaration that the Ministry's grant of licences for deep-water hydrocarbons extraction in the Barents Sea violated the Norwegian

constitution and was inconsistent with the Paris Agreement objective to limit global warming to 1.5° or 2° above pre-industrial levels. Similar arguments were raised about the UK government's decision to permit the expansion of Heathrow Airport in *Plan B Earth and Ors. v. Secretary of State for Transport*. Although the courts in both cases rejected the claims, it is likely that other plaintiffs will attempt to prompt climate action using analogous arguments.

Challenges to planning and permitting decisions

Several planning and permitting decisions have also been challenged based on climate change arguments. For example, in the Australian case of *Walker v Minister for Planning*, a local resident challenged the Minister for Planning's decision to approve a large property and aged care facility development on coastal land. The court ruled that the Minister's decision was invalid because he had failed to consider climate change flood risks and, in particular, whether changing weather patterns could lead to an increased flood risk in connection with the proposed development in circumstances where flooding was identified as a major constraint on development of the site.

In *In re Vienna-Schwechat Airport Expansion*, an NGO and individual petitioners opposed the local government's approval of the construction of a third runway at Vienna's main airport on grounds that it would result in higher GHG emissions. Although successful in the first instance, the decision of the Austrian Federal Administrative Court in favour of the petitioners was ultimately overturned by the Austrian Constitutional Court.

In *Friends of the Irish Environment CLG v. Fingal County Council*, an NGO challenged the local council's decision to issue a five-year extension of the Dublin Airport Authority's planning permission to construct a new runway. The Irish High Court dismissed the plaintiffs' claim for lack of standing, but, in a landmark decision, recognised that:

A right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under Art. 40.3.1 of the Constitution.

Implications for corporations and businesses of actions against States

Actions against States can have significant consequences for corporations and businesses. Successful litigation and potentially the adverse publicity around litigation may result in governments:

- Enhancing their climate-related goals and imposing higher emissions standards on businesses;
- Passing legislation and regulations that prohibit certain activities (e.g. the phase-out of lignite and coal in Germany); and
- Incorporating climate change issues and human rights as considerations in permit or planning procedures.

Challenges to pursuing climate change litigation

Climate change litigation raises novel issues regarding, for example, the global and transboundary nature of climate change and the difficulty of proving that certain GHG emissions have caused, or will cause, harm to a specific group of people or geographic area. Issues of proof are made more difficult by gaps in the science relating to climate change and its impacts. There are questions of competence and justiciability relating to the perceived use of courts to define government climate change policy. Questions also arise regarding the suitability or availability of certain legal principles and doctrines—for example, the public trust doctrine—as a basis for claims. For plaintiffs, demonstrating standing—i.e., an adequate interest in the outcome of the action at issue—can be an obstacle to pursuing a claim. These issues cut across almost all climate change cases.

It is likely that we will see these issues play out in future climate change litigation and some clarity developed—at least on a domestic or potentially a regional basis—about how they should be addressed. Climate science will also become more adept at establishing a causal link between GHG emitters and the harm caused by emissions. What is clear is that corporations and businesses—especially those that operate across borders—will need to track these legal developments and assess the impact on their operations and their exposure to risk of court rulings and related legislative and regulatory changes. They will also need to be ready to deal with questions about how to manage their exposure, including the insurability of climate change litigation risk.

Looking ahead

Climate change litigation is here to stay. Improvements in climate science and a growing body of case-law should serve to clarify the viability of different claims. Growing climate awareness and activism and, in some jurisdictions, the perceived slow pace of legislative and regulatory action will encourage the pursuit of claims against both governments and businesses. However, absent a global consensus about how to address the relevant issues, these developments will happen at different speeds and have different impacts across different jurisdictions.

For corporations, financial institutions and other businesses, the key will be to keep abreast of legal developments and cases testing liability for the effects of climate change around the world in order fully to understand the relevant risks to their own operations and those of their clients.

CONTACTS



Roger Leese
Partner
T: +44 20 7006 8710
E: roger.leese@cliffordchance.com



Rae Lindsay
Partner
T: +44 20 7006 8622
E: rae.lindsay@cliffordchance.com



Steve Nickelsburg
Partner
T: +1 20 2912 5108
E: steve.nickelsburg@cliffordchance.com



Thomas Volland
Partner
T: +49 211 4355 5642
E: thomas.volland@cliffordchance.com



Janet Whittaker
Senior Counsel
E: janet.whittaker@cliffordchance.com

GROWING THE GREEN ECONOMY



This article was initially published in **GROWING THE GREEN ECONOMY: ADDRESSING THE SUSTAINABILITY CHALLENGES AND OPPORTUNITIES**, our far-reaching look at developments in ESG and sustainable finance.

The severe warnings on climate change starkly documented by the IPCC report and others demonstrate why urgent action to meet the goals of the Paris Agreement is needed. The public, governments and legislators are taking notice and taking action. Much of the legislative effort to date has been focused on the financial system but there is an increasing emphasis on non-financial entities and the requirements that are beginning to be expected of them. These requirements stem from legislation, public pressure and possible litigation.

GROWING THE GREEN ECONOMY reflects the breadth and depth of the impact of these environmental and sustainable factors. Visit www.cliffordchance.com/greeneconomy to read and download the publication in full.

OUR INTERNATIONAL NETWORK 32 OFFICES IN 21 COUNTRIES



Abu Dhabi
Amsterdam
Barcelona
Beijing
Brussels
Bucharest
Casablanca
Dubai
Düsseldorf
Frankfurt
Hong Kong
Istanbul
London

Luxembourg
Madrid
Milan
Moscow
Munich
Newcastle
New York
Paris
Perth
Prague
Rome
São Paulo
Seoul

Shanghai
Singapore
Sydney
Tokyo
Warsaw
Washington, D.C.
Riyadh*

*Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh
Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

CLIFFORD CHANCE

This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street,
London, E14 5JJ

© Clifford Chance 2019

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571
Registered office: 10 Upper Bank Street,
London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or contact our database administrator by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.

Abu Dhabi • Amsterdam • Barcelona
Beijing • Brussels • Bucharest
Casablanca • Dubai • Düsseldorf
Frankfurt • Hong Kong • Istanbul
London • Luxembourg • Madrid
Milan • Moscow • Munich • Newcastle
New York • Paris • Perth • Prague
Rome • São Paulo • Seoul • Shanghai
Singapore • Sydney • Tokyo • Warsaw
Washington, D.C.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.



RECYCLED
Paper made from
recycled material
FSC® C012830