

CLIMATE CHANGE LITIGATION – DUTCH SUPREME COURT CONFIRMS STATE OBLIGATION TO REDUCE GREENHOUSE GASSES BY THE END OF 2020.

On 20 December 2019, the Dutch Supreme Court (*Hoge Raad*) confirmed that the Dutch State has a positive obligation under the European Convention on Human Rights ("ECHR") to reduce emissions of greenhouse gasses ("GHG") by at least 25% by the end of 2020.

Rejecting the State's argument that it was not for the judiciary to rule on political questions, the Supreme Court affirmed the judiciary's role in determining whether political decisions were made within the limits of the law. The Court left the precise measures deemed most suitable to reduce GHG emissions to the Dutch Executive and Legislature to decide.

This case demonstrates the increasing use of litigation as a tool by climate change activists and the increasing relevance for businesses of legal developments and cases such as *Urgenda* which test liability for the effects of climate change around the world.

Factual Background

Urgenda is a Dutch foundation whose stated aim is to stimulate and accelerate the transition to a more sustainable society. In 2013, *Urgenda* initiated proceedings against the State of the Netherlands, seeking to force the State to do more to prevent global climate change.

Both the District Court and Court of Appeal of The Hague ruled in favour of *Urgenda* (albeit on different legal grounds); ordering the Dutch State to reduce Dutch GHG emissions by at least 25% by the end of 2020 (relative to levels in 1990).

Whilst the District Court based its decision on a breach of the standard of due care (*maatschappelijke zorgvuldigheid*) in tort, the Court of Appeal ruled that the Dutch State had acted unlawfully by breaching its positive duty of care stemming from Articles 2 (right to life) and 8 (right to respect for private and family life) of the ECHR.

Implications for corporations and businesses

Climate change litigation is here to stay. The potential consequences for corporations and businesses include:

- Enhanced climate-related goals and higher emissions standards
- Legislation and regulations prohibiting certain activities
- Climate change and human rights considerations in permit or planning procedures
- Limitations on (and reputational risks of) bringing claims

Rejecting the State's appeal, on 20 December 2019 the Supreme Court confirmed that the Dutch State has a positive obligation to reduce GHG emissions by at least 25% by the end of 2020. Affirming the Court of Appeal's decision, the Supreme Court held that this obligation flows from Articles 2 and 8 of the ECHR, confirming that climate change is a human rights issue. The Court further ruled that there was a consensus on taking measures to reduce GHG emissions to prevent global warming which was of special importance.

Implications for corporations and businesses

Litigation against governments and corporations with the goal of forcing cuts in GHG emissions or the adoption of far-reaching mitigation and adaptation strategies is on the rise. Successful action against States, and the potentially adverse publicity that surround such cases, can have significant consequences for corporations and businesses. As a result of these decisions, governments may:

- Enhance their climate-related goals and impose higher emissions standards on businesses;
- Pass legislation and regulations that prohibit certain activities; and
- Incorporate climate change and human rights as considerations in permit or planning procedures.

A number of these measures have already been announced by the Dutch Cabinet in response to the *Urgenda* line of decisions. For example, the Dutch Minister of Economic Affairs sent a letter to the Lower House of Parliament in summer 2019 regarding the Dutch Climate Agreement. In this letter, the Cabinet stated that the transition towards a reduction in carbon dioxide emissions should be feasible and affordable to everyone and that the burden should be equally distributed amongst industry and citizens.¹ This letter follows a Draft Bill prohibiting the use of coal as fuel for electricity production from 1 January 2030, which was submitted to the Lower House of Parliament earlier this year. The draft bill aims to achieve a substantial reduction in carbon dioxide emissions in the Netherlands,² and has already triggered a threatened claim by the German company Uniper against the Dutch State under the Energy Charter Treaty. A new subsidy scheme for accelerating industry climate investments also opened on 1 August 2019.³

Whilst significant steps have already been taken by the Dutch government to tackle the climate emergency, in September 2019 the Dutch *Centraal Bureau voor de Statistiek* (Statistics Netherlands) announced that Dutch GHG emission levels in 2018 were only 14.5% lower than those in 1990; falling significantly below the target set in *Urgenda*. It is likely therefore that businesses should expect more far reaching measures to follow if the targets imposed by *Urgenda* are to be achieved; and will need to consider what mechanisms are available to them to address the consequences of such policies, as well as the potential limitations on (and reputational risks of) bringing any claims.

The Right to a Healthy Environment

We have been conducting and co-ordinating a major pro bono project on behalf of Dr David Boyd, the UN Special Rapporteur for Human Rights and the Environment. Analysed at both the national and sub-national levels, the project involves a global mapping survey to determine which jurisdictions around the world recognise a human right to a healthy environment in their domestic law.

The recognition of a human right to a healthy environment has important implications in both domestic and international law. It allows the use of human rights mechanisms in defence of the environment, opening up new legal frameworks for the protection of the environment at the local, national and international levels.

The project team comprised 90 lawyers, trainees, paralegals and members of our Best Delivery team from 27 offices, working in collaboration with lawyers from over 100 other firms globally. All participants contributed their time, technical expertise and legal knowledge pro bono in a combined effort to map the existence of the right across all 193 UN Member States. The findings of the survey will be used by the UN Special Rapporteur in support of a report to the UN Human Rights Council due in the new year.

The firm's work on this project was recognised by the Cyrus R. Vance Center for International Justice in New York for making an important contribution to international environmental law.

¹ <https://www.cliffordchance.com/client-portal/alerters/alerter-energy/2019/06/government-letter-on-dutch-climate-agreement-published.html>

² <https://www.cliffordchance.com/client-portal/alerters/alerter-energy/2019/03/draft-bill-on-prohibition-of-the-use-of-coal-for-electricity-production.html>

³ <https://www.cliffordchance.com/client-portal/alerters/alerter-energy/2019/07/new-subsidy-scheme-for-accelerating-industry-climate-investments-to-open-on-1-august-2019.html>

CONTACTS



TIEMEN DRENTH
Associate, Amsterdam

T +31 20 711 9285
E tiemen.drenth
@cliffordchance.com



CARLA LEWIS
Senior Associate,
London

T +44 20 7006 4323
E carla.lewis
@cliffordchance.com



GUIDO BERGERVOET
Counsel, Amsterdam

T +31 20 711 9534
E guido.bergervoet
@cliffordchance.com



NANCY STOKE
Advocaat-stagiaire,
Amsterdam

T +31 20 711 9691
E nancy.stoke
@cliffordchance.com



ROGER LEESE
Partner, London

T 44 20 7006 8710
E roger.leese
@cliffordchance.com



JANET WHITTAKER
Senior Counsel,
Washington DC

T +1 202 912 5444
E janet.whittaker
@cliffordchance.com



RAE LINDSAY
Partner, London

T +44 207006 8622
E rae.lindsay
@cliffordchance.com



JEROEN OUWEHAND
Global Senior Partner,
Amsterdam

T +31 20 711 9130
E jeroen.ouwehand
@cliffordchance.com



**DR. THOMAS
VOLAND**
Partner, Düsseldorf

T +49 211 4355 5642
E thomas.voland
@cliffordchance.com



**JESSICA
GLADSTONE**
Partner, London

T +44 207006 5953
E jessica.gladstone
@cliffordchance.com

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www.cliffordchance.com

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

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