Mapping climate change adjudication

The Hon Justice Brian J Preston
Chief Judge
Land and Environment Court of NSW
Overview of types of actions

- Tort
- Public trust
- Trade practices
- Administrative law
- Constitutional law
- Human rights
- International law
- European Union law
Tort

- Public nuisance
- Private nuisance
- Negligence
- Conspiracy
Public Nuisance: American Electric Power

  - States and environmental NGOs sued five electric power companies which, through their fossil-fired electric power plants, emitted around 10% of all CO₂ in the US.
  - The plaintiffs sought a permanent injunction requiring the defendants to cap their CO₂ emissions and to commit to yearly reductions over at least ten years.

- The states sued on their own behalf to protect public lands and as parens patriae on behalf of their citizens and residents to protect public health and well-being.

- NGOs sued to protect private conservation lands.
In *People of the State of California v General Motors* (NDCal, C06-05755 MJJ, 17 September 2007):

- California sued six of the world’s largest manufacturers of automobiles based on the alleged contributions (past and present) of their vehicles to climate change impacts in the state.
- The suit alleged these impacts constituted a public nuisance and sought monetary damages.
Public Nuisance: Justiciability

Both the American Electric Power and General Motors suits were dismissed by US District Courts on grounds of non-justiciability, the courts stating that it was impossible to decide the matters “without an initial policy determination of a kind clearly for nonjudicial discretion.”

The plaintiffs in the American Electric Power suit appealed successfully. The Court of Appeals (582 F 3d 309 (2nd Cir, 2009)) held the plaintiffs’ actions did not present non-justiciable political questions and the plaintiffs had standing.


In 2011, US Supreme Court (131 S Ct 2527 (2011)) dismissed the suits and held that the federal Clean Air Act displaces the federal common law of nuisance. The Court, by an equally divided court, ruled that at least some petitioners had standing and did not overrule the CoA’s ruling on justiciability.
Public Nuisance: Kivalina

In *Kivalina v ExxonMobil et al* 663 F Supp 2d 863 (ND Cal 2009) the native Inupiat village of Kivalina in Alaska brought a public nuisance suit against oil, power and coal companies.
Kivalina coastal erosion
Public Nuisance: Kivalina

- The village suffers from the melting of Arctic ice which used to protect its coasts from severe weather and, hence, erosion. The current erosion of coastal areas means the village has to relocate or be abandoned.
- The plaintiffs sought monetary damages from the defendants for their contribution to climate change.
- The District Court dismissed the plaintiff’s federal common law nuisance claim holding it was non-justiciable and the plaintiff lacked standing (663 F Supp 2d 863 (NDCal, 2009)).
Public Nuisance: Kivalina

In 2012 the CoA (696 F 3d 849 (9th Cir, 2012)) affirmed that decision, applying the Supreme Court’s decision in American Electric Power and holding that the Clean Air Act displaced the federal common law of nuisance.

However, these decisions do not imply that state nuisance law is displaced.

In 2013 the Supreme Court (133 S Ct 2390 (2013)) denied a petition by Kivalina for a writ of certiorari.
Private Nuisance Scenarios

- A public authority might construct rock walls or levee banks to control or mitigate increased sea or water levels caused by climate change. If such works are poorly located, designed or constructed, they may exacerbate the problem they were intended to remedy or shift the problem to other locations.

- An action in private nuisance by affected land owners may lie against the public authority, subject to any statutory immunities or defences.
Negligence: Scenarios

- A negligence action by a person who has suffered damage or loss by a climate change-induced event could potentially be brought for failure to mitigate or to adapt to climate change.
- The former is more problematic than the latter.
Defendants would likely fall into four categories:

- **Producers** of fossil fuels whose combustion increases GHG emissions (e.g., oil, gas, and coal companies)
- **Users** of fossil fuels that cause GHG emissions (e.g., electricity power generators)
- **Manufacturers or marketers** of products whose use contributes to climate change (e.g., automobile manufacturers)
- **Governments** that regulate GHG emissions
Negligence: Failure to mitigate

A negligence action by a plaintiff against defendants of these kinds for failure to mitigate is likely to face considerable hurdles:

– Establishing the defendant owed the plaintiff a duty of care
– Establishing the defendant breached any duty of care
– Establishing that the defendant’s breach of duty caused the plaintiff’s damage or loss
– Remoteness of damage
Negligence: Failure of Government

Urgenda Foundation v Netherlands (District Court, The Hague, Case C/09/456689 / HA ZA 13-1396)

In November 2013, the Dutch foundation Urgenda and 886 co-plaintiffs sued the Dutch Government initially requesting:

– A declaration that global warming of > 2°C will lead to fundamental violation of human rights worldwide.
– A declaration that the Dutch State is acting unlawfully by not contributing a proportional share to prevent global warming.
– Orders that the Dutch State reduce Dutch emissions by 40%, or at least 25%, by 2020 below 1990 levels.
On 24 June 2015, the District Court in the Hague ordered the Dutch state to limit annual greenhouse gas emissions to 25% below 1990 levels by 2020 finding that the government’s pledge of a 17% reduction was insufficient.

“Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that the State has a duty of care to take mitigation measures. The circumstances that the Dutch contribution to the present global greenhouse gas emissions is currently small does not affect this”: at [4.83].
Negligence: Urgenda

✈️ The Court concluded that “the State … has acted negligently and therefore unlawfully towards Urgenda by starting from a reduction target for 2020 of less than 25% compared to the year 1990”: at [4.93].

✈️ The judgment has been appealed by the Government.
Negligence: Failure to adapt

- A negligence action for failure to adapt to climate change might have better prospects.
- These actions would likely be based on more conventional ways of establishing liability and negligence, particularly against public authorities.
Negligence: Failure to adapt scenarios

- **Appropriateness of development approvals** in flood prone, coastal zone or bushfire prone areas.
- **Adequacy of building standards** to withstand extreme events, as their area and frequency increases.
- **Responsibility for erosion**, land slides, flooding, etc resulting from extreme weather events.
Negligence: Failure to adapt scenarios

- Adequacy of emergency procedures when more frequently put to the test and over a greater area.
- Failure to undertake disease prevention programmes, as the area and frequency of diseases spread.
- Failure to preserve public natural assets in the face of climate change.
Negligence: Failure to adapt scenarios

**Wohl v City of New York** (NY Sup Ct, No. 10395/2012, 22 October 2014)

- The plaintiffs alleged that the City had been negligent in failing to provide adequately functioning sewer infrastructure to prevent storm damage to their property from Hurricane Irene and another severe rainstorm.

- The Court summarily dismissed the proceedings because the City, as a governmental entity, could only be held liable if the maintenance of sewer infrastructure was not a discretionary obligation and if it had a special duty to the plaintiffs.
Negligence: Failure to adapt scenarios

**Ralph Lauren 57 v Byron Shire Council [2016]**
NSWSC

- In these ongoing proceedings, the plaintiffs allege that the construction, by the local council, of an artificial headland and accompanying seawall caused beach erosion and, consequently, exposed their beachfront properties to damaging seawater and wave action.
- The plaintiffs contend that the local council was negligent in failing to take reasonable steps to protect their properties and in failing to allow the plaintiffs to do so.
Byron Bay Seawall
Conspiracy: Nature

- Conspiracy consists in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means.
Prior to being used in climate change litigation, claims of civil conspiracy were used in lawsuits against tobacco companies, that they had conspired to deceive the public about the dangers of cigarettes.
Conspiracy: Comer

In *Comer v Murphy Oil USA* 585 F 3d 855 (5th Cir, 2009), the plaintiffs who had suffered damage and loss from Hurricane Katrina sued oil, coal and chemical companies in various causes of action, including nuisance, trespass, negligence, unjust enrichment, civil conspiracy and fraudulent misrepresentation.
Hurricane Katrina
The civil conspiracy claim asserted that the defendants were aware for many years of the dangers of GHG emissions, but they unlawfully disseminated misinformation about these dangers in furtherance of a civil conspiracy to decrease public awareness of the dangers of global warming.

US District Court (SD Miss, 1:05-CV436LGRHW, 30 August 2007) and Court of Appeals (585 F 3d 855 (5th Cir, 2009)) dismissed the civil conspiracy claim for plaintiff’s lack of standing.
In 2011, a new lawsuit was filed in the US District Court (839 F Supp 2d 849 (SD Miss, 2012)). The Court dismissed the plaintiffs’ case holding that the doctrines of res judicata and collateral estoppel barred all of the plaintiffs’ claims. The Court held in the alternative that the plaintiffs did not have standing, that the lawsuit was a non-justiciable political question and that all the plaintiffs’ claims were pre-empted by the Clean Air Act.

In 2013, the US Court of Appeals (718 F 3d 460 (5th Cir, 2013)) affirmed the US District Court’s decision on grounds of res judicata.

See also Kivalina v Exxon Mobil 663 F Supp 2d 863 (ND Cal 2009).
In 2015, the state of New York began investigating Exxon Mobil regarding whether it lied to the public about risks associated with climate change or lied to its investors about how such risks might impact the oil business.

The public trust doctrine has its origins in Roman law, specifically in the property concept of res communis. These are things which, by their nature, are part of the commons that all humankind has a right in common to access and use, such as the air, running water, the sea and the shores of the sea, and that cannot be appropriated to private ownership.

Ownership of these common natural resources is vested in the state as trustee of a public trust for the benefit of the people. The state, as trustee, is under a fiduciary duty to deal with the trust property, being the communal natural resources, in a manner that is in the interests of the general public, who are the beneficiaries of the trust. The source of this duty can be the common law, statute law or constitutional law.
Climate change litigants have sought to rely upon the public trust doctrine as a foundation for enforcing an obligation on governments and enterprises to mitigate GHG emissions. To do so, litigants have had to argue that the natural resources held in trust on behalf of the public includes the ‘natural resource’ of the atmosphere.
Public Trust: Alaska

*Kanuk v State of Alaska*, 335 P.3d 1088 (Sup Ct Alaska, 2014):

- Alaskan children’s claim that State had violated public trust doctrine under Alaskan Constitution (Art VIII) by failing to take steps to protect the atmosphere from effects of climate change.
- Standing and justiciability upheld.
- Claim seeking declaratory judgment that atmosphere was public trust resource failed to present actual controversy appropriate for judicial determination.
- Court noted, “past application of public trust principles has been as a restraint on the State's ability to restrict public access to public resources, not as a theory for compelling regulation of those resources”.
Public Trust: New Mexico

Sanders-Reed v Martinez, (NM Ct App, No 33-110, 12 March 2015):

- Affirmed 2013 trial court decision and ruled that Courts could not require the State to regulate GHG emissions based on the public trust doctrine.

- The common law doctrine was not an available cause of action because a public trust obligation to protect natural resources, including the atmosphere, had been incorporated into New Mexico Constitution (Art XX, s 21) and Air Quality Control Act, and the common law must now yield to the governing statutes.
Public Trust: Oregon

**Chernaik v Brown** (Or Cir Ct, No. 16-11-09273, 11 May 2015)

- Action arguing that the public trust doctrine compelled the State of Oregon to take action to establish and enforce limitations on GHG emissions to reduce CO₂ in atmosphere.

- Court ruled that the State’s public trust doctrine applied only to submerged and submersible lands, and not to the atmosphere.

- Court questioned “whether the atmosphere is a ‘natural resource’ at all, much less one to which the public trust doctrine applies”.

- Court further declared that the State does not have “fiduciary obligation to protect submerged and submersible lands from the impacts of climate change”, only that the public trust doctrine restricts the ability of the State to entirely alienate such lands.

- The plaintiffs appealed the decision on 7 July 2015. The hearing is scheduled to commence on 13 September 2016.
Public Trust: Washington


- Judicial review proceedings challenging the Department’s refusal of a public interest petition appealing for it to adopt a proposed rule mandating a particular State GGE cap consistent with scientific assessments of required mitigation.
Court reaffirmed that the Washington State Constitution imposes a ‘constitutional obligation to protect the public’s interest in natural resources held in trust for the common benefit of the people of the State’.

Court rejected the Department’s argument that the public trust doctrine was restricted to ‘navigable waters’ and did not apply to the atmosphere. ‘The navigable waters and the atmosphere are intertwined and to argue a separation of the two … is nonsensical’.

The Court held that the Department was fulfilling its public trust obligations because it was engaging in rulemaking to address GGEs. As its process of rulemaking in this respect was not ‘arbitrary or capricious’, it was beyond the Court’s judicial review power to assess the merits of the Department’s approach.
Public Trust: Washington

Foster v Washington Department of Ecology
(Wash Super Ct, No 14-2-25295-1, 29 April and 16 May 2016)

– In February 2016, the Department withdrew its proposed rule for mitigating GHG emissions.
– Given these “extraordinary circumstances”, the Court vacated parts of its earlier order and ordered the Department to both establish a GHG emission rule by the end of 2016 and recommend this rule to the legislature in 2017.
“The reason I’m doing this is because this is an urgent situation. This is not a situation that these children can wait on. Polar bears can’t wait, the people of Bangladesh can’t wait. I don’t have jurisdiction over their needs in this matter, but I do have jurisdiction in this court, and for that reason I’m taking this action” (p. 20 [13]-[18]).
On 1 June 2016, the Department released a draft rule setting limits on greenhouse gas emissions.

The organisation representing the applicants said that the draft rule was contrary to the Court’s order because it was based on old emissions data and did not require sufficient greenhouse gas emission reductions.

On 15 June 2016, the Department filed a notice of appeal.

(Information sourced from the Sabin Center for Climate Change Law Climate Law Update No. 89)
Judicial review proceedings challenging the alleged failure of the Commonwealth of Pennsylvania and its various departments and agencies to develop and implement a comprehensive plan to regulate greenhouse gas emissions so as to address climate change.

The applicants alleged that the Commonwealth, as public trustee of Pennsylvania’s public natural resources under the Pennsylvania Constitution (Article 1, Section 27) had failed in its fiduciary duty to conduct various studies, investigations and other analysis relating to how the Commonwealth’s obligations as trustee of the public trust are to be fulfilled in “light of climate change and/or increasing concentration of CO₂ and GHGs in the atmosphere”.

The applicants also alleged that the Commonwealth had failed to exercise its duty of promulgating regulations or issuing executive orders to limit GHG emissions in a comprehensive manner.
The applicants did not identify any legislation or regulation that mandated the Commonwealth to perform the specific actions sought in the writ.

The Court held that under the existing legislative scheme, there was no mandatory duty to conduct the requested studies, promulgate or implement the requested regulation or issue the requested executive orders; instead such decisions are either discretionary acts of government officials or a task for Parliament.

Accordingly, mandamus did not lie to compel the Commonwealth to make those decisions.
Public Trust: International

**Environment People Law v The Cabinet of Ministers of Ukraine** (District Administrative Court of Kyiv, 2011)

- Administrative law proceedings challenging the alleged failure of the Ukrainian Government to adequately regulate greenhouse gas emissions.

- The applicant alleged that the Government had failed to uphold its obligation to effectively regulate ‘air’, as a **natural resource constitutionally recognised as being owned by the Ukrainian people**, “on behalf of and for the people of Ukraine”.

- The Court partially upheld the applicant’s claim by directing the Government to prepare and release information as to the progress made by the Government in realising Ukraine’s Kyoto Protocol obligations.

- However, the Court declined to grant the other relief sought by the applicant (confirmed on appeal).
Public Trust: International

- **Segovia v Climate Change Commission** (Petition for writ of Kalikasan and Mandamus, Supreme Court of the Republic of the Philippines, 17 February 2014) (As of 15.9.16 – reply of respondents is pending)
  - Amongst other cause of action, the applicants allege that the Government of the Philippines has “violated” its obligation as public trustee of “the life-source of land, air and water” to the people of the Philippines by failing to adequately mitigate climate change and by “using [an] immodest amount of fossil fuel”.

- **Ali v Federation of Pakistan** (Constitutional petition filed 5 April 2016, Supreme Court of Pakistan)
  - Amongst other causes of action, the applicant alleges that the Government of Pakistan has, in permitting the development of a particular coalfield and the consequent greenhouse gas emissions, violated the “doctrine of public trust”.
  - The Registrar of the Supreme Court initially dismissed the petition however, the Supreme Court overturned this decision and the substantive hearing of the petition is pending.
Misrepresentation

- Misrepresentation is of relevance in the torts of deceit and negligence, in contract and in trade practices law.
Misrepresentation Scenarios

Products or services may be promoted:
- as having “low carbon emissions”
- as having had their carbon emission offset by the business promoting them, or
- to claim that the consumer can offset the emissions in a certain way organised by the seller.

Such representations may be false and give rise to a claim by the customer against the representor in tort or contract as appropriate.
Trade Practices

- Misrepresentations as to the environmental credentials of products and services may also be actionable under the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974*).

- Australian Competition and Consumer Commission (ACCC) has taken action in misrepresentations.
ACCC Enforcement: Saab

- ACCC has challenged the “green” claims by GM Holden Ltd in the advertising of Saab cars.
- Saab promoted the green credentials of its motor vehicles by advertising that:
  - “Grrrrrreeen, Every Saab is green”,
  - “Carbon emissions neutral across the entire Saab range”
  - “Switch to carbon neutral motoring”
  - Saab would plant 17 native trees in the first year after a Saab vehicle purchase as a carbon offset.
A CCC Enforcement: Saab

Grrrrrrreen.
$3000 bonus. Plus Trees.

Saab dealers will give you a $3,000 reward on every new model year 2007 vehicle purchased until September 30. Take it as either $3,000 worth of free fuel or $3,000 additional trade-in bonus. Plus, with every new, demonstrator and approved used vehicle, Saab will plant 17 native trees on your behalf in the first year as a carbon offset.

Shift to Neutral.
ACCC Enforcement: Saab

ACCC considered such claims to be misleading because:

- there would, in fact, be a net release of carbon dioxide into the atmosphere by the operation of any motor vehicle in the Saab range.
- planting 17 native trees would not provide a carbon dioxide offset for any period other than a single year’s operation of any motor vehicle in the Saab range, and
- Saab vehicles do not have any attribute or attributes which contribute to reduced carbon dioxide emissions by those vehicles compared with Saab vehicles supplied prior to the publication of the advertisement.
ACCC commenced proceedings in the Federal Court and obtained declarations that GM Holden had breached ss 52 and 53(c) of the TPA.

In addition, GM Holden accepted a court enforceable undertaking to refrain from re-publishing the original advertisements and to train its marketing staff in relation to misleading and deception green marketing claims.

GM Holden advised the ACCC that it will plant 12,500 native trees which it believes to be sufficient to offset the carbon emissions for the life of all Saab motor vehicles sold during the advertising campaign: ACCC v GM Holden Ltd [2008] FCA 1428.
On 1 September 2016, the ACCC commenced proceedings in the Federal Court against Volkswagen and its Australian subsidiary on the basis that, contrary to the Australian Consumer Law, the Australian subsidiary engaged in misleading or deceptive conduct by marketing its vehicles as “being environmentally friendly, clean burning, low emission and compliant with stringent European standards” when this was allegedly not true.

The ACCC alleges that Volkswagen used ‘defeat’ software to enable its vehicles to comply with nitrogen oxide emission regulations in a test environment. This software would then cease to operate after testing so that the vehicle did not comply with the regulatory standards in normal driving conditions.

ACCC Enforcement:
Volkswagen
The ACCC has also brought proceedings against:

- **De Longhi**: unqualified representation that portable air conditioner “environmentally friendly”
- **Goodyear**: unsubstantiated environmental claims for tyres
- **Prime Carbon**: false or misleading representations about the supply and sale of carbon credits
- **V8 Supercars**: misleading claim that planting trees to fully offset carbon emissions from the V8 Championship Series
- **Global Green Plan**: breach of undertaking to make up shortfall in renewable energy certificates that were to have been purchased for customers of Green Power.
Issues relating to climate change can arise in

- **Judicial review** of administrative decisions and conduct
- **Civil enforcement** of environmental law
- **Merits review** of administrative decisions
Judicial Review

- The legality or validity of administrative decisions and action may be reviewed by the courts on numerous grounds relating to climate change issues.
- The person seeking review must have standing to sue.
- Standing in climate change litigation has proved to be a significant barrier for plaintiffs.
The state of Massachusetts, together with 11 other states, 3 cities, 2 US territories and several environmental groups sought review of the EPA’s denial of a petition to regulate the emissions of four GHGs, including CO$_2$, under s 202 (a)(1) of the Clean Air Act.

This requires that the EPA shall by regulation prescribe standards applicable to the emission of any air pollution from any class of new motor vehicles which in the EPA’s judgment causes or contributes to air pollution reasonably anticipated to endanger public health or welfare.

The US Supreme Court, at 549 US 497 (2007), held that Massachusetts had standing to challenge the EPA’s denial of their rulemaking petition.
The Supreme Court applied the three part test for standing in *Lujan v Defenders of Wildlife* 504 US 555 (1992):

- **Injury in fact**: Massachusetts had suffered an injury in fact as owner of the state’s coastal land which is and will be affected by climate change induced sea level rise and coastal storms: at 19-20.

- **Causation**: reducing domestic automobile emissions, a major contributor to GHG concentrations, is “hardly a tentative step”: at 21-22.

- **Remedies**: regulating motor vehicle emissions sought would not reverse global warming, but it might slow down or reduce its effects: at 22.
Judicial review: Duty to regulate

*Kain v Department of Environmental Protection* (2016) 474 Mass 278

- In reversing a decision of the Superior Court, the Supreme Judicial Court held that the Department was required by the ‘unambiguous language’ of the *Global Warming Solutions Act 2008* to ‘promulgate regulations that address multiple sources or categories of sources of greenhouse gas emissions, impose a limit of emissions that may be released, limit the aggregate emissions released from each group of regulated sources or categories of sources, set emission limits for each year, and set limits that decline on an annual basis’: at [23].

- The Department’s regulatory initiatives had not satisfied this obligation: at [23].
Failure to consider relevant matters

A decision-maker will be bound to take into account matters that the statute expressly or by implication from the subject matter, scope or purpose of the statute require the decision-maker to consider: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 39-40, 55.
Examples of express relevant matters are provisions in local environmental plans requiring consideration of the effect of coastal processes and coastal hazards and potential impacts, including sea level rise, on a proposed development or arising from a proposed development: see Standard Instrument (Local Environmental Plans) Order 2006, cl 5.5 (2).
Implied relevant matters: Examples

- *Australian Conservation Foundation v Latrobe City Council* (2004) 140 LGERA 100 (environmental effects of GHG emissions that were likely to be produced by the Hazelwood Power Station relevant to proposed amendment to planning scheme to facilitate mining coal fields to supply coal for the power station).
Hazelwood Power Station
Implied relevant matters: Examples

«Gray v Minister for Planning (2006) 152 LGERA 258 (GHG emissions from downstream use (burning) of coal mined from proposed Anvil Hill coal mine).»
**Implied relevant matters: Examples**


Subsequent approval unsuccessfully challenged on climate change ground in *Kennedy v NSW Minister for Planning* [2010] NSWLEC 129.
Sandon Point, NSW
Implied relevant matters: Examples

- **Aldous v Greater Taree City Council** (2009) 167 LGERA 13 (effect of climate change induced coastal erosion on new dwelling on beachfront land at Old Bar, NSW relevant but considered).
Implied relevant matters: Examples

- Haughton v Minister of Planning (2011) 185 LGERA 373
  - Challenge that approval of new Bayswater 2 power station failed to consider ESD and anthropogenic climate change as an element of public interest.
  - Challenge dismissed on basis that ESD was considered to extent required and anthropogenic climate change, although not itself a mandatory relevant matter, was considered in any event.
Implied relevant matters: Examples

- **Natural Resources Defense Council v Kempthorne** 506 F Supp 2d 322 (EDCal 2007) (data about climate change that may adversely affect a threatened species of fish and its habitat was relevant matter not taken into account).

- **Barbone v Secretary of State for Transport** [2009] EWHC 463 (Admin); [2009] EnvLR D12 (GHG emissions from increased intensity of Stansted airport was relevant matter but taken into account) (affirmed by Court of Appeal).

- **R (on application of Hillingdon LBC) v Secretary of State for Transport and Transport for London** [2010] EWHC 626 (Admin); [2010] JPL 976 (GHG emissions from expansion of Heathrow airport and recent developments in climate change policy were relevant matters but given that challenge directed at preliminary consultation process rather than final decision, any failure to consider a relevant matter unlikely to justify Court intervention).
Implied relevant matters: Examples

- **West Coast Ent Inc v Buller Coal Ltd** [2014] NZSC 87 (climate change effects from burning of exported coal outside functions of regional councils in granting resource consents for coal mine).

- **Alaska Oil and Gas Association v Jewell** (Alaska Ct App, No 13-35619, 29 February 2016) (projected climate change effects on the critical habitat requirements for polar bears was a relevant matter in designating protected habitat area) (Petition for rehearing denied by 9th Cir. Ct App 8 June 2016)
Non-compliance with procedural requirements

- Many planning and environment statutes require, as a pre-condition to the exercise of power to approve a development, compliance with certain procedures. These include environmental impact assessment (EIA) of the proposed development.

- The EIA may be inadequate for failure to consider the impact of a proposed development on climate change or the impact climate change might have on a proposed development.

- A failure to comply with such procedural requirements may be judicially reviewed on the ground of procedural impropriety.
Inadequate EIA: Examples

**Gray v Minister for Planning** (2006) 152 LGERA 258 (Anvil Hill Coal Mine case-EIA inadequate for failure to consider GHG emissions from downstream burning of coal mined).
Inadequate EIA: Examples

*Border Power Plant Working Group v Dep’t of Energy 260 F Supp 2d 997 (SDCal 2003)* (EIA inadequate for failure to discuss CO$_2$ emissions from new power plants in Mexico which would be connected by the proposed electricity transmission lines with the power grid in Southern California).
Inadequate EIA: Examples

*Mid States Coalition for Progress v Surface Transportation Board 345 F 3d 520 (8th Cir, 2003)* (EIA inadequate for failure to consider, when approving a proposed rail line which would provide a less expensive and hence a likely more utilised route by which low-sulphur coal could reach power plants, the possible effects of an increase in coal consumption, including climate change).
Inadequate EIA: Examples

• *Centre for Biological Diversity v California Department of Fish and Wildlife* 361 P 3d 342, 195 (Cal 2015) (Environmental Impact Report inadequate for concluding that a proposed substantial mixed use development project would not have a significant impact on GHG emissions without sufficient evidentiary support.)
Inadequate EIA: Examples

- **Friends of Highland Park v City of Los Angeles** (Cal Ct App, No B261866, 1 December 2015) (Initial study for ‘transit village’ development inadequate for, amongst other reasons, not attempting to quantify GHG emissions or revealing what raw evidence was relied upon with respect to the assessment of GHG emissions.)
Inadequate EIA: Examples

- *Protect Our Communities Foundation v Jewell* (9th Cir. Ct App, Nos 14-55666, 14-55842, 7 June 2016)
  - The Court dismissed an appeal of a lower court decision concerning the (unsuccessful) challenge to a decision by the Bureau of Land Management (BLM) to grant a right-of-way on federal lands near San Diego permitting the construction and operation of a wind farm.
  - The plaintiffs alleged that the BLM had failed to comply with the *National Environmental Policy Act* in preparing the EIS by, amongst other things, not adequately addressing:
    - Viable alternative projects, including a distributed generation project of installing and using rooftop solar systems on private residential land and commercial properties, and
    - the impact of the wind farm project on greenhouse-gas emissions and global warming.
Inadequate EIA: Examples

- *Protect Our Communities Foundation v Jewell* (9th Cir. Ct App, Nos 14-55666, 14-55842, 7 June 2016)
  - The Court held that:
    - The BLM did not act unreasonably in concluding that the alternative of installing and using distributed generation rooftop solar systems on private buildings was “speculative” given the current status of solar technology and the regulatory commercial landscape.
    - The statement in the EIS that the wind farm “would create a renewable source of energy, thereby potentially decreasing overall emissions attributable to electricity generation in California” was reasonable enough and it was not necessary to conclusively prove this in the EIS (or to assess the upstream emissions generated from the manufacture and transportation of equipment to the wind farm).
Civil enforcement: adaptation

- Climate change issues can arise in civil proceedings to enforce compliance with environmental statutes.
- Example: *Byron Shire Council v Vaughan* [2009] NSWLEC 88 and *(No 2)* [2009] NSWLEC 110 (council sought injunction restraining beachfront land owner rebuilding sandbag wall, originally constructed by council, which had been destroyed by strong storms and elevated ocean water levels and land owner sought to enforce council to comply with consent for sandbag wall).
“Byron Bay beachfront goes begging”
Civil enforcement: mitigation

- **Gray v Macquarie Generation** [2010] NSWLEC 34 concerned proceedings to restrain alleged contravention of s 115(1) of *Protection of the Environment Operations Act* 1997 (NSW) by existing Bayswater Power Station wilfully or negligently disposing of waste by the emission of CO$_2$ into the atmosphere in a manner that harms or is likely to harm the environment.

- Defence under s 115(2) if waste disposed of with lawful authority (such as Environment Protection Licence).
Bayswater Power Station
Civil enforcement: mitigation

Application for summary dismissal:

- **upheld** for primary claim of absence of lawful authority to emit CO$_2$ as Environment Protection Licence authorised combustion of carbon based fuels (including coal) and hence emission of CO$_2$, which is a necessary consequence of activity, was authorised by licence.

- **not upheld** for alternative claim that if licence authorised emission of CO$_2$, it only authorised emission in a way that has reasonable regard and care for people and the environment and such limitation is to be implied in the licence.
Civil enforcement: mitigation

Application to **amend summons:**

- In *Gray v Macquarie Generation (No 3) [2011] NSWLEC 3* leave was granted to amend the summons on basis that it was reasonably arguable that the licence was subject to an implied/common law limitation preventing the emission of CO$_2$ in excess of the level achieved by having “reasonable regard and care for the interests of other persons and/or the environment”.

- In *Macquarie Generation v Hodgson [2011] NSWCA 424* the NSW Court of Appeal upheld Macquarie’s appeal and set aside the orders granting leave to amend.
Merits review

- Merits review involves the court (or tribunal) re-exercising the power of the original decision-maker.
- The courts in merits review appeals have considered the effects a proposed development might have on climate change and the effects climate change might have on a proposed development.
Merits review: SA Example

Northcape Properties Pty Ltd v District Council of Yorke Peninsula [2008] SASC 57 (changes in flood patterns and sea levels by global warming would erode buffer and prevent public access to coast, making proposed coastal land subdivision unacceptable).
Marion Bay, Yorke Peninsula, SA
Merits review: Vic Examples

Gippsland Coastal Board v South Gippsland Shire Council (No 2) [2008] VCAT 1545 (six permit applications for dwellings refused as increase in severity of storm events and sea level rise due to effects of climate change create a reasonably foreseeable risk of inundation of land and proposed dwellings, which is unacceptable).
Merits review: Vic Examples

- **Myers v South Gippsland Shire Council (No 1) [2009] VCAT 1022 and (No 2) [2009] VCAT 2414** (sea level rise and storm surges due to climate change would cut off access and inundate site of residential subdivision, which is unacceptable)

- **Alanvale Pty Ltd v Southern Rural Water [2010] VCAT 480** (effects on aquifers from changes in rainfall and associated recharge by reason of climate change made grant of further water extraction licences inappropriate)
**Merits review: Qld Example**

*Rainbow Shores Pty Ltd v Gympie Regional Council* [2013] QPEC 26 (changes in sea levels and storm surge due to climate change would subject a greater proportion of the future development site to inundation than what was modelled making – amongst other reasons – approval of the seaside resort development unacceptable).
Merits review: NSW Example

**Newton v Great Lakes Shire Council [2013]**

NSWLEC 1248

- Approval for new residential development subject to conditions requiring stricter construction standards to ensure support of building structure for projected sea-level rise due to climate change.
Merits review: Balancing public and private interests

Courts have weighed the public interest in addressing climate change against private interests in carrying out or objecting to development:

- *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 (benefits of addressing climate change by use and development of renewable energy outweigh adverse visual, noise and other impacts).

- *Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd* [2007] NSWLEC 59; (2007) 161 LGERA 1
Merits review: Balancing public and private interests

In *Taralga*, the Court held that:

- “the broader public good of increasing the supply of renewable energy” outweighed the “geographically narrower concerns of” the objector community group and, therefore, approved the proposed wind farm (at [3] and [335]).
Taralga Wind Farm
Merits review: Balancing public and private interests

Continued:


– *Howell v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1189 (At first instance, a planning inspector concluded that the significant public benefits of renewable energy generation from a wind turbine outweighed the insignificant adverse visual impacts. On appeal, the High Court and, subsequently, the Court of Appeal found that the inspector had not made any error of law.)
Merits review: Conditions of approval


Constitutions or statutes may provide for certain rights such as a right to life or right to a healthy environment.

Such rights may provide a source for climate change litigation.

Examples: constitutional rights in India, Pakistan, Kenya, Philippines.
Constitutional law: Court orders directing governments to take climate change action

Asghar Leghari v Federation of Pakistan (Lahore High Court, WP No 25501/2015)

✿ Pakistan had two climate-related policies for which on ground implementation had not taken place:
   – National Climate Change Policy, 2012

✿ A petitioner submitted to the Lahore High Court that the inaction offended his fundamental rights, in particular the constitutional principles of social and economic justice (WP No 25501/2015).
Constitutional law: Court orders directing governments to take climate change action

The Lahore High Court ordered the establishment of a Climate Change Commission to effectively implement the National Climate Change Policy and the Framework for Implementation of the Climate Change Policy (2014-2030). The Court assigned 21 members to the Commission from various government Ministries and Departments and ordered that it file interim reports as and when directed by the Court.

“For Pakistan, climate change is no longer a distant threat – we are already feeling and experiencing its impacts across the country and the region.”
Constitutional law: Court orders directing governments to take climate change action

* The Commission submitted to the Court a report dated 16 January 2016, which included 14 findings and 16 major recommendations.

* In his orders of 18 January 2016, Justice Syed Mansoor Ali Shah:
  - commended the work of the Commission and observed that through its process of examining and reporting on the national climate change policy and framework, “modest progress” had been made “in achieving the objectives and goals” of “the Policy and the Framework” (at [3]);
  - ordered that the “priority items under the Framework” be achieved by the Punjab Government by June 2016 (at [4]);
(Continued)

- tasked the Commission with investigating further achievable “short term actions” under the Framework (at [4]);
- directed the Punjab Government to seriously investigate the funding requirements of climate change action and “allocate a budget for climate change in consultation with” the Commission (at [5]);
- directed the relevant media regulatory authority to consider “granting more prime time for the awareness and sensitisation on the issue of climate change” (at [6]).
Constitutional law: Court orders directing governments to mitigate air pollution

- Courts may order governments to take air pollution mitigation measures to remedy contraventions of environmental and public health related constitutional rights.

- Strong parallels can be drawn between the approach taken by courts in adjudicating constitutional law based air pollution proceedings and the role of courts in adjudicating climate change litigation. In particular, the history of court orders directing governments to implement air pollution mitigation measures may foreshadow similar court orders in future climate change litigation.

- Additionally, air pollution mitigation related court orders can have ancillary benefits for climate change mitigation.
Constitutional law: Court orders directing governments to mitigate air pollution

Farooque v Government of Bangladesh (15 July 2001) Supreme Court of Bangladesh (WP No 891 of 1994)

- While the Government had legislated to regulate industrial pollution, there was no evidence to show “any” effective implementation of this legislation. This failure of the Government to implement the law contravened the constitutional right to a “qualitative life among others, free from environment hazards”.

- Consequently, the Court ordered the Government to “adopt adequate and sufficient measures to control pollution”.

Constitutional law: Court orders directing governments to mitigate air pollution

*Farooque v Government of Bangladesh* (2002) 22 BLD 345 Supreme Court of Bangladesh:

- Similar public interest proceedings to *Farooque (no 1)*, however, instead of seeking government action on pollution from industrial activities, these proceedings concerned vehicle generated air pollution.
- While the Government had both legislated and taken some policy action to control vehicle air pollution, it was submitted that the Government had *failed to safeguard the “fundamental constitutional rights”* of citizens by allowing vehicular pollution to pose a “deadly threat to city dwellers”.
- The Court ordered the Government to undertake “urgent preventative measures” to control the “emission of hazardous black smoke” including phasing out “2 stroke 3 wheelers” and enforcing international petroleum standards.
Air pollution in Dhaka
In order to safeguard the constitutional right to health of the residents of Mumbai, the Court ordered the City of Mumbai to implement air pollution mitigation measures “to protect future generations” including phasing out (or converting) a particular taxi model and old three wheeler vehicles.
Constitutional law: Court orders directing governments to mitigate air pollution

*Prakash Mani Sharma v HMG Cabinet Secretariat* (11 March 2003) Supreme Court of Nepal (WP No 3440 of 1996):

- The Court held that the Government had a **constitutional public health obligation to reduce vehicular air pollution.** To remedy the inadequate implementation of air pollution reduction measures, the Court ordered the Government to “enforce essential measures” to reduce vehicular pollution in Kathmandu Valley.
Kathmandu Valley
Constitutional law: Court orders directing governments to mitigate air pollution

Prakash Mani Sharma v HMG Cabinet Secretariat (2007) Supreme Court of Nepal (WN 3027 of “2059”)

- The Court held that the Government’s constitutional obligations to “protect the health of the people” and work towards “a pollution-free environment” required the Government to address brick kiln generated air pollution.

- Thus, the Court directed the Government, for example, to close brick kilns proximate to tourist areas and schools and ensure the installation of pollution controlling devices in kilns elsewhere.
Constitutional law: Court orders directing governments to mitigate air pollution

Gbemre v Shell Petroleum Development Company Nigeria Limited (2005) AHRLR 151 Federal High Court of Nigeria (The Court ordered Shell to cease polluting by way of gas flaring on the basis that this gas flaring contravened the constitutional right to a “clean, poison-free, pollution-free healthy environment”.)
Constitutional law: Court orders directing governments to mitigate air pollution


- It was uncontested that the constitutional right to life required the Government to protect citizens in Lahore from vehicular pollution. The Government submitted that it was, however, “making all efforts to cure air pollution”.

- In earlier proceedings, the Court had ordered the establishment of a commission to report on how to address vehicular pollution. The parties consented to the Court directing the Government to implement a suite of air pollution reduction measures recommended by the commission including the **phasing out of ‘dirty’ buses** and ‘Autocab Rickshaws’, the creation of **bus lanes**, the enforcement of the **ban** on registering “**two stroke**” rickshaws and the establishment of **air quality and fuel standards**.
Constitutional law: Court orders directing governments to mitigate air pollution

Vardhaman Kaushik v Union of India – National Green Tribunal of India – (Original Application No 21 of 2014)

- In these ongoing proceedings, the Tribunal has made many orders directing the Government to take particular actions to address air pollution.

- These orders have been justified by the Tribunal as a necessary intervention to uphold the constitutional right of citizens to a decent and clean environment and to correct the “casual approach which all concerned stakeholders are dealing with the air pollution of Delhi”. The Tribunal has stated that it “cannot permit” the people of Delhi to be exposed to air pollution that causes “serious environmental pollution and public health hazard”.
Constitutional law: Court orders directing governments to mitigate air pollution

The Tribunal has, amongst other orders, directed the Government to: “ensure free flow of traffic in Delhi”, “enhance public transport facilities”, “install air filters” in “public places”, prioritise bypass highways, install “catalytic convertors” in government vehicles, “increase the forest area” around Delhi, prohibit the burning of garbage, ensure that construction materials in trucks are covered etcetera.
Constitutional law: Court orders directing governments to mitigate air pollution

M.C. Mehta v Union of India - Supreme Court of India (Writ Petition No. 13029 of 1985)

- 30 year history of Court orders compelling Indian governments to take air pollution mitigation measures to comply with public health and environmental constitutional obligations.
- The Court ordered on 5 April 2002 that diesel buses in Delhi be converted from diesel to cleaner natural gas.
- On 16 December 2015, the Court made further orders including, for example, the prohibition of the registration of “luxury” diesel cars and SUVs (with a diesel capacity of 2000 cc and above) in Delhi and requiring the imposition of green taxes/toll-based measures to stop diesel trucks entering, rather than bypassing, Delhi.
Constitutional law: Court orders directing governments to mitigate air pollution

- On 5 January 2016, the Court ordered that all taxis operating in the National Capital Region be converted to natural gas.
- On 10 May 2016, the Court prohibited the registration of diesel city taxis.
- On 12 August 2016, the Court lifted the prohibition it had ordered on 16 December 2015 on the registration of certain diesel cars on the condition that an ‘environment protection charge’ (of 1% of the ex-showroom price of diesel vehicles, with capacity of 2000 cc or greater, sold in Delhi) is levied on the registration of such cars.
Constitutional law: Just compensation for adaptation-related compulsory acquisitions of land

- Constitutions and statutes require that governments pay just compensation for compulsorily acquiring land for public use.
- Land may be acquired to carry out climate change adaptation works.
- The adjudication of compensation cases for climate change adaptation acquisitions of land can have either a chilling effect on adaptation works or incentivise such activity.
Constitutional law: Just compensation for adaptation-related compulsory acquisitions of land

- **Borough of Harvey Cedars v Karan** 70 A.3d 524 (N.J. 2013) (The protective function of a public sand dune project to be constructed on acquired land would protect and benefit the affected landowners. Therefore, the compensation paid to the affected landowners was reduced).

Constitutional law: Just compensation for damage to or destruction of property

- **Harris County Flood Control District v Kerr** (Tex SC, No 13-0303, 17 June 2016)
  - Homeowners who suffered flood damage argued that the County government’s failure to fully implement a flood-control plan, combined with its approval of unmitigated upstream private development, resulted in the flooding of their homes and effected a constitutional taking of their property.
  - The Court noted that, for a takings claim, the plaintiffs must prove that the government “intentionally took or damaged their property for public use, or was substantially certain that would be the result”.

The Court held that the plaintiffs had not established a takings claim because:

- the law does not recognise takings liability for the inaction of failing to fully implement the flood control plan;
- although takings liability could derive from the County’s affirmative conduct of approving private development, there was no evidence that the County ever had designs on the homeowner’s particular properties, intended to use those properties to accomplish specific flood-control measures or was substantially certain its approval of development would result in flooding of the homeowner’s particular properties; and
  - the flooding resulted from multiple causes.
- To uphold the plaintiffs claim “would vastly and unwisely expand the liability of governmental entities”.
Human rights

- Human rights under international conventions and instruments may provide a source for climate change litigation.
  - European Convention for the Protection of Human Rights and Fundamental Freedoms and European Court for Human Rights (ECtHR)
    - **Right to life**: Öneryildiz v Turkey No 48939/99, ECtHR 2004-XII and, by analogy, MFHR v Greece No 30/05, ECSR (6 December 2005)
    - **Right to a fair trial**: Okyay v Turkey No 36220/97, ECtHR 2005-VII
    - **Right to respect for family & private life**: Giacomelli v Italy No 59909/00, ECtHR 2006-XII; Fadeyeva v Russia No 55723/00, ECtHR 2005-IV; Guerra and Others v Italy, ECtHR 1998-I (19 February 1998); Lopez Ostra v Spain, ECtHR judgment of 9 December 1994, Series A no 303.
  - Inter-American Commission on Human Rights (IACHR): Inuit v USA.
**Human rights**

* Fadeyeva v Russia No 55723/00, ECtHR 2005-IV (The Court held that the Russian Government’s failure to enforce environmental standards or take measures to protect Fadeyeva from steel plant generated air pollution, violated her right to respect for her home and private life. The Court awarded Fadeyeva damages of €6000 and ordered the Government to ‘take appropriate measures to remedy’ her situation. The Court also observed that it was not its role to ‘dictate precise measure which should be adopted by States in order to comply’ with their human rights obligations).*
**Human rights**

- **Fadeyeva v Russia**
  - (In 2007, the ECtHR Department for the Execution of Judgments confirmed that Russia had not provided evidence that any appropriate measures had been taken, despite Russia’s claims to that effect.)
Human rights

**MFHR v Greece No 30/05, ECSR (6 December 2005)**

The European Commission of Social Rights held that the Greek Government had violated art 11 of the European Social Charter – the right to protection of health – by failing “to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest” in managing and regulating air pollution from lignite mine operations.
National Inquiry on the Impact of Climate Change on the Human Rights of Filipino People (Commission on Human Rights - Philippines)

- On 12 May 2015, a public interest petition was lodged with the Commission requesting that it investigate the responsibility of 50 large multinational, publicly traded fossil fuel producing corporations for contributing to climate change and thereby allegedly violating various fundamental human rights of the Filipino people. It is alleged that these 50 corporations account for 21.71% of total cumulative carbon dioxide emissions between 1751 and 2010.

- On 4 December 2015, the Commission announced the commencement of the above inquiry and, on 27 July 2016, the Commission has furnished these 50 “carbon majors” with the above petition seeking a response within 45 days.

International law

Many types of environmental damage have transboundary effects. Examples are:

- Sulphur dioxide fumes in *Trail Smelter arbitration* (United States- Canada [1941] 3 RIAA 1907)
- Chernobyl radioactive leak in USSR
- Air pollution from Indonesian forest fires.

Climate change is a form of transboundary environmental harm.
International law: Air Transport case

Air Transport Association of America & Ors v Secretary of State for Energy & Climate Change (C-366/10) [2011] ECR I - 13755:

– Example of polluter challenging laws that limit its polluting
– In 2009, US Air Transport Association and three airlines challenged the validity of EC Directive 2008/101 and respective UK Regulations that brought aviation activities of aircraft operators operating flights arriving at and departing from European Community aerodromes within the EU emissions trading scheme.
– Judicial review initially brought in UK alleging the Directive and Regulations contravened four principles of customary international law, the Chicago Convention, the Open Skies Agreement and the Kyoto Protocol.
International law: Air Transport case

- In 2011, the CJEU made a preliminary ruling:
- The EU was not bound by the Chicago Convention ([71]-[72]) and the Kyoto Protocol was not ‘unconditional and sufficiently precise so as to confer on individuals the right to rely on it in legal proceedings in order to contest the validity’ of the Directive ([77]-[78]);
International law: Air Transport case

- Insufficient evidence to establish that the 4th principle of customary international law applied to aircraft flying over the high seas; and
- Three principles of customary international law and the Open Skies Agreement could be relied on to assess validity of the Directive ([111] and [158]) but the Court found that these principles and provisions did not affect the validity of the Directive ([157], [158]).
EU law: Belgian case

*Essent Belgium v Vlaamse Reguleringsinstantie voor de Elektriciteits en Gasmarkt (VREG)* (Court of Justice, No C-204/12 to C-208/12, 11 September 2014) (ECLI:EI:C:2014:2192)

- Under Belgian law, electricity suppliers in the Flemish Region were annually required to surrender “green certificates” to the Flemish Regulatory Authority for the Electricity and Gas Market (VREG). Green certificates were generated by renewable energy producers in the Flemish Region.
- To meet its green certificate obligations, Essent Belgium, an electricity supplier, surrendered “certificates of origin” from countries abroad (Netherlands and Norway) instead of Flemish green certificates.
EU law: Belgian case

- VREG issued administrative fines to Essent for not meeting its obligations and Esssent brought proceedings in a Belgian court for declaration that the fine was unlawful.
- The matter was referred to the CJEU to determine relevant questions of EU law.
- The CJEU ruled that EC Directive 2001/77, the Agreement on the European Economic Area, and the rules on non-discrimination in the Treaty on the Functioning of the European Union did not preclude a national scheme of the sort set out in the Belgian law i.e. the EU laws did not preclude the Belgian law from not accepting certificates originating from other states in place of Flemish green certificates.
- See also Ålands Vindkraft v Energimyndigheten (Court of Justice, No C-573/12, 1 July 2014) (ECLI:EU:C:2014:2037).
EU law: Nitrogen Dioxide Air Pollution Case


  - The United Kingdom Government was in breach of art 13 of EU Directive 2008/50 for failing to comply with various nitrogen dioxide limits throughout the UK by the directive deadline of 2010.

  - Rather than applying under art 22 of the Directive for an extension of time for compliance, the Government produced plans under art 23 which anticipated complying with the limits by 2025. ClientEarth commenced proceedings seeking an order that the Government be directed to apply for an extension of time under art 22 and commit to securing compliance, pursuant to art 22, by 1 January 2015.
EU law: Nitrogen Dioxide Air Pollution Case

- The decision at first instance ultimately reached the Supreme Court on appeal, which requested a preliminary ruling from the European Court of Justice on whether the Government was obligated to seek an extension of time, limited to a maximum deadline of 1 January 2015, under art 22.

- The ECJ held that art 22 required the Government to make an application for an extension of time when it became apparent that compliance would not occur by the original deadline. Contrary to the High Court and Court of Appeal, the ECJ also held that compliance with the emission limits, and therefore art 13, could be compelled by national courts (rather than by the European Commission exclusively).
EU law: Nitrogen Dioxide Air Pollution Case

- Ultimately, the Supreme Court determined the appeal in April 2015, by which time the maximum time limit extension in art 22 (1 January 2015) had already expired, with the effect that art 22 was ‘of no practical significance’.

- However, the Supreme Court, in order to remedy the serious and sustained breach of art 13, ordered the Government to, by 31 December 2015, produce new plans pursuant to art 23 delineating how it intended to secure compliance ‘as soon as possible’.

- Litigation is ongoing as the Government has allegedly still not complied.
International dispute resolution fora

- Disputes concerning climate change may be addressed in various international fora including:
  - International Court of Justice (ICJ)
  - World Trade Organisation (WTO) Appellate Body
  - International Tribunal for the Law of the Sea (ITLOS)
  - World Heritage Committee
  - European Court of Justice (CJEU).
“Shooting the breeze”