ClientEarth

10 Landmark Climate Change Cases

With Support From:

IUCN World Commission on Environmental Law (WCEL)
Global Judicial Institute on the Environment (GJIE)
EU Forum of Judges for the Environment (EUFJE)

Pico Funchetta, Saceda, Italy.
ricardo-frantz

10
Landmark Climate Change Cases

July 2022, Beijing

Authors:

Danting Fan, Climate and Finance Lawyer, ClientEarth

Boya Jiang, Nature and Climate Lawyer, ClientEarth

Dimitri de Boer, Chief Representative for China, ClientEarth

Xiaoyu Zhang, Director of Partnerships, Adjunct Professor, Vermont Law School

Expert Advisors:

Christina Voigt, Professor of Law, University of Oslo, Norway; Co-Chair, Paris Agreement Implementation and Compliance Committee (PAICC); Chair of the IUCN World Commission on Environmental Law (WCEL);

Antonio Herman Benjamin, Founder of the Global Judicial Institute on the Environment (GJIE);

Brian Preston, Chief Judge of the Land and Environment Court of New South Wales;

Claudia S. de Windt, Chief Executive of the Inter-American Institute of Justice and Sustainability (IIJS);

Jacqueline Peel, Professor and Director of Melbourne Climate Futures, Melbourne Law School;

Hari M. Osofsky, Dean, Myra and James Bradwell Professor of Law, Professor of Environmental Policy and Culture (courtesy), Northwestern Pritzker School of Law;

Tianbao Qin, Professor and Director of the Research Institute of Environmental Law (RIEL), Wuhan University;

Andrew Raine, Head of International Environmental Law Unit at UN Environment Programme (UNEP);

Luc Lavrysen, President of the Belgian Constitutional Court, President of the EU Forum of Judges for the Environment (EUFJE);

James Thornton, Founding CEO of ClientEarth;

Peter Barnett, Head of Asia Climate and Energy of ClientEarth

Forest. Olena Sergienko

Preface

Human-induced climate change is causing widespread, pervasive disruption to human and natural systems. Heatwaves, sea level rise, droughts and floods threaten the livelihoods of millions of people, and undermine development, food security, and ecosystems. While the Paris Agreement sets a goal of limiting global warming to 1.5°C–2°C above pre-industrial levels, current actions are far from achieving that target.

The world is at a crossroads, and it is time to start using all the tools we have. Laws and regulations to address climate change have emerged in many jurisdictions, and creative lawyers have brought climate cases to court even in the absence of such laws. Climate litigation has surged, holding governments and companies accountable for inadequate action and excessive emissions. Even in China, we have seen some cases against wind and solar power curtailment, ozone-depleting substances, and bitcoin mining.

In the run-up to the 2022 International Seminar on Judicial Response to Climate Change co-hosted by the Supreme People's Court of China, the Asian Development Bank, and ClientEarth, we surveyed environmental law experts to nominate the most impactful climate cases from around the world. The goal is to inspire judges, prosecutors, lawmakers, NGO lawyers and legal professionals, to understand the power of the law in addressing climate change. The stories are also meant to be accessible to readers who have no legal background.

Over a thousand climate cases have been brought annually in recent years. It is extremely challenging to select only 10. We sought to cover the most impactful cases, and cover a variety of different jurisdictions, sectors, and legal strategies.

We sincerely hope that the 10 stories provide inspiration. By applying the power of the law, together we can choose a healthier, safer, more dignified and climate resilient future.

Acknowledgements: The summaries and legal analyses of the selected cases are based on court judgments, information from relevant parties' websites, and additional materials provided by contributing experts. We are also grateful to all those who helped with drafting, editing, and translation, including Zhengyan Wang, Jinghan Zhao, and Yanqi Zhang.

Table of Contents

New South Wales, Australia. Quentin Grignet

1. **Australia: Gloucester Resources Limited v. Minister for Planning**

Court rejects new coal mine 'in the wrong place at the wrong time'

Summary

The Gloucester valley, located in the Australian state of New South Wales, is an idyllic rural region with unique topographic features. A mining company, Gloucester Resources Ltd (GRL) proposed to develop an open-cut coal mine here, which was expected to produce 21 million tons of coking coal over a period of 16 years. The planning authority refused to grant approval based on environmental and planning grounds (not including climate change).

This refusal was appealed by the mining company to the New South Wales Land and Environment Court.

In his reasons for judgment, Justice Preston, Chief Judge of the Court, explained in detail his decision to refuse the appeal. The most important and unique part of the judgment is the extensive consideration of the Project's climate change impacts. Other considerations include significant and unacceptable planning, visual, amenity and social impacts, which could not be satisfactorily mitigated.

Drawing upon a wide range of climate change cases from all over the world including *Urgenda*, *Massachusetts v EPA*, etc, this is the first decision to reject a coal mine development in Australia for its potential contribution to climate change. This is especially important given Australia's complex political discourse on climate change, and its long history of coal mining and export.

The Court convincingly rejected various arguments in support of the Project, outlined below, emphasizing that "climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved

by abatement of the GHG emissions from these myriad of individual sources".

Legal analysis

Climate change considerations

Based on clause 14(2) of the State Environmental Planning Policy (SEPP) (Mining, Petroleum Production and Extractive Industries) 2009, which provides that "… the consent authority must consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development…", the Court found that the project's direct and indirect emissions would contribute to climate change, with an aggregate emission of at least 37.8Mt CO_2-e over the Project's life span—"a sizeable individual source of GHG emissions."

GRL contended that the coal mine should be allowed for the following four reasons, all rejected by the Court:

(1) **Emissions offset**. GRL reasoned that emissions from the Project would be balanced by reductions or carbon sinks from other sources. The Court said that such an argument is "speculative and hypothetical" because there is no evidence of any specific and certain action to "net out" the GHG emissions of the project.

(2) **Possibility of abatement**. GRL contended that the global abatement task requires reducing emissions where they count most and generate the least economic and social harm. Refusing approval of an individual coal mine would not achieve this abatement at least cost. The Court disagreed and held that the authority's task is not to speculate on how to achieve "meaningful emissions reductions from large sources where it is cost-effective and alternative technologies can be brought to bear", nor to formulate "policy as to how best to make emissions reductions to achieve the global abatement task", but rather, to determine whether the particular development will result in GHG emissions, the acceptability of the emissions, and the likely impact on the climate, environment and people.

Gloucester valley. Groundswell Gloucester

(3) **Assumptions of market substitution and carbon leakage.** GRL claimed that due to strong demand for coking coal, even if this Project was denied, investments would flow to other countries, likely with less strict GHG reduction obligations thus producing at least the same amount of emissions.

The Court doubted the certainty of GRL's market substitution argument, saying that countries around the world are increasingly taking actions to reduce GHG emissions not only to meet their contributions but also to reduce air pollution. Developed countries such as Australia have a responsibility to take the lead in taking mitigation measures to reduce GHG emissions.

On carbon leakage, the Court held that GRL failed to substantiate the evidence. There were other coking coal mines in Australia operating to the highest environmental standards in the world that could meet current and likely future demand for coking coal.

(4) **Producing high quality coking coal is justifiable.** GRL contended that the Project will produce high quality coking coal, not thermal coal, which is needed for steel production. Since steel is critical to society, and there are limited substitutes for coking coal, the GHG emissions of the Project are justifiable. The Court considered that GRL overstated this argument because the current and likely future demand for coking coal for steel production can be met by other coking coal mines, both existing and approved, in Australia.

An open pit coal mine, NSW, Australia. John Carnemolla/shutterstock

Social performance considerations

Apart from environmental and climate change considerations, the Court held that the "Project will have significant and unacceptable planning, visual, and social impacts, which cannot be satisfactorily mitigated." The Court also undertook a cost benefit analysis and discussed the economic and public benefits of the mine, including the direct economic benefits (royalties, company income tax), indirect economic benefits (worker benefits, supplier benefits), and the indirect costs. It concluded that the benefits of the Project were uncertain and overstated, while the total indirect costs (environmental, social, transport related, agricultural, agri-tourism and tourism industries, etc.) were much greater than assessed.

The Court finally concluded, very succinctly and forcefully, that:

> "An open cut coal mine in this part of the Gloucester valley would be in the wrong place at the wrong time. Wrong place because it is located in a scenic and cultural landscape, proximate to many people's homes and farms, will cause significant planning, amenity, visual and social impacts. Wrong time because the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions. These dire consequences should be avoided. The Project should be refused."

2. Netherlands: Urgenda Foundation v. State of the Netherlands

Court orders the State to raise climate ambition

Summary

Following Urgenda's lower court victories in 2015 and 2018, in December 2019 the Netherlands Supreme Court upheld a judgment that the Netherlands government was obliged to reduce, by the end of 2020, the emission of greenhouse gases by at least 25% over 1990.

The case was initiated by the Urgenda Foundation, an NGO which develops plans and measures to prevent climate change, and which also represented 886 individuals in this case. Before Urgenda initiated the case, the Netherlands was falling behind its emissions target, and had lowered its ambition to a 16% reduction by 2020.

The Supreme Court supported Urgenda's claims under the human rights law, and held that the State is obliged to achieve that reduction target due to the risk of dangerous climate change that could have a severe impact on the lives and welfare of the residents of the Netherlands.

This is a groundbreaking case as it is the first time a court established the legal duty of the State to increase its climate ambition. The court makes clear that even if climate change is a global problem, a State is not precluded from its individual responsibility, and thus must do "its part". The Urgenda case was heavily debated among legal scholars, and inspired climate change cases in Belgium, Canada, Colombia, Ireland, Germany, France, New Zealand, Norway, the UK, Switzerland and the EU.

Legal analysis

In 2012, Urgenda wrote to the Prime Minister of the Netherlands, asking the State to take all measures necessary to ensure a genuine reduction of Dutch emissions. In its reply, the government cited the absence of sufficient action internationally. In 2013, Urgenda served

A Dutch court hears the landmark Urgenda climate case. Chantal Bekker/Urgenda

Ariel view of green fields, Netherlands (right). Daria from TaskArmy.nl

a summons on the government claiming that the Netherlands is knowingly exposing its own citizens to danger and requested the State to realize a reduction of 25% to 40% by 2020, compared to 1990 emission levels, which was both necessary and most cost-effective.

In 2015, the District Court of the Hague ruled in favour of Urgenda, finding that the current target that aimed for only a 16% reduction in 2020 was unlawful, and ordered the State to reduce its emissions by the end of 2020 by at least 25% compared to 1990. The ruling was upheld by the Court of Appeal in 2018 and finally by the Supreme Court.

Climate science and pace of reduction

Drawing on solid climate science, Urgenda and the State both agree on the severe consequences that dangerous climate change has at both a global and local level. The dispute therefore does not concern the need for mitigation, but rather the pace of emissions reduction. In other words, whether a less stringent reduction between now and 2030 and a sharp reduction starting in 2030, as advocated by the State, would lead to a significant contribution to climate change.

The courts held that procrastination is unacceptable. The later the action, the sooner the available carbon budget will be depleted, which in turn would require considerably more ambitious measures to be taken at a later stage.

In reaching this conclusion, the courts were informed by the findings of the Intergovernmental Panel on Climate Change (IPCC) and concluded that for Annex I countries which include the Netherlands and the EU as a whole, a reduction of 25-40% in 2020 from a 1990 basis should be achieved to hold the increase in global average temperatures below 2°C. The courts also referred to the Emissions Database for Global Atmospheric Research (EDGAR), the UNEP reports on the emissions gap, as well as international agreements and policy instruments, including the UN Framework Convention on Climate Change and the Paris Agreement.

Human rights obligation

Urgenda invoked the European Convention on Humans Rights (ECHR) and argued

Generating power, the old and the new way, Eemshaven, Netherlands. Untitled Photo/unsplash

that the Dutch State carries the obligation to take preventative measures against climate change to prevent the violation of Article 2 (the right to life) and Article 8 (the right to private and family life) of the ECHR. While the ECHR may not entail a right to protection of the living environment, according to established case law, protection may be derived from Article 8 ECHR in cases in which the materialisation of environmental hazards may have direct consequences for a person's private lives and are sufficiently serious, even if that person's health is not in jeopardy.

The District Court rejected this claim and considered that a legal person's physical integrity cannot be violated. Urgenda itself cannot be designated as a direct or indirect "victim" of such a violation.

The Court of Appeals, however, accepted ECHR as a viable legal path. It held that Dutch law provides for class actions brought by interest groups, therefore Urgenda is entitled to invoke Articles 2 and 8 ECHR on behalf of the individuals.

This stance is also taken by the Supreme Court. It held that the protection afforded by Articles 2 and 8 ECHR is not limited to specific persons, but to society or the population as a whole, and in the case of environmental hazards, the residents of that endangered region. Urgenda, representing the interests of the Netherlands residents, can invoke this obligation.

Tort law: state duty of care to mitigate emissions

The first instance judgment was based on tort law instead (nuisance under the Dutch Civil Code), that the State failed its duty of care to mitigate as quickly and as much as possible to protect its citizens. The court held the high risk of climate change, with severe and life-threatening consequences for man and the environment, poses a limit on the State's discretionary power to flesh out the climate policy. This was not analysed by the higher courts.

Political domain

The State argued that the *trias politica* prohibits judges from making such decisions that amount to an order to create legislation, which belongs to the political domain. The Supreme Court rejected this claim, holding that the government and parliament have a large degree of discretion to make the political considerations, but it is up to the courts to decide whether they have remained within the limits of the law by which they are bound. This case involves an exceptional situation where measures are urgently needed but the State failed to do "its part".

3. Germany: Neubauer et al. v. Germany

Court orders greater climate ambition to protect future generations

Summary

A group of youths from Germany, Bangladesh and Nepal, supported by environmental associations, brought a case against the government of Germany. They argued that the government emissions reduction efforts were not sufficient to stay within the 1.5°C temperature limit and had thus violated their fundamental rights under Germany's constitution.

The Federal Constitutional Court held on 24 March 2021 that parts of the German Federal Climate Change Act were incompatible with fundamental rights due to lack of provisions on the updating of emission reduction targets for periods after 2030 and ordered the legislator to enact such provisions.

Following the judgment, an amendment to the Federal Climate Change Act entered into force on August 31, 2021. It requires a tightened reduction of 65% from 1990 levels by 2030, a target of 88% reduction by 2040, climate neutrality by 2045, and negative emissions after 2050. The amendment was recently challenged in *Steinmetz et al v. Germany* brought by a group of German youths, claiming that the new targets were still not enough.

This case is an important illustration of intertemporal guarantees of freedom as a fundamental right, meaning that opportunities should be spread proportionately across generations. In the case of carbon emissions, "one generation must not be allowed to consume large portions of the CO_2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom", as said by the court. Therefore, transition to climate neutrality must be designed at an early stage. The court also said profoundly that "the fact that no state can resolve the problems of climate change on its own due to the worldwide nature of the climate and global warming does not invalidate the obligation to take climate action."

Luisa Neubauer, one of the complainants. David Young/AP

Legal analysis

Duty of protection and legislator's decision-making leeway

The court concluded that it is not ascertainable that the legislator has violated its constitutional duties of protection against the risks of climate change.

Art. 2(2) of the German Constitution imposes on the State a general duty of protection of life and physical integrity, which encompasses protection against harm caused by environmental pollution and risks posed by increasingly severe climate change. This duty not only applies to existing violations, but is also oriented towards the future.

The State also has a duty of protection arising from the fundamental right to property in Art. 14(1) of the German constitution, which includes the State's duty to protect property against the risks of climate change.

However, the court said that it is for the legislator to decide how risks should be tackled, and the legislator retains significant decision-making leeway in fulfilling its duty of protection, especially since it also must reconcile the requirements of health protection with conflicting interests. Therefore, only when no precautionary measures have been taken, or if measures are manifestly unsuitable, completely inadequate, or fall significantly short of the protection goal, that the court will find violation of a duty of protection.

But it is not the case here. The court found that legislation has taken the Paris target as a basis to set down its climate neutrality goal by 2050 and has designed a specified reduction pathway of at least 55% by 2030 compared to 1990 levels. Therefore, it is not evident from today's perspective that the level of health protection required under constitutional law would not be achievable, at least with supplementary adaptation measures.

Duty of protection vis-à-vis complainants from overseas

The ultimate answer is also no. To start with, the court accepted the standing of the complainants living in Bangladesh and Nepal, because it cannot be ruled out from the outset that the fundamental rights of the German Basic Law also oblige the German state to protect them against the impacts of global climate change. However, the standard of review is different for overseas cases, because given the limits of sovereignty under international law, Germany would not have the option of implementing adaptation measures to afford protection. Since mitigation and adaptation are inextricably linked, it would not be possible to ascertain whether a possible duty of protection had been violated. However, the court also said that this does not exclude Germany from assuming responsibility, either politically or under international law, to take steps to protect people in poorer and harder-hit countries.

Lenggries, Germany.
Paul Pastourmatzis

There is no planet B.
Kevin Snyman/Pixabay

Intertemporal guarantee of freedom

However, the court found violation of fundamental rights such as the intertemporal guarantee of freedom because the emission amounts in the current period will bring substantial burden to reduce emissions in later periods, which fails to guarantee freedom over time and across generations. In other words, the numerous forms of private and economic activities that emit CO_2 are protected currently, a right which is increasingly limited as climate change intensifies but still protected by the Basic Law. Therefore, the State has an obligation under Art. 20a of the German Constitution (preserving the natural foundations of life for future generations) and under the principle of proportionality to safeguard fundamental freedom over time and to spread the opportunities associated with freedom

Schliersee, Germany. Daniel Seßler

proportionately across generations to avoid an "emergency stop". The smaller the remaining carbon budget, the less freedom enjoyed by future generations.

In this respect, while §3(1) of the Federal Climate Change Act sets a 55% reduction target for the year 2030, and §4(1) sets annual reduction targets for specific sectors, there is a lack of legal provisions specifying minimum reduction requirements after 2030, which was declared unconstitutional.

Precautionary principle

The precautionary principle is enshrined throughout the court reasoning. When looking into the scientific basis for quantifying the remaining national carbon budget, the court accepted that there may be scientific uncertainty, but when it comes to irreversible consequences for the environment, the constitution imposes a special duty of care on the legislator. This means "the legislator must even take account of mere indications pointing to the possibility of serious or irreversible impairments, as long as these indications are sufficiently reliable." The court also cited the UNFCCC that the lack of full scientific certainty should not be used as a reason for postponing precautionary measures where there are threats of "serious or irreversible" damage. Therefore, the law must take into account the IPCC's estimates on the size of the remaining global and national carbon budget.

4. Netherlands: Milieudefensie et al. v. Royal Dutch Shell plc.

Private company liable for inadequate action to curb climate change

Summary

Royal Dutch Shell ("Shell") is Europe's largest oil and gas business by revenue and has operations in more than 70 countries. In April 2019, the environmental group Friends of the Earth Netherlands (Milieudefensie), together with six other NGOs and more than 17,000 Dutch citizens sued the oil giant, alleging Shell's contribution to climate change violates its duty of care under Dutch law and the human rights obligations of business enterprises.

In May 2021, The Hague District Court ordered Shell to slash emissions by 45% by 2030, relative to 2019 levels, across both emissions from its own operations and emissions from the use of the oil it produces.

In March 2022, Shell appealed the decision, hence the case is now pending. However, the Court has declared orders to be provisionally enforceable, meaning Shell will be required to meet its reduction obligations even as the case is under appeal.

This landmark ruling sets a precedent that corporations can be held liable for inadequate action to curb climate change and must cut emissions in line with global climate goals. It may well usher in a new era of evolving climate litigation and fuel more climate suits targeting corporate emitters.

Legal analysis

Corporate duty of care facing climate change

The focusing issue of this case is whether a private company would be held liable and violated its duty of care and human rights obligations for inadequate actions to curb contributions to climate change. This case builds on the landmark Urgenda decision which found that the Dutch government's inadequate action on climate change violated a duty of care to its citizens. In this

Shell tanker. Jeff J Mitchell / Getty Images

suit against Shell, plaintiffs extended this argument to private companies, arguing that given the Paris Agreement's goals and the scientific evidence regarding the danger of climate change, Shell has a duty of care to take action to reduce its greenhouse gas emissions. The plaintiff outlined how Shell's long knowledge of climate change, misleading statements, and inadequate action to reduce climate change helped support a finding of Shell's unlawful endangerment of Dutch citizens and actions constituting hazardous negligence.

The Court interpreted the unwritten standard of care as an obligation of Shell from the applicable Book 6, Section 162 Dutch Civil Code, which means that acting in conflict with what is generally accepted according to unwritten law is unlawful. Its content is further informed by Articles 2 and 8 of the European Convention on Human Rights (ECHR) which guarantee rights to life (Article 2) and rights to a private life, family life, home, and correspondence (Article 8). The Court's interpretation is based on the relevant facts and circumstances, the best available science on dangerous climate change and how to manage it and the widespread international consensus that human rights offer protection against the impacts of dangerous climate change and that companies must respect human rights.

The court also looked into the UN Guiding Principles (UNGP) as to the responsibility of business enterprises to respect human rights, which exists over and above compliance with national laws and regulations protecting human rights. Therefore, the court concluded that it was not enough for companies to follow

Milieudefensie celebrate their court victory against Royal Dutch Shell. Bloomberg

the measures states take; they have an individual responsibility independently of the states, which included:

a. avoid causing adverse human rights impacts through their own activities, and

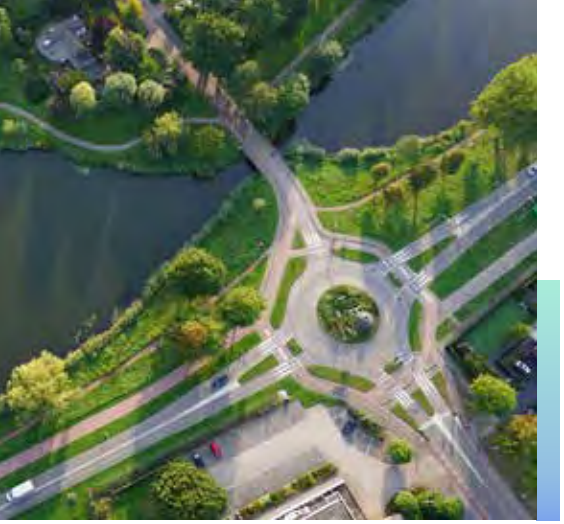
b. seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Thus, such responsibility encompasses the company's entire value chain.

Reduction of scope 1, 2, and 3 emissions

Royal Dutch Shell, as the top holding company, sets the general policy and reports on greenhouse gas emissions of the Shell group on the basis of the World Resources Institute Greenhouse Gas Protocol (GHG Protocol). The GHG Protocol categorizes greenhouse gas emissions in Scope 1, 2 and 3:

- Scope 1: direct emissions from sources that are owned or controlled in full or in part by the organization;
- Scope 2: indirect emissions from third-party sources from which the organization has purchased or acquired electricity, steam, or heating for its operations;



Ariel view of river with bridge, Netherlands. Ezra

– Scope 3: all other indirect emissions resulting from activities of the organization, but occurring from greenhouse gas sources owned or controlled by third parties, such as other organizations or consumers, including emissions from the use of third-party purchased crude oil and gas.

The Court emphasized that Shell was a major player in the worldwide market of fossil fuels and was responsible for significant CO_2 emissions all over the world. The total CO_2 emissions of the Shell group (Scope 1 through to 3) exceeded the CO_2 emissions of many states, including the Netherlands. The Court thus concluded that it was not in dispute that these global CO_2 emissions of Shell contribute to global warming and climate change in the Netherlands and especially the Wadden region. These emissions could lead to dangerous climate change, as established in the Paris Agreement and the IPCC scientific reports. The court listed health risks, illnesses, deaths and the rise in the seawater level as possible risks. In the more extreme scenarios, the Wadden region will drown completely in the long term.

Therefore, the Court concluded that Shell must reduce its Scope 1, 2, and 3 emissions, across its entire energy portfolio, by 45% by 2030, relative to 2019 emission levels. The Court gave Shell flexibility in allocating emissions cuts between Scope 1, 2, and 3 emissions, so long as in aggregate, the total emissions were reduced by 45%.

The EU Emissions Trading System (ETS), substitution by competitors, and state policies

Shell defended that its activities were already covered by the EU ETS. However, the court rejected this argument, saying that the ETS only covered a small part of its emissions, not to mention those outside of the EU. Insofar as Shell's reduction obligation extends beyond the reduction target of the ETS system, it will have to fulfil its individual obligation.

Shell also argued that its reduction obligation will have no effect because its place will be taken by competitors. The court said this argument cannot be justified, as it remains to be seen whether this circumstance will transpire.

The court addressed other rebuttals one by one, including that private parties cannot take any steps until states determine the frameworks, and that the energy transition must be achieved by society as a whole and not by just one private party, among others. According to the court, such grounds do not absolve Shell of its individual responsibility regarding the significant emissions over which it has control and influence.

5. USA: Massachusetts v. Environmental Protection Agency

Court considered CO_2 as a type of air pollutant subject to control

Summary

In 2006, Massachusetts and eleven other U.S. states, and several cities, supported by a group of environmental organisations, brought a lawsuit against the U.S. federal Environmental Protection Agency (EPA), to force it to regulate carbon dioxide and other greenhouse gases (GHGs) as pollutants. The Supreme Court, by a 5 to 4 vote, ruled in favour of the plaintiffs and held that carbon dioxide and other GHGs are "air pollutants" causing "air pollution" under the Clean Air Act (CAA), and thus EPA bears a duty to regulate GHGs.

This continues to be one of the most important climate change decisions ever issued by the courts of the U.S. By interpreting air pollution control to cover GHGs, the holding defines a major new area of EPA's duties. In addition, the case had major cultural, political and symbolic significance, including acknowledgement of the urgency to address the harm caused by global warming, and the implication that favours acting collectively for the common good and welfare.

Legal analysis

Back in 2003, the EPA made two determinations denying the petition to regulate GHG emissions from motor vehicles that (1) EPA does not have authorities under the CAA to regulate CO_2 and other GHGs for climate change purposes, and GHGs could not be considered "air pollutants" under CAA; and (2) EPA has determined that setting GHG emission standards for motor vehicles is not appropriate. In 2005, the U.S. Court of Appeals for the District of Columbia Circuit upheld the decision of the EPA. In 2006, the Supreme Court granted a writ of certiorari to review the decision of the Circuit Court and reversed and remanded the lower court decision in 2007. The final ruling addresses the following three issues:

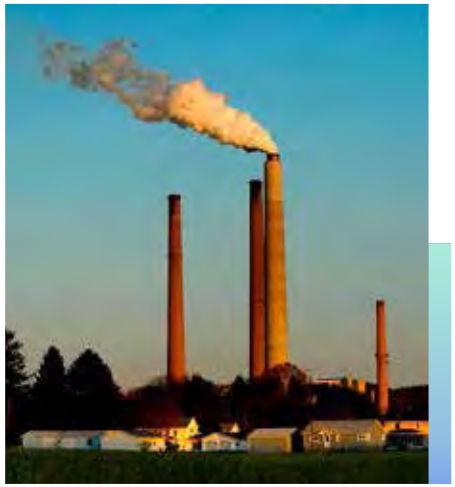
Standing

The Court held the State of Massachusetts had standing to petition for review of the EPA's decision. EPA's refusal presented a risk of harm to Massachusetts from the rise in sea levels associated with global warming that was both "actual" and "imminent". In addition, there was a substantial likelihood that judicial relief requested would prompt the EPA to take steps to reduce such risk.

CAA authorizes EPA to regulate GHGs as "air pollutants"

The key issue is whether carbon dioxide is an "air pollutant" causing "air pollution" as defined by the CAA so that EPA has authority to regulate. EPA argued that it lacked authority to regulate new vehicle emissions because CO_2 is not an "air pollutant", and that, even if it possessed authority, it would decline to exercise it "at this time" because regulation would conflict with other administration priorities. The Court held that GHGs fit well within the CAA's sweeping definition of "air pollutant". "Air pollutant" defined in CAA includes "*any* air pollution agent…, including *any* physical, chemical,… substance… emitted into… the ambient air…". This definition embraces all airborne compounds of whatever stripe. Carbon dioxide and other GHGs are undoubtedly "physical [and] chemical… substance[s]."

The Court also found EPA's argument unpersuasive that its regulation of motor vehicle CO_2 emissions would require it to tighten mileage standards, which is the Department of Transportation (DOT)'s job. Even though DOT's mandate to promote energy efficiency by setting mileage standards may overlap with EPA's environmental responsibilities, this in no way licenses EPA to shirk its duty to protect the public health and welfare.



The A.E.P. (American Electric Power) coal burning plant in Conesville, Ohio. Michael S. Williamson/The Washington Post

EPA cannot decline to issue emission standards for motor vehicles

The Supreme Court held that EPA can only avoid taking regulatory action with respect to GHG emissions from new motor vehicles if it determines that GHGs do not contribute to climate change, or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to make the determination. However, the EPA offered no reasonable explanation for its refusal.

The Court acknowledged that Agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities, but there are key differences between non-enforcement and denials of rule-making petitions that are expressly authorised. The EPA could not avoid taking regulatory action under the CAA on GHG emissions from new motor vehicles based on policy judgments that a number of voluntary executive branch programs already provide an effective response to the threat of global warming. Nor could EPA refuse regulating GHGs by reasoning that such regulation might impair the President's ability to negotiate with "key developing nations" to reduce emissions, and that curtailing motor-vehicle emissions would reflect "an inefficient, piecemeal approach to address the climate change issue."

In addition, the EPA could not make such a refusal by noting uncertainty about whether GHGs contribute to global warming, and its consequent conclusion that it would be better not to regulate "at this time". If scientific uncertainty was so profound, the EPA had to prove whether sufficient information existed.

In conclusion, the Court found the EPA's refusal to be "arbitrary, capricious,… or otherwise not in accordance with law."

Protect the Clean Air Act. Leigh Vogel/Getty Images for NRDC

Vehicle emissions. Ody_Stocker/Shutterstock

6. **Pakistan: Leghari v. Federation of Pakistan**

Judiciary creates a Climate Change Commission for effective implementation of climate adaptation measures

Summary

Pakistan's extensive and frequent exposure to extreme weather events and heavy dependence on vagaries of nature make it economically and socially vulnerable to climate change.

In 2015, Asghar Leghari, a Pakistani farmer, brought a public interest litigation case against the Federal Government of Pakistan for its insufficient implementation of the National Climate Change Policy 2012 and Framework for Implementation of Climate Change Policy (2014-2030), offending his fundamental rights to a healthy and clean environment and human dignity under Article 9 and Article 14 of the Constitution. In its judgment, the Lahore High Court ruled in favour of Leghari by reconfirming that environmental rights and international environmental principles were inalienable parts of Pakistan's constitutional values.

This is Pakistan's first climate change case. The court looked into climate adaptation measures and created a cross-ministerial Climate Change Commission for effective implementation. Also, it is a ground-breaking case from the global south, extending the concept of environmental justice to climate justice.

Legal analysis

Government delay in enforcing climate change policies

Pakistan stands as one of the countries most affected by global climate risk. Its contribution to total global greenhouse gas emissions is tiny, but it nevertheless suffers disproportionately from the effects of climate change, experiencing floods, droughts, and cyclones that further aggravate forest degradation, reduction in agriculture productivity, etc. Climate change, therefore, reaches into the most

Boy holding stock pot. Pakistan.
Muhammad Muzamil

economically and socially vulnerable sectors in Pakistan.

Against this background, priority was given to adaptation measures in Pakistan's National Climate Change Policy 2012 ("Policy") and the Framework for Implementation of Climate Change Policy (2014-2030) ("Framework").

However, the plaintiff Ashgar Leghari, submitted that the most immediate and serious threats listed under the Framework such as water, food, and energy security were absent from government actions. The Ministry of Climate Change also admitted that concerned authorities had not been positively executing their duties.

Considering Pakistan's significant vulnerability to the climate crisis, the court upheld the plaintiff's argument that the government's delay and lack of seriousness in addressing climate change went against its commitments. The court explained that the Framework should be a "living document" instead of a stand-alone document. Passing the Framework was not an end to the process of tackling climate change, but rather a catalyst for mainstreaming climate concerns into decision-making. The court further pointed out that when the consequences of climate change are uncertain, continuously carrying on with the study of environmental hazards and the sufficient implementation of adaptation and mitigation measures would help to navigate the country to a resilient future.

Environmental rights and international environmental principles

The plaintiff submitted that the Ministry of Climate Change and other concerned authorities' inaction offended his right to life (Article 9) and right to human dignity (Article 14) as well as the principles of social and economic justice under the Constitution.

Although the right to a healthy and clean environment itself was not explicitly written in the Constitution, the court recognized it as part of the right to life. Likewise, the right to human dignity should be read with the basic constitutional principles such as democracy, equality, social and economic and political justice. Given that climate change has led to dramatic environmental change, the case provided a clarion call for the protection of citizens in the country, especially those who are poor and vulnerable.

The plaintiff also argued that international environmental principles such as the doctrine of public trust, sustainable development, precautionary principle, and intergenerational equity were also not guaranteed. The court noted that precedents had proved that these principles had been an integral part of Pakistan's environmental jurisprudence. Such environmental values rooted in the Constitution and international law were what the court understood as Environmental Justice.

Kumrat Valley, Pakistan. Ghayoor Ul Hassan

From Environmental Justice to Climate Justice

Notably, the court realized that the case was more than a traditional environmental case and further boldly extended Environmental Justice to Climate Justice. From the court's view, mitigation shares a similar philosophy to pollution control, with a focus on preventing environmental deterioration and penalising polluters, whereas adaptation emphasises improving the capacity to adjust to current and future effects of climate change. Adaptation needs to engage multiple stakeholders and sectors, such as technology, infrastructure, human resources, disaster preparedness, etc., which fell out of the realm of Environmental Justice. Therefore, "mitigation can still be addressed with Environmental Justice, adaptation can only be addressed through Climate Justice," said the court.

The court went a step further from Climate Justice to Water Justice. In the Pakistani context, water-related issues like floods and droughts have been accelerated due to climate change. Thus, the court further moved from Climate Justice to its sub-concept, Water Justice, as rooted in the Constitution, including the accessibility to clean and affordable water for survival and recreational purposes.

For the reasons above, the court ruled that the government's delay and lethargy violated the plaintiff's fundamental rights.

Creation of a Climate Change Commission for implementation

When the court found that no substantial work had been done by the authorities, the court ordered a Climate Change Commission to be set up to expedite

Child sit on cracked earth near drying water.
Piyaset/Shutterstock

implementation, composed of representatives of key authorities, NGOs, technical experts, etc.

The Commission could functionally hear the voice of different stakeholders, monitor the government's progress, and work closely with the Ministry of Climate Change to accelerate the execution of policies. It was also obliged to make recommendations on climate change and file an interim report on the progress of implementation. In the final judgment in 2018, the court noted that among 242 priority actions listed under the Framework, 66% had been successfully completed by the Commission. The court agreed that the Commission had accomplished its mission as an *ad hoc* body and should give place to a standing committee established by Pakistan Climate Change Act 2017 as a successor to keep the ongoing link between the court and the executive.

7. Kenya: Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd.

Court halts huge Kenya coal plant over inadequate environmental assessment

Summary

Lamu, located on Kenya's northern coast, is a UNESCO World Heritage Site. In 2013, the local government proposed its first ever coal power plant project, with a generation capacity of 1050 MW, to be built on the seashore of the Kwasasi area in Lamu County. This project was part of the Kenya Vision 2030 initiative, which formulated a power generation program intended to boost development and industrialization in Kenya.

The planned US$2 billion coal power plant faced criticism on various economic, environmental, health and cultural grounds since its announcement. In 2016, Save Lamu, a community-based organization, brought a case together with five other plaintiffs, challenging the legality of the environment impact assessment (EIA) license, which was issued by the National Environmental Management Authority. The plaintiff argued that there had been inadequate public participation in the EIA process, and the plant would contribute to climate change, was inconsistent with Kenya's low carbon commitments, would have adverse effects on the marine environment, and lacked mitigation measures.

In 2019, the Tribunal upheld the plaintiff's claims, invalidated the EIA license and ordered a fresh EIA study. In 2020, the biggest financier of the project, the Industrial and Commercial Bank of China, announced it had withdrawn plans to finance the project. Later in the same year, the Kenyan government officially cancelled the project.

Lamu, Kenya (above). Wikipedia
Lamu, Kenya. Age fotostock
Anti-coal activists marching in Nairobi. Paul Basweti/Greenpeace

This case is a novel and remarkable win. It affirms climate change as a relevant factor in environmental impact assessments, reemphasizes the importance of public participation in environmental decision-making and is considered the most impactful climate case from Africa to date.

Legal analysis

After carefully examining relevant case facts, the Tribunal ruled that the process leading to the preparation of the EIA was not properly conducted, lacking a proper analysis of alternatives, economic viability, and adequate mitigation measures of the project, with a failure in acquiring adequate and effective public participation. The procedure for the issuance of the EIA was thus in violation of the Environmental (Impact Assessment & Audit) Regulations and the Constitution of Kenya. As a result, the Tribunal quashed the EIA and ordered the project developer (if it chose to pursue the project) to conduct a fresh EIA in compliance with the EIA Regulations, the Climate Change Act 2016, the Energy Act 2019, and the Natural Resources Act 2016. The Tribunal further instructed that the new EIA shall engage with the lead agencies and the public and ensure sufficient access to information by the public.

The issues below are of particular novelty and significance and are thought-provoking for climate law worldwide.

Climate change and EIA

The appellants criticized the proposed project for having breached Kenya's obligations under the Paris Agreement. Amu Power Company argued that the Paris Agreement entered into force well after the EIA had been concluded and Kenya's Climate Change Act was enacted during the EIA process. The Tribunal referred to the precautionary principle

Local students hold a sign that reads "Save Lamu Women's Movement".
Dana Ullman

and ruled insufficiency and inadequacy in consideration of climate change. The Tribunal wrote that "climate change issues are pertinent in projects of this nature and due consideration and compliance with all laws relating to the same. The omission to consider the provisions of the Climate Change Act 2016 was significant even though its eventual effect would be unknown."

Further, the Tribunal emphasized that "in applying the precautionary principle where there is lack of clarity on the consequences of certain aspects of the project it behoves the Tribunal to reject it. On climate change issues, this is of greater importance and made the provisions on climate change within the report incomplete and inadequate."

The Tribunal also explained the interaction between EIA and climate change. The purpose of the EIA process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.

The ruling of this case sets a remarkable precedent for demanding climate change factors be included in the EIA. It sheds light on new access point of climate litigation to be considered by judiciaries from other countries. EIA, as one of the most common and well-established mechanisms of environmental rule of law across the globe, can serve as a durable bridge to tackle climate change from legal perspective.

The importance of public participation

The appellants complained about the lack of proper and effective public participation during the EIA process, while the respondents argued that there were a vast amount of attachments to the exhibits showing public participation with the community and other lead agencies.

However, the court ruled that the true test of participation would be the effectiveness of the process. It is vital that even the most feeblest of voices be heard and views considered. It is presumptuous to unilaterally provide for mitigation measures in complete disregard of the people of Lamu and their views. The Tribunal considered the report to be extremely bulky and purported to capture a lot of information, but devoid of public consultation content, in the manner prescribed by the law, thus rendering it ineffective and at best only of academic value.

The Tribunal highlighted the importance of proper and effective public participation, stating that "public participation in an EIA Study process is the oxygen by which the EIA study and the report are given life. In the absence of public participation, the EIA study process is a still born and deprived of life, no matter how voluminous or impressive the presentation and literal content of the EIA study report is."

This case represents a win for public participation in environmental governance. As stated in the ruling, public participation is at the very core of any EIA experience. The EIA public participation process cannot be a mechanical exercise but must be a vibrant and dynamic activity where affected persons are engaged in a fair and reasonable manner.

8. South Africa: EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others

Climate change must be considered in environmental impact assessments

Summary

South Africa is a significant contributor to global greenhouse gas emissions, because of mining, mineral processing, and its coal-intensive energy system. Coal fired power stations are the single largest national source of GHG emissions in South Africa. Meanwhile, South Africa is a water-stressed country facing future drying trends and weather variability with droughts and sudden excessive rains. Coal-fired power stations require a steady and adequate supply of water, and are therefore not only contributors to climate change, but are also at risk from the consequences of climate change.

In February 2015, the Integrated Environmental Authorisations Department of Environmental Affairs granted Thabametsi, a power company, an environmental authorisation for a proposed 1200 MW coal-fired power station in Limpopo Province, in an area fondly known as "the Heartbeat of the Bushveld" for its beautiful vistas, crystal clear streams, mountain gorges and expansive bushveld. The plaintiff, Earthlife Africa, appealed against the authorisation over lack of climate considerations, among other reasons.

Responding to the appeal the Minister recognised that the climate change impacts of the proposed project were not "comprehensively assessed and/or considered" prior to the issuance of the environmental authorisation by the DEA. As a result, she merely asked Thabametsi to conduct a climate change impact assessment prior to the commencement of the project. Earthlife then proceeded to file a court case, seeking a judicial review of both the authorization and the Minister's decision to uphold the authorization.

Earthlife Africa protest outside the Pretoria High Court. James Oatway for CER

The court set aside the Minister's decision, concluding that climate change impacts of coal-fired power stations are relevant factors that must be considered before granting environmental authorisation, even in the absence of specific provisions in the statute. The court also ordered that in reconsidering the decision, the Minister must consider a climate change impact assessment report, a paleontological impact assessment report, and comments from interested and affected parties.

Being South Africa's first climate change case, the challenge is a milestone that sends a clear message to the authorities and project developers to take climate change impacts seriously.

Legal analysis

Climate change as a "relevant factor" in granting environmental authorisation

Earthlife's case mainly rests on section 240(1) of the National Environmental Management Act ("NEMA"), which obliges competent authorities to "take account of all relevant factors" in deciding on an application for environmental authorisation, including "any pollution, environmental impacts or environmental degradation likely to be caused". Although climate change is not explicitly written in the provision, the claimant argued that a climate change impact assessment must be conducted before granting approval, read together with the country's EIA regulations, and interpreted in light of South Africa's domestic environmental policies, Constitution, and South Africa's obligations under international climate change conventions.

Nyala in D'nyala Nature Reserve, Limpopo, South Africa. Wikiwand

Coal Protest in Lephalale, South Africa. Shayne Robinson/Greenpeace

Segunda power station. James Oatway for CER

The DEA argued that there was no legal provision expressly requiring a climate change assessment to be conducted before the grant of an environmental authorisation. South Africa's international obligations to reduce emissions are broadly framed and do not prescribe measures that the government must implement to reduce emissions. The government has discretion over the design of mitigation measures. It further raised the need to balance economic development with climate change imperatives, the country's over-riding priority to address poverty and inequality, and the acute energy challenges it was facing to emphasize the demand for coal-generated energy.

Thabametsi, the power company, further added that Earthlife's attempt to introduce a mandatory assessment required a challenge to the EIA legislation, which cannot be achieved through this proceeding. It claimed that any attempt to prohibit coal fired power stations entirely would go against the Minister of Energy's decision that 2500 MW of baseload energy must be generated from coal.

The court found that first, "a plain reading of section 240(1) of NEMA confirms that climate change impacts are indeed relevant factors that must be considered." It then interpreted the NEMA purposively through the Constitution, which includes a fundamental justiciable environmental right in section 24. It reads "Everyone has the right—(a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—(i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

The court further interpreted NEMA through obligations under international law. It cited Article 3(3) of the UN Framework Convention on Climate Change that requires all states parties to take precautionary measures in dealing with climate change, and Article 4(1)(f) that requires all states parties to take climate change considerations into account in their relevant environmental policies and actions.

Therefore, the court concluded through "text, purpose, ethos, and intra- and extra-statutory context of section 240(1) of NEMA" that "climate change impacts of coal-fired power stations are relevant factors that must be considered before granting environmental authorisation".

What now?

Despite a reconsideration of climate change impacts, the Minister again approved the authorization in 2018, due to outweighing benefits of the power plant. Earthlife together with another environmental justice group groundWork launched new court proceedings. They found that Thabametsi and Khanyisa – another coal plant, would cost South Africa nearly 20 billion South Africa Rand and would require costly increased mitigation efforts to meet the country's climate commitments.

In 2019, three of the South African commercial banks withdrew financing for the project. Nedbank further confirmed it will not fund any new coal plants, regardless of technology.

Later in 2020, the Development Bank of South Africa, the Public Investment Corporation and the Industrial Development Corporation also withdrew their financing for Thabametsi. Finally, Thabametsi notified government of the cancellation. In November 2020, the High Court issued an order setting aside all governmental authorizations for the plant by agreement between the parties, ending the case with a full stop.

9. **Argentina: Barrick Exploraciones Argentinas S.A. and others v. National Government**

Court protects glacier from mining activities

Summary

Argentina has some of the greatest glacier coverage in the Western Hemisphere, and about 4% of the world's glaciers. Glaciers are part of the Andean region's vast geodiversity, and they have immense environmental, cultural, and social value. Water scarcity is one of the most severe consequences of climate change. Glaciers, as an abundant source of freshwater, can supply water to many areas in the region, including the cities of Quito and La Paz.

Glaciers are also important indicators of climate change. Melting glaciers cause flooding and sea level rise, threatening lives and increasing the difficulties of climate adaptation.

The Argentine Law of Glaciers was passed in 2010 to strictly prohibit harmful extractive activities in glacier and permafrost areas. Mining companies, however, have long marked this region for its rich gold, silver and copper deposits. A few years ago, the mineral company Barrick and the Argentine Mining Exploration S.A. initiated legal action seeking to declare Argentina's Law of Glaciers invalid and unconstitutional.

In 2019, with a unanimous vote, the Supreme Court of Argentina rejected Barrick's challenge and confirmed the constitutionality of the Law of Glaciers. The Court also found no proof of damage to the mining company. In the face of catastrophic climate change, this case is a significant example amongst a recent wave of climate litigations that has led to judicial recognition of the impact that business activity, including mining, has on basic human rights. Given the important function glaciers have on ecosystems and local communities, this case is critical in terms of adaptation to climate hazards.

Penguin, Ushuaia, Argentina. Sander Crombach

Legal Analysis

The case contemplates whether a federal law can be used to restrict mining activities authorized by the provincial government. In Argentina, the permitting and control of mining operations are in the hands of provincial governments, meaning the federal environmental authority has no jurisdiction over such activities. Therefore, the Law of Glaciers is an important tool for the federal government to stop extractive activities due to environmental impacts.

The lawsuit, which was filed in the Federal Court of the Province of San Juan, alleged adverse effects of the implementation of the Law of Glaciers and the nullity of its legislative procedure. The Province of San Juan also sided with the mining company, and claimed the federal law harmed their provincial autonomy. The lower court

Perito Moreno Glacier, Argentina.
Agustín Lautaro.

supported the claims of the mining company and the provincial government and issued an injunction suspending the application of certain articles of the Law which required the mining project to submit a new audit. Those provisions could result in additional environmental protection measures, cessation, or relocation, and were thus against the interest of mining companies. However, the ruling was overturned by the Supreme Court, who supported the full force of the Law of Glaciers.

Notably, when the Court ruled on the alleged unconstitutionality of the Law of Glaciers, it established the need to weigh the various rights of all involved parties, both individual and collective, such as the right to a healthy and well-balanced environment and the right to water. The ruling provided a precedent for courts dealing with similar cases.

In a case where climate justice was at stake, the Court provided legal certainty amid a conflict between extractive mining activity, environmental protection, and the fight against climate change. It rectified the lower court's decision because of conflicting arguments and administrative delay. Subsequently, Congress belatedly mandated the enactment of a national glacier standardization process checklist to facilitate implementation of the Law and designated a priority list of protected areas. This process had been delayed for seven years.

In addition to being exemplary, this ruling advances the judicial dialogue between the countries of the Americas in the following five ways:

Boundaries of justiciable issues

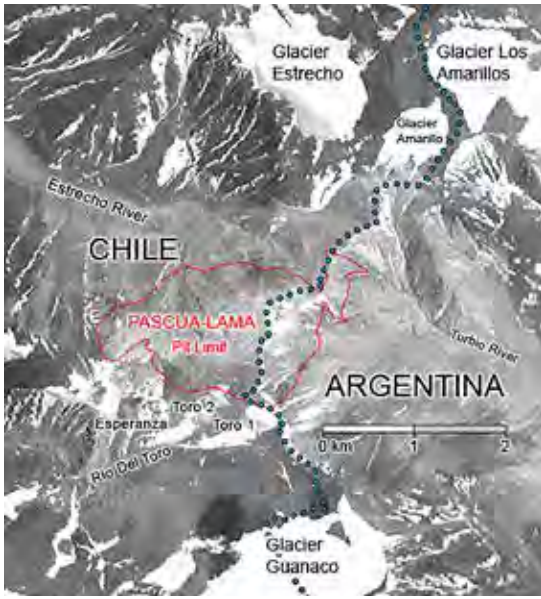
A law can be considered justiciable only when it goes against the principles of the Constitution. If a breach of the minimal constitutional requirements cannot be established, judicial intervention maybe premature and in the exercise of constitutional control judicial proceedings may interfere in environmental policy matters that should be resolved through federal dialogue rather than judicial action.

Jurisdictional areas and environmental federalism

Cooperative federalism (that the federal and provincial government should take concerted action rather than split their duties) and the provision for "minimum environmental standards" (minimal federal environmental boundaries to protect glaciers) are aimed at obtaining "a healthy, balanced environment fit for human development" (article 41 of the Argentine Constitution). Governments at all levels should manage natural resources in accordance with the constitutional provisions for the ecological environment.

Progressive realization of fundamental rights

Any delay of the authority brings particularly serious consequence when the objective of the law is to protect environmental, economic, and social value for the welfare of the current population and future generations. The Paris Agreement advocates "an effective and progressive response to the urgent threat of climate change".



Pascua Lama plan map. Wikimedia Commons

Individual and collective interests under the control of conventionality

Conventions represent federal commitments and international consensus. They are supposed to guarantee the group interests and fundamental human rights.

The legislator established a connection between a variety of effects from the extractive sector. For example, the potential for big-scale mining incidents in some areas of the country, and the preservation and conservation of glaciers as "strategic reserves" for the global water supply. The growing global prominence of rights related disputes caused by climate change requires us to take a polycentric view from the standpoint of collective rights.

El Chalten, Santa Cruz, Argentina.
Rafael Hoyos Weht

Meanwhile, it's difficult for the traditional bilateral negotiation to find solutions for environmental problems.

Climate justice

Under the Paris Agreement, it is necessary to recognize "the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable development in reducing the risk of loss and damage."

The Paris Agreement mentions the importance of placing climate justice at the centre of climate change litigation. In its Barrick-Pascua Lama Ruling, the Supreme Court of Argentina interpreted and practiced climate justice in an innovative way.

In the face of climate crisis and litigation of our time, the ruling of the Supreme Court provides lessons for dealing with similar events in future, enriches the understanding of climate justice, considers all parties involved in a systematic way to protect the ecosystems and biodiversity, and safeguards our common home for present and future generations.

**By Claudia S. de Windt. International lawyer from the Dominican Republic, expert in political science, and Chief Executive of the Inter-American Institute of Justice and Sustainability (IIJS).*

10. **Poland: ClientEarth v. Enea**

Minority shareholders use corporate law to challenge fossil fuels

Summary

In October 2018, ClientEarth, a non-profit environmental law charity, filed a claim against Polish power company Enea challenging its decision to build a new coal fired power plant. ClientEarth, as a minority shareholder of Enea, sought to annul the shareholder resolution approving the construction of the Ostrołęka C coal-fired power plant, arguing that the plant would pose an indefensible financial risk to shareholders because it did not take climate change properly into account. The claim was brought under the Polish Commercial Companies Code.

Ostrołęka C was a newly proposed 1,000 MW coal power plant in north-east Poland. It was a joint venture between Polish state-controlled energy companies Enea and Energa, both listed on the Warsaw Stock Exchange. The plant was scheduled to enter service in 2023. Once complete, it would emit up to 6 million tons of CO_2 per year.

The issue in this case is whether the resolution granting consent to build a coal-fired power plant breaches board members' fiduciary duties of due diligence and to act in the best interests of the company and its shareholders, given climate-related financial risks. ClientEarth argued that the plant would be detrimental to the company's and shareholders' interests, as the profitability of the project would be difficult to guarantee, and the financing structure would be highly risky.

The court found in favour of ClientEarth. On August 1, 2019, the court ruled that the resolution of construction approval was null and void. Enea appealed, but its appeal was rejected. Finally, in mid-2020, Energa and Enea announced the cessation of investment in and construction of the project, for economic reasons.

The case is the first NGO-led shareholder action in the climate context, and the first legal challenge to corporate decision-making on the basis of the failure to properly take into account climate-related

financial risk. Its success highlights a growing trend of climate litigation targeting private investment in fossil fuels. This action has also reminded boards of directors and financial sector actors to better understand and manage climate-related financial risks and opportunities.

Legal analysis

Prior to the adoption of the resolution, the Ostrołęka C coal power project had all the necessary environmental and legal permits in place before construction could proceed. Therefore, challenging the corporate resolution on initiating construction was the last remaining chance to stop construction.

GE Power signs contract with Elektrownia Ostrołęka. GE power

Madaliński Bridge in Ostrołęka. KamperemPoMazowszu

On 30 August 2018, ClientEarth purchased a small number of shares in Enea, participated in Enea's extraordinary general meeting (EGM), voted against the Resolution, and had its objection put on record. In that way, ClientEarth was eligible to bring an action under Art. 422 § 2 Polish Commercial Companies Code (CCC), which states that a shareholder who voted against the resolution and, following its adoption, requested that his objection be recorded in the minutes shall have the right to bring an action for an annulment of a resolution of the general assembly.

Two months later, ClientEarth filed a lawsuit in the Regional Court in Poznań seeking a judgment of annulment of the Resolution. ClientEarth claimed that the Resolution breached board members' fiduciary duties of due diligence and to act in the best interests of the companies and their shareholders for the following reasons:

The resolution may harm the interests of the company and its shareholders

ClientEarth asserted that the construction of the Project is harmful to the interest of the company and its shareholders, in light of compelling evidence from industry, rating agencies, and energy experts that the project is likely to be unprofitable and will pose an indefensible financial risk to investors.

Ostrołęka c's lack of profitability

ClientEarth relied upon the main reason that the Project lacked profitability due to rising carbon prices and the decreasing cost of renewables, as evidenced from expert opinions from industry, financial thinktanks, and rating agencies. The impact of EU energy reforms, and the domestic measures to reduce the share of coal in power generation also have significant risks for its financial viability.

Participation in the capacity market auction is risky

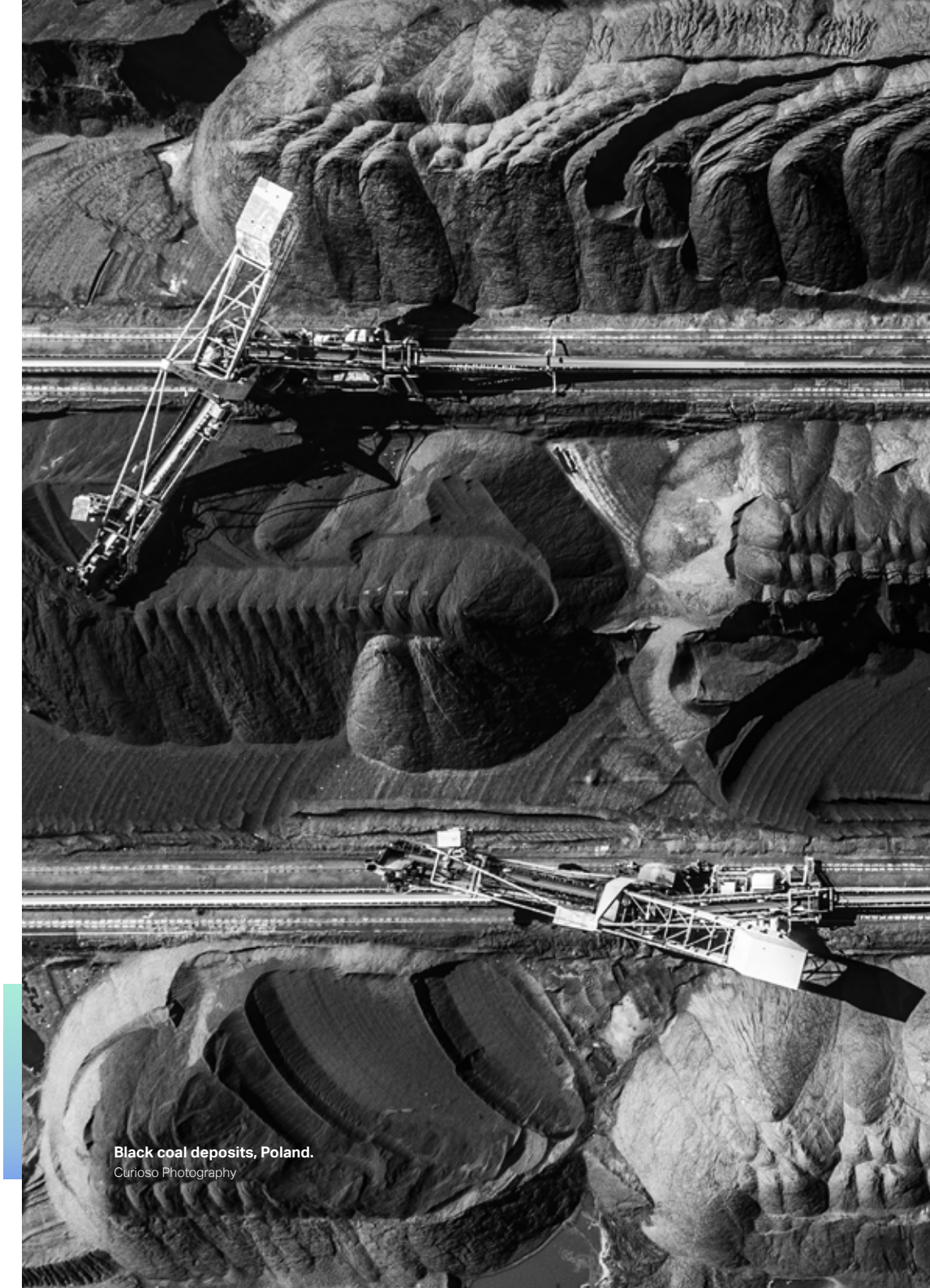
By participating in the capacity market auction, generators procure commitments to provide additional generation capacity at times of system stress and will be rewarded by payment. ClientEarth is concerned that once the Project participates in the auction it would be unable to provide capacity when due, because the plant may not be constructed in time, leading to foregone payments and inevitable penalties.

Risky financing structure

The Project's financing negotiation was tortuous—several domestic and international banks expressed reluctance to provide further financing for the coal project. According to the reported financing structure, only 30-35% of the project would be financed through credit, which means that Energa and Enea as shareholders would need to contribute up to PLN 1.6 billion (about €350 million) of equity each, and both companies would be extremely exposed to the risks associated with the new project, thus increasing their financial risk.

The resolution is contrary to "good practice"

ClientEarth alleged that the behaviour of Enea's management board proposing the resolution breached board members' fiduciary duties of due diligence and to act in the best interests of the companies and their shareholders, thus contrary to the "good practice" set forth in § 1, Article 422 of the CCC, which sets out that "a resolution of the general assembly which contravenes the statutes or good practices and harms the interests of the company or is aimed at harming a shareholder, may be challenged in an action brought against the company for an annulment of the resolution."



Black coal deposits, Poland.
Curioso Photography

10
Landmark Climate Change Cases

July 2022, Beijing

Authors:

Danting Fan, Climate and Finance Lawyer, ClientEarth

Boya Jiang, Nature and Climate Lawyer, ClientEarth

Dimitri de Boer, Chief Representative for China, ClientEarth

Xiaoyu Zhang, Director of Partnerships, Adjunct Professor, Vermont Law School

With support from:

IUCN World Commission on Environmental Law (WCEL)

Global Judicial Institute on the Environment (GJIE)

EU Forum of Judges for the Environment (EUFJE)

Layout: Alain Chevallier, 2022