Climate change law and policy: litigation, negotiations, prospects

Vernon Rive
“Whether the evidence at present available in respect of matters such as the “greenhouse” effect is anything more than conjecture I do not know. I neither accept nor reject the evidence that was placed before me in respect of such matters as it does not fall within my province. It would be a matter entirely for the Council or the Planning Tribunal as to the extent to which it takes such information into account.”

- per Doogue J at 21
“The coast is a dominant social, cultural and economic feature of life in these islands. The coastline itself is constantly evolving, but the climate change phenomenon seems to be accelerating and accentuating the processes that drive these changes. This case is about how coastal communities are learning to cope with both the inevitability of marine incursion onto the foreland, and the difficulty of predicting where and at what rate, incursion will occur.”

-per Williams J
New Zealand Court Judgments involving climate change considerations 2004-2013
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<th>Country</th>
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<td>Australia</td>
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The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.

- Art 3.1, Kyoto Protocol
President Obama
COP15, Copenhagen 2009
Copenhagen Accord

- Aspirational 2°C target, with GHG emissions peaking as soon as possible

- A pledge-and-review process of
  - Quantified economy-wide emissions targets for 2020 by developed countries
  - Nationally appropriate mitigation actions of developing country Parties

  to be reported every 2 years
NZ’s Copenhagen Accord Commitment

Conditional emissions reduction target range of 10% to 20% below 1990 levels by 2020.

Conditions:
- a global agreement that sets the world on a pathway to limit global temperature rises of not more than 2°C
- comparable efforts by other countries
- actions by advanced and major emitting developing countries fully commensurate with their respective capabilities.
- effective rules governing land use, land use change and forestry (LULUCF)
- full recourse to a broad and efficient international carbon market

“New Zealand’s 2020 target will be less than the -10 to -20% range in the event that these conditions are not met as has been previously stated publicly and in international negotiations.”

On 16 August 2013, the Government announced an unconditional 2020 climate change target of 5 per cent below 1990 emissions...

“New Zealand will join countries responsible for more than 70 per cent of global greenhouse gas emissions who are making international pledges under the United Nations Framework Convention (the Kyoto Protocol’s parent body). New Zealand will apply the Kyoto Protocol framework of rules to our unconditional 2020 target to ensure that our actions are transparent and have integrity.”
Copenhagen Accord – Non-Annex 1 party commitments

China
“China will endeavor to lower its carbon dioxide emissions per unit of GDP by 40-45% by 2020 compared to the 2005 level, increase the share of non-fossil fuels in primary energy consumption to around 15% by 2020 and increase forest coverage by 40 million hectares and forest stock volume by 1.3 billion cubic meters by 2020 from the 2005 levels.

Please note that the above-mentioned autonomous domestic mitigation actions are voluntary in nature and will be implemented in accordance with the principles and provisions of the UNFCCC, in particular Article 4, paragraph 7.”

India
“India will endeavour to reduce the emissions 1 intensity of its GOP by 20-25% by 2020 in comparison to the 2005 level.”
Parties to the UNFCCC agreed to negotiate towards “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties.”
Tacloban, Leyte, Philippines, November 13, 2013
Yeb Sano
Philippines lead climate change negotiator, COP19
Climate talks timeline

COP17 Durban 2011
COP18 Doha 2012
COP19 Warsaw 2013
COP20 Lima Dec 2014
Ban Ki-moon Climate Summit, New York, September 2014
COP21 Paris 2015
New global agreement in force

2020
CLIMATE CHANGE LITIGATION IN THE U.S.

Statutory Claims

- Force Government to Act
  - Clean Air Act
  - Other Statutes
    - Project Challenges
    - NEPA
    - State NEPAs
    - Other Statutes
      - Challenges to Coal-Fired Power Plants
      - Challenges to State and Municipal Vehicle Standards
      - Challenges to Federal Action
      - Challenges to State Action

Stop Government Action

- Regulate Private Conduct

- Industry Lawsuits

Common Law Claims

Public International Law Claims

Climate Protesters and Scientists

Adaptation

www.climatecasechart.com/
New Zealand climate litigation ahead?

Ongoing RMA litigation

Planning for effects of climate change
- regional, district planning frameworks
- coastal subdivision & development
- infrastructure consenting

Renewables projects
- windfarm projects
- geothermal development
- hydro-generation

Query: what of the ‘tangibility’/‘de minimis’ issue

*West Coast Ent Inc v Buller Coal Ltd [2013] NZSC 87 at [89]-[93]; [121]-[126]*
New Zealand climate litigation ahead?

Operation of New Zealand’s ETS

• Offence and ‘make good’ provisions of the CCRA concerning ETS obligations
• Monitoring, reporting, surrender obligations under the ETS
• Judicial review of decisions on free allocation - especially industrial sector

New Zealand tribal group threatens multi-million-dollar claim over carbon scheme

The Maori Iwi Leadership Group plans to file demand for NZ$600 million against Wellington for enviromental value lost through emissions trading scheme

Reuters in Wellington

PUBLISHED: Friday, 07 February, 2014, 4:26pm
New Zealand climate litigation ahead?

Corporate/commercial/tax litigation

- Director liability under the CCRA 2002
- Contractual issues associated with domestic emissions trading including NZ ETS cost pass-through
- Mergers & acquisitions issues
- Property issues, particularly in relation to forestry and farm land
- Securities issues
- Tax treatment of emissions units
'When Kiribati disappears, we're going to die with our kids'

In a landmark case, Kiribati native Ioane Teitiota claimed refugee status in New Zealand as a victim of climate change. With his plea rejected, his hope of a better life is sinking quicker than his Pacific islands home.