

DISPUTE RESOLUTION AND CLIMATE CHANGE

The Paris Agreement and Beyond



Chapter 18

10 Years Back - Post COP12

A 2007 Snapshot of Climate Change Litigation, Potential Disputes and Alternative Dispute Resolution

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Independant Mediator and Arbitrator

> Author's preface

In the wake of COP11 in Montréal in December 2005, I was asked to write a chapter about climate change litigation and disputes for a forthcoming book. The book was never published and the chapter written in the spring of 2007 languished in my computer. With the publication of this book in anticipation of COP22 a look back at where we were then seemed of interest. While the current and future status of legislation, regulation and litigation will determine the success of nations in addressing climate change, the article is instructive in highlighting approaches to fostering progress on climate change through the courts, flagging climate change related disputes and describing the advantages of using alternative dispute resolution mechanisms to resolve such disputes. The chapter is purposely not updated, and subsequent decisions in the cases cited are not recorded, so as to provide a true reflection of the state of play at the time. It should be noted that some legal theories discussed were ultimately found not to be viable by the courts, political changes and the recession slowed progress, especially in the United States, and some disputes that loomed large on the horizon at the time have not materialized. However, I hope the chapter will provide a useful historical perspective and persuade the reader that arbitration, mediation and collaboration can be especially valuable in the context of resolving climate change related disputes.

> Introduction

As the need to respond to the threat of global warming has increased, global warming-related activity has accelerated on all fronts. The Intergovernmental Panel on Climate Change reports issued in 2007 stated that “warming of the climate is unequivocal,” bringing the certainty that global warming is caused by human activity to 90%, and predicting dire consequences if significant greenhouse gas emission reductions are not achieved.¹ The nations that are signatories to the Kyoto Protocol and subject to its provisions to reduce emissions have begun work on how an emissions reduction regime should be designed post 2012 when the Kyoto Protocol commitments expire. The European Union, which established the EU Emission Trading Scheme to limit emissions from governmental and business operations, has fine-tuned its program and procedures to make the scheme more effective in reducing emissions and set new goals and tighter regulations for the post Kyoto period.

In the United States in spring 2007, the Supreme Court found that the “harms associated with climate change are serious and well recognized,”² and that “the risk of catastrophic harm, though remote, is nevertheless real.”³ The court noted “the enormity of the potential consequences associated with man-made climate change.”⁴ Broad global warming legislation has been introduced in the United State Senate and House of Representatives and leaders in both houses have committed to undertaking the development of a national greenhouse gas reduction program. The US White House has moved significantly in its position on global warming and has convened a series of meetings with other major economies on a track parallel to the post-Kyoto negotiations to discuss how best to address the problem.

These developments have led to a spate of articles commenting on the many opportunities afforded by global warming developments to lawyers and litigants. Indeed, in keeping with the long tradition of seeking to effect change through litigation in the United States, there have been a host of lawsuits filed which relate to climate change. These suits which have been brought by States, non-governmental organizations and private litigants, are grounded in multiple theories and seek a variety of remedies. Lawsuits have also commenced in the international arena.

The cases brought to date are just the “tip of the iceberg” (a phrase that may lose its currency if the icebergs melt as is predicted due to global warming). The expected impact of climate change is enormous. Climate change is believed to have already created massive damage to people, property and nature. Climate change is driving the development of substantial new investment

vehicles, leading to the growth of new businesses and expanding corporate responsibilities. Climate change is changing the ways in which communities plan for the future and imposing new obligations on government. Disputes in a broad variety of contexts to seek redress for these many new private and societal harms and to seek enforcement of these many new obligations is inevitable. Many of these disputes will best be resolved through arbitration, mediation, collaboration or other alternative dispute resolution (ADR) mechanisms. The nature of the dispute will be determinative of which ADR mechanism will be most suitable.

Part I of this article discusses the litigated cases that have raised climate change issues. Part II discusses various areas in which disputes might arise that are related to climate change. Part III will review the utility of arbitration, mediation and collaborative processes to the resolution of these disputes.

➤ Lawsuits Implicating Global Warming Issues

The Clean Air Act

On 2 April 2007, the US Supreme Court handed down one of the most important environmental decisions of the last few decades in *Massachusetts v Environmental Protection Agency*.⁵ The court acknowledged the general acceptance of the fact of climate change and its potential for massive damage.

In *Massachusetts v EPA* a petition was filed by several states and environmental groups for a review of the denial by the Environmental Protection Agency (“EPA”) of a petition to regulate CO₂ and other GHGs from new vehicles under Section 202(a)(1) of the Clean Air Act. The EPA entered an order denying the rule-making petition and gave two reasons for its decision: (1) the Clean Air Act does not authorize EPA to issue mandatory regulations to address climate change and (2) even if the agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time because the causal link between greenhouse gases and the increase in global surface air temperatures was not unequivocally established, that an EPA regulation of motor vehicle emission would only be a piecemeal approach in conflict with the President’s comprehensive approach to the problem and that EPA regulation would hamper the president’s ability to persuade key developing countries to reduce their emissions.

In reversing the decision below of the D. C. Circuit Court,⁶ a sharply divided Supreme Court held that (1) Massachusetts had standing to bring the action; (2) the Environmental Protection Agency had authority under the Clean Air Act to regulate greenhouse gases as an “air pollutant;” and (3) the scope of EPA’s discretion was defined by the statutory limits. EPA was directed by the court to reconsider its conclusion and form a “judgment” as to whether greenhouse gases “may reasonably be anticipated to endanger public health or welfare” or provide “some reasonable explanation as to why it [EPA] cannot or will not exercise its discretion to determine whether they do.”⁷

The Supreme Court stated that if EPA makes a finding of “endangerment” it is required to regulate emissions from new motor vehicles and cannot refuse to do so because it “constrains agency discretion to pursue other priorities of the [EPA] Administrator or the President.”⁸ However, the court noted that it was not reaching the question of “whether on remand EPA must make an endangerment finding, or whether policy concerns can inform EPA’s actions in the event it makes such a finding.”⁹ The court expressly rejected the “laundry list”¹⁰ of reasons given by EPA for refusing to act and held that its actions were “arbitrary and capricious... or otherwise not in accordance with law.”¹¹ The Supreme Court addressed the question of justiciability. Under US law there is no justiciable controversy that can be addressed by the courts when the parties seek an adjudication of a political question. Since the prior dispute turned on the proper construction of a congressional statute, the Court found the question presented to be “eminently suitable to resolution in federal court.”¹²

Turning next to standing, the court focused only on standing for the state of Massachusetts as only one petitioner needed to have standing to permit the court to review the petition. The court elaborated on the “quasi-sovereign” capacity pursuant to which US states bring cases on behalf of their citizens and the state’s right to challenge the EPA decision in stating that Massachusetts was entitled to “special solicitude”¹³ in the standing analysis. The Court found that Massachusetts satisfied the standing requirements with its showing that it had suffered a concrete and particularized injury that was both “actual” and “imminent,” that the injury was fairly traceable to EPA since EPA’s refusal to act contributed to the injuries, and that there was a “substantial likelihood that the judicial relief requested” would prompt EPA to take steps to reduce the risk of further injury.

The Court rejected EPA’s contention that it should not be forced to act when any regulation it could impose on new vehicles would have a minimal impact on global climate change, finding that incremental steps required by law must be taken, and that in fact US automobiles do make “a

meaningful contribution to greenhouse gas concentrations.”¹⁴ The Court also rejected EPA’s arguments that the requisite causation between EPA’s failure to act and the injury was lacking because EPA’s failure to regulate vehicle greenhouse gases was an insignificant contributor to global warming and because developing countries may significantly increase their emissions, finding that EPA’s regulation could serve to slow or reduce global warming.¹⁵

The most immediate impact of the decision is expected to be in the legislative arena as it does not appear that administrative action will be speedy. How the decision will be interpreted and applied by the courts to lawsuits before them is unclear. The Supreme Court’s recognition of global warming as a serious problem caused by human behaviour with potentially grave consequences will be cited to assist plaintiffs in all climate change litigation. But the decision’s discussion of other critical climate change litigation threshold issues will also provide fertile ground for extensive debate.

The Supreme Court decision applies most clearly to the issues in *Coke Environmental Task Force v EPA*,¹⁶ a case which deals with EPA’s regulation of GHGs from stationary sources and also turns on the definition of “pollutant” under another section of the Clean Air Act. In that case New York State and others sued EPA for failing to adopt strong emission standards to reduce air pollution from power plants claiming that the Clean Air Act requires that the EPA review and revise emission standards for new source pollution every eight years to ensure that they protect public health and the environment. As the final rule issued by EPA did not regulate CO₂, petitioners claimed harm to “public health and welfare” and asserted that EPA’s assertion that it was without authority to regulate CO₂ emissions is contrary to the plain language of the Clean Air Act. The issues relating to regulation of GHG were severed in that case and stayed pending the Supreme Court decision. Now that the Supreme Court has ruled, the matter can proceed. However, it is likely that the Supreme Court clear language on the scope of the Clean Air Act will cause EPA to reconsider its position as to whether it has authority to regulate stationary sources under that statute.

Another case in which the Clean Air Act is of significance and which may be heavily influenced by how the Supreme Court decision is interpreted is *Green Mountain Chrysler Plymouth Dodge Jeep and Association of International Automobile Manufacturers v Crombie*.¹⁷ This lawsuit was brought against the State of Vermont by the automobile companies to block stricter motor vehicle emission standards promulgated by the state of California and adopted by the state of Vermont. Due to its unacceptable air quality the State of California had been granted special congressional authority to regulate motor vehicle emissions as long as the standards set were at least as protective as the federal standards. The provision requires that California obtain a waiver from the EPA authorizing its regulations. Pursuant to this authority California passed legislation in 2002 to apply more stringent limits on vehicle emissions and sought the requisite EPA waiver. Other states are permitted to follow California’s lead and 10 other states, constituting collectively about 33% of the US automobile market, including the state of Vermont, have done so.

Plaintiffs argued, inter alia, that the only way to control vehicle emissions is through fuel efficiency standards, a field they argued was expressly pre-empted by the federal government under the Energy Policy and Conservation Act (“EPCA”) which by statute is to be implemented by the Department of Transportation (“DOT”). Defendants argued that the Supreme Court decision defeats this argument in its statement that EPA and DOT could both administer their responsibilities under the respective statutes and avoid inconsistency. Thus defendants argue that the California regulations under the Clean Air Act are not pre-empted by EPCA. The court refused to grant any dispositive motions based on the legal arguments offered and ordered the case to trial. A parallel and earlier filed case is pending in California challenging the California regulations.¹⁸ Shortly after the Supreme Court decision, EPA announced that it would commence the public comment period on whether it should approve or disapprove the California waiver request.¹⁹

Nuisance Theory

Utilizing a federal common law nuisance theory, a coalition of states representing 77 million people brought an action against several power companies who together represent 25% of the CO₂ emissions from the power sector in the US and 10% of world-wide emissions. The complaint seeks injunctive relief requiring defendants to reduce their emissions by a specified percentage each year. In *Connecticut v American Electric Power Co.*,²⁰ the District Court dismissed the complaint finding that it raised a “non-justiciable political question” since resolution requires an “identification and balancing of economic, environmental, foreign policy and national security interests.”²¹ The court stated that it was being asked to determine the appropriate levels of the cap to be imposed, what percentage reduction should be required, set the time line for the reductions, assess the availability of alternative energy sources and determine the implications of the relief on US energy sufficiency. The court refused to do so without an initial “policy determination” by the elected branches of government.²²

While the Supreme Court in dealing with the question of the interpretation of a federal statute was able to dispense with the question of justiciability in a short paragraph and relegate the actual

scheme for regulating GHG to EPA, the justiciability of a nuisance claim which seeks specific injunctive relief presents a more difficult question. Both sides are likely to argue that the Supreme Court decision supports their position. The case was argued before the Second Circuit Court of Appeals in June 2006 and a decision is expected imminently.

Another suit alleging a nuisance theory, *California v General Motors Corp.*, was filed by the State of California against six major automobile manufacturers seeking monetary damages for the harm caused by automobile emissions to California's infrastructure and natural resources including flood control systems degradation, coastal erosion, snow pack depletion, species impacts and harm to public health.²³ Defendants asserted that the complaint requires the court to create a new federal common law of interstate environmental public nuisance and address judicially unmanageable "political questions."

In the wake of the Supreme Court decision both sides claimed victory in supplemental papers filed in connection with a pending motion to dismiss the case. Plaintiffs claimed that the Supreme Court decision establishes the standing of states to pursue claims in federal court for injuries related to global warming, recognizes that GHGs cause concrete harm, that federal law does not displace its tort claim as there is no federal GHG regulation currently in place, that the Supreme court decision places no limits on the role of the courts in addressing global warming and that whether California is entitled to damages for harm it suffered does not call for any policy determinations as to how or whether to regulate GHG but rather presents a plainly justiciable question of damages. Defendants argued that the Supreme Court decision makes it clear that it is the EPA and the federal policy makers and not the courts that should make the determinations inherent to considerations of global warming as the courts have neither the expertise nor the authority to evaluate these policy judgments and that the Supreme Court's ruling that the EPA is authorized to regulate GHG under the Clean Air Act provides the state of California with a remedy which displaces its tort claim. The motion to dismiss the complaint is *sub judice*.²⁴

Environmental Assessments

Another series of cases turn on allegations concerning the adequacy of required environmental reviews. In *Friends of the Earth, Inc. v Watson*, several nongovernmental organizations sued the Overseas Private Investment Corporation and the Export Import Bank alleging that they had contributed to global warming by providing assistance to projects without complying with the requirements of the National Environmental Procedure Act ("NEPA").²⁵ The statute requires federal agencies to prepare an environmental impact statement ("EIS") for all federal actions that significantly affect the environment. Defendants' motion for summary judgment was denied. The court found that under the lesser standard applicable to a procedural action, plaintiffs (1) had standing as they had adequately demonstrated a reasonable probability that the challenged action will "threaten their concrete interests"²⁶ (2) had sufficiently demonstrated causation as proof that the outcome would be different if the requisite procedures were followed was not required; and (3) had sufficiently demonstrated redressability because the agency's decision might be influenced.

Several other suits have been filed attacking environmental impact statements for failure to address climate change consequences under NEPA or parallel state statutes. In *Border Power Plant Working Group v Department of Energy*, the court found that an environmental review was inadequate under NEPA because it did not disclose and analyze the significance of CO₂, a greenhouse gas.²⁷ Legislation has been proposed in Congress and in several states to explicitly require consideration of GHG consequences in the EIS analysis under NEPA or state equivalent environmental review mandates.

Failure to Make Required Filings

In a recent suit filed to force government action, which Senator Kerry supported with the filing of an *amicus* brief, the Bush administration was called upon to comply with the Global Change Research Act of 1990 and complete a national assessment of the impact of global warming on the environment, economy, human health and human safety of the US, a report that was to be prepared every four years.²⁸ The latest report, *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change* had been issued in 2000.²⁹ Following the filing of the lawsuit, representatives of Congress delivered a letter to Mr. Brennan, the acting director of the Climate Change Science Program, calling for the issuance of the report stating that its absence had "made it more difficult for Congress to develop a comprehensive policy response to the challenge of global climate change."³⁰

Impact on Natural Resources

Taking yet another tack, environmental groups in the United States have filed petitions using the impact on natural resources as the basis for suit in order to influence global warming mitigation measures. In a petition filed with the World Heritage Committee, a request was made to include Waterton-Glacier International Peace Park, which lies on the border of the US and Canada, on the

list of World Heritage Sites in Danger as a result of climate change.³¹ Such a listing would require the development of a plan of corrective actions to mitigate the threat.

Another petition was filed to have the polar bear listed under the US Endangered Species Act. Such a designation would provide broad protection to polar bears, including a requirement that federal agencies ensure that any action carried out, authorized, or funded by the US government will not “jeopardize the continued existence” of polar bears, or adversely modify their critical habitat. This petition has met with some success and the US Department of the Interior recently announced that the US Fish and Wildlife Service proposed to list polar bears as an endangered species. A comprehensive scientific review to assess the current status and future of the species was initiated.

Private Class Action Suits

As these cases demonstrate, the states and the environmental advocacy groups have been actively pursuing litigation as a means to further climate change mitigation measures, but many believe that the private bar is not far behind and is preparing to launch massive tort-based law suits for damages resulting from global warming against the major greenhouse gas emitters. A class action has already been filed by those suffering damage from Hurricane Katrina against the oil and coal companies alleging that the force of the hurricane was greater because of the greenhouse gases emitted by the fossil fuel companies and, taking a cue from the tobacco litigation, that the defendants had purposefully suppressed scientific information about the dangers of global warming.³² A motion to file a fourth amended complaint in that case is now pending. While there are serious questions as to how such tort based suits will fare and whether they will be able to meet the legal requirements both for showing common elements sufficient to permit a class certification and for proving the merits of the claim sufficiently to establish such elements as standing, harm and causation, the continuing threat of such lawsuits exists. There is a growing body of scholarship on the subject.³³

International Cases

Climate Action Network Australia and others filed a petition with the World Heritage Committee asking for the eucalyptus forests of the Blue Mountains in Australia to be placed on the list of World Heritage in Danger because of climate change due to the increased risk of fire. This petition follows five earlier similar petitions of other World heritage sites in danger and calls on the Committee to recognize the duties of State Parties to the Convention to protect world Heritage Sites for future generations and reduce greenhouse gases.

Germanwatch lodged a complaint against Volkswagen Corporation asserting violations of the Organization for Economic Cooperation and Development (“OECD”) Guidelines for Multinational Enterprises which emphasize sustainable development and the precautionary principle with the German Federal Ministry of Economics and Technology, the National Contact Point (“NCP”). The complaint asserts that VW violated these guidelines by expanding in the luxury and medium class markets which are harmful to the climate. The Procedure to be followed calls for a mediation between the company and the complainant; failing resolution, the NCP issues an official statement with recommendations for implementation of the guidelines.

➤ Future Climate Change Disputes

Project based disputes

A likely area for disputes lies in the growing market for energy efficiency and renewable energy. Energy efficiency is being pressed as the most cost-effective and environmentally friendly method for reducing GHG emissions. Many business decisions on implementing energy efficiency upgrades are based primarily on projections of the “pay back” period as businesses look to energy cost savings to pay for the upgrades. Failure to meet promised electricity demand reductions and consequent savings in electricity costs may form the basis for claims for damages, often in significant sums, for energy demand reduction shortfalls. Similarly, as renewable energy technologies are sold based on their projected energy generation and their relatively low maintenance costs, disputes may arise from the failure of specific projects to meet projected energy generation wattage or from the incidence of unexpectedly high operating costs. Again much will turn on the contract language and how it addresses representations, performance guarantees and who bears the risk of a failure of performance.

Siting issues will undoubtedly continue to be raised as more renewable energy and cleaner energy projects are developed. For example, the siting of wind farm projects in the US has attracted considerable local opposition from coast to coast. Similarly, efforts to site liquefied natural gas facilities, in an effort to bring cleaner burning fuel to markets, has led to vigorous local opposition. While the opposition may in some cases be driven simply by the “not in my backyard (NIMBY)” syndrome that frequently afflicts projects in the U.S., the multiple permits and the environmental

reviews usually required by applicable regulation provide project opponents many opportunities for attacks based on established legal theories. On a smaller scale, opposition by neighbours to locally sited distributed generation such as solar panels or small wind turbines in more densely populated areas is a continuing issue that may give rise to further disputes.

Emissions Reduction Market Disputes

The north eastern states Regional Greenhouse Gas Initiative³⁴ and regulation likely to be forthcoming pursuant to California's AB 32 and possibly imminent federal mandatory greenhouse gas regulation setting GHG caps and creating trading markets and demand for carbon credits, allowances and offsets. Many of the issues that have already presented themselves as possible areas for dispute under the Kyoto Protocol and the EU Emissions Trading Scheme will arise in the United States. Issues relating to ownership of the emission reductions, failure to achieve the projected reductions, failure of the project to meet methodology requirements, failure to obtain verification, failure of delivery, failure of payment, issues as to who is responsible for liability arising from the project, change in law and force majeure all create areas for possible dispute.

Mechanisms for reducing risk may also lead to disputes as participants attempt to address risks through such means as insurance, letters of credit, guarantees, performance bonds, warranties, liquidated damages, posting of collateral or delay penalties. The myriad issues that arise in all trading context such netting and set-off, credit, pricing and bankruptcy may create disputes. The nature of these disputes and their resolution will be dictated at least in part by the sufficiency of the contracts written to support the transactions.

False and Misleading Advertising Claims

With growing corporate interest in developing a green image responsive to environmental and climate change concerns, advertising which makes green claims is on the rise. The United Kingdom's Advertising Standards Authority ("ASA") reported that the number of complaints about UK ads that made green claims in 2007 was more than four times higher than greenwashing complaints in 2006. In its 2007 annual report³⁵ the ASA reported that consumers were most confused about ads for carbon emission claims and green tariffs as well as green terms like sustainable and food miles. In the past year, the ASA has ruled against several green ads. A Shell ad depicting flowers coming from industrial smokestacks was ruled misleading for misrepresented the company's global environmental impact. A Lexus ad was deemed misleading for including the phrase "High Performance. Low Emissions. Zero Guilt." The ASA ruled the ad implied the vehicle caused little or no harm to environment and the ad's fine print was not prominent enough.

The US Federal Trade Commission has embarked on a review of its Green Guide a year earlier than planned because of the proliferation of green claims in the marketplace. In 2008 the FTC conducted workshops on green claims with respect to carbon offsets, renewable energy credits, green packaging claims and green claims about textiles, building products and buildings. While the Green Guide is an administrative interpretation of the law and does not have the force and effect of law, the FTC can take action under Section 5 of the FTC Act which prohibits deceptive practices.

Challenges to Government Regulation

With the increasing support by both politicians and industry for a mandatory climate change regime in the United States, and the growing attention by local government to addressing climate change, further regulation in the United States can be expected. Additional laws and regulations will likely generate additional challenges. As noted above, the auto industry has already challenged California's efforts to reduce vehicle emissions and parties opposed to the north eastern states RGGI regime have stated that they will challenge the constitutionality of the regulations. The limits of the powers of local government will also likely be tested as municipalities pass a variety of regulations as mitigation or adaptation measures. For example, revised zoning provisions that impinge on a landowner's ability to develop land projected to flood due to climate change impacts or that bar a landowner from growing vegetation in excess of a specified height that would block a neighbour's solar access will affect pre-existing rights and legal challenges can be expected.

Corporate Governance and Disclosure Disputes

The spectre of class action suits under the US securities laws for alleged failures by corporations to disclose uncertainties that will result in or are reasonably likely to result in "material" impacts, loom on the horizon.³⁶ There is no bright line for what is "material" under US law as it is to be viewed from the perspective of the investor. The US Supreme Court held that information is "material" if there is "a substantial likelihood that the disclosure of the fact would have been viewed by a reasonable investor as having significantly altered the total mix of information available."³⁷ Climate science is becoming more certain and investors are increasingly seeking information concerning corporate emissions and corporate activities *vis-à-vis* climate change, making it easier to argue that such information would have been "material" to a reasonable investor. The scholarly writing on

this subject is developing³⁸ and class action claims on securities law violation theories may be on the horizon.

Liability for corporate management without sufficient regard to climate change consequences may lead to shareholder derivative suits challenging management actions. A significant and growing number of shareholder resolutions have been filed with companies seeking to have the corporations analyze and report their GHG emissions, assess the potential impact of global warming and current and global warming regulation on business prospects and take action to reduce emissions. The Climate Disclosure Project representing a group of 284 institutional investors with assets of US\$41 trillion under management has for the last few years sought disclosure of investment relevant information concerning the risks and opportunities facing companies due to climate change. Such facts evidence the concern in the market place about these issues and can create a predicate for shareholder action for failure to take appropriate action to protect the company from climate change impacts and liability.

Suits on the opposite side of the issue are also possible. Too aggressive a stance on climate change can also lead to litigation and potential liability. Caterpillar Inc.'s CEO received letter from 70 customers and groups complaining about management's decision to publicly support the enactment of mandatory GHG regulation in the United States arguing that such regulation will be costly for the industries on which Caterpillar depends for its business. The letter suggests that such customers would not be loyal to Caterpillar. Shareholders could assert that management's aggressive posture on global warming negatively impacted profits.

Investment advisers and fund managers also need to review their obligations. There is a growing body of evidence that environmental, social and governance issues can have a material impact on shareholder value. Whether investment decision making, especially for the benefit of a long term investor, can and should include a consideration of global warming implications is a question that may gain traction over time.³⁹

Insurance Coverage Disputes

The potential consequences of global warming are extreme and are predicted to lead to catastrophic weather events, severe flooding, droughts and destruction of property in many areas around the world. The implications for the insurance industry have been recognized by major carriers.⁴⁰ Many segments of the insurance industry may be affected including property damage coverage, environmental and pollution coverage, business interruption, supply chain disruptions, equipment breakdown and D&O liability. New forms of coverage to address risks unique to the global warming regime are emerging such as carbon emissions credit delivery guarantees to protect against non-delivery of contracted for credits.

The area will be ripe for numerous disputes.⁴¹ The potential liability of the insurance companies may be astronomical. Indeed, the defence costs alone could be stupendous. Claims for coverage are likely to be vigorously contested. Defences to environmental and pollution liability will draw on many arguments including the exact terms of the policy coverage and causation by the insured of the damage alleged in an arena in which the harm is caused by multiple factors.

The recent finding by the Supreme Court that greenhouse gases are a "pollutant" under the Clean Air Act will be a factor in such litigation as insurance companies argue that GHGs are not a pollutant within the meaning of the policy. The length of time between the causes and effect of global warming which will not fully manifest themselves for a considerable period of time will lead to analogies to the "delayed manifestation" and "long tail coverage" litigation raised in the asbestos insurance coverage lawsuits.⁴²

Other Disputes

A host of other disputes may arise including disputes relating to allocation issues, carbon capture and sequestration, damage to property and the like. With the rapidly evolving developments in the climate change arena, issues unique to climate change, but currently not identified, must also be contemplated.

Illustrative of the unknown is the question of who owns Renewable Energy Credits ("RECs"). Under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), US federal law required utilities to make certain purchases from cogeneration and renewable energy sources.⁴³ Purchase contracts were entered into without reference to ownership of the renewable energy attribute of the power, a commodity that had no recognition or value at the time. With the advent of the renewable portfolio standards requirements in many states and increasing voluntary purchases of RECs, significant value attached to this attribute. The Federal Energy Regulatory Commission ("FERC") ruled that ownership of RECs is a question for the states to determine and was not governed by PURPA. Compelling arguments were made by both sides of the dispute and results varied across the states. Just as the parties in these actions had no inkling that a material contract term was

being omitted in their negotiations, the issues and disputes that will emerge related to climate change cannot all now be anticipated.

➤ **Alternative Dispute Resolution and Climate Change**

The variety of disputes which may be spawned in connection with climate change impacts or remedies or among parties to transactions developed in response to climate change concerns is exceedingly broad. Many of these disputes will best be resolved through an alternative dispute resolution (ADR) mechanism.

Since arbitration is a creature of party agreement and not frequently agreed to as a mechanism for dispute resolution after the dispute arises, arbitrations with their genesis in climate change will generally only arise where there is an underlying contractual arrangement that is the subject of the dispute. There are a host of contractual relationships that form the basis of many climate change related transactions. Some of these contracts are in the context of transactions uniquely responsive to climate change related regimes such as renewable energy credits, carbon allowance trading and verified emission reductions. Others are in the context of more traditional contracts such as those for the construction of renewable energy projects or energy efficiency improvements. Contracts in the energy sector, both related to construction and to trading, often include arbitration clauses and we can expect a significant number of such disputes to be arbitrated as these markets develop.⁴⁴

The arguments that favour the use of arbitration over litigation are even more persuasive in the context of climate change issues. Such issues often arise in a very specialized and complicated regulatory and factual setting where subject matter expertise on the part of the adjudicator can be crucial. Thus, arbitration where relevant climate change expertise by the arbitrator can be specified, would be particularly desirable. Many of the disputes will be among parties with ongoing business relationships best served in the less formal setting of an arbitration where the process can be tailored, the speed of the proceeding and its costs can be controlled by the parties and relationships better preserved. The greater ability to maintain confidentiality can be attractive, especially in cases where developing technologies as to which secrecy is vital are at issue. Moreover, many climate change related disputes will arise in an international context among participants from different countries, making arbitration attractive with the availability of a neutral forum with known procedures, the availability of adjudicators with cross cultural sensitivity and cross border legal backgrounds. And importantly arbitration offers enforcement in over 150 countries around the world under the New York Convention.

Mediation will also play an important role in climate change disputes. Many parties, before they embark on an arbitration will attempt mediation, whether pursuant to a contractual obligation to do so or as a matter of choice. For the many disputes that arise outside of a contractual context, mediation will be an effective mechanism for resolving disputes. Actions for money damages under any theory are always suitable for mediation and the settlement of lawsuits of all kinds, including class action lawsuits, utilizing the skills of an accomplished mediator is common in the United States. Indeed, dozens of US courts now require that the parties engage in a mediation session.

Addressing environmental disputes in the US with a collaborative problem solving and decision-making process or with public input has been institutionalized in a variety of settings. Since 1990, Congress and the executive branch have encouraged federal agencies to assist parties in resolving federal environmental, natural resources and public lands disputes.⁴⁵ Agencies that deal with the energy matters that will have to be addressed in order to effectuate certain climate change solutions have accordingly established vigorous programs for consensual conflict resolution. Thus, for example, the Federal Energy Regulatory Commission operates a strong and effective dispute resolution service for matters within its jurisdiction.⁴⁶ Similarly, many of the state Public Service Commissions offer dispute resolution services to facilitate collaborative solutions on matters before them. The National Environmental Policy Act and parallel state statutes expressly provide for public input in connection with the requisite environmental impact statements. The consequent development of compromises and the mitigation of project impacts in many cases is one of the major benefits of the statutory requirements.

Voluntary solicitation of community views and a comprehensive stakeholder process, often with additional funds budgeted to accommodate some unique community interest, is now undertaken by all smart project developers in the United States. Embarking on such a process early in the development of the project can serve to defuse objections, assist in developing consensually arrived at solutions to problems, obviate the need for any litigation or formal opposition and ultimately serve to expedite the time line for project completion.⁴⁷

Climate change is an emerging area and the decision of a judge or arbitrator may be more unpredictable than in more established areas of the law and will not afford the flexibility to forge a

resolution that will best serve all interests. This greater uncertainty should make mediation especially attractive to parties in the climate change setting as it provides the opportunity to develop solutions that protect the environment and address private interests.

➤ Conclusion

With the solidification of the science underlying climate change as discussed in the 2007 reports issued by the Intergovernmental Panel on Climate Change, the United States is advancing rapidly in many different arenas to tackle climate change. The political, regulatory, litigation and transactional responses to the threat and impacts of climate change will inevitably give rise to a wide range of disputes and will create numerous opportunities for alternative dispute resolution. There will be a significant advantage to utilizing arbitration, mediation and collaboration and other processes that lead to a consensual outcome. The availability in ADR of specialized subject matter expertise, of the opportunity for creative party-generated solutions, of greater confidentiality, party control of the process and the alleviation of cross border concerns will often make ADR the dispute resolution mechanism of choice.

➤ Notes

1. Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report*, at p. 30, available at https://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.
2. *Massachusetts et. alv Environmental Protection Agency et. al.*, 127 S. Ct. 1438, 1455 (2007).
3. *id* at 1458.
4. *id* at 1458.
5. *id*.
6. *Massachusettsv EPA*, 415 F.3d 50 (D.C. Cir. 2005), *rev'd.*, 127 S. Ct. 1438 (2007). The D.C. Circuit Court issued three opinions, each taking a different tack. Judge Randolph dismissed the case and denied the petitions. He did not opine on EPA's claim that it did not have the authority to regulate GHG but upheld the matter on the basis that it constituted an "agency conclusion based on policy judgments" where the agency resolved issues "on the frontiers of scientific knowledge." Judge Sentelle held that petitioners lacked standing because they had not demonstrated particularized injury; he found that the "generalized public good" sought is a "thing of legislatures and presidents, not of courts" and joined in Judge Randolph's decision. Judge Tatel dissented in a lengthy opinion. He found that plaintiffs had standing and that EPA has authority to regulate emissions based on their "contribution to welfare endangering climate change" as it is authorized to regulate any "pollutant"; he rejected EPA's argument that it could deny such regulation because of its stated policy considerations. See Christopher T. Giovino, *Defending Overstatement: The Symbolic Clean Air Act and Carbon Dioxide*, 30 *Harv. Envtl. L. Rev.* 99 (2006).
7. *Massachusetts v EPA*, *supra*, 127 S. Ct. at 1462.
8. *id* at 1462.
9. *id* at 1463.
10. *id* at 1462.
11. *id* at 1463.
12. *id* at 1453.
13. *id* at 1455.
14. *id* at 1458.
15. The decision was a close one with four of nine justices dissenting. Chief Justice Stevens wrote a stinging dissent disagreeing with the majority conclusion that Massachusetts had established standing and stated that the Court's relaxation of constitutional requirements which require the courts to "decide concrete cases — not to serve as a convenient forum for policy debates" has caused the court to "transgress 'the proper — and properly limited — role of the courts in a democratic society.'" Justice Scalia wrote a strong dissent finding that the reasons for not taking action given by EPA were "perfectly valid" and that he "simply cannot conceive of what else the Court would like EPA to say," and that global climate change was not "air pollution" within the meaning of the Clean Air Act and thus not subject to regulation by EPA under that statute.
16. *Coke Environmental Task Forcev EPA consolidated with New Yorkv EPA*, and assigned Case No. 06-1322 D.C. Cir. 2006).
17. *Green Mountain Chrysler Plymouth Dodge Jeep and Association of International Automobile Manufacturersv Crombie*, No. 2:02-CV-302 and 2:02-CV-304 (consolidated) D. Vt. filed Nov. 11, 2005.
18. *Central Valley Chrysler-Jeepv Witherspoon*, No. CV-F-04-6663 ED. Cal. filed Dec 7, 2004. Defendant's motion to dismiss the case was denied. 456 F.Supp.2d 1160 (E.D. Cal. 2006).
19. The statute does not provide a time line within which EPA must act on a request from California for a waiver.
20. *Connecticutv American Electric Power Co.*, 406 F. Supp.2d 265 (S.D.N.Y. 2005).
21. *id* at 274.
22. *id* at 272-273.
23. *Californiav General Motors Corp.*, No. 3:06-CV-05755 (N.D. Cal., filed Sept. 20, 2006).
24. While not raised in the context of a nuisance action, the decision in *Northwest Environmental Defense Centerv Owens Corning Corp.*, 434 F.Supp.2d 957 (D. Or. 2006) is of interest as it addresses both the questions of standing and justiciability and mirrors some of the discussion in the Supreme Court. Plaintiffs alleged that Owens Corning was constructing a manufacturing facility that would emit greenhouse and ozone depleting emissions without obtaining a required Air Contaminant Discharge Permit. Plaintiffs asserted resulting diseases and harm to environmental resources and sought injunctive relief. The court denied defendant's motion to dismiss finding that plaintiffs had standing having adequately pleaded a "concrete risk of harm" as the effects alleged were local and the mere fact that others around the world would also suffer does not disturb a finding of standing. *id* at 963. The court found that "widely shared injuries" are justiciable and that plaintiffs had adequately pleaded that the injury was "fairly traceable" to the challenged action and need not show with scientific certainty that the defendants' emissions were the only source of threatened harm. *id* at 966. The court found that plaintiffs had adequately pleaded redressability and need not prove that the relief sought will solve the entire problem. The court refused to find that climate change was a generalized grievance with wide public significance better left to the representative branches of government in concluding that "[a]n injury is not beyond the reach of the courts just because it is widespread, *id* at 969, and stated that the court was simply enforcing the congressional mandate set forth in the Clean Air Act and so was acting "squarely within the judicial power to adjudicate cases and controversies." *id* at 970.
25. *Friends of the Earth, Inc.v Watson*, 2005 WL 2035596 (N.D. Cal. 2005) (now captioned *Friends of the Earth, Inc.v Mosbacher*).
26. *id* at *2 (citation omitted).
27. *Border Power Plant Working Groupv Dept. of Energy*, 260 F.Supp.2d 997 (S.D. Cal. 2003).
28. *Center for Biological Diversityv Brennan*, No. 4:06-CV-07062 (N.D. Cal., filed Nov. 14, 2006).
29. US Global Change Research Program, National Assessment Synthesis Team, *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change* (2001).

30. Letter to William Brennan, Acting-Director, Climate Change Science Program, Regarding Request for National Assessment of Climate Change Required by the Global Change Research Act of 1990 (Dec. 11, 2006).
31. Petition to list Waterton-Glacier International Peace Park on the List of World Heritage in Danger, Feb. 16, 2006.
32. *Comerv Nationwide Mutual Ins. Co.*, No. 1:05-CV-00436 (S.D. Miss., filed Feb. 23, 2006).
33. See, eg, David A. Grossman, *Warming Up To A Not-So-Radical Idea: Tort Based Climate Change Litigation*, 28 Colum. J. Envtl. L. 1 (2003); see also Angela Lipanovich, Note, *Smoke Before Oil: Modeling a Suit Against the Auto and Oil Industry on the Tobacco Tort Litigation is Feasible*, 35 Golden Gate U. L. Rev. 429 (2005).
34. Detailed information about RGGI can be found at <http://www.rggi.org/>; see also, Edna Sussman, *New York Addresses Climate Change with the First Mandatory US Greenhouse Gas Program*, *New York State Bar Association Journal*, May 2006.
35. UK Advertising Standards Authority, 2007 Annual Report.
36. Rule S-K, Item 303 of the Securities Act of 1933 requires that publicly traded companies disclose instances “where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrants’ financial condition or results of operations.” Rule S-K, Item 101 requires disclosure of “material estimated capital expenditures for environmental control facilities. Under the Sarbanes Oxley Act of 2002 companies must “fairly present” their financial conditions and operations. In addition accounting principles may require accrual of contingent liabilities.
37. *TSC Indus. v Northway, Inc.*, 426 US 438, 449 (1976).
38. See, David Monsma and Timothy Olson, *Muddling Through Counterfactual Materiality and Divergent Disclosure: The Necessary Search for a Duty to Disclose Material Non-Financial Information*, 26 Stan. Envtl. L.J. 137 (2007); Elizabeth Hancock, *Red Dawn, Blue Thunder, Purple Rain: Corporate Risk of Liability For Climate Change and the SEC Disclosure Dilemma*, 17 *Geo. Int’l Envt’l L. Rev.* 233 (2005); J. Kevin Healy and Jeffrey M. Tapick, *Climate Change: It’s Not Just a Policy Issue for Corporate Counsel – It’s a Legal Problem*, 29 Colum. J. Envt’l L. 89 (2004).
39. For a discussion of the law relating to consideration of such issues in investment policy in seven jurisdictions around the world, see “A Legal Framework for the Integration of Environmental Social and Governance Issues into Institutional Investment” UNEP Finance Initiative, 2005.
40. See eg, Lloyd’s “Adapt or Bust,” 2006; Swiss Re, “Opportunities and Risks of Climate Change” 2002; Marsh, “Climate Change: Business Risks and Solutions,” 2006.
41. Dickstein & Shapiro “*The Coming Storm - Global Warming Liability Litigation*,” 2007.
42. For a discussion of the “long tail” issue in the context of global warming see, Wiley Rein & Fielding LLP, “*Hot Enough For You? Global Warming, Prospective Corporate Liability Claims and General and Professional Liability Coverage Implications*,” 2007.
43. Public Utility Regulatory Policies Act of 1978 (“PURPA”), 16 U.S.C. §§ 2601 *et seq.* (1978).
44. For example, members of the American Bar Association Renewable Energy Resources Committee working with members of the Emissions Marketing Association and the American Council on Renewable Energy recently released a Master Renewable Energy Certificate Purchase and Sale Agreement containing a dispute resolution section which parties can elect to utilize and follow a tiered process for negotiation, mediation and arbitration. Many other GHG related contracts contain dispute resolution clauses. The bar association working group is now developing a parallel model contract for verified emission reductions.
45. For a summary of US federal actions to promote Environmental Conflict Resolution see the Office of Management and Budget and President’s Council on Environmental Quality Memorandum on Environmental Conflict Resolution, November 28, 2005 at https://www.udall.gov/documents/Institute/OMB_CEQ_Memorandum_2005.pdf.
46. Federal Energy Regulatory Commission Dispute Resolution available at <http://www.ferc.gov/legal/adr.asp>.
47. The current business interest in engaging and satisfying the environmental perspective early in a business deal so as to make the desired outcome more certain is exemplified by the course of the TXU acquisition now under way. TXU, the largest energy supplier in Texas, had announced plans to add eleven traditional, heavily GHG polluting, coal fired power plants. These plans had drawn heated opposition from various environmental, civic and other organizations. A record setting US\$45 billion private equity buy out of TXU by a group headed by Kohlberg Kravis Roberts & Company (KKR) was commenced in February of 2007. Before an offer was made, the buy out group negotiated an agreement with two leading environmental groups to gain their support for the deal. It is apparent that KKR did not wish to acquire a company that was facing such vigorous environmental opposition. The agreement called for withdrawing the plans for eight of the eleven new plants, investing US\$400 million in demand side management measures and supporting mandatory nationwide emissions limits with a market based trading scheme. (Since that deal was struck, KKR further agreed under additional pressure to make two of the remaining facilities less polluting Integrated Gasification Combined Cycle plants.)