

## A4J Justiciability Topic Sheet

### I. What Is Justiciability?

A claimant bringing a climate change litigation case must satisfy the **admissibility requirements** for the court to hear the case. These are preliminary requirements that determine whether a court has the power to hear your case and whether you have a right to bring a case to that court. These issues are decided before you can make the central arguments in your case.

A common admissibility requirement in many countries is “**justiciability**”. In other words, this is a requirement that the claim being brought to the courts must be of a type the court is willing to hear. A “**justiciable**” case means that the court in question has the authority to hear and adjudicate on the claims raised in the case and that the case is appropriate for the court in question. In some countries, courts can refuse to hear cases when they think they are “**non-justiciable**” or raise a “**political question**.”

Where justiciability is in issue, the **court must initially decide whether the case is justiciable** before it proceeds to the substantive questions of the case. If the case fails the justiciability requirements, the merits of the case will not be heard.

Questions of justiciability are related to the court’s role in relation to upholding the “**rule of law**” and the principle of “**separation of powers**.”

- The rule of law is the principle that requires *all* people and institutions of a society to adhere to and fairly apply the legal rules and systems that govern it.
- The principle of separation of powers outlines what responsibilities courts, legislatures and executive bodies should have in governing a country and ensure checks and balances across these bodies. It operates to prevent a concentration of power in the bodies that govern a country.
- Whilst the role of the judicial branch is to act as a check on the legislative and executive branches of government, the separation of powers contemplates that a level of discretion is given to the government in enacting their policies. As a result, the principle generally dictates that the courts should not rule or decide on purely political or policy questions.

Justiciability also overlaps with requirements of **standing**, in that claims will often only be justiciable where there is an actual legal dispute between the defendant and the claimant (rather than an abstract or academic legal question), the claimant has or will suffer harm, and the claim can be resolved through judicial remedies.

This is only a general outline of the concept of justiciability. The full scope of the justiciability doctrine depends on the country in question.

In some countries, courts approach justiciability in a general fashion, determining justiciability on a case by case basis (i.e. there is not strict set of principles that courts have to apply to decide on the question of justiciability). In these countries, judges considering questions of justiciability will be required to think about the court's role, the principles of the rule of law and the separation of powers, and whether the questions raised by the case are more suitable for the legislative or executive sides of government.

In other countries, there are complex legal tests which set the scope of the justiciability doctrine. In these countries, justiciability may have a number of elements, each of which must be fulfilled for the case to proceed. For example, in the USA, there is a strict doctrine of justiciability that entails the following requirements:

1. There is an “actual controversy” in the case. This means the case involves a concrete legal dispute between the parties, rather than seeking an “advisory opinion” by the court on an abstract question of law;
2. The claimant must have suffered actual harm by the defendant and this harm must be redressable by a remedy of the court;
3. The claim is ripe, meaning the harm has already been suffered by the claimant; and
4. The issues in the case are not “political questions”.

The requirements in your country may not be as strict as these.

## II. Justiciability and Climate Litigation

The requirement of justiciability can be a barrier to successful taking climate litigation. Firstly, judges may consider climate litigation to raise questions relating to policy that should be left with the executive or legislative branches of government (i.e. it involves a **political question**).

- Despite the established scientific consensus about the occurrence of climate change, the issue of climate change and how to address it remains politically charged. A country's lack of political consensus about climate change may present barriers when seeking legal remedies due to the principle of separation of powers.
- Courts can often rule that these cases are non-justiciable because they are matters of “high policy” or raise political questions, with no applicable legal standard, that are best left to the other branches of a state, i.e. the legislative or executive branches.

Secondly, the requirements that there is an **actual dispute** and the **claimant has suffered harm** can result in the claimant having to prove a causal connection between specific harm they have suffered, the defendant's actions and the occurrence of climate change. This question of causation can be

difficult because of the global nature of climate change and especially where future harm is concerned (see the [A4J Climate Litigation Guide](#) for more information on causation).

Thirdly, the global nature of climate change could lead judges to deciding that **climate-related harm to the claimant is not “redressable”**. In other words, because many countries and corporations contribute to climate change, a judge may consider that a judicial remedy in a single case against a government or corporation will be unable to remedy the harm to the claimant.

These potential barriers arise in various types of climate litigation cases:

- **Mitigation Claims** - Justiciability can serve as a barrier to mitigation claims. Specifically, mitigation claims that ask for specific outcomes beyond asking the government for a minimum level of GHG emission reductions may face a justiciability barrier. For example, orders that ask a government to implement specific climate change mitigation policies may be found to surpass the domain of the courts and enter the remit of the other arms of government. This could be avoided if claims are limited to asking for a minimum level of GHG emission reductions.
- **Adaptation Claims** – While justiciability considerations are relevant to adaptation claims, the fact that these claims aren’t asking to change the government’s general climate policy can be helpful in overcoming justiciability arguments.
- **Challenging Carbon-Emitting Projects** - Procedural challenges can avoid questions of justiciability, whereas justiciability may be a barrier for substantive challenges.
- **Carbon Majors Claims** - Justiciability is a common defence in Carbon Majors Claims. It is often argued that such claims are not justiciable because the issues raised are matters of public policy and regulation that should be dealt with by the legislative/executive branches of government, as opposed to being the subject of claims between individuals and corporations.

Additional justiciability issues can arise in some **human rights claims**. In some legal systems, certain human rights are not considered justiciable despite widespread international legal recognition (e.g. economic, social and cultural rights, or the human right to a healthy environment). It is important to check decisions of courts in your country to determine which human rights are justiciable.

It is important to note that even if litigants overcome the justiciability requirement in climate litigation, they will still need to successfully prove the requisite legal elements of their cause of action (for further information, see the [A4J Climate Litigation Guide](#)).

### III. How Have Courts Addressed Justiciability?

In some countries, courts have dismissed climate litigation cases on the grounds of justiciability. For example, several courts in the United States have dismissed cases on the grounds that they were premised on a non-justiciable political question, over which American courts have no **“subject matter jurisdiction**.

**Example: Juliana v United States**

In April 2016, a District Court in Oregon [rejected](#) the government’s argument that climate change policy is a foreign policy decision of the executive branch and therefore is beyond the authority of the courts. The Court noted that a case’s importance to the political branches of government does not necessarily mean it is a “political question” and concluded that the case did not involve a non-justiciable political question. However, the Court accepted that if the case was successful, “great care” would be necessary in constructing a remedy to ensure that the Court adhered to the separation of powers. This was upheld on review in November 2017.

However, in January 2020, the Ninth Circuit Court of Appeal dismissed the claim on the grounds the youths did not have [standing](#) and the claim concerned a [political question](#). The majority in Court held that the case was not justiciable for the following reasons:

- The Court was sceptical that the relief sought was substantially likely to redress the plaintiffs’ injuries, noting that the youths conceded “that their requested relief will not alone solve global climate change”;
- The plaintiffs did not establish that the relief they sought was within the power of the Court;
- It was beyond judicial power to “order, design, supervise, or implement the plaintiffs’ requested remedial plan”; and
- The Court reluctantly concluded that the plaintiffs’ case must be made to the political branches or to the electorate at large.” The fact that the other branches failed in their responsibility to remediate the issue did not give the Court the power to “step in their shoes.”

The dissenting judge disagreed with the above points, arguing that the federal court did not need to administer all matters of foreign relations or the regulatory implications of climate change to offer redress to the plaintiffs through judicial resolution. The plaintiffs filed a petition for rehearing *en banc* in March 2020. As of June 2020, the matter of the rehearing has yet to be decided.

However, there have been some instances of its success in United States courts, as well as in cases in other countries, that have considered climate litigation claims to be justiciable. These cases could provide examples for other courts to follow and may signal that case law is evolving to support the justiciability of climate litigation in some countries.

**Example: Thompson v Minister for Climate Change Issues**

The High Court of New Zealand rejected the government’s argument that climate change was a political question. It found that climate change presents significant risks to individuals and government actions on climate change are subject to judicial scrutiny. It emphasised that courts have the authority to decide legal questions surrounding government action (or inaction) on climate change, even if those decisions may have political consequences.

It also held that courts should not avoid deciding on climate litigation cases because of scientific complexity and found that the IPCC reports provide a sufficient factual basis on which decisions can be made.

A key argument in these cases has been that although a judgement might have political consequences, it only involves a “[legal question](#).”

**Example: [Urgenda Foundation v The Kingdom of the Netherlands](#)**

The Dutch Supreme Court rejected the government’s arguments that the separation of powers prevents the court from interfering with its climate policy, reaffirming that climate change cases are justiciable. It held that:

- The question of whether the government’s policy violated human rights was a legal question which the court had authority to decide [and therefore the separation of powers was not violated]; and
- While the court outlined the minimum the government had to do to respect human rights (i.e. reduce its GHG emissions by 25% by 2020), it left the government discretion as to **how** it would reduce its emissions.

In other cases, courts have used the principle of the rule of law and access to remedies to justify intervention where government climate policy involves potential human rights violations.

**Example: [De Justicia](#)**

In this case, the claimants were a group of young people in Colombia who claimed that their rights were infringed by the Colombian government’s failure to do more about reducing climate change by reducing deforestation.

The Colombian Supreme Court justified their intervention on the basis that climate change affected fundamental rights protected in the constitution that they have the authority and responsibility to protect.

#### **IV. Tips for Satisfying the Justiciability Requirement in Court**

A potential claimant should think carefully about how they will prove that they meet the justiciability requirements in their country. It is necessary to research the country’s approach to the justiciability doctrine, as some countries will have complex legal tests to prove justiciability, whilst other countries accept a more general scope of the doctrine.

To overcome the justiciability requirement, it can be helpful to:

- Refer to relevant and successful cases in your country and other countries where climate litigation has been held to be justiciable;

- Emphasise that although your case may have political consequences, it concerns legal rights and duties, and that it is the court’s role to review the lawfulness of government action (i.e. **the rule of law argument**);
- Argue that you have a right to access remedies or reparation where a legal wrong has been committed (i.e. the **access to remedies argument**); and
- Limit the requests for relief so the government or corporations still has some room to decide how it will reduce GHG emissions. For example, in a mitigation claim, asking for a declaratory judgement that your government’s climate policy is unlawful can be a useful way of anticipating justiciability arguments that the court is being asked to make decisions which should be left to political bodies. By not asking the court to tell the government exactly what to do, you can argue that the **separation of powers** is being respected.

## VI. Further Reading and Resources

In addition to general guidance on justiciability, there is a breadth of academic discussion on the interpretation, meaning and scope of the doctrine. However, such sources of information are extensive and outside the remit of this Topic Sheet.

- United Nations Environment Programme (UNEP), [\*The Status of Climate Change Litigation: A Global Review\*](#): Contains useful information about justiciability and standing (see Part 3.1)
- Greenpeace’s [\*Holding your Government Accountable for Climate Change: A People’s Guide\*](#): Greenpeace Guide on Human-Rights Based Climate Litigation, contains useful information about justiciability and standing (see Ch 4.3)
- OHCHR, [\*‘Key concepts on ESCRs – Can economic, social and cultural rights be litigated at courts?’\*](#): Introductory information about the justiciability of Economic, Social and Cultural rights
- [\*Climate Change Laws of the World Database\*](#): Database on climate litigation cases and climate change laws in different countries.
- [\*Law and Climate Change Toolkit\*](#): Database of countries’ climate change laws and policies.
- [\*Sabin Center Climate Litigation Database\*](#): Comprehensive database on climate litigation.
- [\*Climate change in the courts: challenges and future directions\*](#): Useful blog article with information highlighting the relationship between climate change, constitutional issues and justiciability.
- Hugh Wilkins, "[\*The Justiciability of Climate Change: A Comparison of US and Canadian Approaches\*](#)" (2011) 34:2 Dal LJ 529.
- Jill Jaffe, "The Political Question Doctrine: An Update in Response to Recent Case Law" (2011) 38:4 Ecology Law Quarterly 1033. – Examination of foundation principles of the political question doctrine and in-depth application of these principles in respect of US case law/role of US courts up to 2011.
- Shawn M. LaTourette, "Global Climate Change: A Political Question?" (2008) 40 Rutgers L.J 219. - Examination of two US cases based on public nuisance in the context of climate change and the political question doctrine.