

A4J CLIMATE LITIGATION TEMPLATES

PROCEDURAL CLIMATE-BASED INFRASTRUCTURE CHALLENGES

Action4Justice

Action4Justice (“A4J”) is a **civil society platform** created by a coalition of partners including Greenpeace, Oxfam, Transparency International, PILAC and IHRDA. Its mission to improve **access to justice** globally by building capacity in communities, redistributing legal knowledge and forging partnerships between legal activists. The platform has a range of how-to-guides, manuals and tools designed to help communities and activists use legal action for social justice. The latest of these tools is our series of **A4J Climate Litigation Templates**.

A4J Climate Templates

The A4J Climate Litigation Templates respond to the wish, amongst many communities in many countries in civil society in many countries, to uphold their legal rights in relation to Climate Change and its effects on them. This is illustrated by **the growing wave of legal cases** being taken around the world. The Templates harness the **best practices** in different countries and provide a skeleton for people to follow if they want to use legal action to hold corporations and governments accountable for harmful actions or lack of action on climate change. The Templates have been designed by legal professionals with expertise in climate litigation.

The Templates aim to encourage effective use of the law to bring climate related litigation in appropriate cases by providing:

- An appropriate **format** for drafting a document in which to make a claim (**“the legal complaint”** - paragraphs, font, page numbers, title, headings etc);
- An effective **structure** in which users can place their legal and factual arguments regarding climate change;
- An outline of the **arguments** that could be used when bringing climate litigation; and
- References to **climate science and cases** to help the user build a strong case.

While your complaint needs to be different depending on what country you are taking a legal case, the Templates provide useful general tips and guidance to get you started if you are thinking about using legal action for climate justice.

A4J Template Procedural Climate-Based Infrastructure Challenges

The **A4J Procedural Challenge Template** concerns legal cases brought against public bodies who have licensed resource extraction or infrastructure development which will significantly contribute to climate change (e.g. coal mines, oil drilling, fracking etc).

These projects can be challenged on the basis that the decision-making process which led to the licensing of the project failed to consider or gave insufficient weight to their climate impacts. Successful procedural challenges brought against public bodies in the last decade include:

- ***EarthLife Africa Johannesburg v Minister of Environmental Affairs***: An environmental organisation in South Africa successfully challenged the opening of a new coal mine on the basis that the responsible public body failed to take into consideration its climate impacts when licensing the project.
- ***Save Lamu et al v NEMA and Amu Power Co Ltd***: A Kenyan civil society organization successfully challenged the licensing of a coal-fired power plant on the basis it was granted without a proper environmental impact assessment was conducted. This was in part due to a failure to consider the climate impact of the project.
- ***Plan B and Others v Secretary of State for Transport***: An environmental organization in the UK successful challenged the expansion of Heathrow Airport on the basis that the Paris Agreement was not taken into account in the decision-making process.

The A4J Template extracts key tips, lessons and arguments from these cases, and others, that can be used to draft **complaints** in future cases (in some countries these documents are called pleadings, pleas, particulars of claim, points of claim or petitions). This is where the “**Claimant**” (the person bringing the case – in some countries this is called the plaintiff or complainant) argues that the “**Defendant**” (the government or public body that it is being brought against) has broken the law.

This complaint forms the basis of your case. It does not need to anticipate or “pre-empt” the defences the Defendant will use. It sets out your arguments which the Defendant will have to respond to before the

case goes to court. However, it is important to note that litigation can only be successful if factual and legal grounds exist for bringing a claim. Many of the cases which have been brought have not succeeded and their cases have been dismissed. You will not be able to judge the prospects of success in bringing a case simply by looking at this template. You will need legal advice in the place where you are to assess whether such a claim is appropriate.

These cases involve “**grounds**” for arguing the law has been broken. Common grounds include **public law principles** and **climate change/environmental legislation** which impose procedural requirements on the government. These different claims can be broadly described as “**public law claims**”. To bring a successful climate case under public law, you may need to:

1. Prove that you have the court has jurisdiction (i.e. the power to hear the case)'
2. Prove that you have **standing** (the right to bring a claim) because of either your location, the way you have been affected by climate change, or your status as an organization;
3. Base your arguments in reliable **climate science** that demonstrates the causes and impacts of climate change (global, national and personal impacts);
4. Have **evidence** of the project’s **contribution to climate change** (e.g. the GHG emissions that will result from the project);
5. Have **evidence** that the **decision-making process** to license the project did not consider the climate impact of the project;
6. Make strong **legal arguments**; and
7. Outline the **remedy** or outcome you want to get if you win (e.g. an order to do something or stop doing something).

Further Considerations

The A4J Procedural Challenge Template gives you useful tips and guidance. However, in every successful case, you have to **adapt your arguments to the country** you are from/taking a case in. This means you will have to research:

- The procedure you need to follow to bring a case (including time limits for different steps of the case);
- The law on jurisdiction and standing in your country;
- The substantive law (e.g. constitution, human rights law and environmental laws), their elements and key cases that support or undermine your case; and

- The remedies courts in your country are able to give.

You will also need to consider **practical issues**, such as:

- How you can fund your case;
- How you can gather evidence;
- Where you can get legal support;
- How you can enforce a court order if you win; and
- Threats that you may face in retaliation for bringing climate litigation.

The [A4J platform](#) can help you answer these questions but you will need legal advice in your country. We hope the A4J Infrastructure Challenge Template can help you hold your government accountable for and secure climate justice for your community.

It should also be noted that the A4J Template deals with “**procedural climate-based arguments**”. Extraction and infrastructural projects can be challenged on other procedural grounds (e.g. their impact on local wildlife, noise and air pollution etc). While challenges on these other grounds may not directly concern climate change, they can be equally important in stopping projects that will contribute to climate change. In other cases, projects have been challenged with “**substantive climate-based arguments**” (see [A4J Template for Substantive Infrastructure Challenge](#)). In many cases, a combination of different types of arguments (substantive/procedural/climate-based/non-climate-based) are used alongside each other.

Disclaimer

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[COURT NAME]

[Case Reference Number]

BETWEEN:

[CLAIMANT NAME]

Claimant

and

[DEFENDANT NAME]

Defendant

COMPLAINT OF THE CLAIMANT

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A. INTRODUCTION

1. The introduction provides a summary of the claim. The introduction should provide an overview of the following:
 - a. Who the Claimant(s) is;
 - b. Who is Defendant(s) is;
 - c. An outline of the extractive/infrastructural project you are challenging;
 - d. The project’s contribution to climate change;
 - e. The grounds for which you are claiming the Defendant has broken the law (you do not need to state your reasons for making this assertion in the introduction); and
 - f. The relief or remedies that the Claimant seeks.

Example:

- Paragraphs 1-12 of the Claim in [Plan B Earth and Others v Secretary of State for Transport \[2019\] EWHC 1070](#).

B. PARTIES

2. This section provides details on the claimants and the defendants in the case. This can be important information to establish the admissibility of the claim (see **section E**).

i. Claimants

Individuals

3. If the claimants are individuals, provide information regarding:
 - a. Name;
 - b. Citizenship and residence, particularly if location is near to the project or is vulnerable to climate impacts;

- c. Personal characteristics if relevant to climate change impacts (e.g. age, disabilities, ethnicity, membership of an indigenous group or occupation);
- d. The way in which the project and/or climate change will impact them personally.

Example:

- Paragraphs 16-90 of the complaint in [Juliana et al v United States et al](#) (USA).

Organisations

4. If the claimants are organisations, provide information on the following:
 - a. Name;
 - b. Legal status;
 - c. Membership;
 - d. Country of incorporation;
 - e. A brief history of the organization;
 - f. The aims/mission of the organization as stated in its constitution/articles of association;
and
 - g. Activities of the organization in relation to climate change.

Examples:

- Paragraph 13 of the Claim in [Plan B Earth and Others v Secretary of State for Transport \[2019\] EWHC 1070](#); and
- Pages 4-5 of the Writ of Summons in [Greenpeace Nordic and Nature and Youth v Ministry of Petroleum and Energy \(2018\) 16-166674TV1-OTIR/06](#).

ii. Defendants

5. Provide the following information about the government or public body you are suing:
 - a. Name;
 - b. The position of the Defendant within the government;
 - c. The responsibilities of the Defendant regarding the licensing of the project you are challenging;

Example:

- Paragraph 2 of the statement of claim in [Thompson v The Minister for Climate Change Issues \[2017\] NZHC 733](#) (New Zealand); and
- Paragraphs 6-10 of the petition in [Maria Khan et al v Federation of Pakistan \(No. 8960 of 2019\)](#) (Pakistan).

C. JURISDICTION

6. The court must have jurisdiction for you to bring a case. Jurisdiction relates to whether a court has the power to hear a case. To establish jurisdiction in a public law claim, you generally need to point to a provision in the constitution or another national law that gives the court power to hear the type of claim you are bringing.

Example:

- Pages 4 and 33-35 of the Writ of Summons in [Greenpeace Nordic and Nature and Youth v Ministry of Petroleum and Energy \(2018\) 16-166674TV1-OTIR/06](#);
- Paragraphs 12-14 of the Judgment in [Save Lamu et al v NEMA and Amu Power Co Ltd \[2016\] TRIBUNAL APPEAL NO. NET 196 of 2016](#).

D. FACTUAL BACKGROUND

7. This section details the facts that the complaint relies on and the evidence required to prove these facts.

i. The Occurrence, Causes and Impacts of Climate Change

8. When challenging a project on climate-based grounds, it is useful to start by providing general facts regarding climate change which the rest of the claim will rely upon. The following need to be established:

- a. The Earth is warming is at an unprecedented rate;
- b. The warming of the Earth is caused by man-made GHG emissions (which are created by the type of project you are challenging);
- c. The safe limit of global warming which the world can sustain (i.e. 2° or 1.5°);

- d. The size of the global carbon budget. This is the amount of remaining GHGs that can be emitted if the world is to stay below 2° or 1.5° (this is especially important to include when challenging individual projects);
- e. The warming of the Earth beyond the above limits will have significant impacts (e.g. sea level rises, extreme precipitation and flooding, ocean acidification, heatwaves, forest/bushfires, droughts, loss of biodiversity and storms); and

9. The above assertions have to be based on reliable climate science, such as the IPCC Reports, studies by respected scientific institutions, international organisations and scientific journals.

10. The scientific basis for climate change should then be reinforced by outlining the international political and legal consensus regarding climate change (e.g. the United Nations Framework Convention on Climate Change and the Paris Agreement). This will be especially important if you are arguing the government failed to take these agreements into account.

11. After outlining the general scientific basis regarding climate change, you should detail the national, regional or local impacts that climate change will have. Useful sources of evidence to demonstrate local climate impacts often include local attribution studies, reports by government bodies and regional organisations, and respected scientific studies.

Examples:

- Pages 14-20 of the Writ of Summons in [*Greenpeace Nordic and Nature and Youth v Ministry of Petroleum and Energy \(2018\) 16-166674TV1-OTIR/06*](#);
- Paragraphs 22-37 of the Request in [*Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others \(2018\) A-2992/2017*](#) (Switzerland).

ii. The Government's Climate Change Commitments

12. It can strengthen the argument that a public authority should have considered climate impacts in the licensing of a project when the government has already made legal and/or political commitments to combat climate change. Demonstrate what commitments your government has made to combat climate change. For example:

- a. Signing and ratifying the Paris Agreement and UNFCCC;

- b. Making commitments in national law;
- c. Making a political or policy commitment publicly.

These commitments can then be contrasted against the government's decision to license a project that will significantly contribute to climate change.

Examples:

- Paragraphs 14-16 of the Claim in [Plan B Earth and Others v Secretary of State for Transport \[2019\] EWHC 1070](#).

iii. The Project

13. Details regarding the project you are challenging need to be outlined in depth. Provide details on the following:

- a. What the character of the project will be (e.g. the construction and operation of a coal-fired power plant or the exploration, drilling and export of oil);
- b. Where the project will take place;
- c. How the project was licensed;
- d. When was the project was licensed;
- e. Which public authority was responsible for licensing the project;
- f. When the project will begin;
- g. The duration of the project (i.e. the length of time the power plant will be operational); and
- h. Estimates/projections regarding the output of the project (e.g. if you are challenging an airport expansion, how many extra flights will the project facilitate; if you are challenging an oil drilling project, how much oil is likely to be produced).

Examples:

- Pages 7-9 of the Writ of Summons in [Greenpeace Nordic and Nature and Youth v Ministry of Petroleum and Energy \(2018\) 16-166674TV1-OTIR/06](#).

iv. The Climate Impact of the Project

14. The extent of the contribution the project makes to climate change should be outlined. It is helpful to demonstrate:

- a. The amount of GHGs that will be emitted in relation to the project. This includes:
 - i. GHGs emitted through the direct operation of the project (i.e. through the process of oil drilling or the operation of a coal-based power plant); and
 - ii. GHGs will be emitted down the value chain of the project (i.e. GHGs emitted when the oil that has been produced by the project is used after it has been sold);
- b. The impact these GHG emissions will have on the global carbon budget (**sub-section D(i)**); and
- c. The impact these GHG emissions will have on the government's ability to meet its climate change commitments (**sub-section D(ii)**).

Examples:

- Pages 23-24 of the Writ of Summons in [Greenpeace Nordic and Nature and Youth v Ministry of Petroleum and Energy \(2018\) 16-166674TV1-OTIR/06](#).

v. The Procedure Leading to the Licensing of the Project

15. To make a successful procedural challenge, you need to outline key steps of the decision-making process which led to the licensing of the project. This includes:

- a. The initiation of the process;
 - i. How was the decision-making process initiated?
 - ii. What public body was responsible for overseeing the process?
 - iii. Why was the project initiated?
- b. Any social and environmental impact assessments that were made before the licensing decision was made:
 - i. At what stage in the decision-making process where the assessments conducted?
 - ii. What information was included in the assessments?
 - iii. What were the results of the assessments?
 - iv. How did this affect the licensing decision?
- c. Any expert evidence or consultations that were made before the licensing decision was made:
 - i. At what stage in the decision-making process did the consultations take place?
 - ii. Who was consulted?

- iii. What were the outcomes of the consultations?
- iv. How did this affect the decision?
- d. Any opportunities the public had to participate in the decision-making process:
 - i. At what stage in the decision-making process were the public given opportunities to participate?
 - ii. In what way were the public able to participate?
 - iii. Was were the views of those who participated?
 - iv. How did this affect the outcome of the decision?
- e. Any papers, memos or press releases that were made by the government during the decision-making process;
- f. Any political debates regarding the licensing decision; and
- g. The final reasons for the licensing decision.

Some of this information will be publicly available and others may be made available after a [freedom of information request](#).

Examples:

- Pages 31-32 of the Writ of Summons in [Greenpeace Nordic and Nature and Youth v Ministry of Petroleum and Energy \(2018\) 16-166674TV1-OTIR/06](#).

E. ADMISSIBILITY & STANDING

16. For a court to hear a public law case, the claim must be admissible. Specific admissibility requirements depend on your country’s legal system. Standing (i.e. the Claimant’s right to bring the case) is a common requirement.

i. Standing of Individuals

17. Many countries require an individual to show they have been (or will be) affected by in a government decision to bring a public law case. To show that you are affected, you must show that you have been or will be impacted by climate change and that these impacts are connected to the project. If it is necessary to show individual impact, rely on the **sub-section D(iv)**.

Example:

- Pages 29-36 of the opposition to a motion to dismiss in [Juliana et al v United States et al](#) (USA)

18. However, for procedural challenges, it is sometimes sufficient to show that the claimant has an interest in the project. This could be shown where:

- a. The project will take place near where the Claimant lives; or
- b. The project will take place in an area which the Claimant regularly visits or uses.

ii. Standing for Organisations

19. Where organisations are the claimant, there has to be a provision in national law that gives organisations standing to take cases in the public interest or on behalf of other persons. Where such laws exist, you often have to show that:

- a. The issues of the case relate to the interests/objectives defined in an organisation's constitution or articles of association (e.g. an organization with a stated objective to protect the environment could have standing to take climate litigation in countries with such laws); or
- b. The interests and rights of the group's members are or will be affected (this means you have to prove individual impact on the claimant – see above).

Example:

- Pages 8-9 of *Western Organization of Resource Councils et al v US Bureau of Land Management et al* (2018) CV 16-21-GF-BMM.

F. GROUNDS FOR THE COMPLAINT

20. The laws on which you should base your claim will depend on what country you are bring the claim. Your legal arguments should be based on the facts outlined in **section D**. The following common grounds are outlined below:

- a. Illegality: Acting without lawful authority – where the government licenses a project in breach of procedures set in statute or legislation;
- b. Illegality: Relevant and irrelevant considerations – where the government makes its licensing decision on the basis of irrelevant considerations and/or neglects relevant considerations;
- c. Procedural unfairness in the licensing procedure generally; and

- d. Violations of human rights due to procedural unfairness in the licensing process.

The grounds below can be argued on their own or together in a single complaint. If you do not consider a claim below to be arguable in your case/country, *do not* include that legal claim in your complaint.

21. The Defendant may have defences. However, defences are for the Defendant to raise in their “Defence” and do not have to be addressed in your complaint, but you should think about what arguments you may be able to use to overcome a defence if it is advanced.

i. Illegality: Acting Without Lawful Authority

22. Where there is a law in your country which sets limits or conditions on the government’s powers when it comes to licensing infrastructural or extractive projects but the government acts outside those limits, the licence could be challenged.

23. Where planning, industry or environmental legislation requires the government to conduct an environmental impact assessment before licensing infrastructure/energy projects, a licence could be challenged if:

- a. An EIA was not carried out at all; or
- b. The EIA that was carried out was inadequate as it did not assess the climate impact of the project (the legislation itself may require this or, even if it doesn’t expressly require this, you could argue that any EIA must take into account climate change due to the immense environmental impacts it will have).

24. Where legislation specifically requires (i) the government to take into account climate change when licensing infrastructural projects and/or (ii) give reasons as to how its decisions relate to their climate change commitments, a licence could be challenged if the government has failed to do this.

25. Where legislation requires the government to give the public an opportunity to participate in the decision-making process, a licence could be challenged if it fails to do this.

26. All of these arguments will require you to:

- a. Outline the procedural requirements in legislation that relate to the project you are challenging;

- b. Explain what these requirements required the government to do in the decision-making process; and
- c. Compare what the government was required to do with what the government *actually* did in the decision-making process (see **sub-section D(v)**).

Examples:

- Paragraphs 69-72 of the Claim in [Plan B Earth and Others v Secretary of State for Transport \[2019\] EWHC 1070](#);
- Pages 31-32 and 40-41 of the Writ of Summons in [Greenpeace Nordic and Nature and Youth v Ministry of Petroleum and Energy \(2018\) 16-166674TV1-OTIR/06](#); and
- Paragraphs 53-57 of the Judgment of [EarthLife Africa Johannesburg v Minister of Environmental Affairs and Others \(2016\) Case No. 65662/16](#).

ii. Illegality: Relevant and Irrelevant Considerations

27. Where a law gives the government discretion in licensing a project, how it exercises this discretion could be challenged if you can show:

- a. It took irrelevant considerations into account when deciding to license the project (e.g. considerations based on inaccurate climate science or an inaccurate assessment of the amount of GHGs that would be emitted by the project); or
- b. It failed to take relevant considerations into account when licensing a project (e.g. relevant climate science such as the IPCC 1.5° Report, the Paris Agreement goals, the impacts of climate change, findings of an EIA or recommendations of an official advisory committee on climate change).

28. To make such a challenge, you will need to carefully analyse the decision-making process and seek to identify where irrelevant considerations have been taken into account or where relevant considerations have been omitted (**sub-section D(v)**).

Example:

- Paragraphs 63-69 of the Judgment in [Stephenson v Secretary of State for Housing and Communities and Local Government \[2019\] EWHC 519 \(Admin\)](#); and

- Paragraphs 92-96 of the statement of claim in [Thompson v The Minister for Climate Change Issues \[2017\] NZHC 733](#) (New Zealand). The case concerns mitigation targets but the legal approach towards relevant/irrelevant considerations is useful.

iii. Procedural Unfairness

29. Even if there is not a piece of legislation which requires the government to do adopt a specific procedure, decisions of governments in many countries can be challenged where the procedure leading to the decision is generally unfair. This could be the case where the government:

- Failed to give reasons* for licensing a project;
- Failed to consult* with the public and provide opportunities for public participation in the process leading to the licensing of the project;
- Exercised *bias* in licensing a project where, for example, the relevant official/body has a conflict of interest (e.g. an official has a financial interest in the fossil fuel industry) or was improperly influenced by fossil fuel lobbying; or
- Has promised the public that they would not licence a project, giving rise to a *legitimate expectation*, but has broken that promise by licensing the project.

30. Each of the above arguments will require extensive research into the process which led to the selection of a certain mitigation target. Consider the following questions:

- Why did the government license the project?
- What were the stages of the licensing process?
- What happened at each stage of the process?
- Who was involved in each stage?
- What role did they play?
- Where there any conflicts of interest of the persons involved?
- What opportunities were there for consultation/participation?
- Were these opportunities advertised?
- Who was invited to participate and who was consulted?
- Did the government make any commitments regarding the licensing of the project?

iv. Violation of Human Rights

31. Constitutional and human rights often have a procedural dimension. This means where, for example, there is a right to a healthy environment in your constitution, this requires the government to adopt certain procedures where it is considering whether to licence a project which could harm the environment. The requirements will often include an obligation to conduct an EIA and allow for public participation. The licensing of a project could be challenged on human rights or constitutional grounds where these requirements have not been complied with.

32. To make an effective procedural challenge on the grounds of constitutional or human rights, you have to:

- a. Identify a right in your constitution which the infrastructural or extractive project will potentially affect (e.g. the right to a healthy environment or the right to health);
- b. Identify the procedural obligations the right imposes on the government (e.g. to conduct an EIA); and
- c. Compare the actual licensing process with these requirements to identify any procedural violations (**sub-section D(v)**).

Example:

- Pages 40-41 of the Writ of Summons in [Greenpeace Nordic and Nature and Youth v Ministry of Petroleum and Energy \(2018\) 16-166674TV1-OTIR/06](#); and
- Paragraphs 65-74 of the Claim in [Plan B Earth and Others v Secretary of State for Transport \[2019\] EWHC 1070](#).

F. REMEDIES SOUGHT

33. Briefly outline what you want the court to do if you win. For procedural challenges against infrastructural or extractive projects, this will likely involve:

- a. A court order demanding that the Defendant redo the licensing process with proper procedures;
- b. A court order demanding that the Defendant stops the implementation of the project until a proper licensing process is undertaken; or
- c. A court order quashing the licence and making it have no legal effect.

Examples:

- Page 41 of the Writ of Summons in [*Greenpeace Nordic and Nature and Youth v Ministry of Petroleum and Energy \(2018\) 16-166674TV1-OTIR/06*](#);
- Paragraphs 153-157 in the Judgment of [*Save Lamu et al v NEMA and Amu Power Co Ltd \[2016\] TRIBUNAL APPEAL NO. NET 196 of 2016*](#); and
- Paragraph 126 of the Judgment of [*EarthLife Africa Johannesburg v Minister of Environmental Affairs and Others \(2016\) Case No. 65662/16*](#).

[signature of legal representative]

Date