PART II

National laws

Asia and Pacific
Australia

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(A) Introduction

The Australian legal system

5.01 The Commonwealth of Australia is a federal State with three levels of government comprising a national government, the governments of six states and two territories, and local government. The federal government, the Commonwealth, has no direct constitutional power to legislate with respect to environmental matters. Nevertheless, several heads of power contained in section 51 of the Commonwealth Constitution provide a basis for wide-ranging climate change legislation. These include the corporations power and the external affairs power, the latter of which enables the Commonwealth Parliament to pass laws implementing treaties to which Australia is a Party.\(^1\) As Australia is a Party to the United Nations Framework Convention on Climate Change (‘FCCC’)\(^2\) and its Kyoto Protocol,\(^3\) the Commonwealth may legislate to meet its obligations under these agreements.

5.02 The states and territories also have the constitutional capacity to pass laws with respect to climate change and have done so as the Commonwealth has been unwilling or unable to regulate greenhouse gas (‘GHG’) emissions. However, to the extent that state laws are inconsistent with federal legislation addressing the same

subject matter they are invalid.\textsuperscript{4} The Commonwealth’s efforts to establish a comprehensive emissions trading scheme (‘ETS’) were thwarted in 2010 when the upper house of the Commonwealth Parliament, the Senate, voted against a package of eleven Bills that would have established the Carbon Pollution Reduction Scheme (‘CPRS’).\textsuperscript{5}

5.03 Environmental matters, including climate change cases, are adjudicated in federal, state and territory courts and administrative tribunals, with most cases being brought before specialist environmental courts or tribunals at state level.\textsuperscript{6}

\textit{The governmental stance on climate change}

5.04 Australia’s per capita GHG emissions are among the highest in the world, with only Bahrain, Bolivia, Brunei, Kuwait and Qatar ranking higher.\textsuperscript{7} Around half of Australia’s emissions are produced by the stationary energy sector, which is heavily reliant on coal-fired power plants. Emissions from agriculture and transport comprise the other main sources of Australia’s carbon footprint.

5.05 Australia signed the Kyoto Protocol in 1998 after winning significant concessions in the negotiation of the Protocol text. It was permitted an emissions increase (to 108 per cent of 1990 levels) rather than bound to a reduction like most other States, and the so-called ‘Australia clause’ allowed countries with net emissions from land use change and forestry to include such emissions in their 1990 baseline. Because land clearing was being brought under control in Australia in the 1990s, this meant that Australia could meet its Kyoto target relatively easily, with major smokestack industries such as power generation and aluminium and cement production given room to increase their emissions.

\textsuperscript{4} Australian Constitution, s. 109.
\textsuperscript{5} These included the Carbon Pollution Reduction Scheme Bill 2010 (Cth) and the Australian Climate Change Regulatory Authority Bill 2010 (Cth).
Despite this preferential treatment, the Australian government decided in 2002 not to ratify the Kyoto Protocol. This decision was overturned following the election of the Labor government in 2007.

5.06 Australia’s Fifth National Communication on Climate Change, submitted to the FCCC Secretariat in March 2010, indicated that Australia was on track to meet its Kyoto target without relying on the Protocol’s flexibility mechanisms, with emissions projected to reach 106 per cent of 1990 levels over the first commitment period (2008–12).\(^8\) However, emissions are projected to increase sharply, to 121 per cent of 2000 levels by 2020, unless abatement measures are taken.\(^9\)

5.07 In January 2010, Australia submitted emissions reduction targets to the FCCC Secretariat in connection with the Copenhagen Accord. These involved an unconditional pledge to cut emissions by 5 per cent on 2000 levels by 2020, with additional reductions of up to 15 per cent and 25 per cent contingent upon the level of action taken by other States. The 25 per cent reduction will apply if there is ‘an ambitious global deal capable of stabilising levels of [GHGs] in the atmosphere at 450 ppm CO\(_2\)-eq or lower’.\(^10\) The government has also committed to an emissions reduction target of at least 60 per cent below 2000 levels by 2050. Although the upper-range mid-term 2020 target follows the recommendation of the Garnaut Review,\(^11\) the long-term target falls well short of the 90 per cent reduction that Professor Garnaut found was consistent with a global contraction and convergence approach.\(^12\)

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\(^8\) Department of Climate Change, *Australia’s Fifth National Communication on Climate Change* (2010), p. 86.


\(^11\) The Garnaut Review was commissioned in 2007 by then Leader of the Federal Opposition Kevin Rudd along with the governments of the Australian states and territories. It was required to ‘examine the impacts of climate change on the Australian economy, and … recommend medium- to long-term policies and policy frameworks to improve the prospects of sustainable prosperity’ (see Garnaut, *Garnaut Climate Change Review*, p. xiii).

National climate change risks

5.08 Australia is one of the developed countries most vulnerable to the impacts of climate change. As the driest inhabited continent on earth, with already high levels of climate variability, Australia can expect a range of severe impacts if there is no mitigation of global emissions. Under a business-as-usual scenario it is expected that by 2100 drought will be increasingly frequent; there will be severe stress on urban water supplies; irrigated agricultural production in the Murray Darling Basin, Australia’s main ‘food bowl’, will have declined by more than 90 per cent; the Great Barrier Reef will effectively have been destroyed; and many coastal areas including the Kakadu wetlands will have been transformed by rising sea levels.\(^\text{13}\)

The CPRS

5.09 The Commonwealth, state and territory governments have implemented a range of initiatives to address climate change, but to date these have fallen short of a comprehensive regime to reduce Australia’s GHG emissions.

5.10 The National Greenhouse and Energy Reporting Act 2007 (Cth) established a mandatory system for the reporting by corporations of their GHG emissions and energy consumption, and the Labor government elected in 2007 pledged to introduce a cap-and-trade ETS by 2010. Following an extensive process of consultation, which involved the release of Green and White Papers, and exposure drafts of legislation, Bills to establish the CPRS were introduced into Parliament in 2009.

5.11 These Bills were rejected by the Senate, where the government did not command a majority. In April 2010, the government announced that it would delay the implementation of the CPRS until the end of the first commitment period of the Kyoto Protocol. The 2010 election then saw the Labor Party form government with the support of a number of independents and a Greens member of the House of Representatives. The government established a Multi-Party Climate Change Committee

\(^{13}\) Ibid., Ch. 6.
to explore options for the development of a national carbon price.

5.12 In December 2010, the Committee released a communiqué outlining eleven policy principles to ‘guide’ deliberations on a carbon price mechanism.\textsuperscript{14} These principles are: environmental effectiveness; economic efficiency; budget neutrality; competitiveness of Australian industry; energy security; investment certainty; fairness; flexibility; administrative simplicity; clear accountability; and fair contribution to global efforts. In February 2011, it released a ‘proposal’ setting out the ‘broad architecture’ for a potential carbon pricing scheme.\textsuperscript{15} The proposal envisages the initial imposition of a carbon tax, with provision being made for ‘conversion’ to a cap-and-trade ETS after a set period of time. However, two members of the Committee reserved their position on the proposal, and significant details were left at large. Carbon pricing is currently the subject of intense political controversy. However, it remains likely that many elements of the CPRS will feature in whatever regulatory scheme is ultimately adopted.\textsuperscript{16}

5.13 Had it been implemented, the CPRS would have constituted one of the world’s broadest emissions trading schemes. It would have applied to the six GHGs covered by the Kyoto Protocol and to around 75 per cent of Australia’s emissions, including emissions from stationary energy production, industrial processes, waste, and – most notably – transport, as well as fugitive emissions from oil and gas production. Agricultural emissions were excluded. The CPRS would have directly applied to around 1,000 enterprises.

5.14 Under the CPRS (and in contrast to the situation obtaining under the European Union ETS), the majority of emissions permits were to be auctioned. Controversially, free permits and transitional assistance were to be provided to emissions-intensive and trade-exposed industries in order to prevent ‘carbon leakage’.


Free permits were also to be issued to coal-fired power plants. Other features of the CPRS included a transitional price cap mechanism involving an unlimited number of non-tradeable and non-bankable permits that could be purchased from the government at a fixed price, and an assistance package to ensure that low and middle income families were given offsets for increasing household costs.

**National Renewable Energy Target**

5.15 The Renewable Energy Target (‘RET’) scheme was implemented in 2009, replacing the Mandatory Renewable Energy Target introduced in 2001. Following amendments that came into effect on 1 January 2011, the RET is now divided into two parts: the Large-Scale Renewable Energy Target and the Small-Scale Renewable Energy Scheme. These are administered by the newly established Office of the Renewable Energy Regulator, and enable households and industry with renewable energy systems to generate certificates that can be sold to purchasers such as electricity retailers, which are required to acquire certificates to meet an annual target. The goal of the RET is for 20 per cent of Australia’s electricity to be generated by renewable means by 2020.

(B) Public law

5.16 In the absence of a comprehensive regulatory framework to limit GHG emissions, litigants have turned to the courts in an effort to enforce environmental laws bearing on climate change. The courts have also been called upon to review administrative decisions in which climate change issues have not been appropriately or adequately considered.

**Standing to seek public remedies**

5.17 In order to enforce existing laws, or to seek judicial review or merits review of administrative decisions, a litigant must first

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18 For a more comprehensive treatment of the law of standing in Australia, see e.g. G. Bates, *Environmental Law in Australia*, 7th edn (LexisNexis Butterworths, 2010), Ch. 15; R. Douglas, *Douglas and Jones's Administrative Law*, 6th edn (The Federation Press, 2009), Ch. 22.
establish that he/she has standing to do so. Rights of access to civil enforcement mechanisms and formal merits review procedures arise from legislation, whereas rights to seek judicial review derive either from statute or from the Commonwealth Constitution.

5.18 Historically, Australian courts took a narrow view of the rights of persons seeking to attack the validity of decisions or legislation. Such persons had no standing to litigate unless they were more particularly affected than other people, or would derive some benefit or advantage over and above that to the ordinary citizen, or had a ‘special interest’ beyond a ‘mere intellectual or emotional concern’. The traditional approach has given way in recent years to a somewhat more ‘flexible’ attitude. Nonetheless, it continues to be said that standing at common law depends upon the demonstration of some ‘interest’ surpassing an abstract desire to enforce norms of public administration. The Australian Law Reform Commission (‘ALRC’) has observed that the resolution of issues of standing on this footing tends to be ‘cumbersome and confusing’, a criticism which has been amplified by subsequent academic commentary. Although standing requirements have rarely impeded public environmental litigation in recent years,

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19 For example, section 475 of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) permits ‘interested’ persons, including persons or incorporated organisations involved in recent activities for the protection or conservation of, or research into, the environment, to seek an injunction in the Federal Court to prevent contravention of the Act. Some state and territory planning and environmental statutes go further, incorporating ‘open standing’ provisions (see e.g. Environmental Planning and Assessment Act 1979 (NSW), s. 123; Protection of the Environment Operations Act 1997 (NSW), s. 252).
20 Anderson v. Commonwealth (1932) 47 CLR 50.
24 Where common law constraints on standing are insurmountable, the Attorney-General may enable a judicial review action either ex officio or by way of a relator action, but this is highly unlikely in the environmental context (see Bates, Environmental Law in Australia, [15.29]–[15.30]).
26 See e.g. P. Cane and L. McDonald, Principles of Administrative Law: Legal Regulation of Governance (Oxford University Press, 2008), p. 191.
their continued vagueness ensures that they remain a source of uncertainty.

5.19 Legislation has adjusted the common law rules on standing in certain areas. Many Commonwealth statutes rely on the generic judicial review machinery supplied by the Administrative Decisions (Judicial Review) Act 1977 (Cth) (‘ADJR Act’). Section 5(1) of the Act specifies that a person who is ‘aggrieved by’ a decision under prescribed Commonwealth legislation may seek judicial review by the Federal Court or the Federal Magistrates Court on enumerated grounds. In practice, the ‘person aggrieved’ criterion leads to inquiries comparable to those undertaken in respect of the common law ‘special interest’ requirement, and thus to similar problems.

5.20 The ADJR Act test may itself be modified for particular statutory contexts. For example, where a decision made under the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (‘EPBC Act’) is sought to be reviewed, an applicant who has engaged in recent activities for the protection or conservation of or research into the environment will be taken to be a ‘person aggrieved’.

Enforcement of environmental laws

5.21 There have been a number of cases in which private individuals and non-governmental organisations have sought to utilise open standing provisions of environmental legislation to address asserted contraventions of the legislation in relation to climate change matters.

5.22 For instance, in Gray v. Macquarie Generation, the applicants, climate change activists, argued that CO₂ produced from a coal-fired power station constituted waste requiring a valid environment protection licence, and that the failure to acquire such a

28 To be reviewable under the ADJR Act a decision generally needs to be ‘final or operative and determinative’ and not just a ‘step along the way’, and ‘substantive’ rather than ‘procedural’: Australian Broadcasting Tribunal v. Bond (1990) 170 CLR 321, 337 (Mason CJ).
30 EPBC Act, s. 487. 31 [2010] NSWLEC 34.
licence gave rise to an offence under section 115 of the Protection of the Environment Operations Act 1997 (New South Wales). On an application by the respondent for summary dismissal, the New South Wales Land and Environment Court (‘NSWLEC’) held that CO\textsubscript{2} was not a waste in the relevant sense.

**Review of government decisions having climate change impacts**

5.23 The opportunities for judicial review and merits review of governmental decisions connected to climate change policy are limited in so far as relatively few statutory provisions directly relate to or specifically mention climate change issues.\textsuperscript{32} By way of example, a 2008 review of Commonwealth and New South Wales (‘NSW’) legislation concerning the responsibilities of coastal councils for climate change risks found that of 137 relevant instruments, only 16 contained the words ‘climate change’, ‘sea level rise’ or ‘greenhouse’\textsuperscript{33}. None placed any direct obligations on decision-makers in relation to coastal adaptation.

5.24 The relative paucity of laws directly addressing climate change concerns has sometimes compelled litigants to ventilate such concerns by circuitous means. For example, unsuccessful efforts have been made to link GHG emissions to a disparate assortment of ‘protected matters’ in order to ensure that they are accounted for in certain processes under the EPBC Act.\textsuperscript{34} It stands to reason that opportunities to seek review of government decisions bearing on climate change issues may increase as regulation connected to climate change proliferates.

**Judicial review of administrative decisions**

5.25 Judicial review of the legality of administrative decisions may be sought on various grounds.\textsuperscript{35} Most climate change related cases


\textsuperscript{34} See below at [5.32]–[5.35].

\textsuperscript{35} See ADJR Act, s. 5(1). The ADJR Act is substantially declaratory of the common law in this respect.
have primarily concerned the alleged failure by a decision-maker to take proper account of relevant considerations. Such a failure can only be made out if a decision-maker has failed to attend to a consideration which is expressly or implicitly required by a statute to be addressed in making the decision in question. However, where such a matter is so insignificant that a failure to consider it could not have materially affected the decision, a court will not intervene.36

5.26 Other possible grounds of review – involving, for example, error of law, procedural irregularity or impropriety – are likely to be less frequently available. Opportunities for review of the rationality of decisions are ordinarily limited due to the stringency of relevant tests.37 The law as to legitimate expectations is similarly confined, and effective only to safeguard certain process rights.

Mitigation case law

5.27 In Gray v. Minister for Planning,38 the applicant sought to challenge decisions of the Director-General of the Department of Planning in connection with an environmental assessment prepared in support of a proposed coal mine. The assessment gave consideration to direct emissions from the project and indirect emissions in respect of its use of electricity. However, emissions from third party burning of coal were not examined in detail. Pain J concluded that:

there is a sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of [GHGs] which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Pt 3A [of the Environmental Planning and Assessment Act 1979 (NSW) (‘EPAA’)].39

36 See Minister for Planning v. Walker [2008] NSWCA 224, [34] (Hodgson JA) (‘Walker’).
37 See e.g. Kennedy v. NSW Minister for Planning [2010] NSWLEC 129, [102]–[103] (Biscoe J) (‘Kennedy’).
39 Gray [2006] NSWLEC 720, [100].
5.28 Pain J held that the Director-General’s failure to take into account principles of ecologically sustainable development (‘ESD’) (and in particular the principle of intergenerational equity and the precautionary principle) in considering the public interest served to invalidate his ‘view’ as to the sufficiency of the assessment. However, the assimilation of ESD principles to the public interest was criticised as premature in a subsequent case, discussed below.

5.29 *Drake-Brockman v. Minister for Planning* also concerned an alleged failure to address ESD principles in light of the GHG emissions associated with a proposed development. However, in the circumstances of the case, Jagot J concluded that the Minister had in fact considered all relevant matters. Her Honour emphasised that the EPAA neither dictated that ESD concerns should override other relevant considerations, nor demanded ‘any particular method of analysis of a potentially relevant subject matter’.

5.30 The relationship between climate change, principles of ESD and the general public interest under the EPAA has again been put in issue in *Haughton v. Minister for Planning*, in which the applicant is contesting ministerial approval of concept plans for two new power stations in NSW. The decision of Craig J was awaited at the time of writing.

5.31 In *Australian Conservation Foundation v. Latrobe City Council*, the operator of a large brown-coal power station in Victoria sought approval to develop a new coalfield. A panel appointed by the Minister to consider the proposal was instructed not to consider matters relating to GHG emissions from the power station. Nonetheless, a submission to the panel from the Australian

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40 On the nature and function of ESD principles in Australian environmental and planning law, see e.g. J. Peel, ‘Ecologically Sustainable Development: More than Mere Lip Service?’, Australasian Journal of Natural Resources Law and Policy, 12 (2008), 1; Bates, Environmental Law in Australia, [7.16]–[7.22]. On the treatment of ESD principles in climate change litigation, see e.g. N. Durrant, Legal Responses to Climate Change (The Federation Press, 2010), pp. 225–230.
42 *Ibid.*, [143].
45 10/40423, 10/40424 (NSWLEC).
Conservation Foundation addressed that issue. In proceedings before the Victorian Civil and Administrative Tribunal (‘VCAT’), the Foundation contended that the panel’s failure to take account of its submission contravened a legislative requirement that it consider all submissions. Morris P concluded that the environmental impacts of GHG emissions were relevant, and should have been considered. In effect, Morris P ‘rejected the notion that [GHG] emissions from the [power station were] trivial in comparison to total global [GHG] emissions, and should therefore be disregarded in planning processes’.47

5.32 On a federal level, challenges of a similar nature have been brought in respect of decisions made under the EPBC Act. The Act designates as ‘protected’ certain matters of national environmental significance.48 In general, proposed ‘actions’ (including developments) that are expected to ‘impact’49 on protected matters are prohibited in the absence of ministerial approval. Upon being referred such an ‘action’, the Minister (or a delegate of the Minister) must determine whether its expected impacts render it a ‘controlled action’, and as such subject to special approval and assessment procedures.50 Whilst an action’s expected contribution to climate change is not effective to enliven the ‘controlled action’ regime of itself,51 ‘conservationists have argued that the regime should apply to emission-intensive projects on the grounds that they [will] contribute to climate change, which in turn [is] likely to threaten [protected] matters’.52

48 See EPBC Act, Pt. 3. ‘Protected matters’ include, inter alia, certain World Heritage values; the character of ‘declared’ wetlands; and prescribed threatened species or communities.
49 See EPBC Act, s. 572E.
50 EPBC Act, s. 75.
51 It is worth noting that calls for a ‘greenhouse trigger’ to be incorporated into the EPBC Act have thus far been to no effect. Such a trigger would render ‘actions’ expected to generate GHG emissions in a prescribed amount liable to ‘control’ on that basis alone (see A. Macintosh, ‘The Greenhouse Trigger: Where did it Go and What of its Future?’ in Bonyhady and Christoff, Climate Law in Australia, p. 46). A recent independent review of the EPBC Act recommended that an ‘interim’ trigger be introduced, stressing the need to re-evaluate the utility of such a mechanism in light of any future comprehensive emissions regulation regime (A. Hawke, The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (Commonwealth of Australia, 2009), [4.86]–[4.110]).
52 A. Macintosh, ‘The Commonwealth’ in T. Bonyhady and A. Macintosh (eds.), Mills, Mines and Other Controversies: The Environmental Assessment of Major Projects (The
5.33 In *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc. v. Minister for the Environment and Heritage*, the applicant challenged determinations to the effect that two proposed coal mines were not ‘controlled actions’. It contended that the Minister’s delegate had failed to take into account adverse impacts on protected matters from GHG emissions resulting from the construction and operation of the mines, and from the burning of coal thus extracted. Dowsett J held that the delegate had, in fact, considered these issues. However, Dowsett J went further, questioning whether climate change as attributable to the mines could be considered to impact upon matters ‘protected’ under the Act at all:

I am far from satisfied that the burning of coal at some unidentified place in the world, the production of [GHGs] from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter, can be so described … The applicant’s case is really based upon the assertion that [GHG] emission is bad, and that the Australian government should do whatever it can to stop it including, one assumes, banning new coal mines in Australia.

5.34 Peel has observed that the *Wildlife Whitsunday* case ‘suggests the need for applicants to provide detailed information to the Court as to the likely extent of climate change impacts and feasible means of measuring GHG emissions in order to be successful’.

5.35 *Your Water Your Say Inc. v. Minister for the Environment, Heritage and the Arts* also involved a claim that a delegate of the Minister had failed to take account of climate change impacts in determining whether a proposed action was ‘controlled’ under the EPBC Act. In that case, the relevant ‘action’ had to do with the construction of a desalination plant in Victoria. It was held in the circumstances that climate change impacts attributable to the proposed action were not required to be taken into account as a matter of law, and that in fact the Minister’s delegate had


53 [2006] FCA 736 (‘Wildlife Whitsunday’).

54 Ibid., [72].

55 J. Peel, ‘Climate Change Litigation’ in *Climate Change Law and Policy in Australia* (LexisNexis Butterworths, 2009), [8–075].

considered them nonetheless.\textsuperscript{57} The delegate had concluded that ‘linkages between specific additional [GHG] emissions and potential adverse impacts on matters [protected under] the EPBC act are uncertain and conjectural’.\textsuperscript{58}

5.36 Other proceedings concerning the EPBC Act have alleged jurisdictional error. In \textit{Anvil Hill Project Watch Association v. Minister for Environment and Water Resources},\textsuperscript{59} the applicant challenged a determination that the construction and operation of an open-cut coal mine was not a controlled action. The Minister’s delegate had decided that the project, including downstream GHG emissions from the burning of coal from the mine, would not have significant, identifiable, impacts on protected matters. The Full Federal Court agreed with the judge at first instance that the Act did not require an objective factual determination as a condition precedent to the exercise of the power to designate an action as ‘controlled’. The question as to whether there were significant impacts did not give rise to a jurisdictional fact that could be challenged.

5.37 Objectors to carbon-intensive projects can invoke other grounds of review in order to ensure that relevant assessment and approval procedures are carried out in a manner conformable to law. In \textit{Queensland Conservation Council Inc. v. Xstrata Coal Queensland Pty Ltd},\textsuperscript{60} the Council (‘QCC’) had made representations to the Queensland Land and Resources Tribunal in respect of Xstrata’s application to expand the coverage of an existing mining lease. QCC had contended that climate change impacts flowing from the development of a new mine on the relevant site required that certain conditions be imposed. In proceedings before the Tribunal, it was common ground between the parties that anthropogenic climate change was occurring and that GHG emissions associated with the mine would contribute to it. Despite this, the Tribunal held that QCC had failed to link the mine’s GHG emissions to ‘discernible harm’,\textsuperscript{61} and refused


\textsuperscript{58} \textit{Ibid.}, [15].

\textsuperscript{59} \textit{Ibid.}, [15].

\textsuperscript{60} \textit{Queensland Conservation Council Inc. v. Xstrata Coal Queensland Pty Ltd} [2007] QCA 338 (‘QCC’).

\textsuperscript{61} \textit{Re Xstrata Coal Pty Ltd} [2007] QLRT 33, [21] (Koppenol P). Peel has opined that the judgment of Koppenol P was ‘in its conclusions and tone, an exemplar of climate change scepticism’ (Peel, ‘Climate Change Litigation’, [8–085–5]).
to impose the conditions sought. The Tribunal’s reasoning relied on material said to cast doubt on whether climate change is a function of GHG emissions. This material had been drawn to the attention of QCC at a late stage of the proceedings, with no indication given as to the use to which the Tribunal proposed to put it. In review proceedings before the Queensland Court of Appeal, it was held that the Tribunal had denied QCC natural justice:

The Tribunal relied on the Carter-Byatt critique which contended, contrary to the facts accepted by the parties at the hearing, that there was no scientific evidence demonstrating anthropogenic [GHG] induced global warming, to ultimately conclude that it was not appropriate to impose the conditions sought by QCC … There was nothing in the statutory or factual matrix of this case that made it unreasonable for the Tribunal to inform QCC that having read the critique it was inclined to accept and act on it, so that QCC had an opportunity to respond.62

Adaptation case law

5.38 The alleged failure to consider climate change impacts on proposed developments (as distinct from the climate change impacts of such developments) has been used as a foundation for opposing developments in general or their scale in particular.

5.39 In Walker v. Minister for Planning,63 it was contended that the Minister should have considered flood risk as a result of climate change before approving a concept plan for a major residential and retirement development on coastal land at Sandon Point, south of Sydney. The NSWLEC held at first instance that failure to consider whether flood risk may be compounded by climate change invalidated the Minister’s decision to approve the concept plan under Part 3A of the EPAA.64 The Court reasoned that ESD principles were part and parcel of the public interest, and in the circumstances required climate change flood risk to be assessed. However, this decision was reversed on appeal, on the basis that at the relevant time, principles of ESD were not so plainly an element of the public interest as to necessarily have

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64 [2007] NSWLEC 741, [161].
demanded consideration.\textsuperscript{65} However, it was noted that ESD principles \textit{would} need to be addressed in similar cases in the future, and that failure to do so could be considered evidence of failure to take account of the public interest.

5.40 This came to pass in \textit{Aldous v. Greater Taree City Council},\textsuperscript{66} which was concerned with whether a local council had neglected to consider principles of ESD when approving the construction of a new house in a beachfront area on the mid-north coast of NSW. It was argued that the Council had failed to take into account the public interest as required by section 79C of the EPAA. The NSWLEC distinguished \textit{Walker}, concluding that as a consequence of increasing public concern with ESD, it was now a component of the public interest. However, the Court concluded that there had been no failure to take ESD principles into account, as the Council had considered relevant climate change impacts.

Merits review of administrative decisions

5.41 When empowered to engage in merits review, a court or tribunal stands in the shoes of the original decision-maker\textsuperscript{67} and may take account of fresh evidence where necessary. In the context of Australian environmental law, rights to seek merits review are typically conferred on persons who have themselves sought to invoke statutory processes. It is less common for third party objectors to be afforded such rights, although exceptions often exist in connection with approval processes for major developments.\textsuperscript{68}

5.42 The first Australian climate change case, \textit{Greenpeace Australia Ltd v. Redbank Power Co. Pty Ltd},\textsuperscript{69} involved an application by Greenpeace for merits review of a decision to grant development consent under Part 4 of the EPAA for the construction of a coal-fired power station in NSW. It was contended that the operation of the plant would result in a net increase in CO\textsubscript{2} emissions from power stations in the state, and thus contribute to the greenhouse effect. The Court was invited to apply the precautionary principle and refuse development consent. Although Pearlman J

\textsuperscript{65} \textit{Walker} [2008] NSWCA 224. \textsuperscript{66} [2009] NSWLEC 17.
\textsuperscript{67} See e.g. Land and Environment Court Act 1979 (NSW), s. 39(2).
\textsuperscript{68} Bates, \textit{Environmental Law in Australia}, [18.2].
\textsuperscript{69} (1994) 86 LGERA 143.
found that the proposed plant’s CO₂ emissions would contribute to climate change, she considered that there was uncertainty as to their significance. After taking into account alleged environmental benefits of the development, Pearlman J approved the application. However, approval was made subject to various conditions, including a requirement to plant trees to offset emissions.

5.43 There have been numerous more recent merits review cases relating to climate change across Australian jurisdictions. Most have concerned whether climate change risks were adequately addressed when granting development approvals. Litigants have been most active in Victoria, and VCAT has now developed a substantial climate change jurisprudence.

5.44 Initial cases such as Gippsland Coastal Board v. South Gippsland Shire Council sought to address climate change risks in a context in which planning instruments made no specific mention of climate change impacts such as sea level rises and increasingly frequent severe storms. The Victorian government has since adopted the Victorian Coastal Strategy and the State Planning Policy Framework, with clause 13 of the latter setting out a detailed framework for planners in identifying and managing the coastal impacts of climate change. These matters are now explicitly considered in merits review.

5.45 Another category of merits review case connected to climate change has concerned development applications for renewable energy projects, principally wind farms. In some instances, local residents have objected to such proposals because of adverse impacts such as damage to aesthetic values and noise. In Taralga Landscape Guardians Inc v. Minister for Planning, the NSWLEC sought to balance the concerns of local residents regarding a large wind farm in the Southern Tablelands of NSW.

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71 [2008] VCAT 1545.

72 See e.g. Kala Developments Pty Ltd v. Surf Coast Shire Council [2010] VCAT 2106.

with the broader public interest in the increased generation of renewable energy. The Court resolved the case in favour of the latter, finding that the public benefits outweighed any detriment to the local community and particular landholders, and making particular reference to the principle of intergenerational equity.

**Remedies**

5.46 Success in challenges based on environmental protection and planning laws in Australia may be pyrrhic. Where matters have not been considered at first instance, they may subsequently be taken into account to no substantive effect. Moreover, further administrative or judicial consideration of the relevant issue may be pre-empted by legislative intervention.74

**Assessment of public law litigation**

5.47 The experience of litigants who have raised climate change concerns under the auspices of Australian public law has been mixed. However, it is worth bearing in mind that even ‘unsuccessful’ challenges may generate benefits of some kind.75 Litigation may serve to draw attention to the likely impacts of proposed developments, and to related regulatory deficits. It may disrupt the assumptions on which GHG emitters base relevant planning and operational decisions. It may also oblige governments to publicly address considerations of policy that would otherwise be avoided.76 Finally, litigation may draw into sharper focus judicial thinking on the causation of, and responsibility for, climate change impacts. Peel has commented that ‘the primary contribution of the case law has been in developing a legal culture more

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aware of the need to factor climate change considerations into environmental decision-making’.  

5.48 Overall, however, it is hard to avoid the conclusion that public law litigation provides at best an inefficient means of obliging governmental attention to climate change impacts. That concerned parties have resorted to it at all reflects the failure of governments to ensure that such impacts are balanced in relevant decision-making processes as a matter of course.

(C) Private law

5.49 Having considered various forms of litigation directed to compelling governmental action, Hsu (writing in the North American context) contends that 'seeking direct civil liability against those responsible for [GHG] emissions' is the only litigation strategy 'that holds out any promise of being a magic bullet' in connection with climate change. Hsu observes:

By targeting deep-pocketed private entities that actually emit [GHGs] ... a civil litigation strategy, if successful, skips over the potentially cumbersome, time-consuming, and politically perilous route of pursuing legislation and regulation. The civil litigation strategy is potentially a means of regulation itself, as a finding of liability could have an enormous ripple effect and send [GHG] emitters scrambling to avoid the unwelcome spotlight.

5.50 Despite the potential efficacy of private law action against entities associated with GHG emissions, the legal context in Australia provides reasons for circumspection, and no such action has been initiated to date. The discussion that follows will be framed around the prospects of negligence or nuisance proceedings against such entities, although it is important to note that private law litigation having a connection to climate change may take

77 Peel, ‘Climate Change Litigation’, [8–215].
78 Parts of this section have been adapted from an earlier publication by two of the authors: P. Cashman and R. Abbs, ‘Liability in Tort for Damage Arising from Human Induced Climate Change’ in R. Lyster (ed.), In the Wilds of Climate Law (Australian Academic Press, 2010), p. 235.
80 Ibid., 717.
many other forms. The range of potential plaintiffs reflects the multiplicity of direct and indirect harms that may be attributable to climate change impacts, although limitation issues will likely restrict the class of viable claims. For the purposes of illustration, we will refer to the law applicable in NSW, but endeavour to draw attention to different rules from other Australian jurisdictions where the circumstances warrant it.

Negligence

5.51 Broadly speaking, negligence may be established where a defendant has breached a duty of care owed to a plaintiff, thereby causing harm to the plaintiff.

Duty of care

5.52 Despite numerous attempts, no general formulation as to when a duty of care will exist has been deemed satisfactory. Whilst in many circumstances a duty is recognised as a matter of course, difficulties arise when considering novel situations, particularly where the relationship between the plaintiff and a defendant is unfamiliar or tenuous.

5.53 It is necessary, but not sufficient, to show that harm to the plaintiff was a reasonably foreseeable consequence of a defendant’s negligence, and the courts can frequently be seen to be reaching for some additional factor said to justify or exclude the imposition of a duty in a particular case or class of cases. However, the jurisprudence has not crystallised into anything resembling a

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81 For example, Durrant considers the potential for legal action against: (a) local authorities responsible for adaptation initiatives; and (b) professionals who provide advice or services connected to climate change impacts (see Durrant, Legal Responses to Climate Change, Chs. 20, 21).

82 The common law of torts is uniform throughout Australia, and the statutory regimes applicable in different states and territories are identical in many respects.


neat checklist of factors to which it may be profitable to advert in circumstances of novelty. In *Sullivan v. Moody*, the High Court of Australia noted that:

Different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care. Sometimes the problems may be bound up with the harm suffered by the plaintiff, as, for example, where its direct cause is the criminal conduct of some third party. Sometimes they may arise because the defendant is the repository of a statutory power or discretion. Sometimes they may reflect the difficulty of confining the class of persons to whom a duty may be owed within reasonable limits. Sometimes they may concern the need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle.  

The ‘factorial’ approach affirmed in *Sullivan* provides little guidance as to when a duty of care will be imposed in a case having no clear precedent, and may operate as a disincentive to path-breaking litigation. Some judges have candidly acknowledged that decision-making in this area is a product of ‘trade-offs and value judgments’, in turn informed by ‘questions of fairness, policy, practicality, proportion, expense and justice’. 

The climate change context is particularly problematic because


88 See also *Perre v. Apand Pty Ltd* (1999) 198 CLR 180 (‘Perre’). Factors identified in *Perre* as being relevant to whether the defendant was subject to a duty to avoid causing purely economic loss to the plaintiff included: (a) whether the plaintiff was particularly ‘vulnerable’ to suffering harm by reason of the defendant’s conduct; (b) whether the defendant had ‘actual knowledge’ of the risk of harm that eventuated, and of its magnitude; (c) whether the imposition of such a duty would raise the spectre of indeterminate liability, or burden the defendant ‘out of all proportion to his wrong’; and (d) whether the harm that materialised would have been ‘relatively easy to avoid’. See R. Mulheron, ‘The March of Pure Economic Loss … but to Different Drums’, *Canberra Law Review*, 7 (2003), 87, 89–95.


plaintiffs and defendants may be linked only by the fact that relevant harm has come to pass as a matter of fact.

5.55 In the first place, it may be very difficult to show that the harm alleged was a reasonably foreseeable consequence of the activities of a particular defendant. If a plaintiff cannot rely on any direct or specific relationship with such a defendant as supporting the existence of a duty, a suit would presumably be founded on the latter’s conduct with respect to the world at large, and such conduct may be both geographically and temporally divorced from any adverse consequences for the plaintiff.

5.56 Moreover, satisfying the court that it would be appropriate to recognise a duty as a matter of legal policy would likely be difficult. The Sullivan approach is inherently conservative. Recognising that negligence may consist in the fact of emitting GHGs that feed into a global phenomenon with worldwide effects would have unpredictable consequences, and raise the very real prospect of indeterminate liability. The cases suggest extreme reluctance to impose a duty in such circumstances. Moreover, the diversity of agents to whose activities climate change may be attributed renders it arguable that to impose any significant measure of liability on a particular defendant would be to burden that defendant disproportionately.

5.57 The significance of any lack of proximity between plaintiff and defendant is likely to be heightened where the harm alleged comprises purely economic loss.

Standard of care/breach of duty

5.58 Even if it could be established that a relevant duty existed in a particular case, it might be difficult, if not impossible, to establish that a defendant has actually breached that duty. The issue

91 See Agar v. Hyde (2000) 201 CLR 552, 578 [66]–[67] (Gaudron, McHugh, Gummow and Hayne JJ) (‘Agar’).
of breach is now governed primarily by section 5B of the Civil Liability Act 2002 (NSW) (‘CLA’), which provides that:

1. A person is not negligent in failing to take precautions against a risk of harm unless:
   a. the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
   b. the risk was not insignificant; and
   c. in the circumstances, a reasonable person in the person’s position would have taken those precautions.

2. In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
   a. the probability that the harm would occur if care were not taken;
   b. the likely seriousness of the harm;
   c. the burden of taking precautions to avoid the risk of harm;
   d. the social utility of the activity that creates the risk of harm.

Section 5B appears in general to be affirmative of the antecedent common law, albeit that some of its language differs slightly from that used in Wyong Shire Council v. Shirt, previously regarded as the leading authority on breach of duty in Australia. The Ipp Report, which provided the bedrock for much of the CLA, had expressed concern that the mere fact of foreseeability of risk was being taken as giving rise to a breach of duty without reference to the countervailing considerations now enumerated in section 5B(2).

Thus, a court is required to consider whether a reasonable person in the defendant’s position would have foreseen that his/her conduct created a ‘not insignificant’ risk of injury to the plaintiff.

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95 Similar provisions have been adopted in most other Australian jurisdictions.
97 (1980) 146 CLR 40 (‘Shirt’).
or a class of persons including the plaintiff. If so, the court must then consider what a reasonable person would have done by way of response to that risk. As Mason J commented in *Shirt*:

The perception of the reasonable man’s response calls for consideration of the magnitude of the risk and the degree of probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have.\(^{101}\)

5.61 In the context of climate change litigation, a court would be required to address itself to the risk that the particular type of harm concerned would come to pass as a result of climate change, rather than the risk of climate change occurring in its generality. Specifically, the court would need to consider whether a reasonable person in the position of the defendant should have anticipated the creation of such a risk. Self-evidently, this would present a variety of case-specific problems, differing according to the species of harm in question. Durrant has noted that climate change is an area in which ‘knowledge of the risk of harm has developed over time’,\(^{102}\) and as such the relevant standard of care may have heightened as scientific knowledge has increased and awareness of the potential consequences of climate change has become more widespread. The position and character of the defendant(s) may also be of relevance. The fact that the damage in issue may have resulted from an unpredictable chain of events need not bar a finding of breach of duty; if the general species of risk that ultimately materialised should have been anticipated, the unlikelihood of the actual damage involved is not necessarily problematic. This may be of particular relevance to litigation dealing with extreme weather events.

5.62 The issue of whether a defendant ought to have taken precautions against the risk of harm is required to be addressed prospectively, that is, by ‘look[ing] forward to identify what a reasonable person would have done, not backward to identify what would have avoided the injury’.\(^{103}\) It is in this context that

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\(^{102}\) See Durrant, *Legal Responses to Climate Change*, pp. 274–5 (noting that a series of international agreements and reports might have significance in this connection).

the factors identified in section 5B(2) would be considered, with a focus on the reasonableness of the conduct of the defendant. The idea that ‘the social utility of the activity that creates the risk of harm’ should be taken into account may be particularly problematic in climate change litigation. It is difficult to know how a court is generally expected to go about evaluating such utility.\(^{104}\) However, it would presumably be arguable that many, if not most, activities resulting in the emission of GHGs have some degree of usefulness, and the real issue would be whether precautions should have been taken to reduce their adverse effects at the relevant time. The reasonableness of taking particular precautions will be critical in this context. In some areas, it is conceivable that the only ‘precaution’ actually open to a defendant would have been to cease certain activities altogether. In other cases, it may be arguable that by failing to moderate or modify those activities (e.g. by making use of available technological improvements), a defendant failed to adhere to an acceptable standard of care.

5.63 One significant issue may relate to the degree to which society has become dependent on particular GHG-emitting activities. A court may be reluctant to hold that an emitter should have taken steps to reduce GHG emissions where doing so would have caused detriment or inconvenience to large sections of the population. Durrant points out that it may also be necessary to consider ‘any relevant statutory or customary standards’, observing that ‘[i]ndustries worldwide have historically emitted unabated [GHGs] since the time of the industrial revolution’.\(^{105}\) Moreover, where a particular sector has been subject to relevant government regulation, it may be difficult to argue that an entity which complied with the applicable regime has breached any duty of care. This point is likely to have particular salience if litigation is brought with respect to emissions generated in a jurisdiction subject to a comprehensive regime along the lines of the CPRS.\(^{106}\)

\(^{104}\) McDonald, ‘Legislative Intervention in the Law of Negligence’, 466.


\(^{106}\) See above at [5.09]–[5.14].
From a plaintiff’s point of view, causation is likely to raise two distinct problems. The first is doctrinal, and concerns the attribution of causal responsibility to a particular defendant in accordance with legal principle. The second is practical, and concerns the establishment by evidence of some kind of causal link between relevant negligence and the damage suffered. The difficulties likely to arise in the latter connection should not be underestimated. Even in the context of ordinary toxic tort litigation, the question of whether there is a factual connection between exposure to a particular product or substance and the harm suffered by a plaintiff may be complex, and the subject of conflicting, wide-ranging and expensive expert evidence. Climate change is likely to be significantly more complicated from an evidentiary point of view, and a defendant could be expected to commit significant resources to challenging the scientific foundation of any claim made against them. The science of climate change is complex, and in some respects uncertain. A plaintiff may be forced to rely upon evidence said to establish a statistical association between the negligence alleged and the harm said to have been suffered. Mank has observed that:

Because climate is affected by several factors interacting in complex ways, it is difficult for scientists to tease out what percentage of any climate change is affected by GHGs, and it is even more difficult to determine what percentage is affected by a specific polluter or group of polluters … Climate is a chaotic system affected by natural fluctuations in frequency and severity, so it is difficult to determine to what extent human activities, such as producing GHGs, affect those frequencies or variations.

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107 Cf. Durrant, Legal Responses to Climate Change, pp. 279–281. However, scientific uncertainty is often exaggerated by vested interests (see N. Oreskes and E. Conway, Merchants of Doubt (Bloomsbury Press, 2010), Ch. 6).

108 Cf. e.g. Seltsam Pty Ltd v. McGuiness (2000) 49 NSWLR 262.

The ‘elements’ of causation

5.65 In NSW, section 5D of the CLA provides that:

‘(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm (factual causation) and
(b) that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (scope of liability).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.’

5.66 Precisely how these provisions alter the common law is yet to be completely resolved. Previously, causation in negligence revolved around a holistic ‘commonsense’ approach, described in March v. Stramare (E & MH) Pty Ltd in terms specifically rejecting recourse to a structured, two-stage inquiry such as that

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110 Similar provisions have been enacted in other Australian jurisdictions (see Wrongs Act 1958 (Vic.), s. 51; Civil Liability Act 2002 (WA), s. 5C; Civil Liability Act 2003 (Qld), s. 11; Civil Liability Act 2002 (Tas.), s. 13; Civil Liability Act 1936 (SA), s. 34; Civil Law (Wrongs) Act 2002 (ACT), s. 45).

111 The onus of proving ‘any fact relevant to the issue of causation’ is explicitly placed on the plaintiff: Civil Liability Act 2002 (NSW), s. 5E.

112 In some jurisdictions, the relevant legislation refers to an ‘appropriate’ case: Wrongs Act 1958 (Vic.), s. 51(2); Civil Liability Act 2002 (WA), s. 5C(2).

113 In Western Australia, the corresponding legislation also specifically obliges the court to consider ‘whether and why the harm should be left to lie where it fell’: Civil Liability Act 2002 (WA), s. 5C(2).

114 Corresponding provisions in South Australia and the ACT are quite different in form (see Civil Liability Act 1936 (SA), s. 34(2); Civil Law (Wrongs) Act 2002 (ACT), s. 45(2)).

115 (1991) 171 CLR 506 (‘March’).
now apparently compelled by section 5D.\textsuperscript{116} Despite this, a series of decisions in NSW courts has taken the principles ‘embodied’ in section 5D to accord with the common law.\textsuperscript{117} In light of comments by various members of the High Court,\textsuperscript{118} this position may be untenable. The extent to which section 5D should be taken to signal something more than a semantic shift in the law of negligence remains unclear.\textsuperscript{119} Aside from the fundamental issue of how the existence of ‘elements’ of causation affects the shape of the relevant inquiry, the provision also gives rise to particular uncertainty with respect to the domain and parameters of section 5D(2).

**Factual causation**

5.67 Because the individual agents responsible for the increased atmospheric concentration of GHGs are so numerous and dispersed, it is difficult to imagine that a plaintiff could ever show that the negligence of one such agent was a precondition to the realisation of particular climate change impacts.\textsuperscript{120} Even a large-scale, long-term emitter of GHGs should be able to construct a compelling argument to the effect that its activities had made but a marginal relative contribution. This being the case, a plaintiff would likely be required to establish the fact of an ‘exceptional case’ in accordance with section 5D(2).

5.68 Problematically, section 5D(2) is extremely ambiguous.\textsuperscript{121} It establishes that the ‘but for’ test can be circumvented, but does not speak to when or why. The provision was ‘explained’ prior to its enactment as follows:

The rules for factual causation are set out, including the very limited exception to the ‘but for’ test. This exception was developed by the court for those rare cases, often in the dust diseases context, where there are particular evidentiary gaps. By including this exception in the bill it is not intended that the bill extend the common law in any way. Rather, it is to focus the courts on the fact that they should tread very carefully when considering a departure from the but for test.\textsuperscript{122}

5.69 In general, an ‘evidentiary gap’ has been said to exist where two (or more) putative tortfeasors are implicated in particular loss or damage but the evidence is incapable of establishing the nature or extent of their respective causal contributions. The Ipp Report identified two distinct species of case in which such a gap might be bridged:

- a case in which harm ‘is brought about by the cumulative operation of two or more factors, but … is indivisible in the sense that it is not possible to determine the relative contribution of the various factors to the total harm suffered’, such as \textit{Bonnington Casting v. Wardlaw},\textsuperscript{123} which was said to establish that one such factor ‘can be treated as a cause of the total harm suffered, provided it made a “material contribution” to the harm’;\textsuperscript{124} and

- a case in which harm has resulted from one (or more) of two (or more) separate acts of negligence, but it cannot be determined which caused the harm as a matter of fact. In \textit{Fairchild v. Glenhaven Funeral Services Ltd},\textsuperscript{125} the House of Lords held that in an appropriate case, any defendant whose conduct ‘materially increased the risk’ of the harm could be held liable.\textsuperscript{126}

5.70 Whether or not the \textit{Bonnington} principle should be regarded as ‘exceptional’ is debatable. Mendelson notes that whatever the specificity of its origins, the ‘material contribution’ idea ‘has … been applied indiscriminately in any legal context’.\textsuperscript{127} Indeed, explanations of causation at common law often eschewed reference to the

\textsuperscript{122} New South Wales, \textit{Parliamentary Debates}, Legislative Assembly, 23 October 2002, 5764.

\textsuperscript{123} [1956] AC 613.

\textsuperscript{124} Ipp Report, p. 109 [7.28].


\textsuperscript{126} Ipp Report, p. 110 [7.30].

\textsuperscript{127} Mendelson, ‘Australian Tort Law Reform’, 500.
‘but for’ test altogether and instead used language evocative of *Bonnington*. For example, in *Henville v. Walker*, McHugh J said:

If the defendant’s breach has ‘materially contributed’ to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage.\(^{128}\)

5.71 Despite this, recognition that a non-decisive ‘material contribution’ to harm amounts to a legal cause would now appear to be contingent on successful invocation of the ‘exceptional case’ mechanism contained in section 5D, with its broadly framed ‘whether or not and why’ inquiry. If this obstacle could be overcome, a critical question would concern the meaning of materiality in the circumstances of the case.\(^{129}\) Much would presumably depend upon how close an analogy could be drawn between climate change and the medical phenomena in issue in cases like *Bonnington*.\(^{130}\)

5.72 The decision in *Fairchild* has been extensively analysed elsewhere.\(^{131}\) For present purposes, it will suffice to say that it may be of limited relevance in the climate change context. *Fairchild* was a case in which the plaintiff’s injuries could have been caused by either or both of two different agents, but it was impossible to separate out their respective causal contributions. Crucially, each agent’s conduct was sufficient to have caused those injuries of itself, and all relevant sources of risk to the plaintiffs were tortious.\(^{132}\) By way of contrast, in a climate change case, a defendant could only (subject to evidentiary issues) be shown to have contributed in some finite degree to a generalised global process, which in turn could be shown to have caused harm to the

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\(^{128}\) (2001) 206 CLR 459, 493 [106] (footnote omitted); see also e.g. *Roads and Traffic Authority v. Royal* [2008] HCA 19, [85] (Kirby J), [143] (Kiefel J) (‘Royal’).


\(^{132}\) See *ibid.*, 17 citing *Fairchild* [2003] 1 AC 32, 40 [2], 66–7 [33].
plaintiff, or at least increased the risk that such harm would be inflicted. It could never be established or assumed that the activities of that particular defendant were of themselves sufficient to that process in motion, even in theory.

5.73 The question of causation would, therefore, revolve around whether making some definite contribution to a process resulting from the cumulative effect of a multitude of such contributions (as well as extrinsic causes) could or should be regarded as a legal cause – not whether a possible cause of harm should be deemed to be a cause-in-fact for reasons of justice and fairness.\(^{133}\) It would not be a case, like *Fairchild*, in which the defendant *may* have caused the harm by itself, *may* have caused the harm in conjunction with another party, or *may* not have contributed to the harm at all. This would seem to affirm the centrality of the materiality question alluded to above. That said, an approach based on *Fairchild* could potentially find some application in the specific factual context of extreme weather events.\(^{134}\)

Scope of liability

5.74 Section 5D(1)(b) of the CLA directs attention to the normative aspect of causation. The requirement that a decision-maker consider whether it is ‘appropriate’ to impose liability on a particular defendant would appear, on its face, to leave an extraordinary variety of factors in play. The Ipp Report observed that the kind of ‘policy’ matters going to ‘scope of liability’\(^{135}\) tend to require evaluation ‘case-by-case rather than by the application of detailed rules and principles’.\(^{136}\)

5.75 Some considerations which may be relevant to the ‘scope of liability’ in climate change litigation include:

- the significance of the causal contribution of the defendant to climate change relative to other causative factors (both

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\(^{134}\) See Chapter 17, at para. 17.61.

\(^{135}\) The Ipp Report specified that such matters included considerations typically discussed by reference to such concepts as ‘legal cause’, ‘real and effective cause’, ‘commonsense causation’, ‘foreseeability’ and ‘remoteness of damage’, although its treatment of these issues has been criticised (see McDonald, ‘Legislative Intervention in the Law of Negligence’, 474).

\(^{136}\) Ipp Report, 115 [7.45].
anthropogenic and natural). If the defendant’s negligent activities have made but a minor contribution, a court might conclude that those activities were not a ‘real’ or ‘effective’ or ‘commonsense’ cause of the particular damage alleged. It might also be said that natural phenomena ought to be taken to have ‘broken’ whatever chain of causation exists as a matter of fact;

- the degree to which the end result of the chain of causation (that is, the damage) is removed from the defendant’s negligent conduct. If the damage is distant in space or time, or has been produced in an unpredictable or improbable manner, a court might decline to make the defendant responsible for it;
- other policy considerations, including some of those which might also arise in connection with whether there has been a breach of duty, particularly those concerned with the broader consequences of imposing liability in the specific type of case in issue.

5.76 In the result, even if a plaintiff could find a means of establishing what section 5D of the CLA calls ‘factual causation’, we agree with Durrant that ‘it is highly probable that the Court would conclude that it is not appropriate to impose liability for the emission of [GHGs] and the resulting … harm’.  

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\textit{Nuisance}

5.77 The tort of private nuisance is concerned with serious and unreasonable interference with the use of, or rights over, land. By contrast, public nuisance is addressed to conduct causing general affront to a broader section of the population.\[138\] Both heads of nuisance may be enlivened by adverse effects associated with ‘emissions’, and in one sense public nuisance seems particularly apposite to the climate change context. However, broadly speaking, the law is poorly adapted to dealing with the consequences of large-scale industrial activity, and has rarely ventured beyond cases involving close geographical propinquity:

\[138\] See Chapter 17, at para. 17.43.
Nuisance law plays its most characteristic role in the resolution of small-scale local disputes between neighbouring landowners into which regulators cannot or will not intervene.\footnote{F. Trindade, P. Cane and M. Lunney, \textit{The Law of Torts in Australia}, 4th edn (Oxford University Press, 2007), p. 167. See also J. Conaghan and W. Mansell, \textit{The Wrongs of Tort}, 2nd edn (Pluto Press, 1999), p. 132.}

5.78 Considerations of space preclude a comprehensive examination of the principles underpinning the law of nuisance, but several general theoretical problems would seem to present themselves:

- nuisance cases concerning emissions have typically involved their direct transmission to affected locations. In a climate change case, emissions would have fed into a global phenomenon having incidental regional effects. Whether the law would accommodate a situation in which the activities of the defendant are not proximate to the pleaded interference in a conventional sense, and the defendant lacks genuine control over the interference, is open to question. It is probable that considerations of remoteness would come into play;\footnote{See R. Balkin and J. Davis, \textit{The Law of Torts}, 4th edn (LexisNexis Butterworths, 2008), [14.57].}

- the requirement that interference said to amount to nuisance be ‘unreasonable’ calls for a value judgement in the circumstances of the case.\footnote{See Trindade et al., \textit{The Law of Torts in Australia}, pp. 169–173, 195–6.} It is likely that many of the policy considerations referred to above in connection with negligence would also deter a court from holding GHG-emitting activities to be ‘unreasonable’ in the nuisance context;

- inherent in the ‘unreasonableness’ test is the idea that individuals must show a degree of tolerance for interferences or inconveniences that are endemic to a particular area. The law does not recognise an absolute right to protection from bothersome activities. Subjection to local manifestations of a phenomenon like climate change is in one sense a normal incident of human existence.

5.79 Thus, while the law of nuisance might have the potential to short-circuit some of the complications associated with the law of negligence, it has severe limitations and raises a number of doctrinal hurdles of its own. Moreover, an action in nuisance would
not permit a plaintiff to evade the kind of scientific difficulties and problems of proof that a negligence suit would raise.

Further issues

5.80 Difficulties in dealing with substantive law do not exhaust the problems that would face the proponent of a tort-based climate change lawsuit.142

Remedies

5.81 It is important to note that for all of the effort likely to be expended in pursuing a claim in respect of climate change impacts, any redress potentially available may be relatively nominal and/or ineffective to check the activities of GHG emitters. Of course, the significance of this concern will depend upon the objectives of the plaintiff in bringing proceedings.

5.82 In relation to damages, the CLA provides that in so far as a civil claim for economic loss or damage to property is concerned, a proportionate liability regime applies, such that:

the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant’s responsibility for the damage or loss.143

5.83 Given that any individual emitter’s causal contribution to climate change would probably be considered relatively nominal, it is difficult to imagine a court awarding any significant monetary damages to a plaintiff under such a provision. In any event, precisely how a court would go about determining the extent to which a defendant should be held responsible by reason of such contribution is less than clear. Some commentators have suggested that something resembling the ‘market share’ theory of liability that has been used by some courts in the United States to ‘approximate’ the responsibility of defendants in causally intractable drug liability cases144 could be adapted to the climate

142 See also below at [5.91]–[5.98] (dealing with costs in litigation).
143 Civil Liability Act 2002 (NSW), s. 35(1)(a).

5.84 It may be that a plaintiff would be more interested in seeking to restrain GHG-producing activities by means of a prohibitory injunction. The jurisdiction of a court to grant an injunction is discretionary. It would probably be difficult to persuade a court to grant any kind of interlocutory injunction in proceedings against a GHG emitter given that the plaintiff would need to show that his or her prospects of ultimate success were sufficient to justify restraining relevant activities in the meantime, taking account of the (probably significant) practical consequences of doing so.\footnote{See e.g. Z. Lipman and R. Stokes, ‘Shifting Sands: The Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land’, \textit{Environmental and Planning Law Journal}, 20 (2003), 406; J. McDonald, ‘The Adaptation Imperative: Managing the Legal Risks of Climate Change Impacts’ in Bonyhady and Christoff, \textit{Climate Law in Australia}, p. 124; P. England, ‘Heating Up: Climate Change and the Evolving Responsibilities of Local Government’, \textit{Local Government Law Journal}, 13 (2008), 209; B. Preston, ‘Climate Change Litigation’ (Paper presented at the ‘Climate Change Governance after Copenhagen’ Conference, Hong Kong, 4 November 2010), 10; Durrant, \textit{Legal Responses to Climate Change}, Ch. 20.} Moreover, a plaintiff seeking interim relief would ordinarily be required to provide an undertaking as to damages in connection with the effects of any prohibitory order sought.

\section*{Civil liability of government bodies}

5.85 Government bodies, and particularly local authorities, may face claims in tort as a result of their action or inaction in response to risks arising from climate change impacts.\footnote{See Durrant, \textit{Legal Responses to Climate Change}, Ch. 20.} However, the potential liability of such bodies is narrowed significantly by a patchwork of statutory exemptions and protections.\footnote{Beecham Group Ltd \textit{v.} Bristol Laboratories Pty Ltd (1968) 118 CLR 618; Australian Broadcasting Corporation \textit{v.} O’Neill (2006) 227 CLR 57.} As
Durrant concludes, the ambit of liability of government bodies in Australia is closely confined and diminishing further as these continue to expand.\(^{150}\)

A class or representative action?

5.86 In theory, proceedings seeking compensation for climate change harms would seem ideally suited to commencement under class or representative action rules.\(^{151}\) However, this may be unattractive where the extraction of money from the defendant is not the primary aim of the proponent. In particular, the commencement of the proceedings in class or representative form would compound their complexity, inflate the costs bound up in their outcome, present the defendant with additional non-substantive grounds of attack and increase the likelihood of inordinate interlocutory delay.\(^{152}\)

5.87 On the other hand, it may be that a public interest organisation would see strategic benefit in vesting proceedings with a ‘participatory’ character. Moreover, the aggregation of a large number of claims may have the effect of raising the stakes for the defendant, although it is difficult to say whether this would be of any net benefit to a plaintiff.

Assessment of private law litigation

5.88 It would be premature to conclude that tort litigation seeking to prevent or redress climate change impacts in Australia is bound to fail. However, as the foregoing discussion demonstrates, it is reasonable to expect that such litigation will raise a host of practical problems and prove difficult to accommodate under existing substantive law. Indeed, it is arguable, on a general level, that private law processes are ill-adapted to dealing with a problem in the nature of climate change. There is considerable force to the comment of Boutrous and Lanza that relevant issues:

must be confronted at the national and international levels by [government]. They cannot rationally be addressed through piecemeal

\(^{150}\) Ibid., p. 297.

\(^{151}\) See e.g. Supreme Court Act 1986 (Vic.), Pt. 4A; Uniform Civil Procedure Rules 2005 (NSW), rr. 7.4–7.5.

\(^{152}\) See generally P. Cashman, Class Action Law and Practice (The Federation Press, 2007).
and ad hoc tort litigation seeking injunctive relief – or, even worse, billions of dollars in retroactive and future money damages – against targeted industries for engaging in lawful and comprehensively-regulated conduct.\footnote{5.89}{153}

Nonetheless, in the near term, carefully targeted private law litigation may have value as part of broader efforts to draw public notice to aspects of climate change, stimulate political responses and influence corporate behaviour. Such litigation may, even if only indirectly, play an important role in deterring hazardous conduct.\footnote{5.89}{154}

\section*{(D) Practicalities: litigation costs}

The costs involved in maintaining climate change litigation in Australia are liable to present an immense problem, even for well-resourced litigants. The expense involved in mounting an action is likely to be significant, particularly where a substantial volume of scientific and other expert evidence is called for. Moreover, a party is also ordinarily at risk of being ordered to pay the legal costs of his or her opponent if unsuccessful.\footnote{5.90}{155} Such costs may far exceed that party’s pecuniary interest, if any, in the outcome of the case. Accordingly, it is hardly surprising that costs have been identified by the Environment Defenders Office (Vic.) as ‘the major barrier to environmental litigation in Australia’.\footnote{5.91}{156}

In most Australian jurisdictions, the ordinary rule that ‘costs follow the event’ may be displaced at the discretion of the court.\footnote{5.91}{157}


\footnote{5.91}{Cf. \textit{Royal [2008] HCA 19, [114]} (Kirby J).}

\footnote{5.91}{The risk may be lessened by particular statutory regimes, notably in the merits review context (see e.g. Bates, \textit{Environmental Law in Australia}, [18.7]). In some jurisdictions (e.g. VCAT) costs are not awarded as a matter of course.}

\footnote{5.91}{Environment Defenders Office (Victoria), ‘Costing the Earth? The Case for Public Interest Costs Protection in Environmental Litigation’ (September 2010), 6.}

\footnote{5.91}{On the principles relevant to the exercise of costs discretion in the Federal Court, see \textit{Ruddock v. Vadarlis (No. 2)} (2001) 115 FCR 229, at 234–5 [11] (Black C and French J) (‘\textit{Vadarlis}’). In proceedings before the NSWLEC, a recent amendment to the rules specifically provides that the Court may exercise its discretion not to order costs in public interest litigation (see Land and Environment Court Rules 2007 (NSW), r. 4.2; \textit{Gray v. Macquarie Generation (No. 2)} [2010] NSWLEC 82; \textit{Delta Electricity v. Blue Mountains Conservation Society Inc.} [2010] NSWCA 263, [203] (Basten JA) (‘\textit{Delta}’).}
However, courts have typically been cautious in circumventing that rule in favour of litigants claiming to represent the public interest, and in practice such litigants are rarely insulated from the risk of having to pay other parties’ costs if they lose. In *Oshlack v. Richmond River Council*, Kirby J noted that:

Courts, whilst sometimes taking the legitimate pursuit of public interest into account, have also emphasised, rightly in my view, that litigants espousing the public interest are not thereby granted an immunity from costs or a ‘free kick’ in litigation.

5.92 The reluctance of the courts to grant costs concessions to public interest litigants would appear partly to arise from the amorphous quality of the public interest concept, which makes it difficult to consistently justify exceptions to the ordinary rule. It has often been noted that many cases involve a public interest of some kind. It has also been emphasised that even where a litigant has genuinely and conscientiously sought to pursue a public interest, regard must be had to the position of any defendant unwillingly dragged into court. In *Oshlack*, McHugh J pointedly observed that ‘sympathy is not a legitimate basis to deprive a successful party of his or her costs’.

5.93 In general, only a confluence of special circumstances is likely to convince a court to depart from the ordinary costs rule, where it

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163 See e.g. *Save the Ridge* [2006] FCAFC 51; *Wilderness Society Inc. v. Turnbull* [2007] FCA 1863; *Your Water Your Say Inc. v Minister for the Environment, Heritage and the Arts (No. 2)* [2008] FCA 900 (‘YWYS No 2’). In *Engadine Area Traffic Action Group Inc. v. Sutherland Shire Council (No. 2)* [2004] NSWLEC 434, [15], Lloyd J referred to five factors to be taken into account in determining whether litigation was in the public interest: (1) the public interest said to be served by the litigation; (2) the size and nature of the group of people said to be affected; (3) whether the case involves enforcement of public
The fact that particular climate change litigation raises issues of some novelty may not suffice to compel such departure. Although Australian courts have sometimes chosen to make no orders as to costs in public environmental law cases, anticipating when a court will be receptive to the claim that a litigant has acted in the public interest remains difficult. Uncertainty as to the costs consequences of bringing particular proceedings may of itself ensure that they are never seriously contemplated, especially when it is likely that success at first instance will simply trigger appeal proceedings that magnify the proponent’s costs exposure. Mechanisms by which the attitude of a court to the issue of costs may be anticipated are presently very limited.

The Wildlife Whitsunday case provides a vivid illustration of the costs implications of environmental litigation. As Ruddock observes:

The … case [only] occurred because the client was prepared to risk their organisation to run the litigation. As an organisation with no paid staff or recurrent funding, they were able to take this risk. It was also possible because they obtained a fee waiver for the Federal Court fees, and pro bono … legal assistance …

As a result of the adverse costs order that resulted from the unsuccessful litigation, Wildlife Whitsunday voluntarily agreed to wind up their organisation.

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164 Cf. Victorian Law Reform Commission, Civil Justice Review, Report No. 14 (2008), p. 670. It should be noted that the question of costs does not require ‘all or nothing’ decision (see e.g. Mees v. Kemp (No. 2) [2004] FCA 549, [20]–[21] (Weinberg J)).

165 See e.g. Oshlack (1998) 193 CLR 72; Blue Wedges Inc. v. Minister for Environment, Heritage and the Arts (2008) 165 FCR 211; Minister for Planning v. Walker (No. 2) [2008] NSWCA 334. In other cases, courts have declined to depart from the usual rule (see e.g. YWYS No. 2 [2008] FCA 900; Hastings Point Progress Association Inc. v. Tweed Shire Council (No. 3) [2010] NSWCA 39). In some proceedings, costs have been apportioned (see e.g. Wilderness Society Inc. v. Hon Malcolm Turnbull, Minister for Environment and Water Resources [2008] FCAFC 19; Lansen v. Minister for Environment and Heritage (No. 3) [2008] FCA 1367.

166 See Environment Defenders Office, ‘Costing the Earth?’, 20.


168 Wildlife Whitsunday [2006] FCA 736. See above at [5.33].

In sum, even with a respectable substantive case and exemplary motives, the proponent of climate change related proceedings will frequently be required not only to foot the considerable expense of assembling an arguable claim, but also to accept the real risk of an adverse costs award in the event of failure. The difficulties are likely to be acute where the use of private law against private parties is contemplated.

Costs limiting orders and security for costs

In order to mitigate the deterrent effect of a potential costs order, a 'public interest' litigant may seek an order, early in the proceedings, imposing a limit on any costs which may be ordered at their conclusion.\(^{170}\) In the Federal Court, such an order has been held to also limit the costs able to be recovered by such a litigant in the event of success.\(^{171}\)

On the other hand, a defendant may seek an order that the plaintiff provide an amount of money or guarantee by way of security to meet some or all of the defendant’s costs at the conclusion of the proceedings.\(^{172}\) Although security for costs orders are not normally made against individual litigants who are impecunious, a corporate litigant which is unlikely to be able to meet any order for costs made against it may be ordered to provide security. Where an order for security for costs is made against a public interest litigant, it may have the (no doubt sometimes intended) effect of terminating or staying the litigation. In the NSWLEC, a security for costs order was recently made against a conservation group in a pollution case.\(^{173}\)


\(^{171}\) See e.g. Corcoran [2008] FCA 864, [5] (Bennett J); cf. Delta [2010] NSWCA 263, [187]–[188] (Basten JA) (noting that 'the language of the [Uniform Civil Procedure Rules 2005 (NSW)] imposes no such constraint').

\(^{172}\) See e.g. Uniform Civil Procedure Rules 2005 (NSW), r. 42.21; Corporations Act 2001 (Cth), s. 1335; Land and Environment Court Rules 2007 (NSW), r. 4.2(2).

(E) Other law

5.98 Climate change has supplied the impetus for, or the backdrop to, legal proceedings in a range of other contexts, and it is reasonable to assume that different kinds of cases with climate change connections will continue to appear.

Trade practices law

5.99 The Australian Consumer Law allows ‘any person’ to seek injunctive and/or declaratory relief in respect of misleading or deceptive conduct, or conduct likely to mislead or deceive, in trade or commerce.⁷⁴

5.100 The Australian Competition and Consumer Commission (‘ACCC’) is the federal body charged with supervising compliance with trade practices law, and has examined a range of claims made by businesses to the effect that their products or services have low or neutral climate change impacts.⁷⁵ For example, the ACCC took action against GM Holden Ltd, the distributor of Saab vehicles in Australia, which claimed in its advertising that Saab cars offered ‘carbon neutral’ motoring. The Federal Court granted declarations that GM Holden had made false and misleading statements, contravening sections 52 and 53(c) of the Trade Practices Act 1974 (Cth).⁷⁶ The ACCC has recently indicated that enforcement action in respect of ‘greenwashing’ in advertising remains a priority.⁷⁷

Criminal law

5.101 Climate change is likely to intersect with the criminal law in a variety of ways, which may multiply if concern about climate change

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¹⁷⁴ See Competition and Consumer Act 2010, Sch. 2. The ACL came into force on 1 January 2011, superseding provisions found in twenty Commonwealth, state and territory laws. These laws will continue to apply to transactions and conduct that occurred before the coming into force of the ACL. See www.consumerlaw.gov.au.

¹⁷⁵ See Durrant, Legal Responses to Climate Change, pp. 321–5; Preston, ‘Climate Change Litigation’, 12–16.

¹⁷⁶ Australian Competition and Consumer Commission v. GM Holden Ltd (ACN 006 893 232) [2008] FCA 1428. The Trade Practices Act 1974 (Cth) was the federal precursor to the ACL.

becomes more widespread, climate change impacts become more severe or relevant regulatory schemes proliferate. A recent report produced by the Australian Institute of Criminology observes, for example, that carbon offsetting and emissions trading schemes create new opportunities for fraud and corruption.\textsuperscript{178} The report further notes that climate change impacts may spur an increase in crimes such as water theft, illegal fishing and wildlife poaching.\textsuperscript{179}

5.102 Increasing concern about climate change may also see a rise in civil unrest.\textsuperscript{180} Criminal proceedings have already been brought against climate change activists for activities involving alleged damage to, or interference with, private property and public infrastructure (such as ports and railways used to transport coal for export).\textsuperscript{181} In the United Kingdom, such activists have sometimes been able to invoke lawful justification as a defence.\textsuperscript{182} Defendants in Australia have typically had less success in avoiding conviction, except in cases where there has been no demonstrable physical interference with, or alteration to, property.\textsuperscript{183}

Public international law

5.103 It is possible to identify three types of international proceedings in which Australia may become involved. The first are what might be termed ‘progressive’ proceedings designed to bring positive outcomes for global climate policy by enforcing emissions cuts in an international court or tribunal like the International Court of Justice or the International Tribunal for the Law of the Sea. Australia could conceivably be an applicant or a respondent in such proceedings. The second category of international litigation is ‘regressive’ in the sense that it may be brought to prevent

\textsuperscript{178} S. Bricknell, \textit{Environmental Crime in Australia} (Australian Institute of Criminology, 2010), p. 6.
\textsuperscript{179} Ibid.
\textsuperscript{180} See A. Bergin and R. Allen, \textit{The Thin Green Line: Climate Change and Australian Policing} (Australian Strategic Policy Institute, 2008), p. 5.
\textsuperscript{181} Protesters may also be the target of less conventional legal proceedings (see e.g. T. Anthony, ‘Quantum of Strategic Litigation – Quashing Public Participation’, \textit{Australian Journal of Human Rights}, 14(2) (2009), 1).
\textsuperscript{182} See Chapter 17, at paras. 17.79–17.80.
\textsuperscript{183} \textit{Director of Public Prosecutions v. Fraser and O’Donnell} [2008] NSWSC 244.
Australia or other States from implementing policies to reduce emissions if these have the effect of interfering with other norms such as those relating to trade liberalisation. A third, more likely, category of international proceedings comprises ‘administrative’ proceedings such as those available under the Kyoto Protocol compliance regime to ensure that Australia adheres to its obligations.  

5.104 In relation to the first category, there are several norms of both customary and conventional character that could be used by States impacted by climate change as a basis for proceedings against States that have failed to take steps to limit GHG emissions. Several Pacific island States specifically declared on signing and ratifying the FCCC and Kyoto Protocol that joining the climate regime in no way constituted a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change. As with domestic tort law proceedings, international proceedings based on State responsibility for transboundary damage are unlikely to be successful, primarily due to the difficulty of determining causation of specific climate change impacts.

5.105 Potentially more promising ‘progressive’ litigation is that making specific reference to treaty provisions that have a bearing on climate change policy. An example is the 1972 World Heritage Convention, which imposes obligations upon States Parties such as Australia to protect and transmit to future generations outstanding world cultural and natural heritage. The two world heritage sites in Australia most vulnerable to climate change are the Great Barrier Reef (which has already experienced widespread coral bleaching as a result of elevated water temperatures) and Kakadu National Park (which is threatened by rising sea levels). Other ‘progressive’ proceedings could be pursued before human rights complaints bodies such as the UN Human Rights

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Committee, which Australia has recognised as having competence to examine individual human rights communications.\textsuperscript{187}

5.106 ‘Regressive’ proceedings through the World Trade Organization (‘WTO’) dispute settlement system appear increasingly likely if States lose patience with the slow pace of negotiations on the climate change regime and seek to take unilateral measures to impose trade restrictions on the import of carbon-intensive products. Although the WTO has developed an important body of jurisprudence accepting the legitimacy of certain unilateral trade measures designed to protect exhaustible natural resources,\textsuperscript{188} how it would address a measure such as a border tax arrangement implemented as part of a national ETS remains highly uncertain. The attitude of the Australian government to such measures is also unclear, as it has generally been a strong and active supporter of the global trade liberalisation agenda, and has participated as a third party in proceedings in the WTO supporting challenges to measures such as the European Union’s moratorium on the import of genetically modified agricultural products.\textsuperscript{189}

5.107 Finally, Australia could be the target of ‘administrative’ proceedings within the climate change regime itself if it fails to meet its procedural or substantive obligations under the Kyoto Protocol or its successor. The Kyoto Protocol compliance procedure has begun to be utilised to deal with a number of what are termed by the regime to be ‘questions of implementation’, with alleged or actual non-compliance with procedural obligations by four States (Greece, Canada, Croatia and Bulgaria) considered by the Enforcement Branch of the compliance system.

(F) Conclusion

5.108 Bonyhady has observed that despite the heterogeneity of the Australian public law cases, it is possible to discern a nascent body


\textsuperscript{188} See T. Stephens, International Courts and Environmental Protection (Cambridge University Press, 2009), Ch. 10.

of ‘climate law’, with the science of climate change and issues of causation and proof being drawn into sharper focus.\textsuperscript{190} It is likely that aspects of the public law jurisprudence will influence the approach of courts to private law climate change litigation, if and when it materialises. However, climate change as a legal subject matter raises formidable substantive and practical problems, and it is difficult to predict the direction in which the relevant law will develop.

China

DENG HAIFENG

(A) Introduction

The Chinese legal system

6.01 The People’s Republic of China (‘PRC’/‘China’) is situated in Eastern Asia, bounded by the Pacific in the East. The third largest country in the world, after Canada and Russia, it has an area of 9.6 million square kilometres, or one-fifteenth of the world’s landmass. China is a united and multi-ethnic country, with a unitary system of government yet a multi-tiered legal system. The development of the current legal system began in the early 1980s. China has a long tradition of civil law systems dating back to the Qing Dynasty. This tradition has to a large extent been maintained to the present day. There is a vast network of laws and regulations in China. As of 2010, there are a total of 236 national laws, more than 690 administrative regulations and more than 8,600 local laws and regulations.¹

6.02 The main sources of the law in China include the laws enacted by the National People’s Congress (‘NPC’), which have the highest authority, administrative regulations enacted by the State Council, which cannot be in conflict with statutes, and local laws and regulations enacted by provincial legislatures and governments. The case law of courts and tribunals are not official sources of law, although decisions of the Supreme People’s Court are used in practice to guide lower courts when the law is unclear.

Under the Organic Law of the People’s Courts (1983), judicial power is exercised by the courts at four levels: (i) basic people’s courts: courts at county or district level; tribunals may also be set up in accordance with local conditions; (ii) intermediate people’s courts: prefecture-level courts; (iii) higher people’s courts: provincial-level courts; and (iv) the Supreme People’s Court (also known as the National Supreme Court, or Supreme Court).

The highest court in the judicial system is the Supreme People’s Court in Beijing, directly responsible to the NPC and its Standing Committee. It supervises the administration of justice by the people’s courts at various levels. Cases are decided within two instances of trial in the people’s courts. This means that, from a judgment or order of first instance of a local people’s court, a party may bring an appeal only once to the people’s court at the next highest level, and the people’s procuratorate may appeal a court decision to the people’s court at the next highest level. Additionally, judgments or orders of first instance of the local people’s courts at various levels become legally effective if, within the prescribed period for appeal, no party makes an appeal. Judgments and orders rendered by the Supreme People’s Court as court of first instance become effective immediately.

The governmental stance on climate change

As a responsible country, China has paid and continues to pay great attention to its responses to climate change, in part by incorporating it as an important strategic goal in its economic and social development. This has entailed adopting a series of active policies and actions that, coupled with perfection of the relevant laws and regulations, has produced outstanding results. Climate change is not only a scientific, political and economic issue, but also a legal issue. Therefore China has tried its best to perfect its laws and regulations on climate change. This has resulted in the current legal regime, where the liabilities caused by climate change are enumerated in the relevant laws and regulations.

2 www.lawinfochina.com/Legal/Display_1.asp.
3 www.lawinfochina.com/Legal/Display_1.asp.
In order to address climate change effectively, the Chinese government established in June 2007 a National Leading Committee on Climate Change based on the former National Coordination Committee on Climate Change. It is led by the Prime Minister, Wen Jiabao, and involves twenty ministries and government departments. Amongst these twenty ministries, the National Development and Reform Commission (NDRC) is the key member:

The Department of Climate Change of the NDRC is responsible for comprehensively analyzing the impact of climate change on social-economic development; organising and coordinating the formulation of key strategies, plans and policies dealing with climate change; taking the lead in the implementation of the United Nations Framework Convention on Climate Change, and in collaborating with other interested Parties in international climate change negotiations; coordinating and carrying out international cooperation in response to climate change and related capacity building; organising and implementing the work relating to clean development mechanism (‘CDM’); and undertaking concrete work assigned by the National Leading Group Dealing with Climate Change, Energy Conservation and Emission Reduction.

The NDRC can use all the administrative measures at its disposal such as issuing orders or commands, implementing national plans or drafting policies, etc., for addressing climate change.

Currently, there is no law directly aimed at climate change. However, this chapter examines existing rules and regulations in three clusters. The first cluster relates to policies such as China’s National Climate Change Programme. The second encompasses legislations covering a broad spectrum of issues ranging from environmental protection, climate change and energy

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4 The member organisations include: State Council; Ministry of Foreign Affairs; National Development and Reform Commission; Ministry of Science and Technology; Ministry of Industry and Information Technology; Ministry of Finance; Ministry of Land and Resource; Ministry of Environment Protection; Ministry of Housing and Urban-Rural Development; Ministry of Transport; Ministry of Water Resources; Ministry of Agriculture; Ministry of Commerce; Ministry of Health; National Bureau of Statistics; State Forest Administration; China Academy of Science; China Meteorological Administration; National Energy Bureau; Civil Aviation Administration of China; State Oceanic Administration.

5 A list of the Main Functions of Departments of the NDRC is available at http://en.ndrc.gov.cn/mfod/t20081218_252201.htm.
conservation to emissions reduction. These laws are grounded in constitutional law, basic and specific laws of environmental protection and laws on energy utilisation, and they find their expression in government rules and regulations. Legal liability arising from their infraction can be divided into public law and private law liability. While private law liability manifests itself in terms of tortious liability, public law liability is divided into administrative liability, governed by the laws on energy utilisation and specific laws of environmental protection, and criminal liability. The third and final cluster relates to initiatives from civil society.

**National ‘11th Five-Year Plan’ on environmental protection**

In November 2007, the State Council issued the National ‘11th Five-Year Plan’ reflecting the growing awareness of climate change issues in China. The 11th Five-Year Plan specifies targets for the development of the environmental industry and provides the policy orientations for the legislations addressing climate change. It focuses on greenhouse gas (‘GHG’) emission control and aims to strengthen energy conservation – optimise the structure of energy consumption and enhance energy efficiency; control and mitigate GHG emissions, especially in industrial production; develop renewable resources; strengthen methane popularisation in rural areas; capture and reuse landfill gas emissions in urban areas, control the speed and rate at which methane emissions are increased; improve forests coverage, thereby enhancing carbon sinks; build capacity to address climate change, and strengthen the capacity to monitor and statistically analyse GHG emissions. In March 2011, the State Council issued the National ‘12th Five-Year Plan’, which continues the measures listed in the 11th Five-Year Plan to address climate change. The Proposal of the State Council of China concerning the 12th Five-Year Plan for National Economic and Social Development specifically mentions ‘actively addressing climate change’, and ‘taking significant reduction of energy consumption and CO₂ emission as restrictive indexes, so as to effectively control GHG emissions’.

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The target of the energy consumption per unit of GDP reduction in the 12th Five-Year Plan is 16 per cent.\footnote{See http://news.sina.com.cn/c/2010–10–27/204721364515.shtml.}

**National Plan for Addressing Climate Change**

6.09 Also in 2007, China formulated the National Plan for Addressing Climate Change (the ‘National Plan’),\footnote{Available at www.ccchina.gov.cn/WebSite/CCChina/UpFile/File189.pdf.} which is the first overall policy document addressing climate change. It is also the first national plan on climate change to be issued by a developing country. The National Plan requires China to closely coordinate its response to climate change and the implementation of its sustainable development strategy with building a resource-efficient, environment-friendly and innovative society. This entails focusing on GHG mitigation on the one hand and on enhancing the capability to address climate change by clearly prescribing targets on the other. The National Plan can therefore be seen as the fundamental framework document for China’s response to climate change. It plays a direct role in China’s implementation of the FCCC and the Kyoto Protocol.\footnote{Guo Dongmei, Research on Legal Systems for Addressing Climate Change (Beijing: Law Press, 2010), p. 142.} Following the adoption of the National Plan, the provinces, autonomous regions and municipalities directly under the Chinese Central Government adopted their own plans and programmes along with the industries concerned, adapting the national strategy on addressing climate change to the political and practical realities prevalent in those areas.

**White Paper on China’s Policies and Actions on Addressing Climate Change**

6.10 In 2008, China issued a White Paper on China’s Policies and Actions on Addressing Climate Change,\footnote{‘China’s Climate Change Policies and Actions’, published on 4 June 2007 in Beijing, available at www.gov.cn/zwgk/2008–10/29/content_1134378.htm.} which discusses the impact of climate change on the country, as well as its responses to climate change: it outlines strategies and objectives for addressing climate change, policies and actions for mitigation of and adaptation to climate change, and building institutions and mechanisms for coping with climate change. In 2009 and
China is yet to enact a dedicated law on climate change. Only the policies as articulated in the Plans and documents discussed above exist. However, there are several provisions in existing laws that have a bearing on climate change. These can be found mainly in the relevant sections of environmental, administrative and economic laws, and to a lesser extent in civil and criminal laws. In actual fact, before the adoption of the FCCC and the Kyoto Protocol China had adopted a number of laws and regulations with a bearing on climate change, but these were not incorporated into the legal framework on climate change at that time. The laws that have a bearing on climate change include the following:

**Constitution**

China’s Constitution of 1982, which embodies the fundamental guiding principles according to which China is governed, is the basis for formulating other laws. Although the Constitution is silent on the issues of climate change or GHG emission reduction, Article 26 states:

> The State protects and improves the living environment and the ecological environment, and prevents and controls pollution and other public hazards. The State organises and encourages afforestation and the protection of forests.

The protection and improvement of the environment and the prevention and control of pollution and other public hazards will have an impact on GHG emissions either directly or indirectly. Afforestation will also be critical to reducing GHG emissions.

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13 Article 26, the Constitution of the People’s Republic of China, 1982.
Basic law on environmental protection

6.14 The Environmental Protection Law (1989) (‘EPL’) is the basic law on environmental protection in China, establishing the framework and legal basis for environmental protection. It clearly specifies ‘air’ as one of several environmental factors thus bringing air under the regulatory and protective framework of environmental law. Article 24 of the EPL deals with prevention from waste, air and dust pollution, and damage to the environment. As provided by the EPL, a unit which is likely to cause environmental pollution and other public hazards shall incorporate environmental protection measures into its plans. These include establishing responsibilities for environmental protection, and adopting effective measures to prevent and control the pollution and harms caused to the environment by waste (whether gas, water or residues), dust, radioactive substances, noise, vibration and electromagnetic radiation generated in the course of production, construction or other activities.\(^{14}\) Article 24 provides a legal basis for the control of air pollution, which could be used in a climate change context.

Laws on utilisation of energy

6.15 The reasonable utilisation of energy plays an important role in energy conservation and emission reduction in China. Therefore, the laws on energy utilisation constitute the most important part of the climate change legislation. These laws include the Electricity Law of 1995, the Coal Law of 1996, the Energy Conservation Law of 1997 (amended in 2007) (‘ECL’) and the Renewable Energy Law of 2005. In addition, an ‘Energy Basic Law’ to unify China’s four energy laws is being prepared. These laws establish a dense system of rules that help control GHG emission. For example, the ECL states:

the State implements a system of accountability for energy conservation targets and a system for energy conservation evaluation under which the fulfilment of energy conservation targets is one element taken into consideration in the evaluation of the local people’s governments and their responsible persons.\(^{15}\)

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And Article 7 of the ECL states:

the State implements an industrial policy conducive to energy con-
servation and environmental protection, restricts the development of
industries of high energy consumption and high pollution, and devel-
ops energy-saving and environmentally friendly industries.\textsuperscript{16}

Articles 68 and 86, which deal with the imputation of legal liability, are also of interest.\textsuperscript{17}

Specific laws on environmental protection

6.16 Some provisions in China’s Law on the Prevention and Control of Environmental Pollution by Solid Waste (2004) (the ‘Solid Waste Law’) have a bearing on GHG emission reduction and control. For instance, Article 43 of the Solid Waste Law states:

Urban people’s governments shall, in a planned way, improve the fuel mix and develop coal gas, natural gas, liquefied gas and other clean energy for use in cities. The relevant departments of an urban people’s government shall arrange for the supply of clean vegetables in cities, in order to reduce the quantity of urban household waste. The relevant departments of an urban people’s government shall make overall plans to rationally establish networks for purchasing household waste, in order to promote the recycling of such waste.\textsuperscript{18}

The use of clean energy is certain to reduce GHG emissions effectively.

6.17 China’s Law on the Prevention and Control of Atmospheric Pollution (2000) (‘APL’) takes the development and utilisation of clean energies as the focal point of air pollutant emission controls and therefore plays an important role in changing China’s energy structure and in controlling GHG emission. According to the APL, ‘the State shall encourage and support the development and

\textsuperscript{16} Article 7, \textit{ibid.}
\textsuperscript{17} Article 68, \textit{ibid.}: ‘Where any organs in charge of approving or verifying fixed assets investment projects approve or verify the construction of projects not in compliance with statutory standards for energy conservation in violation of this Law, the personnel directly in charge and other directly responsible personnel shall be given disciplinary sanctions.’

Article 86, \textit{ibid}: ‘If any State functionary abuses his power, is derelict in his duties, or practices graft in energy conservation administration, which constitutes a criminal offence, criminal liability shall be pursued. If such act is not serious enough to constitute a criminal offence, disciplinary sanctions shall be imposed according to law.’

\textsuperscript{18} Article 43, Solid Waste Law.
utilisation of clean energies such as solar energy, wind energy and water energy', and the relevant departments under the State Council and the local people’s governments at various levels shall adopt measures to improve the urban energy structure and popularise the production and utilisation of clean energy'.

6.18 China’s adoption of the Promotion of Clean Production Law of 2002 (‘Clean Production Law’) shifted the emphasis from traditional end-of-pipe pollution control to the prevention of pollution. Clean production refers to the continued application of the environmental strategy of prevention to energy utilisation, production process and product design for all industrial enterprises. The emphasis is on improving the utilisation rate of resources and energies simultaneously with reducing the generation, discharge and toxicity of pollutants, so as to reduce the risks for human beings and the environment. The provisions on utilisation of clean energy and clean production in this law may effectively control GHG emissions. For example, this law establishes a duty on the governments at all levels to purchase products conducive to energy and water conservation, waste reuse, environmental protection and resource conservation.

6.19 In 2008, China adopted the Law on Circular Economy Promotion (‘CEPL’). The CEPL aims to improve the efficiency of resource utilisation, protect and improve the environment and realise sustainable development. It targets the activities conducted in the processes of production, circulation and consumption, by promoting reuse, recycling and related measures, thereby helping to reduce GHG emissions. The specific legal provisions on the control of GHG emissions can be found in Article 17 dealing with the system of labelling resource efficiency, and Article 18 pertaining to the system of eliminating the outdated production technologies, techniques, equipment and products.

19 Article 9, APL. 20 Article 25, ibid.
22 Article 16, Clean Production Law.
23 Article 18, CEPL: ‘The general administration for promoting circular economy under the State Council shall promulgate the catalogue of technologies, processes, equipment, materials and products that are encouraged or restricted or abandoned by the government. The production, import and sale of equipment, materials and products under the catalogue of abandonment shall be prohibited; and the use of technologies, processes, equipment and materials under the catalogue of abandonment shall be prohibited.’
6.20 Forests play an important role in regulating the climate by trapping and storing CO$_2$ and generally protecting the environment. Consequently, China’s Forests Law of 1998, dealing with the administration and protection of forests, forest cutting and planting and the relevant legal liabilities, constitutes an important part of the legal regime relevant to climate change in China. Better forest management, including the control of deforestation, can play a key role in controlling climate change.

6.21 In the current legal system, all the above laws fall under the rubric of environmental law. Although these laws are implemented by different administrative entities, they have similar legal aims and adopt similar methods in implementation and enforcement. Several provisions of these laws have an indirect bearing on climate change, inter alia through strengthening forest protection, promoting the development of a circular economy, and encouraging clean production methods to enhance environmental quality.

Administrative regulations and rules

6.22 China has adopted many administrative rules and regulations on energy conservation and emission reduction in pursuance of its commitment towards fighting climate change. These regulations aimed at controlling GHG emissions include the Measures for Administration of Efficient Use of Electricity (2000), the Measures for Administration of Energy Efficiency Labelling (2004) and the Provisions on Administration of Energy Conservation in Civil Construction (2008). For example, according to Article 3 of the Measures for Administration of Energy Efficiency Labelling (2004), the country is required to adopt a nationwide unified energy-efficiency labelling scheme for energy-consuming products that are widely used and have greater energy-saving potential. The government is required to develop and issue a list of energy-efficiency labelled products of the PRC (the ‘List’) and publish national energy-efficiency standards, implementation rules, and label patterns and specifications.24

6.23 In addition, the NDRC, in conjunction with the Ministry of Science and Technology and the Ministry of Foreign Affairs,

issued the Measures for Administration of Operation of Clean Development Mechanism Projects\textsuperscript{25} (‘Measures for Administration’) in 2005 as the special administrative regulation on GHG emissions. The core of the Clean Development Mechanism (‘CDM’) is to allow developed countries to acquire the certified emission reductions by cooperating with developing countries at project level. The Measures for Administration designate the NDRC as the competent authority to develop CDM projects on behalf of the Chinese government. Additionally, the National Coordination Committee on Climate Change has been designated as the review and coordination authority for important CDM policies.

6.24 CDM projects in China are primarily focused on the improvement of energy efficiency, development and utilisation of new and renewable energy and the reclamation of methane and coal-bed methane. To further develop the CDM in China, the Measures for Administration stipulate the license conditions, specific enforcement procedures and the principles guiding the relationship between the Measures for Administration and the FCCC or the Kyoto Protocol.

6.25 In addition to State and administrative rules and laws, local rules have been formulated to address local conditions. Some instances are the Provisions of Tianjin City on Administration of Energy Conservation in Construction (2006), the Regulations of Shanxi Province for Energy Conservation (2000) and the Measures of Anhui Province for Encouragement of Energy Conservation (2008). These local rules, as part of China’s legislation on climate change, prescribe a series of policies and measures aimed at GHG emission reduction.

6.26 The above five sections together constitute the basic framework of China’s legislation on climate change. To these domestic rules, one needs to add the FCCC, the Kyoto Protocol and other international instruments relating to climate change and GHG emission reduction and to which China is a Party. Other international instruments concluded by China include the China-EU Joint

\textsuperscript{25} \url{http://cdm.cccchina.gov.cn/UpFile/File579.pdf}. The Measures for Administration were issued after amendment on the basis of the Provisional Measures for Administration of Operation of Clean Development Mechanism Projects published on 30 June 2004.
Declaration on Climate Change (2005),26 the Joint Statement on CDM Cooperation between the Chinese and French Governments (2007)27 and the Memorandum on Climate Change Cooperation between the Chinese and Australian Governments (2004).28 These documents define the rights and entitlements of, as well as obligations placed on, countries.

Emissions sources and energy mix

6.27 The National GHG Inventory for China in the year 2005 includes estimated net anthropogenic GHG emissions from the energy sector, industrial processes, agriculture, land-use change and forestry, and waste, and identifies these gases as carbon dioxide (CO$_2$), methane (CH$_4$) and nitrous oxide (N$_2$O).29

6.28 The energy activities inventory mainly covers emissions of CO$_2$ and N$_2$O from the combustion of fossil fuels, emissions of CH$_4$ from coal mining and post-mining activities, fugitive emissions of CH$_4$ from oil and natural gas systems, and emissions of CH$_4$ from the burning of biomass fuels.

6.29 The industrial processes inventory includes emissions of CO$_2$ in the production processes of cement, lime, iron and steel, and calcium carbide, as well as emissions of N$_2$O in the production process of adipic acid.

6.30 The agricultural activities inventory covers emissions of CH$_4$ from flooded rice paddy fields, animal enteric fermentation and manure management as well as emissions of N$_2$O from croplands and animal waste management.

6.31 The land-use change and forestry activities inventory mainly covers changes in the stocks of forests and other ligneous plants.

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26 This Declaration was signed on 5 September 2005. In the Declaration, the two Parties emphasise their commitment to the objectives and principles of the FCCC and Kyoto Protocol and, under this framework, agreed to establish a climate change partnership. ‘The partnership will strengthen the climate change including clean energy, cooperation and dialogue to promote sustainable development.’ The text of the Declaration can be found at http://industry.oursolo.net/data/development-change-climate-energy-2/.

27 The Joint Statement was signed on 26 November 2007 in Beijing. It is available at www.amb-chine.fr/chn/zfgx/zzgx/t384507.htm.

28 The Memo was signed on 16 August 2004 in Beijing. See Guo Dongmei, Research on Legal Systems, p. 148.

as well as emissions of CO\textsubscript{2} due to the conversion of forests to non-forest land. The waste treatment inventory mainly covers emissions of CH\textsubscript{4} from treating municipal solid waste and that from treating municipal domestic sewage and industrial wastewater.\textsuperscript{30}

\textit{China's climate risks}

6.32 Climate change deeply affects and influences China and its actions. China’s temperature rise has basically kept pace with global warming. The latest information released by the China Meteorological Administration shows that the average temperature of the Earth’s surface in China rose by 1.1°C between 1908 and 2007, and that China experienced twenty-one warm winters in the period 1986 to 2007, the latter being the warmest year since the beginning of systematic meteorological observations in 1951.\textsuperscript{31} China experienced grave climate damage in 2009 and 2010. In 2009, it suffered from extremely high temperatures in summer and very low temperatures in winter, temperatures it had not witnessed for decades. An extraordinarily severe drought occurred in 2009–10 in southwest China, the most serious drought in recorded history. In 2010, fourteen rounds of rainstorm continuously attacked south China and regions south of the Yangtze River after entering the flood season; ten rounds of rainstorms continually attacked north China and west China and temperatures were high beyond historical extremes in many


\textsuperscript{31} The national distribution of precipitation in the past half-century has undergone marked changes, with increases in western and southern China and decreases in most parts of northern and northeast China. Extreme climate phenomena, such as high temperatures, heavy precipitation and severe droughts, have increased in frequency and intensity. The number of heatwaves in summer has grown, and droughts have grown worse in some areas, especially northern China; heavy precipitation has increased in southern China; and the occurrence of snow disasters has risen in western China. In China's coastal zones, the sea surface temperature and sea level have risen by 0.9°C and 90mm, respectively, over the past thirty years. The text of the White Paper can be found at: National Development and Reform Commission, 'White Paper: China's Policies and Actions on Climate Change', at http://bbs.pku.cat.com/viewthread.php?tid=763.
places. Cumulatively, these caused major casualties and economic loss to China.

**Legal liabilities for climate change in China**

6.33 Legal liabilities, as the safeguard of legal operations, are an indispensable part of the rule of law. Briefly, legal liabilities refer to circumstances where persons (whether individuals, public bodies or others) are held responsible by law for their actions/inactions or decisions. Sanctions that may be imposed include requiring the person responsible to indemnify or compensate for the loss caused, compulsory performance or acceptance of punishment. The laws with a bearing on climate change impose certain duties and responsibilities on persons and any violation or breach, manifested by a failure to perform or conform, result in legal liabilities. These liabilities can be divided into public law and private law liability.

(B) **Public law**

**Law on the Environmental Impact Assessment**

6.34 China’s Environmental Impact Assessment (‘EIA’) Law (‘EIA Law’) defines EIA as the process (including the institutions involved) whereby the impacts of planning and construction projects are analysed, predicted and appraised, after which countermeasures for preventing or mitigating the negative impacts identified are proposed and follow-up monitoring is ensured. The EIA Law can arguably be used in a climate change context where projects have an impact on the climate and consequently, Articles 29 to 35, which define the relevant liabilities including administrative and criminal liability, may be relevant.

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34 Article 2, EIA Law.
6.35 Generally speaking, an EIA will lead to the planning application being obtained or rejected, and the entity in charge of the project obtaining (or not) the necessary permit. If the EIA reveals that an illegal act has occurred, the EIA Law includes administrative remedies (such as disciplinary measures or penalties) and, if the act constitutes a crime, criminal sanctions. For instance, the planning permit may be revoked or the licence previously granted may be declared void.

6.36 The EIA Law mandates public participation in the conduct of the assessment process. In February 2006, the former State Administration of Environmental Protection (the Ministry of Environmental Protection) adopted the Provisional Measures for the Public Participation in EIA, which aim to achieve effective public participation through consideration and securing of public rights such as the right to access information, the right to participate and the right that opinions or suggestions put forward be properly considered. If such public rights are infringed, the public may seek legal remedies. For example, the public may report to the competent administrative authority as stipulated in Article 18 of the Provisional Measures for Public Participation in EIA, and access administrative review procedures.

6.37 Public Participation in EIA is an important aspect of the process. In a developing country citizens’ environmental concerns can only be addressed gradually, but democratic participation of the public in the EIA process is in keeping with the times. Public participation in the EIA process was introduced relatively recently in China compared to developed countries. Although some progress has been made there are still many problems, such as limited awareness of public participation provisions, limited availability of information on construction projects, time lag in public participation, unreasonable design of questionnaires, unscientific statistical results and ineffective feedback as well as supervision of public participation. These problems have a serious impact on the effectiveness of public participation in the

EIA process, as well as on the quality of the EIA and its ability to catalyse long-term improvements in the environmental protection policies and systems of the nation. The continuous development of public participation in the EIA process in China should draw on experiences both at home and abroad but be tailored to national conditions. At the very least, the legislator should place prime importance on public participation in environmental protection and establish the principle of public participation as a fundamental law of China.

**Energy conservation and emission reduction**

**Overview**

6.38 As evidence that resources conservation is now a basic national policy, China has rebalanced its strategic priorities in relation to conservation and development and prioritised conservation in the development of energy.\(^{37}\) This is reflected in the 11th Five-Year Plan, which sets energy consumption per unit of GDP targets at 20 per cent less than 2010 levels. In order to achieve these targets, there has been a significant focus on energy conservation all over China, with the aim of promoting scientific development. This progress in energy conservation is achieved through a number of policies and measures, which include: (i) perfecting laws, regulations and standards; (ii) strengthening supervision and accountability; (iii) improving technological progress and eliminating outdated production capacities; (iv) implementing key projects; (v) reinforcing policy incentives; and (vi) developing nationwide actions. Based on the statistics issued by the State, energy consumption per unit of GDP dropped by 4 per cent in 2010, with a cumulative drop of 19.6 per cent for the five-year period up to the end of 2010 (the ‘11th Five-Year period’).\(^{39}\) The above illustrates how energy conservation and emission reduction measures form important constituent elements in China’s fight against climate change since their primary focus is on controlling GHG emissions and mitigation of climate change.


\(^{38}\) The target of the energy consumption per unit of GDP reduction in the 11th Five-Year Plan is 20 per cent. See http://news.ifeng.com/mainland/detail_2011_02/10/4606571_0.shtml.

\(^{39}\) NDRC 2010 Annual Report (see n. 32 above).
Legal liability under the ECL

6.39 As mentioned above, China has put in place a system of accountability for energy conservation targets in the 11th Five-Year period. It has also introduced a system for energy conservation evaluation, which will be discussed below. The ECL encompasses, in addition to these systems, procedures for eliminating outdated products, equipment and processes; and systems reporting on the energy utilisation of key energy-intensive entities and energy efficiency labelling. It also contains specific provisions on energy conservation for industries in the construction and transport sectors, public organisations and key energy-intensive entities and simultaneously promotes and encourages technological progress on energy conservation. Chapter 6 of the ECL covers liabilities related to energy conservation and includes the following:

6.40 First, administrative liabilities: these comprise the bulk of legal liabilities arising under the Law on Energy Conservation and include the following three categories:

(i) Liabilities on the administrative authorities which involve disciplinary measures. For instance, Article 68(1) states: ‘Where any organ in charge of approving or verifying fixed assets investment projects approves or verifies a project that does not comply with statutory standards for energy conservation in violation of this Law, the personnel directly in charge and other directly responsible personnel shall be given disciplinary sanctions.’

(ii) Liabilities on construction companies, energy-intensive product manufacturers and energy-intensive entities for breach of the relevant provisions of the ECL, in particular Article 68(2), Articles 69 to 75, Article 77 and Articles 79 to 84. The available remedies include warnings, fines, an order to suspend operations so as to permit rectification and revocation of business licences.

(iii) Liabilities of other entities such as those borne for the provision of false information under Article 76 by service entities engaging in energy conservation consultancy, design, assessment, test, audit and certification or for contravening the provisions of the ECL, borne by an enterprise for

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transmission-line system of electric power. Remedies include rectification orders,\footnote{This is a form of administrative remedy which requires the entity which is in breach of the regulations to terminate the wrongful behaviour.} the confiscation of illegal earnings and the imposition of fines.

6.41 Second, criminal liability: the relevant provisions are Articles 85 and 86. They are, however, general provisions imputing criminal liability for actions only indirectly concerned with climate change.

Legal liability under the Renewable Energy Law

6.42 Renewable energy refers to wind, solar, water, biomass, geothermal and ocean energy.\footnote{Article 2, Renewable Energy Law of the People’s Republic of China, 2005.} Article 4 of China’s Renewable Energy Law (2005) (‘REL’) reflects the prioritisation given to the development and use of renewable energy in the energy sector in China: ‘The Government encourages economic entities, whether public or private, to participate in the development and use of renewable energy and protects the legal rights and interests of the developers and users of renewable energy on the basis of law.’ With regard to the use of renewable resources, the REL outlines a system to ensure that a certain target on renewable energy is met; it also provides for grid-connected power for renewable energy, grid-connected power price and expenses distribution for renewable energy and special funds for renewable energy.\footnote{Articles 7, 14, 19 to 22 and 24, \textit{ibid}.} This is evidence again of China’s active support for the development and use of renewable energy and a contravention of the same will give rise to the following administrative and criminal liabilities:

6.43 Administrative liability, which is broadly divided into two constituent parts:

(i) Failure to perform or the inappropriate performance of its duty by the administrative authority which may result in disciplinary measures under Article 28 of the REL.

(ii) Departure by the enterprises concerned from their legal obligations. Examples include cases where ‘the power grid enterprises fail to purchase renewable power in full’ or
‘enterprises involved in natural gas pipeline network and heat pipeline network fail to make the connection of natural gas and heat that conform to the grid connection technical standard into the network’ or ‘gas-selling enterprises fail to include biological liquid fuel that conforms to the national standard into their fuel-selling system’. The administrative liabilities are prescribed in Articles 29, 30 and 31 respectively. Remedies include orders to make corrections within the stipulated time period, and fines.

6.44 Criminal liability, in accordance with Article 28 of the REL, in cases where the action of the authorities constitutes a crime in the administration and supervision of the development and use of renewable energy. As under the ECL, the criminal liabilities at issue here are only indirectly concerned with climate change.\textsuperscript{44}

The legal liabilities under the Plan for Implementation of Energy Conservation per Unit of GDP Evaluation System

6.45 The above-mentioned system of energy conservation evaluation is specifically set out in the ECL. During the period of the 11th Five-Year Plan, the responsibility for energy conservation and emissions reduction was assigned to governmental authorities at all levels. This resulted in the establishment of a system of target accountability that held local government officials accountable for the failure to complete target tasks. In order to assist with the evaluation of energy conservation and emissions reduction, China adopted the Plan for Implementation of Energy Conservation per Unit of GDP Evaluation System\textsuperscript{45} (‘Evaluation System Plan’) in 2007, which included specific provisions for governments and enterprises. In 2009 and 2010, the Chinese government assessed the attainment of these energy conservation targets and the fulfilment of energy conservation measures for thirty-one provincial governments and thousands of key enterprises across the country.\textsuperscript{46}

\textsuperscript{44} For an example of enforcement of criminal liability under this situation, see para. 6.56 below.


\textsuperscript{46} NDRC 2010 Annual Report (see n. 32 above).
6.46 In accordance with the provisions of the Evaluation System Plan, the objects of energy conservation evaluation are the people’s governments at the provincial level and thousands of key energy-intensive enterprises. The Evaluation System Plan also contains evaluation measures, results and procedures, and measures to encourage conservation and penalise failure.

6.47 Under the provisions in the Evaluation System Plan:

a provincial people’s government which is deemed to have underachieved, shall, within one month after the publication of the evaluation results, report to the State Council in writing, stating the measures it intends to take to remedy the situation within a stipulated period of time, and send a copy to the NDRC. In the event of failure to remedy the situation, the supervisory department will investigate and assign responsibility to the relevant responsible person.

In practice, the results of the energy conservation evaluation at provincial level provide an important basis for comprehensively evaluating the leadership of the provincial people’s government and leader cadres.

6.48 Another Evaluation System Plan provision provides that:

an enterprise which is deemed to have underachieved, shall, within one month after the publication of the evaluation results, communicate to the local provincial people’s government the measures it intends to take to remedy the situation and make the rectification within a stipulated period of time.

The evaluation results in State-owned enterprises or State-holding enterprises in thousands of key industries provide an important basis for the State-owned assets supervisory commission to assess the performance of company managers. These provisions suggest that the evaluation results of energy conservation and emissions reduction measures will act as a source of internal incentive and form the basis of sanctions for public servants.

6.49 In addition to the State, provinces have also adopted their own evaluation plans for energy conservation and emissions

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47 This refers to enterprises whose annual overall energy consumption is more than 180,000 tons of standard coal in nine key energy-intensive industries including steel, non-ferrous metals, petrol and petrochemicals, chemicals, construction materials, coal, electricity, papermaking, textile industries – in total 998 enterprises.

48 NDRC 2010 Annual Report (see n. 32 above).

49 Ibid.
reduction, adapted to local conditions. Instances abound such as the Plan of Shanxi Province for Implementation of Energy Consumption per Unit of GDP Evaluation System\(^{50}\) or the Plan of Nanchang City for Implementation of Energy Consumption per Unit of GDP Evaluation System\(^{51}\), with similar incentive and penalty provisions.

*Legal liability on climate change in the specific laws on environmental protection*

6.50 The laws referred to earlier, such as the Solid Waste Law, the APL, the Clean Production Law and the CEPL, although concerned with mitigation and GHG emission reduction, were not formulated directly to combat climate change.

6.51 On the face of it, the prevention and control of air pollution can have an impact on climate change. According to the Fourth Assessment Report\(^{52}\) on climate change issued by the Intergovernmental Panel on Climate Change in 2007, there is a 90 per cent probability that global warming is caused by an increase in anthropogenic GHG emissions. The GHGs defined under the Kyoto Protocol include six gases, namely CO\(_2\), CH\(_4\), N\(_2\)O, HFCs, PFCs and SF\(_6\). If these GHGs were listed as air pollutants, their emissions would be subject to the APL. However, at present China does not list these GHGs as air pollutants under the APL and thus their emission is not regulated under the climate change framework. Hence, no liability under this framework will arise.

*Climate change liability and procedural law*

6.52 Litigation is an important channel for the crystallisation of liabilities. China provides for civil, administrative and criminal

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\(^{52}\) IPCC (2007), IPCC Fourth Assessment Report: *Climate Change 2007 (AR4)*. For the full text of this report, see www.ipcc.ch.
litigation; all of which may, theoretically, be relevant to an action on climate change.

6.53 This is best explained by way of an example: an enterprise discharges a large amount of CO$_2$. CO$_2$ is one of the main gases responsible for creating the ‘greenhouse effect’ and an increased concentration of CO$_2$ in the atmosphere is believed to cause climate change, which in turn could conceivably cause, through flooding for instance, damage to local residents’ properties. The residents should then be able to bring a civil lawsuit and claim compensation from the enterprise for the losses they sustained. Another instance would be the discharge of great quantities of GHGs by a government-approved plant. The result could be an administrative lawsuit brought about by residents living near the plant demanding the revocation of the government approval pursuant to which the plant was built. By way of further example, if a company discharged such amounts of CO$_2$ as to aggravate climate change, and the resulting disaster and environmental harm killed countless precious lives, the public prosecution body would file a criminal lawsuit. But these are hypothetical scenarios. The problems arising hereunder are listed as follows:

6.54 First, GHGs causing climate change are not listed in China’s laws as pollutants. Therefore, their emissions do not infringe any law. Second, causation is difficult to prove. Third, the harmful effects of GHG emissions on the climate may not become apparent until long after they are released into the atmosphere. Thus, they often do not adversely affect contemporary interests, although they set in motion long-term environmental damage. This makes the identification of the locus standi for a court or tribunal problematic.

6.55 The problems raised by the third point can possibly be addressed by bringing public welfare lawsuits, which would include civil and administrative environmental public welfare lawsuits. Generally speaking, this kind of lawsuit enables a plaintiff without a direct interest to file a claim in the interest of public welfare. However, this does not solve the first two problems mentioned above, and there is no provision for bringing a public welfare lawsuit in the procedural rules. China’s procedural rules stipulate strict limitations on the standing of claimants and require them to have a
legal interest in the case. This suggests that the existing legal framework, in particular the procedural rules, including those on *locus standi*, presents an obstacle to a successful claim based on harm or damage from climate change.

**Climate change liability and environmental criminal law**

6.56 Chinese criminal law recognises environmental crimes as part of its legal framework. Hence, a chapter of ‘the Crime of Disrupting the Order of Social Administration’ recognises fifteen kinds of crimes and establishes, inter alia, the ‘crime of violating the protection of the environment and resources’. Liability under the above fifteen categories of crime arises only if any national laws or regulations have been infringed. This includes three categories: first, the crime of discharging environmental pollutants; second, the crime of importing solid waste; and third, the crime of destroying natural resources. Thus, under the aegis of environmental crimes, there is no specific crime on climate change. Since China’s Criminal Law (1997) (‘Criminal Law’) applies the strict principle of ‘a legally prescribed punishment for a specified crime’, GHG emissions cannot be subject to liabilities and responsibilities arising out of criminal law, and the existing criminal liabilities in other environmental laws are not relevant in this context. For example, Article 45 of the EPL states that:

> any person conducting supervision and management of environmental protection who abuses his power, neglects his duty or engages in malpractices for personal gains shall be given administrative sanction by the unit to which he belongs or the competent higher authorities;

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53 Article 3, Civil Procedure Law of the People’s Republic of China, 2007. In dealing with civil litigation arising from disputes on property and personal relations between citizens, legal persons or other organisations and between the three of them, the people’s courts shall apply the provisions of this Law.

Article 2, Administrative Procedure Law of the People’s Republic of China, 1989. If a citizen, a legal person or any other organisation considers that his/her or its lawful rights and interests have been infringed by a specific administrative act of an administrative organ or its personnel, he/she or it shall have the right to bring a suit before a people’s court in accordance with this Law.

54 The ‘Crime of Undermining Protection of Environment or Resources’ is listed as one of the crimes in the category of crimes ‘Disrupting the Order of Social Administration’ in China’s Criminal Law (1997). The text is available in English at [www.procedurallaw.cn/english/law/200807/t20080724_40992.html](http://www.procedurallaw.cn/english/law/200807/t20080724_40992.html).
if his act constitutes a crime, he shall be investigated for criminal responsibility according to law.\textsuperscript{55}

In the case of specific application, the punishment shall be subject to the provisions of the Criminal Law as well as to Article 45 of the EPL. Moreover, such criminal liability is indirectly related to, and not directly caused by, climate change. Therefore, generally speaking, there is no crime specific to climate change in the Criminal Law, although some crimes related to climate change might indirectly entail criminal legal liability.

\textbf{(C) Private law}

6.57 The climate tort is part of environmental torts, which are directly recognised under Article 124 of the General Principles of the Civil Law, Articles 41 and 42 of the EPL, Chapter 8 of the Tort Law and other specific laws on environmental protection.\textsuperscript{56} These laws directly prescribe the legal liability for environmental torts.

6.58 Environmental torts encompass conduct or activities (industrial or from other anthropogenic sources) which cause harm or damage to personal, property or environmental rights and interests or to public property.\textsuperscript{57}

6.59 The essential ingredients of environmental torts are threefold:

(i) there is an act causing the injury, but such act is not required

\textsuperscript{55} Article 45, EPL.

\textsuperscript{56} Article 124, The General Principles of the Civil Law, 1986: ‘Any person who pollutes the environment and causes damage to others in violation of state provisions for environmental protection and the prevention of pollution shall bear civil liability in accordance with the law.’

Article 41, EPL: ‘A unit that has caused an environmental pollution hazard shall have the obligation to eliminate it and make compensation to the unit or individual that suffered direct losses. A dispute over the liability to make compensation or the amount of compensation may, at the request of the Parties, be settled by the competent department of environmental protection administration or another department invested by law with power to conduct environmental supervision and management. If a party refuses to accept the decision on the settlement, it may bring a suit before a people’s court. The party may also directly bring a suit before the people’s court.’

Article 65, Tort Law of the People’s Republic of China, 2009: ‘Where any harm is caused by environmental pollution, the polluter shall assume the tort liability.’

to be illegal; (ii) there is a harmful result, which includes actual harm or the risk of possible harm; and (iii) there is causation between such act and the harmful result. As the principle of causation presumption\(^{58}\) is applicable to environmental torts, the burden of proof is reversed, i.e. the party causing the injury shall bear the burden of proving that there is no causality between the act causing the injury and the harmful result. The principle of strict liability\(^{59}\) is applicable to environmental torts in China, which means that liability will be imposed on the person legally responsible for the loss or damage without a finding of fault being necessary.

6.60 The remedies available in cases of environmental torts, in accordance with China’s laws, include ceasing the infringement, removing the hindrance, eliminating the danger, \textit{restitutio in integrum}, compensating for loss and offering an apology. The most common remedies are cessation of the infringing act and compensation for the loss caused.

6.61 Climate change may, in theory, give rise to liability under private law, usually in the form of infringement liabilities. When a person’s actions harm the climate and thereby cause harm or damage to others’ rights and interests (whether life, body, property or environment), that person may become liable.

6.62 However, there are several obstacles to the crystallisation of such liability. First of all, liabilities are predicated on existing legal provisions and their contravention. If GHG emissions are not brought under the legal framework, there can be no liability for emitting GHGs. Secondly, it is very difficult to prove causation in the context of climate change, in so far as establishing a direct link between the damage caused and the actions of the person allegedly responsible is problematic. For instance, it is hard to

\(^{58}\) Article 66, Tort Law of the People’s Republic of China, 2009: ‘Where any dispute arises over an environmental pollution, the polluter shall assume the burden of proving that it should not be held liable or that its liability could be mitigated under certain circumstances as provided for by law, or of proving that there is no causation between its conduct and the harm.’

\(^{59}\) Article 7, Tort Law of the People’s Republic of China, 2009: ‘The party who is legally responsible for infringing upon a civil right or interest of another person, whether he is at fault or not, as provided for by law, shall be subject to legal provisions on strict liability.’ Under the law, the liability for environmental pollution is one of these situations.
establish a causal connection between the immersion of a house in Tuvalu due to sea level rise and the excessive discharges of CO₂ by a big plant in Houston. If the principle of presumption of causation is applied without due consideration, the person responsible for the GHG emissions may be wrongly held liable. This is exacerbated by the hidden nature of the harmful effects of climate change, which often become apparent long after the event, at a time when the person allegedly responsible for the harmful activity may no longer be alive (in the case of a natural person) or trading (in the case of a company bankruptcy). If the person allegedly responsible is no longer there, pursuing a claim seems pointless.

6.63 Since there is no provision in China for private law liability directly caused by climate change, GHG emissions will not give rise to tort liability.

(D) Conclusion

6.64 Climate change is a major global challenge. It is the common mission of all of mankind to curb global warming and save our planet. China was the first developing country to adopt and implement a National Climate Change Programme. In the past twenty years, in order to face the challenge of climate change, China has formulated or revised about twenty laws, including the Forest Law (in 1998), the Clean Production Law (in 2002), the REL (in 2005), the ECL (in 2007), the CEPL (in 2008) and the Regulations on Administration of Energy Conservation in Civil Construction (in 2008). Laws and regulations have been an important means to address climate change. However, at present China does not have a specific law on climate change. Climate change issues are dealt with at policy level, through these laws as well as civil society initiatives. Similarly, the issue of climate change liability (whether civil, criminal or administrative) tends to arise through provisions in other fields that are indirectly related to climate change. Looking to the future, the question of the integration of climate change liability within the Chinese legal system is likely to be dictated by the Chinese government’s stance in the climate change negotiations, and the actual responsibility of China under the FCCC.
Finally, it is worth highlighting that the National Development and Reform Commission, the key member of the National Leading Committee on climate change, announced on 23 March 2011 (World Meteorological Day) that the Chinese government has decided to enact a specific climate change law. One hopes that the legislation will be fully committed to achieving and even exceeding the GHG mitigation goals that China has adopted. This will instil confidence in not only the Chinese people but also the world. However it is worth bearing in mind that even if a specific climate change law is adopted, the many difficulties in implementation and enforcement identified in this chapter are likely to stand in the way of an effective response to climate change.

There are two distinct but related aspects to addressing climate change: mitigation by stabilising GHG concentrations in the atmosphere, and adaptation by reducing vulnerability or improving adaptive capacity to climate change. Although adaptation has recently featured high on the international and national climate change law-making agendas, adaptation is less developed and researched than mitigation. As a direct way to prevent and reduce climate change damage, adaptation is especially important for those who are suffering most from the current and expected climate change impacts. The proposed climate legislation in China should focus on establishing systems and regulations to address adaptation needs, in particular through the use of market mechanisms. The use of market mechanisms both for adaptation and mitigation will likely address the implementation concerns, as well as incentivise voluntary GHG reductions.

India

LAVANYA RAJAMANI AND SHIBANI GHOSH

(A) Introduction

Legal system

7.01 India is a parliamentary democracy governed by a lengthy written constitution widely perceived to be a ‘living instrument’, having been amended over a hundred times since its adoption in 1950. India has, in part, a common law legal system, a legacy of its colonial past. The principal sources of law are: (i) legislation, including statutes passed by the Parliament and state legislatures, and subordinate legislation such as rules, notifications and orders passed under the statutes; and (ii) common law to be found in decided cases developed by courts through a reliance on precedent. Much of the law of tort and administrative law is common law based.

7.02 The Indian judicial system consists of a Supreme Court that sits in Delhi, and has original, appellate and advisory jurisdiction, and twenty-one High Courts spread across the territory of India. In addition, there are several specialised tribunals including the recently constituted National Green Tribunal. The law declared by the Supreme Court is binding on all courts within the territory of India.

3 See for further information on the Indian Court system www.indiancourts.nic.in/index. html.
Policy context

7.03 India is on a mission to develop. Economic growth, and with it, poverty eradication, energy security and provision of universal access to energy, are central and enduring preoccupations of the Indian government. Justifiably so: India is placed 134th on the Human Development Index,\(^5\) 41.6 per cent of its population lives on less than US$ 1.25 a day,\(^6\) and an estimated 44 per cent does not have access to electricity.\(^7\) India’s developmental mission, as framed, however, may well leave large carbon footprints, and ultimately weaken its ability to develop.

7.04 If India’s current growth rate continues,\(^8\) energy demand will more than double by 2020.\(^9\) In addition, if India’s targets on poverty, unemployment and literacy in its 11th five year plan\(^10\) – some more ambitious than the Millennium Development Goals (‘MDGs’)\(^11\) – are to be met, and energy provided to the nearly 500 million Indians without access to electricity, this will lead to much greater energy use.\(^12\) India will soon be a significant contributor to climate change.\(^13\) India is predicted by some estimates

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\(^6\) Ibid.
\(^12\) See Integrated Energy Policy, Planning Commission, Government of India (August 2006), pp. xiii and 18–32, noting that to sustain 8 per cent growth through 2031 India would need to increase its energy supply by 3–4 times, and its electricity supply by 5–7 times. Available at www.planningcommission.nic.in.
\(^13\) The rate of growth of GHG emissions in India is approximately 4.6 per cent annually as compared to a world average of 2 per cent. See Subhodh Sharma, Sumona Bhattacharya
to become the third largest emitter by 2015, and with the United States, European Union, China and Russia, to account for two-thirds of global greenhouse gases (‘GHGs’).

**Emissions profile and energy mix**

7.05 India’s energy use is currently at a low per capita emissions rate of 1.5 metric tons annually, and a cumulative share of 4.6%. Of India’s net CO₂ Eqv emissions, 58% can be sourced to the energy sector, 22% to industry, 17% to agriculture and 3% to waste. Of the emissions from the energy sector, 37.8% can be sourced to electricity, 7.5% to transport and 7.2% to residential uses.

7.06 Coal is the mainstay of India’s energy supply, accounting for 53% of installed generation capacity. Hydro accounts for 22.8%, gas for 10.3%, wind for 7.2%, nuclear for 2.8% and other renewables for 2.9%. Coal, not surprisingly, also accounts for 40% of India’s energy consumption, combustible renewables and waste for 27%, oil for 24%, natural gas for 6%, hydroelectric power for 2% and nuclear for 1%. India has large reserves of coal, but limited reserves of oil. The majority of India’s substantial oil requirements is imported from the Middle East.


17 The global average per capita rate is 4.5 metric tons, India’s per capita rate is low compared to most industrialised countries and less than half of China’s 3.8 metric tons rate. The USA has a per capita emissions rate of 20.6, Australia of 16.2 and Canada of 20 (see n. 7 above).

18 See n. 16 above.


20 *Ibid*.


22 *Ibid*. 
7.07 The Indian government, recognising electricity supply as central to sustained growth, global competitiveness and rural development, set itself the targets of providing electricity to all by 2010, and meeting full demand by 2012.\textsuperscript{23} To meet these targets, the National Electricity Policy advocates ‘maximum emphasis’ on feasible hydro potential, significant increase in nuclear capacity, full exploitation of feasible non-conventional energy resources, but with recognition, however, that coal will continue ‘to remain the primary fuel’.\textsuperscript{24}

\textit{Climate risks}

7.08 In the words of India’s Environment Minister, Jairam Ramesh, ‘no country in the world is as vulnerable, on so many dimensions, to climate change as India. Whether it is our long coastline of 7000 kms, our Himalayas with their vast glaciers, our almost 70 million hectares of forests (which incidentally house almost all of our key mineral reserves) – we are exposed to climate change on multiple fronts’.\textsuperscript{25} The Indian Network for Climate Change Assessment (‘INCCA’), a network of 120 institutions and 220 scientists across India, predicts that: the annual mean surface air temperature in India is likely to rise by 1.7°C and 2.0°C in the 2030s; melting glaciers will increase flood risk and decrease water supply; sea level rise (rate of 1.3 mm/year) will threaten coastal regions; monsoons, on which agriculture depends, will become more erratic and rain less plentiful; and incidence of malaria and other vector-borne diseases will increase, as will heat-related deaths and illnesses.\textsuperscript{26} The INCCA also highlights prospective threats to food and water security: by 2080–2100, there is a probability of 10–40 per cent loss in crop production, and before 2025 India is likely to reach a state of water stress.\textsuperscript{27}

7.09 India’s economy is also likely to be significantly impaired by the impacts of climate change. The Stern Review notes that even a

\textsuperscript{24} Ibid.
\textsuperscript{25} Indian Network for Climate Change Assessment, Climate Change and India: A 4X4 Assessment – A Sectoral and Regional Analysis for 2030s, Ministry of Environment and Forests, Government of India (16 November 2010), p. 3.
\textsuperscript{26} See generally Ibid. 27 Ibid.
small change in temperature could have a significant impact on the Indian monsoon, resulting in up to a 25 per cent reduction in agricultural yield.\textsuperscript{28} A 2–3.5°C temperature increase could cause as much as a 0.67 per cent loss in GNP, and a 100 cm increase in sea level could cause a loss of 0.37 per cent in GNP.\textsuperscript{29} Recent Indian research found that southwest monsoon rainfall had decreased by 4.7 per cent between 1965 and 2006, as compared to 1931–64.\textsuperscript{30} A quarter of the Indian economy is dependent on agriculture, and any impact on this sector will fundamentally impair India’s ability to meet its development goals. Climate change, therefore, is an issue that is increasingly being taken seriously by India.

\textit{International negotiating position, actions and partnerships}

\textsuperscript{7.10} In international fora, India, a Party to the Framework Convention on Climate Change (‘FCCC’)\textsuperscript{31} and its Kyoto Protocol,\textsuperscript{32} has consistently rejected legally binding quantitative GHG mitigation targets.\textsuperscript{33} India argues that, given its limited role in contributing to the problem, its overriding development needs, and the historical responsibility of developed countries, India cannot be expected to take on mitigation targets.\textsuperscript{34} India is also opposed to establishing a quantitative long-term global goal or a peaking year, unless it is accompanied by an appropriate burden-sharing arrangement based on equity and differential treatment for developing countries.\textsuperscript{35}


\textsuperscript{33} See for a representative sample, \textit{Climate Change Negotiations: India’s Submissions to the UNFCCC}, Ministry of Environment and Forests, Government of India (August 2009).

\textsuperscript{34} \textit{Ibid.}

\textsuperscript{35} See Letter by Jairam Ramesh, Minister of State for Environment and Forests, Letter to the Members of Parliament: Cancun Agreements, 20 December 2010, on file with authors.
Nevertheless, in 2007, India promised that its per capita emissions would not exceed the levels of developed countries.\textsuperscript{36} India believes that this will incentivise developed countries to achieve timely reductions in their per capita emissions.\textsuperscript{37} The OECD average per capita emissions is 13.2.\textsuperscript{38}

India has also offered to embark on a path of decarbonisation. Decarbonisation, according to India, refers to an economy with lower carbon intensity over time.\textsuperscript{39} Decarbonisation includes enhanced energy efficiency, a shift in primary energy use from fossil fuels to renewable energies (including hydropower) and nuclear energy, and changes in production and consumption patterns.\textsuperscript{40} In 2010, India crystallised its offer to decarbonise into a voluntary undertaking under the non-binding Copenhagen Accord\textsuperscript{41} to ‘endeavour to reduce the emissions intensity of its GDP by 20–25 percent by 2020 in comparison to the 2005 level’.\textsuperscript{42} This undertaking has been mainstreamed into the FCCC process through an information document taken note of\textsuperscript{43} by the Cancun Agreements, 2010.\textsuperscript{44}

India is an enthusiastic participant in the Clean Development Mechanism;\textsuperscript{45} 21.2 per cent of all registered projects are from India (second only to China at 44.4 per cent, and followed by Brazil at 6.2 per cent); 10.8 per cent of all expected certified

\textsuperscript{36} PM’s Intervention on Climate Change at Heiligendamm, Meeting of G8 + 5, Heiligendamm, Germany, 8 June 2007, available at www.pib.nic.in.

\textsuperscript{37} PM’s address at the 95th Indian Science Congress, 3 January 2008, available at www.pib.nic.in.

\textsuperscript{38} Human Development Report: Fighting Climate Change (see n. 7 above).

\textsuperscript{39} ‘Dealing with the Threat of Climate Change’, India Country Paper, the Gleneagles Summit, 2005.

\textsuperscript{40} Ibid.

\textsuperscript{41} Decision 2/CP.15, Copenhagen Accord, FCCC/CP/2009/11/Add.1 (30 March 2010), p. 4 (‘Copenhagen Accord’).

\textsuperscript{42} India – Letter to the Executive Secretary, 30 January 2010, available at www.unfccc.int/files/meetings/application/pdf/indiachpaccord_app2.pdf.


\textsuperscript{45} Article 12, the Kyoto Protocol.
emissions reductions (CERs) are from India (as compared to 63.7 per cent from China and 4.7 per cent from Brazil).\textsuperscript{46}

7.14 India is part of several bilateral and plurilateral arrangements on climate change and energy. India is a part of the Asia Pacific Partnership on Clean Development and Climate,\textsuperscript{47} the Carbon Sequestration Leadership Forum,\textsuperscript{48} the Methane to Markets Partnership\textsuperscript{49} and the International Partnership for a Hydrogen Economy.\textsuperscript{50} India has bilateral partnerships with the European Union (EU),\textsuperscript{51} the United States (USA)\textsuperscript{52} and the United Kingdom (UK)\textsuperscript{53} on climate research and technology. India also participates in meetings of the G20, G8+5 and the Major Economies Forum\textsuperscript{54} that seek to resolve political issues and provide stimulus to the climate negotiations. In the negotiations, India is part of the BASIC (Brazil, South Africa, India and China) group,\textsuperscript{55} which itself is part of the G77/China, a large coalition of developing countries.\textsuperscript{56}

\textit{Domestic policies and measures}

7.15 India launched its National Climate Change Action Plan in 2008 bringing together existing and proposed efforts at decarbonisation under eight national missions: solar energy; enhanced energy efficiency; sustainable habitats; water; the Himalayan ecosystem; ‘Green India’; sustainable agriculture; and strategic knowledge for climate change.\textsuperscript{57} These missions are intended to assist India

\begin{itemize}
  \item \textsuperscript{46} CDM Statistics, available at www.cdm.unfccc.int.
  \item \textsuperscript{47} Further details available at www.asiapacificpartnership.org/.
  \item \textsuperscript{48} Further details available at www.cslforum.org/.
  \item \textsuperscript{49} Further details available at www.methanetomarkets.org/.
  \item \textsuperscript{50} Further details available at www.iphe.net/.
  \item \textsuperscript{51} ‘India-EU Strategic Partnership Joint Action Plan’, available at www.ec.europa.eu.
  \item \textsuperscript{52} ‘Overview of the US-India Climate Change Partnership’, US Department of State, available at www.state.gov.
  \item \textsuperscript{53} ‘Working with Developing Countries – India’, Department for Environment, Food and Rural Affairs, Government of the UK, available at www.defra.gov.uk.
  \item \textsuperscript{54} Further details available at www.majoreconomiesforum.org/.
  \item \textsuperscript{55} India hosted the Sixth BASIC Ministerial Meeting, 26–27 February 2011; further details available at http://moef.nic.in/downloads/public-information/BASIC-Stat-6.pdf.
  \item \textsuperscript{56} Further details available at www.g77.org/.
  \item \textsuperscript{57} \textit{National Action Plan on Climate Change}, Prime Minister’s Council on Climate Change, Government of India (2008), available at http://www.pmindia.nic.in/Pg01–52.pdf.
\end{itemize}
in adapting to climate change, as well as in launching its economy on a path that ‘would progressively and substantially result in mitigation through avoided emissions’. The Plan, an initial cut at addressing the issue, does not contain any mechanisms to estimate the cost of climate change impacts or compliance. Neither does it mainstream climate change factors into development planning, as evidenced by the fact that no reference is made to how this Action Plan is qualified by, or qualifies, India’s Integrated Energy Policy.

7.16 In the years since the release of the Plan, there have been several developments. The Indian government is in the process of developing a ‘roadmap for low carbon development’. The relevant Ministries have developed comprehensive mission documents detailing objectives, strategies, plans of action, timelines, and monitoring and evaluation criteria. There are several noteworthy initiatives contained in these missions, including: the creation of a market – a perform, achieve and trade mechanism – in energy savings certificates; the adoption of a target to generate 20,000 MW of solar power by 2022; and a commitment to double the area to be afforested in the next ten years, taking the total to 20 million ha. In addition, the Indian government has announced a levy – a clean energy tax – of US$ 1 per ton on coal. State-level action plans on climate change are also in preparation.

7.17 India’s domestic climate policy interventions can be located squarely within the logic of a co-benefits approach – an approach that seeks to exploit synergies between development and climate change. Given India’s development imperatives, it has chosen to channel its limited resources into areas that have significant co-benefits. Hence the emphasis in India’s domestic policy interventions on energy efficiency, conservation, and diversification of energy sources (with the promotion of renewable energies as an element). These interventions deliver climatic benefits, but

58 Ibid, p. 6. 59 See n. 12 above.
60 See generally India: Taking on Climate Change – Post-Copenhagen Domestic Actions, Ministry of Environment and Forests, Government of India (30 June 2010).
62 See n. 60 above, p. 5. 63 Ibid, p. 2.
also enhance energy security, lead to greater energy availability and access, and accelerate development.

(B) Public law

The constitutional framework, environmental rights and international law

The Constitution of India, in Part III, titled ‘Fundamental Rights’, creates a regime of protection for a privileged set of rights. Laws inconsistent with or in derogation of these rights are void to the extent of their inconsistency. The centrepiece of these fundamental rights is the right to life and liberty. This right has over the years been extended through judicial creativity to cover unarticulated but implicit rights such as the right to live with human dignity, the right to livelihood, the right to education, the right to health and medical care of workers, and most importantly for current purposes, the ‘right of enjoyment of pollution-free water and air’.

Although, thus far, no climate-related claim has been brought before the Supreme Court, it is likely, should such a claim be brought – given the Court’s jurisprudence and its expansionist proclivities – that it would either interpret the environmental right to include a right to climate protection or apply a human rights optic to climate impacts.

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64 This subsection draws from L. Rajamani, “The Right to Environmental Protection in India: Many a Slip between the Cup and the Lip?”, Review of European Community And International Environmental Law, 16 (2007), 274.
66 Article 21, Ibid.
67 Francis Coralie Mullin v. The Administrator, Union Territory of Delhi (1981) 1 SCC 608, at paras. 7 and 8.
70 Consumer Education and Research Centre v. Union of India (1995) 3 SCC 42, at paras. 24 and 25.
There are many different formulations of the constitutionally protected environmental right in India. Some of these formulations are expansive in that they can readily encompass protection against new forms of environmental harm. Other formulations are more limiting. The less expansive definitions define the environmental right in the context of either pollution or health. So, for instance, in relation to pollution, the environmental right has been characterised as the right to ‘pollution-free air and water’,72 ‘fresh air, clean water’,73 ‘pollution-free environment’74 and ‘clean environment’.75 It has been defined in the context of human health, as for instance, the right to a ‘humane and healthy environment’,76 a ‘hygienic environment’77 and ‘sanitation’.78 It may be difficult in the context of these formulations to argue for an expansion of the environmental right to include climate protection, given that GHGs are not generally considered pollutants and do not typically contribute to localised pollution resulting in identifiable health impacts.

However, the constitutionally protected environmental right has also been characterised as the right to: ‘environmental protection and conservation of natural resources’;79 ‘live in a healthy environment with minimal disturbance of [the] ecological balance’;80 a ‘decent environment’;81 and a ‘living atmosphere congenial to human existence’.82 These formulations leave ample scope for value judgements and judicial discretion, and hence admit the possibility of protecting against threats to the climate. Climate
change will undoubtedly disturb the ecological balance, however that term is defined. It will also render the atmosphere less ‘congenial’ to human existence. The inhabitants of the Sundarbans, at the frontline of climate change, can testify to this.

7.22 Even if the Supreme Court is reluctant to extend the environmental right to cover climate protection, it will likely be impressed with an approach that applies a human rights (in the Indian context, a ‘fundamental rights’) optic to climate impacts. A host of rights and progressive realisation towards them, such as the rights to life, health and water, among others, will be at risk from climate impacts. There is a burgeoning and ever-persuasive literature arguing the case. These rights – to life, health and water – are, as we have seen, constitutionally protected in India. The Supreme Court would need but little persuasion to read climate impacts as threatening these rights.

7.23 The environmental right is complemented by relevant provisions of the Directive Principles of State Policy, in particular Articles 47 and 48A which articulate the duties of the State with respect to public health and environmental protection. Although the Directive Principles of State Policy are not intended to be ‘enforceable by any court’, they are nevertheless ‘fundamental in the governance of the country’ and it is ‘the duty of the State to apply these principles in making laws’. In addition to the relevant Directive Principles of State Policy, the Constitutional schema also includes Article 51A(g) which imposes a duty on citizens to protect and improve the environment.

7.24 India, one of the first jurisdictions to embrace an environmental right, is perceived as having ‘fostered an extensive

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85 Article 47, *ibid*.
86 Article 48A, *ibid*.
87 Article 39, *ibid*.
88 Article 51A(g), *ibid*.
and innovative jurisprudence on environmental rights. The courts have fleshed out the environmental right by integrating into Indian environmental jurisprudence numerous principles of international environmental law. These include the polluter pays principle, the precautionary principle, the principle of inter-generational equity, the principle of sustainable development and the notion of the State as a trustee of all natural resources. The Supreme Court has held these principles to be ‘essential features of sustainable development’, ‘imperative for preserving ecology’ and ‘part of environmental law of India’. The Court requires these principles to be ‘applied in full force for protecting the natural resources of this country’. The constitutionally protected environmental right complemented by these principles of international environmental law provides a fertile breeding ground for ambitious rights-based climate claims.

The principles, in particular, of precaution, public trust and inter-generational equity, as interpreted by the Indian courts, will prove useful to prospective rights-based climate claimants. The precautionary principle requires the State to take environmental measures ‘to anticipate, prevent and attack’ the causes of

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environmental degradation.\textsuperscript{100} It posits further that, ‘where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environment degradation’.\textsuperscript{101} Finally, it lays the onus of proof on the actor or the developer/industrialist to demonstrate that the proposed action is ‘environmentally benign’,\textsuperscript{102} an unusual and controversial interpretation of the principle. Climate change falls neatly into the category of threats that it would be wise to take early action on. This principle could be used to argue the case for ambitious mitigation and adaptation intervention, and to challenge State action that falls short.

\textbf{7.26} The doctrine of public trust would add further weight to the argument. This doctrine places an affirmative duty on the State as a trustee of certain public resources to protect resources like air, sea, water and the forests for the enjoyment of the general public.\textsuperscript{103} The Court envisages that this doctrine would be equally appropriate ‘in controversies involving air pollution, the dissemination of pesticides, the location of rights of ways for utilities, and strip mining of wetland filling on private lands in a state where governmental permits are required’.\textsuperscript{104} The issue of climate change could well engage the duty of a state as trustee to protect the atmosphere from indiscriminate GHG emissions.

\textbf{7.27} The principle of inter-generational equity may also be of assistance.\textsuperscript{105} The principle, formulated originally in the context of forest resources, holds that ‘the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations’.\textsuperscript{106} Climate change presents the ultimate

\textsuperscript{101} \textit{Ibid.}, at para. 11. \textsuperscript{102} \textit{Ibid.}
\textsuperscript{104} Citing Joseph Sax, \textit{ibid.}, at para. 22.
‘inter-generational’ problem. Current generations inherited the problem, are exacerbating it, and will likely leave a legacy that imposes severe burdens of protection and sacrifice on future generations. All three principles – precaution, public trust and inter-generational equity – are to varying degrees recognised in the FCCC as well.\textsuperscript{107} These principles offer powerful building blocks in a rights-based claim seeking more aggressive State action on climate change. The Indian courts would likely provide a nurturing environment for such claims.

7.28 Rights-based claims relating to mitigation, however, may prove difficult to sustain. The principal hurdle in sanctioning State action relating to mitigation as insufficient or requiring the State to take further action will be in identifying benchmarks. How much action is appropriate for a country like India, given its, thus far, limited contribution to the problem, and its limited ability, on its own, over time, to resolve the problem? If the international regime had reached an equitable and effective burden-sharing agreement, and the Indian government was falling short of its just share of the burden, a claim may lie. However, in the absence of such an agreement, the Court would need to substitute its judgement for that of the international community, as well as that of the executive, which it may be reluctant to do. The reluctance may stem from concerns about intervening in an intensely political and polarised North-South climate debate as well as, albeit less so, stepping on the executive’s toes. In the Court’s jurisprudence, ‘[a]n excessively political role identifiable with political governance betrays the court into functions alien to its fundamental character, and tends to destroy the delicate balance envisaged in our constitutional system between its three basic institutions.’\textsuperscript{108}

7.29 Rights-based claims relating to adaptation may fare better. A claim may lie for instance where the government is not taking the necessary action to adapt to predicted climate change in particularly vulnerable areas such as the Sunderbans, and the resulting climate impacts breach the claimant’s protected rights to life, health, water etc.\textsuperscript{109} In the case of adaptation, since core human

\textsuperscript{107} Article 3, FCCC.


\textsuperscript{109} See e.g. ‘Sunderbans’ Stoic Settlers Bear Witness to Climate Change’, The Pioneer, 25 April 2011.
rights are implicated, rather than the right to environment, which is subject to limits in the service of development, claims may prove more successful.

7.30 Rights-based claims relating to adaptation may also be able to press international law into service. Article 51(c) of the Indian Constitution requires the State to ‘foster respect for international law and treaty obligations’. Implicit in this Article, according to the Supreme Court, is that ‘[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these [Article 21 etc] provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee’.

7.31 The core human rights threatened by climate impacts are protected under several human rights treaties that India is a Party to, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. India has an obligation under these treaties to respect, protect and fulfil the rights contained in them. This obligation is binding on every State Party, India included, and must be given effect to in good faith. India is, also, as we have seen, a Party to the FCCC and its Kyoto Protocol.

7.32 India’s treaty commitments read together arguably require it to approach climate change not just as a global environmental problem but also as a human rights issue. Such an approach would have substantive and procedural implications. Substantively, India may be required to devote greater resources to adaptation so as to lessen the human cost of climate impacts. Procedurally, India may be required to integrate the human rights implications of climate impacts into its planning and policy-making processes. India’s treaty obligations could be thus interpreted by the Supreme Court to ‘enlarge the

110 Article 51(c), The Constitution of India, 1950.
meaning and content’ of the constitutional guarantees, inter alia to life, health and water.

Judicial activism and public interest litigation

7.33 The Indian judiciary is an extraordinary institution. It is, unlike in societies more deferential to separation of powers, a dynamic actor that shapes law, evolves policy, and plays a central determinative role in the governance of modern India. The Court plays this role primarily through the exercise of its self-fashioned public interest jurisdiction.

7.34 The origins of public interest jurisdiction in India can be traced to the late 1970s, early 1980s, and in particular the case of S. P. Gupta v. Union of India in which Justice Bhagwati relaxed the rule of locus standi and opened up the doors of the Supreme Court to public-spirited citizens – both those wishing to espouse the cause of the poor and oppressed (representative standing) and those wishing to enforce performance of public duties (citizen standing).

7.35 Public interest litigation in India can be pursued either in the High Court or Supreme Court. If the complaint is of a legal wrong, Article 226 of the Constitution permits recourse to the High Court of the state. If the complaint alleges a violation of fundamental rights, Article 32 of the Constitution permits direct recourse to the Supreme Court. For violations of fundamental rights, the Supreme Court may issue an order, direction or writ, including a writ in the nature of habeas corpus, quo warranto, mandamus, prohibition or certiorari. The High Courts can pass similar orders for enforcement of fundamental rights as well as of other legal rights.

7.36 At the behest of public-spirited individuals, the courts have passed (and continue to pass) orders in a range of cases. In the

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118 Article 226, ibid.
environmental field the Supreme Court, for instance, has passed hundreds of orders inter alia to protect the Taj Mahal from corrosive air pollution,\(^{119}\) rid the river Ganges of trade effluents,\(^{120}\) address air pollution in Delhi and other metropolitan cities,\(^{121}\) protect the forests and wildlife of India,\(^{122}\) and clear cities of their garbage.\(^{123}\)

7.37 The power of public interest litigation in India lies in its freedom from the constraints of traditional judicial proceedings. Public interest litigations in India have come to be characterised by a collaborative approach, procedural flexibility, judicially supervised interim orders and forward-looking relief. Judges in their activist avatar reach out to numerous parties and stakeholders, form fact-finding, monitoring or policy-evolution committees, and arrive at constructive solutions to the problems flagged for their attention by public-spirited citizens. Judges have tremendous power, in particular in public interest litigations, to design innovative solutions, direct policy changes, catalyse law-making, reprimand officials and enforce orders.

7.38 The Supreme Court is constitutionally empowered to ‘make such order as is necessary for doing complete justice in any cause or matter pending before it’.\(^ {124}\) Judges are not hesitant to exercise this power in what they perceive as the public interest. The discretion and flexibility that the courts have arrogated to themselves in the context of public interest jurisdiction will enable them, when faced with a climate case, to tailor solutions to problems, evolve policy where a vacuum exists, and govern when they perceive a governance deficit. The case of *T. N. Godavarman v. Union of India* is a case in point. The Supreme Court defined a ‘forest’ in the absence of a definition in the Forest (Conservation) Act, 1980,\(^ {125}\) and in so doing, the Court extended the protective framework of the statute to *all* forests, irrespective of the nature of their ownership or classification.\(^ {126}\) It has since taken over the

\(^{119}\) *M. C. Mehta v. Union of India (Taj Trapezium Case)*, W.P. No. 13381/1984.

\(^{120}\) *M. C. Mehta v. Union of India (Ganga Pollution Case)*, W.P. No. 3727/1985.

\(^{121}\) *M. C. Mehta v. Union of India (Delhi Vehicular Pollution Case)*, W.P. No. 13029/1985, and *M. C. Mehta v. Union of India (Delhi Industrial Relocation Case)*, W.P. No. 4677/1985.


\(^{123}\) *Almitra Patel v. Union of India*, W.P. No. 888/1996.


\(^{125}\) (1997) 2 SCC 267, at 269.

\(^{126}\) *Ibid.*
governance of the forests in India and passed numerous significant orders, including: that no forest, national park or wildlife sanctuary can be de-reserved without its explicit permission; and no non-forestry activity will be permitted in a national park or wildlife sanctuary even if prior approval under the Forest (Conservation) Act, 1980 has been obtained. It has also imposed complete bans on the movement of cut trees and timber from some states, and on felling of trees in ‘any forest, public or private’ in various hill regions.  

7.39 In the recent past, the judiciary, has, however, struck a cautionary note. In Divisional Manager, Aravalli Golf Club and Anor v. Chander Hass, the Court chastised the judiciary for overreach, and advocated judicial self-restraint. In State of Uttaranchal v. Balwant Singh Chaufal, the Supreme Court directed the High Courts to formulate rules to encourage genuine public interest litigations, and discourage those filed for extraneous reasons. Although some limits to the use of public interest litigations may be in the offing, these will likely only weed out those claims that are filed for private reasons, personal gain and such like. The public interest culture, although straining the judicial system to its limits, is still alive and well.

Environmental law and regulation

7.40 India has a wide array of environmental laws, and an extensive network of Central and State Pollution Control Boards, among other regulatory authorities, to govern them. The laws most relevant for current purposes are: the National Green Tribunal Act, 2010; the Environment (Protection) Act, 1986; the Air (Prevention and Control of Pollution) Act, 1981; and the Forest (Conservation) Act, 1980. Together these laws offer liberal access to litigants, a principled and environmentally benevolent framework, and numerous hooks for climate liability.

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127 Orders in n. 122 above.
130 All environmental legislations are available at http://envfor.nic.in/legis/legis.html.
131 See e.g. the website of the Central Pollution Control Board, Government of India, www.cpcb.nic.in/.
The newly constituted National Green Tribunal has jurisdiction over ‘all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to environment) is involved’ and arises in the context of a defined set of environmental laws, including those listed above. The Tribunal is empowered to hear appeals brought by ‘any person aggrieved’ by the decisions or orders of authorities under the air, water, biodiversity, environment and forest legislations. In addition to the customary extension of ‘person’ to artificial juridical persons, there is reason to believe that the courts, as they have in the past, will read ‘aggrieved person’ expansively. In Prafulla Samantara v. Union of India the Delhi High Court held that the term ‘aggrieved persons’ includes ‘public spirited interested persons, environmental activists or other such voluntary organisations working for the betterment of the community as a whole’. A range of actors will in theory be able to approach the National Green Tribunal. It is worth noting, however, that the National Green Tribunal (Practices and Procedures) Rules, 2011, impose various burdensome procedural requirements, which may in practice deter claimants from appearing in person. Nevertheless, dedicated climate litigants are likely to bring their claims before the Tribunal. Appeals lie from this Tribunal to the Supreme Court.

The Tribunal, while passing an order, is required to apply the principles of sustainable development, precaution and polluter pays. These principles, discussed earlier, have been fleshed out in case law, and are considered part of the law of the land. The application of the precautionary principle, in particular, may prove beneficial to climate litigants. The Tribunal also has far-ranging powers to order relief and compensation to victims of pollution or environmental damage, for restitution of damaged property, and even for restitution of the damaged environment.

132 Section 14, National Green Tribunal Act, 2010.
133 Section 16, ibid.
134 Section 2(j), ibid.
136 Ibid.
138 Section 22, National Green Tribunal Act, 2010.
139 Section 20, ibid.
140 Section 15, ibid.
The Environment (Protection) Act, 1986, empowers the Central Government to take all necessary measures for protecting and improving the environment, and preventing, controlling and abating environmental pollution. The central government has issued several pieces of secondary legislation to regulate different aspects of the environment, including the Environment Impact Assessment notifications that may prove useful to climate litigants.

The Environment Impact Assessment regime in India requires a certain defined set of projects to obtain environmental clearances from either the Ministry of Environment and Forests or the state-level Environment Impact Assessment Authority, depending on the size of the project, before commencing operations. These authorities rely on data gathered and scrutinised by expert appraisal committees. The expert appraisal committees are required to take account inter alia of the outcomes of public consultations in arriving at their recommendations. Such public consultations provide avenues for civil society to introduce climate considerations into the decision-making process. Expert appraisal committees are also permitted to consider documents other than those submitted by the project proponent while making recommendations. These documents could include evidence relating to the potential climate impacts of the project.

Any ‘aggrieved person’ can challenge the grant or denial of environmental clearances before the National Green Tribunal. Clearances have been quashed before other fora on grounds such as: ‘crucial impacts’ were not taken into account; public

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141 Section 3, Environment (Protection) Act, 1986.
142 Gazette Notification for Environmental Impact Assessment, Ministry of Environment and Forests, Order, New Delhi, 14 September 2006. The following categories of projects, some if of a certain scale, require environmental clearances: mining, extraction of natural resources and power generation, primary processing, materials production and processing, building/construction/area/township development projects, oil/gas transportation, hazardous waste, manufacturing/fabrication and physical infrastructure.
143 Section IV, ibid. 144 Section III, ibid. 145 Section IV, ibid.
146 Section 16(h) and (i), National Green Tribunal Act, 2010.
consultation procedure was improperly followed; environmental impact was too great; information submitted was false; decision-granting clearance was not reasoned; and data provided was inadequate to judge the environmental impact. In cases where clearances have been granted without due consideration of GHG intensity or footprints of particular projects, litigants could challenge the clearance on the grounds that these ‘crucial impacts’ were not taken into account. It is worth noting that notwithstanding this seemingly progressive framework, only 1 per cent of applications for environmental clearances are currently rejected. To take an example, of the fifty-eight coal mining projects seeking environmental clearances in 2009–10, thirty-one were approved, none were rejected, and the rest are pending.

7.46 The Air (Prevention and Control of Pollution) Act, 1981, defines air pollutant as ‘any solid, liquid or gaseous substance including noise present in the atmosphere in such concentration as may be or tend to be injurious to human beings or other living creatures or plants or property or environment’. Although this has yet to be done, arguably, GHGs could be covered, through judicial interpretation, under this definition, and regulated. The American Environment Protection Agency, following the landmark case of Massachusetts v. EPA, found that GHG emissions from moving vehicles are ‘reasonably likely’ to threaten public health and welfare, therefore certified six GHGs as pollutants, and proceeded

155 Section 2(a), Air (Prevention and Control of Pollution) Act, 1981.
156 Massachusetts v. EPA, 549 US 497 (2007); see Chapter 20.
to regulate these under the Clean Air Act, 1970. A similar interpretation to ‘air pollutants’ under the Air (Prevention and Control of Pollution) Act, 1981, would permit relevant authorities under this legislation to inter alia lay down ‘standards for emission of air pollutants into the atmosphere from industrial plants and automobiles or for the discharge of any air pollutant into the atmosphere from any other source whatsoever not being a ship or an aircraft’.

7.47 The Forest (Conservation) Act, 1980, restricts the conversion of forestland to non-forest use. State governments have to seek prior approval from the central government before de-reserving forestland, permitting non-forest use, or assigning it for private use. The Supreme Court has carved a role for itself in forest conservation. State governments are required to obtain permission from the Supreme Court for de-reserving forestland. The central government relies on the recommendations of a government-appointed Forest Advisory Committee in making decisions relating to such approvals. The Committee can consider, inter alia, the potential climate impacts caused by the diversion of forest land to non-forest purposes, for instance the impacts attributable to the submergence of forest land by a hydro power project. ‘Aggrieved persons’ can challenge approvals, possibly on climate-related grounds, granted by the Central Government, before the National Green Tribunal.

Judicial review

7.48 Public bodies take numerous decisions, in the course of exercising their functions, that will likely have an impact, direct or indirect, on climate change. They may take decisions approving the setting-up of coal-based power plants or permitting forestland

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157 See Chapter 20.
158 Section 17(g), Air (Prevention and Control of Pollution) Act, 1981.
159 For a comprehensive study of the Supreme Court’s interventions in the area of forest regulation, see generally R. Dutta and B. Yadav, Supreme Court on Forest Conservation, 3rd edn (Delhi: Universal Law Publishing, 2011).
159 Section 2, Forest (Conservation) Act, 1980.
162 Ibid.  Section 3, Forest (Conservation) Act, 1980.
163 Section 16(e), National Green Tribunal Act, 2010.
to be cleared for mining. Climate litigants may wish to challenge such decisions by seeking judicial review of administrative action. There are various techniques available to do so – writs, appeals for review, references to courts, injunctions, declarations, suits for damages for tortious actions (of government bodies/employees), etc. Of these, the technique most favoured is that of writs. The two most relevant, for current purposes, would be that of mandamus and certiorari. A writ of mandamus may be issued to compel the performance of a public legal duty by a public authority while the writ of certiorari may be issued to quash a decision of a body, administrative or quasi-judicial, that affects the rights or interests of any person.

Grounds for judicial review

7.49 Judicial review of administrative action can be sought on several grounds, including: illegality; irrationality; proportionality; and procedural impropriety.

7.50 Illegality: The decision of an administrative body or the exercise of its discretionary powers may be considered illegal if the body acted without jurisdiction, failed to exercise its jurisdiction, or abused its jurisdiction or discretionary powers. In the climate context, abuse of discretionary power due to non-inclusion of relevant considerations and non-application of mind by the administrative body may prove useful. If the statute lays down considerations, express or implied, which have to be taken into account by an administrative body while exercising its discretionary powers, the non-inclusion of such relevant considerations would render the decision illegal. Even if the statute does

not lay down such considerations but provides general powers to the body, the courts may still read in relevant considerations and quash the decision of the body. Relevant considerations may also be gauged from the facts and circumstances of the case, the aims and objectives of the statute and the impact of the decision/action. In the context of decisions affecting the environment, the latest scientific data and technical reports testifying, for instance, to adverse environmental impacts of a project are relevant considerations that the decision-making authority is required to take account of.

7.51 An administrative decision can also be challenged when the authority has not applied its mind to relevant considerations, when it acts mechanically, or it acts under dictation. If the government mechanically permits an industry or process without applying its mind to the potential climate impacts, its decision may be challenged before the courts as illegal.

7.52 Irrationality (or Wednesbury unreasonableness): A further ground on which an administrative decision can be challenged is irrationality. For an administrative decision to be considered irrational, the court has to hold, on material, that the decision is so outrageous as to be in total defiance of logic or moral standards. The intervention of the court in such cases is limited to an examination of the decision-making process, not the decision. If the court finds that the administrator acted illegally, did not perform his/her primary role well, either omitted relevant factors or took irrelevant factors into consideration, or his/her view is one which no reasonable person could have taken, then the court may quash the decision as being arbitrary and in violation of Article 14 of the Constitution. In a climate context, if it can

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176 Chairman, Board of Mining Examination v. Ramjee (1977) 2 SCC 256, at 262.
179 Om Kumar v. Union of India (2001) 2 SCC 386, at 411.
be shown that the authority, despite enjoying the discretion, did not consider relevant climate change policies and reports while granting regulatory approvals or making policy choices, a case for irrationality could be made.

7.53 **Proportionality:** The test of proportionality permits the courts to undertake a closer scrutiny of the administrative decision-making process than that merited by the *Wednesbury* test. Since this necessarily leads to a greater intervention in what is otherwise the executive’s domain, the courts apply the test of proportionality principally in the context of fundamental rights.\(^{180}\) The Supreme Court explains ‘proportionality’ as ‘whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be’.\(^{181}\) In recent years, the Supreme Court has held in some cases that the *Wednesbury* test has given way to the proportionality test.\(^{182}\) But this position remains contested.\(^{183}\) As climate-related claims are likely to be founded on the fundamental right to life, the courts are likely to apply the proportionality test.

7.54 **Procedural impropriety:** A decision of an administrative body can be reviewed on the ground that the procedure as stated in the law has not been followed. If a statute prescribes a procedure for exercise of power, the statutory authority must exercise its power in a manner prescribed or not at all.\(^{184}\) Even if there is no statutory requirement, administrative bodies are expected to be just, fair and reasonable in their dealings or they could fall foul of Articles 14, 19 and 21 of the Constitution which have been read together to provide protection to the principles of natural justice.\(^{185}\)

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\(^{180}\) *Union of India* v. G. Ganayutham (1997) 7 SCC 463.

\(^{181}\) *Om Kumar* v. *Union of India* (2001) 2 SCC 386, at 399.


\(^{185}\) *Maneka Gandhi* v. *Union of India* AIR 1978 SC 597.
Other aspects of judicial review

7.55 Writs are commonly dismissed on the ground that the plaintiff lacks standing, there is unreasonable delay, or that an alternative efficacious remedy exists. Cases raising climate claims are unlikely to be affected by these grounds. First, Indian courts take, as we have seen, a liberal approach to standing.\textsuperscript{186} Second, Articles 32 and 226 of the Constitution do not prescribe a reasonable timeframe within which a case must be brought before the court. Besides, in climate and environmental claims, the cause of action will likely be ongoing, and if there is illegality it is likely to be continuing.\textsuperscript{187} Third, as one of the issues in a climate claim is likely to be the violation of the fundamental right to life, the existence of an alternative efficacious remedy is not a ground for the court to reject a writ before it.\textsuperscript{188}

(C) Private law

7.56 There have been no significant private law claims in India based on allegations of actual or anticipated damage from climate change. However, should claimants be inclined to bring such claims, the two torts that offer promise are nuisance and negligence. The essential elements of both torts are drawn from the common law principles of tort evolved by the courts in England, and applied to the extent of their suitability and applicability to Indian conditions.\textsuperscript{189}

Nuisance

7.57 Although there is no strict definition of the tort of nuisance, it may be defined as ‘an inconvenience that materially interferes with the ordinary physical comfort of human existence’.\textsuperscript{190} The

\textsuperscript{188} \textit{Mumtaz Post Graduate Degree College v. Vice Chancellor} (2009) 2 SCC 630.
\textsuperscript{190} \textit{Vasant Manga Nikumba v. Baburao Bhikanna Naidu (Deceased) by LRs.} 1995 Supp. (4) SCC 54, at 56.
Supreme Court has identified the essential elements of nuisance as an unlawful act, and damage, actual or presumed.\(^{191}\)

7.58 There are two kinds of nuisance – public nuisance and private nuisance. Public (or common) nuisance according to the Indian Penal Code, 1860 is an act or illegal omission which ‘causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right’.\(^{192}\) Private nuisance affects one or more individuals rather than a large group.

7.59 Public nuisance may offer some (limited) hope to climate litigations. For a claim to be successful the damage need not already have occurred. It is sufficient if there is an imminent danger to the health or the physical comfort of the community in the locality in which the trade or occupation causing the nuisance is conducted.\(^{193}\) In *Kuldip Singh v. Subhash Chander Jain*, the Supreme Court held that ‘… a future nuisance to be actionable must be either imminent or likely to cause such damage as would be irreparable once it is allowed to occur …’.\(^{194}\) This will prove useful in climate-related litigation, as the damage, while not imminent, is potentially irreparable.

7.60 Both civil and criminal remedies are available in public nuisance cases. The Code of Civil Procedure, 1908, provides that the Advocate General or, with the permission of the court, even persons to whom no damage has been caused, can file a suit.\(^{195}\) This may prove useful to civil society in filing climate-related claims. However, this provision is not widely used in this fashion due to the lengthy delay in bringing civil proceedings to a close, and the liberal access provided to higher courts in India. Cases of public nuisance can also be pursued and addressed under criminal law.\(^{196}\)


\(^{192}\) Section 268, Indian Penal Code, 1860. The texts of all Indian laws are available at http://indiacode.nic.in/.


\(^{194}\) AIR 2000 SC 1410.  \(^{195}\) Section 91, Code of Civil Procedure, 1908.

In a landmark case on nuisance, the Supreme Court directed a municipality to remove the public nuisance caused due to lack of sanitation and drainage facilities and improper disposal of factory effluents. The municipality pleaded lack of funds but the Supreme Court held that financial inability did not exonerate the municipality from statutory liability.

The law of public nuisance may therefore offer some promise for climate litigants. While it may be difficult to prove imminent danger related to GHG emissions, it may be possible to demonstrate irreparable damage. It could also be argued that since emission of pollutants constitutes a nuisance, by logical extension emission of GHGs can also be construed to be a nuisance.

**Absolute liability**

The Supreme Court in a landmark decision in 1987 fashioned a new rule of tortious liability that has come to be characterised as ‘absolute liability’. The court held that where an enterprise is engaged in a hazardous or inherently dangerous industrial activity and harm results on account of an accident in the operation of such hazardous or inherently dangerous activity, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident. Unlike the principle laid down in *Rylands v. Fletcher*, the absolute liability principle does not require an ‘escape’ of the thing (causing the harm) from the premises. Further, the enterprise is held liable irrespective of the care taken by it to prevent the accident. Indeed none of the exceptions allowed by the rule of strict liability in *Rylands* apply in the case of absolute liability. The justification for this type of liability is that a non-delegable duty is owed to the community to ensure that highest standards of safety are maintained. In addition, the enterprise alone is in a position to prevent and discover any harm and send out warning signals against potential

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The court, to achieve deterrence, also held that the quantum of compensation should depend on the ‘magnitude and capacity’ of the enterprise.\textsuperscript{205}

7.64 In \textit{Indian Council for Enviro-Legal Action v. Union of India}\textsuperscript{206} the Supreme Court held chemical industry units absolutely liable for discharging waste in the surrounding areas, polluting the soil and water, and thereby adversely affecting people living in the vicinity. The Supreme Court also, for the first time, relied on the principle of ‘polluter pays’ and held the industries responsible not only for compensating the victims but also for repairing the damage caused to the environment and restoring the water and soil to the condition it was in before the units commenced their operations.\textsuperscript{207} In \textit{Deepak Nitrite v. State of Gujarat}, the Court broadened the basis of compensation and held that ‘compensation to be awarded must have some broad correlation not only with the magnitude and capacity of the enterprise, but also with the harm caused by it’.\textsuperscript{208}

7.65 These cases, and concepts – both of absolute liability and polluter pays – are useful tools in the arsenal of public interest environmental litigants. However, since claims can only be brought once the damage has been caused, they may prove useful only in a subset of climate-related claims.

\textbf{Negligence}

7.66 Negligence is both a tort and a crime (some forms of it are offences under the Indian Penal Code).\textsuperscript{209} As a tort, it has been defined as the breach of duty caused by the omission to do something that a reasonable man, guided by those considerations that ordinarily regulate the conduct of human affairs, would do, or doing something that a prudent and reasonable man would not

\textsuperscript{204} \textit{Ibid.} \textsuperscript{205} \textit{Ibid.}
\textsuperscript{209} Sections 269, 284–289 and 304A, Indian Penal Code, 1860.
do.210 The Supreme Court has identified the elements of negligence as:

… whether the defendant owed a duty of care to the plaintiff, whether the plaintiff is a person or a class of persons to whom the defendant owed a duty of care, whether the defendant was negligent in performing that duty or omitted to take such reasonable care in the performance of the duty, whether damage must have resulted from that particular duty of care which the defendant owed to the particular plaintiff or class of persons.211

7.67 The plaintiff has to establish that the defendant owes a duty of care. This requires the plaintiff to demonstrate foreseeability of the damage, a sufficiently proximate relationship between the parties, and that it is just and reasonable to impose such a duty.212 In addition there ought not to be any policy considerations that negative the existence of such a duty. The courts have held the concept of duty of care to be a fluid one, ‘influenced and transformed by social, economic and political development’.213

7.68 The breach of the duty of care has to lead to some damage – whether in the form of economic loss or damage to person or property. A cause of action for negligence only arises when damage occurs214 and not on the date on which the negligent act took place.215

7.69 The defendant’s negligent act must have caused the damage. However, the defendant does not have to be wholly responsible for the damage. The courts have relaxed the causal rules in some instances. In the case of Jaipur Golden Gas Victims v. Union of India,216 the Delhi High Court, relying on English217

212 Ibid., at 579–80.
and Canadian cases,218 held that the claimant does not have to prove that the defendant’s breach of duty was the sole, or even the main, cause of damage, provided he/she can demonstrate that it made a material contribution to the damage. Although the Court borrowed and applied concepts from foreign law, it did not analyse these in sufficient detail or depth to permit sensible predictions on the direction in which causal rules will evolve. Suffice to say that the cases that the Court borrowed from find causation where a material contribution to the damage exists. They also equate a ‘material contribution to the damage’ to a ‘material increase in the risk’ of the damage occurring. This might prove helpful in climate claims, where proof of causation, given multiple contributory factors and difficulties in attribution, hampers litigation. For instance, claims against power plants arguing that their indiscriminate GHG emissions, among other causes, have materially increased the risk of climate change and extreme weather events occurring, may, in the event of such events occurring, help locate liability and obtain compensation for victims.

7.70 For a climate claim based on negligence to be successful, the claimant would first have to establish proximity and foreseeability of damage. The person causing the GHG emission would have to be aware of the foreseeable damage that could be caused due to increased GHG emissions. Although the damage suffered by the plaintiff as a result of climate change (higher risk of disease, rising sea level, increases in extreme weather conditions etc.) may have several contributory factors, the relaxed causal rules in operation may allow the claim of the plaintiff to proceed.

7.71 Where negligence is proven, the courts can award damages that could be nominal, substantial or exemplary.219 An injunction may also be sought to prevent the further infringement or disturbance of a right or prevent continued breach of duty of care leading to negligence.220

(D) Other law

Criminal law

7.72 The Indian Penal Code, 1860, imposes a punishment on any person (including company, association etc.) who voluntarily vitiates the air in a manner which makes it harmful to the health of persons residing or carrying on business in the area.\(^{221}\) This provision may be of limited use to climate litigants, for not only is there a requirement of physical proximity, but the fine that can be imposed is a mere 500 Rupees (approximately US$ 10).

Competition law

7.73 Although the Competition Act was passed by Parliament in 2002, significant provisions of the Act such as Sections 3 (prohibition of anti-competitive agreements) and 4 (prohibition of abuse of dominant position) came into force only in 2009. The legislation is therefore recent and is yet to reach a stage when it can be creatively interpreted so as to prohibit competitive advantage that might be enjoyed by industries that are emission-intensive.

World heritage

7.74 India has twenty-three cultural sites and five natural sites that are part of the list of World Heritage Sites.\(^{222}\) Changes in temperature and rising sea levels will likely have an adverse impact on historical monuments as well as the floral and faunal diversity of the heritage sites.\(^{223}\) One of the natural sites in India is the Sunderbans in West Bengal, featured on the cover of this book. Projected sea level rise due to climate change is the single largest threat to it.\(^{224}\) The mangroves forests of Sunderbans are known for their biodiversity, and increased salinity in the water would threaten their continued existence.\(^{225}\) The World Heritage

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\(^{221}\) Section 278, Indian Penal Code, 1860.

\(^{222}\) A list of properties in India inscribed in the World Heritage List is available at http://whc.unesco.org/en/statesparties/in.


\(^{224}\) Note 25 above, at 97.

\(^{225}\) UNESCO, Case Studies on Climate Change and World Heritage (2007), p. 36.
Convention, 1972, ratified by India in 1977, obliges States to protect and conserve the identified heritage sites.\textsuperscript{226} This arguably includes action to reduce the impact of climate change on these sites.\textsuperscript{227}

\textit{Unfair trade practices}

7.75 Under Indian law, if any false or misleading statement about the standards, quality, composition, quantity etc. of a product is made orally, verbally or through visible representation, then it constitutes an unfair trade practice.\textsuperscript{228} A complaint against unfair trade practices can be made at specialised fora constituted under the Consumer Protection Act, 1986, by a consumer to whom such a good was sold, by a recognised consumer association, or even by the central or state governments.\textsuperscript{229} Orders can be issued by the competent forum for discontinuation of such practices.

7.76 There is no special law relevant to the field of advertising. However, the Advertising Council of India, a voluntary organisation of the advertising sector, has formulated a Code for Self-Regulation in Advertising.\textsuperscript{230} The Code states, inter alia, that: advertisements cannot distort facts or mislead consumers; they cannot abuse the lack of knowledge or experience of a consumer; and should not contain anything that is in breach of the law or omit anything that the law requires. Violation of the Code can be challenged before the Consumer Complaints Council set up under the Code. If the Council upholds a complaint against an advertiser and the advertiser does not comply with the Council’s decision, the Council can report to the concerned government agency.\textsuperscript{231}

\textsuperscript{226} Articles 4, 5, World Heritage Convention, 1972.
\textsuperscript{228} Section 2(1)(r)(1), Consumer Protection Act, 1986.
\textsuperscript{229} Section 12(1), \textit{ibid.}
\textsuperscript{230} Available at www.ascionline.org/regulation/ASCI_Code_of_Self_Regulation.pdf.
\textsuperscript{231} The procedure for processing a complaint against an advertisement, for contravention of the Code, is available at www.ascionline.org/procedure/procedure_1.htm.
The provisions of the Consumer Protection Act and the Code can be relied on in cases where companies such as those selling automobile as well as electrical and electronic equipment make claims with regard to their emissions, fuel/energy efficiency or their impact on the climate that may be false or misleading.

(E) Practicalities

This section provides an overview of the procedural aspects of the law and analyses whether the current state of law is procedurally amenable to climate claims.

Founding jurisdiction for a claim

The Civil Procedure Code, 1860, is the principal procedural legislation with regard to civil suits in India and therefore any tort-based climate change claim would be governed by it. For a person to be made a party to a civil suit, residence or domicile in India is not necessary. If the cause of action has arisen in India, the immovable property with regard to which a compensation claim has been made is situated in India or if the defendant carries on business in India, the suit can be brought before the appropriate civil court in India irrespective of the nationality or domicile of the defendant.

Criminal offences under the Indian Penal Code, 1860 can be tried either at the court in whose local jurisdiction the cause of action has arisen or at the court in whose local jurisdiction the consequences have been suffered. Therefore offences such as public nuisance and criminal negligence can be tried in Indian courts, if the act causing the nuisance or the criminally negligent act has been committed in India or if the impact of the act is felt in India. The residence, domicile and citizenship of the person responsible for the act are not relevant. The provisions of the Indian Penal Code, 1860, are equally applicable if the offences are committed outside India by an Indian citizen.

232 Section 19, Code of Civil Procedure, 1908.
234 Section 4, Indian Penal Code, 1860.
There are many ways in which a civil decree can be enforced in India – delivery of property; attachment and sale of property; appointment of receiver; arrest and detention in prison (if certain conditions are met). Decrees passed by foreign courts can be executed by Indian courts as if they were decrees passed by an Indian court if the foreign court is of a ‘reciprocating territory’. However, if the decree is not conclusive the Indian courts can refuse to execute it. An arbitral award can be executed in the same way as any other civil decree.

Foreign arbitral awards can be enforced in India under the Arbitration and Conciliation Act, 1996. The court can refuse to enforce an award on certain grounds such as the enforcement of the award is contrary to public policy, the agreement for arbitration is not valid in law or the subject matter is not capable of settlement through arbitration in India. If the court makes a finding that the arbitral award is enforceable, then it is deemed to be a decree of the court.

The Code of Civil Procedure, 1908 recognises the inherent power of courts to issue such orders as are necessary to meet the ends of justice. Among other orders, Indian courts have the power to issue temporary injunctions to restrain a defendant from causing any injury to the plaintiff or breach of contract during the continuance of suit proceedings. They can issue injunction orders to restrain the commission of any act that is likely to damage property that is the subject matter of a suit.

235 Section 51 read with Order XXI, Code of Civil Procedure, 1908.
236 Section 44A, *ibid*.
237 Section 13, *ibid*. (explaining that a foreign decree can be found to be inconclusive on grounds such as incompetence of the decreeing court, violation of principles of natural justice, etc.).
238 Sections 49, 58, Arbitration and Conciliation Act, 1996.
239 Section 151, Code of Civil Procedure, 1908.
241 Order XXXIX, Rule 2, *ibid*. 
Courts can also pass interlocutory orders preserving property that is the subject matter of a suit or for inspecting and authorising a person to enter any property to take samples or undertake experiments necessary to bring to light full information and evidence.242

**Litigation costs**

7.84 Costs of litigation are generally borne by the litigants unless a person is entitled to legal services from the State.243 The courts have discretion to award costs.244 In case the court decides not to award costs then it has to state the reasons in its order.245 The court can also impose costs in cases of proven false and vexatious claims246 and deliberate delay.247

**Obtaining information**

7.85 In a civil suit, parties have to file copies of documents relied on by them to the court.248 The court has the power to order discovery either on its own or in response to an application filed with it. It can issue necessary directions with regard to delivery and answering of interrogatories (set of questions filed by either party), inspection, production, impounding and return of documents or other objects.249 It can even issue summons to a person required to give evidence or produce documents.250 In a criminal case, whenever the court or the officer in charge is of the opinion that certain documents or any other things are necessary for the case, summons or order may be issued.251 Electronic records can also be summoned by the court.

7.86 The Indian Evidence Act, 1872 imposes certain restrictions on the disclosure of information derived from unpublished official records relating to affairs of the State and communication made

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242 Order XXXIX, Rule 7, *ibid.*
243 The Legal Services Authorities Act, 1987, in Section 12, lays down the criteria for providing legal services.
244 See Order XXA and Section 35, Code of Civil Procedure, 1908.
246 Section 35A, *ibid.*
247 Section 35B, *ibid.*
248 Order VII, Rule 14, *ibid.*
249 Section 30 read with Order XI, *ibid.*
in official confidence.\textsuperscript{252} However, if there is a conflict between the provisions of the Right to Information Act, 2005\textsuperscript{253} and the Indian Evidence Act, 1872, the former will override the latter.\textsuperscript{254}

7.87 The Right to Information Act, 2005 provides statutory recognition to a hitherto uncodified fundamental right to information.\textsuperscript{255} This legislation is intended to promote transparency and accountability in the governance of the country.\textsuperscript{256} Citizens can file Right to Information applications seeking information from public authorities, i.e. government bodies and bodies that are owned, controlled or substantially financed by the government.\textsuperscript{257} Information can also be obtained from private bodies as long as these can be lawfully accessed by a public authority.\textsuperscript{258} Certain types of information are exempt from disclosure such as trade secrets, intellectual property etc.\textsuperscript{259} However, even exempt information can be provided if public interest warrants disclosure.\textsuperscript{260} The Right to Information Act, 2005 lays down a strict timeline within which the information has to be provided,\textsuperscript{261} and non-compliance with the timeline, without reasonable cause, can lead to individual liability of the concerned official.\textsuperscript{262}

7.88 The Right to Information Act, 2005 can be a useful mechanism to obtain information on actions initiated by government agencies to respond to climate change;\textsuperscript{263} on reasons, if on record, for governmental inaction; on decisions taken by such agencies which may result in GHG emissions or reduction in carbon sink, etc. This information would be admissible as evidence in litigation, and as the source would be the government, it would be difficult for the government to challenge its authenticity/accuracy.

\textsuperscript{252} Sections 123, 124, Indian Evidence Act, 1872.  
\textsuperscript{253} See paras. 7.87–7.90, below.  
\textsuperscript{254} Section 22, Right to Information Act, 2005.  
\textsuperscript{255} \textit{State of Uttar Pradesh v. Raj Narain} AIR 1975 SC 865.  
\textsuperscript{256} Preamble, Right to Information Act, 2005.  
\textsuperscript{257} Section 2(h), \textit{ibid}.  
\textsuperscript{258} Section 2(f), \textit{ibid}.  
\textsuperscript{259} Section 8(1)(d), \textit{ibid}.  
\textsuperscript{260} Section 8(1)(d), (2), \textit{ibid}.  
\textsuperscript{261} Section 19(1), (3), \textit{ibid}.  
\textsuperscript{262} Section 20(1), (2), \textit{ibid}.  
\textsuperscript{263} The Right to Information Initiative of the Climate Revolution, a Gurgaon-based organisation, has filed several applications with the Ministry of Environment and Forests, the Prime Minister’s Office and other government departments seeking information relating to the government’s policy on climate change. The information received is publicly available at http://climaterevolution.net/rti/.
7.89 Government bodies are under an obligation to retain documents for a certain period of time. Each department is expected to formulate ‘weeding out’ rules clearly stating the length of time a type of record is to be maintained.\footnote{The Public Records Act, 1993.} Companies are also required to retain certain records for a stipulated length of time.\footnote{Companies (Preservation and Disposal of Records) Rules, 1966.}

7.90 Under the Right to Information Act, 2005, public authorities are under an obligation to \textit{suo moto} disclose information relating to them – such as details about their organisation, functions, work practices, budget, remuneration of employees, recipients of concessions, minutes of meetings etc.\footnote{Section 4, Right to Information Act, 2005.} The Companies Act, 1956 and other provisions of corporate law require companies to disclose certain information about the company.\footnote{Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.} For instance, when there is a public issue of shares, the offer document would include important up-to-date information about the company – its history and corporate structure, shareholders agreements, details about the management etc. According to the disclosure requirements, the corporate structure must include information about environmental issues.

\textit{Conclusion}

7.91 Climate-related claims have yet to be litigated in India. There are a few cases in which climate change is referred to, but only in passing. This situation may, however, be set to change. Climate change and its impacts are rapidly capturing the popular imagination in India. There is a growing recognition of the importance and urgency of the climate challenge, and a slew of climate policies and initiatives have been launched in response. India has an engaged and proactive civil society, an activist judiciary, a progressive body of enviro-legal jurisprudence and an unparalleled culture of public interest litigation.

7.92 There are several hooks in Indian law for climate-related claims to be litigated. It is but a question of time before these hooks are raised and explored before the courts. Of these hooks however,
the constitutional rights-based ones – whether in relation to an environmental right, or core rights to life, health, etc. – are most likely to be explored first. Not least because other cases can take up to fifteen years to be disposed of.\footnote{268} Constitutional rights-based avenues, given the rich culture of judicial activism and public interest litigation prevalent in India, offer the most promise, and are therefore well worth tracking.

\footnote{268 National Litigation Policy, Ministry of Law and Justice, Government of India (23 June 2010). There are currently 54,600 cases pending before the Supreme Court, and 41,83,731 cases before the High Courts (Court News, July–September 2010, available at http://supremecourtofindia.nic.in/courtnews/2010_issue_3.pdf).}
(A) Introduction: climate change risk, sources and government policies and measures

Climate change risk

8.01 Climate Change has a significant negative impact on Indonesia. The combination of sea level rise and an increased occurrence of extreme weather, i.e. La Nina and El Nino,\(^1\) will cause higher intensity of erosion and abrasion. In turn it will further negatively affect the changes in the coastline that is already losing ground to higher sea level.\(^2\) This negative impact is reflected in Indonesia’s capital Jakarta. It is estimated that by 2100 Jakarta’s coastline will be reduced by 15 km, thereby directly affecting the central business district.\(^3\) The erosion also contributed to the loss of twenty-four Indonesian islands in two years (2005–07).\(^4\) Extreme weather also causes a significant negative impact on the lives of the population that lives along the coastline. This population is often subject to maritime accidents\(^5\) and disasters caused by extreme weather, diseases\(^6\), drought and flood. These factors also have a severe impact on

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1. It is predicted that from 2001–30 La Nina and El Nino will occur every year. By comparison, from 1870–1999 they only happened once in every four years. Bappenas, ‘ICCSR: Scientific Basis; Analysis and Projection of Sea Level Rise and Extreme Weather Event’ (March, 2010), pp. 38–41.
2. ICCSR, p. 47.
3. ICCSR, p. 59.
5. Because of the extreme weather caused by anomalies in the climate, an accident happened on 29 December 2006 in the Java sea that caused the deaths of more than 200 people. ICCSR, p. 46; NAPACC (2007), pp. 3–5.
the agricultural sector. It should be noted that agriculture is a source of income for 40 per cent of the Indonesian workforce.

Sources of greenhouse gases

8.02 The majority of Indonesia’s GHGs come from land use change and the forestry sector (46%), followed by energy (24%), peat fire (12%), waste (11%), agriculture (5%) and industry (2%).

Governmental stance on climate change

8.03 Indonesia is party to the FCCC and Kyoto Protocol. Both were ratified through Act No. 6/1994 and Act No. 17/2004 respectively.

8.04 The President has announced Indonesia’s commitment to reduce GHG emissions by up to 26% by national effort and 41% with international support by 2020. The plan for emissions reduction is explained in the table below.

8.05 The National Council on Climate Change (DNPI), headed by the President, was established in 2008. The Council is tasked with developing policies, strategies and programmes to address climate change, coordinating climate change activities and strengthening Indonesia’s position in international negotiations. Initiatives are also taken at the regional level through the establishment of a Regional Council on climate change, a green development strategy and adaptation plan.

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7 For example, drought will cause a decrease of palm oil production of up to 6 per cent per year. GoI, ICCSR; Sektor Pertanian (ICCSR Agriculture Sector) (March 2010), pp. 18–25.
8 ICCSR Agriculture Sector, p. 1.
9 The total amount is 1,415,988 Gt CO$_2$e. Summary for Policy Makers: Indonesia Second National Communication Under UNFCCC (November 2009) (‘2nd National Communication’), pp. 6–7.
10 This commitment was first announced on 25 September 2009 before the G20 meeting in Pittsburgh, USA.
11 This Council is established through Presidential Regulation 46/2008.
12 Article 3, Presidential Regulation 46/2008.
14 East Kalimantan and Aceh, for example, have stated themselves as Green Provinces. See for instance www.kaltimprov.go.id/kaltim.php?page=detailberita&id=4474.
15 See www.antaramataram.com/berita/?rubrik=5&id=11456.
<table>
<thead>
<tr>
<th>Issue</th>
<th>Planned emissions reduction</th>
<th>Action Plan</th>
<th>Responsible party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Forestry and peat land</td>
<td>0.672 1.039</td>
<td>Control of fire on forest and peat land, management of water, rehabilitation of forest and peat land, combating illegal logging, deforestation prevention, public empowerment</td>
<td>Ministry of Forestry, Ministry of Environment (MoE), Ministry of Agriculture (MoA), Ministry of Public Works (MPW).</td>
</tr>
<tr>
<td>Agriculture</td>
<td>0.008 0.011</td>
<td>Introduction of low emission of Paddy variety, irrigation efficiency, use of organic fertiliser</td>
<td>MoA, MoE</td>
</tr>
<tr>
<td>Energy and transportation</td>
<td>0.038 0.056</td>
<td>The use of biofuel, higher standard of machine in using more efficient fossil fuel, demand side management, energy efficiency, and expansion of renewable energy</td>
<td>Ministry of Transportation, Ministry of Energy, MPW.</td>
</tr>
<tr>
<td>Industry</td>
<td>0.001 0.005</td>
<td>Energy efficiency, use of renewable energy</td>
<td>Ministry of Trade</td>
</tr>
<tr>
<td>Waste</td>
<td>0.048 0.078</td>
<td>Closure of open dumping and develop integrated final dumping</td>
<td>MPW, MoE</td>
</tr>
</tbody>
</table>

Source: Adapted from National Action Plan Reduction of Green House Gas Emission, draft per August 2010
The Indonesian Government entered into a Letter of Intent (‘LoI’) with the Norwegian Government on 26 May 2010. This represents an important development in the area of reducing emissions from deforestation and forest degradation.\(^{16}\) Under the terms of the LoI, the Norwegian Government has pledged to contribute funds to Indonesia’s REDD+ efforts to the tune of US$ 1 billion. As part of this initiative, the Indonesian government has established a Presidential Task Force to lay the groundwork for the introduction of a new institution tasked with, inter alia:\(^{17}\)
- implementing REDD+ activities;
- introducing a moratorium on new concession licences on the primary forest and peat land areas;
- developing an instrument for financing; and
- developing a draft national strategy on REDD+.

\[(B)\] \hspace{1cm} \textbf{Legal system and practice}

\textit{Source of law and hierarchy of legislations}

Indonesia inherited its civil law system from the Dutch. In addition to written laws, other sources of Indonesian law are custom, case law, treaty and doctrine. Indonesian law acknowledges the rank or hierarchy of legal norms. According to Law 10/2004 on Legislation Making, the hierarchy, from the highest to the lowest, is: \textit{Undang-undang Dasar 1945} (the ‘Constitution’); \textit{Undang-undang} (the ‘Statutes’ or ‘Laws’, enacted by Parliament and Government) or \textit{Peraturan Pemerintah Pengganti Undang-undang} (the ‘Government Regulation in Lieu of Law’); \textit{Peraturan Pemerintah} (the ‘Government Regulation’); \textit{Peraturan Presiden} (the ‘Presidential Regulation’); and \textit{Peraturan Daerah} (the ‘Local Regulations’).\(^{18}\) Lower-level norms should not contradict higher-level norms. The law also acknowledges legal norms made by other arms of government, ministerial or public bodies, as


\(^{17}\) Presidential Decree 19/2010 concerning Working Group to Prepare Institutional Development of REDD+.

long as they are mandated to do so by the law (although their positions in the hierarchy are still in dispute).\textsuperscript{19}

\textit{Law enforcement}

8.08 Generally, criminal law is enforced by the police and the public prosecution service. There are several government agencies and independent bodies that can investigate (and prosecute) special crimes – such as the Civil Servant Investigation Unit (‘PPNS’) in the area of forestry and environment.

8.09 Law enforcement agencies, aside from some independent bodies, are perceived as far from effective. Their integrity, commitment, competency and professionalism – including enforcement of environmental-related crimes – are often questioned.\textsuperscript{20}

8.10 The government has a significant role in supervising and enforcing administrative law in relation to private sector activities on environmental issues. However, due to the points raised above, notwithstanding many alleged violations, that power is seldom used.\textsuperscript{21}

\textit{The judiciary}

\textbf{Structure and jurisdiction}

8.11 The judiciary is divided into four main jurisdictions: General Courts, Religious Courts, Military Courts and Administrative Courts. The law also allows the establishment of special courts/chambers under each of the four jurisdictions. \textit{Mahkamah Agung} (the ‘Supreme Court’) has the power to hear appeals from every jurisdiction and to review the compliance of lower-level regulations with higher-level regulations, including statutes – but not their compliance with the Constitution.\textsuperscript{22}

\textsuperscript{19} For example when a ministerial regulation contradicts a local regulation. In practice, normally the former will be recognised as higher law if it gets its mandate from the law to regulate the disputed matter.

\textsuperscript{20} See for instance, Satuan Tugas Pemberantasan Mafia Hukum (Satgas PMH), \textit{Modus Operandi, Akar Masalah dan Penanggulangannya} (Jakarta: Satgas PMH, 2009).

\textsuperscript{21} Mas Achmad Santosa, \textit{Good Governance dan Hukum Lingkungan} (Jakarta: ICEL, 2001).

\textsuperscript{22} Article 24 A (1), 1945 Constitution.
8.12 In addition to these ‘traditional courts’, Indonesia has a newly established Mahkamah Konstitusi (the ‘Constitutional Court’). Its main authority is to review the constitutionality of a statute passed by the parliament and the government.\(^\text{23}\)

Judicial independence, impartiality, competence, accountability and culture\(^\text{24}\)

8.13 While judicial independence from the legislative and executive branches is no longer a serious issue in ‘traditional courts’,\(^\text{25}\) issues around judicial impartiality, competence, accountability and culture still persist. Generally, judges do not perceive case law as an important factor in deciding similar cases, thereby making it difficult for parties to predict the outcome of a case. Moreover, court decisions usually do not provide in-depth legal grounds/arguments. Similarly, discussions/reviews of the court’s decisions are rare.

8.14 Many judges tend to decide according to a strict interpretation of the letter of the law and only when the law is clear and explicit. As a consequence, they refrain from entertaining legal arguments that are based on the intent or spirit of the law or general provisions in the law such as those that make reference to human rights – not to mention international principles or case law from other jurisdictions. Some judges take the position that general provisions of the law that require implementing regulations do not produce legal consequences until such regulations are passed.

\(^{23}\) Ibid.


\(^{25}\) Before the so-called Reform Era, judicial independence was fragile due to government intervention, especially in big cases involving the government, the elites or corporations connected with the elites. After the Reform Era there were several reform initiatives which significantly minimised direct intervention into the judiciary.
8.15 At the same time, an established legal doctrine, case law or legal expert’s witness argument is occasionally referred to by the judges when interpreting some basic/common legal issues.

Litigation culture

8.16 Indonesians are not litigious people.\textsuperscript{26} This is primarily due to the state of the judiciary (as mentioned above), limited access to justice and limited legal awareness, various cultural issues and, in some cases (including environmental cases), imbalance of power between the perpetrator and the victim. Public interest litigation is relatively common. It is normally brought to court or is supported by non-governmental organisations which unfortunately have limited resources at their disposal.

(C) Legal framework for climate change related issues

Laws and regulations

8.17 Indonesia has no specific law on climate change. However, there is a framework of laws that govern environmental issues. These laws can be divided into three main categories according to their scope of application: General Environmental Law; Sectoral Environmental Law; and Provincial and Local Environmental Legislation.

General environmental law


8.19 EMPA explicitly acknowledges that climate change is happening and makes several references to it. For example, the State is obliged to have a mitigation and adaptation plan as part of its Environmental Protection and Management Plan (‘EPMP’).\textsuperscript{27}

\textsuperscript{26} The Asia Foundation, ‘Survey Report on Citizen’s Perception of The Indonesian Justice Sector’ (2001), shows that 62 per cent of Indonesians will avoid taking their dispute to court at all costs.

\textsuperscript{27} Article 10 (4), EMPA.
The EPMP has therefore to be developed at national, regional and local levels in the form of a government regulation and a provincial/local regulation.\textsuperscript{28} The EMPA also regulates the government’s obligation to establish criteria for environmental damage caused by climate change and stipulates clearly that the breach of it by intention or negligence would result in criminal prosecution.\textsuperscript{29}

8.20 The EMPA also introduces a Strategic Environmental Study (‘SES’), which should be used as a guide in policy-making – such as in developing a spatial plan or in evaluating programmes.\textsuperscript{30} The SES is developed based on an analysis of the carrying capacity of the environment, risks to the environment – including risks caused by climate change and the capacity to adapt to climate change, efficiency in the utilisation of natural resources, vulnerability and adaptability to climate change, resilience and the prospect of biological diversity utilisation.\textsuperscript{31}

8.21 A new characteristic of EMPA is the introduction of an integrated environmental licence/permit. The EMPA states that an environmental licence should be acquired prior to the issuance of the operational licence for projects requiring an environmental impact assessment (‘EIA’).\textsuperscript{32} The law also stipulates that if an environmental licence is revoked, then the business licence is automatically annulled.\textsuperscript{33}

8.22 One of the aims of the Waste Management Act is to put an end to the practice of open dumping that is very common in Indonesia.\textsuperscript{34} The law states that open dumping should be discontinued by 2013.\textsuperscript{35} However, to date no implementing regulation has been passed even though the law states that it should be completed by 2009.

8.23 The Spatial Planning Act is important as it strengthens environmental capacity, i.e. by defining the minimum amount of forest and open-space area in each province.

\textsuperscript{28} Article 10 (3), EMPA.
\textsuperscript{29} Articles 98 and 99 junto Article 21 (2), EMPA.
\textsuperscript{30} Article 19 (1), EMPA.  
\textsuperscript{31} Articles 15–17, EMPA.
\textsuperscript{32} Article 40 (1), EMPA.  
\textsuperscript{33} Article 40 (2), EMPA.
\textsuperscript{34} Open dumping releases methane into the atmosphere.
\textsuperscript{35} Article 44, DWMA.
Sectoral environmental law


8.25 The Industry Act only provides minimum and normative environmental considerations but none are operational.\(^{36}\) The Act does not provide adequate encouragement to cleaner production, including emission reductions.

8.26 The Forestry Act of 41/1999 is very important in the Indonesian context since most of Indonesia’s emissions come from the forestry sector. This law provides a framework for different uses of forests, forest delineation, business activity in the forest area and criminal sanctions for illegal activities within the forest.\(^{37}\) However, the law and its implementing regulation still have many loopholes, for instance those that permit conversion of protected forests into other uses. Forest delineation is critical to ensuring legal certainty in forest areas since, for example, all criminal sanctions under the Forestry Act are only applicable to forest areas. At the implementation level, forest delineation has only been completed for around 11 per cent of the whole forest area.\(^{38}\) Problems caused by weak legislation and numerous implementation problems contribute to the current rate of deforestation of around 1 million ha per year.\(^{39}\)

8.27 Indonesian emissions from the agriculture sector (including plantations) are low, while climate change impact on it is significant. Unfortunately, the Agriculture Act does not provide a framework for adaptation to climate change. However, the Act acknowledges the impact of the agriculture sector on the environment, thus

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\(^{36}\) See Articles 2, 3 and 9 for normative provisions.

\(^{37}\) See ICEL’s research on Climate Friendly Legal Framework on forestry sector (forthcoming).


\(^{39}\) Ministry of Forestry, Statistik Kehutanan Indonesia, 2008, p. 15.
requiring an EIA for agricultural businesses.\textsuperscript{40} It is important to note that one of the highest pressures for forest conversion comes from the agricultural sector, particularly palm oil plantations.\textsuperscript{41} The Act also mentions the role of agriculture as a carbon sink.\textsuperscript{42} Unfortunately, there is no further explanation on the carbon sink role in the Act.

8.28 The Energy Act does not provide a strong framework for encouraging the use of renewable energy. Nonetheless, Presidential Regulation No. 5 of 2006 gives clearer direction by stipulating that by the year 2025, the proportion of renewable energy should be more than 15 per cent to ensure the fulfilment of national energy demand.\textsuperscript{43} At the same time, the President released an instruction to enhance the supply and use of biofuel.\textsuperscript{44} Currently there is a policy that obliges the government to buy geothermal energy from producers.\textsuperscript{45}

8.29 The Mining of Mineral and Coal Law and Oil and Gas Act basically do not address emission reductions from these sectors.

8.30 The Majelis Permusyawaratan Rakyat (‘People’s National Assembly’) and the government have identified problems embedded in the natural resources related legal framework.\textsuperscript{46} Some of these are: the natural resources related legislation provides too much discretion in granting concession permits and in taking decisions on forest areas, with few checks and balances; the relevant legislations have many flaws and loopholes which are often used to justify unsustainable practices; and the legislation is not supportive of indigenous people and forest-dependent people.

\textsuperscript{40} Article 25, Law 18/2004.
\textsuperscript{41} Resosudarmo, \textit{et al.}, National Country Profile on REDD+ (Jakarta: CIFOR, forthcoming).
\textsuperscript{42} Article 4, Agriculture Act.
\textsuperscript{43} That comes from geothermal, biofuel, and other renewable energies, each for more than 5 per cent.
\textsuperscript{44} Presidential Instruction 1/2006.
\textsuperscript{46} Ketetapan Majelis Permusyawaratan Rakyat No. IX/MPR/2001, 9 November 2001. The decree obligates the government and the parliament to address the issue in the natural resources related legislations.
Therefore, the strategy calls for the development of a national climate-friendly legal framework to support effective mitigation and adaptation measures to address climate change. Five main elements of this climate-friendly legal framework are:47 (i) legislation should be based on environmental inventory, environmental protection and management plan, and strategic environmental study – three of the environmental management instruments provided for in the EMPA; (ii) legislation related to major drivers of GHGs should orientate to reduce GHGs; (iii) legislation should give adequate protection of the rights of the marginalised people, particularly indigenous and forest-dependent people; (iv) legislation should be able to contribute to the creation of strong deterrent effects; and (v) legislation related to mitigation and adaptation should seriously consider civil and political rights as well as economic, social and cultural rights, particularly for the marginalised people as guaranteed by the Constitution.

(D) Climate change litigation

Public law

Overview

8.31 There are four avenues for bringing a climate-related action in the area of public law: (i) constitutional review before the Constitutional Court; (ii) judicial review (of legislation) before the Supreme Court; (iii) challenge of administrative decision before the Administrative Court; and (iv) administrative enforcement through regulatory compliance.

Constitutional review

8.32 The human rights provisions under the Constitution, particularly the right to a healthy environment, can be used as grounds to challenge statutes which are not supportive of GHG reductions before the Constitutional Court. Article 28 H (1) reads: ‘Every person shall have the right to ... enjoy a good and healthy environment ...’ Other provisions, such as the right to work (Article 28 D) and the right to property (Article 28 G) also can

47 Mas Achmad Santosa, Role of Governance in Addressing Climate Change, unpublished paper prepared for Democratic Governance Unit, UNDP-Indonesia (December, 2010).
be used.\textsuperscript{48} Furthermore, Article 33 acknowledges the sustainable development principles.\textsuperscript{49}

8.33 While the interpretation of right to a healthy environment was never tested, in the Water Act case the Court used environmental arguments in its reasoning. Although the main legal issue in the case related to the question of deciding who can utilise technology to modify the weather by making artificial rain (private sector or State), the Court also maintained that such activity can only be undertaken ‘after an in-depth study and experiment, including by developing capacity to prevent negative impacts on the environment and humans’.\textsuperscript{50} This decision bears witness to the progressive character of the Constitutional Court,\textsuperscript{51} and we can expect the public to use this forum in similar cases on climate change related statutes.

8.34 To bring a legal action before the Constitutional Court, one must prove the potential damage that he/she might be exposed to as a result of the enactment of the statute.\textsuperscript{52} In the Water Act case the Court argued that practically everybody has the right to a healthy environment, thus allowing a wide interpretation of legal standing in related cases.\textsuperscript{53}

Judicial review of regulations

8.35 Generally, a legal action can be brought before the Supreme Court, for instance to review ministerial or local regulations on permits and planning, provided that such regulations clearly violate a statute (e.g. EMPA) or a government regulation. There will be wider grounds to review ministerial or local regulations once the Environmental Protection and Management Plan (EPMP)

\textsuperscript{48} Climate change could also create loss of jobs (e.g. due to long droughts) as well as private property.
\textsuperscript{52} Constitutional Court Decision 006/PUU-III/2005.
has been passed\textsuperscript{54} and provided substantive guidance on how to mitigate and adapt to climate change. As has been discussed, the EPMP should be enacted in the form of a government regulation which is superior in the hierarchy of legal norms.

8.36 It is important to note that, according to the Supreme Court Regulation No. 1/2004, a judicial review application should be submitted no later than 180 days after a regulation has been passed (Article 2 (4)). This provision inevitably limits the right of a third party whose claim may emerge after the period has expired. In the Head of Local Government’s Election, Appointment and Dismissal case a panel of Supreme Court justices allowed a judicial review application from a third party even though it was submitted after the time limit had expired.\textsuperscript{55} However, it seems that the above decision has not been followed by other justices.\textsuperscript{56}

Challenging administrative decisions

Jurisdiction

8.37 Aside from the judicial review mechanism above, government liability for its actions/inactions can be enforced in two other jurisdictions: Administrative Courts and General Courts. The Administrative Courts only have jurisdiction to settle disputes arising in the field of administration as a consequence of the issuance (or non-issuance) of an administrative decision. The law identifies the elements of an ‘administrative decision’ as:\textsuperscript{57}

- a written determination;
- issued by an administrative organ/official;
- containing an administrative act based on the law and regulation;

\textsuperscript{54} See discussion on this matter in the environmental framework section, at para. 8.19 above.

\textsuperscript{55} They argue, among other things, that since such limitation is restricting human rights, it should be regulated by statute, not lower-level regulations. See Supreme Court Decision 41/P/HUM/2006.

\textsuperscript{56} In latter decisions, the Supreme Court normally rejected judicial review applications submitted after the time limit.

that is concrete (i.e. not abstract or of a general nature) and pertaining to an individual (i.e. concerning a person/legal person);
that is final (can be applied without approval from another agency or official); and
that creates legal consequences for a person/legal person.

Other claims related to liability for unlawful governmental activities fall under the jurisdiction of the General Courts.\(^{58}\)

8.38 With this limited jurisdiction, we can anticipate that only legal actions concerning the issuance of a permit can be raised in climate change litigation.\(^{59}\) Nonetheless, this is a big issue because research shows that many permits issued by government for mining and agriculture corporations in forest areas violate forestry and spatial planning regulations – thus contributing to the ongoing massive destruction of forest areas.\(^{60}\)

Grounds for challenge and timing

8.39 There are two grounds on which an administrative decision can be challenged:\(^{61}\)
- the administrative decision is contrary to law and regulations; and
- the administrative decision is contrary to good governance practices (which are narrowly interpreted as: legal certainty, supremacy of law, transparency, proportionality, professionalism and accountability).

8.40 To successfully challenge a permit, the plaintiff needs to establish an explicit violation of the law or regulation caused by the issuance of that permit. There is a risk when using good governance principles as the legal basis for the challenge due to the narrow interpretation of those principles in the current

\(^{58}\) See also the elucidation of Law 5/1986.

\(^{59}\) In theory such actions offer a strong chance of success in climate-related cases, unless there is ‘extra judicial involvement’ as in the case of Transgenic Cotton where the court argued that the Ministry of Agriculture decision authorising restricted planning of transgenic cotton in several areas to Monsanto was actually not a permit, thus it did not have to complete an EIA.


law as compared to the principles already established and practiced.\textsuperscript{62}

8.41 The law stipulates a time limit by which individuals who are the subject of the administrative decision must submit their application (no later than ninety days after the decision was received or published).\textsuperscript{63} There is no such provision for any third party affected by the decision. Such third party can refer to the Supreme Court Guidance which allows judges to decide the time limit on a case-by-case basis – which normally goes in favour of the applicant.\textsuperscript{64}

Legal standing
8.42 In order to have standing before the Administrative Court, an individual applicant must have suffered loss as a result of the contested decision (Article 53 [1]). However, environmental NGOs have been granted legal standing by law and in the case law.\textsuperscript{65}

Remedy
8.43 The main remedy in an Administrative Court is the annulment of administrative decisions and rehabilitation. Monetary compensation is available, only as pro forma, up to around US$ 600.

\textsuperscript{62} Prior to the amendment of Law 5/1986 some judges already applied good governance principles – such as principles of prudence and justification of decision – as grounds to review an administrative decision despite there being no explicit provision in Law 5/1986 allowing the use of those principles. In the new amendment (Law 9/2004) some, but limited, good governance principles are incorporated. The new law, for instance, does not include the principles of prudence and justification of decision. Thus there is a risk the judges may not apply those principles or other principles that are not explicitly acknowledged in the new law. See Anna Erlyana, ‘Administrative Court and Legal Reform since 1998 in Indonesia’ in Sakumoto and Juwana (eds.), Reforming Laws, p. 95. It is important to note that in the controversial Transgenic Cotton case, the judges found that the Minister of Agriculture had carried out the necessary checks (e.g. public announcement, expert review and laboratory test) before issuing the decision – which was thus in line with the precautionary principle. The failure to perform EIA was not considered a violation of that principle.

\textsuperscript{63} Article 55, Law 5/1986.

\textsuperscript{64} According to the Supreme Court Circular Letter 2/1999, enforced in, e.g., Supreme Court Decision 41K/TUN/1994, the application should be lodged no later than ninety days after the third party became aware of the existence of the contested decision. See Bedner, Administrative Court, p. 115.

\textsuperscript{65} Article 92, Law 32/2009. See also Mas Achmad Santosa and Sulaiman N. Sembiring, Hak Gugat Organisasi Lingkungan (Jakarta: ICEL, 1997) and Walhi v. Inti Indorayon Utama (South Jakarta District Court Decision 820/Pdt./G/1988/PM.Jkt.Pst).
Nonetheless, based on the Court’s Specific Guidance No. 223/Td.TUN/X/1993 and the case Lindawati v. Bupati Gianyar, the plaintiff can seek material compensation in a General Court as a follow-up to his/her victory in the Administrative Court.\textsuperscript{66}

Administrative enforcement through regulatory compliance

8.44 The central and local governments are responsible for promoting regulatory compliance following the issuance of permits. In doing so, they have extensive powers, such as entering premises, taking samples, checking equipment, etc.\textsuperscript{67} They can also impose sanctions on corporations that violate regulations by, inter alia, issuing warnings or revoking permits.\textsuperscript{68} However, as mentioned earlier, those powers are seldom used by the responsible officers despite many alleged legal violations by corporations.

*Private law*

Unlawful action: Introduction

8.45 Civil proceedings deal with, among other things, any unlawful action (*perbuatan melawan hukum*) by person, legal person or government – excluding those instances that fall within the jurisdiction of Administrative Courts as discussed earlier. Consequently, it is civil proceedings that are likely to be brought in relation to climate change issues.

8.46 There are two grounds for legal actions in relation to unlawful activities in a climate change context. These can be found in Article 1365 of the Civil Code and Article 87 of the EMPA.

Article 1365 states that:

Every unlawful action which causes loss to another person, obliges the person by whose fault the loss has resulted, to compensate that loss.

Article 87 reads:

Every party responsible for the enterprise and/or activity committing unlawful action in the form of pollution and/or environmental

\textsuperscript{67} Article 74 (1), Law 32/2009.  \textsuperscript{68} Article 76 (2), Law 32/2009.
damage causing loss to another person or the environment shall be
obliged to pay compensation and/or carry out certain actions.

8.47 Elements of an unlawful action that must be established, as well
as other important related aspects, are elaborated below.\textsuperscript{69}

**Unlawful action**

8.48 The term ‘unlawful’ is usually defined widely, to include actions
that contravene:\textsuperscript{70}
- another’s subjective right (e.g. freedom, reputation or property);
- lawful obligations of persons;
- public decency; and
- principles of propriety/appropriateness, prudence and reason-
able care.

8.49 Article 1365 is wider than Article 87 since the action that can be
challenged under that Article is not limited to those who cause
environmental pollution or damage as in Article 87. Furthermore,
the subject of the law in Article 1365 is everybody (including the
government),\textsuperscript{71} while in Article 87 the subject is limited to the
party responsible for the enterprise and/or activity. Thus, to chal-
lenge the government’s unlawful action, we can only use Article
1365 as our legal basis.

**Fault**

8.50 In general, fault includes subjective and objective elements.
Subjectively, a person must have understood the meaning and
the nature of the action and must have acted with deliberate
intention or negligence in carrying out the unlawful action.
Objectively, the measure is whether a reasonable person in the
same circumstances would have foreseen the potential damage
and would have acted differently.\textsuperscript{72} Both of these elements must
be fulfilled to establish fault. Although elements of fault are not

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\textsuperscript{69} Rosa Agustina, *Perbuatan Melawan Hukum* (Jakarta: Program Pasca Sarjana FH UI, 2003), p. 36.

\textsuperscript{70} Setiawan, ‘Empat Kriteria Perbuatan Melawan Hukum Yurisprudensi’, *Varia Peradilan*, 16(II) (January 1987), 716.

\textsuperscript{71} Wirjono Prodjodikoro, *Perbuatan Melanggar Hukum* (Bandung: Sumur Bandung, 1976), p. 84.

\textsuperscript{72} Moegni Djojodirdjo, *Perbuatan Melawan Hukum* (Jakarta: Pradnya Paramita, 1982), p. 66.
explicitly listed in Article 87, in practice plaintiffs must be able to prove the existence of both these elements.\textsuperscript{73}

8.51 The EMPA provides for strict liability (liability without faults) for activities that use hazardous materials, produce hazardous waste or ‘create serious threat to the environment’.\textsuperscript{74} Under the previous law, strict liability implicitly applied to any activity that required an EIA.\textsuperscript{75} However, in the new EMPA the language has been changed to provide for strict liability for actions that cause a ‘serious threat to the environment’.\textsuperscript{76} It remains to be seen how the courts will interpret this provision.

Damage or loss

8.52 Article 1365 only recognises damage or loss to a person, including both material and immaterial loss. Examples of the latter include damage to one’s health, enjoyment of life or feeling of security. Article 87 also acknowledges damage or loss to the environment.

Causality

8.53 The causality element is one of the most important aspects of this law, as the action in question has to be the most proximate and actual cause of the claimed loss.\textsuperscript{77}

Remedies

8.54 There are several remedies available in civil litigation, including provision of compensation and an order to perform a certain action. The EMPA provides several examples of ‘certain actions’, which include: installing or improving waste management units; restoring environmental functions or eliminating causes of environmental pollution and/or damage.\textsuperscript{78}

\textsuperscript{73} Nicholson, \textit{Environmental Dispute Resolution}, p. 74.
\textsuperscript{74} Article 88, Law 32/2009.
\textsuperscript{75} Suparto Wijoyo, ‘Penyelesaian Sengketa Lingkungan Menurut UUPLH’, \textit{Jurnal Hukum Lingkungan}, V(I) (1999), 32–3; and Koesnadi Harjosoemanti, ‘Strict Liability (Tanggung Jawab Mutlak)’, 8 (paper presented at the Lokakarya Legal Standing & Class Action, Hotel Kartika Chandra, Jakarta, 7 December 1998) in Nicholson, \textit{Environmental Dispute Resolution}, p. 83 (see also pp. 82–5). However, courts are not demonstrating progress in the application of this concept. Nicholson, pp. 82–5, based on the \textit{Laguna Mandiri Case} and \textit{PT Walhi v. PT Pakerin}.
\textsuperscript{76} Article 88, EMPA.
\textsuperscript{77} Djojodirdjo, \textit{Perbuatan Melawan Hukum}, p. 35
\textsuperscript{78} Elucidation of Article 87, Law 32/2009.
8.55 There do not appear to be any cases where a court has granted a remedy in the form of an order for the government to initiate a policy to minimise a similar risk in the future. Nonetheless, there are cases where the court has ordered companies to repair the environmental damage and take actions necessary to prevent or reduce future negative impact.

Burden of proof

8.56 The plaintiff bears the burden of proof in respect of Article 1365 and Article 87 although, at least in the law, judges have a discretion to extend the burden of proof to the defendant under certain conditions.

Who may claim and who can be a defendant?

8.57 Anyone who can prove that he/she suffered damage/loss can claim compensation, especially for material loss. Environmental NGOs can bring claims for certain actions only in the context of environmental preservation. Principally, anyone ‘responsible’ for the damage/loss can be sued. Normally, the court will interpret ‘responsible’ narrowly, targeting the main actors.

Standing and representations

8.58 Standing to bring civil proceedings in General Courts is similar to standing in Administrative Courts. NGOs are also given legal standing. The main difference is the recognition of a class action.

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79 In the Nunukan case the court found that the Government was not conducting an unlawful activity in protecting a migrant worker while acknowledging that the protection currently afforded to migrant workers is not satisfactory. It therefore instructed the Government to enact all necessary laws, ratify relevant convention(s) and generally take concrete steps to reform the status of migrant workers (South Jakarta District Court Decision 28/PDT/G/2003/PN.JKT.PST). This decision was rejected by the High Court (480/PDT/2005/PT.DKI).

80 Wahliv. PT Freeport Indonesia (South Jakarta District Court Decision 399/PDT.G/2000/ PN.Jaksel) and the Mandalawangi Landslide case (Supreme Court Decision 1794K/Pdt/2004) where the court ordered the defendants in a class action to reclaim the landslide areas through forest and land rehabilitation programmes.

81 Article 163, HIR and Article 1865, Civil Code. Nonetheless the judge may shift the burden of proof to the defendant under certain conditions. However, this is seldom done. See Yahya Harahap, Hukum Acara Perdata (Jakarta: Sinar Grafi ka, 2006), pp. 518–34.

82 According to Law 32/2009, there are three requirements for a NGO to have standing before the court: (a) it should be formed as a legal person; (b) its statute must clearly state that it was established to preserve/protect the environment; and (c) it has to have been actively involved in environmental preservation/protection for no less than two years.
procedure in the general court. Supreme Court Regulation No. 2/2002 provides clear guidance on how to administer a class action, in response to controversy in past practice. Citizen’s lawsuits are also beginning to be recognised.

Potential cases: government liability

Overview

8.59 To date there has not been a single case brought to the courts using the climate change arguments. Thus, in this section we will try to elaborate potential for climate change litigation in the context of Indonesian private law, as discussed above.

8.60 Apart from cases where strict liability applies, elements of fault and causation in environmental disputes generally are difficult for plaintiffs to prove. Loss resulting from pollution, for instance, involves a complex chain of causality. In many cases, pollution may originate from multiple sources, thus making it difficult to prove that a particular action by the defendant caused the loss in question although joint responsibility is acknowledged in several cases. Even more difficult problems may be faced in climate-related litigation, especially direct climate change litigation in Indonesia. First, Indonesia is not the main contributor to GHGs. Second, defendants can argue (and this will most likely be in line with the courts’ interpretation) that it is nature (weather, climate, etc.) that caused the loss, not them.

8.61 It seems more likely that indirect rather than direct challenges on climate change issues will succeed. Nevertheless, it may be possible to directly challenge the government’s unlawful actions related to climate change since the government has several obligations under the law.

85 In J. Sandyawan Sumardi, el. v. Government of Indonesia, for instance, the District Court accepted for the first time an application using the citizen lawsuit procedure. Nonetheless, there were critics of the decision since it did not provide clear qualification to bring citizen lawsuits (see District Court Decision 28/PDT.G/2003/PN.Jkt.Pusat). As discussed earlier, there is a tendency for many judges not to entertain new concepts in the absence of guidance from the Supreme Court. Thus it is safer to say that since there is still no guidance from the Supreme Court concerning this matter, there will be cases where citizen lawsuits will be rejected by the courts.
8.62 Article 1365 stipulates that there are at least three occasions where government liability in the context of climate change is enforceable, that is if the government: (i) fails to conduct its specific obligation under the environmental legal framework related to climate change; (ii) fails to take necessary action under human rights or other relevant laws to prevent climate change impact; or (iii) acts in contravention to its plan, policy or obligation. The following illustrate these three scenarios.

Failure to conduct obligation under environmental legal framework

8.63 As discussed, environmental law and regulations impose several obligations on the government in relation to mitigation and adaptation. Among others, these obligations include the obligation to develop an Environmental Protection and Management Plan, a Strategic Environmental Study and criteria for environmental damage caused by climate change, and to complete the delineation of forest areas and spatial plan and prohibit open dumping. Some, if not all, of these obligations can be challenged in court on the basis of unlawful action.

8.64 As an example, the government has acknowledged that some parts of Jakarta will be impacted by climate change and that it should develop adaptation plans. If such plans are absent and people in that area suffer losses attributable to climate change, they could argue that the government should be held liable for the failure to comply with its stipulated obligation. This challenge, however, may be difficult to sustain as it would be difficult to establish the causal link between the absence of an adaptation plan and the loss suffered. In addition, scientific expert opinion is also required to prove cause and effect.

8.65 The government’s obligation to put an end to open dumping so as to minimise the release of GHGs into the air as well as prevent smell and other negative consequences, is on a different plane. When the government does not comply with its stipulated obligation to put an end to open dumping practices and there is a loss, e.g. there is a landslide that causes loss to property or life, the causal link is clearer – improving the plaintiff’s chances in court.

87 ICCSR, p. 59 and 2nd National Communication, p. 17.
Failure to implement an obligation under human rights or other relevant laws

8.66 Human rights provisions, such as the right to life, property or the right to environment or right to health as stipulated in the Health Act\(^88\) can be used as a basis to challenge the government’s failure to properly adapt to climate change by minimising climate change impacts on health. Due to the change of climate, for example, there is a higher risk that the public will suffer from dengue fever. Consequently, if the government failed to initiate the necessary policy and take the relevant actions to minimise the risk and loss/damage occurs, grounds may be available to take legal action. There is a significant probability of success. In *Gun Subasri, el v. Government of Indonesia cq Governor of Jakarta* the court assessed the adequacy of the local government’s system to prevent and respond to (regular) floods in Jakarta and found that the Mayor was indeed engaging in an unlawful inaction in failing to implement the system correctly.\(^89\)

8.67 Indigenous people can also claim that their right over land in the forest areas\(^90\) has not been respected by a REDD or a forest conservation project.\(^91\) Nonetheless, this particular issue is related to other causes – such as the unfinished task of delineating forest areas, and conflicts between the laws of forestry and land law (both topics would require specific attention that is beyond the scope of this chapter).\(^92\)

8.68 The most readily available legal ground to raise claims is in relation to a government failure to inform the public on the impact of climate change. The Public Access to Information Law clearly states that a public body, including the government,\(^93\) should...
publish information relating to public harm, including natural or man-made disaster. As mentioned above, the government is already in possession of data related to areas in Jakarta that will be impacted by climate change. Thus, if the government does not provide this information to those who live in or have property that will most likely be damaged or destroyed due to sea level rise, then such entities should have standing to claim compensation from the government when the actual damage/loss takes place. Although the right to information under the Public Access to Information Law has never been tested, in *David Tobing v. Minister of Health* the Supreme Court confirmed that the government’s failure to publish information concerning the existence of harmful bacteria in baby milk is an unlawful inaction as it demonstrates carelessness on the part of the government in conducting its public-service duty.

**Failure by the government to implement its plan/policy or action contrary to the government’s plan/policy or obligation**

8.69 As discussed, the government has adopted policies related to climate change, such as measures to increase the use of renewable energy or to put an end to open dumping practices at certain times. While the government’s failure to achieve its plan/target is difficult to challenge, a member of the public can challenge the government’s level of effort in implementing its policies. The likelihood of success is low, however, especially due to the difficulty in linking such failure to the loss that might occur. Nevertheless, such an action can be used as a means to pressure the government to take climate change more seriously.

8.70 Government action that contravenes its own plan/policy is a different story. In West Sumatera for instance, the government developed infrastructure (roads) despite the fact that, based on research, the area is likely to be impacted by climate change.
(sea level rise). When such infrastructure is damaged (and in this case, it was), a member of the public can make a claim against the government for wasting public funds. Similarly, if there is damage to private property in such an area, the property-owner can challenge before an Administrative Court the government’s act in permitting houses or businesses to be built in this area.

Prospective bases: business liability

8.71 Businesses may also be held liable for their indirect activities that contribute to climate change. For example, if they breach a logging licence (by, e.g., logging outside the designated area) or start fires and burn land for the purpose of land-clearing. In such cases, there is no need to prove the activity’s relation to climate change as the breach itself is an unlawful action. Thus if such actions result in damage to a person or to the environment (as in *Walhi v. P. T. Pakerin et al*), the businesses concerned can be held liable.

8.72 Another possibility is that a business can be challenged for conducting an activity without a proper licence. An environmental NGO wishing to bring a lawsuit on this basis would only need to prove that such unlawful activity is damaging the environment.

Criminal law

8.73 There are several provisions of criminal law that can be used in the context of climate change; for example under the EMPA a person whose activity exceeds the standard criteria for environmental damage, or who is burning land (for land clearing) or conducting an activity without an environmental licence, can be prosecuted. The EMPA also recognises corporate criminal liability including corporate directors’ liability. The EMPA, Forestry,

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99 The case is about a corporation which burnt land for land clearing which contributed to a significant forest fire.
Spatial Planning and Access to Information Acts also envisage sanctions for: (i) officials granting an operational licence without prior approval and an environmental licence; (ii) officials granting an environmental licence without an Environmental Impact Statement; (iii) officials intentionally not performing their supervisory work, which results in environmental damage; (iv) persons cutting and transporting logs without a proper licence; (v) officials granting permits that are not in accordance with spatial plans; and (vi) any public body failing to disclose information relating to public harm.

8.74 While the law is relatively adequate in terms of providing legal protection in the climate change context, law enforcement, as discussed earlier, remains an issue. Furthermore, most people who have been convicted of crimes under the Forestry Act (for instance, for cutting and transporting logs without a proper licence) are field actors (physical perpetrators), not intellectual actors (functional perpetrators).

**Practicalities**

Orders and enforcement

8.75 Courts can issue protective orders, such as freezing orders. They can also issue orders to inspect the disputed object so as to gather enough information to be able to decide the case.

8.76 General Court decisions are mostly enforceable, for instance by seizing the defendant’s assets, although problems have occurred in such instances.100 Administrative Court decisions used to be difficult to enforce, unless the losing party (the government) was willing to enforce it voluntarily. The new law seeks to resolve this issue by stipulating that sixty days after a court has declared that the administrative decision challenged is unlawful, it is automatically null and void and the court can, inter alia, order the government to pay a mandatory sum *(dwangsom)*.101

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Foreign court decisions do not have any legal effect. Only foreign arbitration awards concerning commercial matters can be legally enforced (by submitting a request to the court).  

Litigation costs

Plaintiffs are required to pay a certain amount of estimated court fees (for the administration of the case) to initiate civil and administrative litigation. However, the court will order the losing party to pay the fees at the end of the process. This does not include legal fees and costs of gathering evidence, such as laboratory test or expert witness fees – both of which are more substantial. Impecunious plaintiffs are entitled to have court fees waived and to free legal assistance. There are no fees levied to lodge a claim before the Constitutional Court.

Access to information

A party can request the judge to order the other party to provide information as long as he/she can convince the court of the importance of that information to the litigation.

According to the EMPA, EIA contents, government reports and evaluation of environmental observation/monitoring concerning the compliance and quality change in environmental conditions and spatial plans are all considered as public information. However, there are no grounds for a member of the public to access documents submitted by corporations to the government, besides EIA-related documents. With the new Freedom of Information Act (see below) such documents do not form part of the information that can be exempted from public access, and therefore should be accessible.

102 Article 67 (1), Law 30/1999. Other conditions are: reciprocity principles and enforcement are not against public policy. There are notorious cases where courts have refused to recognise and enforce or even annul international awards without reasonable arguments, although that is not the majority position of courts. See S. R. Luttrell, ‘Lex Arbitri Indonesia – The Law, Practice and Place of Commercial Arbitration in Indonesia Today’, available at www.srluttrell.com/articles/Lex_Arbitri_Indonesia_(Int_A_L_R-%20Dec-2007).pdf.

103 Article 181 (1), Civil Procedural Law.

Since Law 14/2008 regarding Public Access to Information came into force in 2010, there are stronger legal guarantees to access to information from a public body (either State or private). Public body decisions, policies (and supporting documents), project planning as well as correspondence of head/officers are all available for public information. There is also an obligation for a public body to publish information relating to public harm.

(E) Conclusion

To date there is no strong legal framework to address climate change in Indonesia. Although there have been some advances, particularly through the Environmental Management and Protection Act, in general environmental governance is plagued by weak law enforcement. Law enforcement agencies and the judiciary are perceived as far from effective and their integrity, commitment and professionalism are often called into question. Nonetheless, the government stance on climate change is positive and there are some positive developments in government policies and law.

The commitment by President Susilo Bambang Yudhoyono to reduce GHGs by 26 per cent with self-financing and by up to 41 per cent with international support by 2020 has attracted national stakeholders – government and non-government – and the international community to develop ways to implement climate change mitigation in Indonesia, particularly in relation to reducing deforestation and forest degradation as a major source of GHGs. The LoI between the Government of Indonesia and the Royal Norwegian Embassy has induced Indonesia to take concrete steps to resolve longstanding problems on reforestation and forest degradation through REDD+ including instituting a moratorium policy to suspend new licences in primary and secondary forests and peat land, and to accelerate and improve enforcement practices so as to create a strong deterrent. At the end of May 2011, the long-anticipated Presidential Instruction on moratorium was issued.⁴⁵ This Instruction basically stated that all new

⁴⁵ Presidential Instruction 10/2011 on Suspension of Issuance of New Licences and Improvement of Governance in Primary Forest and Peat Land.
licences on primary forest and peat land should be suspended in two years’ time. During this time improvement of governance in the forest and peat land is required.

8.84 The strengthening of enforcement practices in the area of natural resources has begun through the establishment of a joint enforcement team initiated by the Ministry of Forestry consisting of the Ministry of Forestry, Ministry of Environment, police, and public prosecutors. The joint enforcement team could be viewed as a positive step to develop synergised efforts in promoting strong and effective environmental enforcement instead of a sectoral approach in an uncoordinated fashion.

8.85 The Supreme Court and the Ministry of Environment, in cooperation with the Indonesian Centre for Environmental Law and the Asian Environmental Compliance and Enforcement Network, have developed the practice of environmental certification of judges, which authorises only certified judges to handle environmental and natural resources related cases. To be certified, judges require special training and continuous evaluation. With this, judges’ knowledge and expertise in handling natural resources related cases, including climate change cases, should be improved.

8.86 The current involvement of the Corruption Eradication Commission in working with the Ministry of Forestry in preventing potential corruption in the forestry sector could also be seen as a concrete step in promoting sound and good governance in Indonesia’s forestry management. This initiative should be an important beginning for further work to address a potential risk of corruption in mitigation of and adaptation to climate change. As reiterated by UNDP, corruption will potentially affect the REDD+ readiness, implementation and distribution phases.106

106 Staying On Track: Tackling Corruption Risks in Climate Change (UNDP, 2010).
(A) Introduction

The Japanese legal system

9.01 Contemporary Japanese law\(^1\) is primarily based on statute law, which underlies the present Constitution (‘Nihonkoku kenpo’) enacted in 1946\(^2\) as the ‘Supreme Law of the Nation’.\(^3\) Although the Constitution and some laws had been revised under the influence of US law during the period of the Allied occupation after the Second World War, major codes, including the Civil code and the Criminal code, were modelled on the French and German codes and are still heavily influenced by the Civil law system.

9.02 The main sources of the law, in addition to the Constitution, are (i) legislation, which is enacted by the Diet (Parliament), (ii) cabinet orders and ministerial ordinances, which are enacted by the central government, and (iii) local regulations enacted by local authorities within their power under legislation. While there has been debate on whether or not judgments of courts are to be considered as sources of law, judgments, especially those of the Supreme Court, are in most cases respected and followed as precedent by lower courts. The courts have played a critical role in the development of Japanese law, especially in areas such as environmental law.

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\(^2\) See [www.kantei.go.jp/foreign/constitution_and_government/frame_01.html](http://www.kantei.go.jp/foreign/constitution_and_government/frame_01.html).

\(^3\) Article 98 of the Constitution: ‘This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.’
The Constitution provides for a list of fundamental rights. While there is no explicit provision relating to environment, some rights, especially ‘personal rights’ based on Articles 13\(^4\) and/or 25\(^5\) of the Constitution, have been often invoked in environmental litigation.

The governmental stance on climate change

Japan is a Party to the United Nations Framework Convention on Climate Change (‘FCCC’) and its Kyoto Protocol. As a Party to the Kyoto protocol, Japan is required to reduce its Greenhouse Gas (‘GHG’) emissions by 6 per cent below 1990 levels in the period 2008–12\(^6\).

The Global Warming Prevention Headquarters established by the Cabinet's decision just after the Third Session of the Conference of Parties (COP3) of FCCC is responsible for promoting national climate policies and measures and implementation of the Kyoto Protocol. It is composed of all ministers and chaired by the Prime Minister. Following the 1998 Guidelines of Measures to Prevent Global Warming, in October 1998, the Law Concerning the Promotion of the Measures to Address Global Warming (‘1998 Law’)\(^7\) was adopted by the Parliament. The 1998 Law provides a legal framework for Japanese policies and measures to tackle climate change (see paras. 9.13–9.20 below).

Despite the early response after the adoption of the Kyoto Protocol, it was not until the adoption of the Marrakesh Accords, the detailed rulebook of the Kyoto Protocol, in 2001,
that concrete policies and measures to achieve the Japanese 6 per cent reduction target were decided, in 2002, through revision of the 1998 Guidelines and amendment of the 1998 Law. Based on the amended 1998 Law, a new Global Warming Prevention Headquarters was established and has gained official regulatory status. The amended 1998 Law also obliges the government to establish the Kyoto Protocol Target Achievement Plan (‘KPTAP’) to meet its 6 per cent reduction commitment under the Kyoto Protocol.

9.07 While the government stance to achieve a 6 per cent reduction target under the Kyoto Protocol has been continuously affirmed, there are few mandatory measures to implement this target. Japanese climate policy is based principally on voluntary initiatives, such as voluntary action plans for industries. Each industrial association and sectoral organisation is encouraged to fix a voluntary target and implement it. The voluntary action plan that was originally initiated by the Nippon Keidanren (national economic organisation) has become a national scheme with annual governmental review under the Kyoto Protocol Target Achievement Plan. Mandatory measures, especially the imposition of a carbon tax and a national emissions trading scheme, have been strongly resisted by most of the business sector, in particular the Nippon Keidanren.

9.08 As regards mitigation commitments beyond 2012, all political parties including the party currently in government, the Democratic Party (‘DP’), recognise that, based on scientific findings, especially from the Intergovernmental Panel on Climate Change (‘IPCC’), vigorous efforts are needed to address climate change. Global long-term reduction targets such as at least 50 per cent global emission reduction by 2050 are supported by all political parties in Japan.

9.09 However there are dramatic differences between political parties when it comes to mid-term targets. The former Prime Minister Yukio Hatoyama made a statement at the United Nations Summit on Climate Change held on 22 September 2009:

Based on the discussion in the Intergovernmental Panel on Climate Change (IPCC), I believe that the developed countries need to take the lead in emissions reduction efforts. It is my view that Japan should
positively commit itself to setting a long-term reduction target. For its mid-term goal, Japan will aim to reduce its emissions by 25 per cent by 2020, if compared to the 1990 level, consistent with what the science calls for in order to halt global warming.\(^8\)

He also announced the need to introduce national policies and measures including a domestic emissions trading mechanism and a feed-in tariff for renewable energy, as well as the consideration of a global warming tax. He added the promise of a 25 per cent target in 2020: ‘However, Japan’s efforts alone cannot halt climate change, even if it sets an ambitious reduction target. It is imperative to establish a fair and effective international framework in which all major economies participate. The commitment of Japan to the world is premised on agreement on ambitious targets by all the major economies.’

9.10 This 25 per cent reduction target was criticised by the Japanese business sector for fear of possible increase in carbon price and loss of international competitiveness vis-à-vis emerging economies, especially China. Although most parts of his statement at the UN were derived from a public pledge that the DP had made in its election manifesto, this announcement caused debate even within the party. At the end of 2010, the current DP government in fact suspended its initiative to introduce an emissions trading scheme, while it decided to introduce feed-in tariffs with moderate price-setting and to increase slightly tax on fossil fuels over the next five years.

9.11 Under these circumstances, the government has been arguing in the climate negotiations for a new single legally binding instrument covering all major emitters to replace the Kyoto Protocol post-2012. As Japan announced in Cancun: ‘we will never inscribe our target in the Annex B to the Kyoto Protocol under any circumstances and conditions’ since the ‘Kyoto second commitment period will never constitute a fair and effective single framework with the participation of all major emitters’.\(^9\) While


\(^9\) Statement by Japan at the Fifteenth Session of the Ad-hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) on 29 November 2010, held in Cancun, Mexico.
this stance has attracted strong criticism from developing countries and environmental groups, it has received support in Japan, especially from the business sector.

9.12 The earthquake on 11 March 2011 and nuclear incident in Fukushima is likely to change national and governmental debate on future energy and climate policy. The 25 per cent reduction target is premised on construction of fourteen new nuclear plants, which might now be impractical with public opposition. Increased dependency on thermal power plants would be inevitable for a shorter period, and a drastic shift from nuclear to renewable energy has been gaining increased support. However the governmental stance on future energy policy and climate policy will take considerable time to finalise. At the Bangkok climate talks in April 2011 Japan announced that ‘it is too premature to assess how the recent developments will influence energy supply and demand, Japanese economy as a whole or our climate change policy in the future’ while assuring that Japan will continue its serious efforts to tackle climate change.¹⁰

1998 Law Concerning the Promotion of the Measures to Address Global Warming

9.13 The 1998 Law Concerning the Promotion of the Measures to Address Global Warming (‘1998 Law’) is the centrepiece of Japanese climate policy, providing a general framework, including an institutional one, for measures to address climate change. This Law refers to the stabilisation objective provided in Article 2 of the FCCC,¹¹ but does not set legally binding national targets in response.

9.14 The 1998 Law obliges the government to elaborate and implement measures to tackle climate change;¹² to take necessary measures to implement Japan’s international commitments, including

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¹⁰ Presentation made by Japan in the pre-sessional workshop on assumptions and conditions related to the attainment of quantified economy-wide emission reduction targets by developed country Parties, as requested by decision 1/CP.16, paragraph 38, held on 3 April 2011 under the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA).

¹¹ Article 1 of the 1998 Law.  
¹² Article 3.1, ibid.
measures facilitating its participation in international emissions trading;\(^\text{13}\) and to promote international cooperation for reducing emissions.\(^\text{14}\) The 1998 Law provides for a Kyoto Protocol Target Achievement Plan, which the government is required to elaborate and, where necessary, revise.\(^\text{15}\)

9.15 Local authorities have an obligation to reduce emissions according to natural and social conditions.\(^\text{16}\) The government and local authorities are required to reduce and/or limit their own emissions.\(^\text{17}\)

9.16 Companies and citizens have a duty to make efforts to reduce and/or limit their emissions, and to cooperate on measures taken by the government and local authorities.\(^\text{18}\)

9.17 The government is obliged to estimate national emissions and removals by sinks to implement its reporting and inventory requirements under the FCCC and the Kyoto Protocol. It is also required to make these emission and removal data public on an annual basis.\(^\text{19}\)

9.18 Designated large-emitter companies have an obligation to report their emissions annually.\(^\text{20}\) The ‘large-emitter company’ means ‘designated energy management factories’ and ‘designated transportation companies and cargo owners’ under the Act concerning rational use of energy, 1979 (‘the 1979 Energy Conservation Act’) (see paras. 9.21–9.29 below) for energy-related CO\(_2\) emissions, as well as for emissions of GHG other than energy-related CO\(_2\) emissions, designated installations of which total annual emission is equal to/more than 3,000tCO\(_2\) equivalent.\(^\text{21}\) For installations that submit their report under the 1979 Energy Conservation Act, the portions of their report regarding matters pertaining to CO\(_2\) emissions shall be deemed as reports under the 1998 Law.\(^\text{22}\) Any person may request the disclosure of these submitted data.\(^\text{23}\) These designated companies, when considering that disclosure

\(^{13}\) Article 3.4, \textit{ibid.}\(^{14}\) Article 3.6, \textit{ibid.}\(^{15}\) Articles 8 and 9, \textit{ibid.}\(^{16}\) Article 4.1, \textit{ibid.}\(^{17}\) Articles 3.2 and 4.2, \textit{ibid.}\(^{18}\) Articles 5 and 6, \textit{ibid.}\(^{19}\) Article 7, \textit{ibid.}\(^{20}\) Article 22–1, \textit{ibid.}\(^{21}\) Articles 5 and 5–2 of Order for Enforcement of the Law Concerning the Promotion of the Measures to Address Global Warming.\(^{22}\) Article 21–10.\(^{23}\) Article 21–6.
might impede their ‘rights, competitive position and other legitimate interest’, may request the government to disclose only total emissions and not to disclose detailed emission data by sources.\textsuperscript{24} The minister in charge (in most cases, the Minister of Economy, Trade and Industry) decides whether such requests should be allowed or not.\textsuperscript{25} In cases of non-reporting or false reporting, a financial penalty (up to 200,000 yen) is to be imposed on companies concerned.\textsuperscript{26} 

9.19 There are several possibilities for climate litigation related to the 1998 Law. A first possible type of litigation is that a citizen and/or a civil society organisation brings an action requesting the government and/or local authority to implement their obligation or impose or confirm their obligation to take more aggressive mitigation action under the Law. Besides difficulties in standing surrounding judicial review as mentioned below, another specific difficulty exists relating to the 1998 Law. This Law imposes weak obligations on government and local authorities, permitting them considerable discretion. In most cases their obligations are limited to elaborating measures and making all efforts, obligations that are difficult to enforce.

9.20 This is also true for the obligations imposed on private entities. The only exception is the mandatory obligation placed on large-emitting companies to report their emission data. In the case of non-compliance with these reporting obligations, and if there is no enforcement action by the government, a suit may be brought by a citizen before the court in order to request the government to take the necessary measures to address such non-compliance. If the government decides not to disclose emission data upon request of disclosure, a claimant requesting disclosure has the right to institute an action against such an administrative order of non-disclosure on the basis of the Act on Access to Information Held by Administrative Organs enacted in 1999.\textsuperscript{27} Three cases of this nature related to the 1979 Energy Conservation Act are currently pending before the courts (see paras. 9.78–9.80 below).

\textsuperscript{24} Article 22–3.1. \textsuperscript{25} Article 21–3. \textsuperscript{26} Article 50. \textsuperscript{27} The Act on Access to Information Held by Administrative Organs was enacted in 1999 and has become effective since 1 April 2001. The Act provides for the right of any person to request disclosure of information held by governmental organs and procedure for such request. In principle, local authorities are out of the scope of the Act: many but not all
The Act concerning the rational use of energy

9.21 The Act concerning the rational use of energy was enacted in 1979 (‘the 1979 Energy Conservation Act’), after the oil crisis in the 1970s. The 1979 Act is significant for two reasons. First, it tackles CO₂ emissions from energy use, which constitute 90 per cent of GHG emissions in Japan. Second, while most existing measures in Japan are not mandatory, the 1979 Act provides for mandatory measures. While the Act itself does not contain any references to climate change (only its ordinances refer to it), this legislation has been one of the core measures to tackle climate change.

9.22 The 1979 Act mainly provides for four categories of measures. The first category of measures is for factories and installations with large energy consumption (annual consumption is equal to/more than 1,500kl of crude oil) (‘designated energy management factories’). These installations have an obligation to make all efforts to reduce their energy used per unit of throughput by 1 per cent annually. To do so, they have to appoint energy managers, submit their planned measures and periodically report on their energy use. About 13,000 factories are currently covered.

9.23 The second category of measures is for buildings. Owners of buildings larger than or equal to 2,000 m² of total floor space (‘designated buildings’) have an obligation to report on the energy efficiency measures taken on new constructions and large-scale repair works and to make a periodic report on maintenance.

9.24 The third category of measures is for machinery and equipment. Producers and importers of electrical appliances, such as computers and domestic appliances specified by the Ordinance, are obliged to keep the energy efficiency of their products not lower than that of the most efficient energy products commercially available on the market. This is known as the Top Runner Method.

local authorities have enacted local regulations to similar effect. See www.japaneselaw-translation.go.jp/law/detail/?id=99&vm=04&re=01&new=1.


29 Chapter III of the 1979 Act. 30 Chapter V, ibid. 31 Chapter VI, ibid.
From April 2007, measures for consigners and carriers are also introduced.\textsuperscript{32} Transportation companies and cargo owners with 200 automobiles or more are obliged to submit long- and medium-term plans and to periodically report on their energy use.

In addition, energy suppliers are obliged to make efforts to disseminate highly energy efficient equipment and publish information on the implementation and effects of such efforts. Further, retailers have an obligation to make efforts to display the energy efficiency performance of their products in order to provide the consumer with information on annual electricity consumption, fuel cost, etc.\textsuperscript{33}

If there is non-compliance with such obligations, the Minister of Economy, Trade and Industry and other competent ministers who have jurisdiction over business pertaining to installations, buildings etc. may take measures such as recommendations, orders and public announcements of non-compliance.\textsuperscript{34}

The government shall endeavour to take fiscal, financial and taxation measures necessary to promote the rational use of energy.\textsuperscript{35} Public financial institutions such as the Development Bank of Japan furnish companies wishing to invest in energy conservation promotion with funds at a preferential rate.

In the context of climate litigation, although the 1979 Act and related ordinances stipulate more specific obligations and standards than the 1998 Law, these obligations are in principle to submit data concerning energy use and to report on measures taken. Some indicative targets, however, have been provided by the Ministry of Economy, Trade and Industry as guidelines for business to take measures. While it should be relatively simple for a citizen to challenge the omission of the government to enforce non-compliance by business with its reporting obligations, difficulties remain in determining whether or not mitigation efforts by business are sufficient or whether the government has taken

\textsuperscript{32} Chapter IV, \textit{ibid.} \textsuperscript{33} Article 86, \textit{ibid.} \textsuperscript{34} Articles 16 (for designated energy management factories); 57 (for carriers); 64 (for consigners); 75, 75–2 and 76–6 (for designated buildings); and 79 and 81 (for machinery and equipment). \textsuperscript{35} Article 82.
adequate measures to oblige business to make more appropriate levels of mitigation efforts.

**National climate change risks**

9.30 *Global Warming Impacts on Japan*, report from a research project funded by the Ministry of the Environment (‘MOE’), presented projections for three scenarios: 450 ppm stabilisation scenario, 550 ppm stabilisation scenario and business-as-usual (‘BaU’) scenario. These three scenarios project an average temperature increase of 2.1°, 2.7° and 3.8° respectively in 2100 compared to pre-industrial levels.

9.31 Although provided projections are not comprehensive, major findings are the following: the cost of damage by floods will increase up to about 5 trillion yen per year by 2050, and will increase beyond 2050. Rice production will likely increase by 2050 but production areas and pattern will likely change drastically. Risk of death by heat stress will double in all scenarios by 2050 and beyond that, the risk might triple. The report concludes by projecting more severe impacts in various areas even with a 450 ppm stabilisation scenario, but noting that a drastic cut of global emissions could significantly mitigate damage caused by climate change.36

**Industrial and natural resources (emissions sources and energy mix)**

9.32 In 2008, crude oil accounted for 41.9% of total primary energy supply; coal for 22.8%; natural gas for 18.6%; nuclear for 10.4%; hydro for 3.1% and renewables for 3.1%.37

9.33 In 2008, coal-fired generation accounted for 26.8% of total electricity generation; gas-fired generation for 26.3%; oil-fired generation for 13.0%; nuclear for 24.0%; hydro for 7.1% and renewables and others for 2.8%.38

38 See www.fepc.or.jp/present/jigyou/shuyoukoku/sw_index_03/index.html. The above report *Energy in Japan* provides slightly different numbers but the trends are similar.
Until the 1960s, Japanese energy depended on domestically produced coal and hydro that accounted for about 60% of primary energy supply. Due to the shift from coal to cheap oil, the ratio has drastically declined since then. In 2007, the Japanese self-sufficiency ratio of energy was as low as 4%, including hydro power. This is very low compared to other countries. 39

According to figures published by the MOE and the Greenhouse Gases Inventory Office of Japan, National Institute of Environmental Studies (‘NIES’), 40 the following were the main sources of GHG emissions in Japan in 2008: 34.0% from the power sector; 28.0% from industries; 18.8% from transport; 8.1% from commercial and service sectors; 4.9% from households; 4.1% from industrial processes; and 2.1% from waste. It is clear that as much as 62% comes from the power and industrial sectors, which are the main sources of emissions in Japan.

Since the adoption of the Kyoto Protocol, Japanese emission has been consistently about 4–8% above the 1990 level. However, due to the financial crisis experienced since mid-2008, Japanese emissions have recorded significant decreases. Emissions in 2009 were 4.1% below the 1990 level without counting removals from national sinks (expected to be 3.8% in the Kyoto Protocol Target Achievement Plan) and Kyoto mechanisms units. 41 This decline can be traced to a decrease in industrial activities, for instance steel production.

(B) Public law

Overview of judicial review system

The Constitution stipulates that: ‘The whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law. No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial

39 See n. 37 above.
41 Ibid.
The Supreme Court and lower courts have all the judicial power. The courts are the final adjudicators and deal with all legal actions against public bodies and private persons.

There are five types of courts in the Japanese judicial system: Supreme Court; 8 High Courts (with 6 branches and Intellectual Property High Court); 50 District Courts (with 203 branches); 438 Summary Courts; and 50 Family Courts (with 203 branches and 77 local offices). The jurisdiction of each court is provided for in the Law, starting with the Law on Courts enacted in 1947. There are no administrative or constitutional courts.

Article 81 of the Constitution stipulates: ‘[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act’. On the basis of the provision, not only the Supreme Court but also lower courts may determine the constitutionality of any law, ordinance and administrative decision. In practice, it is rare that the courts, including the Supreme Court, judge a law unconstitutional except cases concerning discrepancies in the value of votes.

It should be noted that judicial review including review of the constitutionality of any law is only possible when it is necessary to render judgment on a specific case. Abstract normative control on constitutionality without a specific dispute, as in the German Constitutional Court, is not allowed in Japan.

Besides these courts, there are several administrative commissions, which are part of the government but operate independently from it. One of these commissions is the Environmental Dispute Coordination Commission (‘EDCC’) (see paras. 9.97–9.100 below).

In the context of climate litigation, judicial review on administrative litigation and civil procedure are the most likely potential types of legal actions. There is also a possibility of recourse to the EDCC.

42 See www.courts.go.jp/english/system/system.html#01.
Administrative litigation

9.43 The Administrative Case Litigation Act (‘ACLA’)\(^44\) provides for different types of actions to be brought for the purpose of judicial review: (i) Actions for the Revocation of Administrative Dispositions (Articles 8–35); (ii) Other Actions for the Judicial Review of Administrative Dispositions (Articles 36–38) containing four sub-categories; (iii) Public Law-Related Actions (Articles 39–41); (iv) Citizen Actions (Article 42); and (v) Interagency Actions (Article 43). Each category of actions has its own scope and conditions under the Act. To be filed effectively, an action needs to fall into and meet the requirements of the relevant category.

Actions for the Revocation of Administrative Dispositions

9.44 Actions for the Revocation of Administrative Dispositions (‘Torikeshi sosho’) are actions seeking the revocation of an administrative disposition and any other act constituting the exercise of public authority by an administrative agency (Article 3.2). This category is considered the most typical administrative litigation.

9.45 Before going into judgment on merits, courts examine three main requirements by which the action could be admitted by the court. First, actions shall target an administrative ‘disposition’. The ‘disposition’ subject to this type of actions does not cover all administrative acts but the ones that in law directly establish rights and obligations of nationals and/or which directly determine their scope.\(^45\) This by implication excludes some types of administrative acts such as acts internal to the administration, administrative guidance (which has been often used in Japan by the government to guide private persons), and intermediate acts in a series of acts.

9.46 What might constitute an administrative ‘disposition’? The Supreme Court decided that while a decision on urban planning constitutes the exercise of public authority by an administrative agency, the elaboration of a re-zoning plan prior to urban

\(^{44}\) See [www.japaneselawtranslation.go.jp/law/detail/?id=1922&vm=04&re=01&new=1].

\(^{45}\) Judgment of the Supreme Court, 29 October 1964, Minshu 18(8), 1809.
planning is only a ‘blueprint’ which does not determine rights and obligations of persons concerned and therefore does not constitute an ‘administrative disposition’ subject to this category of actions.

9.47 In a recent case related to a re-zoning plan, however, the Supreme Court set a new precedent by stating that once a re-zoning plan is decided, it would be possible to foresee what kind of effect might be caused to the rights of landowners in the area concerned; it would also be possible to foresee that they would be subject to a relocation decision as a next step, and therefore, a decision on a re-zoning plan would have direct effect on their legal status and constitutes an administrative disposition within the meaning of the Act. The Supreme Court added that although landowners may have recourse to actions for revoking a relocation decision, it would be less likely that the Court would nullify the decision and that claimants could not enjoy effective remedies after the project had actually started.

9.48 Despite this decision of the Supreme Court in the context of a re-zoning plan, there is no similar judgment of the Court that recognises urban planning as a ‘disposition’ within the meaning of the Act.

9.49 The second requirement is a standing to sue (Article 9). The Act limits the standing to file actions for the revocation of administrative dispositions to persons who have a ‘legal interest’. The person to whom the disposition is addressed clearly falls within this definition.

9.50 The question is to what extent the third parties (who are not an addressee) of the disposition enjoy such standing. Courts have interpreted ‘legal interest’ as an ‘interest protected by law’. While criticising this interpretation as too narrow to provide appropriate remedies to claimants, the majority of scholars interpret it as ‘interests deserving protection by law’. Under this interpretation, whether to have a standing or not will be determined on a case-by-case basis, taking into account the nature

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47 Judgment of the Supreme Court, 10 September 2008, Minshu 62(8), 2029.
48 Judgment of the Supreme Court, 14 March 1981, Minshu 32(2), 211.
and extent of the interests injured and whether or not the interests injured are distinguishable from those of the general public.

9.51 While the Supreme Court has maintained its interpretation of ‘interest protected by law’, it has shown some flexibility in interpreting standing by considering the concrete damage suffered by claimants especially when there is direct damage to life and the person\(^{49}\) (for example, the Nigata Airport case\(^{50}\)). In a similar vein, the Supreme Court recognised that inhabitants of the area within 58 km of MOX plant ‘Monju’ may have a standing to file an action for revocation of a decision on a construction permit.\(^{51}\)

9.52 This interpretation was incorporated into the Act by an amendment in 2004 which inserted Article 9.2:

9.53 When judging whether or not any person, other than the person to whom an original administrative disposition or administrative disposition on appeal is addressed, has the legal interest prescribed in the preceding paragraph, the court shall not rely only on the language of the provisions of the laws and regulations which give a basis for the original administrative disposition or administrative disposition on appeal, but shall consider the purposes and objectives of the laws and regulations as well as the content and nature of the interest that should be taken into consideration in making the original administrative disposition. In this case, when considering the purposes and objectives of said laws and regulations, the court shall take into consideration the purposes and objectives of any related laws and regulations which share the objective in common with said laws and regulations, and when considering the content and nature of said interest, the court shall take into consideration the content and nature of the interest that would be harmed if the original administrative disposition or administrative disposition on appeal were made in violation of the laws and regulations which give a basis therefor, as well as in what manner and to what extent such interest would be harmed.


\(^{50}\) Nigata Airport case, Judgment of the Supreme Court, 17 February 1989, *Minshu* 43(2), 56. The Nigata Airport case was raised by those living in the area surrounding the airport. Claimants requested the revocation of a licence permitting regular air service by defendants in order to bring to an end the significant noise pollution caused by the air service operations. The Supreme Court recognised standing for those, in terms of general social norms, who suffer significantly from noise caused by aircraft activity permitted by the licence.

\(^{51}\) Monju Mox Plant case, Judgment of the Supreme Court, 9 April 1993, *Minshu* 46(6), 571.
9.54 The Supreme Court has passed judgments respecting the effects of the amendment. In the Odakyu case, for instance, in the context of a rail expansion project, it accepted the standing of inhabitants and landowners within the area covered by the ordinance on environmental impact assessment issued by the Metropolis of Tokyo.\textsuperscript{52}

9.55 The third requirement is that actions can only be filed when the legal interest can be 'recovered by revoking the original administrative disposition'.

9.56 For this category of actions, the filing of an action in principle does not preclude the effect of the administrative disposition, the execution of the disposition or the continuation of any subsequent procedure (Article 25.1). The court may, upon petition, by an order, stay the whole or part of the effect of the administrative disposition and the execution of the administrative disposition. It may also stay the continuation of any subsequent procedure if there is an urgent necessity in order to avoid any serious damage that would be caused by the disposition, the execution of the disposition or the continuation of any subsequent procedure. However, the court may not stay the effect of an administrative disposition if the purpose can be achieved by staying the execution of the disposition or staying the continuation of any subsequent procedure (Article 25.2).

9.57 For instance, the government authorised the construction of a coal-fired power plant that will significantly increase CO\textsubscript{2} emissions. Citizens want to challenge this authorisation. In such a case, to whom and to what extent will standing be admitted? Courts have shown some flexibility in interpreting standing for such actions. In interpreting under Article 9.2 of the Act, courts consider (i) the purposes and objectives of the laws and regulations and of any related laws and regulations that share a common objective; and (ii) the content and nature of the interest in making the administrative disposition. The extent to which courts take into account related laws and regulations depends on a consideration of the above items by courts. References in the objectives and purposes of these laws and regulations to the

\textsuperscript{52} Odakyu case, Judgment of the Supreme Court, 7 December 2005, \textit{Minshu} 59(10), 2645.
interest of citizens in protecting the climate system might help to further expand the standing.

Action for the declaration of nullity

9.58 The category (ii) of Other Actions for the Judicial Review of Administrative Dispositions (Articles 36–38) contains four types of action. The first type of action is an ‘action for the declaration of nullity, etc.’ (‘Muko kakunin sosho’). This is an action seeking the declaration of the existence or non-existence of, or validity or invalidity of, an administrative disposition (Article 3.4). Standing for this type of action is provided for in Article 36 with the understanding that its standing is similar to the one for actions for revocation. Therefore a similar problem might be raised (see paras. 9.49–9.54 above).

Action for the declaration of illegality of inaction

9.59 The second type of action is an ‘action for the declaration of illegality of inaction’ (‘Fusakui no iho kakunin sosho’). This is an action seeking the declaration of illegality of an administrative agency’s failure to make an administrative disposition which it should have made within a reasonable period of time in response to an application filed under laws and regulations (Article 3.5). This type of action may be filed only by a person who has filed an application for an administrative disposition, and therefore it would have a relatively small role in the context of climate litigation.

Mandamus action

9.60 The third type of action is a ‘mandamus action’ (‘Gimuzuke sosho’). This is an action seeking an order to the effect that an administrative agency should make an administrative disposition (see para. 9.45 above) in the following cases: (i) where the administrative agency has not made a certain administrative disposition which it should make (excluding the case set forth in the following item); (ii) where an application for administrative review for requesting the administrative agency to make a certain administrative disposition has been filed or made under laws and regulations, but the administrative agency has not made the administrative disposition which it should have made.
(Article 3.6). While the latter case (ii) is brought before the court on the basis of failure by administration to respond to an application, the former case (i) is not premised on such failure. In the context of environmental litigation, the former type of action has been often brought before courts. For instance, a citizen might bring an action in order to seek an order obliging the government to introduce more stringent mitigation measures in accordance with the objective of the 1998 Law and/or the 1997 Act. Another example is the actions for disclosure of emission data brought by Kiko network as introduced below.

9.61 Requirements for a ‘mandamus action’ are relatively stringent compared to other types of actions. Article 37–2 (1) states: ‘a mandamus action may be filed only when any serious damage is likely to be caused if a certain administrative disposition is not made and there are no other appropriate means to avoid such damage’.

9.62 The Act thus requires ‘seriousness of damage caused’ and ‘supplementarity’ for actions to be filed. When judging whether or not any serious damage would be caused, the court shall consider the degree of difficulty in recovering from the damage and shall take into consideration the nature and extent of the damage as well as the content and nature of the administrative disposition.

9.63 As for standing, a mandamus action may be filed only by a person who has a legal interest in seeking an order to the effect that an administrative agency should make a certain administrative disposition. For interpretation of ‘legal interest’, Article 9.2 on standing for revocation of an administrative disposition shall apply mutatis mutandis.

9.64 Kiko Network, the national centre of climate NGOs in Japan, has brought three actions of this type before the courts in order to compel the government to disclose emission data of large-emitting companies (see 9.78–9.80 below).

Action for an injunctive order

9.65 The action for an injunctive order is an action seeking an order, in cases where an administrative agency is about to make a certain administrative disposition which it should not make, to the effect
that the administrative agency should not make the administrative disposition (Article 3.7).

9.66 An action for an injunctive order may be filed only in cases where any serious damage is likely to be caused if a certain administrative disposition is made; provided, however, that this shall not apply if there are any other appropriate means to avoid such damage (Article 37–4.1).

9.67 These requirements of ‘seriousness of damage’ and ‘supplementarity’ mean that claimants should substantiate the existence of threat of serious damage impossible to be recovered by action for revocation of administrative disposition or for suspension of disposition. With these requirements, it is rare that courts admit this type of action for an injunctive order to be filed.

Public law related action

9.68 A public law related action is an action relating to an administrative disposition that confirms or creates a legal relationship between parties, wherein either party to the legal relationship shall stand as a defendant pursuant to the provisions of laws and regulations, an action for a declaratory judgment on a legal relationship under public law and any other action relating to a legal relationship under public law (Article 4). With the 2004 amendment of the Act, the latter part of Article 4 was added, recognising formally substantive public law related action.

9.69 A recent case of this type of action, the Henoko assessment case, has been brought before the court to confirm the governmental obligation to go through an appropriate environmental impact assessment (EIA) in case there is a defect in the EIA procedure. To what extent this type of action contributes to environmental litigation depends on how the interpretation of terms such as ‘legal relationship under public law’ might evolve.

Citizen actions

9.70 A citizen action (‘Jumin sosho’) is an action seeking a correction of an act conducted by an agency of the State or by a public entity

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53 The Henoko Assessment Case is the one that relates to the relocation project of a US military base to the Henoko area in Okinawa where there are important habitats for dugongs.
which does not conform to laws, regulations and rules, which is filed by a person based on his/her status as a voter or any other status that is irrelevant to his/her legal interest (Article 3.8).

9.71 Citizen actions do not only target an administrative disposition but any act conducted by an administrative agency or by a public entity when they do not conform to laws and rules. Importantly, citizen actions do not require a person to show his/her legal interest.

9.72 However, these actions are to be filed only by persons specified by the relevant Acts in cases specifically provided for in these Acts. At present, citizen actions may only be filed to seek corrections of financial and budgetary acts by local authorities under the Local Autonomy Law (Articles 242 and 242–2 of Local Autonomy Law).

9.73 According to the Local Autonomy Law, an injunctive order against an illegal financial act may be issued provided that such an act significantly impedes prevention of serious danger to human life and body and other public welfare. Therefore, such an injunctive order is rarely issued.

9.74 The most crucial element of citizen actions lies in determining when a financial and budgetary act of an administrative body can be construed as illegal. The judgments of courts are diverse. Some courts limit the scope of citizen actions purely to financial and budgetary acts (meaning that the acts aim directly at financial administration); others admit that acts subject to citizen actions are not only purely financial and budgetary ones but also acts constituting the grounds for financial payment. Payment for dredging ooze was accepted as a financial and budgetary act in the Tagonoura hedoro (ooze) case, while payment for maintaining and conserving a forest reserve was not accepted in the Kyoto City forest reserve case.

9.75 In the context of climate change, citizen actions have the potential to indirectly control administrative acts through budgetary

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54 Tagonoura hedoro (ooze) case, Judgment of the Supreme Court, 13 July 1982, Minshu 36(6), 970.
55 Kyoto City forest reserve case, Judgment of the Supreme Court, 12 April 1990, Minshu 44(3), 431.
and financial control, especially if ‘financial and budgetary act’ is broadly construed. However, disappointingly, the current scope allowed for citizens’ actions is very narrow since it is not local authorities but the government that has the jurisdiction over most climate-related areas, starting with energy policy. It would play a significant role in climate protection if citizens’ actions are allowed for budgetary and financial acts by the government. For instance, it would contribute to emission reduction if subsidies for import of coal by the government could be challenged and then suspended through citizen actions. Another example is that citizens might challenge through citizen actions the legality of payments for overseas development assistance that would increase CO\textsubscript{2} emissions, such as funding for an inefficient coal-fired power plant.

**Action under the State Redress Act, 1947**

9.76 The State Redress Act enacted in 1947\textsuperscript{56} provides the following: ‘When a public officer who exercises the public authority of the State or of a public entity has, in the course of his/her duties, unlawfully inflicted damage on another person intentionally or negligently, the State or public entity shall assume the responsibility to compensate therefor.’ (Article 1)

9.77 Action under the State Redress Act is brought to correct illegality of acts by the administration. Recently, an increased number of actions to seek correction of unlawfulness in the context of failure to use administrative power, and compensation therefore, have been brought before the courts. A significant case is that of the public nuisance one of the Minamata disease (poisoning caused by industrial mercury pollution). The Supreme Court held that when the failure to exercise administrative power is manifestly unreasonable, such inaction is unlawful.\textsuperscript{57}

**Cases with direct relevance to climate change**

9.78 In 2005, the Kiko Network brought three actions before the courts seeking a revocation of the decisions not to disclose emission

\textsuperscript{56} The State Redress Act, 1947. See www.japaneselawtranslation.go.jp/law/detail/?id=1933 &vm=04&re=01&new=1.

data of large-emitting installations, and an order of disclosure by the government. In 2004 the Kiko Network began requesting the Directors of Regional Bureaux to disclose reports submitted by designated installations under the 1979 Act. They did this on the basis of the 1999 Act on Access to Information Held by Administrative Organs.\textsuperscript{58} The Act provides that any person may request from the head of an administrative organ the disclosure of administrative documents held by the administrative organ concerned (Article 3). When there is a disclosure request, unless it is for information protected by non-disclosure, the head of an administrative organ shall disclose said administrative documents to the applicant (Article 5).

9.79 Emission data for the year 2000, for which disclosure was rejected, amounted to around 20 per cent of total emissions of Japan, from 17 per cent of designated installations including steel manufacturing plants. In the course of these three actions brought by the Kiko Network, decisions not to disclose emissions data relating to 340 installations (out of 753) were modified to permit disclosure.

9.80 The defendants argued that the requested information falls into Article 5 (ii) (a): ‘Information which when disclosed is likely to cause harm to the rights, competitive position, or other legitimate interests of the said juridical persons, etc. or of the said individual.’ District courts of Nagoya, Osaka and Tokyo accepted requests from Kiko Network and ordered the disclosure by stating that in order to justify non-disclosure it is necessary to demonstrate the probability of causing harm to legitimate interests of concerned juridical persons, and that the abstract possibility of such harm is not sufficient to justify non-disclosure.\textsuperscript{59} In October 2007 the Osaka High Court revoked the judgment of the Osaka District Court by stating there had been no abuse of discretion by administrative organs.\textsuperscript{60} The Kiko Network then appealed to the Supreme Court. The Nagoya High Court, on the other hand, in

\textsuperscript{58} See n.27 above.


\textsuperscript{60} Judgment of Osaka High Court, 19 October 2007, available at www.kikonet.org/theme/archive/kaiji/decision-osaka20071019.pdf.
November 2007 maintained the judgment of the Nagoya District Court and ordered disclosure.\(^{61}\)

(C) Private law – civil litigation

9.81 The Civil Code\(^{62}\) enacted in 1896 contains a general provision on tort liability. Article 709 states: ‘A person who intentionally or negligently violates the rights of others shall be liable for the loss caused by the act.’ Despite the dramatic social changes since 1896, this provision on tort liability has remained unchanged. On the basis of this provision, a claimant may seek compensation for loss and an injunction of the act causing the loss. Neither a specific area of nor a special body of rules dealing with public and private nuisances exists: Article 709 of the Civil Code deals with all the cases involving tort liability and the courts have developed a flexible interpretation of this provision so as to deal with environmental litigation by considering the unique features and specifics of such litigation.

\textit{Negligence}

9.82 For a person to be liable for the loss caused by his/her act, the person should have violated the rights of others intentionally or negligently. In the context of environmental litigation, negligence has been interpreted in two different ways. The first interpretation is that if a person can foresee the occurrence of the damage, he/she is liable. The second interpretation is that if a person can avoid foreseeable damage, but does not do so, he/she is liable. Scholars advocate the first while courts maintain the second. Some lower courts dealing with pollution cases have passed judgments to the effect that when there is a threat to life and body, costs to avoid the damage should not be considered and defendants should be obliged to cease operations.\(^{63}\)


\(^{62}\) Civil Code, 1986. For Parts I, II and III, see www.japaneselawtranslation.go.jp/law/detail/?id=1928&vm=04&re=01&new=1; for Parts IV and V, see www.japaneselawtranslation.go.jp/law/detail/?id=2&vm=04&re=01&new=1.

9.83 Operators who engage in hazardous activities involving significant risks have an obligation to avoid the damage resulting from the risk occurring. For instance, operators of mining and of nuclear plants owe liability without fault under specific legislations.

Causation

9.84 One of the greatest difficulties in the context of environmental litigation is to establish the causal link between the act causing the loss and the occurrence of damage. In theory, the burden of proof of factual causation primarily falls on victims (claimants). As it is difficult for victims to bear this burden in most cases, scholars and courts try to mitigate their burden of proof. Some lower courts admit indirect evidence to prove causation. For instance, the Niigata District Court in the First Niigata Minamata Disease Case allocated the burden of proof between the claimants and the defendant. The claimants had to identify and show reasonable grounds for what the substance causing damage was, and how the substance reached the victims, and the defendant had to demonstrate that it did not release the substance in question. Other courts still require claimants to prove a high probability of causation, but admit epidemiologic proof in order to mitigate the burden of proof for claimants.

9.85 Even in the case of diseases that do not show a particular relationship between the pollutant in question and the disease, such as bronchitis, the Osaka District Court in the Second to Fourth Nishiyodogawa air pollution cases admitted claims by accepting epidemiologic evidence of factual causation between collective acts and the disease, stating that as proving causation between the individual act and the disease is extremely difficult, it would therefore be socially and economically inappropriate that claimants assume the burden of proof, and to such extent, it would be appropriate that burden of proof would fall on defendants.

65 For instance, Itai Itai disease case, Toyama District Court, 30 June 1971, *Hanrei jiho* 635, 17.
Recently, some lower courts have begun to award compensation tailored to the degree of probability. In an action brought by victims of a relatively less serious condition in the Minamata disease case, the Tokyo district court judged that even though claimants only show evidence with lower probability, they may receive not full but discounted compensation providing that there is a substantial likelihood that claimants suffer from the disease. The court considered that it would be scientifically difficult for victims suffering from less serious conditions to prove a causal link with a high probability; if the court required the victims to prove causation with high probability, claimants would have to assume too heavy a burden of proof due to lack of scientific evidence, which is contradictory to the concept of fair share of loss. This approach actually weakens the burden of proof and ensures more effective remedies for claimants by reflecting the degree of probability in the quantum of damages.

Joint and several liability

Article 719 of the Civil Code provides for joint and several liability: ‘If more than one person has inflicted damages on others by their joint tortious acts, each of them shall be jointly and severally liable to compensate for those damages. The same shall apply if it cannot be ascertained which of the joint tortfeasors inflicted the damages.’

The courts’ interpretation is that the act of each person needs to meet the requirements of this provision independently and that it is therefore necessary to have a causal link between the individual act and the occurrence of the damage. Recently, another interpretation has been advocated, and it has been met with increasing support, that when the act of each person has a common relevance and there is causation between such collective acts and the occurrence of the damage, each of them shall be jointly and severally liable.

9.89 The Nishiyodogawa cases\(^{68}\) and the Kawasaki Pollution case\(^{69}\) relate to air pollution caused by factories and automobiles on the highway. The district courts admit in both cases that emissions from factories have common relevance, even if these operations started at different times and even though the extent of their contribution to the occurrence of damage is not clear. The Nishiyodogawa cases went further to recognise the existence of common relevance between emission from factories and emission from automobiles based on commonality of pollutant.

9.90 In light of the nature of climate change issues, when a claimant suffering from damage caused by the adverse impacts of climate change brings an action seeking compensation for the damage suffered, proving a causal link between the act of emission and the damage is one of the barriers that claimants find the most difficult to surmount. This is also true for when a claimant wants to sue the government for its failure to introduce mitigation measures sufficient to avoid climate change impacts.

9.91 In the context of climate litigation, the courts would easily admit that GHG emission collectively causes adverse impacts based on scientific findings so far. The difficulty, rather, lies in proving that the act of emission by a specific defendant and/or defendants as a group caused the damage suffered by a claimant and/or claimants as a group. Some approaches taken by the courts mentioned above, for instance joint and several liability, might prove helpful in overcoming, to some extent, such difficulties.

9.92 Climate impacts occur due to accumulated acts by many all over the world and over time. Besides, the damage is in general caused not by a single factor of climate change, rather by a complex of multiple factors. Therefore, it is practically difficult, if not

\(^{68}\) For the First Nishiyodogawa case, Judgment of the Osaka District Court, 29 March 1991, *Hanrei jiho* 1383, 22; for the Second to Fourth Nishiyodogawa cases, Judgment of the Osaka District Court, 5 July 1995, *Hanrei Times* 889, 64. On 29 July 1998, both the plaintiffs and defendants agreed a compromise recommended by the Osaka High Court.

\(^{69}\) The First Kawasaki Pollution case, Judgment of Yokohama District Court, Kawasaki Branch, 25 January 1994, *Hanrei jiho* 1481, 19. For the actions against thirteen private companies, a compromise between the plaintiffs and these defendants was reached on 25 December 1996 while for the actions against the government and the Metropolitan Highway Public Corporation a compromise was reached on 20 May 1999.
impossible, to single out a portion of damage directly attributable to climate change and to prove a causal link between the act of emission and the damage caused by it. The approach of compensation in proportion with probabilities might play a role in mitigating this burden of proof and in ensuring better remedies. However, since proving some level of probabilities would still not be scientifically easy, compensation might be considerably discounted even with this approach.

**Injunction**

9.93 Injunctions have an important role to play in preventing environmental pollution and damage. Although there is no explicit provision on injunction in the Civil Code, courts have reviewed requests and issued injunctive orders in some cases based on real rights and in other cases based on personal rights.

9.94 In cases on tort liability, the courts consider that the act should be unlawful, which is one of the requirements for liability to be admitted. In determining the unlawfulness of the act, the courts make use of the balance of interest test especially by balancing the nature of the interest which was violated and the tort: if the nature of the interest which was violated is serious and exceeds the limit tolerable by the victim, it is regarded as unlawful.\(^70\) In the case of injunctions, the Supreme Court places particular importance on the nature of and probability of damage as well as the public nature of activities causing damage, as observed in its judgment in the National Route 43 case.\(^71\) This judgment also recognised that a higher level of unlawfulness is required for an injunction compared to one required for compensation since injunctive order might suspend the act in question and likely cause serious damage to the defendant.

9.95 Injunctions have the potential to play a powerful role in climate protection: for instance, injunctions could result in the suspension or limitation of those GHG emitting activities of large emitters that are likely to cause climate change. The difficulty lies in the need to show ‘unlawfulness’: if the activities in question are considered public in nature and/or if the damage in question is

\(^71\) National Route 43 case, Judgment of the Supreme Court, 7 July 1996, *Minshu* 49(7), 1870.
regarded as not significant, the courts would not order an injunction. However, the courts have reconfirmed in several cases that where there is a high probability of damage to human health, even if the activities in question are of a public nature, injunctive relief should be provided.\(^{72}\)

9.96 The question of whether or not a request for an abstract injunction, for instance seeking to limit pollutants below a certain level, may be admitted is also an important question in the context of climate litigation. In terms of climate change, as the sources of pollution are quite numerous and diverse and claimants do not often have the necessary information, it is difficult for claimants to specify the exact content of the injunction they are seeking for each defendant in order to achieve their expected outcome. While judgments differ from court to court, the courts in general appear reluctant to admit such injunctions.

(D) Other law

*Review by independent administrative commission*

9.97 The Environmental Dispute Coordination Commission (’EDCC’) is an administrative commission established on 1 July 1972, by integrating the Land Coordination Commission and the Central Pollution Examination Commission under Article 3 of the National Government Organisation Act.

9.98 The EDCC enjoys quasi-judicial powers for settling environmental disputes.\(^{73}\) The major roles of the EDCC are as follows: (i) settling environmental disputes quickly and justly through conciliation, mediation, arbitration and adjudication (Environmental Dispute Settlement System); and (ii) seeking coordination between mining, quarrying or gravel-collecting industries and the public interests (Land-use Coordination System).

9.99 Decisions of the commission can be subject to judicial review by courts but the court is bound by the facts determined by the commission as long as the facts are based on substantial evidence.

\(^{72}\) For instance, National Route 43 case, *ibid.* and Nagoya nanbu air pollution case, Judgment of Nagoya District Court, 27 November 2000, *Hanrei jiho* 1746, 3.

\(^{73}\) See [www.soumu.go.jp/english/eo.html](http://www.soumu.go.jp/english/eo.html).
The EDCC environmental dispute settlement system provides a quicker, cheaper, and access-friendly means to settle disputes, especially common ones such as disputes relating to pollution. However, in the case of climate change, as a number of emitters exist all over the world, it would be a challenge for the EDCC to deal with such global issues if a climate-related complaint about large emitters is brought.

**Human rights**

As mentioned above, the Constitution contains a list of human rights, which includes the right to life (Article 13) and the right to maintain the minimum standards of wholesome and cultured living (Article 25), but this has no reference to a right to the environment. In practice, the courts have provided compensation and ordered injunctive relief on the basis of personal rights, the legal basis of which are Articles 13 and/or 25. Recently, the right to live in peace, based on these two provisions of the Constitution, has been invoked by claimants as grounds for compensation and injunctive relief. The right to live in peace is understood as providing an added value in that it extends the scope of interests protected by law, which means grounds of civil litigation, to non-pecuniary injury to life.

Japan is a Party to various international human rights conventions including the International Covenant on Civil and Political Rights. Although Japan has not yet ratified the optional protocol to ICCPR that recognises the Committee’s competence to receive and consider communications from individuals who claim to be victims of violation of rights provided for in the covenant, Japan is expected to ratify it in the near future. Once ratified, interpretations by the Committee could influence the acts of the government as well as the courts.

**Criminal law**

The Criminal Code enacted in 1907\(^4\) does not have special provisions on the environment.

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9.104 Most environmental legislations, including climate-related laws such as the 1998 Law and the 1979 Act, contain penalties for non-compliance. The objective of these provisions is to ensure compliance with and to realise the outcomes of these legislations.

9.105 Experiences of severe environmental pollution have led to the enactment of the Act on Punishment of the Crime of Causing Pollution Harmful to Human Health, 1970 (‘the 1970 Act’). The objective of the 1970 Act is to punish a person for having caused a risk to public health or for intentionally or negligently emitting substances hazardous to human health in the course of operations in factories or installations.

9.106 The 1970 Act has three features. First, the Act penalises a person for having caused a risk, not injury, to public health. Second, it punishes not only the person having caused such a risk but also the legal person. Third, the Act contains provisions that allow a presumption of a causal link between hazardous substances and the risk that occurred without clear evidence of causation.

9.107 The Supreme Court has in the past interpreted the term ‘operations’ narrowly, attracting criticism that it would reduce the effectiveness of the Act. Nevertheless, the provisions on presuming a causal link and on punishment of a legal person would be helpful in case the government decides to hold illegal emitters responsible.

Public trust/global commons

9.108 The Japanese legal system does not recognise the concept of a public trust. However, in the actions for judicial review and for tort liability, sometimes claimants have invoked the concept of the right of nature and have given nature the status of a claimant. For instance, in the Amaminokurousagi case, the claimants, on behalf of amaminokurousagi, also known as the Amami rabbit or *Pentalagus furnessi*, and a couple of other species that have their habitat in the area, brought an action for revoking a licence granted for forest development. The claimants argued that they

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were entitled to standing on behalf of these species. The court rejected this concept while admitting that the concept of right of nature has raised serious questions of the current legal system, the basis of which is to protect the interests of individual natural and legal persons.

**Competition/anti-trust law**

9.109 The Law on Prohibition of Private Monopoly and Ensuring of Fair Trade (‘the Anti-Monopoly Law’) was enacted in 1947, while Japan was still under the occupation of the Allied forces. Under such circumstances, the Anti-Monopoly Law was heavily influenced by the US antitrust legislations. In the same year, based on the Law, as the organ to implement the Anti-Monopoly Law, the Fair Trade Commission (‘FTC’), an independent administrative commission, was established.

9.110 The Anti-Monopoly Law has the goal to promote free and fair competition, to stimulate creative initiatives by entrepreneurs, to enhance business activities, to increase the level of employment and the real income of the people, and thereby to ensure the interests of consumers and to promote the democratic and social development of the national economy. With a view to achieving this goal, the Law prohibits private monopolisation. It also regulates various types of combinations of companies in order to prevent the excessive concentration of economic power. Companies are prohibited from acquiring shares, which result in a substantial restraint of competition. Unreasonable restraint of trade starting with cartel and unfair trade practices is also prohibited.

9.111 In the context of climate change, in March 2010 the FTC issued an interim report on issues under competition policy relating to the use of market mechanisms to address climate change.

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78 Article 1 of the Anti-Monopoly Law.
81 Articles 10.1 and 15, *ibid*. 82 Articles 3 and 19.9, *ibid*.
focusing on the national emissions trading scheme. The report raises some issues which are likely to violate the Anti-Monopoly Law: for instance, it would be the case if business persons collectively decide on the amount of production and of supply in light of each reduction target; on means to achieve the target; on when and to what extent increased carbon price would be added to the price of products and services.

Public international law

9.112 International law concluded by Japan is in effect part of the Japanese legal system without the need for transposing it into national law.

9.113 There is no case so far in which principles of international environmental law such as sustainable development have been directly applied.

9.114 However, in several cases, claimants have invoked the application of international treaties, for instance the Convention on Biological Diversity (‘CBD’) as the additional ground for illegality in the actions for revocation of administrative disposition,\(^84\) in actions for tort liability and in citizen actions.\(^85\) In most cases, courts have decided that provisions of CBD and agreements on protection of migratory birds require parties only to make efforts to take appropriate measures without requiring them to take specific measures and therefore the act in question does not violate these treaties.

9.115 In the Grampus Purchase case, the Nagoya District Court decided that the CBD would not apply to an act by a private person but the objective and effect of the Convention might be taken into account when interpreting ‘public order’ provided for in the Civil Code.\(^86\) The court did not admit the possibility of direct application to an act by a private person but did admit the possibility of indirect application of an international environmental agreement.

9.116 In the context of climate change, in case a company emits excessive GHG, against which a person wants to get an injunctive

\(^84\) Kenodo Hachioji Junction case, Judgment of Tokyo District Court, 31 May 2005.
\(^85\) Wajiro Higata Umetate case, Judgment of Fukuoka District Court, 31 March 1998.
\(^86\) Judgment of Nagoya District Court, 7 March 2003.
order by the court to stop such emissions, by way of indirect application above, the court might decide on whether or not the act is unlawful not only based on national legislations but also by taking into account the objectives and commitments of the FCCC. Conditions and circumstances in which the court indirectly applies international law are not necessarily clear: much depends on the discretion of the courts.

(E) Practicalities

Founding jurisdiction

9.117 The Code of Civil Procedure, 1996, provides for rules covering jurisdiction. An action shall be subject to the jurisdiction of the court that has jurisdiction over the location of the general venue of the defendant. The general forum is determined by his/her domicile, by his/her residence if he/she has no domicile in Japan or his/her domicile is unknown, or by his/her last domicile if he/she has no residence in Japan or his/her residence is unknown. The general venue of a juridical person or any other association or foundation shall be determined by its principal office or business office, or by the domicile of its representative or any other principal person in charge of its business if it has no business office or other office.

9.118 The general venue of a foreign association or foundation shall be determined by its principal office or business office in Japan, or by the domicile of its representative or any other principal person in charge of its business assigned in Japan if it has no business office or other office in Japan.

9.119 The general venue of a State shall be determined by the location of a government agency that represents the State in a suit.

9.120 Actions relating to a tort may be also filed with the court that has jurisdiction over the place where the tort was committed.

90 Article 4.4, ibid. 91 Article 4.5, ibid.
92 Article 4.6, ibid. 93 Article 5(9), ibid.
Enforcement

9.121 The Civil Enforcement Act, 1979,\(^94\) regulates the enforcement of judgments by the courts. There are different procedures for monetary and non-monetary claims.

Ancillary order

9.122 The Law on Civil Interim Measures, 1989,\(^95\) provides for two types of interim measures aiming to secure the enforceability of judgment by the courts. The first type of measures is an order of provisional seizure which may be issued to preserve the property to carry out compulsory execution for a claim for payment of money.\(^96\) The second type is an order of provisional disposition, (i) to preserve the property or (ii) to establish or maintain the legal relationship between parties in dispute.\(^97\)

Public interest litigation

9.123 Traditionally, standing for actions is granted to those who have a legitimate interest in the subject matter. While there is no system similar to class actions in US law, there is a system of representative action, in which a representative who pursues actions is selected by those wishing to participate in actions and in which all parties should be specified.\(^98\)

Costs/funding

9.124 A defeated party shall bear court costs.\(^99\) All costs except court fees should be paid in advance of the proceedings. In the context of environmental litigation, costs of witnesses and of expert opinions are essential, which makes litigation costly.

\(^{94}\) The Civil Enforcement Act, 1979.
\(^{96}\) Subsection 2 of the Law on Civil Interim Measures.
\(^{97}\) Subsection 3, ibid.
\(^{99}\) Article 61 of the Civil Procedure Code.
Obtaining information

9.125 Under the Act on Access to Information Held by Administrative Organs, 1999, any person may request the disclosure of information held by the government and its organs. Upon such request, in principle, the government needs to disclose information it holds. The government may refuse the request for disclosure only if the case comes under one of the reasons provided for in the Act.

9.126 The problem is that the Act does not apply to information held by a local authority. Disclosure of such information depends on whether or not the local authority has local regulations for disclosure of information and on the procedure and conditions such regulations require.

9.127 The Civil Procedure Code of 1996 was amended in 2001. Since then in civil proceedings the holder of the document in question may not refuse to submit the document in the cases specified in the Act, such as where a party personally possesses the document that he/she has cited in the suit; and where the document has been prepared in the interest of the party who offers evidence or with regard to the legal relationships between the party who offers evidence and the holder of the document.100

9.128 The Code of 1996 strengthens the power of the court to order submission of documents in the proceedings. The court, when it finds that a petition for an order to submit a document is well-grounded, shall make an order to the effect that the holder of the document should submit the document pursuant to conditions and procedures provided for in the Code.101

Conclusion

9.129 Both in judicial review and in civil litigation, Japanese case law demonstrates a clear trend towards better environmental protection and more effective remedies for victims. In judicial review, standing has been a challenge for actions to be filed. With flexible interpretation by courts, standing in judicial review cases has expanded to cover persons other than the addressees of the administrative disposition.

100 Article 220, *ibid*. 101 Article 223.1, *ibid*.
9.130 In civil litigation, causation and the collective and combined nature of pollution which relates to several and joint liability have been barriers for victims of environmental damage to obtaining remedies. Courts and scholars have tried to overcome such barriers and to introduce new methods and approaches such as epidemiological evidence and discounted compensation in proportion with probabilities to lighten the burden of proof for claimants.

9.131 Nevertheless, because of the nature of climate change, courts will face further difficulties in dealing with climate litigation. Among the challenges courts will face are: how to deal with ‘damage’ since it is difficult to distinguish damage caused by climate change from that due to other factors; how to treat the uncertainty surrounding causation; and to whom standing should be granted in which categories of actions.

9.132 As for standing, in light of the nature of the interest in climate protection, standing should be more flexible in judicial review. One of the options is to expand the scope of Citizen Actions, for instance, to national budgetary and financial acts; another is to provide a standing to NGOs and environmental groups acting for the public interest of climate protection.

9.133 Placing clear and specific obligations on the government, local authorities and large emitters, starting with emission-reduction obligations, is essential to realising aggressive GHG reductions. It is also necessary to strengthen judicial review by the courts.

9.134 For compensation for damage caused by climate impacts, some innovative ideas and schemes might be useful to explore, for instance, a compensation fund or insurance scheme. This could be funded by levying a charge on those who emit more than they are permitted to. The fund could pay for restoration and rehabilitation of the damaged area, and offer damages to those affected. For more effective remedies, it is necessary both to vitalise the means of litigation and to elaborate regulatory schemes that provide effective remedies for victims.