21
Climate Change Litigation: A Global Tendency

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Abstract

The field of climate change litigation is developing rapidly. The cases are abundant, mainly in the United States and Australia, but also in other countries. Already, numerous climate change cases have been decided by international organisations and by national courts. At the international level, climate change litigation faces barriers which are typical of international environmental disputes. There are no adequate international organisations which have compulsory jurisdiction. At the national level, the cases are grouped into two categories: civil cases against companies that are major greenhouse gas (GHG) emitters, and administrative cases against governments or administrative agencies. At the national level, civil lawsuits against GHG emitters still need to clear considerable hurdles, such as providing proof of negligence, causality or harm, before effective remedies can be advanced. The administrative litigation is likely to be more effective. *Massachusetts v Environmental Protection Agency* (EPA) culminated in a landmark decision because it forced the EPA to regulate GHGs as air pollutants. Some decisions in Australia based on general environmental principles were effective in making the administrative decisions more low-carbon-oriented. Although it has hitherto often been unsuccessful, litigation can in future also provide a path to enforce climate change policies.

A. Introduction

Twenty years ago, in 1992, Principle 10 of the Rio Declaration remarked that "environmental issues are best handled with the participation of all concerned citizens, at the relevant level". To put this into practice, the member countries of the United Nations Economic Commission for Europe in 1998 adopted the Convention on Access to Information, Public Participation in

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Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

The objective of this convention is to guarantee three pillars of environmental rights: access to information, public participation in decision-making, and access to justice (collectively referred to as "Green Access Rights"). These pillars are now embedded in national legislation and judicial decisions in many countries. The access to justice plays a direct and important role in promoting environmental policy and providing citizens with the means to ensure their meaningful participation in decision-making relating to environmental matters.[1]

Recently, local governments, environmental non-governmental organisations (NGOs) and affected individuals have been increasingly promoting litigation in this regard, either via lawsuits or via alternative dispute resolution (ADR). The cases abound, mainly in the United States (US) and Australia.[2] But the numbers are growing in Asia (Thailand and Nepal), Europe (Germany and the United Kingdom (UK)), Africa (Nigeria), and Latin America (Belize and Peru).[3] In short, the present global expansion of climate change litigation is recognised.

In Japan, the climate change policy has depended mainly on "voluntary approaches",[4] in cooperation with actors in various sectors. Nonetheless, there are some cases seeking access to data kept by the government about greenhouse gas (GHG) emissions of each factory unit in the country. Recently, environmental lawyers, NGOs, individuals and polar bears[5] went to conciliation against power companies, demanding GHG cuts from their factory units. That is the so-called Polar Bear case.

Compared with other environmental litigation, climate change litigation is a brand-new phenomenon. Notwithstanding the many challenges to be overcome, the number of cases is increasing. What are the main reasons for that? And to what extent is this kind of litigation successful and effective?

1 The number of environmental courts and tribunals is increasing. There are over 350 in 41 countries, see Pring & Pring (2009).

2 Preston (2010).

3 For documentation on some of these cases, see http://www.climatelaw.org/cases, last accessed 25 January 2013.

4 Okubo (forthcoming 2013).

5 Polar bears (*Ursus maritimus*) are indeed parties in this conciliation. See also Morath (2008:23-40).

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What kind of impacts could it have on climate change policy and related legislation reform? There are still many uncertainties and hurdles to clear.

These climate change cases have been decided by international organisations and by national courts.[6] At the national level, the cases are grouped into two categories: civil cases against companies that are major GHG emitters (e.g. power plants) and administrative cases against governments or administrative agencies.

While it is likely that civil lawsuits, typically in tort, need to clear considerable hurdles, such as proving negligence, causality or harm, before resulting in effective remedies, some administrative lawsuits challenging administrative decisions or acts have been relatively successful. The *Massachusetts v Environmental Protection Agency* (EPA) is a landmark decision. It has triggered and inspired further litigation all over the world.

In fact, litigation could also provide a path to enforce climate change policies.[7] Also, it might sharpen policymaking by pushing two core issues: adaptation (preparing for the unavoidable and foreseeable effects of climate change) and mitigation (reducing GHG emissions in order to curb climate change). That will directly and indirectly influence governmental decision-making, company behaviour and public awareness.

B. Climate Change and Human Rights

The modern human rights system can be traced back to the Universal Declaration of Human Rights, adopted by the United Nations on 10 December 1948. Since then, human rights have been developing through treaties, such as the International Covenant on Economic, Social and Cultural Rights, which details its scope.

Despite the recent recognition of human rights implications arising from climate change, most countries still address such matters as an exclusive ecological problem. The human rights lens can also be helpful in approaching climate change.[8]

6 Osofsky (2005).
7 Osofsky (2007b); Posner (2007).
8 International Council on Human Rights Policy (2008).

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The Human Rights Council has adopted some resolutions[9] linking human rights and climate change. Reiterating this concern, the Council in 2011 remarked that "climate change poses an immediate and far-reaching threat to people and communities around the world, and has adverse implications for the full enjoyment of human rights". [10]Also, it remarks that the climate-change-related impacts have a range of implications for the effective enjoyment of internationally accepted human rights, including the rights to life, to food and water, and to a healthy environment, and the rights of indigenous people, particularly.

It is especially important to consider the above-mentioned rights from the perspective of climate victims and the most climate-vulnerable countries. However, these rights are difficult to enforce. One of the difficulties is that climate-change damages can be attributed only indirectly to their perpetrators.

Considering the interconnections between human rights and climate change, any enforcement instrument one might have will be mutually beneficial for both issues. This is why litigants have started to bring suits arguing that damages caused by climate change are concrete violations of human rights. On the other hand, public interest litigation aiming at protecting a healthy environment and promoting environmentally sustainable development could also contribute to guarantee human rights.

C. Climate Change Cases at the International Level

Until the present, there has been no adequate international organisation for settling environmental disputes, including climate change cases. Perhaps that is why there have been only a few cases at the international level.[11]

9 UN Human Rights Council Resolutions on Human rights and climate change, 7/23 of 28 March 2008 and 10/4 of 25 March 2009.

10 UN Human Rights Council Resolution on Human rights and climate change, A/HRC/18/L26/Rev. 1 (30 September 2011).

11 Sands (1999); Burns (2008); Preston (2011a:256-262).

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I. Inter-American Commission of Human Rights – The Inuit Case

The *Inuit* case is one of the first involving climate change litigation.[12] In December 2005, an alliance of Inuit from Canada and the US filed a petition on behalf of all Inuit people before the Inter-American Commission of Human Rights. They alleged that the human rights of the Inuit had been violated owing, in large part, to the failure of the US to curb its GHG emissions.

The petitioners contended that the effects of global warming constitute violations of Inuit human rights for which the US are responsible.[13] In fact, the petitioners argued that each state is responsible either jointly or severally.[14] The most challenging aspect was to demonstrate the causality between the omissions of the US government and the suffering of particular local people in climate-sensitive areas. In 2006, the Commission rejected the petition as unmotivated.

In 2008, the Inuit village of Kivalina and the City of Kivalina, Alaska, jointly took action at national level against 22 energy companies, including big oil companies such as ExxonMobil Corporation, BP Private limited company, Chevron Corporation and Shell Oil Company.[15] Kivalina alleged a breach of the federal common law of public nuisance for unreasonable emission of GHGs. It asserted that the city is being forced to relocate itself since global warming had diminished the ice cap, bringing about a sea-level rise. Therefore, a pecuniary compensation was sought.

After the District Court dismissed the proceedings,[16] the Court of Appeals for the Ninth Circuit held on 21 September 2012 found that the Clean Air Act, its respective EPA regulations and the EPA action that the Act authorised displaced the appellants' common law nuisance claims.[17] Circuit Judge Sidney R. Thomas recognised that "[o]ur conclusion obviously does not aid Kivalina, which itself is being displaced by the rising sea. But the solution to Kivalina's dire circumstance must rest in the hands of the legislative and executive branches of our government, not the federal common law".

12 Goldberg & Wagner (2004); Osofsky (2007a).
13 International Council on Human Rights Policy (2008:41).
14 (ibid.:42).
15 Breakfield (2011).
16 *Kivalina v ExxonMobil* 663 F.Supp.2d 863, NDCal September 2009.
17 *Kivalina v ExxonMobil Co.*, No. 09-17490, 2012 U.S. App. LEXIS 19870, 9th Cir. 21 September 2012.

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II. International Court of Justice – The Tuvalu Case

The Small Island States are the most climate-vulnerable countries. They have tried to force the developed countries to take adequate action to reduce GHGs through various measures. In 2002, Tuvalu threatened to take action against Australia and the US in the International Court of Justice (ICJ).[18] At that time Australia was the biggest per capita producer of GHGs. The US are the world's single biggest polluter by means of such gases. Both had refused to ratify the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC).[19]

However, Tuvalu has never commenced any proceeding. The first hurdles were jurisdiction and standing. Although state parties to the United Nations Charter may bring disputes before the ICJ against any other member state, it is further required that both parties accept the jurisdiction of the court. The US rescinded their acceptance of the compulsory jurisdiction in the 1980s and it is unlikely that the US would agree to bring a case before the ICJ.[20] As to standing, Tuvalu has, in addition, to demonstrate not only that it has suffered a violation of its legal rights, but also that it has suffered as a result of a breach of the obligations under the UNFCCC.[21]

III. European Court of Justice

The *Inuit* case and the *Tuvalu* case mentioned above involved certain communities struck by global warming and their pursuit of compensation. It is however worth emphasising that climate change litigation comprises an even wider range of demands than those which thwarted these plaintiffs.

Not only climate-sensitive people figure as plaintiffs. Also big corporations, blamed for a big share of GHG emissions, have been playing the role of petitioner. However, in such cases, they challenge governmental regulation on climate change. Several cases of this nature have been brought before the European Court of Justice (ECJ).

18 Okamatsu (2005). For further articles see http://www.tuvaluislands.com/warming.htm, last accessed 22 April 2013.
19 Australia ratified the Kyoto Protocol on 3 December 2007.
20 Preston (2011a:259).
21 Okamatsu (2005:5).

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In Europe, if a national court is in doubt about the interpretation or validity of a certain EU law, it may ask for the advice of the ECJ. This advice is called a *preliminary ruling*. Such an expediency is often used in climate change litigation cases in Europe, as is demonstrated below.

1. Arcelor Cases

Cases involving the Emission Trade Scheme (ETS) constitute typical examples of climate change cases brought to the ECJ. The steel company Arcelor has brought a series of litigation challenging the Directive 2003/87/EC (ETS Directive) and its implementation by member states. Arcelor firstly filed a lawsuit in France. It argued that the Directive infringes on its fundamental rights to property and the freedom to pursue an economic activity by requiring it to operate its plants under unsustainable economic conditions. Arcelor also insisted that the Directive infringes on the principle of equal treatment by making the ETS compulsory to the steel sector and voluntary for the chemical and non-ferrous metal sectors.

The French court referred only to the issue of breach of the principle of equal treatment to the ECJ and dismissed the other requests. In 2008, the ECJ held that the Directive did not infringe on the principle of equal treatment by treating comparable situations differently:[22]

> In view of the novelty and complexity of the scheme, the original definition of the scope of Directive 2003/87 and the step-by-step approach taken, based in particular on the experience gained during the first stage of its implementation, in order not to disturb the establishment of the system were within the discretion enjoyed by the Community legislature.

2. Aviation Case

In 2008, the EU introduced an ETS specific for aviation under the Directive 2008/101/EC. Then, the UK issued a regulation in order to enforce this Directive within its boundaries. Based on the allegation that such further regulation is, in fact, an infringement of the Chicago Convention, the Air Trans-

22 C-127/07, *Société Arcelor Atlantique et Lorraine and Others v Premier Ministre and Others*, 2008, paras. 61, 73, 74.

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port Association of America, the United Airlines and the American Airlines filed a petition before the British Justice.

The administrative court in the UK referred the case to the ECJ. Some environmental NGOs, such as WWF-UK and Earthjustice, intervened in the process. On 21 December 2011, the ECJ decided for the validity of the 2008 Directive. As for the Chicago Convention, it concluded that (a) since the EU had never actually ratified such a convention, the Directive was not bound to it; and (b) the Directive 2008/101 was also not invalid in the light of Article 15(3) of the Open Skies Agreement, inasmuch as it provided in particular for the application of the ETS in a non-discriminatory manner to aircraft operators established both in the EU and in third States.[23]

Even if binding only EU countries, the ECJ plays an important role as an international forum for climate change litigation. Other organisations still have to overcome many obstacles to achieve the same status. Some motions were proposed at the Rio+20 Conference to establish an International Environmental Court.[24] However, it does not seem to be an easy task.

D. Lawsuits against Emitters at the National Level – Tort

Recently, there have been more cases targeting major emitters of GHGs based on public nuisance grounds.[25] Private litigants have brought civil actions to enforce environmental legal provisions by making major emitters mitigate GHG emissions. They have also sought compensation for losses and damages caused by the effects of these gases in the atmosphere.

23 C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, 2011, paras. 71, 155-157.

24 See ex. BOND-DEG – UK NGO's Joint Rio+20 Narrative, 2011, http://icecoalition.com/wp-content/uploads/2011/11/20111101_-_BOND-DEG_-_UK_NGO_Rio_Joint_Narrative_-_FINAL-1.pdf, last accessed 3 February 2013. See Call for action from lawyers and environmental law organizations, http://www.petitions24.com/rio20_call_from_lawyers_and_organizations, last accessed on 3 February 2013.

25 Grossman (2003); Harper (2006:672–698); Farber (2008); Hunter & Salzman (2007); Preston (2011a:3–14).

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I. Not a Judicial Question, but a Political One?

The most famous case is said to be *American Electric Power v Connecticut*. Twelve states, a municipality and three environmental NGOs sued five electric power companies, alleging that the fossil fuels burnt by the defendants represented around 10% of all carbon dioxide in the US.

The plaintiffs sought injunctive relief aiming at establishing a cap on the defendants' GHG emissions, with annual reductions over the next ten years. The plaintiffs alleged that the companies' contribution to climate change constituted a public nuisance.

The District Court dismissed both suits, remarking that they were actually non-justiciable political questions.[26] The Second Circuit reversed the sentence and held that the political question doctrine did not bar the suits and that the plaintiffs had standing.[27] In other cases, such as *California v General Motors,*[28] some district courts dismissed cases, holding that it was impossible to decide the matters without making an initial policy determination which is not subjected to judicial discretion.[29] Therefore, the fact that the Second Circuit denied the application of the "non-justiciable doctrine" represented an important precedent.

However, in 2011, the Supreme Court turned down the request.[30] Although it reaffirmed the plaintiffs' standing, it held that the Clean Air Act displaces any federal common law right to seek abatement of carbon dioxide emissions from power plants fired by fossil fuels.[31]

II. Requirements of Ordinary Tort and Specificities of Climate Change Litigation

If the litigants overcome the "non-justiciable doctrine" encumbrance, they still have to succeed in complying with tort requirements. In this case, the

26 *Connecticut v American Electric Power,* 406 F. Supp. 2d 265 (S.D.N.Y. 2005).
27 *Connecticut v American Electric Power,* 582 F. 3d 309 (2d cir.2009).
28 *California v General Motors,* 2007 U.S. Dist.LEXIS 68547 (N.D.Cal. 17 September 2007). State of California voluntarily dismissed its appeal on 19 June 2009.
29 Thorpe (2008).
30 *American Electric Power v Connecticut,* 131 S.Ct.2527 (2011).
31 Osofsky (2012); O'Connell Miller (2012).

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main hurdles are to answer the following questions – and substantiate their answers:

- What is the damage?
- What is the duty of care and what is the breach of duty?
- What risks are reasonably foreseeable and when does such foreseeability arise?
- How may the causation be identified?

In another famous case, *Comer v Murphy Oil*, victims of Hurricane Katrina sued oil and coal companies, among others. The plaintiffs insisted that the defendants had a duty to conduct their businesses in such a way as to avoid unreasonably endangering the environment, public health, as well as the citizens of Mississippi. The defendants argued that the causal link between the emissions, the sea-level rise and Hurricane Katrina was too attenuated, and that the defendants were but some of many contributors to climate change.

The District Court dismissed the request in 2007 on the grounds that the plaintiffs lacked standing and that their claims presented non-justiciable political questions.[32] In 2009, the Court of Appeals rejected the defendants' contention and found that the plaintiffs had shown that the injuries were fairly traceable to the defendants' actions.[33] The case was immediately remanded to the District Court. However, the reversal was vacated when the Fifth Circuit agreed to rehear the appeal en banc. Before the rehearing, the Appellate Court lost its quorum, which triggered, by the appellate rules, the rehearing dismissal. Because the Fifth Circuit's opinion had already been vacated, the dismissal by the District Court in 2007 was reinstated. Because the Supreme Court denied the plaintiffs' request for a writ of mandamus,[34] they filed Comer II in 2011. The Southern District of Mississippi dismissed it on 20 March 2012.[35]

Although some of the difficulties have been partially cleared in several cases, there are still many barriers for injunction and compensation claims against GHG emitters.[36]

32 *Comer v Murphy Oil,* No.1:05-cv-436 S.D. Miss., 18 April 2006.
33 *Comer v Murphy Oil,* 585 F.3d 855, 5th Cir 2009.
34 In re Ned Comer, 131 S. Ct. 902 (2011).
35 *Comer v Murphy Oil,* No. 1:11CV220-LG-RHW, Slip op., S.D. Miss. 20 March 2012.
36 Butti (2011).

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E. Administrative Cases against Governments or their Agencies

Not only individuals who were victims of climate change effects are seeking legal countermeasures or compensation. In countries where an open standing approach is adopted, local governments and NGOs have also been taking action in the courts. In this area, there have been some remarkable cases that were successfully concluded.

In Australia, where standing requirements are quite flexible, climate change litigation cases, including several successful ones, are increasing.[37] In this sense, the Land and Environment Court (LEC) in New South Wales deserves special attention.

Climate change cases against governments fall into two categories: (a) mitigation of GHG emissions; and (b) adaptation to the consequences of climate change.

I. Administrative Cases Relating to Mitigation

1. Massachusetts v EPA

The most famous and remarkable climate change litigation case is *Massachusetts v EPA*.

Section 202 of the *Clean Air Act* requires the EPA to prescribe the standards applicable to the emission of any air pollutant from any class of new motor vehicle. The EPA rejected the rule-making petition to regulate the emissions of GHGs because such gases were not to be considered air pollutants. The State of Massachusetts, along with 11 other states, three cities and several environmental NGOs sought in court a review of the EPA's decision.

Firstly, the Supreme Court[38] upheld the standing of the State of Massachusetts because Massachusetts had suffered actual harm as the owner of the state's coastal land which is affected by sea-level rise and storms resulting from climate change.[39]

37 Bach & Brown (2008); Preston (2011b); Millner & Ruddock (2011).
38 *Massachusetts v EPA*, 549 U.S. 497 (2007).
39 Abate (2008).

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Secondly, and the most important point, the Supreme Court found that GHGs are air pollutants and, therefore, the statutory provision authorised the EPA to regulate GHG emissions.

Thirdly, the EPA argued that GHG emissions from new motor vehicles contribute so insignificantly to the petitioners' injuries that the agency cannot be hauled into federal court to answer for them. The Supreme Court ruled against the EPA's contention and, in addition, stated that the EPA administrator must determine how new motor vehicle GHG emissions will endanger public health in the future.

Finally, the Supreme Court held that EPA regulation on GHGs might not reverse global warming, but there was a great likelihood that it would reduce emissions, thus reducing the effects of GHGs as a consequence.

In response to the Supreme Court's ruling, the EPA on 7 May 2010 issued a regulation establishing greenhouse gas emission standards for light-duty vehicles.[40] On 13 May 2010, the EPA issued the final GHG Tailoring Rule.[41] This rule stipulates that projects that substantially increase GHG emissions (e.g. power plants and boilers) will require a specific permit.[42]

The decision in the *Massachusetts v EPA* case that GHGs are indeed air pollutants has inspired other cases in the US and in other countries. In Japan, in 2011, environmental lawyers, NGOs, individuals and polar bears went to conciliation in the Environmental Dispute Coordination Commission against power companies. That is the so-called Polar Bear case.

The Environmental Dispute Coordination Commission, established in 1972, provides mediation, conciliation, arbitration and adjudication services. It consists of a chairman and six commissioners appointed by the prime minister, subject to the consent of the Diet.

The petitioners of the Polar Bear case required the companies to reduce carbon dioxide emissions. However, the Commission dismissed this case. One of the reasons is that the Commission deals with environmental pollution disputes, and climate change was not considered to be such. The Basic Environmental Law distinguishes environmental pollution and other environmental problems. The definition of environmental pollution includes air pollution, but it does not expressly refer to climate change. On 11 May 2012,

40 EPA, Final Rulemaking: Model Year 2012-2016 Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards.

41 Final Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule.

42 Hwang (2009).

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the applicants sued the government, seeking judicial review of this dismissal.[43]

2. *Gray v Minister for Planning*

In the case *Gray v Minister for Planning*, the plaintiffs sought a sentence declaring void the decision of the director-general which considered as adequate the environmental impact assessment (EIA) of an open-cut coalmine in New South Wales. The applicant argued that EIA should have considered not only the GHG emissions of the mine itself, but also emissions downstream, i.e. those resulting from the burning of the coal yet to be mined.

The assessment of GHGs in the EIA was conducted by the entrepreneur's consultants principally in accordance with the GHG Protocol 2004, issued jointly by the World Business Council for Sustainable Development and the World Resources Institute (WRI), namely the WBCSP GHG Protocol. This protocol refers to three scopes of assessment. Scope 3 is an optional report category that comprises all other indirect GHG emissions. In other words, the scope of the assessment is the emissions of the company itself, but those occurring in sources not owned or not controlled by the company. In this case, Scope 3 was ignored in the EIA of the coalmine.

Also, according to the Environmental Planning and Assessment Act (EPA Act) of New South Wales, entrepreneurs must provide the Environmental Authority with a detailed GHG assessment. Based on that, the applicant alleged that it was mandatory for the director-general to require a Scope 3 report in the EIA.

The Land and Environment Court (LEC) of New South Wales held that the discretion of the director-general must be exercised in accordance with the purposes of the EPA Act which includes the encouragement of ecologically sustainable development. Furthermore, particularly considering the principle of intergenerational equity and the precautionary principle, the court held that GHG downstream emissions (e.g. coal burning) were a matter of relevance and should have been included in the EIA of the mine. On that basis, the director-general's decision was sentenced null and void.[44]

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43 See plaintiff's HP [Kikoteki Seigi wo motomete] (only in Japanese) at http://climate-j.org/, last accessed 3 February 2013.

44 *Gray v Minister for Planning* (2006) 152 LGERA 258.

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This decision has influenced the development of case law,[45] strengthening the importance of the principle of ecologically sustainable development. It also forced the government of New South Wales to introduce the State Environmental Planning Policy 2007 and to ensure that indirect emissions are considered in the decision-making processes.[46]

3. Drake Brockman v Minister for Planning

There are some cases that were not successful, but led to change of policy or projects. In *Drake Brockman v Minister for Planning,*[47] the applicant challenged the minister's approval of a concept plan for urban redevelopment in central Sydney.

The applicant claimed that: (a) the available GHG emission information would not be sufficient to enable the minister to carry out a careful evaluation to avoid relevant damage to the environment; (b) the minister failed to make the entrepreneur bear the onus of proving that the redevelopment would have no or negligible impacts on climate change; and (c) the minister neither undertook a risk-weighted assessment of the various options for redevelopment of the site, nor considered alternatives that could reduce impacts on climate change.[48]

In view of the alleged failure of the minister to demand or properly assess GHG emissions impacts, the applicant, based on experts' reports, also argued that GHG emissions from the project would be substantial and equivalent to 0.45% of the total emissions in the City of Sydney.

The LEC turned down the request. The court found that there was no factual basis for suggesting that the minister had failed to consider ecologically sustainable development when approving the project.[49]

Nevertheless, there was significant pressure on the entrepreneur, who then redesigned the concept plan of the development.[50] According to the new

45 (ibid.); Preston (2011b).
46 (ibid.:495).
47 *Drake Brockman v Minister for Planning* (2007) 158 LGERA 349.
48 (ibid.:at 7).
49 (ibid.:at 129).
50 (ibid.); Preston (2001b:508).

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plan, the developer adopted innovative sustainable initiatives, including striving for 100% carbon neutrality in operation.[51]

II. Cases Relating to Adaptation to the Consequences of Climate Change

There are several cases relating to adaptation. *Gippsland Coastal Board v South Gippsland Shire Council*[52] is one such case relating to the denial of permission for development. It involved six permit applications for dwellings on lots of 2 to 4 hectares in a coastal area of the State of Victoria, Australia. The case is of particular interest because of the potential sea-level rises resulting from climate change.

The Victorian Civil and Administrative Tribunal held that, owing to the possibility of more severe storms and sea-level rises as effects of climate change, the risk of future inundation of the land is reasonably foreseeable. Therefore the land is unsuitable for residential development. The Tribunal applied the precautionary principle and refused to grant the permit for the development. The Tribunal concluded that increases in the severity of storm events coupled with rising sea levels create a reasonably foreseeable risk of inundation of the subject land and the proposed dwellings, and that this is unacceptable.[53]

This decision has influenced the state planning policy. On 18 December 2008, the State of Victoria introduced a new Department competent to manage coastal hazards and coastal impacts of climate change.[54] Now, the State Planning Policy Framework requires decision- makers to apply the precautionary principle to planning and management decisions by considering the risks associated with climate change.[55]

Although the Victorian Justice decision represents an important precedent, the relevance of climate change to the urban planning process and decision-making process in general is still in an evolutionary phase. Other countries also provide examples of climate change administrative litigation

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51 See http://www.frasersbroadway.com.au/broadway/sus2.htm, last accessed 3 February 2013.

52 VCAT 1545, 29 July 2008.

53 (ibid.:at 46–48).

54 Direction No.13, Managing Coastal Hazards and the Coastal Impacts of Climate Change Based on Section 12(2)(a) of Planning and Environment Act 1987.

55 15.08 of the Amendment VC 52 to Victoria Planning Provisions under Planning and Environment Act.

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related to adaptation. In Thailand, after the 2011 flood, more than 300 plaintiffs, including some environmental NGOs, sued the government for compensation based on state liability to avoid flood damages. Such cases are expected to increase, especially in climate-vulnerable developing countries.

F. Conclusion

Climate change litigation is a new and often contentious field, but is developing rapidly. It has not always been successful; or rather it has often been unsuccessful. However, this is no surprise. Since we still rely on traditional legal systems and theories, there are many hurdles yet to be cleared. It is recognised that litigation is an important measure of participation of the public as watchdog. From this perspective, there are signs that climate change litigation is likely to be fruitful.

Climate change litigation at the international level faces barriers which are common for international environmental disputes. There are no adequate international organisations that have compulsory jurisdiction. The ECJ however plays an important role. It has competence both to ensure that the member states comply with obligations under the EU treaties and also to interpret EU law at the request of the national courts.

At national level, civil lawsuits against GHG emitters are still likely to face considerable obstacles, even if the emitters have had direct or indirect effects on government and companies. If the litigants overcome the "non-justiciable doctrine", they still have to succeed in complying with tort requirements, such as to establish causation. At present, the administrative litigation is likely to be more effective. It includes litigation relating to, among others, disclosure of information, regulation of GHGs, review of EIAs or permission for development plans, and adequate adaptation measures.

In particular, it is remarkable that some decisions in Australia based on general environmental principles (e.g. ecologically sustainable development and precaution) were effective in making the ensuing administrative decisions more low-carbon-oriented. Additionally, the decision of the Supreme Court in *Massachusetts v EPA* in the US also has significance because it forced the EPA to regulate GHGs as air pollutants and has inspired other litigation not only in the US, but also in other countries.

Climate change litigation could promote and strengthen climate change policy as well as contribute to guarantee human rights. At the same time,

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peculiarities of the climate change issue, such as the relatively long-term effects and global impacts, require a more strategic and integrated approach with other measures, such as alternative dispute resolution, access to information and citizens' participation in government decision-making processes.

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