Climate Change Litigation in the Asia Pacific

Edited by Jolene Lin and Douglas A. Kysar
CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC

This is the first scholarly examination of climate change litigation in the Asia Pacific region. Bringing legal academics and lawyers from the Global South and Global North together, this book provides rich insights into how litigation can galvanize climate action in countries including Pakistan, Indonesia, Malaysia and China. Written in clear and accessible language, the fourteen chapters in this book shed light on the important question of how litigation may unfold as a potential regulatory pathway towards decarbonization in the world's most populous region.

JoLene Lin is Associate Professor at the Faculty of Law, National University of Singapore and Director of the Asia Pacific Centre for Environmental Law. She has published in leading journals including the American Journal of International Law and the European Yearbook of International Law, and is author of Governing Climate Change: Global Cities and Transnational Lawmaking (2018). She is on the editorial boards of Journal of Environmental Law, Climate Law and the Chinese Journal of Environmental Law.

Douglas A. Kysar is Deputy Dean and Joseph M. Field '55 Professor of Law at Yale Law School. He publishes in the areas of torts, environmental law, climate change, animal law, products liability, and risk regulation. In addition to his articles and chapters, he is the author of Regulating from Nowhere: Environmental Law and the Search for Objectivity (2010). He has taught climate change law as a visiting professor at the National University of Singapore and the University of Hong Kong.
CLIMATE CHANGE
LITIGATION IN THE ASIA PACIFIC

Edited by

JOLENE LIN
National University of Singapore

DOUGLAS A. KYSAR
Yale University
CONTENTS

List of Figures
List of Tables
List of Contributors
Foreword by the Honourable Justice Syed Mansoor
Ali Shah
List of Abbreviations

Introduction  1
DANIEL HORNUNG, DOUGLAS A. KYSAR AND
JOLENE LIN

PART I  Theoretical Underpinnings and Implications
of Climate Change Litigation

1 Uncommon Law: Judging in the Anthropocene  15
JOSHUA ULAN GALPERIN AND DOUGLAS A. KYSAR

2 Networked Public Interest Litigation: A Novel Framework for
Climate Claims?  38
KETAN JHA

PART II  International Law and International Adjudication

3 Using Human Rights Law to Address the Impacts of Climate
Change: Early Reflections on the Carbon Majors
Inquiry  73
ANNALISA SAVARESI AND JACQUES HARTMANN

4 Litigating Human Rights Violations Related to the Adverse
Effects of Climate Change in the Pacific Islands  94
MARGARETHA WEVERINKESINGH
5 The Potential for UNCLOS Climate Change Litigation to Achieve Effective Mitigation Outcomes 120
MILICENT MCCREATH

6 Investor-State Dispute Settlement in Renewable Energy: Friend or Foe to Climate Change? 144
HUI PANG

PART III Domestic Law and Domestic Adjudication

7 ‘Next Generation’ Climate Change Litigation in Australia 175
JACQUELINE PEEL, HARI M. OSOFSKY AND ANITA FOERSTER

8 Climate Change Litigation: A Possibility for Malaysia? 207
MAIZATUN MUSTAFA

9 Climate Change Litigation in Indonesia 234
ANDRI G. WIBISANA AND CONRADO M. CORNELIUS

10 From Shehla Zia to Asghar Leghari: Pronouncing Unwritten Rights Is More Complex than a Celebratory Tale 261
WAQQAS AHMAD MIR

11 Climate Change Adaptation Litigation: A View from Southeast Asia 294
JACQUELINE PEEL AND JOLENE LIN

PART IV China, Courts and Climate Change

12 Climate Change Litigation: A Promising Pathway to Climate Justice in China? 331
JIANGFENG LI

13 The Subordinate and Passive Position of Chinese Courts in Environmental Governance 365
ZHU YAN

14 Tort-Based Public Interest Litigation on Air Pollution in China: A Promising Pathway for Chinese Climate Change Litigation? 394
YUE ZHAO, WEI LIU AND SHUANG LYU

Index 416
CONTRIBUTORS

CONRADO M. CORNELIUS is a corporate lawyer and environmental law researcher in Indonesia.

ANITA FOERSTER is Senior Lecturer at Monash University Business School.

JOSHUA ULAN GALPERIN is Visiting Associate Professor of Law at the University of Pittsburgh School of Law.

JACQUES HARTMANN is Reader in Law at the School of Law, University of Dundee.

DANIEL HORNUNG is a JD candidate at Yale Law School.

KETAN JHA is a final-year PhD candidate at Sussex Law School.

DOUGLAS A. KYSAR is Deputy Dean and Joseph M. Field ’55 Professor of Law at Yale Law School.

JIANGFENG LI is a JSD candidate at Yale Law School.

JOLENE LIN is Associate Professor at the Faculty of Law, National University of Singapore, and Director of the Asia-Pacific Centre for Environmental Law.

WEI LIU is a postgraduate student at the School of Law, Sichuan University of China.

SHUANG LYU is a postgraduate student at the School of Law, Sichuan University of China.
MILICENT MCCREATHE is a Scientia PhD Scholar at University of New South Wales, Sydney, Australia.

WAQQAS AHMAD MIR is Partner at Axis Law Chambers in Pakistan.

MAIZATUN MUSTAFA is Associate Professor at Ahmad Ibrahim Faculty of Laws, International Islamic University Malaysia.

HARI M. OSOFSKY is Dean of Penn State Law and the Penn State School of International Affairs, and Distinguished Professor of Law, Professor of International Affairs, and Professor of Geography.

HUI PANG is a PhD candidate at University of New South Wales, Sydney, Australia.

JACQUELINE PEEL is Professor at Melbourne Law School.

ANNALISA SAVARESI is Lecturer in Environmental Law at the University of Stirling.

MARGARETHA WEVERINKE-SINGH is Assistant Professor of Public International Law at Leiden University.

ANDRI G. WIBISANA is Vice-Dean and Senior Lecturer in Environmental Law and Economic Analysis of Law at the Faculty of Law, University of Indonesia.

ZHU YAN is Professor of Law at the Law School of Renmin University of China.

YUE ZHAO is Researcher Associate at the School of Law, Sichuan University of China.
Climate Change Litigation: A Possibility for Malaysia?

MAIZATUN MUSTAFA

Introduction

Managing climate change impacts is one of the greatest challenges facing the global community at present. The consequences of ongoing human activities that emit anthropogenic greenhouse gases (GHG) are dreadful both in the short and long run as well as on local and international levels.\(^1\) Impacts related to climate change are evident across regions and in various sectors. At the domestic level, climate change–related harm could include impact to human health, agriculture and food security, water supply, or damage to public infrastructure and settlements.\(^2\) The inevitable climate change consequences have raised the question of who should bear the risk of climate harm, is it the industry, the government, or the private individual? A worldwide trend is emerging where governments and entities are blamed for their responsibility in causing the detrimental effects of climate change. Lawsuits have been filed against legislators and policymakers relating to their approach to climate change, in addition to litigations undertaken challenging the validity of a climate change law or seeking to fill any gap within the law. In many situations, climate change policy is shaped when parties continue to turn to the courts in order to protect their interests.\(^3\)

For a developing country such as Malaysia, economic development is often pointed out to be the cause of environmental issues, as well as

---


\(^2\) Ministry of Natural Resources and Environment, Malaysia, Malaysia Biennial Update Report to the UNFCCC (MNRE 2015).

the increase in GHG emissions.\textsuperscript{4} International commitment and global pressure have led Malaysia to take some measures, relying on Acts of Parliament and government policies as primary instruments to address climate change.\textsuperscript{5} Being a country with strong parliamentary traditions, environmental issues including that pertaining to climate change are governed predominantly by federal law and enforced by related government agencies.\textsuperscript{6} In as much as Malaysia is putting serious efforts on combating climate change, litigation has not played a significant role in shaping its climate change policy. As compared to other countries, Malaysia’s climate change regulatory instruments have been slower to develop.\textsuperscript{7} While litigious culture is not common among Malaysian society, factors such as the state of the judiciary, limited access to justice, limited environmental awareness, and limited recognition of environmental rights have further undermined litigation in the area of environment and climate change.\textsuperscript{8} The aims of this chapter are to investigate Malaysia’s policy and law relating to climate change and to identify areas of law that can become potential tools directly or indirectly pertinent to climate change litigation. All over the world, litigation has progressively been seen as an effective means in promoting climate change mitigation and adaptation. This chapter is meant to discover whether Malaysia would follow the global trend or whether it is adamant that legal responses to climate change should be based on its local circumstances using different strategies that are not necessarily litigious in nature.

8.1 Malaysia’s Climate Change Commitments

The status of Malaysia’s environmental quality is very much related to its economic growth. A number of economic activities from various sectors have been identified to be the main sources of environmental pollution. Excessive fossil fuel usage and changes in land use are considered to be

\textsuperscript{4} Department of Environment Malaysia, Annual Report (DOE 2015).
\textsuperscript{5} Economic Planning Unit Malaysia, Eleventh Malaysia Plan 2016–2020 (EPU 2016).
\textsuperscript{6} M. Mustafa, Environmental Law in Malaysia, 3rd ed. (Kluwer Law International 2016).
\textsuperscript{7} United Nations (n 3).
Table 8.1 GHG emissions by sector in Malaysia

<table>
<thead>
<tr>
<th>Sectors</th>
<th>Emissions percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Energy</td>
<td>76</td>
</tr>
<tr>
<td>Waste</td>
<td>12</td>
</tr>
<tr>
<td>Industrial processes</td>
<td>6</td>
</tr>
<tr>
<td>Agriculture</td>
<td>5</td>
</tr>
<tr>
<td>Land use, land use change, and forestry (LULUCF)</td>
<td>1</td>
</tr>
</tbody>
</table>

Source: Ministry of Natural Resources and Environment

the main reasons for the considerable increase in anthropogenic GHG emissions. Table 8.1 below illustrates sectoral sources' percentages of GHG emissions within the energy sector, such as energy industries, transport, manufacturing, and construction, followed by waste, industrial processes, and agricultural sectors.

With 0.4 percent of the world's population, Malaysia's 31 million people accounted for 0.6 percent of the global carbon emissions. Malaysia's carbon emissions growth is one of the fastest, namely by 221 percent from 1990 to 2004. Rapid transformation from an agricultural to an industrialized economy in the last forty years, apart from expansion in industrial and automotive sectors, the overdependence on fossil fuel, unsustainable waste management, and forest conversion, has contributed to the rapid increases in GHG emissions. The International Energy Agency reported that Malaysia's carbon emission was a total of 220 million tonnes for 2015, which was an increase of nearly 300 percent

---

9 Ministry of Natural Resources and Environment Malaysia, Malaysia Biennial Update Report to the UNFCCC (n 2).
12 Economic Planning Unit Malaysia, Eleventh Malaysia Plan (n 5).
'Governments everywhere have failed to take strong enough action to address climate change, and people are increasingly looking to the courts. Most of the litigation is in the United States and Europe, but the Asia Pacific region, which before long will have a majority of the world population, is beginning to see cases, and will soon see many more. This book makes an outstanding contribution by surveying many cases previously all but unknown to the English-speaking world, and, more importantly, identifying the ways that profoundly different legal systems can address one of humanity’s greatest challenges.'

Michael B. Gerrard, Columbia Law School, co-editor, Legal Pathways to Deep Decarbonization in the United States and Global Climate Change and U.S. Law

'An animated collection of essays that opens up the legal mind to the realities and possibilities of the role of courts in addressing climate change, in legal cultures that have traditionally escaped the scholarly gaze.'


'This book has initiated a long overdue conversation on climate litigation: the question of the roles of litigation and judicial action can play in the world of climate change. If you are a climate scholar, reading this book would be like inviting an old friend for a long chat you desperately needed.'

Linda Yanti Sulistiauwati, Universitas Gadjah Mada, co-Editor, Environmental Rule of Law in Asia (2019)