



## Introduction

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Any plausible solution to the world's growing climate crisis will need to take root in the Asia Pacific region. With Asia holding 54 per cent of the world's projected 2050 population<sup>1</sup> and 41 per cent of its projected 2040 energy use,<sup>2</sup> a policy response to climate change that does not include a major role for Asia and does not give voice to the region's governments and citizens would be wholly incapable of achieving the kind of decarbonization that scientists agree is necessary to avert climate catastrophe.

As the urgency and difficulty of achieving adequate progress on climate policy continue to mount, a salient question becomes what role (if any) litigation and judicial action could play. That question has already been debated in several countries – including, for example, in the United States and the United Kingdom,<sup>3</sup> where climate change litigation has spread and has even begun to affect the way policymakers think about climate policy outside of the courts.<sup>4</sup> The idea of climate change litigation, however, has received far less attention in the Asia Pacific region, with perhaps the exception of Australia, where climate change litigation has had a relatively long history.<sup>5</sup>

<sup>1</sup> United Nations, 'World Population Prospect Key Findings and Advanced Tables' (UN Population Division, 2017), [www.population.un.org/wpp/](http://www.population.un.org/wpp/), accessed 29 August 2019.

<sup>2</sup> Linda Capuano, 'International Energy Outlook 2018 for Center for Strategic and International Studies' (US Energy Information Administration, 24 July 2018), 4, [www.eia.gov/pressroom/presentations/capuano\\_07242018.pdf](http://www.eia.gov/pressroom/presentations/capuano_07242018.pdf), accessed 29 August 2019.

<sup>3</sup> See Douglas A Kysar, 'What Climate Change Can Do about Tort Law' (2010) 41(1) *Environmental Law* 1; Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press, 2015).

<sup>4</sup> See, e.g., Umair Irfan, 'Exxon Is Lobbying for a Carbon Tax. There Is, Obviously, a Catch' (Vox, 18 October 2018), [www.vox.com/2018/10/18/17983866/climate-change-exxon-carbon-tax-lawsuit](http://www.vox.com/2018/10/18/17983866/climate-change-exxon-carbon-tax-lawsuit), accessed 29 August 2019 ('In exchange for a [carbon] tax, [Exxon] wants immunity from all climate lawsuits in the future.').

<sup>5</sup> See Chapter 7.

Commentators have correctly identified several legal, social, and institutional variables that, as a general matter, make the role of litigation likely to be less significant in many Asia Pacific jurisdictions versus countries where climate change litigation has already begun to emerge.<sup>6</sup> But the question demands further academic attention in light of the profound stakes at issue. As the Asia Pacific becomes an increasingly important actor in global affairs, as the world becomes increasingly interdependent, and as the climate crisis deepens, *Climate Change Litigation in the Asia Pacific* offers a novel perspective on whether climate litigation has a meaningful future in the Asia Pacific, what such litigation could look like, and the implications it would hold for the future of international climate change law and policy.

Naturally, given the political, economic, social, and cultural diversity of the Asia Pacific region, this book cannot and does not offer readers tidy, uniform answers that comprehensively characterize climate change litigation in the entire region. Rather, the book aims to explore common themes and critical differences within emerging and future climate change litigation. And it aims to do so in countries that, although diverse and divergent in countless ways, are nevertheless geographically proximate and firmly recognized as a coherent group by international institutions like the Asia-Pacific Economic Cooperation, the Asian Development Bank, and the ASEAN Regional Forum. Even for countries in the region that have historically shared little beyond geographic proximity and political affiliation, the impacts of climate change may force a greater collective self-awareness. Distinctive regional impacts of climate change – such as shifts in the Asian monsoon cycle or the particularly pronounced threat of sea-level rise to Asian megacities – will bind Asia Pacific countries together in important ways such that a regional analysis is appropriate, notwithstanding critical differences among them.

### I.1 What Is Climate Change Litigation?

Beyond the diversity of the countries in the region, another reason this book cannot offer tidy, uniform answers that comprehensively characterize climate change litigation in the entire region is that scholars differ on what

<sup>6</sup> See, e.g., Jolene Lin, 'Litigating Climate Change in Asia' (2014) 4 *Climate Law* 140, 142 ('In many Asian jurisdictions, litigation is not an option. It is prohibitively expensive; cases can get caught up for years in a tangle of bureaucratic channels; there are few, if any, well-trained environmental lawyers who are able and willing to litigate test cases. In some jurisdictions, the judiciary is simply not independent.').

constitutes climate change litigation generally. More specifically, scholars also differ on whether such litigation should be defined or theorized differently in different regions, such as the Global South or the Asia Pacific. As one of us wrote in a recent article with Jacqueline Peel, ‘there is a danger that [the] seemingly universal definitions of climate change litigation’ that have been put forward to date ‘will fail to capture adequately developments occurring outside the Global North’.<sup>7</sup> As a result, this book – which deals with many countries that are part of the Global South – includes chapters that explore several definitions of climate change litigation and does not limit this analysis to previously provided definitions. As a starting point, however, it is useful to understand some of the definitions that scholars have previously put forward, and how the definitions most frequently used in this volume might differ from those definitions.

To begin, Columbia University’s Sabin Center for Climate Change Law relies on a definition of ‘climate litigation’ as ‘any piece of federal, state, tribal, or local administrative or judicial litigation in which the . . . tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts’.<sup>8</sup> This approach, however, excludes cases that do not explicitly raise an issue of fact or law related to climate change, but involve environmental harms that to some degree can be traced to the impacts of climate change. As a result, Chris Hilson has relied on a broader definition of climate change litigation: ‘to count as climate change litigation, cases must be framed as such’ and ‘this framing may not always appear on the face of the legal judgment itself’.<sup>9</sup> Finally, Jacqueline Peel and Hari M. Osofsky have identified a range of cases that might be considered climate change litigation, beginning with ‘core’ cases where climate change is ‘a central issue in the litigation’.<sup>10</sup> But beyond these cases, according to Peel and Osofsky, climate change litigation also includes ‘cases where (1) climate change is raised but as a peripheral issue in the litigation, and (2) lawsuits motivated at least in part by

<sup>7</sup> Jacqueline Peel and Jolene Lin, ‘Transnational Climate Litigation: The Contribution of the Global South’ (2019) 113(4) *American Journal of International Law* 679–726.

<sup>8</sup> Columbia Law School Sabin Center for Climate Change Law and Arnold & Porter Kaye Scholer LLP, ‘US Climate Change Litigation (Climate Change Litigation Databases)’ <http://climatecasechart.com/us-climate-change-litigation>, accessed 29 August 2019.

<sup>9</sup> Chris Hilson, ‘Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back In)’, in Fabrizio Fracchia and Massimo Occhiena (eds), *Climate Change: La Risposta del Diritto* (Editoriale Scientifica 2010).

<sup>10</sup> Jacqueline Peel and Hari M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (Cambridge University Press 2015), 8.

concerns over climate change but brought and decided on other grounds'.<sup>11</sup> Peel and Osofsky also acknowledge that '[a]t the outer limits of the boundaries of climate change litigation lie cases that are not explicitly tied to specific climate change arguments but which have clear implications for climate change mitigation or adaptation'.<sup>12</sup>

While chapter authors in this volume have taken somewhat differing views of what constitutes climate change litigation, many have taken the view that an analysis of climate change litigation should include cases that are outside of what Peel and Osofsky refer to as the 'core' of climate change litigation – litigation that, as Kim Bouwer has written, is 'in the context of climate change, as well as litigation about climate change'.<sup>13</sup> This view has allowed many of our chapter authors to analyse a growing body of case law that would be missed under a narrower definition of climate change litigation, given the lack of 'core' climate change litigation in many Asia Pacific jurisdictions to date. Moreover, this view has allowed many of our chapter authors to begin a conversation about climate change litigation in countries, where such a conversation is only just beginning – a central goal of this book.

## I.2 The Conceptual Approach

The question of if and how climate change litigation could develop in the Asia Pacific has been foremost in the minds of many of the contributors to this book since well before the formal work on this book commenced. Motivated by these questions and the limited discussion of them to date, we decided to convene an exceptional group of scholars and practitioners in the fields of environmental, climate change, and international law for a first-of-its-kind conference on climate change litigation in the Asia Pacific. The conference took place in Singapore during June 2018. The Singapore convening – hosted jointly by the Asia-Pacific Centre for Environmental Law at the National University of Singapore (NUS) and Yale Law School (YLS) – featured paper presentations and commentaries by scholars working in Australia, China, Indonesia, Malaysia, Pakistan, the Philippines, Singapore, the United Kingdom, the United States, and Vanuatu.

<sup>11</sup> Peel and Osofsky, *Climate Change Litigation*, 9.

<sup>12</sup> *ibid.*

<sup>13</sup> Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30(3) *Journal of Environmental Law* 483.

The goals of the conference were multifold. Most obviously, we aimed to generate a significant collection of original research on the vital topic of climate change litigation in the Asia Pacific. By encouraging scholars to think and write about the topic, including in their home countries, and providing a forum for them to share their ideas, we believed even a short conference could spur a conversation about climate change litigation in the region. Second, we hoped to inspire academics in the region to take on the kind of theoretical, normative, and empirical scholarship that provides the standard of excellence for legal academia in many leading jurisdictions around the world. Third, we aimed to assemble a group that was diverse along many dimensions, including seniority in the academic profession. In particular, we aimed to use our convening power to recruit and bolster several promising young scholars and to expose them to more senior scholars who could potentially serve as role models and mentors. Fourth, we hoped to create the beginnings of a transnational network of scholars and practitioners who could continue to engage and collaborate in years to come, with the Asia-Pacific Centre for Environmental Law serving as a hub for their endeavours.

Unsurprisingly, the conference did not lead to a definitive conclusion on whether climate change litigation in the Asia Pacific will or should play a major role in global climate change mitigation. As noted above, a single such answer does not and should not exist across such a diverse region. Yet, the papers that were presented, critiqued, and discussed reinforced our view that there are many questions related to climate change litigation in the Asia Pacific that merit further academic inquiry and debate. Furthermore, we believe the conference succeeded in spurring a serious academic conversation around these issues to a point where the insights of the scholars in attendance needed to be shared beyond the conference itself – which, of course, became the purpose of this book.

In particular, the conference and the papers presented raised a number of questions about climate change litigation in the Asia Pacific that we believe should be explored in more depth. For example, are there particular private or public law avenues to domestic climate change litigation in the Asia Pacific that may offer success in achieving mitigation outcomes? What kind of contributions would climate change litigation in the Asia Pacific make to domestic political organizing efforts surrounding climate change? What is the likelihood of climate change litigation emerging in specific countries throughout the region? How is China different or similar to the rest of the region on these issues? And from

a normative standpoint, is climate change litigation in the region something scholars and advocates should actively push for?

These questions, among others, are the focus of this collection. And while we believe this book addresses many questions of importance related to climate change litigation in the Asia Pacific, it does not answer all of them. In particular, we do not take a comprehensive handbook-style approach to climate change litigation in the Asia Pacific, in which each country within the region is given a comprehensive examination of past and potential climate change litigation. The approach we adopt instead is driven by our desire to encourage authors to examine and innovate in the area of climate litigation scholarship. While the literature on climate litigation is well developed in Europe and the United States, it is comparatively sparse in the Asia Pacific. By affording our chapter authors a degree of scholarly autonomy and encouragement, we sought to catalyse an academic discourse that is currently at an embryonic stage. Moreover, given the nascent state of climate change litigation in many of the region's jurisdictions, asking each author to write a section on a predetermined list of elements in each country would have likely yielded empty sections throughout.

*Climate Change Litigation in the Asia Pacific* instead offers scholarly analyses in four key thematic areas: the theoretical underpinnings and implications of climate change litigation; the use of international law and international tribunals for climate change litigation in the Asia Pacific; case studies of the potential for climate change litigation to take root in several specific Asia Pacific jurisdictions; and an extended focus on the possibility of China, the world's largest greenhouse-gas emitter, to embrace climate change litigation as part of its comprehensive climate change policy.

### I.3 Overview of the Book

The book's first of four sections begins with a simple yet important question: what role should judges play in the pronouncement of norms of responsibility regarding the causes and consequences of climate change? In the first chapter, Joshua Galperin and Douglas Kysar show that the answer is complex. After reviewing academic literature on the institutional strengths and weaknesses of courts as environmental law-makers, Galperin and Kysar argue that most commentators overlook the role of courts as prods or instigators of governmental action. In the context of climate change – an intractable commons dilemma of

existential proportions – the authors argue that the judicial capacity to catalyse the hydraulics of governance is of utmost significance.

Through its analysis, this chapter also introduces a thematic question that several of the book's other contributors attempt to tackle: what are the principal purposes and goals of climate change litigation? Some of the potential answers are to vindicate science, to spur public mobilization, to alter behaviour toward regulatory goals, to compensate for loss and damage, and to condemn tortious or wrongful actors.

In the next chapter 'Networked Public Interest Litigation: A Novel Framework for Climate Claims?', Ketan Jha takes a deeper dive into one of those possibilities: litigation as a spur to public mobilization. Drawing on a sophisticated co-constitutive understanding of law and social movements, Jha argues that climate change litigation has led citizens to undertake a significant and unique role in law-making. This, he argues, will be among the great lasting legacies of climate change litigation, not just for climate policy but for citizen engagement and 'cause lawyering' more generally.

The collection then moves in its second section to a more applied analysis of what climate litigation could look like within international fora or by using international law. This section begins with a chapter by Annalisa Savaresi and Jacques Hartmann that analyses the Carbon Majors Petition before the Human Rights Commission of the Philippines. In particular, the chapter considers the role of international human rights law in attributing responsibility for climate change damages. The authors argue that the Petition is far from a mere symbolic gesture and has the potential to engender significant domino effects, including the ultimate provision of compensation to climate victims. Savaresi and Hartmann conclude by addressing how significant issues like causality, retrospectivity, and apportionment – as well as the provision of an adequate remedy – can be addressed in the context of human rights law.

The next chapter, by Margaretha Wewerinke-Singh, analyses the significant international litigation options for a group of countries that have arguably contributed the least to anthropogenic climate change but are suffering its impacts the most: the Pacific Small Island Developing States. The author considers government actions in domestic courts or human rights bodies against fossil fuel companies, regional cooperation between Pacific Island nations, and government action before international human rights bodies against major fossil fuel companies or foreign States.

The third chapter of the section, by Millicent McCreath, analyses whether climate change claims could be brought by states through the binding dispute resolution mechanism of the United Nations Convention on Law of the Sea (UNCLOS). In the absence of such a binding dispute mechanism in the Paris Agreement, the author asks whether UNCLOS could be the best forum for holding underperforming states accountable or whether this approach could have an adverse effect on global mitigation efforts. Her analysis shows that, as a legal matter, the UNCLOS tribunal could be available as a valid forum for adjudicating the contours of state responsibility for climate change, particularly in relation to ocean-specific adverse climate impacts like acidification. Whether such adjudication is politically advisable remains a separate and complicated question, however.

The second section concludes with a chapter by Hui Pang, examining the climate policy effects of investor-state arbitration proceedings. Specifically, Pang examines the case of foreign investors utilizing dispute resolution procedures under international investment agreements in response to state revocation of renewable energy incentives. Pang hypothesizes that deeming revocation of the incentives a breach of obligation by host countries could encourage states to uphold their renewable energy incentive commitments. On the other hand, the author argues, such decisions could also exert a ‘policy chill’ that discourages states from offering these renewable energy supports in the first place. Through a careful review of existing arbitral tribunal decisions that have examined renewable energy incentive schemes, Pang seeks to present a comprehensive view of the potential impact of investor-state dispute resolution on climate change policy.

The book’s third section continues with a more applied analysis of climate change litigation in the Asia Pacific but shifts focus to domestic law and litigation in several key countries. The section’s first chapter, by Jacqueline Peel, Hari Osofsky, and Anita Foerster, examines the well-developed climate change case law in Australia and asks what a ‘new generation’ of climate change litigation might look like for that jurisdiction. Specifically, the authors consider whether conditions in Australia might be ripe for the kind of litigation pioneered in the Netherlands and Pakistan that has sought to hold governments accountable for inadequate ambition in their climate change policies.

In the next chapter ‘Climate Change Litigation: A Possibility for Malaysia?’, Maizatun Mustafa takes a deeper dive into potential litigation in Malaysia, a country where, to date, there has been no climate change



litigation. She identifies the major barriers to Malaysian climate change litigation to include the state of the judiciary, limited access to courts, limited environmental awareness, and limited recognition of environmental rights. As a result, she argues that climate change liability in Malaysia would be best addressed through a nationally consistent, clear regulatory framework, instead of through courts.

The section's third chapter, by Andri Wibisana and Conrado Cornelius, engages in a discussion that is similar to Mustafa's for another Southeast Asian jurisdiction: Indonesia. Unlike Mustafa's analysis, the authors point to existing case law that could pave the way for future climate change litigation: forest and peatland fire cases in Indonesia where courts have held plantation companies liable and ordered the companies to pay damages, including amounts assessed for the emission of greenhouse gases associated with the fires. They argue that these cases may provide a model in Indonesia and elsewhere for how the goals of climate mitigation may be met through tort law – specifically by addressing greenhouse gas emissions as secondary claims under the heading of other, more firmly established nuisance and negligence tort claims.

In the chapter 'From Shehla Zia till Ashar Leghari: Pronouncing Unwritten Rights Is More Complex than a Celebratory Tale', Waqqas Ahmad Mir casts his critical gaze on the landmark case of *Leghari* and evaluates its significance within the broader context of Pakistani constitutional law. His chapter argues that *Leghari* is the result of the Pakistani constitutional courts' growing receptiveness to the adjudication of environmental issues. While this is often lauded as a positive development, Waqqas Ahmad Mir points to the danger that judicial activity can have stultifying effects on the role of the executive in developing, implementing and enforcing environmental laws. As such, while there is good reason to celebrate *Leghari*, there is also a need to be cautious. His chapter also raises questions about the long-term practical value of cases like *Leghari* and environmental public interest litigation more broadly.

The section's final chapter, by Jacqueline Peel and Jolene Lin, seeks to shed light on the potential for climate change litigation in three key Southeast Asian jurisdictions where there has been little case law to date: the Philippines, Malaysia, and Singapore. The authors focus specifically on the relationship between climate change litigation and adaptation planning, using Australia's climate litigation experience as a lens for understanding preconditions for the emergence of adaptation litigation. They explore how the conventional understanding of climate change litigation may need to be refashioned to appropriately capture cases

arising in the Global South context. And they highlight likely barriers to climate change litigation in Southeast Asia, including inadequate planning law frameworks, access to justice constraints, corruption, and limitations on judicial capacity, such as caseload backlogs.

The book's final section focuses on China – the country that will arguably play the greatest role in global climate policy over the next several decades. Analysts predict that China's economic growth will outpace that of the OECD's through 2040 by nearly three times.<sup>14</sup> As a result, the US Energy Information Administration projects that China will represent between 35 and 41 per cent of global energy-intensive goods production in 2040.<sup>15</sup> Despite this growth, recent Chinese policy and a shift in the US international climate posture has led some to argue that China has become a global leader in climate policy and diplomacy.<sup>16</sup> What role, if any, will litigation play in China as the nation struggles to contain its emissions while continuing to offer growth and opportunity to its massive population? This section offers three different perspectives from leading Chinese legal scholars.

First, Jiangfeng Li argues that, while China has not to date relied on climate change litigation as a significant part of its climate efforts, the Chinese government is beginning to open the door to climate change litigation. However, Li argues that, moving forward, China should take further steps to overcome the economic, cultural, legal, and historical barriers to climate change litigation. She maintains this is critical because climate change litigation can serve as a driving force in developing the regulatory landscape in China.

In the second chapter of this section, Zhu Yan sees less of a role for the development of climate change litigation in China. He highlights the dominance of criminal over civil, environmental litigation in China. He also emphasizes the importance of the executive – with the judiciary playing only a 'secondary supportive role' – in Chinese environmental policy. And while the chapter discusses the establishment of special environmental resources tribunals within Chinese courts and takes an in-depth look at environmental public interest litigation, the author concludes that neither provides robust tools for environmental policy making in Chinese governance.

<sup>14</sup> Asa Johansson et al., 'Looking to 2060: Long-Term Global Growth Prospects' (*OECD Economic Policy Papers*, No. 3, November 2012), 22.

<sup>15</sup> Capuano (n 2) 13.

<sup>16</sup> See, e.g., Edward Wong, 'China Is a Climate Leader but Still Isn't Doing Enough on Emissions, Report Says' (*New York Times*, 19 July 2018), [www.nytimes.com/2018/07/19/world/asia/china-climate-change-report.html](http://www.nytimes.com/2018/07/19/world/asia/china-climate-change-report.html), accessed 29 August 2019.