CHAPTER 7

CLIMATE CHANGE LITIGATION: POTENTIALITY AND POSSIBILITY

Introduction

Certain societies and jurisdictions are regarded as being more litigious than others. Whilst difference in “litigation culture” contribute to this to some degree, essentially it is recognised that certain legal systems and their respective judicial infrastructures lend themselves to class actions and organised civil suits, whereas other jurisdictions (with normal legal systems) are less geared towards the use of litigation for seeking the same kind of redress.¹ Addressing climate change impact is in some countries led by individuals, public interest groups and others by lobbying to influence the policy and legislative change in order to achieve reform. In other countries, litigation is more commonly used as a tool for reform to influence climate change policy. In these countries the objective of climate change litigation from the point of view of the plaintiff environmentalist probably have less to do with actually asking the Courts to formulate climate change policy of itself, and more to do with seeking to attract public attention through the commencement of Court’s proceedings, in order to increase pressure on governments to respond and implement suitable policies and legislation addressing global warming.²

² Ibid.
The present chapter will analyse the increasing popularity of climate change litigation worldwide and its conceivable future in India also.

7.1 Meaning and Objective of Climate Change Litigation

The US government's decision not to ratify the Kyoto Protocol to the UNFCCC and the perceived reluctance of the US Congress to act on climate change has sparked frustration within civil society and has led to the first major wave of climate change litigation. However, climate change litigation is a global matter, with claims also being brought in differing forms in Europe, Africa, and Australasia largely in response to a perception that the governments are not doing enough to deal with climate change. Accordingly, while this state of affairs exists, the potential for many more claims arising worldwide, out of damage to properties and communities as a result of floods, severe and catastrophic weather events, and climate change generally is significant.

There is no one convenient definition that encapsulates the meaning of "climate change litigation". However, broadly speaking, on the basis of the emerging global warming liability claims worldwide impacting on the public and private sectors, climate change litigation can be described as litigation which arises from:

(a) A cause of action where climate change is the alleged casual factor in the context of a civil wrong, tort or delict

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5 Supra note 1 at 230.
such as negligence or nuisance, which has led to an alleged liability (liability litigation);

(b) An administrative law claim against a public authority challenging any action, inaction, breach of statutory duty or constitutional law or other failure properly or fairly to regulate or take into consideration greenhouse gas emissions in the authority’s decision-making processes (administrative law litigation); and

(c) Other ancillary legal cause of action arising out of growing public awareness of climate change matters. These can include alleged breaches of advertising regulations and standards in the course of making claims in respect of climate change, or alleged failure by companies, their directors or officers to adequately report climate change and other environmental impacts affecting company performance which can lead to shareholder derivative actions, or other regulatory action (consequential litigation).\(^6\)

The objectives of climate change litigation tend to be either: to seek compensation for harm to the environment, property or human health cause by global warming (in case of a liability litigation arising from an allegation that climate change is the cause of damage complained of); or in the case of all the three forms of litigations identified above, to prevent or reduce global warming (eg by challenging government acts or omissions relating to climate change),

\(^6\) Ibid.
by way of judicial review or by petitioning to the disclosure of corporate behaviour which can have an impact on climate change.\footnote{Id., at 231.}

\section*{7.2 Climate Change Litigation: Potentiality and Possibility}

Climate change litigation has its basis on liability claims as civil society more and more believes that human actions and emission of certain greenhouse gases into the atmosphere can lead to grim consequences for the environment, property and human health. It creates the possibility of future litigations against the governments or corporations engaged in commercial activities. Once commenced it creates whole new legal challenges of which both plaintiffs and defendants must be aware.\footnote{Arindam Basu, “Climate Change Litigation in India: Seeking New Approach Through the Application of Common Law Principles”, \textit{NALSAR Law Review}. Vol. 5, No. 1, 45-59 at 45 (2010).}

In India, the first two possibilities discussed above in meaning of climate change are already being explored but in entirely different environmental context and not as a part of climate litigation.\footnote{Ibid.} Broadly speaking, in India the citizen has a choice of a following remedies to obtain redress in case of violation of their environmental right:

(a) A common law action against the polluter including nuisance and negligence;

(b) A writ petition to compel the authority to enforce the existing environmental laws and to recover clean up costs from the violator;

(c) Redress under various environmental statues like Environment (Protection) Act, 1986, Water (Prevention
and Control of Pollution) Act of 1974, Air (Prevention and Control of Pollution) Act, 1981 etc.; or

(d) Compensation under the Public Liability Insurance Act, 1991 or the National Environment Tribunal Act, 1995 in the event of damage from a hazardous industry accident.¹⁰

Nuisance and negligence actions are very common in India these days when it comes to check environmental pollution.¹¹ But, unfortunately, none of them have been used so far to include climate litigation purely.

### 7.3 Sources of Climate Change Litigation

Here a few case laws to date will be explored that arises in climate change litigation and disputes world over. The different sources of climate change litigation are identified and are listed below and specific legal issues arising out of the case law to date are further considered.

#### 7.3.1 Liability Litigation

Liability litigation comprises any proceeding, action, claim or dispute in public, private or international law, in which it is alleged that climate change is the casual connection to the alleged damage or loss for which compensation is sought. Whilst it is possible in principle for individual to sue corporate defendants in torts for damage resulting out of GHG emissions,¹² liability litigation is probably the most difficult for plaintiffs to succeed-for example,

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¹¹ Among all these remedies, the writ jurisdiction is more popular. The action in tort is rarely used and statutory remedies are largely untried.

because of the complex issues of standing, justiciability, forum and causation which commonly arise.\textsuperscript{13} The examples of liability litigation can be found in:

7.3.1.1 The Law of Nuisance

Nuisance can be categorised as either public or private under common law, or otherwise statutory. A private nuisance takes place when one uses one’s property in a manner that harms the property interests of others. Theoretically, if a company uses its property in a way that harms other’s property interests by contributing to global warming, it can be held liable under private nuisance. Climate change, however, is a broad problem that has less to do with defendants’ use of their property and that involves much less direct “annoyance” with “neighbours”. Therefore, private nuisance does not seem like a good fit for a climate change lawsuit.\textsuperscript{14} Public nuisance is more appropriate remedy for climate change cases.\textsuperscript{15} Recent international decisions on public nuisance relating to climate change are listed below.


\begin{small}
\textsuperscript{13} Supra note 1 at 231.

\textsuperscript{14} Supra note 8 at 48.

\textsuperscript{15} Supra note 12 at 52.

\end{small}
alternative, under state law. Specifically, the States asserts that Defendants are “substantial contributors to the elevated levels of carbon dioxide (CO₂) and global warming”, as their annual emissions comprise “approximately one quarter of the U.S. electric power sector’s carbon dioxide emissions and approximately ten percent of all carbon dioxide emissions from human activities in the United States”.

The complaint cites report from the Intergovernmental Panel on Climate Change (IPCC) and U.S. National Academy of Sciences to support the States’ claims of a causal link between heightened greenhouse gas concentrations and global warming, explaining that carbon dioxide emissions have persisted in the atmosphere for “several centuries and thus have a lasting effect on climate”. The States posit a proportional relationship between CO₂ emissions and injury: “The greater the emissions, the greater and faster the temperature change will be, with greater resulting injuries. The lower the level of emissions, the smaller and slower the total temperature change will be, with lesser injuries”.

As a result, the States predict that these changes will have substantial adverse impacts on their environments, residents, and property, and that it will cost billions of dollars to respond to these problems. Not only the complaint spell out expected future injuries resulting from increased carbon dioxide emissions and concomitant global warming, but it also highlights current injuries suffered by the States...The States claim that the impact on property, ecology and public health from these injuries will also cause extensive economic harm.

Seeking equitable relief, the States seek to hold Defendants jointly and severally liable for creating, contributing to or maintaining
a public nuisance. They also seek permanently to enjoin each Defendant to abate that nuisance first by capping CO$_2$ emissions and then by reducing emissions by a specified percentage each year for at least ten years.

Also on July 2004, three land trusts filed the complaint against the same six Defendants named in the States’ complaint. The Trusts also base their claims on the federal common law of nuisance or, in the alternative, “the statutory and/or common law of the private and public nuisance of each of the States”. They assert that reductions in Defendants’ “massive CO$_2$ emissions will reduce all injuries and risks of injuries to the public, and all special injuries to Plaintiffs, from global warming”. Accordingly, the Trust seek to abate Defendants’ “on going contribution to global warming”.

The District Court dismissed the complaints, interpreting Defendants’ argument that “separation-of-powers principles foreclosed recognition of the unprecedented ‘nuisance’ action Plaintiffs assert” as an argument that the case raised the non-justifiable political question. Drawing on Baker v. Carr, in which the U.S. Supreme Court enumerated six factors that may indicate the existence of a non-justifiable political question...According to the district Court, the broad reach of the issues presented revealed the “transcendently legislative nature of this litigation”.

However, in September 2009, restoring the case, the Second Circuit Court of Appeals reversed the District Court’s judgement. It held the political question doctrine did not bar the Court from considering the case and all plaintiffs had standing to bring “public

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17 Id., at 271.
19 406 F. Supp.2d at 270.
nuisance” lawsuit against power companies for injuries caused by climate change.20 This decision does not address the final question though, as rehearing is still pending.

It is observed that the district Court erred in dismissing the two complaints on the ground that they presented non-justiciable political questions...All parties have stated a claim under the federal common law of nuisance, which is grounded in the definition of “public nuisance”.21 With regard to air pollution, particularly greenhouse gases, this case occupies a similar to the one Milwaukee occupied with respect to water pollution. With this in mind, the concluding words of Milwaukee have an resonance almost forty years later.

To paraphrase: “It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal ourts will be empowered to appraise the equities of the suits alleging creation of a public nuisance” by greenhouse gases.23

In Native Village of Kivalina v. Exxon Mobil Corp.24 is an example in the context of climate change displacement. In this case the plaintiffs are the residents of the native Alaskan Inupiat village of Kivalina comprised of approximately 400 people whose ancestors have occupied the area since 'time immemorial'.25 Kivalina is located on the tip of a six-mile barrier reef located between the Chukchi Sea and the Kivalina and Wulik Rivers on the Northwest coast of Alaska, some 70

20 Supra note 8 at 49.
21 Supra note 16 at 85.
23 Supra note 16 at 86.
25 Ibid.
miles north of the Arctic Circle. The Plaintiffs claim that the global warming is destroying their village and as a result they must be relocated soon, or alternatively the village must be abandoned and cease to exist. The United States Army Corps of Engineers and the United States Government Accountability Offices have undertaken studies of the viability of a number of native villages in Alaska, concluding in case of Kivalina that 'remaining of three island... is no more viable option for the community'. Both bodies conclude that Kivalina must be relocated due to the effects of climate change and estimate the cost somewhere between $95 and $400 million.

Based on these facts, Kivalina had filed a complaint for damages against the group of 19 oil, coal and power companies. The plaintiffs alleges three main causes of action: nuisance, conspiracy and concert of action. First, Kivalina seeks monetary damages for the Defendant’s contribution to global warming through emissions of large quantities of greenhouse gases. In respect of this cause of action, the plaintiffs claim public nuisance under federal common law, and in the alternative public and private nuisance under state law. Secondly, Kivalina seeks monetary damages for civil conspiracy against eight of the Defendants for allegedly participating in an agreement with each other to mislead the public about the science of global warming and to delay public awareness of the issue. Finally, Kivalina alleges that the Defendants have engaged in tortious acts in concert with each other relating to the creation, contribution to, and/or maintenance of public nuisance of global warming.

The Defendants responded in June 2008 by seeking to have Kivalina’s action dismissed due to what they allege to be inordinately difficult problem of factual proof in tracing property losses suffered

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26 Ibid. Also see United States GAO 32 (2003).
27 Kivalina Complaint, para 186.
28 Ibid. Paras 249-82.
by the plaintiffs to human-induced changes to the global climate. Moreover, the Defendants claim that there is no precedent for holding a collection of Defendants liable for such global atmospheric damage.

The suit was dismissed by the United States District Court on September 30, 2009 on the ground that regulating greenhouse gas emission was a political rather than a legal issue and one that needs to be resolved by the government and the administration rather than Courts.

The US Courts have dismissed other common-law climate-change based claims because, among other things, they have raised non-justiciable political questions that are beyond the competence of Courts. Even in the event that the Court accepts the complaint as justiciable, challenges persist in the form of establishing standing and causation, which would well hamper its success.29

The above mentioned two important decisions cast considerable doubt on the present viability of public nuisance claims alleging contributions to global warming, based on non-justiciability issues predicted on the doctrine of separation of powers. Notwithstanding this, nuisance remains a popular cause of action in climate change relate suits.30

Another significant case on climate change based on the ground of nuisance is Comer v. Murphy Oil USA,31 where the three-member panel of the Fifth Circuit Court revived a lawsuit filed by residents along the Mississippi Gulf coast against several corporations in the

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29 Angela Williams, “Promoting justice within the international legal system: Prospects for Climate Refugees” in Benjamin J. Richardson et al. (eds.), Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy, 81-101 at 93 (2009).
30 Supra note 1 at 233.
31 585 F.3D 855 (5th Cir. 2009); Full text is available at: http://www.ca5.uscourts.gov/opinions/pub/07/07-60756-CV0.wpd.pdf, (accessed on August 20, 2012).
energy and fuels industries, alleging they were responsible for property damage caused by Hurricane Katrina. Initially in 2007, the plaintiffs sought damages under the tort theories of unjust enrichment, civil conspiracy and aiding and abetting, public and private nuisance, trespass, negligence, and fraudulent misrepresentation and concealment. At the district Court level, the defendants were successful in dismissing plaintiffs’ complaint. The United States District Court for the Southern District of Mississippi granted the defendants motions and dismissed the action on the ground that plaintiff did not have standing to raise political question that should not be resolved by judiciary. The Court also found that the harm was not traceable to individual defendants. On 16 October, 2009 the U.S. Court of Appeals for the Fifth Circuit overturned a District Court dismissal in part, holding that the plaintiffs both have standing to raise at least three of the claims (nuisance, trespass, negligence).

This recent development in Comer v. Murphy Oil USA is very important because this may set a parameter of future climate litigation for the American Courts. Also it may provide answer to a question whether a corporate entity can be made liable for catalysing devastating climatic incidents along with clarifying plaintiff’s legal stand to bring a suit for such activities.\textsuperscript{32}

7.3.1.2 The Law of Negligence (fault and duty of care)

Generally, in common law, in order to establish a claim in negligence, a plaintiff must prove that: (i) the defendant owed a duty of care to the plaintiff; (ii) that duty of care was breached; (iii) the defendant’s breach of the duty of care caused the injury or damage

\textsuperscript{32} \textit{Supra} note 8 at 50.
suffered by the plaintiff; and (iv) the injury or damage suffered was foreseeable, and not too remote a consequence of the breach of duty.  

In climate change litigations these necessary elements of negligence are difficult for the plaintiff to establish. For example, most GHGs are emitted with lawful authority, either by way of licence or concession from the relevant regulator. It will usually be difficult to argue that an installation’s emission of GHGs was “unreasonable” if it was unlawful in this sense. Categories of negligence can change over time in accordance with social needs and so too can the persons legally bound to exercise a duty of care. Notwithstanding this, a duty of care will be a significant hurdle for claimants for any negligence-based climate-change liability litigation. It will depend on the facts of each case whether the relationship between the claimant and the defendant is one where a duty of care is owed. Generally, the question turns on whether it is considered reasonably foreseeable that the defendant’s act or omissions would be likely to cause the harm complained of by the claimant. The challenges associated with proving causation present a particularly difficult burden for claimants in climate change litigation.

It is expected that scientific challenges may continue to affect climate change lawsuits based on public nuisance and negligence

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34 Supra note 1 at 233.
36 As scientific knowledge develops, the legal question of whether it was reasonably foreseeable that certain actions would cause or contribute to global warming or its knock-on effects may gradually be answered differently by the Courts. However, the claimants will usually also be required to demonstrate that the specific harm complained of ... were a reasonably foreseeable consequence of the defendant company’s action and this is even a more difficult hurdle.
actions. It is also argued that plaintiffs may be successful by applying those common law theories. If it happens as expected, the damages and cost of adaptation will be enormous and the interest in the finding parties to pay those costs will likewise be enormous.\textsuperscript{37}

7.3.2 Human Rights and Climate Change Litigations

Human rights are another area of law that have been used by plaintiffs attempting to seek redress for damage caused by climate change. International environmental claims based in human rights can arise under specific regional and international declarations, conventions and agreements. “Environmental” human rights claims are usually framed in relation to right to life, property, personal security and health as opposed to environmental grounds alone and, as such, in the context of climate change, causation will be an important element in demonstrating that a human right was infringed due to any specific weather event or state of affairs arising from climate change.\textsuperscript{38} In this regard, the general consensus is that there is no international human right to be free of pollution, global warming or climate change \textit{per se}.

Damages are more likely to be awarded, however, within national jurisdictions for human right breaches leading to actual damage and harm. A recent example of human right issues intermingling with environmental damage in the national context arises out of the decision of the Federal Court of Nigeria on November 14, 2005 to order the complete cessation of gas flaring in the Niger Delta by the Nigerian National Petroleum Corporation (NNPC) and six oil companies. In this case i.e., \textit{Barr et. al. v. Shell Petroleum Development Company of Nigeria et al},\textsuperscript{39} the plaintiffs sued on behalf

\textsuperscript{37} Supra note 8 at 50.  
\textsuperscript{38} Supra note 1 at 236.  
\textsuperscript{39} No FHC/CS/B/1256/2005 (Nigerian F.H.C.).
of themselves and representing the communities in Nigeria and the plaintiffs were of the view that the gas flaring was alleged to contribute to greenhouse gas emissions and to produce toxic gases impacting on human health. The plaintiffs, eight individuals each living in different communities impacted by gas flaring, were held to have had their “fundamental rights to life and dignity of human person” violated under the Nigerian Constitution, the African Charter on Human and Peoples Rights and the Nigerian Environmental Impact Assessment Act, 2004. Importantly, the Court granted declaratory relief to the effect that right to life and dignity of human person also include a right to a “clean, poison-free, pollution-free healthy environment”. It also ordered the legislative action to amend the gas flaring provisions...in order to make the legislation consistent with the human rights provided for under the Nigerian Constitution.

Another example of climate change litigation based on human rights is that of the petition filed with the Inter-American Commission on Human Rights by the Inuit Circumpolar Conference, claiming that climate change policy in the United States was in violation of the Inuit and other Arctic Indigenous people’s human rights. 40 Whilst the petition was ultimately rejected on evidentiary grounds, it largely challenged US energy policy and lack of regulations on greenhouse gas emission which were alleged to be causing destruction to homes, roads and other structures, and violating a host of human rights as a result. Whilst US government would not have been bound by any decision given the commission's lack of enforcement powers, any recognition by the Commission that (i) the US government’s act or omissions had caused climate change, and (ii) the climate change had led to human rights violations, would arguably have established a

40 Supra note 1 at 237.
precedent encouraging further climate change and human rights claims to be made in various Courts, tribunals and other fora.\textsuperscript{41}

7.3.3 Administrative Law Litigation and Climate Change

Governments are under increasing scrutiny by civil society in relation to how they regulate, or fail to regulate GHG emissions. This is particularly so for those governments which have ratified the Kyoto Protocol and implemented consequential laws and policies in order to regulate GHG emissions. With new regulatory regimes come new opportunities for plaintiffs to challenge governmental decision making.\textsuperscript{42} The most significant decision relating to administrative law litigation is that of the US Supreme Court in \textit{Massachusetts v. Environmental Protection Agency},\textsuperscript{43} ruled that country’s environmental agency had the authority and responsibility to regulate carbon dioxide emissions and other greenhouse gases (GHGS) under the Clean Air Act, 1963, as an “air pollutant”.

The Court was hearing the case filed against EPA by Massachusetts and 11 other states, and environmental groups and others in 1999 petitioning EPA to set carbon-dioxide emissions standards.\textsuperscript{44} US Supreme Court’s decision in this case has significantly altered the government’s policy and re-drawn the litigation landscape. Massachusetts and several others brought claims against the U.S. Environmental Protection Agency (EPA) challenging the agency’s decision not to regulate GHG emissions from motor vehicles under the Clean Air Act, 1963. Massachusetts contended that under the Clean Air Act, EPA had the responsibility to regulate any air pollutant

\begin{itemize}
\item \textsuperscript{41} \textit{Id.}, at 238.
\item \textsuperscript{42} \textit{Id.}, at 239.
\item \textsuperscript{43} 127 S. Ct. 1438 (2007).
\item \textsuperscript{44} “Fixing Onus”, \textit{Down to Earth}, (April 30, 2007).
\end{itemize}
including GHGs that can “reasonably be anticipated to endanger public health or welfare”. The U.S. Supreme Court decided that the Clean Air Act, 1963 does give EPA the power to regulate.\textsuperscript{45}

This case is typically an example where the US Supreme Court decided an administrative law question whereby avoiding a much disputed issue of the scientific evidence for climate change.\textsuperscript{46} Although, administrative law cases are not subject to Daubert Standard.\textsuperscript{47} In \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.},\textsuperscript{48} the US Supreme Court established Daubert standard for admissibility of scientific expert testimony. To be admissible under Daubert, expert testimony must be both reliable and relevant. A Court first must ask whether the scientific ideology underlying the testimony is reliable-is it “ground[ed] in the methods and procedures of science” and “supported by appropriate validation”. While Daubert challenges have primarily worked to the benefit of defendants, there is no reason why plaintiffs cannot use them in climate change litigation where the plaintiff’s position is supported by the weight of scientific evidence), and the Federal Rules of Evidence, they do help in making up the backdrop of climate change litigation in which common law actions proceed.\textsuperscript{49} However, establishing scientific evidence in climate change litigation is an important step in deciding the standing of the parties.

\textsuperscript{45} Supra note 8 at 48.
\textsuperscript{47} Id., at 265.
\textsuperscript{48} 509 U.S. 579 (1993).
\textsuperscript{49} Id., at 261.
The Supreme Court’s above decision has paved the way for a multitude of judicial and administrative challenges seeking to compel the EPA to regulate GHG emissions.\(^50\)

The concept of this chapter will be incomplete without citing and analyzing the case of Trial Smelter Dispute. Though this case is not directly linked with climate change but has become a *topos* of international environmental law and it is indirectly linked with climate change and the main sources of climate change today are also responsible of transboundary air pollution.

The *Trial Smelter Dispute (USA v. Canada)*,\(^51\) dealt with air pollution that emanated from a private company in British Columbia, Canada, and caused damage to private property in the U.S. State of Washington. Trial Smelter Arbitration between the United States and Canada in 1941 constitutes the first significant event in the development of international law in the field of environment. The dispute had concerned of transfrontier air pollution by sulphur dioxide (SO\(_2\)) Fumes Originating in Canada and causing damage in the United States.\(^52\) In this case, the arbitration tribunal declared that allowing the use of one’s territory by a state in such a way, that cause serious injury to the person or property in the territory of another state is prohibited in International law.\(^53\)

In 1896, a Smelter was built at Trial, in British Columbia, Canada where zinc lead were smelted in large quantities. In 1906, the Consolidated Mining and Smelting Co. of Canada acquired the smelter

\(^{50}\) Supra note 1 at 243.


\(^{53}\) Ibid.
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plant at Trail. The plants emitted sulphur dioxide fumes in growing quantities, the amount of which varied between 10000 and 20000 tons per month. From 1925, at least until the end of 1931, damage occurred in American territory, only about seven miles distant. It was brought to the attention of the company that damage was being done to American property. The first formal complaint was made in 1926 by a farmer whose farm was located a few miles south of the boundary line. This action was followed by others and the Trail Smelter proceeded to negotiate with the complaining property owners, with a view to settlement. Settlements in different amounts were made with a number of farmers. However, in 1928, an association known as the “Citizens Protective Association” was formed consisting of individuals suffering damage not yet recompensed.54

In June 2007, the case was first taken officially to the government of United States. A communication was sent from the Consuel General of the United States in Ottawa to the Government of the Dominion of Canada. In December, 1927, the United States Government proposed to the Canadian Government that problem arising from the operation of the smelter at Trail should be referred to the International Joint Commission which had been set up under the Boundary Waters Treaty of 11 January, 1909. On 28 February, 1931, the International Joint Commission delivered its report, finding that all past damage and all damage up to and including 1 January 1932 amounted to 350000 dollars. In addition, the Commission recommended a method of indemnifying persons in Washington State for damage which might be caused by operations of the Trail Smelter after 1 January, 1932. It also recommended that the Consolidated Mining and Smelting Company of Canada Ltd. should make certain

54 Supra note 51 at 57.
changes and additions to its plants for the purpose of reducing the amount of sulphur discharged from the stacks.\footnote{Id. at 58.}

Subsequently, two years after the signing of the International Joint Commission’s Report, the United States Government made a representation to the Canadian Government that existing conditions were entirely unsatisfactory and that damage was still occurring. After renewed diplomatic negotiations, a convention was signed at Ottawa on 15 April 1935 for the settlement of difficulties arising from operation of the Smelter at Trail. According to Article 1, the Government of Canada agreed to pay 350000 dollars to the United States Government in payment of all damage which had occurred in the United States prior to 1 January 1932 as a result of the operation of the Trail Smelter. Moreover, the two governments agreed to constitute tribunal consisting of an independent chairman and two national members for the purpose of deciding the following questions states in Article III:

\begin{itemize}
    \item[(a)] Whether damage caused by the Trail Smelter in the State of Washington had occurred since 1 January 1932, and if so, what indemnity should be paid therefor?
    \item[(b)] If such damage has been caused, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future, and if so, to what extent?
    \item[(c)] In the light of the answer to the preceding question, what measures or regime, if any, should be adopted or maintained by the Trail Smelter?
\end{itemize}
What indemnity or compensation, if any, should be paid on account of any decision rendered by the tribunal pursuant to the preceding questions?  

Under Article IV, the tribunal was to apply “law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice”, and had to give “consideration to the desire of the high contracting parties to reach a solution just to all parties concerned”.

In the first decision on 6 April, 1938, the tribunal concluded that damage caused by the Trail Smelter in the State of Washington had occurred since the beginning of 1932 and up to 1 October 1937. The complete and final indemnity and compensation for all damages which occurred between such dates was fixed at 78000 dollars. The tribunal decided to determine the fact of existence of damage, if any, occurring after 1 October 1937 in its final award. It also decided that pending this award, the Trail Smelter would refrain to a certain extent from causing damage. The tribunal decided that it was unable to answer the question of a permanent programme for the Trail Smelter to adopt with the information placed before it. Thus, it established a temporary regime and decided to continue further examination of the case for the purpose of a final award.

The second decision was reported to the American and Canadian Governments on 11 March, 1941. The United States had argued that damage had occurred in the State of Washington since 1 October 1937 as a consequence of the continued emission of sulphur dioxide by the Canadian Smelters. However, it was held that the United States

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56 Ibid.
57 Id., at 59.
Government had failed to prove that any fumigation between 1 October 1937 and 1 October 1940 had caused injury to crops, trees or other property. Similarly, the tribunal rejected the American claim for indemnity for costs of investigations.58

In part three of the judgment, which contains the most celebrated rulings of the case, the tribunal faced the issue of whether the Trail Smelter should be required to refrain from causing future damage in State of Washington and, if so, to what extent. The tribunal first examined whether this question should be answered on the basis of United States law or on the basis of international law. It found that there was no need to solve this problem as the law followed in the United States in dealing with the quasi sovereign rights of the states of the union, in the matter of air pollution, was in conformity with the general rules of international law. After examining pronouncements by leading authorities and international decisions concerning the duty of a State to respect other states and their territory, the tribunal found that the real difficulty was to determine what is deemed to constitute an injurious Act. The tribunal declared:

...[u]nder the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.59

• Assessment of the Trial Smelter Dispute

58 Ibid.
59 Id., at 60.
Trial Smelter arbitration is the father of developments in the area of international environmental law. The case is usually pointed at as an example of successfully resorting to international adjudication. The trial smelter arbitration was indeed a result of undertaking voluntarily accepted, and resulted in a binding award which the parties carried out in good faith. In the consideranda of the 1941 award, the arbitral tribunal made it perfectly clear that its function is not to apply law, U.S. or international, to a set of facts and draw a conclusion on the rights and duties of the parties, but to find a middle ground between conflicting interests. Such a transaction was to take place not only between the legal interests of two sovereign states:

while for the United States’ interests now be claimed to be injured by the operations of the Canadian corporation, it is equally possible that at some time in the future Canadian interest might be claimed to be injured by an American corporation.

But also between two different sectors of their economies:

[i]t would not be the advantage of the two countries concerned that the industrial effort should be prevented by exaggerating the interests of the agriculture community. Equally it would not be to the advantage of the two countries that the agricultural community should be oppressed to advance the interest of industry.

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60 Id., at 56-57.
Somewhat more pertinently, the Tribunal move to cite several cases regarding water and air pollution between U.S. States. Had the Tribunal relied on the proper law clause contained in the 1935 Convention, which explicitly authorised it to refer to U. S. Law and judicial practice to adjudicate the case, this would have been enough to establish Canada’s responsibility under American law. However, the arbitrators, not content with this solution, struggled to dignify the no-harm rule by elevating it to principle of international law. While the Trial Smelter arbitration has typically been remembered for the only principles its arbitrators articulated, quite ironically the Tribunal was concerned more with finding practical solutions satisfactory to “all parties” rather than stating broad legal principles. Much like a conciliator, the tribunal spent most of its time designing an air pollution control regime which will be acceptable to all parties, which justified the levity with which international law had been approached.

Another factor that makes the Trial Smelter arbitration unique in the international dispute settlement scenery is the central role played by the science. It turns out that the source, dynamics and impact of fumigation in the Columbia River Valley were studied for no less than 15 years—a scientific research unprecedented in extension and detail. The length and detail of the investigation of the Trial Smelter problem is hardly repeatable in any judicial context.

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63 _Id._, at 276.
64 _Ibid._
65 First of all, international Courts and Tribunals are reluctant to get involved in such expensive activities, since they might unduly stretch the length of the case. Second, international judicial bodies, unlike the Trial Smelter Arbitral Tribunal, are usually called to decide point of law.
The other peculiarity of the dispute concerns the role played by the non-state entities. While the Bering Sea Fur Seals dispute arose out of acts committed by a state (U.S. Customs revenue cutters,) which purportedly violated the sovereignty of another (vessels flying the Union Jack), in the case of the Trail Smelter the offence was committed by a private corporation (CM&S) against the property of individuals (farmers in Stevens County). States were not directly involved either in carrying out the unlawful act or in suffering its consequences.66

The Trail Smelter Award has been cited so often by publicists that the rule and principles referred to constitute the teachings of the most highly qualified publicists of the various nations. Since the states have accepted the rules and principles stated, they constitute the opinio juris and because there has been no conflicting State practice, they actually are part of international customary law. The Trail Smelter Award has contributed significantly to the development of international environmental law.67

The Trail Smelter Award has established that States have the right to be free from established injury of a serious consequence. However, what establishes an injury of a serious consequence has not been defined. Technical and quantitative environmental norms, the so-called ecostandards, are lacking in the field of international law.68

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66 The United States never argued nor the Tribunal feel the need to do so, that Canada had a duty to sanction CM&S behaviour. Moreover, while the US government claim compensation for the violation of US sovereignty, the claim had been disallowed by the tribunal. R.I.A.A., Vol. Ill, at 1932-1933.
67 Supra note 54 at 60.
68 Ibid.
7.4 Drawing Inspiration from Affluence: Scope and Potentiality of Climate Change litigation in India

7.4.1 Constitutional Impact of Climate Change

Climate change, if unmitigated, will directly and indirectly bear upon Article 21 rights that are guaranteed under the Indian Constitution. This is evident in some of the early predictions made by scientists and some preliminary observations of the possible climate-related occurrences. Some early observations of the effects of climate change are also becoming visible. In early 2007, an Indian farmer was reportedly forced to abandon his ancestral agriculture land because it was part of two islands submerged in The Sunderban region. Absent compensation and support from their government, the farmer moved to urban areas in search of alternative livelihood. The incident, which have attributed to climate change related sea level rise, portend the fate of some of the nearly 65 per cent of India’s population that is dependent on agriculture, forestry and fisheries for a living.

The Indian Constitution,...could serve as a potential basis for pursuing climate change litigation within India, not only because of its substantive provisions but also because the Supreme Court of India has facilitated the enforcement of fundamental constitutional rights by relaxing several formal procedural rules, which generally impedes access to Courts. Firstly, the Court has waived “ripeness” requirements for bringing an action, on a ground that in a country where most people are unaware of their rights, violations should be addressed before they occur. Thus, the presence of substantial threats

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69 Deepa Badrinarayana, “Indian Constitutional Challenge: a less visible climate change catastrophe” in Benjamin J. Richardson et al. (ed.), Climate Change and Developing Countries- Legal and Policy Challenges for the World Economy, 63-83 at 68 (2009).
70 Id., at 69.
71 Basheshar Nath v. Commissioner of Income Tax, AIR 1959 SC 149, holding that waiver of fundamental rights could not be upheld in a country where many people were ill-informed about their rights. Cited in supra note 69 at 70.
of climate-related violations should be sufficient to invoke the Court's writ jurisdiction under Article 32.72

Secondly, the Court has the authority to determine whether an injury has occurred, without relying on statutory enactments. Further, petitioner need not to satisfy any additional standing requirements such as causation and redresability (i.e., the remedy). Further, any person with 'sufficient interest' in helping poor and vulnerable sections of the population can seek judicial review. In the alternative, the Court can assume suo mottu jurisdiction by treating newspapers reports or letters as writ petitions. Finally, the Court can provide broad remedies; it can issue a writ of mandamus not only ordering the government to perform non-discretionary functions, or enjoining it from performing statutorily prohibited actions, but also requiring it to perform discretionary functions. The judiciary could also issue 'continuing mandamus', obliging the government to take specific actions and report progress on a regular basis.73

This unique alignment of procedural flexibilities and substantive rights that will be affected if climate change is not mitigated provided a sound basis for pressing forth a constitutional rights violation argument in the Indian context.74

7.4.2 Scope of Nuisance Related Climate Change Cases in India

In India, public nuisance so far has covered issues ranging from sewage cleaning problem to brick grinding operations, from hazardous waste management to factories untreated effluent discharges. But climate change is still unexplored. It has to be further understood that in liability claim proceedings based on nuisance or negligence arising out of global warming, the plaintiff always faces problem to establish

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72 Ibid.
73 Ibid.
74 Ibid.
his standing because it is extremely difficult to set up a casual connection between the injury suffered by the plaintiff and defendant’s emission of greenhouse gases.75

Also, remedies available in India for public nuisance, in general, are impressive. Section 268 of IPC, 1860 provides the definition of public nuisance. According to the section “a person is guilty of a public nuisance who does any act or is guilty of an 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 occasions to use any “public right”. 76 It again provides that “a common nuisance is not excused on the ground that it causes some convenience or advantage”. Persons who conduct ‘offensive’ trade and thereby pollute the air, or cause loud and continuous noises that affect the health and comfort of those dwelling in the neighbourhood are liable to prosecution for causing public nuisance. This, however, is less attractive because the penalty for this is merely Rs. 200, which makes it pointless for a citizen initiate a prosecution under section 268 of IPC, by a complainant to a magistrate.77

A much better remedy is available under Section 133 of the Code of Criminal Procedure, 1973 which deals with the Conditional order from the magistrate for removal of nuisance. This section provides an independent speedy and summary remedy against public nuisance.78 In the famous judgement of Municipal Council, Ratlam v.

75 Supra note 8 at 52.
76 Section 268 of Indian Penal Code, 1860.
77 Supra note 10 at 87.
78 Id., at 112.
Vardichand,\textsuperscript{79} the Supreme Court of India has interpreted the language of Section 133 of CrPC as mandatory. Once the magistrate has before him the evidence of public nuisance, he must order to remove such within a specified time. This case was decided in relation to water pollution where the Court directed the municipality to take immediate action to remove the nuisance. The same principle can also be applied in case of air pollution and it is not uncommon for the Court in India to come down heavily on industries for polluting air.\textsuperscript{80}

Same can also be said about action for negligence that may be brought to prevent greenhouse gas emission. In an action for negligence, the plaintiff must show that the defendant was under a duty to take reasonable care to avoid the damage complaint of and the defendant has made a breach of that duty resulting in the damage of the plaintiff.\textsuperscript{81}

An act of negligence may also constitute a nuisance if it unlawfully interferes with the enjoyment of another's right in land. It may also breach of the rule of strict liability if the negligent act of the defendant allows the escape of any dangerous thing which he had brought on the land. Establishing casual connection between the negligent act and the plaintiff's injury is probably the most problematic link in pollution cases\textsuperscript{82} and in climate change matter it is even more difficult because of uncertainty of scientific data.

Further, looking into some of the environmental legislations, there are some provisions that can be very well used by the plaintiff in climate change litigation. Needless to mention here that all these

\textsuperscript{79} AIR 1980 SC 1622.
\textsuperscript{80} Supra note 8 at 55.
\textsuperscript{81} Ibid.
\textsuperscript{82} Supra note 10 at 100.
provisions may be used by the prospective litigants to bring actions for damage suffered on property or health by industrial activities. Moreover, establishing casual connection between damage and emission by industries will be much easier if the Court look in to the existing emission norms for different localities set by the government under various environmental statues.\textsuperscript{83}

\textbf{7.5 Role of Judiciary in India to Control Atmospheric pollution}

The Indian judiciary has not got an opportunity till now to address the problem of climate change through its pronouncements but in number of occasions judiciary got a opportunity to address this menace though indirectly, which shows that while deciding any land marking case the concern about the problem of climate change is in the mind of judiciary. Be it a case of accidental gas leakage or continuous emissions of poisonous gases from vehicles and industry, environmental protest is increasingly becoming more strident. As the executive has repeatedly failed to secure environmental safety and protection, people seek redressal from the judiciary.\textsuperscript{84}

"The failure on the part of the government to respond to the emerging crisis by enacting appropriate laws and implementing them, has made judicial intervention to lay down basic principles of environmental matter crucial", says Justice P N Bhagwati, former Chief Justice of the Supreme Court.\textsuperscript{85}

The Supreme Court gets deeply involved with its most significant air pollution cases of the decade: The public interest litigation on air pollution in the Taj Trapezium filed in 1984 and the

\textsuperscript{83} Supra note 8 at 57.
\textsuperscript{85} Ibid.
air pollution case in Delhi filed in 1985 has been the focus of one of the most long drawn legal battles over air pollution in the country. In *M.C. Mehta v. Union of India*, \(^{36}\) (Taz Trapezium Case), in this case according to petitioner, the foundaries, chemical/hazardous industries and the refinery at Mathura are the major sources of damage to the Taj. The sulphurdioxide emitted by the Mathura Refinery and the industries when combined with Oxygen – with the aid of moisture in the atmosphere forms sulphuric acid called “Acid rain” which has a corroding effect on the gleaming white marble. Industrial/Refinery emissions, brick-kilns, vehicular traffic and generator-sets are primarily responsible for polluting the ambient air around Taj Trapezium (TTZ). The petition states that the white marble has yellowed and blackened in places. It is inside The Taj that the decay is more apparent. Yellow pallor hue is magnified by ugly brown and black spots. Fungal deterioration is worst in the inner chamber where the original graves of Shah Jahan and Mumtaz Mahal lie. According to the petitioner The Taj a monument of international repute – is on its way to degradation due to atmospheric pollution and it is imperative that preventive steps are taken and soon. The petitioner has finally sought appropriate directions to the authorities concerned to take immediate steps to stop air pollution in the TTZ and save The Taj.\(^{37}\)

The court took serious note of this petition and as per the directions of the Supreme Court the National Environment Engineering Research Institute (NEERI) gave “Over-view report” regarding status of air pollution around the Taj in 1990. Relevant part of the report is as under:

\(^{36}\) AIR 1984 SC 734.
\(^{37}\) Id., at 736.
The sources of pollution, including small and medium scale industrial units, are scattered all around Taj Mahal. High air pollution load is thus pumped into the Taj air shed. Sudden rises in concentration level are often recorded in all directions in gaseous as well as particulate pollutant depending upon the local micro climatic conditions. On four occasions during the five year air quality monitoring, the 4 hrly average values of SO$_2$ at Taj Mahal were observed to be higher than 300 ug/m$^3$, i.e. 10 folds of the promulgated CPCB standard of 30 ug/m$^3$ for sensitive areas. The values exceeded even the standard of 120 ug/m$^3$ set for industrial zones. Statical analysis of the recorded data indicate that 40% (cumulative percentage level) has crossed the standard set for sensitive reporters/zones. The SPM level at Taj Mahal were invariably high (more than 200ug/m3) and exceed the national air quality ambient standards of 100 ug/m3 for SPM for sensitive locations barring a few days in monsoon months. Another study during 1985-87 brought to fore that the overall status of the ambient air quality within the trapezium has significantly deteriorated over the period.

The impact of the air quality on The Taj has been stated as under:
The rapid industrial development of Agra Mathura region has resulted in acidic emissions into the atmospheric at an alarming rate. This causes serious concern on the well being of Taj Mahal . . . . The gaseous pollutants being acidic in nature, significantly impact both the biotic as well as the abiotic components of the ecosystem like plants and building material like marble and red stone.\(^8\)

The comments of the Archaeological Survey of India as noticed in the Varadharajan Report are as under:

On the structural side, the Taj Mahal is in a sound State of preservation and the studies conducted so far also confirm the same. The only threat to the Taj Mahal is from the environmental pollution.\(^9\)

After careful examination of the two Varadharajan Reports (1978 and 1995) and the various NEERI reports placed on record, the court found that there is no contradiction between the two sets of reports. Accordingly, on April 11, 1994 the court passed the following orders:

... [t]he shifting of the industries from the Taj Trapezium has to be made in a phased manner. NEERI's report indicates that the maximum pollution to the ambient air around Taj Mahal is caused by the industries located in Agra...

\(^8\) Id., at 738.
\(^9\) Id., at 748.
therefore, as a first phase, take up the industries situated in Agra for the purposes of the proposed shifting outside Taj Trapezium. 

The Taj, apart from being cultural heritage, is an industry by itself. More than two million tourists visit the Taj every year. It is a source of revenue for the country. This Court has monitored this petition for over three years with the sole object of preserving and protecting the Taj from deterioration and damage due to atmospheric and environmental pollution. It cannot be disputed that the use of coke/coal by the industries emit pollution in the ambient air. The objective behind this litigation is to stop the pollution while encouraging development of industry. The old concept that development and ecology cannot go together is no longer acceptable. Sustainable development is the answer. The development of industry is essential for the economy of the country, but at the same time the environment and the eco systems have to be protected. The pollution created as a consequence of development must commensurate with the carrying capacity of our eco systems.

The precautionary principle and the polluter pays principle have been accepted as part of the law of the land.

In view of the above mentioned constitutional and statuatory provisions this court has no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country.

Based on the reports of various technical authorities mentioned in this judgment, court have reached to the finding that the emissions

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90 Id., at 749.
91 Id., at 761.
generated by the coke/coal consuming industries are air pollutants and have damaging effect on the Taj and the people living in the TTZ. The atmospheric pollution in TTZ has to be eliminated at any cost. Not even one per cent chance can be taken when human life apart the preservation of a prestigious monument like The Taj is involved. In any case, in view of the precautionary principle as defined by this Court, the environmental measures must anticipate, prevent and attack the causes of environmental degradation. The "onus of proof" is on an industry to show that its operation with the aid of coke/coal is environmentally benign. It is, rather, proved beyond doubt that the emissions generated by the use of coke/coal by the industries in TTZ are the main polluters of the ambient air.

The Supreme Court therefore, holds that the above mentioned 292 industries shall as per the schedule indicated hereunder change over to the natural gas as an industrial fuel. The industries which are not in a position to obtain gas connections – for any reason – shall stop functioning with the aid of coke/coal in the TTZ and may relocate themselves as per the directions given by use hereunder.92

Likewise, in a M.C. Mehta v. Union of India, (Oleum Gas Leakage Case),93 hardly had the people got out of the shock of Bhopal disaster when the major leakage of oleum gas took place from one of the units of Shri Ram chemicals in Delhi.In this case, the Supreme Court of India evolved a new principle of "absolute liability" which the English courts have not done. While evolving this new principle the supreme court of India observed:

92 Id. at 762.
93 AIR 1987 SC 965.
[W]here an enterprise in a hazardous or an inherently dangerous activity resulting for example, in the escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any exceptions which operates \textit{vis-a-vis} the tortuous principle of strict liability...\textsuperscript{94}

However, in this case after the court was satisfied that all the safety and control measures had been complied with by the management in satisfactory manner, the plant should be allowed to be restarted subject to certain conditions and as per the provisions of the Air (Prevention and Control of Pollution) Act, 1981.

The air pollution case in Delhi has moved toward directing specific laws and implementation. The significant principle that emerged from the case is Justice Rangnath Mishra’s observation in his ruling of November 14, 1990.\textsuperscript{95} He had observed:

\begin{quote}
Law alone...cannot help in resorting a balance in the biospheric disturbance. Nor can funds help effectively. The situation requires a clear perception and imaginative planning. It also requires sustained efforts and result-oriented strategic action.
\end{quote}

Despite this observation, subsequent Court orders have failed to force the executive to move towards imaginative planning.\textsuperscript{96} A review


\textsuperscript{96} Supra note 84 at 204.
of supreme Courts orders since 1991 shows that the Court has slowly moved from initial concern for policy matters to actual enforcement of laws in the subsequent years. Table 1 below shows the directions given by the Supreme Court to the government in relation to combating air pollution.\textsuperscript{97}

**Table 1**

<table>
<thead>
<tr>
<th>Date of Court Order</th>
<th>Orders and issues raised by the Supreme Court</th>
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<tbody>
<tr>
<td>November 14, 1990</td>
<td>Enforcement of norms which had not been notified; actual notification took place in 1991.</td>
</tr>
<tr>
<td>March 14, 1991</td>
<td>Establishment of committee under Justice K.N. Saikia to advise the Court on technical matters.</td>
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<tr>
<td>October 3, 1991</td>
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<td>December 6, 1991</td>
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<td>February 18, 1992</td>
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<tr>
<td>February 18, 1997</td>
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<tr>
<td>August 12, 1994</td>
<td>Introduction to unleaded petro and catalytic converters for new petrol drive cars.</td>
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<tr>
<td>October 21, 1994</td>
<td></td>
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<tr>
<td>March 28, 1995</td>
<td></td>
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<tr>
<td>February 9, 1996</td>
<td></td>
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<tr>
<td>February 14, 1996</td>
<td>Supply of petrol with low lead levels of 0.15 grammes per liter by December 1996. Introduction of unleaded petrol (ULP) in four metros in April 1995. Court takes a serious view of the removal of catalytic converters by vehicle owners.</td>
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\textsuperscript{97} Id., at 205.
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<tr>
<th>Date of Court Order</th>
<th>Orders and issues raised by the Supreme Court</th>
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<tbody>
<tr>
<td>May 9, 1996</td>
<td>Court is assured of increases in retail outlets for ULP in four metros. Court is assured that sulphur in diesel will be reduced to 0.5 per cent from 1 per cent by April 1996.</td>
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<tr>
<td>October 7, 1996</td>
<td>Government was asked to examine the proposal of using unleaded petrol in 2-3 wheelers without the use of catalytic converters.</td>
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<tr>
<td>November 8, 1996</td>
<td>Justice Kuldip Singh issued a suo moto notice to the Delhi government to submit an action plan for controlling the city's air pollution problem.</td>
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<tr>
<td>December 9, 1996</td>
<td>Pilot project on conversion of auto rickshaws to run on propane.</td>
</tr>
<tr>
<td>January 24, 1997</td>
<td>Discussed outlets for unleaded petrol and CNG.</td>
</tr>
<tr>
<td>February 14, 1997</td>
<td>Lowering of sulphur levels further from 0.5 per cent being examined by the Court. Pilot project for retrofitment of catalytic converters on in-use heavy duty diesel vehicles.</td>
</tr>
<tr>
<td>March 21, 1997</td>
<td>Discussed installation of propane dispensing stations.</td>
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<tr>
<td>August 11, 1997</td>
<td>In response to the Court directive, the Delhi government presented an action plan for combating air pollution in the city.</td>
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<tr>
<td>December 16, 1997</td>
<td>Directed the Government of India to set up an authority under the Section 3 of the Environment Protection Act, 1986, to protect and improve the quality of the environment in the National Capital Territory of Delhi.</td>
</tr>
<tr>
<td>July 28, 1998</td>
<td>Directed the Delhi Government to implement phasing out of old commercial vehicles in</td>
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<tr>
<td>Date of Court Order</td>
<td>Orders and issues raised by the Supreme Court</td>
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<tr>
<td>Delhi.</td>
<td>Implementation of directives to restrict plying of commercial vehicles including taxis, which are 15 years old by October 2, 1998.</td>
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<td></td>
<td>Enforcement of restriction on plying of goods vehicles during the day.</td>
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<td></td>
<td>Enforcement of ban on dispensing of loose 2T oils at petrol stations and service garages by December 31, 1998.</td>
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<tr>
<td></td>
<td>Augmentation of public transport to 10000 busses by April 1, 2001.</td>
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<tr>
<td></td>
<td>Replacement of all pre-1990 autorickshaws and taxis with vehicles running on clean fuel by March 31, 2000.</td>
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<tr>
<td></td>
<td>No eight year old buses to ply, except on CNG or other clean fuels from April 1, 2000.</td>
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<td></td>
<td>Entire city bus fleet to be steadily converted to single mode fuel on CNG by March 31, 2000.</td>
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<td></td>
<td>New inter State bus terminals to be built at every points in the north and southwest by March 31, 2000 to avoid pollution due to entry of inter State buses.</td>
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<td></td>
<td>Gas Authority of India limited to increase number of CNG supply outlets from 9 to 80 by March 31, 2000.</td>
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<tr>
<td></td>
<td>Automated inspection and maintenance facilities to be set up for commercial vehicles immediately.</td>
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<tr>
<td></td>
<td>Comprehensive inspection and maintenance programme to be started by transport department and private sector by March 31, 2000.</td>
</tr>
</tbody>
</table>

**Source:** State of India's Government, The Citizen's Fifth Report-I, Centre for Science and Environment, New Delhi, 205 (1999).
Till the middle of the year 1998 the role of the Supreme Court in the matter of resolving the problem of air pollution remained somewhat subdued. It was to a large extent explanatory, finding what went wrong where; persuading the people and the government to use unleaded instead of leaded petrol; trying alternative modes of relatively clean fuel by using either the technology of either catalytic converter or employing single fuel mode of CNG. On July 28, 1998 a bench of the Supreme Court consisting of A.S. Anand, J. (as he then was), B.N. Kirpal, J. And V. N. Khare, J., took a demanding decision in a case of M.C. Mehta v. Union of India and others, (CNG Case), on July 28, 1988, the white paper on environmental pollution published by the Government of India came to the studied attention of the Supreme Court. It proved to be an eye-opener in certain respects. Inter alia, it revealed that the vehicular pollution in Delhi contribute 70% of the air pollution as compared to 20% in 1970. In view of such findings certain major actions were recommended for implementation with a deadline of April 1, 2001. The Court, however, found that till date no concrete steps had been taken by the State administration in spite of the assurances held out by it in their affidavit filed on November 18, 1996. To the same effect was the finding of the report submitted by the authority appointed vide Gazette Notification, dated January 29, 1998. The Court rather felt ‘distressed’ at the apathy of the State administration by noting that it did ‘precious little’ to tackle the acute problem of vehicular pollution in Delhi despite the assurances held out to the Court through various affidavits filed by the competent officers.

For arresting the growing pollution of air, the Court directed the administration to take the following steps immediately:

(a) Implementation of directions to restrict plying of commercial vehicles including taxis, which are more than 15 years old, by 2nd October, 1998.

(b) Restriction on plying of goods vehicles during the daytime shall be strictly enforced by 15th August, 1998.

(c) Expansion of pre-mixed oil dispensers (petrol and 2T oil) shall be undertaken by 31st December, 1998.

(d) Ban on supply of loose 2T oils at petrol stations and service garages shall be enforced by 31st December, 1998.

In addition to the above, the Court also approved in its order of July 27, 1998 (of course in consultation with the counsels for the parties) the following measures proposed by the Bhure Lal Committee in its action taken report within a corresponding time frame:

(a) Augmentation of public transport (stage carriage) to 10,000 buses by April, 2001.

(b) Elimination of leaded petrol from NCT Delhi as proposed by the Authority and agreed to by the Ministry of Petroleum and Natural Gas by September 1, 1998.

(c) Supply of only pre mix petrol in all petrol filling stations to two stroke engine vehicles by December 31, 1998.

(d) Replacement of all pre-1990 autos and taxis with new vehicles on clean fuels by March 31, 2000.

(e) Financial incentives for replacement of all post-1990 autos and taxis with new vehicles on clean fuels.
(f) No buses older than 8 year old to ply except on CNG or other clean fuels by April 1, 2000.

(g) Entire city buses fleet (DTC and private) to be steadily converted to single fuel mode on CNG by March 31, 2001.

(h) New ISBT’s to be built at entry points in North and Southwest to avoid pollution due to entry of inter-State buses by March 31, 2000.

(i) GAIL to expedite and expand from 9 to 80 CNG supplies outlets by March 31, 2000.

(j) Two independent fuel testing labs to be established by June 1, 1999.

(k) Automated inspection and maintenance facilities to be set up for commercial vehicles in the first phase with immediate effect.

(l) Comprehensive I/M programme to be started by transport department and private sector by March 31, 2000.

(m) CPCB/DPCC to set up new stations and strengthen existing air quality monitoring stations for critical pollutants by April 1, 2000.

The Court administered “a strong caution to all concerned that failure to abide by any of the directions hereinabove noticed would invite action under the Contempt of Courts Act against the defaulter.

Administration of such a ‘strong caution’ eventually resulted, in our view, in precipitating the whole situation. As a result, there came to be noticed visible changes on many fronts in due course. However,
despite the directions given in the above case the response of the Delhi administration remained that on ‘I care little!’.... With a view to save... a situation petition started pouring in before the Supreme Court as the deadline approached. And the Supreme Court refused to budge or move. Out rightly, it refused to grant any blanket extension of the date line of March 31, 2001. It was only after taking note of the submission of the bar, pleading to mitigate, to whatever extent possible, the hardship that the commuter public would have to put to, particularly the school going children that on 26th March, 2001 the Supreme Court eventually agreed to grant certain relaxations.\textsuperscript{100}

Finally, in public interest and with a view to mitigate the sufferings of the commuter public in general and schoolchildren, in particular, the Court made inter alia the relaxation.\textsuperscript{101}

Out of this mazy mix-up emerged certain gains, albeit latent, that were conducive to the control of air pollution....It led to change the ‘mind set’ of the people concerned...It instantly made them realize that they could not be allowed to pollute air with impunity. Norms laid down by the apex Court for the prevention or at least for the minimization of air pollution had to be observed. All connected or related people...must proclaim to preserve and protect the environment. They must solemnly affirm (through sworn affidavits!) to switch over to CNG mode by the stipulated date... Such was the deep physiological impact of the Supreme Court expressed on 26\textsuperscript{th} March, 2001 as made many people rush to the registry of the Supreme Court.\textsuperscript{102}

\begin{thebibliography}{99}
\bibitem{100} Supra note 98 at 56.
\bibitem{102} Supra note 90 at 56-57.
\end{thebibliography}
From time to time the Supreme Court has issued various directions to regulate the supply of CNG in Delhi. For example, directions were issued to publish notice that there is no limitation on taking delivery of any amount of CNG, i.e., up to customer's fullest capacity. The Supreme Court has also issued guidelines and necessary orders for the supply of quality high speed diesel (HSD) and Petrol in NCR, Delhi and asked the additional solicitor General to inform the Court as to when the rest of country will be brought to the same level as Delhi. Directions were also issued that no medium or light good vehicles which do not comply to Euro-II norms or not using low sulphur or low benzene fuel will ply on inter-state routes by passing through Delhi.

However, unlike the many parts of the world especially U.S., Australia etc. Indian judiciary yet has not got an opportunity to address the cases which specifically deals with the problem of climate change. Though judiciary in India plays a proactive role in solving the various environmental problems. While pronouncing two of the significant air pollution cases of the decade i.e. Taz trapezium and Oleum gas leakage case it becomes evident that the framers of the judgement were conscious of the emerging problem of climate change and that is the reason the Court decided the case of TTZ keeping in mind the atmospheric problem which is causing damage to this historic monument. The Court went on to opine that:

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104 Supra note 94 at 192.
"The atmosphere pollution in the Taz Trapezium zone has to be eliminated at any cost..." 106

In deciding another landmark case of Banawasi Seva Ashram v. State of Uttar Pradesh and others,107 the Court while tried to balance between the twin needs of development and the traditional rights of the forest dwellers thus harping the concept of sustainable development also laid down the emphasis on the importance of forests. The Court was of the opinion that:

Indisputably, forests are a much wanted national asset. On account of the depletion thereof, ecology has been disturbed; climate has undergone a major change and rains have become scanty. These have long term adverse effects on national economy as also on living process.

7.6 Assessment of various Cases on Atmospheric Pollution

The judiciary in India have not get an opportunity to address any litigation which can specifically deal with climate change. However, in the past few years judiciary decided few landmarking cases relating to air pollution caused by industrial indiscipline. The historical and landmarking are mainly the Taz Trapezium case, Oleum gas leakage, Bhopal gas leak disaster and CNG cases. The role of judiciary in setting up environmental jurisprudence and norms is very innovative. It is only in Oleum gas leak case that the supreme court of India reiterated that the old principle of “strict liability” is no more applicable for the Indian

106 M. C. Mehta v. Union of India. AIR 1997 SC 761.
107 AIR 1987 SC 374.
conditions and accordingly Supreme Court evolved a new principle of “absolute liability” which is not subject to any exceptions as in the case of “strict liability” principle which is subject to exceptions.

The major tool in the hands of courts in India is granting compensation for any industrial wrongs to the victims of industrial accidents or to the sufferes. The purpose of providing compensation is to serve as a deterrent measure.

The courts always take a stance that the measure of compensation must be co-related to the magnitude and the capacity of the enterprise. In *Union Carbide Corporation v. Union of India*, the then Chief Justice Ranganath Misra, in his concurring judgement observed that the view of the Supreme Court in *Oleum Gas Leakage Case*,...that in toxic mass tort actions arising out of hazardous enterprise, the award for damages should be proportional to the economic capacity of the offender cannot be pressed to assail the settlement reached in Bhopal disaster case. In case of mass tort action, like this, quantification of damages can be had without attaching much importance to individual injuries. It was further observed that if the settlement fund is exhausted, the union of India should make good the deficiency.

However, after 21 years of Bhopal disaster the victims are still not get their due and they are struggling for justice from one of the most disastrous industrial accident in the environmental history. As Rosencranz had aptly said that Bhopal is just a window and one can see a whole India through it. Unless and until the role of the government is sluggish in creating concrete, concerted laws and

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108 Supra note 94 at 27.
110 Supra note 94 at 27.
above that their proper implementation and also the awareness among the masses all the best legal pronouncements will remain in books only. No doubt, the court tried their best by applying the law available to them but looking at the level of increasing air pollution in India and increasing concern of the climate change as a new and the gravest environmental problem which the humanity likely to face government need to be more careful about the emission norms and stringent penalties are required, to mitigate the problem of climate change and various other forms of atmospheric pollution.

In *Taz Trapezium* case as well as CNG case the Supreme Court address the inadequacy of urban infrastructure as well as the high air pollution load which pumped into the Taj air as well as in the air of Delhi from vehicular pollution. In these cases, the Supreme Court took a strict stance for not complying with the orders of the court. The objective behind these judgements is to stop the air pollution as well as to encourage development of industry. The Court lays down that industrialisation is important for economy of the nation but also give equal importance in its judgement on the protection of ecology and environment. What court tried to give message through its judgement that in the name of development industrial indiscipline will not be allowed.

The Court while delivering a judgement on TTZ case hold that precautionary and polluter pays principles are part of the environmental law of the country.

Looking at the above scenario and the active role of judiciary in India in addressing the environmental problems it will not be taken as a surprise if the judiciary will get an
opportunity to address climate change related litigations in India too.

7.7 Concluding Observations

The increasing number of climate change litigation has made it one of the up-and-coming environmental issues in recent time. Climate change litigation is marred by the scientific, economic, political questions which are considered as significant impediments in devising opposite litigation strategy. The world is truly divided when it comes to the attitude of the Courts in encouraging this type of cases till date. In India climate change litigation is yet to take off. Climate claims will have a strong footing in India in years to come depending upon working out an objective legal strategy based on some of the common law principles like public nuisance and negligence. Although, for critiques climate change litigation based on common law theory may still appear uncertain, the potentiality of such suits cannot be overlooked in providing the new dimension in entire climate change discussion.\textsuperscript{111}

From above observations we can say that Supreme Court has played a catalytic role while addressing the environmental problems and the Judiciary is conscious of the impacts and effects of climate change and also India's vulnerability to climate change and whenever got an opportunity Courts in India are pointing that climate change is happening and it will not be taken as a surprise if in near future Indian judiciary will specifically decide the litigation on climate change. However, lessons need to learn from the experience of rest of the world in dealing with climate change litigation especially on scientific uncertainty.

\textsuperscript{111} Supra note 8 at 45.