

Climate Change Related Legal Issues

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CLIMATE CHANGE RELATED LEGAL ISSUES (I) - OVERVIEW

I. INTRODUCTION

If we believe that climate change related problems are in the future, we are ignoring the present. The climate has changed (in some aspects, irreversibly), and is continuing to change faster than we can think or act. Climate change related problems are a present reality. The risks arising from climate change are multifarious, and the stakeholders are many.

Since 2016, the World Economic Forum (WEF) has been listing climate change - including extreme weather events, failure of climate change adaptation and natural catastrophes - among the top 10 global risks for businesses. In its 2022 Global Risks Report, the WEF provides that over a 10-year horizon, the health of the planet dominates concerns. Environmental risks are perceived to be the five most critical long-term threats to the world as well as the most potentially damaging to people and planet, with "climate action failure", "extreme weather", and "biodiversity loss" ranking as the top three most severe risks.

Due to climate change, businesses face risks and uncertainties in all realms – physical operations, availability of natural resources, change in markets and supply chain, regulatory changes, contractual rights and obligations, damage, insurance, and goodwill among others. A large risk in a business' risk portfolio is, and will be, that of climate change related disputes. New finance frameworks and emerging developments in climate change related technologies also add to business risks.

The circumstances arising out of climate change have spurred thousands of disputes across the globe. Key stakeholders in such disputes include the general human society, vulnerable communities, political leaders, businesses, industry bodies, commercial contracting parties, investors, funders, shareholders, state governments and state entities, among others.

Businesses that are often in a better position to mitigate, transition and adapt to the impact and growing demands of climate change are those that are cognizant of climate change impact, scrutinize their investment opportunities, seek proper funding, tailor their internal policies and transaction documents, comply with applicable laws and regulations, manage risk, and plan their approach to dispute resolution. These practices help them safeguard against business and reputational risks.

In this series on Climate Change *related Legal Issues*, we attempt to identify risks arising from climate change for businesses and states, and attempt to prepare them by delivering solutions to manage climate change related disputes risks. The present article aims to familiarize commercial parties with climate change realities, emerging developments in climate finance and climate technologies, and management of disputes risks.

To watch our video podcast on this topic, please click [here](#).

II. CLIMATE CHANGE & GLOBAL WARMING

Climate refers to the long-term regional or even global average of temperature, humidity and rainfall patterns over seasons, years or decades. Climate change is a long-term change in the average weather patterns that have come to define Earth's local, regional and global climates.¹

Changes observed in Earth's climate since the pre-industrial period (i.e. between 1850 and 1900) are primarily driven by human activities such as fossil fuel burning. This increases 'greenhouse' gas levels i.e. levels of carbon dioxide, methane, nitrous oxide and fluorinated gases² in Earth's atmosphere. When solar radiation passes through the atmosphere, most is absorbed by the Earth's surface. The surface warms up and re-emits some energy as infrared radiation. A portion of the radiation escapes back into space.

However, greenhouse gases in the atmosphere trap the remaining radiation and re-emit it in all directions of the lower atmosphere. This is called the 'greenhouse effect' – a phenomenon that incrementally warms the atmosphere, land and oceans. This rise in temperature is commonly known as 'global warming'. It is most commonly measured as the average increase in Earth's global surface temperature.

Since the pre-industrial period, human activities are estimated to have increased Earth's global average temperature by about 1 degree Celsius (1.8 degrees Fahrenheit), a number that is currently increasing by 0.2 degrees Celsius (0.36 degrees Fahrenheit) per decade.

Between 1990 and 2015, global emissions of all major greenhouse gases have increased manifold. Carbon dioxide (which accounts for nearly three-quarters of total global emissions) increased by 51%; methane increased by 17%; nitrous oxide increased by 24%; and emissions of fluorinated gases more than tripled. In 2015, human activity

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resulted in worldwide net emissions of approximately 47 billion metric tons of greenhouse gases - representing a 43% rise from 1990.³

In 2018, the Intergovernmental Panel on Climate Change (IPCC) provided critical insights into the impact of greenhouse gas emissions on global warming, and the urgent need to mitigate, adapt and transition to limit global warming to 1.5 degree Celsius. Beyond this temperature, the planet can become dangerous for life.⁴

However, by 2018, human activities had already caused approximately 1°C of global warming above pre-industrial levels. A February 2022 report of the IPCC suggests that at the current rate, global warming is likely to reach 1.5°C in the near term. 'Near term' is defined as '2021 – 2040'. We are already in the danger zone.

The past few years have been punctuated with several shocking climate events, leading to loss of several ecosystems, biodiversity, life and livelihoods. Nine of the 10 warmest years since 1880 have occurred since 2005, and the 5 warmest years on record have all occurred since 2015. Last week, in an unusual historic event, the Earth's poles faced extreme heat simultaneously. Antarctica and the Arctic Circle were 70 degrees Celsius and 50 degrees Celsius warmer than normal.

Records provide evidence of key indicators of climate change, such as global land and ocean temperature increases; rising sea levels; ice loss at Earth's poles and in mountain glaciers; frequency and severity of extreme weather conditions such as hurricanes, heatwaves, wildfires, droughts, floods and precipitation; changes in cloud and vegetation cover, among others. We are in the thick of climate change and moving fast towards a precipice.

III. EMERGING DEVELOPMENTS:

A. Climate Change related disputes

Climate change disputes can be broadly defined as disputes arising out of natural climate events, human activity, or violation of international or national environmental laws and regulations. The circumstances arising out of climate change have already spurred thousands of disputes across the globe, involving several stakeholders.⁵

Commonly, parties involved in climate change related commercial disputes are private contracting parties, state governments, state entities, investors, and shareholders of companies. For ease of understanding, climate change related disputes can be categorized into the following. We will deal with each of these categories in detail in this series.

i. Contractual disputes between private parties

Performance under contracts may be impacted by climate related natural events. This could result in disputes involving force majeure, frustration, termination of contracts, admissibility of claims, repudiation, re-negotiation, damages, insurance claims etc. A commercial party could initiate litigation or submit a dispute to arbitration depending on the terms of the contract or mutual agreement of the parties.

Performance may also be impacted by climate related action and policies. Violation of environmental laws by parties, change in laws and regulations, introduction of policies requiring businesses to transition and adapt to alternate practices - could give rise to claims involving breach of contract, breach of representations and warranties, allocation of liability, indemnity etc.

ii. Disputes between states

A State may suffer environmental harm due to human activities undertaken in another state, or due to lack of action by a State to prevent damage arising from its actions in another State. This could result in disputes involving violation of territorial sovereignty, environmental agreements or arrangements entered into between the States, or international obligations agreed under regional or multilateral treaties.

iii. Disputes between investors and state governments / state entities

A foreign investor can initiate action against A State for adopting arbitrary environmental measures, changing environmental laws, revoking licenses or incentives, violating due process, breaching legitimate expectations, or according discriminatory treatment to foreign investors. Depending on the facts and circumstances, action could be initiated under the national laws of the State, a bilateral investment treaty, a multilateral or regional agreement, or free trade agreement with an investment chapter.

At the same time, a State can enforce compliance with environment-related obligations in treaties, exercise its margin of appreciation, balance investor expectations against regulatory chill, , claim preclusion of liability under the treaty, or can initiate counter-claims against investors in certain situations.

iv. Other non-contractual disputes – Shareholder actions etc.

All disputes that are not strictly governed by private contracts or international agreements fall under this category. This includes claims by individuals affected by state inaction to adopt or enforce environmental laws, state response to environmental complaints, corporate action and operations affecting certain communities and surroundings, or shareholders enforcing corporate commitments and obligations relating to the environment among others.

v. Potential disputes – New trends

As human society, governments and companies gear up to mitigate, adapt and transition in the wake of climate change, existing legal relationships will witness change and new legal relationships will be created . The novelty of new and uncertainty in the old is bound to give rise to disputes.

With climate change, there has been a surge in certain types of environment-related agreements, such as funding, technology transfer, licensing, commissioning, de-commissioning, and insurance agreements. Climate change investments have increased. New types of funds and agreements have emerged, such as Sustainable Investment Funds, Green Climate Fund Agreements and Emission Trading agreements. New cross-sectoral partnerships are being forged. Companies and governments are harnessing the power of technology and finance to adapt and

transition to greener practices. Hence, as businesses adapt, transition, innovate and strategize on legal relationships, they will invariably face a large risk of new types of disputes.

Further, some sectors are more vulnerable to climate change – such as agriculture, construction, energy, mining, manufacturing and processing and transport. Resultantly, policies mandating transition to adapt to climate change will abound in the sectors most impacted by climate change. Such transitions and adaptations could further increase the risk of climate change related disputes for parties operating in these sectors.

B. Climate Technologies

Climate technologies perform the task of reducing Greenhouse Gases (“GHGs”) and help transitioning into modes of using renewable resources like solar energy, wind energy and hydropower. Examples range from sophisticated, modern technologies like drought-resistant crops, sea walls etc. to ‘softer’, skill-related knowledge like use of energy-efficient practices in the industrial sector, or better irrigation management in the agricultural sector. Manufacturing, transfer of know-how and local capacity to enable the workforce to generate technology takes center-stage in climate technologies.

The importance of transferring climate technologies across borders, from developed to developing countries, emerged in the 1992 Rio Summit as well as in its related conventions like the United Nations Framework Convention on Climate Change (“UNFCCC”). Provisions regarding transfer of technologies were incorporated into the UNFCCC wherein it was noted that developed countries would take practicable steps to promote, facilitate and finance the transfer or access to climate technologies to other countries.

While activists, investors and commercial entities have started to take note of the urgency of transitioning into using climate technology, effecting its transfer through legal agreements becomes a matter of thoughtful drafting tailored to promote the efficacy of the transactions in terms of the environmental impact. Certain issues associated with negotiating transfer arrangements involving climate technologies include the structure of licensing intellectual property, whether “broader” or “narrower” patents should be provided to the licensees in order to fully realize the potential of the concerned technology; clauses governing supply chains of the relevant technologies; breach and termination clauses that may occur due to some of these technologies being in a nascent experimental stage; and dispute resolution procedures that ensure that dispute management mechanisms do not become a negative environmental externality to the transaction.

C. Climate Finance

There has been a surge in interest from companies and some major investors in adopting sustainable business plans that are compatible with a 1.5°C future, as decision-makers recognize the vast growth opportunities ahead in the global transition to a decarbonized economy by 2050.⁶

Rise of green projects and initiatives - aimed at reducing emissions, enhancing sinks of greenhouse gases, and reducing vulnerability and increasing resilience of human and ecological systems to negative climate change impacts - has spurred local, national and international funding to mitigate and adapt to climate change. Companies engaged in such projects enter into funding agreements with financial institutions, multilateral banks and special climate change related funds such as the Green Climate Fund, Special Climate Change Fund, Least Developed Countries Fund to obtain funding for special purposes. These funds have policies, priorities and eligibility criteria for funding. Major pensions funds and investments firms, who acknowledge that their portfolios are now more aligned with a 3.5°C future, are now starting to move at scale by working with the asset managers and companies in their portfolios to decarbonize and align with net zero targets.⁷

With increase in climate finance, chances of breach of funding agreements also rise. Several multi-development banks impose stringent terms and conditions that could be difficult to negotiate and navigate. Nevertheless, there is potential to mitigate risk and incorporate safeguards for businesses that seek climate funding. It is necessary to carefully review and negotiate the terms of funding agreements. (Please watch this space for our detailed piece on climate finance.)

IV. CONCLUSION

Climate change generates impacts and risks that may result in grave harm and losses.

While commercial parties align their internal policies and agreements with climate change related developments, they must also anticipate and prepare for risks arising out of climate change related legal issues. With heightened economic uncertainty and increasing environmental threats, understanding of risks is critical, and there is an urgent need for all stakeholders to prevent, mitigate, adapt and transition to climate-resilient practices.

In transactions involving climate technology, climate finance, and other climate change related contracts, parties will need to understand the law that governs their rights and obligations, and choose mechanisms, institutions and rules to resolve the disputes effectively and efficiently. This will depend on several factors such as the legal relationship between parties, nature of the dispute, underlying issues, law applicable to the dispute, required relief, loss suffered, stakes involved and required relief among others. Accordingly, parties can be guided to adopt the appropriate strategy and mechanism to climate change related risks.

Most changes impacting society and its constituents are capable of being managed by the rule of law. As we face climate change, as lawyers, we are best placed to create a global legal ecosystem that works together with its constituent stakeholders to prevent, mitigate, adapt, transition and create resilient strategies to address climate change.

In the next article in this series, we will evaluate climate change related contracts and disputes in detail.

– Kshama A. Loya & Vyapak Desai

You can direct your queries or comments to the authors

¹ <https://climate.nasa.gov/resources/global-warming-vs-climate-change/>

² Hydrofluorocarbons, perfluorocarbons, sulphur hexafluoride, and nitrogen trifluoride

³ <https://www.epa.gov/climate-indicators/climate-change-indicators-global-greenhouse-gas-emissions>

⁴ IPCC Special Report on Global Warming of 1.5 degree Celsius

⁵ <https://www.nortonrosefulbright.com/en-in/knowledge/publications/b4cbedfe/climate-change-and-sustainability-disputes-international-arbitration-perspective>

⁶ <https://www.un.org/en/climatechange/raising-ambition/climate-finance>

⁷ Ibid.

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