

FUNDAMENTAL CHARACTERISTICS AND LIMITATIONS OF INTERNATIONAL CLIMATE CHANGE LEGAL ORDER AND NATIONAL LEGAL INITIATIVES IN AUSTRALIA AND NEW ZEALAND

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ABSTRACT

In mitigating the adverse impact of global climate change, the role of binding international norms and effective national legal response addressing climate change is highly indispensable. As the impact of climate change transcends national borders, the development of international law took precedence albeit the specific challenges faced in seeking uniform undertaking of binding obligations among sovereign states. However, the development of international normative order governing climate change has only been gradual, and it continues to evolve. Consequently, national responses to climate change have been quite fragmented, making it difficult to assess how international climate change efforts are effectively reflected in a domestic context. The present paper, with an objective to investigate the scope and limitations of national implementation of international climate change mitigation norms, reviews the evolution and transformation of specific legal standards addressing climate change in distinct legal regimes. The paper critically examines the key international legal instruments on climate change and identifies the fundamental legal obligations emerging from those instruments to determine whether they have the potential to mandate sufficient national response measures. The paper reviews some of the key domestic laws and regulations aiming to mitigate the effects of climate change in two specific jurisdictions in the Pacific, namely Australia and New Zealand, to examine whether the relevant domestic regimes are progressive and responsive to international norms. The concluding part of the paper underlines the important findings regarding the international normative development and the transforming role of national legislative response and emphasizes the importance of national judicial activism in interpreting and enforcing the normative standards to ensure that climate justice is upheld in every possible opportunity.

Keywords: Climate Change Mitigation, International Law, National Regulatory Standards, Australia, New Zealand.

Introduction

In recent decades, among various environmental risks of global magnitude, the potential adverse impact of climate change has triggered the foremost concern among international community. Despite the prime concern on climate change, the response measures have remained lacklustre in certain countries, which could be attributed to various conflict of interests. Among them, the fundamental division surrounding the principle of common but differentiated responsibilities (CBDR) demanding developmental equity has been the major cause of some dreary response to climate change. Although this phenomenon could be witnessed in various frontiers of climate change response, the present paper primarily questions the drive and determination of sovereign states in developing an effective normative order addressing climate change. To assess the will of the states in this regard, it is relevant to first examine the debates surrounding the treaty making in climate change as well as the scope and limitations of relevant international instruments resulting from global climate change negotiations.

Secondly, the extent to which specific states have taken efforts to introduce domestic legislation to implement their climate change related international obligations or to reflect evolving international legal standards addressing climate change is an important element to be assessed to determine how international norms have impacted individual state response. The present paper primarily examines the key characteristics and the evolution of international norms governing climate change to determine how they seek to achieve a fine balance between conflicting interests between sovereign states. It identifies some of the fundamental divisions and limitations evident in the formation and undertaking of relevant international obligations. Then to determine the nature and effectiveness of national legal response in implementing international norms, the present paper systematically reviews all major legislative enactments addressing climate change in the two developed country jurisdictions of Australia and New Zealand, which have undertaken the full range of binding international obligations. The paper concludes with a comparative assessment of the findings pertaining to the international norms and the national implementation in Australia and New Zealand and underlines the importance of the role of national judicial institutions in upholding climate justice. The major contributions of the present paper are the identification of limitations and challenges of key climate change related international legal instruments and the determination of whether they have stifled or stimulated effective national response in specific jurisdictions.

Key Characteristics and Limitations of the International Regime Governing Climate Change.

In the last two decades of twentieth century, concerns of increasing emission of greenhouse gases resulting from economic and developmental activities of human beings causing adverse impact on global climate patterns started to emerge. Although, the evidence of adverse impact did not reveal any alarming climate change patterns until then, the potential for substantive adverse impact in the future indicated the inevitable need to address the emerging threat. In addition to the new initiatives addressing climate change in various disciplines, the international community started to voice the need to develop international legal and regulatory standards to deter the worsening of global climate.

One of the earliest initiatives relating to the climate change concern was proposed in 1985 at the United Nations Environmental Program (UNEP) meeting, which recommended a specific program on climate change involving governments,

scientific community and other international organizations including World Meteorological Organization (WMO) and the UNEP¹. Some of the concrete international legal initiatives made in a related field of environmental concern pertaining to Ozone depletion also created the atmosphere for the international community to continue to focus on climate change threats. The successful conclusion of the 1985 Vienna Convention focusing on the Ozone layer protection and its related protocol in 1987 focusing on Ozone depleting substances, no doubt has brought the issue of the potential risks of global warming in limelight. The larger international community then took cognizance of the climate change concern by virtue of a General Assembly resolution in 1988. The government of Malta introduced a proposal in the General Assembly calling for the need to initiate conservation of climate, and interestingly, as part of the common heritage of mankind.

In response to the proposal, the General Assembly² passed a resolution highlighting its concern regarding the activities triggering global climate change and its potential to cause adverse economic and social impact. The resolution also expressed its concern regarding growing greenhouse gas concentrations and its potential in ultimately causing sea level rise. However, the Assembly resolution admitting that it is necessary to carry out further research and scientific studies regarding the factors and the sources of climate change shows the early emergence of the concerns of 'scientific uncertainty' surrounding the issue. Despite the prevailing uncertainty, the resolution revealed two major convictions pertaining to the impact of climate change namely the impact on development and the impact on the whole humanity. Emphasizing the significance of the need to combat such impacts through a global framework, the General Assembly resolution recognized several key elements.

Reviewing some of those elements reveals the key goals and actions the international community in the early stages perceived as important to initiate a concerted global action against climate change. Firstly, it recognized that climate being inevitable to sustenance of life, its change is a common concern of mankind warranting a timely and necessary action of global scope. Secondly, it emphasized the importance of cooperation between relevant international organizations under the auspices of the UNEP in promoting a World Climate Program (WCP), with other relevant UN organs and programs according the same with a high priority. Thirdly, it endorsed the establishment of an intergovernmental panel on climate change (IGPCC) to provide necessary international scientific assessment of various impacts of climate change. In addition, it called upon the governments, international organizations and scientific institutions to prioritize climate change by undertaking action-oriented programs and research to promote the understanding of the causes and sources of climate change (a recommendation emanating out of the concern of scientific uncertainty discussed earlier), to identify the cause and effect of human activities upon climate and provide relevant human and financial support to sustain the global climate.

Moreover, it requested the WMO and UNEP to initiate action under the IGPCC to review the state of scientific knowledge of climate and its change, as well as existing studies on the social and economic impact of climate change. It also requested them to make recommendations on developing strategies addressing the adverse impact of climate change, identifying and strengthening existing international legal instruments relevant to global climate and identifying potential elements that could form part of any future international climate convention. The resolution also encouraged the convening of conferences on climate change and global warming to emphasize the need for a timely action on climate change and it called upon the governments and international organizations to collaborate in preventing detrimental effects on climate change and related activities affecting ecological balance. As could be seen from the founding UN General Assembly resolution on climate change, two specific legal initiatives were propounded among several other measures to effectively tackle the climate change related impacts.

In furtherance of the recommendation of the UN General Assembly resolution, an intergovernmental negotiating committee was subsequently established for the purpose of initiating the negotiating process towards the conclusion of framework convention on climate change. In addition, the IGPCC with the participation of scientists and experts from around the world started to produce periodical assessment reports on climate change along with relevant mitigating measures to tackle the impact of climate change. Despite the progressive start, a clear a division regarding binding obligations emerged in the actual negotiations of the climate change convention primarily between developed and developing countries. Due to the overwhelming opinion of the developing countries that the causes of climate change should be fundamentally attributed to the economic activities of the developed countries, they were unwilling to undertake specific obligations. However, certain consensual legal principles emerged from the negotiations that proved to be instrumental in establishing certain general obligations that mandated all states, irrespective of their developmental status, to introduce national level initiatives mitigating the causes of climate change and its effects. Although the developed countries were also equally concerned about the possible impact any international obligations could cause on their economic growth, ultimately subscribed to the consensual legal principles emerging from the negotiations and agreed to undertake specific climate change mitigating obligations.

The Divisions and Limitations in the Binding Obligations of the UNFCCC

The key legal principle of CBDR caused a bifurcation in undertaking of obligations in the UN Framework Convention on Climate Change (UNFCCC) in 1992, whereby the developed countries listed in Annex-1 of the Convention were obliged to undertake specific commitments to cut down on climate change emissions, while the developing country members only agreed to abide by certain general obligations arising from the Convention. A closer analysis of key legal provisions of the UNFCCC would reveal the dichotomy discussed above. Despite the apparent disparity in the undertaking of the obligations, it is arguable that the general obligations to undertake national programs to mitigate the cause of climate change and its effects established certain minimum

¹ For a succinct account of the early history of global climate change regime, see Daniel Bodansky, "The History of the Global Climate Change Regime" in Urs Lauterbacher and Detlef F. Sprinz (eds), *International Relations and Global Climate Change*, Cambridge: MIT Press, (2001) PP.23-40.

² For some interesting studies on the role of the Security Council in the context of the climate change see Shirley V Scott and Charlotte Ku (eds), *Climate Change and the UN Security Council*, Cheltenham: Edward Elgar, 2018.

standards in the fight against climate change³. Moreover, the establishment of such minimum obligations, along with the general principle of international law that parties to treaty should not act to defeat the purpose and objective of a treaty, have laid a foundation that climate cannot be taken for granted and the concerns of impact of climate change and its causes should not be ignored.

To determine how the division between developed and developing countries as well as the concerns of the sovereign states in undertaking international obligations regarding climate change held sway in the negotiations leading up to the Convention, a closer analysis of certain specific provisions of the preamble of the UNFCCC provides interesting insights. At the very outset, after acknowledging a common concern about climate change and its adverse effects as well as the nexus between human activities and greenhouse gas emissions, the preamble categorically asserts the distinct role of developed and developing countries. Two key points draw this distinction. Firstly, the shares of the developed country emissions contributing to the climate change, historically and currently, are categorically declared as the largest. Secondly, the shares of the per capita emissions in the developing countries are not only acknowledged to be low but also apposite to grow to meet the needs of their society and development. The culmination of this division could also be seen in the categorical acknowledgement that an appropriate and effective international response to climate change should be developed based on the CBDR of individual states depending on their respective capabilities and socio-economic conditions.

In addition to the clear divisions between the developing and developed countries, a closer assessment of the preamble reveals further issues forming the fundamental inhibitions facing global climate change action. The first and foremost in this regard pertains to the classic debate between development and environmental protection. While the preamble reiterated the sovereign right of individual states to exploit their resources in accordance with the UN Charter and international legal principles albeit it equally referred to the responsibility of the states to refrain from causing transboundary environmental harm. Another notable provision of the preamble that adds to the inhibitions facing action against climate change pertains to the clear acknowledgement of various scientific uncertainties surrounding the predictions of climate change and the pattern of its potential impacts. In addition, the preamble explicitly acknowledged that actions addressing climate change can be effective only if such actions are informed by relevant scientific, technical and economic considerations and are regularly subjected to re-evaluation based on any new findings in those three fields of considerations. Also, while emphasizing the significance of certain ecosystems serving as sinks and reservoirs of greenhouse gases, the preamble inevitably refers to the reassertion of sovereignty of states in international climate change cooperation.

Finally, it is relevant to note that the preamble also incorporates provisions addressing certain sensitivities developed and developing countries would typically face in introducing actions against climate change. While generally recognizing that actions designed to address climate change can be economically justified, it specifically acknowledged that the need for immediate action against climate change on the part of the developed countries could be designed in a flexible manner subjected to certain priorities and due consideration to factors related to greenhouse gas emissions and effects. Regarding the developing countries, the preamble specifically recognized the potential impact of the any climate change action would have on economies that are dependent on the production of fossil fuels and its use and exports. Moreover, the preamble recommended that such actions should be inconsonance with socio-economic development with due regard to the legitimate priorities of developing countries in achieving sustained growth and eradication of poverty as well as their access to relevant resources in achieving the development. It is obvious from above discussion of the diverse references in the preamble of the UNFCCC, that several inhibitions and predilections that continued to challenge the global concerted action against the adverse impact of climate change could be traced to the preamble of the very first international legal instrument that created binding obligations for sovereign action against climate change.

In addition to the various provisions of the preamble examined above, it is arguable that the dichotomy and predilections inhibiting climate change legal response are inherent in the formulation of the substantive norms under the UNFCCC and other subsequent international legal instruments. The key norms and obligations under the UNFCCC that arguably evidences the limitations facing climate change legal cooperation should be identified to assess the evolution of subsequent international legal order and the national implementation of international norms. On substantive provisions, firstly subjecting the actions introduced to attain the objective of the UNFCCC to the principles of equity and to the CBDR and respective capabilities of a member state indicates specific concerns⁴. Similarly, the mandate imposed upon the developed state parties to the convention to take the lead in combating climate change and its impact is a feature that demonstrates a bifurcation.

Four other specific principles or limitations propounded by the UNFCCC are arguably evidences of various balancing measures. They include the principle mandating the full consideration of any disproportionate or abnormal burden developing member states would face as a result of the UNFCCC, subjecting the policies and actions taken in furtherance of the precautionary principle to be cost effective and achieving related benefits at a lowest possible cost⁵, and the principle that actions protecting climate should be in consonance with the specific conditions of the relevant state party and its national development programs. Other balancing characteristics evidencing the divide and inhibitions could be seen in the context of specific commitments prescribed by the UNFCCC. Firstly, the general commitments of all parties under the UNFCCC are subjected their respective CBDR standard as well as the circumstances relating to their specific national and regional developmental objectives and priorities. However, it is important to note that the UNFCCC categorically declared that the effective implementation of the commitments of the developing member states would be fully dependant on the developed member states honouring their commitment on financial resources and technological transfer with due regard to the fact that development (both social and economic) and poverty eradication would be the foremost priority of those developing country member states.

³ For other contrasting arguments on how the principles pertaining to the CBDR are essential to the integrity and stability of the legal regime governing climate change see Jutta Brunnee and Charlotte Streck, "UNFCCC as a Negotiation Forum: Towards Common but more Differentiated Responsibilities" *Climate Policy* 13 (2013) 589.

⁴ See Article 3 (1) of the UNFCCC 1992.

⁵ For a detailed analysis of the relevance of the precautionary principle and cost benefit analysis in the legal governance of climate change see, Daniel A Farber, "Coping with Uncertainty: Cost-Benefit Analysis, the Precautionary Principle, and Climate Change", 90 *Washington Law Review* (2015) 1659.

Secondly, the some of the commitments of the developed member states of UNFCCC and the Annex-I listed member states are also subjected to some explicit limitations. For example, the obligation to review some of their commitments in the subsequent conference of the parties to the UNFCCC is subject to the limits of best available scientific information relating to climate change and its impact (which arguably prevent the review of obligations based on precautionary principle) as well as relevant technical, social and economic information (which grounds could also potentially limit the possibility of review of the commitments)⁶. Thirdly, certain Annex-I listed member states that are in the process of transition to the market economy are permitted with a degree of flexibility in the implementation of their commitments. Finally, in implementation of the commitments all the member states of the UNFCCC are obliged to give due consideration to the economies of all member states (not only developing member states) that would be adversely affected by the measures adopted in response to climate change⁷. Especially due consideration should be given to the economies of the member states that are highly dependent on use of fossil fuels or the income arising from such fuels and associated energy intensive products with no easy means to switch to other alternatives.

Divisions and Limitations Reflected in Kyoto Protocol 1997

After UNFCCC obliged the parties to undertake commitments to adopt climate change mitigation policies and measures, the Kyoto Protocol was concluded in 1997 to practically implement the commitments and achieve the emission targets. The need to introduce an additional protocol clearly evidences the significance attached by the international community in developing the international coordination addressing climate change in the form of legal obligations. This arguably demonstrates the importance of legal mitigation of adverse impacts of climate change and how an international normative approach to this global problem is an inevitable mechanism in the fight against climate change. The importance of legal mitigation continued to be felt even beyond the introduction of the Kyoto Protocol, both in international and domestic frontiers. Subsequent expansion of international legal regimes on climate change as well as the enactment of several domestic legislation and the increasing number of climate change related litigations are further evidence that highlight the growing importance of legal mitigation. The Kyoto Protocol fundamentally follows the structure of classification of member states in distinct groups and bifurcation of obligations as originally laid out in the UNFCCC. Therefore, it is relevant to review its provisions to determine how it continued to reflect some of the divisions and limitations of the UNFCCC identified in the previous section. Firstly, regarding emissions reduction commitments, although the Kyoto Protocol requires the UNFCCC Annex-I member states to implement their commitments as well as further elaborate their policies and measures, the member states are permitted to achieve them in accordance with their respective national circumstances.

The Kyoto Protocol, while mandating the Annex-I member states to ensure that their emissions of certain greenhouse gases listed in Annex A of the Protocol do not exceed the assigned levels derived from Annex B of the Protocol⁸, requires them to achieve the implementation in such a way to minimize adverse impact upon developing countries including their economy⁹. The Kyoto Protocol while prescribing certain obligations on all member states of the Protocol like formulation of certain climate change mitigation and adaptation programs, extending cooperation in the developing environmentally sound technologies including in scientific and technical research and other efforts in reducing climate change of key climate change related uncertainties as well as in the developing and implementing of relevant education and training programs, etc subjects those obligations to the CBDR and specific national and regional development priorities of the respective member states¹⁰.

Moreover, in implementing the above obligations arising under the Kyoto Protocol all member states are required to consider various specific provisions of the UNFCCC¹¹ that evidences certain divisions and limitations as discussed earlier in this paper. In addition to the above, other instance of balancing provisions could be evidenced in the Kyoto Protocol, that can also provide reference for any relevant assessment of how national implementation of the climate change related international obligations have evolved. In the interest of space, now we can examine how next major international instrument, namely the Paris accord on climate change continues to demonstrate the signs of division and limitations facing climate change legal normative development.

Continued Limitations Evidenced in Paris Agreement on Climate Change 2015

After more than two decades since the first international legal regime governing climate change was adopted by the international community, the Paris Agreement was concluded. It is important to examine whether the long experience in global climate change governance has reduced the signs of limitations and division under the new accord. A decade after the conclusion of the Kyoto Protocol, the international community started to introduce other initiatives to enhance further legal commitments and cooperative measures. The period between 2007-2014 witnessed the introduction of various related initiatives during the periodical conference of the member states of UNFCCC (COP), which included some prominent ones like the Bali Road Map¹², the Copenhagen Accord¹³,

⁶ See Article 4 (2) (c) and (d) of UNFCCC.

⁷ See Article 4 (10) of the UNFCCC.

⁸ The objective of such obligation is to reduce the emission levels of those member states during the four-year period from 2008 to 2012 by a minimal of five percent below the levels of such emission during the reference year of 1990. See Article 3 (1) of the Kyoto Protocol 1997.

⁹ Interestingly, the Protocol also mandates the Annex-I member states to specifically minimize the impact upon such interests of the developing country member states recognized under certain provisions of the UNFCCC. See Article 3(14) of the Kyoto Protocol.

¹⁰ See Article 10 of the Kyoto Protocol.

¹¹ See Article 11 (1) of the Kyoto Protocol.

¹² See Bali Road Map and Bali Action Plan resulting from the COP-13 held in 2007.

¹³ See the Copenhagen Accord concluding in the COP-15 organized in 2009.

the Cancun Agreements,¹⁴ the Durban Platform¹⁵, the Doha Climate¹⁶ and the Warsaw Outcome¹⁷. These initiatives ultimately culminated in the conclusion of a third major international legal regime governing climate change namely the Paris Agreement on Climate Change adopted during the COP-21 held in Paris. Despite the divisions and limitations of the UNFCCC and Kyoto protocol continued to prevail during the intermittent years, the conclusion of the Paris Agreement demonstrated the resolve of the international community to enhance the tackling of the adverse impacts of climate change using the legal mechanism. In this context, it is relevant to examine the specific provisions of Paris Agreement to determine the extent to which divisions and balancing provisions are present in its legal obligations.

The preamble of the Paris Agreement first and foremost referred to the principles and obligations of the UNFCCC and certain subsequent legal initiatives on climate change. Among them, the principle of equity, the principle of CBDR and respective capabilities, and the principle of deference to national circumstances are particularly reiterated. In addition, the Agreement also recognized that response to urgent threats emanating from climate change should be commensurate with the best available scientific knowledge. The Paris Agreement mandates member states to set and communicate successive periodical emission reduction targets referred as Nationally Determined Contributions (NDCs). Member states should undertake various national mitigation efforts to achieve the NDCs and periodically communicate the progress. With such communications, it would be possible to calculate the aggregate reductions in global greenhouse gas emissions and track individual and collective progress achieved. It creates a progressive approach for achieving the long-term goals of the Paris Agreement with the possibility of periodical reviews and adjustments. The preamble of the Agreement continued to emphasize the need to take cognizance of the specific needs of the developing country member states and their special circumstances. The preamble, interestingly, emphasizes on importance of considering the needs and special circumstances of all least developed states on matters of funding and technology transfer without mandating their membership to the Agreement. Two other additional caveats raised by the preamble of the Agreement are important to note. Firstly, the preamble points out that the member states to the Agreement, in addition to the adverse impact of the climate change, could also be affected by the very measures taken in response to the climate change. Secondly, the preamble also points out to the intrinsic relationship climate change response and related impacts could have on sustainable development and poverty eradication.

For the purpose of the present paper, it is pertinent to point out that newer limitations and additional caveats relating climate change response measures are recognized in the preamble of the Agreement. Firstly, the preamble mandates that any action taken to address the impact of climate change by the member states of the Agreement should respect international obligations on human rights in general, and various specific rights like right to development as well as human rights of certain groups of people. In addition, it is interesting to observe that the preamble mandates that response measures should also respect other values like 'intergenerational equity'. Secondly, the preamble also emphasizes on the need to consider certain imperative needs like 'just transition of workforce' and relevant national development priorities. Thirdly, the preamble calls for the need to take deference to the concept of 'climate justice' and be sensitive to certain cultural perceptions like 'mother earth', while undertaking actions in furtherance of climate change. These provisions indicate that the set of limitations and balancing requirements have not reduced since the UNFCCC and the Kyoto Protocol but instead have (*prima facie*) increased in the more recent Paris Accord. In addition to the preamble, specific limitations and balancing provisions are also visible in the formulation of substantive obligations in the Paris Agreement.

The National Legislative Response to International Climate Change Norms in the Pacific

Beyond assessing the divisions and limitations in the international legal regime governing climate change, it is important to determine how state parties to the international obligations have responded with domestic initiatives to mitigate adverse effects of climate change. In this regard, the analysis here examines two specific UNFCCC Annex-I member states in the Pacific Region to examine how their respective national legislative instruments have responded in implementing the international obligations. This paper focuses on Australia and New Zealand and assess their domestic legislation that have been enacted or amended to address climate change and its adverse impacts since they have become member states of the relevant international climate change regimes. The present paper has identified 13 distinct legislative instruments relating to climate change in Australia, where as the number of relevant legislations identified in New Zealand is 9.

a. The Dynamics and Diversity of Domestic Norms Governing Climate Change in Australia

The major Australian legislative response to climate change concerns could be traced to the turn of the century. The prominent Australian legislative instruments addressing climate change and its impact includes Renewable Energy (Electricity) Act 2000; Offshore Petroleum and Greenhouse Gas Storage Act 2006; National Greenhouse and Energy Reporting Act 2007; Building Energy Efficiency Disclosure Act 2010; Emissions Reduction Fund 2011; Australian National Registry of Emissions Units Act 2011; Climate Change Authority Act 2011; Australian Renewable Energy Agency Act 2011; Clean Energy Finance Corporation Act 2012; Greenhouse and Energy Minimum Standards Act 2012; Carbon Farming Initiative Amendment Bill 2014 and Climate Change Act 2022. As can be seen from the legislative instruments, Australia has enacted some of the very pertinent and direct legislation addressing climate change. The most recent in this regard is the Climate Change Act 2022 (CCA 2022), which prescribes the emission targets for Australia and related procedures. It defines key functions of the relevant national Authority in charge of climate change and its regulation. The CCA 2022 aims at promoting progressive and effective response to climate change threats using the best available scientific knowledge by setting reduction targets. In addition, it seeks to make the environment minister

¹⁴ See Cancun Agreements resulting from the COP-16 of 2010.

¹⁵ See the Durban Platform for Enhanced Action 2011 as an outcome of COP-17.

¹⁶ See the Doha Climate Gateway as a result of COP-18 held in Doha in 2012.

¹⁷ See COP-19 held in November 2013 in Poland and the related Warsaw Outcomes.

ambitious and accountable towards those targets by producing annual climate change statements that consist of the NDCs, prepared and adjusted according to the independent advice from the national climate change authority.

As per the CCA 2022, the NDCs to be included in the climate change statement could be those originally communicated to the state parties as per the Paris Agreement or those that are subjected to subsequent adjustments as permitted by the Agreement¹⁸. It is important to note that the application of the CCA 2022 is not limited to the land territory of Australia but also to the activities carried out in its maritime zones in furtherance of the exercise of its sovereign rights. The CCA 2022 prescribes specific emission target levels to be achieved in two stages. In the first stage ending in 2030, the CCA 2022 aims to reduce the emission of Australia's net greenhouse gases by forty three percent below the level of emissions recorded in 2005. In the second stage ending 2050, the same target is set at an ambitious level of zero percent emissions. The CCA 2022 also mandates that the above emission target levels should be interpreted in consonance with the provisions of the Paris Agreement and NDCs of Australia¹⁹. The CCA imposes a duty on the Minister to prepare an annual climate change statement within a period of six months after the close of a financial year for the parliamentary review and prescribes various elements that should be included in the statement. Information about the following elements is prescribed for inclusion namely, the annual progress in emission reduction, international developments addressing climate change, growing risks of climate change impact on diverse fields, related policies and its impacts on specific sectors as well as different social benefits derived²⁰. The CCA 2022 prescribes the subject matter and elements of the advice, which the Climate Change Authority of Australia should give to the Minister, which the latter is obliged to seek at least once in a period of five years. While the Climate Change Authority is required to seek public consultation before rendering its advice to the Minister, its advice is also a prerequisite before the Minister is satisfied about any new NDAs proposed and decides to communicate them for certain purposes contemplated in the Paris Agreement²¹.

For enforcing some of its obligations under the UNFCCC, Australia enacted its Greenhouse and Energy Minimum Standards Act in 2012 (GEMSA 2012). It is aimed at developing and utilizing products that are energy efficient or emit less greenhouse gases or contribute similar values in tackling adverse impact created by other products. GEMSA 2012 enabled the establishment of minimum standards addressing greenhouse gas emissions and energy use, which are aimed at governing the supply and commercial use of certain products with implications of inefficient energy use. A register to ensure that the concerned products comply with the established standards is created by GEMSA 2012.

In 2012, Australia also established a new financing mechanism to support the drive for combating climate change by enacting the Clean Energy Finance Corporation Act 2012 (CEFCA 2012). The Corporation was mainly aimed at facilitating financial flow to clean energy sector and make investments in related technologies. In furtherance of CEFCA 2012, an investment mandate direction was issued in 2020, to provide investment guidance to the Board of the Corporation regarding its function of investing in technologies contributing to clean energies²². The mandate direction pointed out the need for the Corporation to balance between the commercial aspects of its investment and other externalities, public policy outcomes as well as potential effect on other market participants. The mandate direction sets a benchmark return rate the Corporation should strive to achieve in its investment portfolio and suggests the level of risks for those portfolios. It also sets various limits regarding the concessionally and guarantees typically provided by the Corporation and prescribes specific standards and procedures, which the investments and projects of the Corporation should adhere. It delineates certain areas of technologies and products, which the activities of the Corporation should focus and furnishes a range of other directions to the Corporation to effectively achieve its purpose and goals.

In 2011, Australia enacted three other statutory instruments that paved way in creating three fundamental institutions governing its climate change mitigation efforts. These include the Climate Change Authority Act, Renewable Energy Agency Act and National Registry of Emission Units Act. Firstly, the Climate Change Authority was empowered to carry out reviews and research on matters relating to climate change. The Authority was bestowed with the responsibility to ensure that the measures introduced to tackle climate change satisfy certain principles and standards. Secondly, the Renewable Energy Agency (REA) was established to mainly fund research and development of related technologies and enhance their competitiveness²³. The REA has an advisory role in policy formulation and is aimed at facilitating projects to enhance renewal energy supply. The Act establishes the Board of the REA, prescribes its functions and strategies for funding activities, and provides relevant guidelines and work plans for the Board. The Act also elaborates the rules governing the appointment and functions of the officer and staff as well as consultants of the REA. The third Act mentioned above established the Emissions Unit Registry (EUR) to enable the registration of carbon credit units as well as Kyoto units²⁴. The Act prescribes a detailed procedure for opening and operation of Registry accounts and elaborates the rules governing Kyoto Unit dealings in the Registry accounts. The information about the account holders in the Registry and holders of Kyoto units are public information and the relevant authority is obliged to publish the same. The Act prescribes rules governing cancellation of registered units and civil penalty orders against persons contravening certain provisions.

The Building Energy Efficiency Disclosure Act 2010, (BEEDA) of Australia mandated the furnishing of a Building Energy Efficiency Certificate (BEE Certificate) whenever a large commercial office is put forward for sale or lease. The mandatory BEE Certificate is aimed at enhancing energy efficiency by enabling the buyers or tenants of commercial office space to have access to relevant energy efficiency information and make an informed decision to buy or rent. The requirement to furnish the certificate is mandatory except in certain cases and the hefty penalties are prescribed for any failure to comply. The obligation to

¹⁸ See Article 4, Paris Agreement on Climate Change 2015.

¹⁹ Although, the NDCs are subjected to any adjustments made periodically in accordance with the Paris Agreement, the CCA 2022 mandates that the adjusted NDCs must reflect an enhanced ambition level of Australia. Alternatively, if Australia chooses to announce a new set of NDCs, they should be aimed at progression beyond the current NDCs or its subsequent adjustments. See Section 10 (6) and 10 (5) (a), (b) of CCA 2022.

²⁰ See Section 12 (1) (a-f), Climate Change Act 2022.

²¹ See Article 2 of the Paris Agreement.

²² See Clean Energy Finance Corporation Investment Mandate Direction 2020.

²³ See Section 3, Renewable Energy Agency Act 2011.

²⁴ See Section 17, National Registry of Emissions Units Act 2011.

disclose relevant information on energy efficiency arises in the context of making any offer to sell or let or sublet and invitations calling others to make purchase offer or lease or sub-lease a commercial building or a prescribed space in such a building. While prohibiting the sale or lease or sub-lease of the prescribed buildings and space without a BEE Certificate, the BEEDA delineates the relevant rights of a purchaser or the lessee²⁵. It defines the characteristics of the BEE Certificates including the need to specify an energy efficiency rating (EE rating) and creates a BEE Register for recording valid BEE certificates issued. In addition to prescribing the procedure for information gathering to issue a BEE certificate, the BEEDA mandates the accreditation of assessors and a subsequent auditing of the accredited assessors involved in BEE certification process and elaborates relevant requirements²⁶. The BEEDA contains a strong enforcement mechanism with powers to demand any information or document, issue infringement notices and impose civil penalties. Subsequently, in 2016 the size prescription for the application of BEEDA to commercial office space were reduced to bring more space within the purview of the regulation. Similarly, more flexibilities were also introduced in the administration of BEEDA to facilitate effective compliance.

In 2007 Australia enacted the National Greenhouse and Energy Reporting Act (NGERA) to establish a cohesive framework the purpose enabling the reporting of and providing access to critical information about emissions and projects pertaining to greenhouse gases as well as corporate energy consumption and production in Australia. It was not only aimed at complying with international obligations for reporting information on emissions but also providing the foundation for establishment of an emission trading system. NGERA also prescribes standards and thresholds governing emissions and energy and requires corporations satisfying the same to register and submit relevant annual reports (with the obligation to submit a report arising even when there is a failure to satisfy the prescribed threshold in any particular year).

One of the earliest legislative initiatives in Australia relating to climate change is the Renewable Energy (Electricity) Act 2000 (REEA). With an overall objective to reduce greenhouse gas emission in electricity production, REEA promotes certain renewable energy-based electricity production and sought to secure the sustainability of those sources of renewable energy. REEA provides for the issuing of certificates to recognize the utility of renewable energy resulting from a large-scale generation by power plants or a small-scale generation by small units or technology like solar heaters²⁷. Prescribed entities purchasing electricity have the obligation to obtain those certificates while acquiring electricity every year. Failure to have the required number of certificates to produce will have the consequence of imposition of additional charges upon the failing entity for the renewable energy shortfall. The entities facing potential liabilities for a shortfall (liable entities) could purchase such certificates that are created by registered persons generating power from accredited power stations using eligible renewable energy source. Persons registered under the REEA can also create certificates that are related to small generation units and solar heaters. REEA prescribes the procedure for registration of persons who can create certificates and accreditation of the power stations. Any certificate creation should follow the detailed provisions of the REEA regarding both the large-scale generation and small-scale technology certificates. Any impropriety in creation of certificates will constitute an offence under the REEA with the consequence of civil penalty. Certificates issued must be registered and are then transferrable to other persons. REEA enables the creation of a clearing house to facilitate the transfer of small-scale technology certificates and a renewable energy special account for the purpose of compliance with other relevant legislation. The characteristics of the electricity acquisitions that will fall within the purview of the REEA and the liability for the imposition of the shortfall charge are defined. In addition, situations that would attract imposition of penalty charge for not providing statements or other information are foreseen²⁸.

In addition to some of the above key climate change related legislative initiatives enacted by Australia in furtherance of enforcing its international obligations and national policies on climate change, there are other statutory enactments in Australia that need not be discussed in detail here but deserves to be noted. These includes the Carbon Credits Act 2011 governing carbon farming and the subsequent bill in 2014 seeking to amend a related initiative. The 2011 Act created a scheme for issuing carbon credit units (which could be sold or traded) to eligible climate change mitigation projects and the subsequent bill in 2014 sought to establish a fund for reducing emissions. Earlier in 2006 Australia introduced its Offshore Petroleum and Greenhouse Gas Storage Act 2006. This legislation governing offshore exploration activities of petroleum products and greenhouse gas formations and its storage provided a joint regulatory framework involving agencies of different states and those of the commonwealth.

b. Consistent Legislative Response to Climate Change in New Zealand

The key legislation relating to climate change action in New Zealand have started to emerge since 2000 and since then there has been regular legislative enactments or amendments aimed at addressing climate change and its impact in New Zealand. The notable legislation in New Zealand in this regard includes the Energy Efficiency and Conservation Act 2000; Climate Change Response Act 2002 and its various amendments; Resource Management (Energy and Climate Change) Amendment Act 2004; Forests Amendment Act 2004; Gas Amendment Act 2004; Electricity (Renewable Preference) Amendment Act 2008; Crown Minerals (Decommissioning and Other Matters) Amendment Act 2021; COVID-19 Recovery (Fast-track Consenting) Act 2020 and Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021. This section systematically examines the characteristics of these instruments to determine how effectively New Zealand has responded to the international legal standards and obligations relating to climate change.

In 2021 New Zealand sought to introduce amendments to its law governing the financial sector and markets in order to mandate certain disclosures pertaining to climate change. The Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021 (FSAA 2021) introduced amendments to the Financial Markets Conduct Act of 2013 (FMCA) requiring the disclose of any climate change risk related to the market listed issuers of equity and debt instruments. The FSAA 2021 mainly applies to certain entities that have reporting obligations under the FMCA and are considered to owe a higher degree of public

²⁵ See sections 11 and 12 of the Building Energy Efficiency Disclosure Act 2010.

²⁶ See Parts 3 and 4 of the Building Energy Efficiency Disclosure Act 2010.

²⁷ See sections 17C-20A, 20B-23AA and 23AB-23E of the Renewable Energy (Electricity) Act 2000.

²⁸ See sections 99-103 of the Renewable Energy (Electricity) Act 2000.

accountability. Such entities satisfying certain characteristics²⁹ are referred as climate reporting entities and the FSAA 2021 mandates them to maintain records of their climate related disclosure, prepare climate statements and lodge them as required. The FSAA 2021 explains how the disclosure records should be maintained and how climate statements should be prepared (including those to be submitted to foreign climate reporting bodies). Any non-compliance with climate standards occurring with the knowledge of a climate reporting entity and its directors constitutes an offence under the FSAA 2021 and certain contravention under the Act imposes civil liability³⁰. The FSAA 2021 also introduced several other amendments to the FMCA and its various schedules, which need to be examined for the purpose of the present paper.

To supplement the national policy and efforts to recover from the adverse effects of the Covid-19 pandemic, New Zealand made a legislative initiative to expediate the state consent to certain projects with the enactment of the Covid-19 Recovery (Fast-track Consenting) Act 2020 (CRA 2020). The act recognized the possibility to seek faster state consent for certain projects including those that contribute to the climate change mitigation efforts and accelerate the transition to lower emissions or strengthen the ability to manage risks emanating from adverse effects of climate change. The CRA 2020 prescribes the relevant procedural principles and makes provision for electronic service of related documents. It elaborates various procedures governing the fast-tracking consent mechanism, including its constitution, functioning and decision-making powers³¹. It also confers additional powers, duties and functions upon the Environmental Protection Authority of Australia to enable its role in promoting the purpose of CRA 2020.

To reduce the adverse climate contribution of fossil fuel-based power sources, New Zealand introduced some key amendments through the Electricity (Renewable Preference) Amendment Act in 2008 (EAA 2008). By objective of the amendment was to reduce the adverse effects caused by thermal electricity, produced with the use fossil fuels. The EAA 2008 imposed restrictions on the production of such electricity albeit permitting some exemptions under circumstances where supplies dwindle. Moreover, the amendments contained a sunset clause, whereby the relevant provisions of the amendment were prescribed to be in force for a period of ten years after they enter effect. The EAA 2008 imposed restrictions on connecting with or operating specified types of electricity plants and prescribed penalties for related breaches. However, the Minister of Energy was granted with the power to grant exemption upon satisfaction of list of prescribed matters³². The grounds for granting exemption and the terms and conditions upon which the exemption could be granted were prescribed by the EAA 2008. While public consultation is a requisite before exemptions are granted, any such grant should be published with the underlying reasons for the grant. The exemptions so granted could also be revoked under prescribed circumstances³³.

Preceding the EAA 2008, three key amending legislation seeking to tackle diverse adverse impacts on climate change were introduced in the year 2004. These were the Gas Amendment Act of 2004 (GAA 2004), Forest Amendment Act of 2004 (FAA 2004) and Resource Management (Energy and Climate Change) Amendment Act of 2004 (RMAA 2004). The GAA 2004 establishes the Energy Commission for governing the gas industry in New Zealand and prescribes the process for the commencement of its provisions. The GAA introduces various amendments to the principal Gas Act of 1992 to constitute a detailed legal framework for the governance of gas industry. It outlines the regulation making powers of the government and the Energy Commission and the process of making recommendations for those regulations³⁴. Interestingly, the GAA 2004 provides for the co-regulation involving the government and an industry body and recognizes various related roles the industry body could play in the gas governance including making recommendations, strategic plans and annual reports. Finally, the GAA 2004 elaborates the rules governing the establishment and the functions of the Energy Commission. In this regard, one of the prescribed mandates of the Energy Commission is to achieve a specific outcome of ensuring the contribution of the gas sector to the climate change objectives of the New Zealand government. As recognized by the GAA 2004, such contribution could be achieved through minimization of loss of gas, enhancement of energy efficiency and a better demand side management³⁵.

The FAA 2004, although did not have any direct reference to the climate change mitigation, its purpose and objectives have a significant relevance to the fight against climate change. Its imposition of various felling controls, including the prohibition of felling of indigenous timber contributed to the conservation of natural values of the forest and enhancement of sustainable forest management³⁶. The FAA 2004 also imposed a prohibition on exporting of prescribed indigenous forest produce³⁷. In addition, the recognition of the possibility to issue sustainable forest management permits balancing between conservation and utilization of timber and forest produce, is one of the striking features of the FAA 2004. The amendments introduced by FAA 2004 along with some other climate change related legislative initiatives in New Zealand have elevated forests as one of the key resources in the fight against climate change. The third important amendment act in 2004 namely the RMAA 2004 was aimed at mandating the persons exercising various powers and functions under the Resource Management Act of 1991 to have due regard to factors influencing climate change including energy efficiency, development and use of renewable energy and effects of climate change. It was also aimed at prescribing when local authorities must plan for effects of climate change and when they need not consider such effects. The RMAA 2004 provided for the rules governing greenhouse gas discharge and its application to climate change concerns by a regional council³⁸. The RMAA also regulates the decision-making process of the consent authorities considering applications related to greenhouse gas discharge.

²⁹ Like being large and is a listed issuer or a registered bank or a licensed insurer or a credit union or a building society. See section 461-O of the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021.

³⁰ See sections 461-ZG and 461-ZK of the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021.

³¹ See sections 14-27 of the Covid-19 Recovery (Fast-track Consenting) Act 2020.

³² See section 62G of Electricity (Renewable Preference) Amendment Act, 2008.

³³ See section 62K of Electricity (Renewable Preference) Amendment Act, 2008.

³⁴ See sections 43F-43H and 43I-43P of the Gas Amendment Act of 2004.

³⁵ See section 43ZZK(j) of the Gas Amendment Act of 2004.

³⁶ See sections 8- 17 of Forests Amendment Act 2004.

³⁷ See section 5 of Forests Amendment Act 2004.

³⁸ See section 70A of Resource Management (Energy and Climate Change) Amendment Act 2004.

The fundamental legislative framework of New Zealand aimed at implementing its international obligations on climate change was enacted in 2002 through the Climate Change Response Act (CCRA 2002). Enforcing relevant obligations like those arising from the UNFCCC and Kyoto Protocol, the CCRA 2002 establishes necessary institutional mechanism for climate change governance including a national inventory agency³⁹. It prescribes rules for holding and management of units of greenhouse gas emissions and their international trading in carbon markets. It creates detailed rules governing a general scheme for greenhouse gas emissions trading in New Zealand and specific provisions governing certain sectors like energy, agriculture and forestry⁴⁰. It introduces the imposition of a synthetic greenhouse gas levy and defines the obligations imposed upon anyone importing leviable goods from abroad. By prescribing an elaborate set of provisions governing the above areas, the major objectives of CCRA 2002 namely enabling New Zealand to meet its international climate change obligations, and supporting global efforts through the development of a greenhouse gas emission trading scheme and introduction of a levy on certain greenhouse gases and related products are well served. The provisions and standards of CCRA 2002 were subsequently improved through different amendment acts like the Climate Change Response (Emissions Trading Reform) Amendment Act 2020 and the Climate Change Response (Zero Carbon) Amendment Act 2019 that were aimed at enhancing the operation of emissions trading system and achieving nil carbon emissions by 2050 respectively.

The 2020 amendment seeks to improve the administration of the emission trading system and enhance its accessibility. It also aims at improving certainty for the involved business entities and revise certain reduction levels. The changes to the emissions trading system, sought by the 2020 amendment were preceded by other improvements and revisions. They were introduced by different amendments to the CCRA 2002 in earlier years, including the amendments in 2012, 2009 and 2008. The 2019 amendment to CCRA 2002 also seeks to reduce other emissions contributing to climate change at a determined level and aims to review the need to include emissions from certain other specific sources. It requires the government to carry out risk assessments and develop related follow-up plans for necessary adaptation. In addition to the above two sets of amendments, certain specific measures of climate change response introduced by the CCRA 2002, were also subjected to other amendments carried out in 2014, 2011 and 2006. The fact that the CCRA 2002 is one of the most regularly updated climate change legislation in New Zealand demonstrates the efforts of New Zealand to adapt and keep up with the evolving dynamics of the international climate change obligations and standards.

One of earliest legislative initiative of New Zealand addressing climate change came with the enactment of the Energy Efficiency and Conservation Act 2000 (EECA 2000). It mainly aims at promoting energy efficiency and conservation as well as the use of renewable energy. Firstly, the EECA delineates the responsibilities of the Minister in developing relevant policies and strategies, enhancing pertinent awareness among public, promoting related technologies and practices, organizing necessary research and studies, as well as other related functions like monitoring and reviewing of situations and publishing of relevant information. EECA 2000 established a new Energy Efficiency and Conservation Authority by elaborating its constitution and defining its powers and functions⁴¹. In addition to some of the major legislation discussed above, New Zealand also introduced other statutory instruments that are pertinent to the fight against climate change. For example, New Zealand sought to introduce certain amendments to its Crown Mineral Act of 1991 to prohibit some excavation activities, which have the potential to contribute to climate change. The said amendments were proposed by the Crown Minerals (Decommissioning and Other Matters) Amendment Act of 2021, which introduced bans on new offshore oil and gas extraction projects. Similarly, restrictions were imposed on granting permission to such onshore projects.

Concluding Remarks

The development of the normative order addressing climate change and its impact reveals the pioneering role of the international legal regimes in initiating the fight against climate change. From the analysis earlier in this paper, it is evident that despite the consistent legal developments, the challenges and limitations facing the formulation of international legal obligations always existed. Two clear patterns are discernible. Firstly, the scope and reach of the norms governing global climate change have continued to expand from the UNFCCC through several subsequent COPs. Among them, the conclusion of the two prominent landmark legal regimes of Kyoto Protocol and the Paris Agreement evidences the willingness of the international community to accept the expanded scope of international obligations, despite the divisions and limitations identified in this paper. In particular, the undertaking of obligations by Annex-I member states of the UNFCCC subjected to the CBDR principle as well as various other sensitivities of the developing country members is a major sign of wider consensus regarding the need to achieve and equitable legal solution to the problems of climate change and its impact.

Secondly, the analysis in this paper revealed that the divisions and limitations facing the development of international legal obligations in the fight against climate change have not only been present over the years but also have expanded in the more recent Paris Agreement. In the light of the specific limitations and inhibitions, it is essential to systematically review how national legislative initiatives, particularly those in the Annex-I member states have responded to the related challenges. In this regard, the identification of the key climate change related legislation in the two Annex-I member states in the Pacific, namely Australia and New Zealand, indicates the diversity of national responsive measures. The closely review of the specific features of these two sets of national climate change legislation reveals a very positive response. The two jurisdictions have not only established specific and comprehensive climate change legal framework, but also have periodically revised the relevant regulatory standards to ensure they are in lines with the growing expansion of international norms and obligations. In case of Australia, this is much more discernible in comparison with New Zealand as its national legal response in climate change mitigation is distinctly deeper and diverse.

It is evident from the analysis that Australia has chosen to address different fields of governance relating to climate change through the introduction of distinct legislative instruments. However, New Zealand has mainly taken the approach of introducing various amendments to its primary climate change response legislation and other existing legislation governing

³⁹ See Part 3, sections 31-53 of the Climate Change Response Act 2002.

⁴⁰ See Part 5 of the Climate Change Response Act 2002.

⁴¹ See sections 20, 24, 25 and sections 21 and 22 of the Energy Efficiency and Conservation Act 2000.

relevant fields in order to comply with its international obligations. Moreover, Australia has sought to introduce distinct set of regulations governing climate change in diverse fields like financing clean energy, mandatory building energy efficiency disclosure and carbon farming. However, New Zealand has also kept pace in updating its national legal measures addressing climate change through regular and successive amendments to its fundamental climate change instruments and various other environmental legislation. Despite some differences in the national legal response of Australia and New Zealand, none of the identified divisions and challenges emanating from the international legal norms seems to have been reflected or withheld either of these two jurisdictions in introducing relevant national legal standards or reforming their respective regulatory frameworks.

From the strong domestic legal foundation being laid by these two jurisdictions and from the dynamic nature of their respective NDS and other mitigation goals that are periodically revised to attain specifically targeted goals, it can be concluded that both Australia and New Zealand have been highly responsive to the international norms and obligations governing climate change. However, the fruition of the goals of a strong international normative order and a dynamic national regulatory response cannot be achieved without effective enforcement and a due process guarantee in resolution of related disputes. To realize the goals of norms governing climate change, the role of national courts in interpreting related national laws and international obligations in climate change litigation is highly crucial. Especially, as evident from the analysis of the Paris Agreement earlier in this paper, its prescription of climate change obligations categorically mandates reference to the values of climate justice. In this regard, it is recommended that the national courts in Australia and New Zealand should undertake an activist role to ensure that the legislative aspirations of their respective jurisdictions are met with due judicial recognition and enforcement. The need for consideration of climate justice under the provisions of the Paris Agreement reinforces the significant role of national courts, which underscores the importance of assessing how national courts in Australia and New Zealand have made conspicuous efforts to render climate justice. Although the lack of review of relevant national judicial interpretations of the climate change laws of Australia and New Zealand in this paper is a major limitation, future studies should aim at identifying pertinent judicial pronouncements to critically analyse whether the purpose and objectives of international instruments and national legislative intention are sufficiently served through an effective rendering of climate justice in both jurisdictions.

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