

individual human rights arising thereof, which is required for the Constitutional Court to step in to decide the constitutionality. At least for the Korean courts, it is hoped that they focus more on the “how” question rather than whether the courts are competent to address a highly, but not exclusively, political question when the policy can risk the full enjoyment of the fundamental rights.

Regardless of the limitations and questions remaining, the Constitutional Court of Korea taking the step to assess the NDCs from a rights-based approach in Asia for the first time is commendable. As the number of contentious climate litigation cases suggest, especially in the context of challenging the responses of states against the climate crisis to secure their human rights, are soaring in various countries,¹² it would serve as a meaningful precedent that would provide food for thought to other courts.

BUHM-SUK BAEK

Kyung Hee University Law School

HOSUNG AHN 

Jesus College, University of Oxford

doi:10.1017/ajil.2024.64

This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

Supreme Court of India (SCI)—Great Indian Bustard—International Union for Conservation of Nature (IUCN)—climate change—United Nations Framework Convention on Climate Change (UNFCCC)—International Solar Alliance (ISA)—right to be free from adverse effects of climate change

M.K. RANJITSINH AND OTHERS V. UNION OF INDIA AND OTHERS. 2024 INSC 280. At <https://climatecasechart.com/non-us-case/mk-ranjitsinh-ors-v-union-of-india-ors>. Supreme Court of India, March 21, 2024.

On March 21, 2024, the Supreme Court of India (SCI) rendered its decision on a dispute regarding the protection of the Great Indian Bustard (GIB). The SCI’s decision related to a case that was first brought before it in 2019 when M.K. Ranjitsinh and other environmentalists invoked its writ jurisdiction under Article 32 of the Indian constitution. The petitioners wanted to protect the GIB, a native bird of western India and Lesser Florican, especially in the states of Gujarat and Rajasthan. They attributed the dwindling population of these birds to pollution, climate change, loss of habitat, and the expansion of human activities. They argued that due to the constant decline in the GIBs’ population in the last few decades, the species’ status has been downgraded by the International Union for Conservation of Nature (IUCN) from “threatened” (1988) to “endangered” (until 2008) to “critically endangered” (current status).¹

¹² Columbia Law School Sabin Center for Climate Change Law, *Climate Change Litigation Database*, at <https://climatecasechart.com>.

¹ IUCN, *Red List of Threatened Species, Great Indian Bustard* (Ardeotis Nigriceps), at <https://www.iucnredlist.org/species/22691932/134188105>.

The case is yet another example of the prevailing development-environment dichotomy, only here there was also a question of wildlife protection. For years, third world countries have been derided in international fora for ignoring the environment at the altar of development. Countries like India, China, and Brazil are often targeted for failing to meet their international commitments. This case, however, is an example where the Indian government argued for keeping its Intended Nationally Determined Contribution (NDC) to the UN Framework Convention on Climate Change (UNFCCC) in mind while carrying out any wildlife conservatory efforts. As such, this was a unique case that pitted wildlife conservation against climate change.

* * * *

In 2019, the petitioners filed a Writ Petition before the SCI to challenge the laying down of overhead transmission lines (OTL), used for transmission of electricity generated through solar and wind energy in the two states of Rajasthan and Gujarat. The petitioners requested the SCI to “(i)ssue directions to the respondents to urgently frame and implement an emergency response plan for the protection and recovery of the GIB” (para. 4.a).² While that matter was being heard, the petitioners filed an Interim Application seeking direction to the government “to ensure predator proof fencing, controlled grazing in the enclosure development and to direct the said respondents not to permit installation of overhead power lines and also not permit further construction of windmills and installation of solar infrastructure in priority and potential habitat as identified by the Wildlife Institute of India.”³

In April 2021, ruling on the Interim Application, the SCI restricted laying down of OTL, and ordered for their conversion into underground powerlines, wherever possible. In November 2021, three ministries of the government—Ministry of Environment, Forest and Climate Change; Ministry of Power; and Ministry of New and Renewable Energy—approached the SCI for modification of its April 2021 order. They argued that the judgment will adversely affect India’s “energy transition away from fossil fuels” (para. 7.a), since the area under consideration “contains a very large proportion of the solar and wind energy potential of the country” (para. 7.c). Further, it was also argued that that the “reduction in the population of GIBs began in the 1960s, much before the electrification of the area and the construction of transmission lines” (para. 9.a).

Moreover, in its submissions, the government noted that India “has a commitment at the international level to reduce [its] carbon footprint and recourse to renewable sources of energy including solar installations provides the key to the implementation of these commitments” (para. 9.c). It also highlighted its efforts to protect the GIB, including by listing it in Schedule I of Part III of the Wild Life (Protection) Act 1972.⁴

Noting India’s commitment under international legal instruments, such as the UNFCCC and the International Solar Alliance (ISA), the SCI argued for a balance between protection of

² M.K. Ranjitsinh and Others v. Union of India and Others, Judgment, 2024 INSC 280, at <https://climatecasechart.com/non-us-case/mk-ranjitsinh-ors-v-union-of-india-ors> (India) [hereinafter *Ranjitsinh*].

³ M.K. Ranjitsinh and Others v. Union of India and Others, Order, I.A. NO. 85618 of 2020, 2, at https://api.sci.gov.in/supremecourt/2019/20754/20754_2019_31_1502_27629_Judgement_19-Apr-2021.pdf (India).

⁴ The Wild Life (Protection) Act, 1972, at <https://tribal.nic.in/downloads/FRA/Concerned%20Laws%20and%20Policies/Wildlife%20Protection%20Act,%201972.pdf>. Interestingly, one of the petitioners—M.K. Ranjitsinh—had helped in the drafting of this Act.

the GIB and promotion of renewable sources of energy. It thus modified the April 2021 order that had restricted the laying down of OTL.

The SCI focused on “India’s obligations towards preventing climate change and tackling its adverse effects” (para. 10). It mentioned the Kyoto Protocol, UNFCCC, and Paris Agreement, highlighting India’s commitments to limiting greenhouse gas emissions. In its first nationally determined contribution, submitted in 2015, India had aimed to “achieve about 40 percent cumulative electric power installed capacity from non-fossil fuel based energy resources by 2030 with the help of transfer of technology and low cost international finance including from Green Climate Fund (GCF).”⁵ This goal was increased to 50 percent in 2022, in the updated nationally determined contribution.⁶

In its NDCs, India has mentioned its desire to move toward clean energy through the promotion of solar power.⁷ The court after noting these international commitments categorized the transition to non-fossil fuels as a “fundamental necessity for environmental preservation” (para. 17). From here, the court went on to marry international environmental laws with the Indian constitution. It observed that the “promotion of renewable energy sources plays a crucial role in promoting social equity by ensuring access to clean and affordable energy for all segments of society, especially in rural and underserved areas. This contributes to poverty alleviation, enhances quality of life, and fosters inclusive growth and development across the nation” (para. 18). It then proceeded to *create* a new fundamental right—right to be free from the adverse effects of climate change (para. 27)—under the rubrics of right to life guaranteed under Article 21 of the Indian constitution.⁸ This was despite the observation that “there is no single or umbrella legislation in India which relates to climate change and the attendant concerns” (para. 19).

* * * * *

M. K. Ranjitsinh draws our attention toward India’s obligations regarding mitigating climate change, specifically by transitioning to solar energy, and its commitment to clean energy. One of the major arguments for the petitioner was that the conservation efforts of GIB should not hamper India’s potential to harness solar energy. This was consistent with India’s ambitions to perform a leading role in transitioning to solar energy. India has been focusing on solar energy much before it agreed to an NDC under the UNFCCC. In 2010, it established the Jawaharlal Nehru National Solar Mission (NSS), with the aim “to establish India as a global leader in solar energy by creating the policy conditions for its deployment across the country.”⁹ The NSS aimed to create “policy framework for the deployment of 22

⁵ UNFCCC, NDC Registry, India’s Intended Nationally Determined Contribution: Working Towards Climate Justice, at <https://unfccc.int/sites/default/files/NDC/2022-06/INDIA%20INDC%20TO%20UNFCCC.pdf> (emphasis added).

⁶ UNFCCC, NDC Registry, India’s Updated First Nationally Determined Contribution Under Paris Agreement (2021–2030) (Aug. 2022), at <https://unfccc.int/sites/default/files/NDC/2022-08/India%20Updated%20First%20Nationally%20Determined%20Contrib.pdf>.

⁷ *Id.* at 9.

⁸ Constitution of India, 1950, at <https://www.constitutionofindia.net/constitution/constitution-of-india-1950>. Article 21 states, “No person shall be deprived of his *life* or personal liberty except according to procedure established by law” (emphasis added). *Id.* Art. 21.

⁹ International Energy Agency, *Jawaharlal Nehru National Solar Mission (Phase I, II and III)* (Aug. 24, 2021), at <https://www.iea.org/policies/4916-jawaharlal-nehru-national-solar-mission-phase-i-ii-and-iii>.

gigawatts (GW) of solar power by 2022,”¹⁰ a target which has since been revised to a domestic goal of 175 GW of installed renewable energy capacity by 2022, of which 100 GW was to come from solar power.¹¹

Subsequently, at COP21, India co-launched the ISA with France. Within six months of the United States’ withdrawal from the Paris Agreement—an agreement which was the outcome of COP21—ISA formally entered into force, with 120 signatory countries,¹² of which 103 have ratified it thus far.¹³ The ISA is the “first instance in which the treaty-making process was led by India and backed primarily by poor and developing countries in Asia and Africa.”¹⁴

It was the outgrowth of an extended process.

In 1981, the UN General Assembly adopted Resolution 36/193, which, referring to the Nairobi Work Plan, recognized that:

developing countries seek to enhance their collective self-reliance in various areas, which are in their mutual interest, through programmes of economic and technical co-operation in such areas as exchange of information, joint ventures in project development, joint efforts in research, development, demonstration and adaptation of technologies for *new and renewable sources of energy*, and technical assistance, to supplement the indispensable action to be undertaken by the international community.¹⁵

Referring to this resolution and noting that there were “no specialized agencies created under the UN system to promote renewable energy,” the Working Paper on ISA proposed an alliance of “(c)ountries lying fully or partially between Tropic of Cancer and Tropic of Capricorn [which] are endowed with excellent solar insolation, but [where] the potential remain largely untapped.”¹⁶ The paper listed 121 such countries. The ISA became the mechanism for them to “collectively address key common challenges to the scaling up of solar energy in line with their needs.”¹⁷

The government of India has itself committed to support the ISA structurally and financially by providing infrastructure and a corpus of USD 62 million, including land, for a five-year period until 2021.¹⁸ Vyoma Jha argues that “the ISA could have geopolitical implications as developing countries, or solar-rich countries, attempt to recalibrate global rules for solar energy deployment based on their specific needs.”¹⁹ She notes that the “ISA illustrates the preference of developing countries for legally binding institutions as opposed to legally

¹⁰ VYOMA JHA, *THE MAKING OF THE INTERNATIONAL SOLAR ALLIANCE: INDIA’S MOMENT IN THE SUN* 34 (2023).

¹¹ Vyoma Jha, “*Soft Law in a Hard Shell*”: *India, International Rulemaking and the International Solar Alliance*, 10 *TRANSNAT’L ENVTL. L.* 517, 530 (2021).

¹² International Solar Alliance, *Signatory Countries*, at https://isa.int/membership/membership_country_list?type=mcl (as of Oct. 30, 2024).

¹³ International Solar Alliance, *Member Countries*, at https://isa.int/membership/membership_country_list?type=mcl (as of Oct. 30, 2024).

¹⁴ Jha, *supra* note 11, at 518.

¹⁵ GA Res. 36/193, United Nations Conference on New and Renewable Sources of Energy (Dec. 17, 1981) (emphasis added).

¹⁶ International Solar Alliance, *ISA Working Paper and List of Prospective Members*, 2 (2015), at <https://isolaralliance.org/uploads/docs/dbfa9f55b96709204ae12988596d9b.pdf>.

¹⁷ International Solar Alliance, *Framework Agreement on the Establishment of the International Solar Alliance (ISA)* (2016), at <https://isolaralliance.org/uploads/docs/04519cec12c15e9bc80ad92b3cb10e.pdf>.

¹⁸ *Id.* at 6.

¹⁹ Jha, *supra* note 11, at 518–19.

binding obligations.”²⁰ This point is really important considering India’s objections to the need for a new legally binding obligations in form of the Paris Agreement.²¹

Developing countries like India were at the forefront of climate change negotiations. India was an active participant in the formulation of common but differentiated responsibility principle, and even drafted legally binding principles for the UNFCCC and Kyoto Protocol.²² However, India’s reluctance toward the legally binding obligations started when developing countries were asked to give binding commitments for reduction of greenhouse gases, notes Lavanya.²³ While other developing countries started taking binding obligations, India alone remained steadfast in its opposition. In doing so, India “both trigger[ed] innovation and experimentation in law making as well as blur[red] the boundaries between law, soft law, and non-law.”²⁴ The ISA is one example of such “innovation and experimentation.” It is a legally binding *institution*, not a legally binding *obligation*. The fact that a developed country like France co-launched the ISA, and that many developed countries, including the United States—which has had disagreements with India on climate change negotiations (and had infamously walked out of the Paris Agreement)—have signed and ratified the ISA should be considered as a sign of acceptance of India’s approach toward innovation and experimentation in law making for climate change.

M.K. Ranjitsinh must, therefore, be understood in light of India’s commitment to the ISA and its NDCs, through which it has committed to transition to renewable energy. As mentioned previously, even before committing under the Paris Agreement, India had started its journey toward being a solar powerhouse through its National Solar Mission, but its efforts were hampered by the United States. Though the United States claimed to support India’s aims, it objected to India’s specific policies for transitioning to solar energy, by labeling them as “discriminatory.”²⁵ In 2013, it brought a claim against India before the World Trade Organization (WTO) to challenge India’s policies as violative of General Agreements on Trade and Tariffs.²⁶ The Panel Report, issued on August 25, 2015 and circulated publicly on February 24, 2016, upheld the United States’ claims. India subsequently challenged the Report to the Appellate Body, which also upheld the United States’ claims. At the same time, India challenged some of the United States’ own domestic policies on renewable energy before the WTO.²⁷ The Panel Report in that case upheld India’s claims. In the light of these two cases, the two countries decided to reach a “mutually agreed solution” and accordingly notified the WTO of the same on July 13, 2023, terminating both cases.

²⁰ *Id.* at 528.

²¹ See generally Lavanya Rajamani, *India’s Approach to International Law in the Climate Change Regime*, 57 INDIAN J. INT’L L. 1 (2017).

²² *Id.* at 1–2.

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ Marianna Karttunen & Michael O. Moore, *India–Solar Cells: Trade Rules, Climate Policy, and Sustainable Development Goals*, 17 WORLD TRADE REV. 215 (2018).

²⁶ WTO, Dispute Settlement, DS456: India—Certain Measures Relating to Solar Cells and Solar Modules (2016), at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm. For an analysis of this case, see Sherzod Shadikhodjaev, *India—Certain Measures Relating to Solar Cells and Solar Modules*, 111 AJIL 139 (2017).

²⁷ WTO, Dispute Settlement, DS510: United States—Certain Measures Relating to the Renewable Energy Sector, at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds510_e.htm.

These two cases involving India and the United States are symptomatic of the developed-developing countries divide on climate negotiations, and raise questions about the trade-environment dichotomy. Thus, analysts argued about the negative impacts of “free trade” advocacy for meeting renewable energy goals of not just developing countries (like India), but also developed countries (like Canada).²⁸

That is why the Indian government’s insistence on following through its NDCs in *M.K. Ranjitsinh* is noteworthy. The judgment highlighted India’s commitment to “achieve about 50 percent cumulative electric power installed capacity from non-fossil fuel-based energy resources by 2030.”²⁹ It noted the government’s claim that “India’s commitment to transitioning to non-fossil fuels is not just a strategic energy goal but a fundamental necessity for environmental preservation” (para. 17). However, it lamented the lack of any single domestic umbrella legislation relating to climate change and its attendant concerns. It is because of this lacuna in law that the court then went on to create a new right—right to be free from the adverse effects of climate change—under the rubric of Article 21 of the Indian Constitution. Considering India’s active role in international rule making *qua* solar energy, it is baffling why the government has not created a domestic legislation on the issue. While the ISA does not have mandatory provisions and thus has been described as a soft law in a hard shell,³⁰ the Indian government should have enacted domestic legislations on climate change, especially considering its international commitments under the Paris Agreement and UNFCCC.

Perhaps the most significant part of *M.K. Ranjitsinh* is the following paragraph:

India’s international obligations and commitments in the present case . . . *have not been enacted in domestic law. Regardless*, the Court must be alive to these obligations while adjudicating writ petitions which seek reliefs that may hinder these obligations from being fulfilled or otherwise interfere with India’s international commitments as well as the right to be free from the adverse effects of climate change. (Para. 58, emphasis added.)

Here, the SCI notes that the government has not enacted any domestic legislation with regard to its international obligation. Enacting legislation in furtherance of an international treaty is the sole prerogative of the Parliament of India, as per Article 253 of the Indian Constitution, which states that:

Notwithstanding anything in the foregoing provisions of this Chapter, *Parliament has power to make any law* for the whole or any part of the territory of India *for implementing any treaty, agreement or convention* with any other country or countries *or any decision made at any international conference, association or other body* (emphasis added).³¹

²⁸ See generally, for protectionist interpretation: A. Jayagovind, *Missing the Wood for the Trees: A Critique of the WTO Ruling in India: Solar Cells and Modules*, 56 INDIAN J. INT’L L. 201 (2016); and for free-trade interpretation: Prabhash Ranjan, *A Case for Accepting the WTO Ruling*, THE HINDU (Oct. 14, 2016), at <https://www.thehindu.com/opinion/columns/A-case-for-accepting-the-WTO-ruling/article14799193.ece>. See also WTO, Dispute Settlement, DS426: Canada—Measures Relating to the Feed-in Tariff Program. Here the complainant was the European Union, and the United States and India were third parties.

²⁹ UNFCC, *supra* note 6.

³⁰ Jha, *supra* note 11, at 528.

³¹ Constitution of India, *supra* note 8, Art. 253.

Not only does this article give exclusive power to the Indian parliament to implement any treaty to which India is a party, it also provides no exception to this power of the parliament. As such, the SCI should not have taken it upon itself to domesticate India's international law obligations. Doing so was a wide usurpation of legislative power by the SCI, and it makes this otherwise well-intentioned judgment a legally flawed one. Almost a decade ago, V.G. Hegde asked the Indian courts to be flexible "to accommodate evolving and increasingly changing normative structures of international law."³² Perhaps instead of flexibility, the court needs to limit its forays into legislative powers for incorporation of international law, keeping in mind the separation of powers between the three branches of the government. This will also inculcate a sense of accountability in both the legislature and the executive vis-à-vis signing any international treaty.

Nonetheless, this judgment must be appreciated for its recognition and enforceability of India's commitments for its NDCs. It also highlights how India, which is often criticized by the developed nations for not doing enough to mitigate climate change,³³ is moving ahead in its aim of transitioning from fossil fuel to renewable energy and focusing particularly on solar energy as mentioned in its updated NDC.

AMAN KUMAR

Australian National University

doi:10.1017/ajil.2024.65

This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

ITLOS—UN Convention on the Law of the Sea—climate change mitigation—adaptation to climate change—due diligence obligations—Paris Agreement—temperature goal

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE COMMISSION OF SMALL ISLAND STATES ON CLIMATE CHANGE AND INTERNATIONAL LAW. At <http://www.itlos.org>. International Tribunal for the Law of the Sea, May 21, 2024.

On May 21, 2024, the International Tribunal for the Law of the Sea (ITLOS) delivered a unanimous advisory opinion on the obligations of states to mitigate climate change and to promote adaptation to the impacts of climate change. Following decisions by United Nations human rights treaty bodies¹ and the European Court of Human Rights,² the

³² V.G. Hegde, *International Law in the Courts of India*, 19 ASIAN Y.B. INT'L L. 63, 87 (2013).

³³ Justin Rowlett, *Can Paris Climate Talks Overcome the India Challenge?*, BBC NEWS (Nov. 26, 2015), at <https://bbc.com/news/world-asia-india-34929578>.

¹ *E.g.*, Committee on the Rights of the Child, Decision Adopted by the Committee Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 104/2019, *Sacchi v. Argentina*, UN Doc. CRC/C/88/D/104/2019 (Sept. 22, 2021); Human Rights Committee, Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 3624/2019, *Billy v. Australia*, UN Doc. CCPR/C/135/D/3624/2019 (July 21, 2022).

² *E.g.*, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, App. No. 53600/20, Judgment, (ECtHR Apr. 9, 2024), at <https://hudoc.echr.coe.int/?i=001-233206>.