

SUMMARY OF WORKSHOP 2F: ROLE OF THE COURTS, NONGOVERNMENTAL ORGANIZATIONS, AND THE PRESS: CLIMATE LITIGATION CASE STUDY

Facilitators: Peter Lehner, Environmental Protection Bureau, New York Attorney General's Office, United States
Catherine Pearce, Friends of the Earth International, United Kingdom

Rapporteur: Matt Cooper, Environmental Media Consultant, United States and New Zealand

GOALS

- To discuss what elements of climate change and its causes have made litigation a possible tool to promote action, drawing on prominent climate litigation actions;
- To identify ways in which national and international laws may be used to address climate change polluters (whether nations or industries);
- To discuss and identify the important role that media & nongovernmental organizations (NGOs) play in the climate issue and in litigation strategies;
- To critically analyze the way in which the issues of global warming and climate change are framed and portrayed in the media generally.

1 INTRODUCTION

1.1 Climate Litigation

The facilitators began with opening comments generally describing some of the more prominent climate change litigation cases around the world that may be used as a possible tool to spur action on climate change. Also discussed was the way in which climate change is played out and portrayed in the media and how issues of climate change and global warming are framed generally. The three types of litigation cases identified were: 1) cases to get governments to disclose information about the climate change impacts of their actions; 2) cases to directly limit carbon emissions; and 3) cases to reduce energy use or encourage use of “greener” or renewable fuels.

Other theories and ideas discussed involved: 1) the utilization of human rights actions based on the right to a clean and healthy environment; 2) cases,

actions, and communication campaigns highlighting government-backed projects that are not climate friendly; 3) tort actions based on nuisance or trespass based on property damage caused as a consequence of climate change (such as rising sea levels leading to loss or destruction of coastal property); 4) actions based around countries or institutions unfairly subsidizing industries that are accelerating climate change; 5) choices of relief sought in such actions (i.e., injunctive relief versus claims for monetary damages).

1.2 Framing and Messaging

The workshop participants agreed that any message concerning dramatic climate change effects already occurring or coming in the near future (e.g., stories of environmental catastrophes and environmental refugees created through resource scarcity, droughts, etc.), should be married with a message of hope and education based on renewable or “green” energy. It is

necessary to tell a story of climate change as it relates to human values and the effects of climate change on local communities.

The general consensus was that the message of climate change needed to be communicated in a simple, straightforward, and interesting manner to grab the attention of a skeptical or uninformed public and to answer concerted efforts to dispute the fact that climate change is a reality. A values-based message could be built around the right to clear air, clean water, and a clean environment generally, in order to preserve the health of future generations (i.e., to lessen human health effects of fossil fuel use through the use of cleaner energy). Part of this message would also be that addressing climate change will lead to substantial economic benefits and opportunities in addition to environmental benefits – an entire new area of industry built on renewable energy sources and the new technology, business developments, and job opportunities it creates.

2 DISCUSSION SUMMARY

2.1 Opening of Workshop

The facilitators introduced and gave a general overview of some of the high-profile climate change cases currently being litigated, or that have previously been litigated, around the world. These cases are set out in detail in the background paper Summary of Climate Change Cases Worldwide attached to this workshop report. Participants agreed that the scientific evidence of climate change is robust, and it is becoming more and more certain that climate change impacts can be attributed to increased carbon dioxide emissions from human activities. The three types of litigation cases introduced for discussion were:

- 1) Cases to get governments to disclose information about the climate change impacts of their actions and force consideration of climate emissions;
- 2) Cases where citizens and/or governments are trying to directly limit carbon emissions; and

- 3) Cases seeking to reduce energy use or encourage use of “greener” and renewable fuels.

2.2 Cases from Background Paper Discussed

2.2.1 Climate Litigation & Industry: Case 1.A – State Attorneys General in U.S. Sue Private Utilities

This case involved eight U.S. states (including New York) and the City of New York suing the five largest power companies in the U.S. in July 2004, claiming the companies, which emit nearly 10% of the nation's total carbon dioxide emissions, were substantial contributors to the public nuisance of global warming. The action seeks injunctive relief to reduce pollution; it does not seek damages.

2.2.2 Climate Litigation & Industry: Case 1.D – German NGOs Sue Government for Export Credit Support of Fossil Fuel Projects

This case involved a legal challenge by NGOs against the German government in June 2004 over its secret export credit support for fossil fuel projects since 1997 through its own agency, Euler Hermes AG. Money was expropriated into offshore fossil fuel projects, and the goal of the action taken against the German Federal Ministry of Economics and Labor was to force the government to disclose the contribution to climate change made by such government-supported projects in developing countries. The case is still pending.

2.2.3 International Law & Climate Litigation: Case 3.D – NGOs Submit Climate Change Petitions Under World Heritage Convention

This case involved a petition to the World Heritage Committee in November 2004 to place Sagarmatha National Park (Mt. Everest) on the World Heritage Danger List as a result of glacial degradation caused by climate change. This national park is a focal point of Nepal's tourism-

based economy and is rich in biodiversity, which is imperiled by melting glaciers that could destroy the park's natural and cultural value and place thousands of lives at risk. The case was also linked to two other petitions calling for the coral reefs of Belize and glaciers in Peru to be added to the Danger List as a result of climate change.

The World Heritage Committee is to meet in July this year to decide whether to pick up these cases.

2.3 Other Theories of Interest and Related Cases Discussed

2.3.1 Human Rights Cases: Case 3.A – Arctic Peoples to Frame US Inaction on Climate Change as Human Rights Violation

In the near future, the Inuit people intend to bring a petition in the Inter-American Human Rights Commission against the United States, through the Inuit Circumpolar Conference (ICC). The ICC case will highlight the link between human rights and environmental degradation, especially considering that climate change is projected to impact the Arctic regions sooner and more substantially than other parts of the Earth.

The group discussed whether there are other opportunities around the globe to bring similar actions based on “Eco-Justice” and the link between human rights and environmental damage. Are there possibilities to use World Trade Organization (WTO) mechanisms for this purpose and to bring actions against some of the world financial institutions in order to highlight and bring these human rights and environment stories to light?

2.3.2 Injunctive Relief versus Claims in Damages

The group agreed that calculating the value of damages in the area of climate change was indeed difficult, whereas injunctive relief could impose overall reduction targets. Such reductions could be achieved by various means which could include: improving the efficiency of power plants; using renewable energy sources;

and investing in conservation measures (such as conversion of power plants from coal to gas).

2.3.3 Reduction Goals

The group discussed whether there was a basis or framework for what constitutes an attainable and realistic goal for emissions reduction. Based on statistics and evidence of carbon accumulation in the atmosphere, scientists have tried to determine a reasonable and realistic emission reduction goal that would put us on a trajectory toward some real results and toward avoiding the dramatic consequences of global climate change.

A possible role for network participants is to help pull together some of these emission statistics and formulate questions to focus discussions on what is a reasonable target level. The longer we wait to impose targets, the higher the emission cuts need to be. It was agreed that real cuts need to start now.

2.3.4 Sector Legal Suits

Suits against entire industrial sectors were identified as a valuable tool for creating pressure on industry to develop regulations rather than individual lawsuits against single industry players. By focusing on controls and regulation, you develop and create market mechanisms that can ultimately lead to larger changes in industry behavior and greater emission reductions.

2.3.5 Tort Actions Based in Nuisance or Trespass

The possibility of nuisance or trespass tort actions based on property damage caused as a consequence of climate change was discussed. The specific example raised was rising sea levels leading to loss or destruction of coastal property. Participants noted that proving the causal link between climate change as a consequence of carbon emissions and the property damage now occurring could at times be difficult.

The example of Pacific island nations becoming submerged due to rising

sea levels was raised. Examples such as this were not persuasive to people in countries such as the Ukraine which is not an island nation and therefore people do not see this example as relevant to them. In the context of Kyoto, the Ukraine is interested in selling carbon credits under Kyoto and in the economic advantages the agreement may bring..

Exxon's Climate Footprint: the Contribution of Exxonmobil to Climate Change since 1882, a report issued by Friends of the Earth International in January 2004, also was discussed. One of the major conclusions of the report was that Exxonmobil's emissions of carbon dioxide from 1882 to 2002 totaled approximately 5% of global carbon dioxide emissions, or one twentieth of the world's total. It was noted by participants that more such reports could assist attribution efforts.

2.3.6 Actions Based in Human Rights

The possibility of human rights actions based on the link between human rights and environmental degradation was raised for discussion again. Related concepts discussed included: environmental refugees; the possibility of a major environmental catastrophe; and the dramatic economic as well as human consequences that can occur as the result of an environmental disaster. The idea would be to promote the view that lack of clean water, lack of clean air, coastal flooding, loss of glaciers and snowmelt, etc. are human rights issues. The group discussed the question "How powerful is the human rights angle?"

Some felt that litigation of such human rights cases in local jurisdictions, rather than in the international courts, was more likely to succeed. It is difficult for a local judge to disregard a local human rights argument as opposed to international actions based solely on environmental concerns, which can be too far removed from local concerns and effects on local communities. It was suggested that international human rights bodies were not ready for a case based on environmental human rights. Another question posed was

whether the Alien Tort Claims Act could be utilized as the basis for a legal action in the United States.

A human rights strategy should ideally involve a series of litigation actions that would raise global awareness of the issue of climate change and how it is affecting local communities, peoples, and cultures. Various forms of environmental media and press coverage could be used to support such a campaign.

The group suggested that this was something network participants could help support, networking with, sourcing, and supporting local lawyers around the world to make such a litigation campaign a reality.

Litigation is not as prevalent and tied into the culture of other countries as it is in the United States, but the idea of joint actions setting out the problems, connections, and similarities that exist between countries, regions, peoples, and cultures on the issue of climate change (water scarcity, drought, changing weather patterns, rising sea level, etc.) is a good idea. Such actions could also help provide a vision for the future based on cleaner energy, new technologies, and alternative transportation networks.

Any cases brought must be sound and have beneficial effects on the problem. An added benefit is that sound cases will survive challenges and thus stay in the courts long enough to enable the media to stay focused on the human rights angle as a press-worthy issue.

In the context of the United States it was pointed out that economic arguments were as compelling, if not more compelling, than an action based in human rights. There may be a real opportunity for a tort case based on property damage caused as a consequence of climate change (the example of sea levels rising was raised again). Is there evidence from an economic and industry viewpoint (such as rising insurance premiums for coastal property in high risk areas or offshore oil rigs for example) that can be drawn upon and used as evidence to support the fact that global warming is a reality rather than a disputed theory?

2.3.7 The Framing of the Climate Change Message in the Media

Public attitudes are extremely important. The group suggested that we need to focus on the goal of communicating the problems that are already occurring, or beginning to become apparent, and marry this with a message of hope for the future – suggesting solutions and renewable energy options as an alternative to the status quo. We need to set out what the problems are, in a simple and clear way, and suggest the positive solutions available. It is very difficult to sell a negative message – the doom and gloom message of global warming and hard science – in the absence of a human story and solutions that provide some hope for our collective future.

2.3.8 Other Ideas and Strategies Raised in Group Discussion

The need to address the argument that “the science of global warming is unclear” was discussed. Litigation can be used as a tool to demonstrate the real evidence that climate change and global warming is occurring and that there will be real and dramatic human consequences as a result. A related topic discussed was the fact that the media's portrayal of the “climate change debate” in the States is very unbalanced. The reality of the climate change science is that there are over 1500 scientists who attest to the fact that climate change is a reality versus a few industry-backed scientists who are suggesting that climate change either is not occurring or does not pose a problem. The media in the States needs to be encouraged and educated so that the portrayal of the issue in the media is more balanced. Alternatively, is the better approach not to even enter into a debate on the science?

Other points raised include:

- There is a real need to combine media, law, and science, to facilitate a cooperative approach to selling the message. Only by having all of the different experts in the field working together can we battle the counter-spin in an effective manner. NGOs and expert groups also

need to work to educate judges and the media about the reality of climate change.

- There must be a focus on basic human values and the effects climate change is having on human communities.
- The environmental movement must get away from speaking solely about strict scientific data and evidence and re-frame the message of climate change at a level of human values and how environmental change is impacting people and communities. The group discussed the idea of telling the stories of the plight of indigenous people and local communities being impacted by climate change as an indicator of the wider changes that could impact all people and their way of life.
- We may be at a “tipping point” where there will be sudden change that could have dramatic effects (such as a major environmental or humanitarian disaster).
- The media is a very visual tool that should be utilized to create video releases and tell many human stories. There is a very clear need to create media content and produce documentary pieces about the issue. Examples of human stories are the Sherpas from Tibet – whereby a human story can be told, but undercutting the local story is a wider message about climate change.
- A majority of countries have accepted that climate change is a reality but are acting on this knowledge in different ways. There must be joint action from countries in all regions of the world to address climate change.
- The group discussed the example of the Chernobyl Nuclear Reactor disaster and lessons learned. This environmental catastrophe spurred a whole environmental and democratic movement in the Ukraine, and the press arising from the disaster has created substantial political pressure to ensure that such an incident does not occur again. Unfortunately, people have now become tired of the issue because it is always portrayed in a

negative light. The press in the Ukraine has become very sensationalist where-by stories are only published if they are possible to sell to a mass audience.

- In Algeria, there are educational programs to help prevent summer fires, using theatre as the medium to educate and tell a story.
- It was agreed that renewable energy and a focus on sustainable building practices both provide a valuable opportunity to develop and promote a positive message through: education about alternatives to fossil fuel reliance; examples of green buildings; and emphasizing reduced impacts on human health (i.e., cleaner air and water) through cleaner energy.
- Other ideas discussed involved ancillary cases promoting energy efficiency and cases where deforestation is highlighted as a cause of and contributing factor to climate change.
- The group discussed the establishment of marine sanctuaries in the Philippines, the possible scientific theory that coral reefs are in fact carbon sequestration sinks, and whether anyone knew of any studies currently being undertaken that prove this theory. In the context of climate litigation cases, it was agreed that there needed to be a strategy of linking plaintiffs to defendants, as well as identifying where and in what forum (national/international) to bring an action.

3 RECOMMENDATIONS FOR INECE

The group concluded that network participants have a potential role to play in eliminating the barriers that may exist in bringing legal actions based on climate change. It was suggested that network participants could investigate areas of cooperation in capacity building, networking, and creating awareness, not only in the form of exchanging ideas and sharing experiences, but by generating material and evidence that helps educate the media, the judiciary, and the public, countering the cur-

rent media spin on climate change issues. Network participants could also help in the preparation of evidence and material to support the formulation of any climate change legal actions. This could include the development of concise abstracts, for use in many languages, on the science and stories of global warming to be distributed to the public, media, and judiciary, utilizing the internet and other forms of media.

The assistance work suggested included:

- Disseminating and simplifying the background science so that laypeople (media, politicians, the public, etc.) can understand the issue of climate change and the threat it poses clearly.
- Presenting the climate change science in a way that demonstrates the causal link between human-based carbon emissions and the dramatic effects of climate change on people.
- Providing legal support and networking opportunities around prominent climate change litigation cases and ensuring that the human stories behind such cases are publicized. Translating scientific articles into simple abstracts that can support litigation cases and be used to educate media and the public. These abstracts would also be translated into other languages where needed.

4 CONCLUSIONS

- Actions based on human rights and environmental degradation are and can continue to be a very successful strategy to raise awareness of climate change. In the event that the laws of a particular jurisdiction do not allow for an action to be brought, a good fallback position may be a tort action based on property damage (so long as the defendant is large enough and has existed for long enough to meet appropriate tests of causation).
- Education of the media, public, judiciary, and lawmakers is extremely important to ensure the message of climate change

is communicated and represented in a balanced and clear manner.

- Information about climate change and stories of the effects of climate change on people must be communicated simply and effectively through media sources and the press. Media and publicity is also a valuable tool to help support and publicize a particular litigation action.