Winds of Change? A Review of International Climate Change Litigation

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Winds of Change? A Review of International Climate Change Litigation

By Marianne Dellinger

I. Introduction

Two recent landmark decisions by American courts may signal new beginnings to climate change litigation in this country. In Massachusetts v. EPA, the Supreme Court held that the Clean Air Act does indeed give the United States Environmental Protection Agency the authority to regulate greenhouse gases. In late September 2009, the well-respected United States Court of Appeals for the Second Circuit held - as the first court in the USA - that cases involving the Clean Air Act and climate change issues cannot simply be dismissed based on the political question doctrine or because of the complexity of the lawsuit. In the latter instance, suit was brought on a common law public nuisance theory. Human rights violations based on climate change have been actively asserted, but not met with much success so far. In fact, a recent United Nations report on the relationship between climate change and human rights concluded that while in theory, global warming may infringe on certain fundamental rights, individual human rights-based climate lawsuits are not likely to be successful.

Perhaps because of past failures in successfully litigating climate change issues, another legal camp believes that climate change litigation is unlikely to play a significant role in arresting global climate change altogether. Instead, these scholars are of the opinion that the bulk of the work in reducing greenhouse gases must be undertaken by nation states in the form of international agreements.

This article examines the middle road approach seen from an international perspective. Whereas national and international agreements are, of course, an extremely important tool in the fight against climate change, litigation plays a valuable role as well. This is so because lawsuits may not only result in judicial mandates, but also because the attention they cause may produce a spill-over effect in the legislative and international agreement arenas, thus converging what might otherwise be seen as two competitive approaches.

The article will examine select international lawsuits most of which were successful in the sense that they either reached settlements or were heard by a tribunal the outcome of which the environmental associations were satisfied. As valuable lessons may also be learned from ideas for lawsuits that have not (yet) come to fruition, the article will also briefly analyze a few such examples.

II. Successful Attempts

Germany: Climate Impacts of Export Credits to be Disclosed

In what has been said to be the first European instance of taking legal action to combat climate change, two major German NGOs filed suit against the German Federal Ministry of Economics and Labour in 2004. The suit was launched to force the German government to disclose its contribution to climate change via projects supported by the government’s export credit agency Euler Hermes AG (“Hermes”). Hermes provides government-backed guarantees and insurance to German corporations seeking to do business in developing countries. Through these programs, billions of dollars are funneled into projects that support traditional energy, mining and transportation projects, thus contributing to climate change. Germanwatch and Friends of the Earth Germany initially asked the German government to disclose certain information about these projects after 1997, the year of adoption of the Kyoto Protocol. The request was based on German laws modeled after European Union legislation on the freedom of environmental information. The government rejected the request, stating that some of the information had already been published and that the request was thus unnecessary, claiming that the German government is not subject to the European Environmental Information Act and thus does not have to fulfill any direct mandate of environmental protection, and citing to the need to prevent the publication of trade and business secrets.

In 2006, the case was settled by the Berlin Administrative Court. The court rejected the German government’s arguments that its export credit activities were not subject to European environmental information laws and that the credits did not affect climate change and the environment.

Transparency in government funding is thus a viable litigation method in Germany and may work in other EU-nations too. These are all subject to the same Directive that formed the underlying basis of the suit. Further, most have ratified the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which may be and, as shown, has been used as an argument for public access to what governments otherwise may classify as non-accessible information. A similar line of attack...
may perceivably work in the United States under, inter alia, the Freedom of Information Act.\(^7\)

**The United Kingdom: “Lawful Excuse” to Bailing out Banks**

Because of the closeness of the American and English legal systems and their historical connectedness, it is relative to examine climate change suits in the United Kingdom. In October 2007, a group of six Greenpeace climate protesters scaled a chimney at the Kingsnorth power station in Kent in an attempt to shut down the plant because of its daily emissions of 20,000 tons of carbon dioxide. In court, the defendant protesters pleaded “lawful excuse,” claiming that they shut down the power station in order to defend property of greater value from the global impact of climate change.\(^8\) The defendants cited to known climate change hot spots such as the Arctic ice sheet, the coastal areas of Bangladesh, the city of New Orleans and the Pacific island nation of Tuvalu, but also argued that the local Kent neighborhood was in immediate need of protection. The jury heard testimony from such diverse witnesses as Professor James Hansen, one of the world’s leading climate scientists, and an Inuit leader stating that climate change is already seriously affecting life in that region. By majority vote, the jury of nine found the protesters not guilty, thus signaling that action was justified in the context of damage caused around the world caused by CO\(_2\) emissions from the power plant.\(^9\)

In a first-of-its-kind case, a group of non-profit organizations brought suit against the British Treasury in June 2009, accusing the government of breaking its own promises to combat climate change and human rights violations when bailing out the Royal Bank of Scotland (“RBS”).\(^10\) RBS has financed a host of non-renewable energy companies in controversial or politically and environmentally sensitive regions since the recent rounds of financial rescue packages. In the six months following the initial bailout of the banks, RBS lent close to the equivalent of $16 billion to traditional coal, oil and gas companies; more than a quarter of the amount the bank received via taxpayer funds at that point in time. The suit is in part based on the British government’s own economic guidelines which require the government to undertake a comprehensive assessment of all new policies, programmes and projects so as to best promote the public interest when using government resources. The legal argument is that using public money to finance new fossil fuel projects in spite of the threat of climate change flies in the face of public interest and is contrary to the government’s posturing in the international political arena as a “global leader on climate change.” Although the “UK Financial Investments” – the Treasury’s framework for public investment in recapitalized banks – makes no reference to the need to consider social and environmental criteria, nor to support or even be consistent with other public policy objectives, the legal challenge lies in successfully arguing that the government has an affirmative responsibility to ensure that the public is not paying to expand further fossil fuel developments. The Treasury relied on its alleged need to maximize the financial return for the taxpayer. The court held that the Treasury had acted within the law to protect the interests of its shareholders, and the case is currently on appeal.\(^11\)

These examples show quite a bit of ingenuity on the part of British individuals and groups in attempting to hold private parties and even the British government accountable for climate change. At any rate, the suits exemplify new litigative strategies in a legal system not too dissimilar from that of the United States.

**Canada: Kyoto Protocol Compliance a Non-Justiciable Issue**

In 2008, two environmental organizations as well as several pro bono lawyers brought suit against the Canadian government for violating the 2007 Canadian Kyoto Protocol Implementation Act (“KPIA”).\(^12\) The KPIA establishes mandatory legal obligations and deadlines including the publication of a climate change plan and the enactment of regulations to ensure that Canada takes effective and timely action to meet its obligations under the Kyoto Protocol.\(^13\) The government was sued for failing to publish the required climate change plan, for failing to publish the required proposed regulations and for failing to establish the greenhouse gas emissions reductions reasonably expected under proposed.\(^14\) After months of deliberation, Canada’s Federal Court ruled that the KPIA is non-justiciable.\(^15\) The case is now under appeal.

In another internationally relevant case, the Canadian Supreme Court has already proved willing to apply domestic Canadian law extraterritorially to private United States defendants.\(^16\) In **British Columbia v. Imperial Tobacco**, the Court upheld a judgment against American tobacco manufacturers for the health care costs incurred by British Columbia in caring for people stricken by tobacco-related diseases. Although this was not a climate change case, it may prove applicable to future cross-border cases based on global warming costs caused by American power companies and car manufacturers.

**Australia: Can Coal Really be “Clean” and Should Intergenerational Justice Form Part of Power Plant Permitting Processes?**

Turning to the world down under, two recent suits stand out. In one, the Australian Climate Justice Program and Greenpeace lodged a complaint against the energy company HRL with the Australian Competition and Consumer Commission (“ACCC”).\(^17\) The suit alleged that HRL engaged in false, misleading and/or deceptive conduct within the meaning of the
Australian Trade Practices Act by referring to its proposed coal-fired power plant as a “New Clean Coal Power Station” and touting its production as “Low Greenhouse Power from Brown Coal” when in reality, “clean coal” is but a euphemism for what is still a heavily polluting source of energy. The proposed power plant will add more than three times more greenhouse gases to the atmosphere than will be saved under the Australian Federal Government’s plan to phase out incandescent light bulbs in Australia. The controversial statements were presented both on the plant’s website and in promotional media releases. HRL also used the same terminology in connection with its applications for state and federal funding.

The plaintiffs argued that HRL’s use of the term “clean coal” is not only contrary to the law, but also has serious infrastructural and economic consequences since consumers believing they are buying energy from “clean” sources are less likely to buy energy that is truly green and since taxpayer funds are being shifted away from renewable energy projects. Plaintiffs further argued that just as the ACCC did not let tobacco companies get away with claiming that mild cigarettes were “healthy,” neither should HRL now be allowed to get away with using the phrase “clean coal,” which plaintiff saw as a mere “smokescreen.”

In somewhat a technical decision, the ACCC held that the use of the terminology had not breached the Trade Practices Act. First, the Commission found that the media releases were merely “promotional” and not an “act of trade and commerce.” Thus, the Trade Practices Act was held not to apply. The ACCC further found that whereas HRL’s applications for funding may have been of a commercial or trading nature under the Act, given the nature of the “technical material” provided and the “sophistication” of the target audience – power generation specialists, investors and government scientists – no evidence of misleading or deceptive conduct by HRL could be established. Nonetheless, the ACCC also expressed its willingness to continue to pursue questionable green power and “clean coal” claims in connection with marketing efforts and has released a set of guidelines governing the use of those phrases.

In another case, conservation groups sought judicial review of the exclusion of the impacts of greenhouse gases from brown coal in connection with the possible permission of the expansion of a coal mine in Victoria. The Victorian Civil and Administrative Tribunal (“VCAT”) found that the local government’s planning panel must consider greenhouse gas impacts in power plant planning processes. The decision is said to be important because it not only emphasizes the fact that the environmental goals and processes of the Victorian planning system are designed to ensure thorough?

Federal Climate Change Legislation Status Report

By Diane Henkels, Past Chair, Environment and Natural Resources Section.


Both bills set goals to limit greenhouse gas emissions using 2005 levels as a baseline measure. The Senate bill identifies a more stringent 20 percent reduction by 2020 compared with the 17 percent in the House bill. The other targets are the same: a 3 percent reduction from 2005 levels in 2012; 42 percent reduction in 2030; and an 83 percent reduction in 2050. Significantly, unlike the House bill, the Senate bill establishes an auction for 10 percent of the emissions allowances. Also, the House and Senate bill differ in their treatment of EPA standards on new and existing sources. Both bill include provisions for protecting forests in developing countries using forest sequestration. The Senate bill designates the Secretary of Agriculture as the lead agency for implementation of offset programs pertaining to agriculture and forestry.

The House bill is broad in that in addition to setting the greenhouse gas limits, and a cap and trade regime, it also includes provisions addressing transmission, Smart Grid technology and planning, net metering for federal facilities, setting up a carbon sequestration framework, regulating coal energy technologies, establishing a framework for cap and trade for greenhouse gas emissions, offsets and related forestry regulation, and adaptive management response to climate change. Also H.R. 2454 establishes State Energy and Environment Accounts, funded by proceeds of sales of emissions allowances, to serve as a state-level repository for managing and accounting for emission allowances provided to states designated for renewable energy and energy efficiency purposes. The House bill amends the Public Utility Regulatory Policies Act of 1978 to include a combined energy efficiency and renewable electricity standard requires a minimum retail electricity to meet 20% of demand through renewables by 2020. The Senate bill provides grants within the states’ individual frameworks, favoring states with renewable portfolio standards.

For more information on the two bills, see http://www.pewclimate.org/ or thomas.loc.gov.
independent assessment of environ-
mental impacts, but also because it
underscores the legal right of com-
munity members to have a say about
how their environment is treated by
government planning bodies.

Incidentally, the VCAT decisional
language bears a resemblance to the
Philippine Supreme Court case Oposa
v. Factoran in which children from all
over the country filed suit to compel
the government to protect the nation’s
forests for “generations yet unborn”
based on the then-novel theory of
“intergenerational justice.”20 Although
Oposa won much international legal
fame, it has also been criticized for
being a pyrrhic victory because, among
other things, the part of the Supreme
Court holding that incorporated
these phrases was just dictum and
not precedential, because the case
would purportedly have been decided
the same way had the children only
filed suit on their own behalf since
the environment cannot be protected
for future generations without also
protecting present ones, and because the
protection of future generations already
formed part of Philippine jurisprudence
before the case.21

New Zealand: Climate Change is “Relevant” in Power Plant
Permitting

Traditional coal-fired power
plants frequently seem to take quite
a bit of heat when it comes to global
warming. So too in New Zealand,
where Greenpeace protesters recently
occupied the roof of a power plant
for nine days protesting the plant’s
application for permission to run on
cool. When the permit was granted,
Greenpeace and others appealed to
New Zealand’s Environment Court
arguing that climate change impacts
should be considered in any approval
of the reconfiguration of the plant.
The Environment Court held that
climate change was an “irrelevant con-
sideration” in the approval process.22
However, the High Court of New

Zealand overturned that decision, rul-
ing that climate change was a relevant
factor to be considered.23

Coming out completely differently in
another case, the same Environmental
Court held that greenhouse gas reduc-
tions and climate change are relevant
when considering the permit to build
even small wind farms of 63 MW and
19 turbines.24

III. The Ones That Did Not Fly

Finally, inspiration may perhaps
also come from examples of ideas of
climate change suits that never came
to fruition. After the extreme heat
wave that scorched several European
nations in 2003, claiming an estimated
35,000 lives (almost 15,000 in France
alone), It was expected that individuals
or organizations would file the first
major European climate change suit
to involve families whose relatives
perished because of the heat wave.
But to date, no such suit has been
brought. Similarly, contemplated
actions by Alpine ski resorts bringing
suit for snowpack losses or suits against
European automobile manufacturers
were never brought.

Research for this article did not
produce any specific answers as to why
these ideas did not work out. One
explanation may, in general, lie in the
different legal cultures between the
United States and Europe. Whereas
in the United States, lawsuits are an
accepted method of enforcing civil rights
and shifting burdens of compensation,
the situation tends to be much different
in Europe. There, bringing suit is not
only much more unusual in general,
but it could also be a costly affair since
losers of suits must in many cases com-
 pense the winning party’s attorneys.
Nationalized health care makes cost-
shifting unnecessary, and accidents are
typically seen as just that, not as a basis
for suit. Furthermore, various national
legal systems make it more difficult than
in the United States for individuals to
bring class action lawsuits. Perhaps
most importantly is the cultural
antipathy against lawsuits that are often
seen as a last-resort, extreme solution
typically only undertaken by well-heeled
corporations and other major players.
However, as shown in the cases of
Germany and the UK above, more
indirect suits based on, for example,
access to information or environmental
accountability in government-backed
export and other financial programs
have already been successful.

IV. Conclusion

So far, climate change litigation
both in the USA and around the world
is in the early phase and has yet to
create much in the way of results.
The most significant ones so far are
probably the focus on government
funds being indirectly used for projects
that contribute to climate change
through export credits, such as in the
German example, and perhaps via
the bail-out of banks, such as in the
upcoming case involving RBS in the
UK. The focus on the importance of
assessing climate change and using
non-misleading terminology in power
plant permitting and marketing efforts
as in the Australian and New Zealand
cases is also noteworthy. The budding
use of the concept of intergenerational
justice as shown in the Philippine and
Australian cases is also of importance,
although it is still too early to tell if this
will truly gain enough momentum.

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Endnotes

1 Massachusetts v. EPA, 549 U.S. 497, 528-29,
533-34 (2007).
2009).
3 Id. at *33.
4 U.N. High Comm’r for Human Rights, Human
Rights Council, Annual Report of the United
Nations High Commissioner for Human
Rights and Reports of the Office of the High
Commissioner and The Secretary-General, 29,
The Public Trust Doctrine and Oregon Law
By Susan O'Toole, Environmental and Natural Resources Executive Committee and Issue Editor

Arguments have been made that two areas of Oregon law incorporate the Public Trust Doctrine. First, some have argued that ORS 537.110 provides that water in aquifers, streams and rivers belongs to the people in trust. This statute states that “All water within the state from all sources of water supply belong to the public.” Other statutes have also been used to make this argument. They include:

- ORS 537.525: “. . . the right to reasonable control of all water within this state from all sources of water supply belongs to the public . . .”
- ORS 536.310(1): “. . . all the waters within this state belong to the public for use by the people for beneficial purposes without waste. . .”
- ORS 537.525(2): “Rights to appropriate ground water and priority thereof be acknowledged and protected, except when, under certain conditions, the public welfare, safety and health require otherwise.”

The Water Right Act also arguably contains public trust language, in that it defines an “in-stream water right” to mean “a water right held in trust by the Water Resources Department for the benefit of the people of the State of Oregon to maintain in-stream for public use. . .” ORS 537.341 provides for certification for in-stream water rights, and this certification in the name of the Water Resources Department as “trustee for the people of Oregon.” Various related statutes have also been cited as placing an obligation on the Water Resources Department to ensure that the “corpus” of the trust is not diminished. See, e.g., ORS 390.815, 390.835, 537.332(2) and (3), 537.341, 536.220(2)(a), 537.190, 537.153, 537.170, 537.621, 537.622, and 537.628.

As outlined above, only in-stream water rights are held expressly in trust by the Water Resources Department. Even if it were accepted that all water is held in trust, the corpus of that public trust is arguably the sum total of the usufructory rights of the public to use the waters of the state for beneficial use. Thus, this corpus is administered by the Water Resources Department through an orderly system of water rights. To the extent that it exists, the “public trust” responsibility of the Water Resources Department with regard to all water rights is arguably to ensure that water is used for beneficial purposes without waste.

There are also public trust ideas in the context of the Common School Fund in Oregon. These include the concept that the trustee’s duty is to maximize income from the trust corpus. In managing the lands held by the Common School Fund, the state is bound to execute the provisions of the trust “with the object of obtaining the greatest benefit for the people of this state, consistent with the conservation of this resource under sound techniques of land management.” Or. Const. VIII, § 5(2). This duty has been characterized as contemplating “a complete management responsibility of the state’s land resources to make them product of income or other values depending on what will best conduce with the welfare of the people of the state and the conservation of the state’s land resources. 36 Op. Atty. Gen. 150, 223 (1972). Two other Oregon Attorney General Opinions addressing the Common School Fund have indicated that a trust of the trust fund has a duty to maximize earnings from the corpus of the trust. 46 Op. Atty. Gen., n. 12 (1992); 37 Op. Atty. Gen. 569, 576 (1975).