WWW.NYLJ.COM

An ALM Publication

VOLUME 253—NO. 47 THURSDAY, MARCH 12, 2015

ENVIRONMENTAL LAW

Expert Analysis

Scale and Focus of Climate Litigation Outside of United States

he large and growing volume of litigation in the U.S. courts about climate change has received an avalanche of analysis in the professional and academic literatures. In contrast, climate litigation outside the United States is little known on these shores and has gotten far less attention.

For the first time, this non-U.S. climate litigation has now been compiled and analyzed. Some of the findings:

- There is far more climate litigation in the United States than in the rest of the world combined. Through the end of 2013, more than 420 climate cases had been resolved in the United States; the total for the rest of the world was 173.
- The other country with the largest volume of climate litigation is Australia. The cases there are dominated by disputes about the assessment of projects' impacts on greenhouse gas (GHG) emissions, and of the impact that sea level rise and other climate-related events may have on projects.
- Numerous cases have arisen from the European Emissions Trading System, such as disputes about member states' implementation measures.

By Michael B. Gerrard



• The underlying science of climate change is broadly accepted; it is rarely questioned in the courts..

The compilation of non-U.S. cases is found in a database maintained and posted by the Sabin Center for Climate Change Law where I am director.² This column is based on an analysis of these cases.³

Strategic vs. Tactical

One striking difference between litigation inside and outside the United States is the relative breadth of its ambition.

There is far more climate litigation in the United States than in the rest of the world combined.

In the United States, litigation has played a central role in the development of climate law and policy. Administrative petitions and lawsuits filed by those frustrated with federal inaction culminated in 2007

in the landmark Supreme Court decision in *Massachusetts v. Environmental Protection Agency*,⁴ which held that the Clean Air Act gives the Environmental Protection Agency the power to regulate GHGs. This decision has formed the basis for most of the flurry of federal activity that has occurred since, and that is continuing today.

States and industries that are opposed to regulating GHGs have looked to the courts to try to halt EPA's actions. The first round of EPA rules led to more than 100 lawsuits; all were dismissed together by the U.S. Court of Appeals for the District of Columbia, giving EPA a resounding victory.⁵ The Supreme Court granted review but ultimately left standing all the EPA actions with the exception of one narrow provision that applied to only a small fraction of GHG emissions.⁶

EPA has proposed an elaborate set of new regulations on GHG emissions from fossil fuel power plants; when they are issued in final form—probably this summer—a new flood of litigation seeking to invalidate them seems inevitable.

The federal courts here have seen several high-profile cases that attempted to use public nuisance theories to establish a federal common law that would limit or impose money damages for GHG emissions, and another set of cases using public trust doctrine theories. None of these cases has succeeded, though several

MICHAEL B. GERRARD is Andrew Sabin Professor of Professional Practice and director of the Sabin Center for Climate Change Law at Columbia Law School, and senior counsel to Arnold & Porter. MEREDITH WILENSKY, formerly a fellow and associate director of the Sabin Center, assisted in the preparation of this article.

New Hork Caw Journal THURSDAY, MARCH 12, 2015

of the public trust doctrine cases are still pending and more are being filed.

On top of all these cases with strategic objectives is a large volume of cases with narrower aims, such as seeking to block the construction of particular coal-fired power plants.

With the few exceptions discussed below, this sort of strategic litigation has been absent in the rest of the world. Litigation has not either spurred or sought to halt climate regulation anywhere else. A suit was brought in the federal courts of Canada to force that country to comply with the Kyoto Protocol; it was dismissed as raising political questions beyond the reach of the judiciary. Though there are several other common law countries, in none has a suit been brought attempting to utilize common law theories against GHG emitters.

Our Childrens Trust, the Oregonbased group that has organized much of the U.S. litigation under the public trust doctrine, has also spurred comparable cases elsewhere in the world. with broad aims to spur climate regulation. The suit in Ukraine enjoyed a partial victory in the lower court, but this was reversed on appeal. 10 A suit filed in the High Court of Uganda is pending. A petition was filed with the Philippines Supreme Court in February 2014 seeking a change in the nation's transportation system to reduce GHG emissions and make roads safer for people traveling by bicycle or on foot. This case is now being briefed.¹¹

One of the most interesting pending cases was filed in December 2013 in the District Court in The Hague, Netherlands, by the Urgenda Foundation and 886 Dutch citizens against the Dutch State (the Kingdom of the Netherlands). The suit seeks an order that the Dutch State take measures to reduce GHG emissions in the Netherlands to at least 25 percent below 1990 levels before 2020. The legal bases for the case are the principle of international law that transboundary pollution may not cause harm in

another state; obligations under the United Nations Framework Convention on Climate Change and subsequent decisions under it; the European Convention on Human Rights, especially Article 2 (right to life) and Article 8 (right to private and family life); and torts such as nuisance and endangerment. The plaintiffs are relying in particular on a 1988 decision from the Dutch Supreme Court, called the Potash Mines judgment, concerning liability for cumulative emissions from different sources. The case has been briefed and will be argued on April 14.

While Australian state courts generally agree that direct GHG emissions should be considered in the permitting process, they did not usually find emissions sufficient to justify rejection of the proposed project.

Statistical Findings

Of the 173 cases found, 159 were claims against government entities. The largest group by far (107 cases) involved the environmental assessment and permitting processes. These cases focus on procedural requirements for land use and planning, including impact assessment and construction and emissions permits.

The second largest category (38 cases) involved substantive climate change regulations, especially the European Emissions Trading System.

Australia had 70 cases. Second was the United Kingdom (35 cases), followed by the European Union (30 cases). New Zealand and Spain follow with 14 and 13 cases, respectively. One or two cases also arose in Canada, France, Czech Republic, Germany, Nigeria, and Ukraine.

Australian Cases

Since Australia has by far the largest volume of climate litigation outside the United States, some attention to its cases is warranted.

Seventeen of Australia's 70 cases were challenges to the permitting of direct and indirect emissions sources. These claims were almost exclusively aimed at proposed coal mines and coal-fired power plants.

Plaintiffs trying to prevent direct emissions sources only experienced a few successes among many failures. While Australian state courts generally agree that direct GHG emissions should be considered in the permitting process, 13 they did not usually find emissions sufficient to justify rejection of the proposed project.¹⁴ Most sympathetic to plaintiffs challenging emissions sources has been the New South Wales (NSW) Land and Environment Court, which found legal justification to set a limit on GHG emissions in two instances, but the decisions were short-lived. In Macquarie Generation v. Hodgson, this court found that a power station's license to emit carbon dioxide included an implied limitation of "reasonable regard and care for people and the environment."15 However, the NSW Court of Appeal reversed the decision, reasoning that interpreting the permit not to allow carbon dioxide emissions would "deprive the license of sensible operation."16

Hunter Environmental Lobby v. Minister for Planning involved a challenge to the expansion of a coal mine. The NSW Land and Environment Court affirmed the project approval, but subject to conditions, including requiring offsets for any direct GHG emissions from the mine that exceed projected levels. The court found that these conditions were permissible under a state statute that grants the power to include in planning permits reasonable conditions that are consistent with the goals of the statute.

New York Law Tournal THURSDAY, MARCH 12, 2015

The court noted that the conditions could be suspended if relevant legislation was subsequently enacted; when the Australian Government established a carbon tax in 2012, it was suspended.¹⁸

While Australian courts have agreed that direct GHG emissions must be considered in environmental impact assessments, they have diverged on how indirect emissions should factor into environmental permitting. Australian courts were asked to determine whether impact assessment of a proposed coal mine should take into account GHG emissions that result from third parties burning the coal. In *Gray v. Minister for Planning* the Land and Environment Court of NSW found that the state's environmental impact assessment statute does require consideration of such emissions, and rejected an impact assessment for a large coal mine because it failed to consider them. 19 In contrast, the Queensland Land Court, in *Xstrata Coal Queensland v*. Friends of the Earth, held the transport of coal or its end-use need not be considered.²⁰

In 2013 the NSW Land and Environment Court upheld a challenge to a proposed coal mine citing vulnerability to climate change as contributing to biodiversity concerns.²¹

About half of the climate change cases in Australia focused on whether the effects of climate change on proposed construction projects were adequately considered. Several state and local governments have enacted planning measures and development conditions designed to ensure adaptation to climate change impacts, especially sea level rise, increased storms and bushfires.²² For example, in *Queensland*, the Redland Shire Strategic Plan of 1998 requires urban developments to take sea level rise into consideration. On this basis, a Queensland court upheld a limitation on construction to only those parts of the

property above the 1-in-100-year flood level.²³ Similarly, citing climate change provisions in the state development plan, a South Australia court upheld a local council decision to reject a proposed coastal development due to risk of sea level rise.²⁴

The state of Victoria also adopted planning policies that require consideration of climate change impacts on proposed projects. The Victoria Civil and Administrative Court has consistently found that a Coastal Hazard Vulnerability Assessment (CHVA) is required prior to approval of a planning permit where there is any evidence of vulnerability due to sea level rise.²⁵ The court has required project plans to apply necessary adaptation measures based on the findings of CHVAs. In two cases where the CHVA revealed insufficient adaptation to future sea level rise, the court denied planning permits.²⁶

Migration

One notable New Zealand case addressed the issue of climate change induced migration. In *Ioane Teitiota v*. Ministry of Business, Innovation and *Employment*, a citizen of the low-lying island nation of Kiribati sought refugee status, arguing that rising ocean levels and environmental degradation made returning to Kiribati economically unviable.²⁷ The New Zealand High Court found that the circumstances did not qualify the applicant for refugee status because the applicant was not subjected to persecution as required under the 1951 United Nations Convention Relating to the Status of Refugees.

The court also expressed concern about expanding the scope of the Refugee Convention and opening the door to millions of people who face hardship due to climate change. In dismissing the application, the Court of Appeals noted the gravity of climate change but stated that the Refugee Convention does not address the issue.

We are continuing to follow these cases and will report on any decisions of particular significance.

- 1. The U.S. cases are compiled in an on-line chart that is maintained and frequently updated by Arnold & Porter and the Sabin Center for Climate Change Law, available at www climatecasechart.com.
- 2. It is available at http://web.law.columbia.edu/climatechange/non-us-climate-change-litigation-chart.
- https://web.law.columbia.edu/sites/default/files/microsites/climate-change/white_paper_-_climate_change_in_the_ courts_-assessment_of_non_u.s._climate_litigation.pdf 4. 127 S.Ct. 1438 (2007).

- 5. Coalition for Responsible Regulation v. EPA, 684 F.3d 102 (D.C. Cir. 2012).
- 6. Utility Air Regulatory Group v. EPA, 134 S.Ct. 2427 (2014). 7. American Electric Power v. Connecticut. 131 S.Ct. 2527 (2011); Native Village of Kivalina v. ExxonMobil, 696 F.3d 849 (9th Cir. 2011), cert.den. 133 S.Ct. 2390 (2013); Comer v. Murphy Oil, 585 F.3d 855 (5th Cir. 2009), vacated and dist. Ct. decision reinstated, 607 F.3d 1049 (5th Cir. 2010), pet. for writ of mandamus denied sub nom. *In re Ned Comer*, 131 S.Ct. 902 (2011); California v. General Motors, 2007 WL 2726871 (N.D. Cal. 2007)
- 8. E.g., Alec L. v. McCarthy, ___ F.3d ___ Chernaik v. Kitzhaber, 263 Or. App. 463 (2014) (D.C. Cir. 2014);
- 9. Friends of the Earth v. Canada (Governor in Council), 2008 F.C. 1183, aff'd 2009 FCA 297.
- http://epl.org.ua/en/lawnbspnbspnbsp/access-to-justice/cases/climate-change-litigation-violation-of-the-legislation-on-the-right-to-information-and-public-participation-inclimate-change-issues-by-the-ministry-of-environmental-protection-in-ukraine/
- 11. The petition is available at http://ourchildrenstrust.org/ sites/default/files/Philippines%20Petition%20.pdf.
- 12. An English translation of the summons is available at http://www.wijwillenactie.nl/wp-content/uploads/2014/06/ FINAL-DRAFT-Translation-Summons-in-case-Urgenda-v-Dutch-State-v.25.06.10.pdf.
- 13. E.g. Re Australian Conservation Foundation, [2004] 140 LGERA 100(Austl.).
- 14. E.g. Greenpeace v. Redbank Power, [1994] 86 LGERA 143, 153-55 (Austl.).
- 15. Hodgson v. Macquarie Generation, [2010] NSWLEC 34 2010 (Austl.).
- 16. Macquarie Generation v. Hodgson, [2011] NSWCA 424 at para. 18 (Austl.).
- 17. Hunter Environment Lobby v. Minister for Planning [2011] NSWLEC 221 (Austl.).
- 18. Hunter Environment Lobby Inc v. Minister for Planning (No 2) [2012] NSWLEC 40 (Austl.).
- 19. Gray v. Minister for Planning [2006] 152 LGERA 258 (Austl.).
- 20. Xstrata Coal Queensland v. Friends of the Earth [2012] OLC 013 (Austl.).
- 21. Bulga Milbrodale Progress Association v. Minister for Planning and Infrastructure, [2013] NSWLEC 48 (Austl.).
- 22. Jacqueline Peel, "Climate Change Law: The Emergence of a New Legal Discipline," 32 Melb. U. L. Rev. 922, 952 (2008). 23. Charles & Howard v. Redland Shire Council, [2007] 159 LGERA 349, 359 (Austl.).
- 24. Northcape Properties v. District Council of Yorke Penin sula, [2008] SASC 57 (Austl.).
- 25. Wade v. Warnambool [2009] VCAT 2177 at para. 15 (Austl.) (citing Owen v. Casey CC [2009] VCAT 1946, Myers v. South Gippsland SC [2009] VCAT 1022, Ronchi & Anor v. Wellington SC [2009] VCAT 1206.
- 26. West Gippsland Catchment Management Authority v. East Gippsland SC [2010] VCAT 1334; Myers v. South Gippsland SC, [2009] VCAT 2414 (Austl.).
- 27. Ioane Teitiota v. Ministry of Business, Innovation and Employment [2014] NZCA 173 (N.Z.).

Reprinted with permission from the March 12, 2015 edition of the NEW YORK LAW JOURNAL © 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-03-15-19