COP 10: The Green Litigation Tango

by Christopher C. Horner

The greens are coming—they're lawyered up and ready for a fight. And the recent United Nations Framework Convention on Climate Change (UNFCCC) 10th Conference of the Parties (COP-10) in Buenos Aires provided a glimpse of what they've got in store.

At COP-10 on December 13, representatives from Iceland held a prime-time event announcing a study on Arctic warming. Featuring computer-predicted melting and pleas about the Arctic Inuit's plight, the report was already a month old and well-spun through the media cycle. It took an event two nights later to bring this rehash into focus.

On December 15, the Center for International Environmental Law (CIEL), a hard green legal group, convened the press to detail a human rights complaint that CIEL plans to file before the Inter-American Commission on Human Rights (IACH), an organ of the Organization of American States. The aggrieved are Arctic Inuit peoples as represented by the Inuit Circumpolar Conference, the defendant is the United States; the allegation against the U.S. is "for causing global warming and its devastating impacts."

Leave aside for the moment this action's legal merits (there are none). Consider the presentation, which included a remarkable approach to oral argument.

Left to right: CEI Editorial Director Ivan Osorio, CEI Director of International Environmental Policy Myron Ebell, and Argentine environmental attorney Horacio Franco at the conference, "Climate Change, Energy, and the Future of the Global Economy," co-sponsored by CEI and Argentina's Fundación Atlas.

Green Gimmicks from COP-10: Hula dancer from the National Environmental Trust and conference badge neck sash from Greenpeace.

The speaker was Dr. Robert Corell, an American oceanographer and scientific bureaucrat. According to Dr. Corell, the Inuits—whom he described as steeped in a 9,000-year-old subsistence lifestyle (that's a good thing?)—now appear to have their ages-old lifestyle and hand-to-mouth existence threatened by global warming, because their snowmobiles are falling through the ice. You can't make this stuff up.

"Indigenous communities are facing major economic and cultural impacts," Corell said.

"If you are indigenous and you have lived with your ancestors for upwards of 7,000 to 9,000 years and you had a subsistence living which has been dependent upon the existence of ice, that is now a serious problem. Snowmobiles do not detect thin ice; I think you will find indigenous partners in this room who will tell you some of their close relatives who have not made it through the ice pack because they expected it to be more firm than it actually was and their snowmobiles went through."

Warming that would apparently not have occurred but for the United States is the turbulence supposedly imposed on this idyllic stability. Unfortunately for the complainants, there is a lot of evidence that the Arctic climate, including the extent of the ice cap, fluctuates cyclically over periods of several decades. For example, the Arctic was apparently warmer in the 1930s than today.

The Inuits might consider calling John Edwards if he gets back into the ambulance-chasing business. This complaint—seeking an unenforceable determination, under an agreement which the U.S. has not ratified—is mere foreplay to making "climate change" the trial lawyers' next tobacco.

This is because success before the IACH can produce no tangible outcome because the panel has no binding authority and no jurisdiction over the U.S. anyway. As such this likely is an effort to parlay "soft" international law into a stepping-stone for awarding domestic damages. Reading CIEL's 15-page argument and roadmap, the groups appear to be laying a foundation for subsequent tort claims, its lawyers' denials notwithstanding.

Still, this group does dwell excessively on claims of purported deprivations of the Inuits' rights to privacy, residence, preservation of home and property, and the like. Again, this must be "preamble" complaining. For tort purposes, the money claim is a determination that "human rights"—as protected by both treaties and "the law of nations"—have been

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in-state alcoholic beverage industries' economic interests, then it will likely strike them down. Judging by the oral arguments, the latter argument seems to have won the day.

Justice Antonin Scalia expressed doubt that requiring "an in-state office somehow prevents wineries from shipping to minors or prevents them from evading taxes," and added that the experience from the 26 states that allow direct shipping from other states "suggest it's not a problem." Justice Ruth Bader Ginsburg noted that the purpose of the 21st Amendment "was not to empower states to favor local liquor industries by erecting barriers to competition."

Although the 21st Amendment applies solely to alcoholic beverages, a Supreme Court ruling in favor of protecting interstate direct wine sales under the commerce clause could clear away other potential barriers. Beyond wine, middlemen for a wide variety of goods and services—including motor vehicles, real estate and mortgages, contact lenses, medical supplies, and pharmaceuticals—are also exerting in-state political clout to restrict Internet competition. Federal Trade Commission (FTC) Chairman Timothy Muris, commenting on a FTC report advocating an end to state restrictions on wine e-commerce, noted that, "our findings in the wine industry suggest that anti-competitive state regulations may significantly harm consumers in many of these industries." This being the first such case to reach the Supreme Court, a decision allowing direct Internet wine sales will set a powerful precedent, and could go a long way in shaping the future of Internet commerce.

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results by using implausible scientific and economic assumptions. And even if global warming occurs as predicted, the alleged adverse impacts have been exaggerated or simply made up.

At the same events and in an appearance on Argentine television, I discussed the costs that the Kyoto Protocol would impose on developing countries like Argentina. Although developing nations don't have to make cuts in Kyoto's first round, they would have to be included in further rounds if global emissions are going to be slowed significantly. But, unlike western Europe and Japan, countries like India, China, and Brazil are still increasing in population. Greater population means greater energy demand. Thus, Kyoto, by leading to energy rationing, would be a disaster

for the developing world.

Fortunately, many major developing country leaders seem to understand this. China, whose rapid economic growth has made it the world's second largest producer of greenhouse gases, stated emphatically in Buenos Aires that as a developing nation it will not accept any curbs on emissions now or for at least 50 years. The resistance of major developing countries to sign on to energy rationing, plus the fact that the European Union, Japan, and Canada probably won't meet their initial targets means that Kyoto has probably reached a dead end. But that won't keep its supporters from trying to resurrect it. They'll be coming soon to a courtroom near you.

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violated.

Potential plaintiffs are placing great value in a ruling—even one by the IACH—that anthropogenic climate change violates human rights. Such a determination could qualify plaintiffs to sue for money—and thus possibly a non-subsistence lifestyle—under the 1789 Alien Tort Claims Act. That Act gives any foreigner with a tort claim access to the U.S. federal courts, so long as they allege violation of a treaty or "the law of nations."

Therefore, whatever its weaknesses, this approach should be taken seriously. Substantively, of course, many other difficulties impede an effort to assign responsibility for some portion of climate change—particularly since earlier climate changes have occurred naturally, without calamity (or lawsuits), and which even many alarmists admit cannot be distinguished from alleged man-made climate changes.

Assisting such plaintiffs, however, is the Bush Administration's biggest environmental policy blunder: the Climate Action Report 2002. The report—submitted to the United Nations as America's official "policy and position" on climate change—"admits" U.S. complicity in climate change, albeit with some watery qualifications. Presumably, its authors assumed that this, like so much else in the diplomatic arena, is a consequence-free feel-good project. Jurists increasingly disagree.

All of this begs for the opportunity to put climate alarmism on trial. To date, grandstanding lawsuits, like that of New York Attorney General Eliot Spitzer, et al. against select utilities, are not likely to yield substantive debate but only settlements for windmill quotas. Depending on how the Inuits proceed, they might surprise the world through altering their ages-old culture—by adopting litigiousness.

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