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## Panel II Symposium- A New Legal Frontier in the Fight against Global Warming

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## PANEL II

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MS. THOMPSON: Welcome back. I hope you all enjoyed lunch.

My name is Nycole Thompson, and I am Notes and Articles Editor on Fordham's *Environmental Law Review*. It is my pleasure to be moderator this afternoon for our panel discussion.

Before we begin, I would like to take this opportunity to thank our keynote speaker, Ms. Sheila Watt-Cloutier, for the time she took out of her demanding schedule to be with us. Her emphasis on the connections linking the different peoples of the world are especially important, and I would like to reiterate her three basic messages: First, global climate change is happening in the Arctic. Second, the effect of global climate change on the Inuit culture has been devastating and threatens the future of the culture. Third, there are massive changes in store for the rest of the world due to global climate change.

Now getting to this afternoon's panel, our first speaker will be Paul McGee. Paul McGee is a law professor at Seattle University. His areas of expertise include environmental law and land use. Professor

McGee's career highlights include serving as county prosecutor in Chicago, a litigator in a Chicago law firm, and a civil rights attorney in Mississippi. Professor McGee was twice a Fulbright Professor at the University of Madrid. He was professor at UCLA Law School from 1969 to 1994 and has had joint appointments at Fordham-UCLA and Fordham-Seattle University, from 1992 to 1994. Prof. McGee has visited and taught at other universities in Europe, Latin America, and South Africa. He received his law degree from Columbia University.

Among his remarks today, Prof. McGee will describe strategies employed by environmental NGOs and state governments to bring the U.S. into compliance with the Kyoto Protocol's goals.

Without further ado, I introduce Professor McGee.

PROF. MCGEE: We agreed that I would go first, partly because of the paper I did here. I want to thank the staff of Fordham Law School, particularly Susan Santangelo, for being so receptive. I came out from Seattle Friday to see "The Gates" in Central Park. Thank God I did, because the weather wasn't permitting the next couple of days. So I have enjoyed my stay here.

I have quite a bit of manuscript, but I won't read it all. I am going to focus on the Pacific Island states. I am going to talk just a little bit about what I call pending and incipient litigation.

The common-law private/public nuisance litigation, whereby what I call the New England states versus the power companies – and it is largely a common-law nuisance suit, alleging federal common law, with all the Erie implications that you can imagine. I actually think, in terms of substantive law, in many ways, that is probably on the soundest theory, but reasonable women can differ about what a nuisance is. There is a view on the Supreme Court in the *Lucas* case, by Scalia, that it has to have some precedence in common law, meaning that if the Plantagenets didn't recognize it, Scalia doesn't recognize it. Whether he can take that wing of the Court with him, if this case ever gets there, is another question.

The next suit is the so-called CO<sub>2</sub> Petition by blue states, Friends of the Earth, Greenpeace, and the usual cities – Arcata, California, Oakland, Santa Monica, and Boulder. This is a shootout between red and blue states. They petitioned EPA to regulate, under 202 of the Clean Air Act, CO<sub>2</sub> as a pollutant. All the red states, without exception, except for Michigan – and Michigan came in on the side of the national automobile dealers, engine manufacturers, truck manufacturers, and utility regulatory groups – so you can see that

those states which are either supportive of the administration and/or have industries that would be affected have opposed the suit.

The environmentalists want tailpipe regulation of emissions of CO<sub>2</sub>. I think the case will turn on whether the EPA has to regulate CO<sub>2</sub> emissions. In the first place, there is a problem about whether you consider it a pollutant or you don't consider it a pollutant. Some people consider it as something to nourish growth. On the other hand, in the context of global warming, it is a pollutant.

The second question is whether or not EPA has the discretion to decide what they are going to regulate. It is true that this act says "any," but it is not like the Clean Water Act, which says that everything has to be regulated unless it is excepted – everything that comes out of the end of pipe.

So it is problematic, in my mind, as to whether that suit will eventually be upheld if it gets to the court of appeals and whether the Supreme Court will take it. I think that is, at best, a fifty-fifty chance.

I think the public nuisance suit is a stronger case than the CO<sub>2</sub> petition. But I hope I am wrong.

The other is the failure of – the Export-Import Bank and the Overseas Private Investment Corporation are being sued by Friends of the Earth, Greenpeace, Boulder, Arcata, Oakland, and Santa Monica. I may have this in the earlier suit, and I may not be right about that – I am not right about that – Baltimore – yes, they are in both suits, I guess.

The question there is whether or not these agencies had to do environmental study. The case that may be close to it is one out of the Southern District of California, by Judge Gonzalez, sitting in San Diego, that held that a power plant entirely constructed in Tijuana, designed to generate power for Baja, shipping only some of its power to San Diego, had impacts in the United States because of the transmission lines. I guess there was a presidential permit involved in it. Anyway, Judge Gonzalez held that there were real impacts, secondary impacts, like growth inducement – the usual suspects when it gets to impact discussions. They cite that case.

I thought, in looking at the litigation, that the government would claim extraterritoriality – that is, that the EIS/EAs only apply to actions within the continental United States or in Antarctica. There are some cases. There is one from the D.C. Circuit. There is a line of cases about extraterritoriality.

The plaintiffs claim that the only way you can get out of doing it is by an express exemption by Congress. But, of course, that is not

true. There are several different ways in which the courts have found that Congress has precluded EIS/EA study without explicit, categorical exemptions from Congress. When two statutory schemes collide, you can assume that Congress did not intend for the EIS/EAs to apply.

So the theory of that is simple. It is a federal agency. There are impacts to the United States because of global warming, and they didn't do environmental studies. The problem with it, finally, unlike the CO<sub>2</sub> suit, is that there is no substantive bite to it. As you know, you can do an EIS and EA, and in the end, it doesn't matter what you do. It is a completely procedural statute in the fact that plaintiffs claim procedural and informational standing.

The other case is a human-rights petition to the Inter-American Commission. That is one I am not going to comment on, because we have two people here on the panel that are going to do that. I had thought the stars, as I told people, had aligned perfectly, where you had a forum. You had somebody who would hear the suit. The United States had not escaped jurisdiction entirely. It was one of the portholes that the United States didn't cover when it escaped from the world. So under the doctrine of American exceptionalism, the United States could be subject to an advisory opinion from the Inter-American Commission, not by the Inter-American Court, because we withdrew jurisdiction from them. You know from the Hoffman Plastics case that Rehnquist held that the Mexican undocumented workers could not get overtime pay because they were not American citizens; they were here illegally.

The Inter-American Court held differently. It held that was a violation of their human rights. But it is of no effect within the United States.

I think, overall, the public nuisance case is the one that in the long run has the greatest chance of success.

What I want to talk about today – and I only have a few minutes – is what I call transboundary paradigms. Those are classic transboundary impacts in public international environmental law, which holds that industrial activity in a nation cannot be carried on in a way that substantially harms another country.

So my first paradigm was transboundary air pollution in the Pacific Island states – there is no way I have time to read it, so I will simply try to tell you what it holds – then the ozone depletion as an international customary law violation, *erga omnes*, which means “against all,” transboundary contamination and the protection of human rights, and then my last paradigm was acid rain.

So the heart of my paper, for your purposes today, would be state responsibility for significant transboundary air contamination. What I point out is that, by treaties and by customary international law – customary international law means nations behave in the international arena because they think customary law obligates them to act in that fashion. That is the thing that is between custom, like ships that pass in a certain way, the saluting of captains to other ships and other minor protocol stuff that doesn't rise to the dignity of customary international law. It is not sufficient for a nation simply to do something. There is a *mens rea* component, for you law students out there. It is their state of mind that is important in judging whether they are complying with international law.

So fault remains an element of liability. But there is also now a rising school of thought that there can be environmental harm without fault of negligence. The Framework Convention on Climate Change establishes a basis for liability under regimes of fault or no fault. The state responsibility has been thought to require attribution of responsibility to the states, but the official government position of the United States in opposing the protocol has, in effect, endorsed and ratified the continued generation of greenhouse gases here.

Then I mention a number of international conflicts, the famous case – I am just talking to my brother here from British Columbia, where Trail Smelter, east of Vancouver, contaminated farms in Washington State. It was settled by an arbitration panel, but the panel held that, as a matter of customary international law, Canada had violated the rule that they have to use their territory in a way that they don't export pollution to the United States.

There are very few such precedents, but there is an overwhelming recognition of the salience of that principle. There are a lot of treaties creating civil liability. What has happened is that nations have tried to privatize this transboundary prohibition so that they don't have to sue each other. There are very few states – there is the Corfu Channel, Turkey or something – there are about four or five actual precedents in which judicial tribunals have actually held and applied the principle.

The principle has been more recognized in mediation and in other treaties. For example, the Law of the Sea – yes, I know we didn't sign the Law of the Sea. We were only one of two nations that did not do so. But I think it is the view of scholars – Guruswamy and others – Guruswamy, at Colorado, is a leading authority on this. He argues that it has created – because customary international law is a function of the Western powers, Western Europe, during the colonial

and times of the slave trade, establishing rules of conduct between themselves. Now the feeling is that customary international law has to be established internationally, and it doesn't take several centuries for it to generate.

So the thought is that the United Nations Convention for the Law of the Sea has, in fact, created this principle and recognized it. In Article 32, there are the conventional non-navigational uses of water courses, which parallels the Organization of Economic Development, which articulates the principle that domestic or national courts can and should grant relief and compensation. Article 32 holds that where a person suffers threat of suffering significant transboundary harm, the state should grant the injured person, in accordance with its legal system, access to justice.

In other words, if Mexico contaminates, as they have, the New River in eastern California, the United States should have some access to Mexican courts to remedy this. This leaves NAFTA to the side, of course.

There is a cluster of other treaties, with a range of activities, including the peaceful use of nuclear energy, maritime carriage of nuclear materials, oil pollution, dangerous goods by road, rail, and inland navigation vessels. There is NAFTA. There is the Paris Convention on Third-Party Liability for Nuclear. There are several conventions that recognize this principle. There are treaties protecting the Rhine against pollution. But claims have, as I said, been privatized.

The other important sources, of course, are the Stockholm and Rio de Janeiro treaties. I won't spend time on that.

But there are different levels of authority within international law with respect to the law. The primary sort is a treaty, then customary international law, and then the works of scholars. With memories of Rodney Dangerfield, we do get some respect somewhere.

It is recognized by scholars in such documents as a restatement of the foreign relations law of the United States that a state must take all necessary measures to prevent activities from causing significant injury to the areas beyond the national jurisdiction. I cite some other scholars. Then they go into the question of *erga omnes*, about whether an externality generated or an act by a nation creates a responsibility to the whole world. Ozone contamination would be an example of that. There is also the concept of *erga omnes* where Australia and New Zealand, in the nuclear test cases, claimed the right to be free of radioactivity.

So on the basis of treaties, customary international law, and the prevailing view of scholars, nation-states are responsible for pollution in the environment of other countries. Operationally, this means that nations have created schemes of civil liability to avoid the diplomatic problems that arise from nation-against-nation legal actions. At the very least, where they insufficiently develop these civil schemes, the instances in which claims have been settled by polluting sources with nations, even while conceding international liability – state responsibility either recompensed by settlement or to shift responsibility for remedial action to private entities suggests that civil lawsuits might be brought against private actors with the impacted states in the case of nations whose very existence is threatened. Resort to international tribunals for relief, even if that relief is only to a territory – then I talk about ozone depletion and protection of human rights.

I don't have time to do the science of ozone depletion, but it has to do with certain chemicals that rise in the atmosphere and destroy the ozone layer. In a nutshell, what happens is that there are a handful of chemicals being produced in the most developed countries, destroying the ozone layer. The science of it is that if the ozone layer diminishes over population areas – and there is some evidence that it has begun to do so – the consequences would be dire. Ultraviolet radiation, a form of light invisible to the human eye, causes sunburn and skin cancer. In addition, it has been linked to cataracts and weakening of the immune system. Without the ozone to screen out the ultraviolet, illness would increase. A 1 percent decline in ozone levels would result in 10,000 more cases of skin cancer. Between now and 2075, ozone depletion could cause an extra 200 million cases of skin cancer, as well as less specific damage to plant life and so forth.

One scholar has said that theoretically, the complete destruction of the ozone layer would result in the extinction of life on earth.

So it is quite serious, but there was a technological fix. The last refuge of industrialists or contaminators is the technological fix. Americans are used to having technology fix stuff. With ozone depletion, they had the perfect fix. There was a substitute technology that was readily available. There were two conventions, one in Vienna and then a protocol in Montreal and then a Copenhagen agreement, ways in which they could keep increasing the level of regulation, substances regulated, in a way that laid the foundation, in fact, for Kyoto.

It is true that China and India are still using the old CFCs, but it is possible, in the long run, to fix this problem.

The reason I cite the ozone paradigm is because there is a recognition in the ozone paradigm that no nation has a right to destroy the ozone layer. For the most part, New Zealand, Chile, and Australia were the ones that were the most affected by it.

I talk about the ozone layer in the paper. I want to skip over the Inuit case, which is the most interesting. We have people to talk about that. I want to talk about the Pacific Islands.

[Slide] The interesting part about the Pacific Island states – and this is one slide of where they are. They are very small islands. Like the people in the Arctic, they have nothing to do with greenhouse gases. They generate about 0.03 percent of the earth's CO<sub>2</sub> emissions. Yet they are the nations that will be most impacted almost immediately. So the most innocent people will be the people most directly affected.

They have already experienced disruptive changes consisting of coastal erosions, droughts, coral bleaching, widespread and frequent occurrence of mosquito-borne diseases, high sea levels, making soil too saline for cultivation of crops. A high island such as Viti Levu could experience average annual economic losses of \$23 million to \$52 million by 2050, equivalent to 2 to 4 percent of Fiji's growth development project [sic]. A low group, such as Tarawa, famous for the Marines in World War II – a famous battle there – faces annual damages of \$8 million to \$16 million by 2050, compared to a current gross domestic product of \$47 million U.S. dollars, or in the case of catastrophic events, much greater losses.

In a worst-case scenario of climate change impacts based on the IS92e scenario, the Intergovernmental Panel of Climate Change suggests a temperature rise of three-and-half centigrade by 2100 and a sea level rise of ninety-five centimeters above the present level. These impacts would render some of the island uninhabitable. Tuvalu, Kiribati, the Marshall Islands, and Tokelau would be the most severely impacted. Atolls such as Papua and New Guinea and the low-lying islands of other states would be included.

Prime Minister Kaloa Talake of Tuvalu has said, "For the people of low-lying island states of the world, and certainly of my country, global warming already threatens our survival and our existence." Tuvalu is a small, remote – about halfway between Hawaii and Australia – one of nine atolls in the South Pacific that represent Oceania. With predicted sea level increases of up to eighty-eight centimeters in the coming century, they face the imminent possibility

that they may follow Atlantis to a watery grave. Already facing flood resettlement programs, 75 of their 11,000 inhabitants are going to New Zealand. Ironically – or maybe predictably – Australia, which at one time did not admit people who were not of European descent, which is, along with the United States, in defiance of the world community, has shut the door to immigration, blaming the victim, claiming that Tuvalu, through deforestation and other failures to protect the environment, has accelerated the impacts of global warming, and therefore they are responsible for it.

In short, global climate change will slowly but surely open a Pandora's box of political, social, and economic stability. Look at a couple of slides here.

[Slide] That is actually Tuvalu. You can see just how shallow it is.

[Slide] There is a picture of where it lies. You can see where they are. They are halfway between the Hawaiian Islands and Australia. That just sort of shows the Pacific Basin. We had a map of both Asia and North and South America to show how they lie, but I think you can figure out where it is.

So I think that in the case of Tuvalu you have the perfect fusion of human-rights doctrine – and that will be described to you by my colleague here. In fact, I close my piece, for the time at least, with his statement about the catalogue of human-rights violations that he thinks are being generated by global warming. I think that a human-rights action on behalf of one of the Pacific Island states against Australia or against the United States and Australia is the perfect case. You would have the perfect doctrinal suit under public international environmental law. You have the perfect case for human-rights violations.

The problem, of course, is a forum, because the United States has pulled up the drawbridge and isolated itself from the rest of the world, in terms of real, viable, meaningful context with the rest of the world. This isolation, this diplomatic isolation, has meant that it is sort of difficult to see how you would get jurisdiction in the ICJ, which would be the perfect forum for it.

But I think a suit by Tuvalu – and I understand there is somebody in the room that knows more about it. I hope he comments during the question-and-answer period, where that stands. I understand there is somebody in Australia who has become a sort of folk hero, advocating some action by the Tuvaluans to sue somebody for the harm that is impending.

I am sure I have run over my time, so I will yield to some people who are actually on the front lines doing this work.

Thank you.

MS. THOMPSON: Thank you, Prof. McGee. You reviewed the strengths and weaknesses of those four suits you mentioned dealing with transboundary pollution, which I think highlights the fact that you have to have a certain set of factors in order to bring a successful suit.

You also went into treaty and customary international law, plus the works of scholars, regarding transboundary air pollution, which we hadn't talked about in our first panel discussion. So that adds a lot to the discussion.

Lastly, you ended up with the case study on the Pacific Island states, which really shows the impact of global climate change on the population and the prospective impacts regarding their political, social, and economic stability. You ended by talking about jurisdictional issues with an ICJ case.

Thank you very much.

Our second speaker is Donald Goldberg. Donald Goldberg is a senior attorney for the Center for International Environmental Law, which he helped found in 1989. He currently directs the CIEL's climate change program. Among Mr. Goldberg's many accomplishments, he was the first NGO representative on the U.S. delegation to the international climate negotiations, as well as the Global Environment Facility. He has been assisting the Inuit Circumpolar Conference to bring a global warming-based human-rights lawsuit against the United States, and he was the co-chair and vice chair of the ABA's Committee on Climate Change and Sustainable Development from 1998 to 2004.

He is adjunct professor of law at the Washington College.

He will talk today about the prospects of international litigation regarding global climate change suits.

MR. GOLDBERG: [Slide] As our moderator just told you, I have been working with the Inuit Circumpolar Conference on a human rights petition, which Paul Crowley, our next speaker, is going to go into in detail. I am not going to talk too much about that particular petition.

I thought what I would do is talk a little bit about some of the thinking that led us to the conclusion that a human-rights claim would be a good way to go, if we wanted to take a legal or litigious approach to the issue of global warming.

My organization, for those of you that didn't get it the first time, is the Center – well, it says right there. You can see that we focus on international environmental law.

When we first addressed the question, I will tell you that it really came up early in the Bush Administration, when George Bush announced that he was not going to fulfill his campaign pledge to regulate power plants, or CO<sub>2</sub> from power plants, and when he made it clear that he was not going to go forward with ratification of the Kyoto Protocol. At that point, I think there was a lot of frustration in the environmental community, and a number of groups and independent lawyers — a few are in this room — started to think about the possibilities of litigating to bring some pressure against the administration. Because we are international in our focus, we looked at international options.

[Slide] So that is the question: Could we find any tribunals, any fora where we could raise the question of global warming as a legal question? The first question we asked was, what is the substantive basis in international law for bringing such a claim?

[Slide] We looked at customary international law first. Prof. McGee just talked about that fairly extensively, so I don't need to say much about it. The only thing I would point out here is that the issue of transboundary harm seems now to be pretty well-established as customary international law. The most authoritative statement we have is from the ICJ itself. It was actually an advisory opinion on the legality of the threat of nuclear weapons. The ICJ said, "The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment."

I don't think you could get a more authoritative statement that there is a duty not to harm other states by actions that you take within your own boundaries than this statement from the ICJ.

[Slide] Another approach: The U.N. Framework Convention on Climate Change. Does this give us a handle to bring some sort of a claim against the U.S.? Not a very good handle. The objective, you see here, of the convention is to stabilize greenhouse gas concentrations, basically, at safe levels. That is not happening. That much is clear. The U.S. has not taken actions to stabilize emissions, let alone stabilize concentrations in the atmosphere.

[Slide] I am going to get, in a couple of slides here, to some of the procedural problems with each of these approaches, but let me run through the third approach that we considered, and that is human

rights. Just to give you one example of a human-rights declaration, so you can get a sense of what kinds of rights are available, these rights are taken from the American Declaration of the Rights and Duties of Man, part of the OAS system. It was one of the founding documents of the OAS. It applies to all members of the OAS, the Organization of American States.

You see what some of the rights are: right to life, to residence and movement, inviolability of the home, preservation of health and well-being, a right to the benefits of culture, to work and fair remuneration, and to property. I think when Paul tells you about some of the – you heard this morning from Sheila Watt-Cloutier about some of the impacts. Paul will go into greater detail. I think it will be readily apparent that these rights, at least on their face, apply to many of the impacts that the Inuit are already experiencing.

[Slide] Looking at some of the procedural questions that would be faced if you went to any of the organizations or fora that I just named, beginning with the ICJ – I think Prof. McGee mentioned this – the big problem with the ICJ is, you can't get the U.S. into a contentious case unless the U.S. joins of its own volition, because it withdrew from what is referred to as the optional clause, which made jurisdiction of the court mandatory. At one time, the U.S. was subject to mandatory jurisdiction of the ICJ, but it withdrew about twenty years ago, when Nicaragua's harbors were being mined. That became the subject of an ICJ suit, prompting the U.S. to withdraw.

Another route under the ICJ would be to seek an advisory opinion. An advisory opinion can be sought by one of the organs of the U.N., by the Security Council, by the General Assembly, and a few other agencies. At least at the time we were looking at this, this didn't seem like a viable route, because it didn't seem to us at the time that any agency – certainly not the Security Council, and probably not the General Assembly – would be willing to take up this issue, because so many other countries are involved in contributing to the problem.

I am now starting to think that an advisory opinion sometime in the future, requested by the General Assembly, may not be so farfetched, as states start to see themselves more on the impact side of global warming as opposed to contributing to the problem itself. When you have such big players as the U.S. still out of the game, I think that is feasible sometime in the future, perhaps.

The Framework Convention, the UNFCCC, does have a dispute-resolution mechanism. Again, you have the problem of it not really

being mandatory. It can't impose at this point any remedies on the U.S. That is a problem throughout. We will leave that just with that observation for the moment.

U.S. domestic courts we talked enough about this morning, so I will skip over that.

Which leaves us with the human-rights systems. We looked at two that we thought might be possible to provide a forum for bringing a case against the U.S., one being the U.N. and the other the OAS system, or the Inter-American system.

Another point that I should mention: as we were thinking about this – I didn't say this – of course, as NGOs, we weren't thinking so much about what other states could do. We were thinking about what an organization like CIEL could do or an organization like the Inuit Circumpolar Conference or a community, a village. We don't have the same standing in international law as a state does. So there might be many routes available to states that wouldn't be available to us.

I guess it is of secondary importance, but in seeking – well, we would not have the standing to bring a contentious case to the ICJ anyway, even if the U.S., for some unknown reason, consented to be a party to it. The suit would have to be brought by another state. So we were actually looking for a route that would be open to private actors and civil society. Clearly, that is not the ICJ.

[Slide] Advisory opinion – I guess you could say the same problem. We would have no power to request an advisory opinion. I believe states can request them and, as I said, some of the agencies in the U.N.

[Slide] The Conciliation Commission – again, the procedure can only be initiated by a party. It is not open to observers or non-parties. Its effect is nonbinding, but that is pretty much true throughout.

Another point is that we are still waiting for the Conference of the Parties to adopt the rules for dispute resolution and the Conciliation Commission.

I don't know whether that would be an impediment to bringing a dispute, the fact that the Conciliation Commission hasn't been created yet. I suspect not.

[Slide] U.S. domestic courts we will skip.

[Slide] Which brings us to the human-rights systems. Again, the two that we looked at were the U.N. system and the Inter-American system. In the U.N. system, there is, actually, a route that individuals or private parties or organizations can take to bring a

claim in the U.N. system, but only against countries that have ratified the optional protocol to the International Covenant on Civil and Political rights. The U.S. did not ratify that protocol. So a claim can't be brought against the U.S. by a private party in the U.N. system.

[Slide] In the Inter-American system, that is actually not the case. It is possible for an individual or an organization to initiate a claim in the Inter-American system. That was what we saw as one of its major advantages. There are some other advantages: The commission has been very forward-looking in recognizing the connection between environmental harm and human rights. Its jurisprudence is also, I think, conducive to this kind of claim, because the Inter-American Commission looks beyond its own cases. It will look at, of course, cases of the Inter-American Court, but it will look at cases and findings outside of the Inter-American system. It will look at the European system, the U.N. system, not for precedent, but, I guess you would say, more for guidance.

[Slide] The limitations of going to this system: The big one, I suppose, is that the Inter-American system is divided into two bodies. There is a commission and there is a court. The court has jurisdiction over, I believe, all but two members of the OAS. That is all the countries of North, Central, and South America. Two countries did not ratify the convention that established the court; hence, they are not subject to the jurisdiction of the court. I am sure we can guess at least one of those countries. Of course, the U.S. didn't ratify the convention. It turns out Canada was the other country. When I tell Canadians that, they are appalled.

The difference between the court and the commission, basically, is binding authority. The court can issue orders to states that, at least technically, they are required to fulfill. The commission doesn't have that power. It can only make recommendations.

But the important thing is that both the commission and the court have the power to interpret the Inter-American human-rights system. If the commission were to find that greenhouse emissions violated the human rights of the Inuit or any other group, that is an authoritative statement of international law, and that does have some legal ramifications. Of course, if the case were to then go on to the court, the court might be of a different view than the commission, and it would have the last word on the matter.

I just want to say a word or two more about this question of whether it is good or bad for a human-rights petition of this nature – you couldn't go to the court. First of all, for any private party or

organization, you would have to start with the commission anyway. That is how the process begins. At the end of the commission process, it is up to the commission to decide whether the case should go on to the court. If the commission makes recommendations and the country abides by them, then probably it won't go on to the court. If the commission finds that there is a violation and the country is unwilling to remedy it, then there is a good chance that the commission will pass the case on to the court. As I have said, if the case is being brought against the U.S., the commission can't take the case to the court.

Is that a good thing or a bad thing? Naturally, you would first assume that is a bad thing, because that means there is no binding authority here. There is no tribunal that can tell the U.S., "You must do this," or, "You must do that."

Another way of looking at it, though, is maybe that is not a bad thing, because, frankly, even if you could imagine the court making some sweeping statement about what the U.S. needs to do about reducing its emissions or paying compensation for harm, what are the chances of the U.S. actually abiding by those mandates? The court knows very well that the chances would be slim, which puts the court in a difficult position, because it doesn't want to have its authority flouted. So I think it actually makes it less likely that the court would – it gives the court a reason, even if they don't articulate it, to not find in our favor.

The commission, on the other hand, is really only being asked to determine whether this is a human-rights violation and make some recommendations. So one way to look at it is that the ICC has a better chance of getting a good outcome if we know the process has to stop with the commission.

I think that is probably a good place for me to stop and let Paul take over. If there are questions later on during the question-and-answer period, I would be happy to address anything about the issues that I have covered.

MS. THOMPSON: Thank you, Mr. Goldberg. You discussed a number of issues that advance our discussion, including what went into your approach to bring a human-rights claim when deciding to litigate the issue of global climate change, highlighting customary international law, human-rights law, procedural questions, such as jurisdiction, and the inability to get a binding decision, and also discussing what went into your decision to go with the Inter-American Commission as opposed to the court itself.

Before I continue, I would like to issue an apology to our first speaker. I inadvertently called him Paul McGee. His name is Henry. Excuse me for that.

PROF. MCGEE: I went to Catholic school, and like his Holiness, I am Hank Paul, not John Paul. "Henry" is insufficiently Catholic, I fear. [Laughter]

MS. THOMPSON: Our third speaker is Paul Crowley. Paul Crowley is legal counsel for the Inuit Circumpolar Conference. Since 1990, Mr. Crowley has developed a practice in sustainable development, law, and policy. He is currently directing the organization's legal efforts to develop a petition to the Inter-American Commission on Human Rights against the U.S. government because of its lack of action to reduce greenhouse gas emissions that are responsible for impacts to Inuit culture.

As a community activist, Mr. Crowley successfully advocated for a citizens group seeking to stop open burning of garbage. Mr. Crowley has worked with numerous Inuit organizations and on a wide variety of environmental and social issues.

Today he will speak with us about his work on the Inuit Circumpolar Conference petition to the Inter-American Commission. Mr. Crowley.

MR. CROWLEY: Thank you for the introduction and for inviting me here – inviting us here, Sheila and me. Thanks for keeping it a bit chilly outside, too. That makes me feel at home.

What I am going to go through is a bit more of the evidentiary base. You have understood now kind of why we have gone down this route, trying to characterize climate change as beyond an environmental issue, as a human issue. You understand why we have come down the funnel of the Inter-American Commission as opposed to taking another route.

When we look at a petition to the Inter-American Commission, we have to look at what the evidence is. We saw a lot of that in terms of the Arctic climate impact assessment. So we are very fortunate that we have a strong body of science and a strong body of traditional knowledge that we can refer to when bringing forth the evidence.

The traditional-knowledge evidence is particularly interesting, and also the Inter-American Commission allows such evidence to be introduced. What we have to understand is that Inuit are a maritime people. Most of the communities are coastal. In my region, in Nunavut, all communities are coastal, save one. Even in that community, Baker Lake, folks go to the ocean and travel on the sea ice. Hunting, as you heard from Sheila, is very much still part of the

culture. It has very important social and cultural implications. It also, I might add, has very basic implications in terms of nutrition. Country food is much more nutritious than the food we get, as we call, from the south – “south” being anywhere south of us. Also it is a lot less expensive. The same diet that someone would have in southern Canada would cost two to three times the amount where I live.

So you are looking at huge implications, cultural and economic, just on the hunting side.

Folks still do hunt an awful lot. Even in my community of Iqaluit – it is an administrative capital; we have a lot of government jobs – folks still do rely on hunting to a great extent. Even though there may be fewer hunters per capita in our community, those hunters that are there supply a lot of food to a lot of people. So it is not unusual to have, say, two hunters go out to the floe edge at this time of year, travel fifty, sixty kilometers out to the floe edge, and spend the day. If they are fortunate and successful, they bring back four or five, sometimes up to ten ringed seals. By the time they get home, the word is already out – there is fresh meat coming into town. As soon as they get home, that meat is distributed. So they may be responsible for feeding five, six, seven, eight families.

So the importance of hunting in the social fabric and just nutrition is still evident even in the community that has seen the most transition, which is ours.

Based on a kind of intergenerational knowledge that has come forward, people started noticing these changes. We saw some of them.

I will back up a bit. Hunters are very humble people, generally. They will never boast. They will never say, “I understand all this.” They will just say, “Things are different. I saw this. I’ve never seen one of those before. What do you think it is?” In this case, it turned out to be a robin. They had never seen one before. Up in the high Arctic, further up from us, someone spotted a wasp this year. We don’t have a word for wasp. So these are changes that folks will see. They won’t say, “Ah, it’s global warming. That’s it.” They will just say, “There’s a wasp here. Where did that come from? How come it’s here? I don’t get it.”

I think Sheila kind of touched on it. We like it cold. I like it cold now, after being there for a while. Inuit relish cold, relish ice and snow. If you are going out hunting, you would rather hunt on the ice than you would on the open water. It is a lot safer, it is easier to travel, and there is more chance of success.

Ice is kind of a binary thing: Either you have it or you don't. The in-between stage is very short. Either that ice is there and supports you and supports the animal life that is dependent on it – the ringed seal, in particular, is one of the most important food items, and is also an important food item for polar bears – if that isn't there, then the whole food chain, which includes Inuit, who are not separate from the environment, is really stressed.

People have been noticing the changes. Experienced hunters have been falling through in areas where, before, the ice was always known to be safe. Again, the hunter in our community who ended up losing his legs because he fell through the ice, managed to survive and drag himself, after two days, to safety – he wouldn't say, "Oh, it's global warming." He just said, "It always was safe there before. I don't quite understand. I thought I read the ice well."

I can read just a quote from a region in Hudson's Bay where Inuit live. This fellow, Zack Novalinga [phonetic], says, "Our sea ice is now averaging 2.5 to 3 feet thick, whereas it used to be 6 feet thick. It's a lot thinner, plus it rots and deteriorates much faster. Now even before the end of May, the sea ice has broken away. We've had a few cases where Inuit had to be rescued by boat as a whole coastline has become ice-free. We may no longer be able to harvest seals or polar bears. Inuit are a marine-based people."

That is further south than us. Where we are, typically, the sea ice stays until the end of June, and people will hunt all the way into the end of June, sometimes all the way into July.

So we have deteriorating sea ice and we have the hunters who are trying to provide for the community. That either deteriorates by being less thick and harder to observe the differences – so it is dangerous that way – or, if you are at the floe edge, which is the edge where the land-fast ice is and the open water, where folks go to hunt, it is more dangerous because a whole pan of ice can be cracked open and take you along. Just this year, a family was out there and had to be rescued because a whole pan of ice, about a kilometer wide, broke off and was starting to get carried out.

It also means that the hunting seasons are much shorter. Ice sets up later and leaves earlier. As we know, as we have seen, there is less protection from coastal erosion. The communities of Shishmaref and Kivalina, in particular, in Alaska are literally now perched on the edge of the ocean. They used to have an extra 150 to 200 feet of oceanfront. That has been eroded away by storm surges that have come in, because there is no ice to dampen the storm surges. This has incredible economic costs. We are looking at

estimates by the General Accounting Office – not by Greenpeace, but the General Accounting Office – estimates for these small communities of about 800 people of \$200 million to \$400 million each to move them. There are 140 communities to go. So there are huge implications there.

That money, if it goes to moving the communities, doesn't go into other very pressing issues, such as all the social issues, health, etcetera, education. So money, at some point, will become an issue.

So the sea ice changes have been very important already. The projections are fairly stark – by the end of this century, no more summer sea ice. That means all of this will continue deteriorating at a faster and faster rate.

Hunters and elders have noticed changes in the snow. How is that a human-rights issue? It is, because Inuit need snow to travel. You can travel inland to hunt caribou much more easily on the snow. So it impacts the harvest.

It also impacts how you travel, because for Inuit, while they don't live in snow houses, igloos, any more, it is still a very important part of a harvesting culture. An igloo is safest. When I left home just a few days ago, we had just had a blizzard, where the winds were over 100 miles an hour. There was some snow. I basically could not see from here to the end of the room. If you are in a tent, you are in trouble. If you are in an igloo, you are nice and safe.

But the elders are finding that the snow conditions have changed sufficiently that they cannot reliably find snow that can build a safe igloo. When you talk about good igloo snow, it is snow that is as hard as concrete. You walk on it and barely leave a footprint. Now the snow – there are many more layers in it. There are many more freeze-thaw cycles and warmer and colder temperatures. It is just not as consistent. It is not as safe. Inuit are curtailing where they are going. They find the weather less predictable, so they are less willing to go to traditional hunting areas, because they are not sure about the weather and they are not sure about being able to be safe, by being able to build igloos.

In the summer, the permafrost is melting. We saw that that has some implications for the future in terms of infrastructure. Most of our community infrastructure is built on the basis of a foundation of permafrost. As that melts, the foundations of houses start to wobble, and that needs to be shored up. But also for many airstrips in our communities, there is no road access; you either get in by boat or you get in by air. If your airstrip is all wobbly, you don't get in by air so easily.

There has been major slumping, mudslides. There is a lot of glacial runoff. Sheila touched on that.

Basically, it comes down to, in many ways, limiting access to the resources, to the environment that Inuit always had access to. You cannot travel to the same areas. Those areas have changed. The tundra is changing sufficiently that sometimes there is less food for the animals. Berry production has been curtailed in a lot of areas. In Alaska in the last few years, last year in particular, there was a record number of forest fires.

If there is less food for the animals, the animals are less healthy. That means they are not as good for people to hunt and eat. Also people still, surprisingly, rely on their skins for clothing. Caribou-skin clothing is still the warmest clothing in the world. It is warmer than anything that the military can come up with. It is warmer than any GORE-TEX-clad coats you can have. That has all been tested. If you are out in -40, you want to have caribou-skin clothing with you as insurance at the very least. The skins are getting thinner, and the clothing is getting less useful. They are not able to make clothing in the same way that they were before.

There are a lot more insects as well. We are getting a lot more different types of insects – the wasps, which we hadn't experienced. Where I live, we had black flies a couple of years ago for the first time. Believe me, that was not a good thing. In some parts of the Arctic, there are a lot of mosquitoes. As global warming is happening, those mosquitoes bring diseases, such as West Nile. Alaska, being contiguous with the rest of the continent, is likely to have West Nile sooner rather than later.

The Arctic species of animals that are there are becoming stressed by these various conditions. They are being pushed out of their ranges, and new species are coming in. The changes are happening so fast that it is not allowing some of the species the time to adapt, which, of course, is what the United Nations Framework Convention says, that we should be making sure that climate change is slowed down sufficiently to allow ecosystems to adapt. The Arctic won't be able to adapt. In a hundred years, the polar bear will not be able to find another way to hunt seal on the ice, if there is no ice. There is no place for it to go. It can't go further up. There will be no more ice there either.

Overall, the weather is less predictable. Storms are fiercer than before. Elders are noticing that the winds that we have experienced of late, in the last few years, are beyond what they are used to.

That adds an interesting point. There is an elder in one of our communities who teaches on-the-land skills to the younger people. Recently, I found out that whenever he teaches skills, he now always says, "This always used to work for me, but I can't guarantee it will work for you."

The role of the elder in Inuit culture is very important. What this is all doing is undermining the role of the elder. As the weather is less predictable, as the traditional knowledge is less useful in predicting weather, is less useful in allowing people to be safe on the land, the role of the elder is further diminished.

There are economic impacts, some obvious ones in terms of the traditional economy of hunting and trapping. The animals are not as easy to get, harder to get to, etcetera, and they are not as healthy. Obviously, there are impacts on the wage economy. In many of our communities, that wage economy is very tenuous to start out with, but still very important. Inuit live in the world, as everyone does. So the commercial harvest of some wildlife, fish is endangered, made more vulnerable. Loss of equipment is more likely. There is some fishing that happens at the commercial level on the sea ice, with snowmobiles. A few years ago, a small community lost a high percentage of its snowmobiles, of the fisher people that were out there, and their sleds and their equipment. That is not a huge deal in the overall scheme of things, but for a small community of 800, that is a very big deal.

Those are some of the current impacts. We know there are projected impacts. We have seen some of those in the Arctic climate impact assessment video. I won't touch on those too much, except to say that when you think of them in terms of the human rights that are at stake here, it is fairly easy to make the correlation, where they will fit in.

For Inuit, climate change is, first and foremost, a human issue. That brings us to, where can we go? Where can we bring a case? Where will we be validated? Where is the chance of being validated? Don brought us along to why we ended up in the Inter-American Commission.

Before I go there, though, I just want to say, this is something that is also being validated by other writers and scholars. Recently, Rodolfo Stavenhagen was a special rapporteur to the United Nations General Assembly. He noted that it is evident that climate change goes beyond being an isolated environmental matter and has serious human-rights implications. Again, I think we are at the cusp of a broader consensus, just as the commission is at the cusp, having

made previous decisions linking environmental health, environmental security, to human rights, and linking in particular the special rights of indigenous peoples. It is all kind of lining up to be able to make the jump into having the commission make a declaration that, in fact, climate change is violating the human rights of Inuit.

I will just read a little bit of the report of the Inter-American Commission, when it did a country report for Ecuador in 1997. It said, "Certain indigenous peoples maintain special ties with their traditional lands and a close dependence upon the natural resources provided therein, respect for which is essential to their physical and cultural survival. Special protections may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival, a right protected in a range of international instruments and conventions."

So the commission has already, in our opinion, started to grapple with this and sees a lot of the connections that Inuit will be putting forward.

We know why we are targeting the United States. For Inuit, if there is going to be a change made, it is likely to have to happen from here.

So what rights? We are looking at the right to life, personal property. The right to life is beyond the right to not be shot. The court has seen that and has remarked on it, that it is not limited to the protection against arbitrary killing, for instance. It is much broader than one would look at, at first blush, perhaps.

They went on to say that it requires states to take certain positive measures to safeguard life and physical integrity. In the past, the commission has held that government's failure to prevent mining or other activities from degrading the environment of traditional indigenous lands violated the rights to life, health, and personal security.

There is the right to privacy, residence, and protection of the home. International tribunals have recognized this, that it is broad enough to encompass environmental harm. For example, in the case of *Lopez Ostra v. Spain*, the European Court of Human Rights held that Spain's failure to prevent a waste-treatment plant from polluting nearby homes violated the petitioner's right to respect for her home and her private and family life. They held the state liable for damages.

There is the right to property. I would like to do a little tangent here. In Canada, there are four land claims that have been settled in the Inuit homelands of Canada. These land claims have established certain rights, including property rights, including rights to harvest. These are entrenched rights, now entrenched in the Canadian constitution. They are property rights.

This is recognized in Article XIII of the American Declaration, that every person has a right to own such a private property as meets the essential needs of decent living. In the case of the negotiated land claims, that is what was established. This is the minimum required for the Inuit of Canada to have a decent living. It also applies to movable and immovable property.

Perhaps more telling is the customary right to one's own means of subsistence. When you think of all the impacts this is having on Inuit, you can see how this kind of overlaps almost perfectly. One's own means of subsistence is what Inuit still do. They still look to the land to provide for themselves.

Finally, there is a right to culture, especially for indigenous peoples. As one jurist has written, "Cultural disintegration is compounded by destruction of the ecology and habitat upon which indigenous groups depend for their physical and cultural survival." The commission has recognized that certain indigenous peoples maintain special ties with their traditional lands and a close dependence upon the natural resources provided therein.

So again, I think we are on pretty good grounds to bring forward these claims.

I will just leave you with one last quote from the commission: "The Commission further noted that, for historical reasons and because of moral and humanitarian principles, special protections for indigenous populations constitute a sacred commitment of the states. For these reasons, the Commission has agreed that indigenous peoples have the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being."

On that, I will leave you.

MS. THOMPSON: Thank you, Mr. Crowley. Your remarks vividly illustrate the effects of global climate change in the Arctic on Inuit culture. We learned about the economic, social, and cultural effects, as viewed through the eyes of hunters. You also discussed why you decided to bring the case in the Inter-American Commission.

What I thought was interesting also was that the Inter-American Commission takes into evidence traditional knowledge. I didn't know that.

You also highlighted other international bodies that have dealt with similar issues with regard to human rights: the right to culture, a healthy environment, and to life.

Our last speaker is Christopher B. Kende. He is a partner at Cozen O'Connor, P.C. Mr. Kende has over twenty-five years of experience in handling major, complex multinational litigation in areas including environmental law and admiralty and maritime disputes. His experience includes virtually every aspect of pretrial, trial, and post-trial proceedings in state and federal courts around the country.

Among Mr. Kende's most notable matters was his successful representation of the French government in the *Amoco Cadiz* oil spill litigation, which involved the largest shoreline pollution in history. He has also acted for Native regional and village corporations in Prince William Sound in the *Exxon Valdez* oil spill action in state and federal court in Alaska.

Mr. Kende has written extensively on topics including limitation of liability and pollution legislation in the U.S. He teaches at Brooklyn Law School.

Today he will be speaking about the corporate perspective with regard to global climate change.

MR. KENDE: Thank you very much. It is a pleasure to be here. Thank you for the invitation.

I am going to meander a little. I apologize in advance. I get to be the last one, so I get to talk about what everybody else has said, to some degree.

In terms of background, my perspective is environmentally oriented. We represented the French government in the *Amoco Cadiz* oil spill litigation, which was a very significant case in Chicago arising out of the *Amoco Cadiz* oil spill in France in 1978, which devastated the Brittany community. We got a very, very significant recovery against Amoco Corporation.

In the *Exxon Valdez* litigation, we represented Alaska regional and Native corporations. Obviously, we are still fighting, but got a very significant punitive damage award against Exxon, \$5 billion, which is on appeal. There were several other classes of parties involved in that.

I was also involved in the Shoreham nuclear power plant litigation many years ago, where we were successful in shutting Shoreham down when it was a local operation.

So I have a background which is generally directed towards pro-environmental issues. What I thought I would do, just listening to the others, is speculate to some degree about the problems that are raised by the goodwill of everything we have heard, but kind of a reality check, I guess, in terms of some other things that might be worth talking about, and what these esteemed gentlemen, who are working so hard to save this world, are probably going to be up against in dealing with these issues.

There are, obviously, a number of levels here. The first one is the international level. That is the one that seems to be pursued the most. The problem I see with the international approach is that, first of all, the U.S. has not ratified the Law of the Sea Convention. It has not ratified Kyoto. I don't think the U.S. has ratified an international convention in the environmental area in its history. Maybe it ratified the Harter Act, which is an act involving marine law, in the 1920s. That is probably one of the last international conventions that it has ratified.

There was an International Pollution Convention after the *Amoco Cadiz*, which was also not ratified by the United States. They passed their own legislation.

So I think to get the U.S. to act on the international level is going to be very difficult. Private actions to enforce international rights, I think, are admirable, but I don't see the enforcement of those. I think you are going to have a big enforcement problem once you get everything you want. I just don't see an international organization saying, "Global warming is bad, and the U.S. industries are bad for allowing global warming," is going to really amount to much more than a hill of beans, I am afraid to say, in terms of actual changes to environmental policy in the United States – although it is certainly better than doing nothing.

So on the international level, I think there are huge obstacles to having any actual result, other than statements by international organizations. I am happy to debate that or have someone come in and argue with me that I am wrong, because I would love to be wrong.

On the national level, we have a political environment which is pro-business, as we know, now. I am not sure that a court is going to tell the administration to change its environmental policy. There are regulatory things that can be done – maybe fighting fire with fire and having a strong environmental lobby, which we do have to a certain degree. We have a lot of environmental organizations that are part of the political process to push for regulatory changes at the

national and regional levels, to make some impact on reducing this crisis down. To me, that seems something that is frustrating, with the economic and political environment, but certainly something that could result in tangible progress, if you were able to have some political clout, some political influence, and some regulatory impact, which might be worth devoting a lot of attention to.

Industry actions, political campaigns, and possibly press campaigns with respect to industry may have some impact. I heard on the radio the other day – I know that there is a huge anti-New Jersey political campaign in the smoking area now. The American Cancer Society is running ads that New Jersey is the “ashtray of the country” because it is one of the few states that still allows smoking in public places. There has been a lot of consternation and “upsetness” by New Jersey officials and people in New Jersey about that. But it is having impact. It is getting on the radio. It is getting on the television. It is making people uncomfortable and stressing them out, and maybe will have some impact in changing the politics with respect to smoking in New Jersey.

Then there is the community and the local level. I know a little bit about the Alaska community because I was up there for four years on and off, and actually had to get an Alaska driver’s license, because my New York license was expiring during the Exxon trial. It is a very, very complicated social environment in Alaska, all originating, ironically, out of the pipeline and environmentally related activities. There was a statute called the Alaska Native Claims Settlement Act, which was passed in the late 1960s or early 1970s, essentially to allow the building of the Alaska pipeline. It is a very long and complicated story, but, basically, the oil companies did not want an easement over the property that was going to be where the pipeline was. They wanted fee title to the property, because they didn’t want anybody coming back and saying, “Oh, we own the land under the pipeline.”

Alaska Natives have what the U.S. recognizes as aboriginal rights. It was very interesting to hear about the subsistence issue, because U.S. legislation recognizes subsistence rights. The Oil Pollution Act of 1990, which was passed in the wake of the *Exxon Valdez* – no pun intended – creates special damage categories for Alaska Natives who suffer from oil pollution, including subsistence rights damages. It is a whole category of claims that is carved out and created and recognized based on the aboriginal rights of Alaska Natives.

In any event, to get back to the main story, because of these aboriginal rights, Congress basically passed legislation which

allowed Alaska Natives to purchase large tracks of land and create businesses to exploit that land and develop what the statute suggested was self-determination – whether it worked out that way is another question – in exchange for these aboriginal rights.

So the Alaska Native Claims Settlement Act created what are called Native corporations – very unique animals. Basically, Alaska was divided up into twelve areas roughly corresponding to Alaska tribal areas and a thirteenth for Alaskans who lived outside of Alaska. Native corporations were created. You had to prove that you were one-fourth aboriginal to acquire stock in these Native corporations. These corporations would have the opportunity to choose very large tracks of land within certain areas of Alaska where the shareholders are based, and those properties would be conveyed, along with substantial sums of money, the idea being that the corporation could manage the property and do anything it wanted with it – anything from mining the timber and developing the mineral rights, to maintaining preserves. I can tell you that there are several Alaska Native corporations that are highly successful with timber businesses. The one that we represented in *Exxon* was called Chugach Alaska Corporation, which is the Prince William Sound corporation.

These are very unique creatures of statute. They cannot be foreclosed against. They have a lot of immunities that ordinary corporations don't have. They are run by Native boards. Native Alaskans can be very unique in the way they operate businesses. It is a very complex situation.

On top of that you have something called Native village corporations, which are supposed to recognize the old, traditional Native villages. They are also corporations, but they don't have the mineral rights. They only have surface rights to the property on which they are located. We represented Tatitlek, Eyak, Port Graham, and English Bay, which were the four major village corporations impacted in Prince William Sound by the *Valdez*. There is a lot of stress between the regional corporations and the village corporations.

All this is a long story to explain that it is a very complicated and convoluted situation in Alaska. There is a very strong lobby for development of ANWAR, because the Native corporation in the ANWAR area is very poor. It doesn't have anything, like some of the others. This is a huge opportunity to develop huge economic resources through ANWAR.

So I am not sure that the local and Native environment is very conducive to getting very much done. I am a little concerned about how much cooperation you would get on that basis. Every Alaskan gets \$1,000 a year in money from the state because of the oil revenues from the pipeline. I don't know if people know that or not. That is a very important thing for Alaskans. I am not sure you can assume that they are going to automatically welcome action that is going to limit or reduce industrial development or power plants or things like that there.

So I think that is something that is going to have to be contended with.

In terms of the federal government, I believe there was one mention of a suit against OPIC, which is the Overseas Private Investment Corporation. I actually do work for them. It is called the Overseas Private Investment Corporation. They are a federal agency under the Foreign Assistance Act of 1961. They guarantee loans for public works projects in countries that you would not otherwise be able to develop in, like Afghanistan, places like that. They do have a whole complex procedure for environmental impact. An environmental impact statement has to be put on the Web. There is a whole vetting process for any public works project –

PROF. MCGEE: But they don't follow NEPA, right?

MR. KENDE: It is the EPA. It is an environmental impact statement, which has to be approved, and there have to be certain labor conditions that are met. So there are some restrictions on what OPIC can finance.

I guess the point is that there are a lot of obstacles. I think that the fighting-fire-with-fire approach, just from what I heard today, which is lobbying, bad publicity, hitting industry in its pocketbook on the national level through ad campaigns and very aggressive lobbying, and perhaps some selective strike suits on particular projects that are especially gruesome. Shoreham, for example, was a situation – it was a nuclear power plant on Long Island, and it was a very long, incredibly expensive, and draining process. But Shoreham was shut down as a result of litigation.

There are probably a lot of very well-intentioned, well-meaning, highly intelligent lawyers in the public sector that can do these strike suits on a project-by-project basis, and probably also accomplish something concrete.

My view is that the way to deal with this is lobbying, pressure, and probably individual suits that have some chance of limiting, on an individual, project-by-project basis, what is going on.

So that is my view of the subject. I hope it has been of some interest.

Thank you.

MS. THOMPSON: Thank you, Mr. Kende, for that reality check on the process of litigation in this area. Your suggestion that there are alternatives to litigation, including political campaigns, bad press campaigns, and selected strike suits shows that this can be dealt with in a different forum, if not through the courts.

I would like to just say that Mr. Crowley sends his apologies. He has to leave for travel purposes.

We will open up the forum for questions.

QUESTION: This is for Mr. Goldberg. Where are you now in your petition? What is coming up for CIEL and the ICC in the next year?

MR. GOLDBERG: Paul is on his way out. I was going to suggest that he take the first crack at answering that.

As to the timing of the ICC petition, I can't say anything definite, because it is really up to them. We are hopeful that in the next few months they will have worked through all their internal processes. All I can do is guess that perhaps by this summer – I would say this summer at the earliest – that would be filed.

But let me just mention one other thing. I tried to suggest in my remarks that the petition does not have to be brought by the ICC. If for any reason the ICC decides it doesn't want to move forward with the petition at this point, we would still like to see the petition brought. There are many other communities, individuals, organizations that could file such a claim. The ICC is well aware of the fact that, even if they don't file, other organizations probably will.

I would like to think that within the year we will see a petition filed.

PROF. MCGEE: I just wanted to comment on the OPIC situation. I actually thought counsel was going to say they actually were funding in Alaska. Of course, that really would be important.

He raises the question of the so-called functional equivalence doctrine – that is, whether or not their own processes were intended by the Congress to substitute for NEPA, the EA/EIS process. I think that is a good question, actually. Generally speaking, the courts have been hostile to functional equivalence claims. The Forest Service and the BLM typically try to fashion their own environmental clearances. The courts have, generally speaking, not accepted them.

I think a larger question with OPIC and the Export-Import Bank is whether or not the Congress – a double question – whether Congress intended for them to be covered by NEPA. I think that is a real question. Secondly, I think there is an extraterritoriality problem, the same problem as was raised in the Andres [phonetic] and some other cases, about whether the NEPA and EIS has any effect on a foreign territory, except for the special case of the Antarctic and the open seas.

So I agree with you, for different reasons, that that particular suit – I still think the strongest suit is the public nuisance suit or else the Tuvalu Island suit – Tuvalu Island only because I don't think it is going to mean much. I think what it would have is a David-Goliath publicity feeling, and I don't think anything more than that.

QUESTION: I just want to ask the panelists if they have any thoughts about other ways the courts can be used in the climate change battle. We have the public nuisance one, which I am most familiar with, having researched and written on that one. But there is also the NEPA suit. There is the CO<sub>2</sub> petition, and there is the human rights angle internationally. I know there is the Climate Justice Programme, [climatelaw.org](http://climatelaw.org), that is working on stuff internationally.

I was wondering if there are any other thoughts about other ways the courts can be used on the climate change front.

MR. GOLDBERG: I will mention one. It has been talked about quite a bit. I don't think anybody knows at this point whether it could be successful. The Alien Tort Claims Act is one piece of law that has been used quite a bit lately in the human rights area, with some success. The Supreme Court just issued a decision that some feared might gut ATCA. It didn't. It left the law very much intact, but constrained. We don't know exactly what the constraints are.

The point of ATCA is that you can use a violation of international law as the basis of a claim. Not to give away too much strategy – because it really isn't strategy at this point; it is putting one foot in front of the other and doing what seems possible at the time. But were the Inter-American Commission to issue a declaration that U.S. emissions constitute a violation of human rights, that might form the basis for an ATCA claim.

PROF. MCGEE: I was actually amazed at how much has been done domestically. I have been teaching environmental law and land use for a long time, and it never really occurred to me that domestic litigation would be of any effect at all. I was really thrilled and very impressed by the range of activity. I would have thought that

international environmental law is perhaps the only resolution, because, again, the United States is – the doctrine of exceptionalism is, as counsel has explained, is really “fortress America.” It seems to be very difficult.

I also wonder about – one thing that ought to be done is suing some other countries. Why not sue the PRC? Why not sue Australia? There are other countries out there that are certainly not in compliance. I certainly agree with the remarks this morning that the 895-pound gorilla is going to speak Mandarin. Very, very soon, the Chinese – if the Chinese live like people do in California, it is all over anyway. It doesn't really matter what we do. In the end, Spaceship Earth is doomed, if they do pretty much what we do, and if India does pretty much what we do. In the long run, we will all be dead.

One thing that should be said – I said this today to some of the students – keep in mind that we are talking about the protection of the human species and human cultures. The earth will survive. The question is whether we as a species will survive. In fact, I think a far more imminent threat – and I am sorry the environmental groups have not talked about this – is the threat of nuclear detonations and nuclear contamination. I think it is a much, much more imminent threat. Not only is there this nut in North Korea, but there are the Iranians. Even the United States, which wants everybody to disarm except itself, is now talking about testing its atomic weapons, while at the same time, asking the Iranians to use – so I guess if you don't have a European DNA, as far as the United States is concerned, you can't have nuclear weapons.

So in that kind of anarchistic view of the world, I think we are much, much more likely to see an atomic weapon go off in Baltimore Harbor or down in Puget Sound. As a matter of fact, the new guy, Goss, said a couple of weeks ago before the Congress that there is every possibility of a nuclear detonation in one of the port cities in the United States.

So I think global warming is actually what I would call a low-level threat compared to nuclear war and conflict.

MR. KENDE: There is a Maritime Security Act of 2002, which has created a fairly elaborate scheme of security. The ports are the most – clearly, without question – other than Grand Central Station, which makes me very nervous to be in – the ports of the country – and there is an international version of this, too – are probably the most vulnerable areas for this type of event. There is an international convention, the name of which escapes me. The

Maritime Security Act of 2002 requires that ports have security plans, a security officer. The Coast Guard has a huge new responsibility for checking containers and tracking. Vessels have to give notice when they come in.

So there are measures being taken, but it is clearly a very, very vulnerable point. I think that is the big vulnerability, I agree.

MR. GOLDBERG: I would just like to, if I may, go back to Chris's initial remarks. It is good to have a reality check. I think that all Chris's comments had some validity to them, undoubtedly. We are very out-front about the fact that the human-rights petition, as it is presently postured, is not going to force the U.S. to change its position.

But Chris mentioned some other very interesting approaches. I would just like to point out the fact that these dovetail. We have actually seen more publicity and more press interest emanating from the ICC's announcement that it is planning on bringing a petition than, frankly, I have ever seen about any specific issue relating to global warming. There are a few pretty big things in the works. I don't want to spoil any surprises, but some very big media outlets are looking at doing some reports on this.

If the goal is to get more publicity and apply public pressure that way and to inform the public, I think this petition fits nicely into that strategy.

The other point that I wanted to make is that what we are starting to see is a real shift in the dialogue about global warming. As the human-rights angle has been introduced, that has caught on. I go to the negotiations, and I hear a lot of the talk in the halls. I can't say it has made a big impact yet, but I think it is important to bring out the moral aspect of this. Again, by itself, it may not do anything, but in combination with all the other efforts that groups are making to get our government to act, I think this will make a contribution. It may not be the silver or golden bullet, but hopefully it will help.

MS. THOMPSON: More questions?

QUESTION: I am wondering, in the hypothetical instance that you were successful with one of these suits, what kind of relief are you looking for? Are you looking for the equivalent of legislative relief to actually stop pollution, or are you looking for damages for these communities that are hurt by it?

MR. GOLDBERG: Is that question to me?

QUESTIONER: To the entire panel.

MR. GOLDBERG: I will just tell you about the remedies in the human-rights petition, although they haven't been completely

decided as to what we would ask the commission to do. The main thing, actually, is the declaration itself, that this constitutes a human-rights violation. As to what would be appropriate remedies, of course, we would suggest a recommendation that the U.S. reduce emissions, perhaps along Kyoto Protocol lines; compensation for harm suffered. The property right, in particular, is interesting in that respect, because it says in the American Convention that the government can't take property without providing compensation. That resonates with our Constitution.

I think those would be the main ones.

PROF. MCGEE: The statutory suits, the NEPA suit, that OPIC and the Export-Import Bank should do an environmental study – the most they could get, if they win hands-down, aside from attorney's fees – assuming that they can get them – would simply be to have them do environmental statements prospectively. I don't think there is any way they would make them do it on projects that are already funded. As you know – and if you don't, let me tell you – at the end of the EIS statement is the capacity to do whatever you want to do, once you do the study.

So all it would do would be to have a slowdown effect on them. Unlike a project, like this boondoggle on the West Side, the stadium – slowing that down has a greater effect than trying to slow down OPIC and the Import-Export Bank. They have time to wait them out. So that is the NEPA/SEPA suit.

The other suit is listing CO<sub>2</sub>. There, of course, the remedy would be regulating tailpipe emissions. That would really lower emissions. That is the relief they would seek, to have CO<sub>2</sub> regulated. But air regulation has been successful in the United States historically. My twenty-five years in Santa Monica are not like the twenty-five years that preceded my coming there. So there have been some successes. But they are, at best, partial.

I again think the public nuisance suit – if they win that, you are looking for damages and stuff. I think that is terrific, if they can get that. They can start trying to pick off power plants one after another. It might be like a lawyer's full employment act if it passes. There is a class action problem, I guess, but I don't think these are class actions. I think these are American Electric Company and five other companies on behalf of particular states, somewhat like the tobacco litigation.

So I think that is the most promising. The other two, I think, either won't be won or certainly will have mixed results in one case and won't have any result in the other case, except political publicity.

PARTICIPANT: Just to point out, the initial public nuisance suit that has been filed is not seeking damages. It is purely seeking injunctive relief at this point.

PROF. MCGEE: Which one is that?

PARTICIPANT: The public nuisance suit.

PROF. MCGEE: Okay. They are not asking for damages?

PARTICIPANT: Not in this suit. I guess if this one is successful, it might open the door. But the public nuisance suit that the eight A.G.'s and New York City filed against the five utilities is purely seeking injunctive relief.

PROF. MCGEE: What would the injunctive relief be, that they stop producing power or they produce in –

PARTICIPANT: I think it is emissions reduction.

MR. GOLDBERG: They want greater investment in renewables. I am not sure they have actually stated specifically what remedies they are seeking.

PARTICIPANT: I don't think that is specified.

PROF. MCGEE: I think that is terrific, then. That is better than asking for damages, because that puts them on the white horse.

MS. THOMPSON: Any other questions?

QUESTION: Could you talk a little bit more about the \$1,000 for every Alaskan? Is that per child or –

MR. KENDE: Every Alaskan citizen who is a resident gets \$1,000, because of the surplus that the state has as a result of oil license fees. I, unfortunately, did not qualify as a resident. You get a check at the end of the year for \$1,000 if you are an Alaska resident because of the licensing.

PARTICIPANT: It is about \$1,800 now.

MR. KENDE: It was \$1,000 in 1994. It is going up.

PARTICIPANT: It is the permanent fund dividend, because when the oil companies came in, they had a – in Alaska, they just decided, unlike the lower 48, when their [inaudible] were being taken, they were going to get something for it. There is this permanent fund of revenue from the oil, and the interest every year is paid out in a dividend to every man, woman, and child in Alaska and is currently around \$1,800.

PROF. MCGEE: This gentleman here wants to comment.

PARTICIPANT: I was just going to say that it is actually almost a red herring [inaudible] Alaska is one of the very few states that doesn't have an income tax, and other taxes are lower as well because of that.

PROF. MCGEE: Counsel here was quite reserved in his comments about Alaska. I remember being in Alaska in the early 1990s and going to a meeting in Anchorage, and I was stunned. You think people in Wyoming and the western states – the Alaskans are the most development-conscious of any state I have ever been in. I am not saying there aren't public interest groups – but even the governor of Alaska, who is a Democrat – I don't know if he is still the governor or not. He is no longer the governor? Who is the governor?

PARTICIPANT: Frank Murkowski is the governor.

MR. KENDE: He was state senator when I was up there.

PROF. MCGEE: Is he a Republican?

PARTICIPANT: Yes.

PROF. MCGEE: There is not really any difference on developing environmental policy in Alaska. I hadn't heard the story about the Native Americans on ANWAR. I was interested to hear that. Forget about the locals. They aren't going to be of any help whatsoever.

MS. THOMPSON: Any other questions?

[No response.]

Please join me in thanking our panelists.

We have closing comments.

MS. PEAN: That concludes "A New Legal Frontier in the Fight Against Global Warming." At this time, the Environmental Law Review would like to invite our panelists and the audience to join us for a reception in the atrium.

But before we part ways, I would just like to reiterate some of Hannah's opening comments and extend many thanks to everyone who helped contribute to what has turned out to be a very successful and informative program. I would like to thank again Ms. Watt-Cloutier for coming such a long way, all of our panelists, Dean Treanor, Prof. Johnson, everyone on the journal for all their hard work on this symposium and their work this year, and last but certainly not least, thank you, Hannah.

With that being said, I hope you will join us at the reception. Thank you all for coming.

