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THE LEGAL DIMENSIONS OF CLIMATE CHANGE:

CONFERENCE REPORT

by Jennifer Rohleder and Jillian Button*

INTRODUCTION

Climate change is emerging as one of the major environmental issues of our time, and lawyers are playing an increasingly active role. To help build awareness of this urgent issue in the legal community, American University's Washington College of Law ("WCL"); the American Bar Association Section on Environment, Energy, and Resources; the Center for International Environmental Law ("CIEL"); and the U.S. Environmental Protection Agency ("EPA") sponsored *The Legal Dimensions of Climate Change* conference on November 15, 2005 at WCL. This one-day primer provided an overview of the many legal dimensions of climate change.

The conference was attended by more than 150 participants representing a broad spectrum of the legal community: law students and faculty, in-house counsel, law firm attorneys, government policymakers, and public interest advocates. The attendees gained information about the latest developments in the field, with a special focus on the challenges and opportunities faced by the business sector. Case studies explored how leading companies assess risk, evaluate their emissions, and develop reduction strategies. Participants left the event with information and skills they will be able to use to help assess corporate climate risks and opportunities, and develop strategies for the future. This report provides a précis of the panelists' presentations.

BACKGROUND

Although the United States has not ratified the Kyoto Protocol, important legal developments are taking place at the corporate, municipal, state, federal, and international levels. Lawyers are involved at each of these levels: advising companies on emerging best practices for climate change risk evaluation and management; assisting federal, state, and local governments to develop innovative programs for monitoring and controlling greenhouse gas ("GHG") emissions; and exploring the potential of litigation and other legal tools to promote or delay action.

No matter whose interests they represent – companies, government agencies, or non governmental organizations – lawyers need to be fully informed about the legal implications of climate change and potential response options. Business lawyers, in particular, need to understand the risks of climate change and the challenges and opportunities posed by emerging climate policies. Companies that ignore the problem of climate change face ever increasing business and legal risks from shareholders, regulators, litigators, and lawmakers. They also may overlook opportunities to remain competitive as new markets develop for

cleaner, more efficient energy and products. Companies cannot evaluate and make informed decisions to respond to these risks and opportunities without the advice and guidance of a knowledgeable bar.

THE BASIC SCIENCE OF GLOBAL WARMING

Before delving into the legal dimensions of climate change, the conference was given an overview of the basic science by Dr. Jonathan Pershing, World Resources Institute. Six GHGs are controlled by a few emerging regulatory regimes. The three predominant GHGs – carbon dioxide ("CO₂"), nitrous oxide, and methane – occur both naturally and as byproducts of human activities. The other three – hydrofluorocarbons, sulphur hexafluoride, and perfluorochloride – are entirely man-made. Although they comprise a comparatively small part of the atmosphere, these man-made substances have a large impact on the climate due to their potent heat-trapping properties and long residency times in the atmosphere – in some cases several thousands of years.

Most GHG gases are emitted as a result of fossil fuel combustion, forest fires, and land use changes. The gases trap energy near the earth's surface that would have escaped into space, much as a greenhouse causes the sun's rays to heat the air trapped within. A changing temperature trend exists in all hemispheres, but particularly in the Arctic, where temperatures in some areas have risen ten degrees or more in recent decades. Retreating sea ice and melting permafrost have exposed coastal communities to much more powerful winds and waves, causing erosion that sends cabins sliding into the sea, and forcing residents to begin the long and costly process of relocation.

WHY SHOULD LAWYERS CARE ABOUT CLIMATE CHANGE?

Ken Berlin of Skadden Aarps gave a comprehensive response to the question "why should lawyers care about climate change?" He touched on the many legal components of the Kyoto Protocol with its three trading mechanisms, multi-faceted registry system, complex reporting guidelines, rigorous certification, monitoring and verification rules, and ground-breaking compliance system. The Clean Development Mechanism

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("CDM") alone, which allows projects in developing countries to sell credits to buyers in developed ones, could keep a battalion of lawyers busy for decades to come.

THE GLOBAL PERSPECTIVE

Donald Goldberg of CIEL gave participants a brief overview of the United Nations Framework Convention on Climate Change ("UNFCCC"), which was established in 1992. The goal of the UNFCCC is to stabilize GHG concentrations in the atmosphere to prevent dangerous human interference with the climate system. The Kyoto Protocol to the UNFCCC was ratified by 156 countries, and came into force in February 2005. The initial commitment period is from 2008–2012, with assumed contiguous commitment periods for the future.

Mr. Goldberg pointed out that, because the United States has not ratified the Kyoto Protocol, it cannot participate fully in the trading market it established. He canvassed three potential implications for the business community. First, while U.S. entities may be able to buy credits from Kyoto-impacted countries to ful-

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fill GHG targets under a potential domestic regulatory system, they will not be able to sell credits on the international market established by the Protocol. This may create a buyer's market, effectively devaluing U.S. carbon credits. Second, non-participation may have a chilling effect on the development of green technologies in the United States relative to the rest of the world. Third, he discussed the possibility of Kyoto-impacted market competitors using border tax adjustments or other trade measures to address any competitive advantage U.S. companies may gain as a result of escaping expenses associated with GHG reduction.

In the United Kingdom, a Kyoto-impacted country, the emphasis is on binding regulation and research and development. Jim Reilly, who presented on behalf of the British Embassy, relayed the words of Tony Blair: "Climate change will only be addressed through *both* technological development *and* a robust, inclusive, and binding international treaty." And what's more, he said, the UK is on track to meet its Kyoto target. The UK Emissions Trading Scheme was instituted in April 2002, three years before the EU trading scheme began. But the European carbon market is now truly up and running, with CO₂ trading at €20 – 30 per ton.

Crucial to the Kyoto regime from a sustainable development perspective are the CDM and joint implementation ("JI") mechanisms, which allow developed countries to contribute funds and technology towards clean development projects in developing countries and countries with economies in transition, in exchange for CO₂ reduction credits. Flavia Rosembuj of the World Bank ("WB") gave the conference technical details on the operation of the WB Carbon Finance Unit ("CFU"), which acts as a clearing house for the CDM and JI investment schemes. She told the conference that the CFU improves liquidity in the carbon market by benchmarking carbon asset creation and expanding frontiers of the market into poorer regions. The CFU also addresses market distortions by opening markets for small projects and small countries and strengthening technology development for less developed countries.

THE U.S. PERSPECTIVE

Robert Nordhaus of Van Ness Feldman ran through the main problems with the current domestic regulatory landscape. First, no definitive stance has been taken by the EPA on whether to regulate GHGs under the Clean Air Act ("CAA"). Second, litigation is unlikely to be an effective means of controlling U.S. GHG emissions in light of various federal district court decisions that rejected the common law nuisance theory as a basis for litigating corporations that emit GHGs. Third, state initiatives are vulnerable to state preemption or commerce clause challenges, or intervention by Congress.

Mr. Nordhaus then gave participants a tour of potential federal actions. He concluded that federal actions would provide corporations with greater regulatory certainty and would ensure that GHGs are comprehensively monitored. Various bills proposing the implementation of an economy-wide cap-and-trade system have been introduced over the years, but none have been approved by Congress. Other proposed federal options include an electricity industry cap-and-trade system or a carbon tax.

The Pew Center on Global Climate Change's Judith Greenwald provided a closer look at some of the more advanced state and regional climate action programs, including the new California auto emissions standards and the nine-state Regional Greenhouse Gas Initiative ("RGGI"), which is modeled after the EU Emissions Trading System. She highlighted the importance of state and regional initiatives by pointing out that the emissions from RGGI-participant states and California alone approach emission levels of the whole of Japan.

David Berg, from the U.S. Department of Energy's Office of Climate Change Policy, gave the conference an overview of the Bush Administration's three-part climate change strategy. The first part encourages industry to help achieve the Bush administration's goal of reducing GHG emissions intensity by eighteen percent by 2012 through voluntary programs. One of these, Climate VISION, implements work plans under which industry partners report GHG reductions, hasten the development and adoption of GHG reducing technologies, and work on

strategies to reduce GHG emissions in other economic sectors. The second part of the Bush Administration's strategy is the Climate Change Science Program. This program is designed to help the U.S. government understand and manage the risks associated with climate change. The final part of the Bush Administration's strategy is the Climate Change Technology Program. This program invests in the development of key technologies, including energy efficiency and renewable energy, and advanced CO₂ capture and sequestration techniques. Mr. Berg also brought the conference's attention to the international partnerships through which the United States is collaborating with other countries to tackle climate change, including the Asia Pacific Partnership for Clean Development and Climate.

STRATEGIC OPPORTUNITIES FOR COMPANIES

John Ramsey brought his experience as General Electric's ("GE") Vice President of Environmental Programs to the conference. He began his keynote address by quoting a statement by the G8 ministers: "[w]hile uncertainties remain in our understanding of climate science, we know enough to act..." His presentation used GE's *ecomagination* project as an example of how companies can take action on climate change while still maintaining and improving their relationship with clients. GHG policies are also an opportunity to work on a company's corporate image, he said, referring to the media coverage GE had received as a result of its approach to global warming.

In the absence of any strict targets from the government, GE voluntarily sets high environmental and profit goals, and links its promise to consumers of operating performance with a promise of environmental performance. To enable businesses to use similar strategies, he said, government regulation should implement flexible policies and sensible environmental goals.

RISKS AND RESPONSIBILITIES

J. Kevin Healy of Bryan Cave LLP gave the conference an update on pending lawsuits. In *Connecticut v. AEP*, eight states and New York City brought claims against the five biggest power producers in the country under the federal common law of public nuisance. The Court decided that these were policy decisions for Congress and the President, rather than the courts. The case is now on appeal to the Second Circuit. In *Friends of the Earth v. Watson*, the plaintiffs alleged that the Overseas Private Investment Corporation and the Export-Import Bank of the United States were violating National Environmental Protection Act by not preparing an environmental impact statement prior to financing major power projects abroad. The Court denied the defendants' motion for summary judgment, finding that the plaintiffs had demonstrated the requisite "injury in fact." In *Massachusetts v. EPA*, a petition was submitted to EPA under provisions of the Clean Air Act arguing that the EPA has a mandatory duty to set limits on CO₂ emissions. The petition was denied by EPA, and the petitioner appealed up to the D.C. Circuit Court of Appeals. The appeal was denied, and a petition

for rehearing has now been filed.

Litigation is just one risk to companies. Others include the direct effects of climate change on operations or the cost of complying with new regulations. To what extent should managers and directors be required by corporate governance rules to disclose the company's exposure to potential liabilities of global climate change?

Mindy Lubber, President of the Coalition for Environmentally Responsible Economies ("Ceres"), was the luncheon keynote speaker, and provided an overview of the work Ceres has done with its Investor Network on Climate Risk ("INCR") to raise awareness among institutional investors about the need to assess climate risk of their holdings. Ms. Lubber discussed the successful INCR meeting in May 2005 at the UN that included several dozen state treasurers and major investment firms, and gave highlights of recent shareholder activity requesting companies to assess and disclose their climate risk.

Dave Buente of Sidley Austin Brown & Wood LLP offered the conference some perspectives on the fiduciary duties of directors and officers in the context of climate change. He summarized the key aspects of *Corporate Governance and Climate*

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Change, published by Ceres in 2003. The Ceres corporate governance paradigm mandates special actions on climate change from the board and management levels, including public reporting of risks and opportunities. Mr. Buente discussed the potential issues in relation to climate change reporting duties, including the uncertainty of the effects of climate change, and the differing nature and extent of risks and opportunities from sector to sector, and business to business.

As an energy company whose facilities produce approximately 74 million tons of coal per year, Cinergy Corporation would be particularly vulnerable to government regulation of GHGs. Despite the absence of strict rules on the degree of risk disclosure, the corporation decided to have an open dialogue with stakeholders on the topic. The General Manager of

Environmental Economics and Finance, Kevin Leahy, told the conference about the process of producing Cinergy Corporation's *Air Issues Report to Stakeholders* in collaboration with Mission Responsibility Through Investment and Ceres. This report discloses Cinergy's regulatory risk, its risk mitigation strategy and voluntary GHG reduction program, as well as the possible impact of regulation on Cinergy's customers. Mr. Leahy reported that tackling the issue head-on has paid off, and that "Cinergy is better today for having discussed its vulnerabilities and shared its vision."

MITIGATING RISK AND SEIZING OPPORTUNITY

Mary Anne Sullivan of Hogan & Hartson LLP said that a mandatory national cap-and-trade program is all but inevitable, but brought the conference's attention to the hurdles the United States faces in bringing one about. At present, the U.S. carbon market lacks all the key features of an efficient market: established rules, volume, and liquidity. Current efforts are limited in scope and voluntariness, and Congress has been unable to reach consensus on the exact rules that an economy-wide cap-and-trade system should adopt. On the other hand, she pointed out, the potential cost of inaction, and the relative affordability of investment in the carbon market, point towards voluntary action. Ms. Sullivan advises lawyers investing on behalf of clients in nascent carbon markets to ask themselves, "are risk and reward in proper balance?"

Investing in the carbon market is just one of a range of risk mitigation actions. Lisa Nelowett Grice, of CH2MHill, told the conference that a complete risk management plan should include:

- A complete GHG inventory;
- Reporting GHG emissions and energy emissions;
- Voluntary program membership;
- Setting GHG emission reduction or related goals;
- Implementing specific internal GHG reduction actions; and
- Investing in GHG offsets.

She said that industry experience thus far shows that the process of crafting an inventory management plan creates a more robust vision for managing GHG emissions.

United Technologies Corporation ("UTC") has been engaged in corporate climate change action since 1997, when it launched its energy program. Ellen Quinn, Director of Environmental Programs, reported that since then, UTC has:

- Brainstormed energy reduction opportunities;
- Introduced a shut off program;
- Educated its staff through an energy awareness program;
- Run a leak management program; and
- Identified best practices amongst its facilities.

The results, she reported, were positive: an audit of 35 manufacturing plants across Europe, Asia, South America, and the United States showed that the measures UTC had taken resulted in an average energy saving of twenty percent, with energy conservation measures paying for themselves after just three years.

CONCLUSION

Regardless of whether the federal government introduces mandatory GHG targets tomorrow or in five years, lawyers and their corporate clients need to take action now in order to mitigate risks and seize business opportunities. By bringing together legal and corporate leaders, *The Legal Dimension of Climate Change* gave participants a sense of direction, as well as practical ideas, in an otherwise uncertain domestic regulatory landscape. The discussion highlighted that, despite the challenges, a culture of openness rather than avoidance will yield the best results for all sectors of the community.

The conference concluded with general agreement that there is value in convening annually on climate change and its legal ramifications and opportunities. For more information on participation, or to obtain copies of the PowerPoint presentations from the conference, please contact WCL's Office of Special Events at (202) 274 4075.

