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NON-STATE ACTORS AND THE EMERGING CLIMATE CHANGE LAW REGIME

This panel was convened at 10:45 a.m., Friday, March 26, by its moderator, Jaye Ellis of McGill University, who introduced the panelists: Elizabeth Burleson of the University of South Dakota School of Law; Naomi Roht-Arriaza of the University of California, Hastings College of Law; and William L. Thomas of Skadden, Arps, Slate, Meagher and Flom LLP.*

NON-STATE ACTOR ACCESS AND INFLUENCE IN INTERNATIONAL LEGAL AND POLICY NEGOTIATIONS

By Elizabeth Burleson[†]

Most creative solutions that integrate local needs with local and global environmental concerns come from frontline and fenceline communities in collaboration and dialogue with other actors. Procedural barriers to participation include language generally, and literacy in particular. Internal politics and hierarchies within communities also create obstacles to involvement, particularly for indigenous people. The environmental movement has grown substantially in the last two decades,¹ raising awareness about the need for genuine involvement rather than perfunctory notification of projects that detrimentally impact public health and ecological viability. Cultural and social capital barriers to participation and equity include access to education and the means by which to gain the requisite “professionalism” to take part in the political process. Historical injustice compounds the ability of extremely understaffed small NGOs directly representing people in frontline communities.

What works and why is it important? NGOs have increased their capacity to engage with nation-states in high-stakes international negotiations.² It is crucial that NGOs remain able to interact with individual stakeholders who benefit from such advocacy efforts. Listening to people takes time but can result in gathering locally specific knowledge, often traditional, but also new knowledge based on observations of changing patterns. No one should try to reinvent the wheel, but decisionmakers do not always have the insight or resources with which to be inclusive in a way that embraces cultural knowledge. Policies are all too often made at centralized levels that preclude the possibility of particular community solutions.

The environmentalism of the poor is an environmentalism of livelihood concerned not only with economic security in the marketplace, but also with non-market access to environmental resources and services. Youth and women have increasingly been recognized as stakeholders with community knowledge and sustainable policy recommendations.

When poor people want to take part in environmental movements, they tend to face barriers to effective participation. Environmental activists and academics have drawn from three broad categories of justice: distributional justice, procedural justice, and entitlements.³ Distributional

* Naomi Roht-Arriaza and William L. Thomas did not submit remarks for the *Proceedings*.

[†] Prof. Elizabeth Burleson, Pace Law School; this piece is based upon the following article ELIZABETH BURLESON AND DIANA PEI WU, “COLLABORATIVE COMMUNITY-BASED NATURAL RESOURCE MANAGEMENT,” 21 *Fordham Environmental Law Review* 201 (2010).

¹ ENVIRONMENTAL JUSTICE TIMELINES—MILESTONES, SECOND NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT (2002), available at <http://www.ejrc.cau.edu/summit2/%20EJTimeline.pdf>.

² Michele M. Betsill & Elisabeth Corell, *NGO Influence in International Environmental Negotiations: A Framework for Analysis*, 1 *GLOBAL ENVTL. POL.* 65, 65 (2001), available at <http://www.polisci.colostate.edu/fac/mb/NGO%20Influence.pdf>.

³ Robin L. Turner & Diana P. Wu, *Environmental Justice and Environmental Racism: An Annotated Bibliography and General Overview, Focusing on U.S. Literature*, in *BERKELEY WORKSHOP ENVTL. POL.* 10 (2002).

justice refers to the distribution of harms and benefits over a population.⁴ For this standard to be met, the distribution of harms should not be more prevalent for any identifiable subgroup than another.⁵ If egalitarian (equality-based) standards are used to assess distributional justice, then each group should have the same level of harms and benefits.⁶ If equity-based standards are applied, then groups may not have identical levels of harms and benefits.⁷ Distributional justice principles can be applied across groups within society and across time (intergenerational equity).⁸

Procedural justice focuses on the process through which environmental decisions are made.⁹ If they are made through a fair and open process, they may be considered just regardless of their distributional impact. “Concern with procedural justice therefore centers on two issues: procedural fairness and the effective ability of groups to participate in ostensibly fair processes.”¹⁰ Issues of community empowerment and “access to resources necessary for an active role in decisions affecting one’s life” are crucial.¹¹ This includes attention to the role of knowledge and expertise in a class-stratified society and the right of communities to be involved in all stages of planning processes—especially when political representatives do not reflect the concerns, needs, knowledge, and/or experience of their constituents.¹² Some procedural justice struggles are as basic as providing translators so that public hearings can be held in multiple languages or publishing environmental impact assessments in languages other than English.

Rights approaches seek to ensure that individuals (and communities) have effective access to and control over environmental goods and services necessary to their well-being.¹³ This conception of justice leads to minimum standards for just outcomes.¹⁴

Community participation in policy inquiry is important for three reasons. First, it is intrinsic to the meaningful practice of what Benjamin Barber calls a strong democracy.¹⁵ Second, community participation can contribute to the legitimacy of policy development and implementation, for instance, “collaborative deliberation has the possibility of building new political cultures.”¹⁶ Third, community or non-expert participation can contribute to the science itself, by integrating the general and the specific.¹⁷

⁴ *Id.*

⁵ *See id.*

⁶ *See id.*

⁷ *See* David S.G. Thomas & Chasca Twyman, *Equity and Justice in Climate Change Adaptation Amongst Natural Resource-Dependent Societies*, 15 *GLOBAL ENVTL. CHANGE* 115, 117–20 (2005), available at <http://www.astepback.com/GCC/Equity%20and%20Justice%20in%20CC%20Adaptation.pdf>.

⁸ *See Intergenerational Equity*, SOC. CAP. BLOG (Feb. 26, 2010), available at <http://socialcapital.wordpress.com> (describing how intergenerational equity requires older generations to take care of their young).

⁹ Turner & Wu, *supra* note 3.

¹⁰ *Id.*

¹¹ *See* Michael K. Heiman, *Race, Waste, and Class: New Perspectives on Environmental Justice*, 28 *ANTIPODE* 111, 111–21 (1996), available at <http://www.ejnet.org/ej/rwc.html>.

¹² *See, e.g.,* Jeanne Nienaber Clarke & Andrea K. Gerlak, *Environmental Racism in the Sunbelt? A Cross-Cultural Analysis*, 22 *ENVTL. MGMT.* 857, 857–67 (1998).

¹³ *See, e.g.,* AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* (1983); Melissa Leach, Robin Mearns & Ian Scoones, *Environmental Entitlements: Dynamics and Institutions in Community-Based Natural Resource Management*, 27 *WORLD DEV.* 225, 243 (1999).

¹⁴ *See* United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 (Sept. 13, 2007), available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

Including underrepresented members of civil society in decision making can help achieve good governance and sustainable development. Game theory suggests that cooperation results from interactions that do not have a future end point.¹⁸ The international community is sufficiently intertwined to necessitate ongoing dialogue on transboundary concerns. Civil society generally, and youth in particular, have contributed to this international decision-making process.

Underrepresented civil society engagement in international legal negotiations has not only led to such procedural legitimacy as transparency, but has also led to strong environmental provisions being included in international conventions. Public participation gives youth the opportunity to voice their recommendations.

Diplomacy skills can be learned through observation and practice. Combined with respect and persistence, the ability to effect change depends upon thoughtful policy recommendations delivered in a compelling manner. Bravery is not the absence of fear; rather, it is the ability to contribute to important work in the face of fear. Henry David Thoreau suggested that most people lead lives of quiet desperation.¹⁹ Yet committed spirits can come together to advance simple truths of equity, integrity, and sustainability in the face of daunting odds. Increasing the diversity of civil society participation must remain a priority.

In the political fray this is a wise path, requiring inner peace and outer presence. Jeffersonian and Hamilton dilemmas regarding representation versus direct public involvement arise over and over. Civic discourse to arrive at political consensus does not always remain civil in nature. Countries sponsor youth delegates who then struggle to walk a tightrope between protocol and pushing the envelope. These findings about the role of youth and representatives from frontline and fenceline communities in international negotiations are echoed in the scholarship on the role of youth and these communities in social movements in general.²⁰

Who decides? This is at the core of achieving sustainable development. Good governance often proves to be elusive. Public participation can help achieve good governance that is responsive to present and future societal needs in an accountable, effective, transparent, equitable, and inclusive manner. “[U]ltimate choice[s] between possible solutions can only be made after considering qualitative issues such as power, politics, public opinion, tradition, and fairness.”²¹ Legal frameworks can increase or decrease sustainable development. Non-state actors include civil society, which in turn includes individual stakeholders, and an array of organizations that have become effective advocates in negotiations among nation-states. High transaction costs can hinder the formation of bilateral, regional, and global treaties. When interdisciplinary expertise is needed to understand and determine optimal use, efforts to find a solution often stall. In 1987 the General Assembly adopted the study, “Our Common Future,” and instructed all UN agencies to report annually on their progress toward sustainable development.²² Since the Earth Summit in 1992, we have had global conferences on environment, human rights, indigenous people, population, social development, and women.²³ Yet

¹⁸ Kevin Gibson, William Bottom & J. Keith Murnighan, *Once Bitten: Defection and Reconciliation in a Cooperative Enterprise*, 9 BUS. ETHICS Q. 69, 75 (1999).

¹⁹ Brian Walker, *Thoreau's Alternative Economics: Work, Liberty and Democratic Cultivation*, 92 AM. POL. SCI. REV. 845, 846 (1998).

²⁰ See CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960s (1995).

²¹ Katrina Smith, *Fairness in Water Quality: A Descriptive Approach*, 4 DUKE ENVTL. L. & POL'Y F. 85, 85 (1994).

²² Oluf Langhelle, *Sustainable Development: Exploring the Ethics of Our Common Future*, 20 INT'L POL. SCI. REV. 129, 129 (1999).

²³ Ton Bührs, *From Diffusion to Defusion: the Roots and Effects of Environmental Innovation in New Zealand*, 12 ENVTL. POL. 83, 94 (2003).

we often are unable to cooperate, to innovate, or to transcend rhetoric. Equity and efficiency must be balanced in a manner that facilitates genuine nonstate-actor participation in international decision making.

Changing the culture of experts requires the development of an analytic-deliberative method capable of bringing together citizens and experts.²⁴ Participation is especially important in the early stages of the process, when problems and questions themselves are being developed. While deliberation cannot end all conflict, it can include normative judgments more easily than reductionist approaches, such as formal risk analysis.²⁵ On the other hand, people within the environmental justice movement have been particularly successful at developing professional–community collaborative projects.

Science can help integrate analysis and policy formulation across ecological and sociopolitical scales. Particularly relevant to negotiations at the international level, the role of scientists, as well as negotiators and representatives in international arenas, could be to provide knowledge and political leverage to enable communities to implement their own decisions and affect decision making at higher levels. The goal is policies and institutions that enable local people to have sustainable livelihoods where they live and an effective voice at higher sociopolitical levels. Conservation and the sustainable use of natural resources are two sides of the same coin.

Increasing the flow of information to and the thoughtful analysis by ordinary citizens avoids policy stagnation in a rapidly changing world. The Århus Convention²⁶ recognizes the need to protect the environment for both present and future generations.²⁷ Including citizens in environmental protection increases the effectiveness of that protection since people often have a deep interest in and are affected by the state of their surrounding environment.²⁸ This rights-based approach prohibits discrimination on the basis of citizenship, nationality, or domicile. Public authorities must generate and provide basic environmental information, access to which will facilitate informed participation in decision making. This approach to transboundary decision making that affects sustainable development should become widespread throughout international, regional, national, provincial, and local efforts to balance equity and efficiency to achieve good governance. Public participation in international decision making can sustain trust in governments and strengthen international consensus building.

²⁴ FRANK FISCHER, *CITIZENS, EXPERTS, AND THE ENVIRONMENT: THE POLITICS OF LOCAL KNOWLEDGE* 245 (2000).

²⁵ *Risk Analysis*, NEWSLETTER OF THE ASSOCIATION FOR VETERINARY EPIDEMIOLOGY AND PREVENTIVE MEDICINE, Winter 2002/2003, at 12, available at <http://vetmed.illinois.edu/avepm/newsletters/winter02.pdf>.

²⁶ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 UNTS 447, 38 ILM 517 (1999) (entered into force Oct. 30, 2001), available at <http://www.unece.org/env/pp/documents/cep43e.pdf>.

²⁷ *Id.*

²⁸ *Id.*