

text to present the arguments to the Supreme Court. Without the Paris Agreement, we would not have had a case, because, as I mentioned, we did not have a law, and our national constitution only includes sustainable development and the right to a healthy environment. International law gave us all the arguments, and although the Paris Agreement was not ratified at the moment, we said to the court that there was a clear intention of the government to ratify the agreement. Any omissions in fulfilling its duties were against that commitment.

As an activist and also as an environmental lawyer, I agree with some of the things that Krishnendu shared at the beginning. I feel like we as lawyers need to start talking to other professionals, to scientists, and to think more about the implementation of the cases we are participating in. It is not enough to have the best legal arguments if we do not think about the implementation and the possible consequences of the cases.

### **DANIEL BODANSKY**

Thanks. Lisa, I want to turn to you. We are looking at it from both perspectives, what international law means to local communities and local action but then, conversely, how local action feeds into the international negotiations. Krishnendu mentioned that the experience of people living in the Sundarbans can link people's imagination and can be a motivational factor in the negotiating process. I want to ask you, to what extent do you think the kinds of local experiences that he describes actually do inform the climate negotiations? Are they, in fact, a motivational factor? Could anything be done that might increase their influence in the negotiating process?

### **REMARKS BY LISA BENJAMIN**

doi:10.1017/amp.2023.30

Hi, Dan. Hi, Gabriela. I also wanted to thank the organizers for facilitating a hybrid format so I could be here with you today. I think in terms of that question, Dan, you and I have both been at negotiations where the plenary starts with all the countries there and a minute of silence for some victims of some typhoon in one of the countries that is there, or victims of a hurricane of a country that is there, and then the minute of silence ends. Then we swiftly move on to the business of negotiating. I think that it is not as much of a motivational factor in the outcomes of the negotiations. I think it does motivate some of the countries that are there, and of course, they are the more vulnerable countries, and they are the ones that have less influence in terms of crafting the outcomes of the negotiations.

I will say that I have only been attending since 2010, and, Dan, you may have much more experience, and so you may have seen this as well. I have seen more and more protestors, both around the Conference of Parties (COP) in the negotiations, outside the COP meetings, and also the Secretariat of the UNFCCC has authorized, I think, more and more protests inside the negotiations. What happens is you will have thousands of negotiators get up, leave a room, move to another room, and walk by protests both inside and then, of course, going into the negotiations. Those protests are important in terms of media coverage of the COP negotiations. They are also really important in terms of trying to influence at least some of the more powerful actors in the negotiations, and so we have seen, in the past few years, the presence of Greta Thunberg, who now goes to G7 meetings and talks, and not only at the negotiations. I would also like to highlight some activists from the Global South, like Vanessa Nakate from Uganda. There has been a rise of the presence of young protestors, basically trying to put pressure on negotiators.

Ultimately, though, negotiators take instructions from their capitals. That kind of rights-based activism is very influential at the domestic level for countries who are large emitters and are

actually democracies where protests can happen. But we cannot forget that a lot of the actors in the negotiations and the big emitters are not democracies and it can be very dangerous to protest there, and so it is less influential at that level.

The last thing I will say is that some of the formats of some of the negotiations could be friendlier to observers. In the big COP negotiations at the end, you will have observers like Indigenous communities talking about their experience of climate change. It comes at the end of a long day. The actual negotiators who negotiate for countries are leaving the room. They are going back to their hotel to prepare for the next day, and so I think that having observers be able to actually participate in a more influential manner can be helpful.

An example of this that I saw this week, the ExCom of the Loss and Damage Committee was meeting in Bonn, and you actually had observers in the room and people who could attend virtually, which I did. And those observers on each agenda item were given a few minutes at the end to give their input into what the actual negotiators said. They were in the room, and I found their participation quite moving and more influential in those structures. Of course, there is always a pressure of time at COPs, and so it is hard to structure it that way. But I thought that was an innovative way to try to get more motivation directed at actual negotiators.

### **DANIEL BODANSKY**

Thanks, Lisa. I am what is called sometimes a “frequent COP-er.” I’ve been going to COPs since there was the first COP and have been involved for thirty years now. I would agree with everything that Lisa just said. I think it is easy to be cynical about the negotiations, and certainly, as somebody who has been involved with it for thirty years, I share some of that. As Lisa said, there is often some moving testimony at the beginning about a crisis. I remember after the cyclones in the Philippines, there was a moment of silence for that, but then the negotiators start negotiating and it is just back to business as usual. And they are arguing over a comma or a particular word and so forth, and the testimony is quickly forgotten.

But the pressure that is being exerted by protestors, by social movements, by the youth groups is the backdrop that motivates countries and pushes them to do more. One of the functions now of COPs is not simply to negotiate but to serve as a focal point for international pressure. They are essentially a catalyst to try to get countries to do more, and I think the protests in that connection actually do have some influence because at the COPs, even at the most recent one in Glasgow, countries did come forward with more—at least some countries came forward with more stringent, more ambitious NDCs.

I think without that kind of constant pressure, without that kind of activism, there would not be nearly as much motivation for countries or pressure on countries to be doing more. I think a lot of the influence is indirect, it comes through national political processes, but it still has a very important effect.

In some contexts, as Lisa says, it depends on the negotiating format. COPs tend to be the biggest and the most formal. In smaller contexts, as Lisa mentioned, observers can play a bigger role.

Since I am also a panelist as well as the moderator, I will ask myself a question and discuss it. Krishnendu’s testimonial touched on two ways that even as countries in the Global North are taking steps to limit their emissions, they’re still contributing to increases in emissions in the Global South. One way is by outsourcing pollution through the movement of production to developing countries like Bangladesh, including in the production of clean technologies such as electric cars. Rather than produce them in a developed country and have the emissions count against their emissions inventory, the factories move to a developing country, and then the emissions to produce those cars are counted by the developing country. That is called “carbon leakage.” The other

way is by providing finance for dirty technologies in developing countries such as the finance for the coal-fired power plant in the Sundarbans region that Krishnendu mentioned in his testimonial, which banks in developed countries contribute to and help finance. Both of these are huge problems, and they are both problems that the international climate regime has not really been very successful thus far in addressing.

The first problem, that of carbon leakage, is a byproduct of the fact that the climate regime does accounting based on where the emissions take place rather than where the goods are consumed that led to those emissions, and I think there are two possible solutions to this. One would be to impose broader tax adjustments on goods imported from countries with lower standards, with weaker carbon control regimes. But this is an approach that developing countries in particular actually have been very strongly opposed to.

The other is to make the regime truly global so that you cannot escape the bounds of the regime by moving to another country, and this was really one of the key ideas behind the Paris Agreement. To move beyond the Kyoto Protocol framework to the Paris Agreement is to make the regime global so that you can address the issue of carbon leakage, because the countries where the industry is migrating to also have carbon control standards.

But the problem, of course, is that although the Paris Agreement is global in one sense—and now virtually every country in the world is a party to the Paris Agreement—it allows countries to nationally determine their contributions. Countries can still have different levels of control of carbon emissions. So the Paris Agreement does not fully address the leakage problem. But, as countries, at least in theory under the Paris Agreement, ratchet up their level of ambition over time through the so-called “ambition cycle,” hopefully the issue of carbon leakage then will be addressed.

The issue of financing dirty industries, brown industries in developing countries, is something that the Paris Agreement at least begins to try to address. Article 2(1)(c) of the Paris Agreement, which defines the goals, defines as one of the goals to make financial flows consistent with the goals of the Paris Agreement. That really lays down a significant marker that it is not just a matter of reducing your own emissions. It is also a matter of making financial flows consistent with the goals, and so financing dirty industries in developing countries obviously is problematic under Article 2(1)(c) of the Paris Agreement. That is being picked up in the Glasgow Financial Alliance for Net Zero, which involves encouraging 450 financial institutions that manage \$130 trillion of private capitalists to try to get their financial investments consistent with the Paris Agreement goal. I think that there is certainly recognition of both of these problems in the international negotiating process and some baby steps toward trying to address them.

That was my question and answer for myself. Lisa, let me now turn it back to you. Land erosion in the Sundarbans, which Krishnendu talked about in his testimonial, is a clear example of loss and damages. This is a core, contentious issue in international law with regard to climate change. Lisa, I am wondering if there is something in Krishnendu’s story on the Sundarbans that strikes you from the perspective of the climate negotiations in terms of loss and damage issue.

## **LISA BENJAMIN**

Yes. I think that, sadly, the story that Krishnendu has told about loss and damage is one that you can see replicated across a number of countries in the Global South and even for some communities in the Global North, particularly environmental justice communities. One of the things that struck me about his story is the idea of multipliers. Climate change exacerbates existing vulnerabilities. The hardest effects are felt by the most vulnerable within the Global South, specifically poor communities and coastal communities—communities that do not have a lot of options or resilience.

One of the things that has come up in the negotiations, particularly pushed by small-island developing states and other vulnerable countries, is this idea of multidimensional indicators of vulnerability. It is not just that you experience a permanent loss—like a coral reef bleaches and dies. It is that the fishing community that is dependent on that coral reef for its livelihood has now lost jobs, and it has now pushed community members into more exploitative jobs that Krishnendu talked about. Climate change is rolling back the development gains that developing countries have made in the past few decades. It is really eroding resilience.

For example, in The Bahamas, if there is a hurricane, the government will pull from public budgets to recover from that hurricane, and that money was supposed to be used for poverty eradication or education or other development gains. Now it has to be put toward recovering from an extreme event, and as those events get closer and closer in frequency, we will not have the ability to recover from them as quickly. That means that we are not developing in other areas as well.

It is a cycle of vulnerability that unfortunately downcycles our ability to continue to live at the level of development that we have gained. It becomes complicated because of those multidimensional factors, because it deals with economics, not just environmental impacts. That is why it gets very contentious at the international level, because developed countries, in particular, do not want to be responsible for compensation or, as they would call it, “reparations” for those kinds of erosions of gains. It leaves developing countries in even more vulnerable positions than we were ten or twenty years ago.

There are reports about staying within global temperature goals, and if we do not meet those, the numbers are estimated at billions of people who will be either kept in poverty, pushed into poverty, or experience more extreme poverty. The sustainable development goals that we have tried to achieve to lift people out of extreme poverty, climate change is rolling those back.

### **DANIEL BODANSKY**

Thanks. Gabriela, a question for you. Krishnendu’s work on climate change issues in the Sundarbans is essentially focused on a rights-based approach like yours. At the same time, though, he emphasizes the importance of his work for the purpose of raising awareness in Western industrialized countries. I was wondering how you see the relationship between these two functions of human rights litigation, the local perspective, the rights-based approach, and raising awareness globally. Do these interact? Are they different worlds? Are they both part of your work?

### **GABRIELA ESLAVA BEJARANO**

Thanks. In our case, those two aspects absolutely interact. The mechanism that we had to be able to talk about climate change was the basic right to quality of life, to health, to access food, to access water. That was all we had, and we tried to put a human face to the climate change problem so the Court could see who was behind that problem that the Colombian government has received funding about.

It has a really symbolic effect. In the past two or three years, we have seen activist movements, such as the Fridays for Future movement, out on the streets. Back in 2016 and 2017, we did not have that in the Global South. Having a supreme court declaring the most biodiverse region of the world as a legal entity and declaring it had rights opened up this space to talk about climate change seriously in Colombia and in the region. The Amazon is an ecosystem that at least nine countries have jurisdiction over.

With different young activists and young lawyers from these nine countries, that is the way forward. Law and litigation is the only mechanism we found to actually protect the environment.

When public policy fails, local communities use the rights-based approach to pursue litigation that might have a symbolic effect, but at least it will open a public policy conversation.

**DANIEL BODANSKY**

Let me just ask one final question. The protection of future generations is at the heart of the case that you brought, Gabriela, and is also the subject of litigation in courts in other parts of the world. I am wondering how you see the idea of intergenerational solidarity expressed in the international climate negotiations, if at all. Is this idea of intergenerational rights and intergenerational solidarity reflected in the climate negotiations, and if so, how? Lisa, that question is for you.

**LISA BENJAMIN**

The UNCCC, which is the mother treaty, does talk about intergenerational equity. Intragenerational equity appears a lot more in the negotiations of the Paris Agreement in terms of addressing issues of equity. There is a lot of language around poverty reduction—not threatening food production through climate mitigation measures. That idea is expressed through principles like the common but differentiated responsibilities and respective capabilities of certain countries. Developed countries take the lead to go first, dealing with different national circumstances, the idea of intragenerational equity appears a lot, and it can actually be a huge tension point in the negotiations as to who is supposed to take action when. That is where we try to make progress, and the Paris Agreement did make some movement toward that, because all countries have signed up to some commitments.

There is solidarity with regard to some points and a real lack of solidarity for others. I think, interestingly enough—and going back to Gabriela’s testimony—intergenerational equity has appeared a lot more through the litigation in national courts, and we see so many cases brought by young people in terms of looking at the future, where they are going to be affected more than most of the negotiators and political leaders. They are not going to be around in 2050, and so we see a lot more of the pressure and the use of the Paris Agreement in innovative and creative ways by litigators in Global South countries. That has been one of the more encouraging points.

I do not know about you, Dan, but after the Paris negotiations, I was pretty depressed with the outcome, and then I saw it used in national courts. I thought, wow, we did a better job than I thought we did at the time. I think people like Gabriela are really pushing forward intergenerational equity at the national level more than at the international.

**DANIEL BODANSKY**

Thanks. I think with Paris, it is very much a question of whether you are seeing the glass half full or half empty. Having been involved for many years in negotiations, I was pleasantly surprised at how much the Paris Agreement accomplished, given how difficult the negotiations were, but compared to what we need, obviously it falls short in many respects.