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Climate Change Litigation: Opening the Door to the International Court of Justice

Andrew L. Strauss

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INTRODUCTION

In March 2003, I wrote an article for the *Environmental Law Reporter* surveying potential international judicial forums where victims of global warming could bring lawsuits.¹ In the ensuing six years, numerous lawsuits have been brought in the United States and in other countries,² and environmentalists can now celebrate

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¹ Andrew L. Strauss, *The Legal Option: Suing the United States in International Forums for Global Warming Emissions*, 33 ENVTL. L. REP. 10, 185 (2003).

² See, e.g., *Friends of the Earth, Inc. v. Watson*, No. C02-4106 JSW, 2005 WL 2035596, at*1 (N.D. Cal. Aug. 23, 2005) (alleging the U.S. Overseas Private Investment Corporation and Export-Import Bank facilitated the financing of projects in developing countries that contributed significantly to global warming without following proper procedures, including the production of Environmental Impact Statements, under the National Environmental Policy Act (NEPA) and the Administrative Procedures Act (APA)); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (alleging that five major American power company emitters of carbon dioxide should be held liable under federal and state common law for contributing to the public nuisance of global warming); *California v. Gen. Motors*, No. 3:06 CV-05755 MJJ (2006) (alleging that the six largest automobile manufacturers should be held liable to the state of California for global warming-related damages under both the federal and state common law of public nuisance); *New York v. EPA*, No. 06-1148, 2007 U.S. App. LEXIS 30013 (D.C. Cir. Dec. 26, 2007) (per curiam) (challenging the EPA's refusal to add carbon emissions standards to the new power plant source performance standards); *Cent. Valley Chrysler-Jeep v. Witherspoon*, 2007 WL 135688 E.D.Cal., 2007. January 16, 2007 (challenging the California Air Resources Board's regulations to limit greenhouse gas emissions from motor vehicles on the basis that the regulations are preempted by the Clean Air Act and on other grounds); *Ctr. for Biological Diversity v. Norton*, N.D. Cal., No. 3:05 CV 05191 (settled Jan. 2007) (alleging that the Secretary of the Interior had not acted within the statutory period to review the petition of the polar bear as an endangered species due to global warming); *Comer v. Murphy Oil*, C.A. No. 1:05-cv-00436-LG-RHW (S.D. Miss.) (dismissed) (on appeal to U.S. Court of Appeals for the Fifth Circuit, No. 07-60756) (claiming that, because of their contribution to global warming which warms the waters in the Gulf of Mexico, insurers, chemical companies, oil companies and coal companies are liable for the increasing frequency and severity of Atlantic hurricanes including Hurricane Katrina). For representative cases outside of the United States, see *GermanWatch v. Euler Hermes AG*, Administrative Court Berlin, Jan. 10, 2006, 10A 215.04, available at <http://www.climatelaw.org/media/Germany/de.export.decision.pdf>; *Genesis Power Ltd. v. Franklin Dist. Council*, 2005 NZRMA 541 A148/05 (Env't Ct. Auckland); *Gbemre v. Shell Petroleum Dev. Co Nigeria Ltd.*, [2005] F.H.C. FHC/B/CS/153/05 (Nigeria).

their first significant victory. In April 2007, based upon its finding that greenhouse gases are pollutants under Section 202(a)(1) of the U.S. Clean Air Act, the Supreme Court in *Massachusetts v. EPA*³ held that the U.S. Environmental Protection Agency (EPA) has the authority to regulate greenhouse gases.

Though we are still in the early days of global warming litigation, these lawsuits are having a significant impact on the legal and political climate. In response to a good deal of popular⁴ and academic discussion⁵ suggesting that those most responsible for the global warming problem be held legally accountable, corporations in the carbon sector are becoming concerned about the extent of their potential legal liability. This concern is one reason they are coming to publicly accept the reality of anthropogenic-caused global warming, and the corresponding need for regulation of greenhouse gas emissions.⁶

Despite the significance of this litigation, however, global warming actions thus far have almost all been brought in domestic rather than international forums. The only exceptions are a petition by the Inuit to the Inter-American Commission on Human Rights,⁷ and petitions by environmental groups and others to UNESCO's World Heritage Committee to include various natural sites as world heritage endangered by global warming.⁸ While domestic courts are still far and away the primary formal

³ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁴ See, e.g., Andrew Simms & Andrew Strauss, *America in the Dock: Poor Nations at Risk from Global Warming Are Growing Tired of Talking*, FIN. TIMES, Aug. 22, 2002, at 21. Eoin O'Carroll, *As Earth Warms, Lawsuits Mount*, CHRISTIAN SCI. MONITOR, Feb. 22, 2007, at 12; *Global Warming: Here Come the Lawyers*, BUS. WK., Oct. 30, 2006, David Lynch, *Corporate America Warms to Fight Against Global Warming*, USA TODAY, June 1, 2006, at 1B.

⁵ See, e.g., JOSEPH SMITH & DAVID SHEARMAN, CLIMATE CHANGE LITIGATION (2006); JUSTIN R. PIDOT, GLOBAL WARMING IN THE COURTS: AN OVERVIEW OF CURRENT LITIGATION AND COMMON LEGAL ISSUES (2006); RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION, DUTIES AND STATE RESPONSIBILITY (DEVELOPMENTS IN INTERNATIONAL LAW) (2005); Sara Aminzadeh, *A Moral Imperative: The Human Rights Implications of Climate Change*, 30 HASTINGS INT'L & COMP. L. REV. 231 (2007); Philippe Sands, *International Environmental Litigation and Its Future*, 32 U. RICH. L. REV. 1619 (1999); Rebecca Elizabeth Jones, Comment, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y J. 103 (2005); J. Chris Larson, Note, *Racing the Rising Tide: Legal Options for the Marshall Islands*, 21 MICH. J. INT'L L. 495 (2000); Kevin Healy & Jeffrey Tapick, *Climate Change: It's Not Just an Issue for Corporate Counsel – It's a Legal Problem*, 29 COLUM. J. ENVTL. L. 89 (2004).

⁶ Jeffrey Ball, *Electricity Group Backs Emissions Caps*, WALL ST. J., Feb. 7, 2007, at A10; Jeffrey Ball, *Conoco Calls for Emissions Cap – Oil Producer Joins Effort to Shape New U.S. Policy on Greenhouse-Gas Limits*, WALL ST. J., Apr. 11, 2007, at A3.

⁷ See Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (submitted Dec. 7, 2005), at 13–20, available at http://www.earthjustice.org/library/reports/ICC_Human_Rights_Petition.pdf; Letter from the Organization of American States to Sheila Watt-Cloutier regarding Petition No. P-1413–05, Nov. 16, 2006, available at <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>.

⁸ See U.N. Educ. Sci. and Cultural Org. [UNESCO], World Heritage Comm., *Decision 29COM 7B.a Threats to World Heritage Properties* (2005), available at http://whc.unesco.org/download.cfm?id_document=5941; U.N. Educ. Sci. and Cultural Org. [UNESCO], World Heritage Comm., *Decision 30COM 7.1 The Impacts of Climate Change on World Heritage Properties* (2006), available at http://whc.unesco.org/download.cfm?id_document=6728.

institutions of dispute resolution in the world, they are in certain ways ill suited to address the global nature of the climate change problem.⁹ For example, in the *Massachusetts* case, the EPA partially based its refusal to regulate carbon emissions on the global dimensions of the climate change problem which raise “important foreign policy issues” that are “the President’s prerogative” to address.¹⁰ Also based in part on similar concerns and quoting from that EPA decision, Judge Preska of the Southern District of New York dismissed a claim that the greenhouse gas emissions of the power companies constituted a nuisance.¹¹ Though both the EPA and Judge Preska address the problem from their vantage point as discrete decision makers within a domestic forum, the implication of their analysis points to the need for global prescriptive and adjudicatory action.

Within the international realm, the one court of general competence is the World Court or the International Court of Justice (ICJ). In terms of status and hold on the public imagination, it is the closest institution we have to a high court of the world. Initiating a global warming case before that body could, therefore, bring significant benefits, but the barriers to initiating such a case are also quite formidable, perhaps fatally so. My intention in this chapter is to contribute to the discussion of global warming litigation with an exploration of both the benefits of and barriers (primarily jurisdictional) to initiating a case. It updates and expands that part of my analysis from the 2003 *Environmental Law Reporter* relating specifically to the ICJ. As with the 2003 article, this chapter is not meant to be the definitive word on possibilities for litigating before the ICJ, but rather a contribution to an evolving exploration of the issue. Because the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol establish the core of the present global warming international legal regime, they both loom large in my analysis. Yet the days of the Kyoto Protocol are numbered, and what will come after is now the subject of intensive negotiations. To the extent (as is likely) that the post-Kyoto regime draws on many of the legal structures and institutional approaches of Kyoto, much of my Kyoto specific analysis will continue to be relevant in the post-Kyoto world.

In Section 1, I continue with a general discussion of the advantages of litigating before the ICJ. In Section 2, I introduce the countries that could be potential applicants and those that could be potential respondents in a global warming suit, and I focus on evaluating the possible jurisdictional basis upon which such a suit could proceed. I conclude this section with a discussion of other procedural and substantive hurdles that would have to be overcome before a case could be decided by the ICJ. In Section 3, I then shift to reviewing briefly the nature of the substantive law that the ICJ would apply. Finally, I conclude by considering the need to view litigation

⁹ For a view critical of the characterization of the climate change problem as of essentially global dimension, see Hari M. Osofsky, *Is Climate Change “International”: Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. 585 (2009).

¹⁰ Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, at 52,928 (Sept. 8, 2003).

¹¹ *Connecticut v. Am. Elec. Power Co.*, F. Supp. 2d 265 (S.D.N.Y. 2005).

the ICJ would likely rule on State responsibility under international law rather than corporate responsibility under domestic law, its rulings would carry liability implications for corporations. In potential domestic nuisance or negligence cases against corporations for causing harm, it is necessary to establish that the defendant corporation's contribution to the global warming problem contravened some community-wide standard of behavior.¹⁴ A decision by the ICJ could help to establish the existence of such standards and perhaps be a guide as to the limits on corporate greenhouse gas emissions they require.

Finally, as will be discussed in Section 2, the mere fact that countries join a climate change regime does not ensure compliance with that regime. Moreover, even such compliance may not be adequate to meet the whole complement of their remedial obligations under international law. As Section 3 explains, standards derived from customary international law and general principles of international law as evidenced frequently in judicial and arbitral decisions, solemn declarations, and restatements can also effect the ultimate obligation of states to limit their contribution to the global warming problem. A ruling by the ICJ can help to put pressure on countries to comply with their obligations, and it can help clarify the full extent of these obligations.

2. GETTING INTO THE ICJ

2.1. *Contentious Cases*

2.1.1. Applicants and Respondents

Only countries can bring suits against other countries before the ICJ.¹⁵ Determining which applicant State or States could most effectively bring such a suit would not be simple. Almost all of us today are participants in the carbon economy. We are both contributors to, as well as victims of, global warming. Having said that, some are contributing orders of magnitude more than others to the problem. For example, the average citizen in the United States is responsible for emitting over forty times more greenhouse gases into the environment than the average citizen of Kiribati.¹⁶ And some, in contrast, are bearing the brunt of the effects of global warming and will continue to do so into the foreseeable future. The most obvious applicant

Emissions: The Energy Challenge: Big Oil, Small Step, N.Y. TIMES, June 30, 2006, at C1; Steven Mufson & Juliet Eilperin, *Energy Firms Come to Terms with Climate Change*, WASH. POST, Nov. 25, 2006, at A1; Daniel B. Wood, *On Road to Clean Fuels, Automakers Cover Some Ground*, CHRISTIAN SCI. MONITOR, Dec. 1, 2006, at 01; Claudia H. Deutsch, *Selling Fuel Efficiency the Green Way*, N.Y. TIMES, Dec. 11, 2006, at C7; John O'Dell, *So Who's the Greenest of Them All?: Well, It Depends on Who You're Talking To: In Any Case, There's Hot Competition Among Car Makers to Lay Claim to the Eco-Friendly Crown*, L.A. TIMES, Mar. 29, 2000, at 1.

¹⁴ See generally DAN D. DOBBS, *THE LAW OF TORTS* 393-403 (2000).

¹⁵ Statute of the International Court of Justice, effective Oct. 24, 1945, art. 34 (1), 59 Stat. 1031, 1060, T.S. No. 993.

¹⁶ See World Resources Institute Chart of Total Greenhouse Gas Emissions in 2000, available at <http://cait.wri.org/cait.php?page=yearly> (last visited Apr. 30, 2007).

countries, therefore, are those that have contributed little to the problem and are most victimized by it. Low-lying Pacific island countries such as Kiribati whose very existence is imperiled by global warming have been most often mentioned.¹⁷ A few years ago, the small Pacific island nation of Tuvalu, for example, considered trying to bring a claim against the United States before the ICJ.¹⁸

Another category of applicant countries that has not been considered are developed country parties to the Kyoto Protocol.¹⁹ Specifically identified in Annex 1 to the Protocol, these countries bear almost the entire burden for reducing greenhouse gases.²⁰ Consistent with the increasingly accepted principle that countries have common but differentiated responsibilities to remediate environmental problems,²¹ the Protocol puts the onus on them because of the developed world's disproportionate wealth and historical contribution to the global warming problem. To the extent, therefore, that such developed countries are themselves victims of global warming, a potential claim could be explored against fellow developed countries that are not bearing their share of the responsibility for the global warming problem, either because they do not appear to be on track to meet their emission reduction obligations, including under the Protocol, or they have not acceded to the Protocol and are not otherwise bearing their share of the responsibility for the global warming problem.

Whether either vulnerable developing countries or developed countries that are making a serious effort to deal with the global warming problem could successfully bring a lawsuit before the ICJ presents the threshold question of whether the ICJ would find it had jurisdiction over the dispute. In accordance with the principle of State sovereignty, jurisdiction by the Court must ultimately be based upon State

¹⁷ Low-lying coastal states such as Bangladesh are also particularly at risk. For a discussion of the probable effects of global warming on low-lying coastal island states, see Intergovernmental Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007), at 481. For a discussion of the extent to which international law protects vulnerable island states from harms caused by global warming, see William C.G. Burns, *Potential Implications of Climate Change for the Coastal Resources of Pacific Island Developing Countries and Potential Legal and Policy Responses*, 8(1) HARV. ASIA-PAC. REV. 1-8 (2005). See also Nicholas D. Kristof, *Island Nations Fear Sea Could Swamp Them*, N.Y. TIMES, Dec. 1, 1997, at F9.

¹⁸ Koloa Talake, the prime minister who was the driving force behind the lawsuit, lost reelection in August 2002, and the subsequent government did not pursue the litigation. See Leslie Allen, *Will Tuvalu Disappear Beneath the Sea? Global Warming Threatens to Swamp a Small Island Nation*, SMITHSONIAN, Aug. 1, 2004, at 44.

¹⁹ Protocol to the United Nations Framework Convention on Climate Change (UNFCCC), art 3, Dec. 11, 1997, 37 I.L.M. 32 (1998), available at <http://unfccc.int/resources/docs/cpmvp/kpeng.html>.

²⁰ *Id.*

²¹ The idea that international agreements should place different burdens on differently situated states predates modern international environmental law. The term first appears explicitly in the United Nations Framework Convention on Climate Change (UNFCCC), see *infra* note 20, but the concept has been integrated into earlier international environmental agreements. For further discussion, see Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276 (2004). For an exploration of the idea applied specifically to climate agreements, see Comment, *Rethinking the Equitable Principle of Common but Differentiated Versus Absolute Norms of Compliance and Contribution in the Global Climate Change Context*, 13 COLO. J. INT'L ENV'T L. & POL'Y 473 (2002).

consent, which can be manifest in three ways. The first way would be for disputing parties to agree to refer a matter to the Court pursuant to Article 36(1) of its Statute.²² The second way the Court could attain jurisdiction is if under the so-called optional clause of the Article 36(2) of the ICJ Statute, the respondent State has prospectively entered a declaration accepting the compulsory jurisdiction of the Court for the kind of dispute being litigated, and the applicant State has allowed in its own declaration that, in accordance with the *rule of reciprocity*, it would itself be subject to the Court's jurisdiction were it to be sued in a case of a similar nature.²³ Finally, the third way that the Court could gain jurisdiction, also pursuant to Article 36(1), is if the parties have specifically provided for dispute resolution before the Court in a pertinent treaty which is in effect between the parties.²⁴

2.1.2. Referral to the ICJ by Mutual Agreement

It is unlikely that a developed country being challenged by either a developing or developed country for a claimed failure to deal sufficiently with its emissions of greenhouse gases would agree to have that claim adjudicated by the ICJ. The ICJ has over time heard many cases under the referral by mutual agreement provision of Article 36(1).²⁵ However, almost all of them have been in the nature of boundary disputes where the disputing parties both desired an independent and authoritative resolution of a thorny political problem.²⁶ In the global warming context, it is quite unlikely that a targeted State would see itself as having an interest in exposing itself to a potentially adverse ICJ decision.

2.1.3. Compulsory Jurisdiction under the Optional Clause

The viability, on the other hand, of establishing jurisdiction under Article 36(2) would depend upon the coincident existence of applicant and respondent parties who had accepted the compulsory jurisdiction of the ICJ over such a dispute. Of

²² I.C.J. art. 36(1), Stat. 1031, 1060, T.S. No. 993.

²³ *Id.* at art. 36(2).

²⁴ *Id.* at art. 36(1).

²⁵ For some representative cases, see *Minquiers and Ecrehos* (Fr. v. U.K.), 1953 I.C.J. 47 (Nov. 17); *Sovereignty over Certain Frontier Land* (Belg. v. Neth.), 1959 I.C.J. 209 (June 20); *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20); *Continental Shelf (Libya v. Malta)*, 1984 I.C.J. 3 (Mar. 21); *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554 (Dec. 22); *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond., Nicar. intervening)*, 1992 I.C.J. 351 (Sept. 11); *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 (Feb. 3); *Grabčikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25); *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045 (Dec. 13); *Pulau Ligitan and Pulau Sipadan* (Indon. v. Malay.), 2002 I.C.J. 625 (Dec. 17); *Frontier Dispute (Benin v. Niger)*, 2005 I.C.J. 90 (July 12); *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea*, 2007 I.C.J. (Oct. 8).

²⁶ For reference to the prevalence of land and sea delimitation cases, see TERRY D. GILL, *ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* (2003). See also Todd L. Allee & Paul K. Huth, *Legitimizing Dispute Settlement: International Legal Rulings as Domestic Political Cover*, 100 AM. POL. SCI. REV. 219, 220–21, 229–32 (2006) (discussing the domestic political advantages of referring bilateral disputes to the ICJ).

the category of unambiguously developed countries, only two, the United States and Australia, refused timely ratification of the Kyoto Protocol. Australia, however, has now ratified the Protocol, leaving the United States as the sole remaining holdout. And with the Obama administration now in office, the United States is poised to play a meaningful role in negotiating the post-Kyoto regime.²⁷

Among the more economically significant countries that are not party to the Kyoto Protocol, Turkey also has neither signed nor ratified the agreement to reduce its greenhouse gas emissions. Other countries that are not party to the Kyoto Protocol include Afghanistan, Andorra, Brunei, Central African Republic, Chad, Comoros, Iraq, Kazakhstan, Saint Kitts and Nevis, San Marino, São Tomé and Príncipe, Somalia, Tajikistan, Timor-Leste, Tonga, and Zimbabwe. Among the nonmember countries, only Somalia has acceded to the compulsory jurisdiction of the ICJ.²⁸ Somalia, one of the least developed countries in the world, is in political turmoil and is, in any event, a very low emitter of greenhouse gases. Of the countries that have acceded to the Kyoto Protocol, the most likely targets of an international liability claim would be those whose compliance with that agreement is in question. The primary requirement the Protocol imposes is that the developed country members (Annex 1 Countries) make reductions in their greenhouse gas emissions during the period 2008–2012,²⁹ and that by 2005 they have made demonstrable progress toward this commitment.³⁰ In addition, all of the parties to the Kyoto Protocol are also parties to the master agreement, the UNFCCC, which requires more broadly in Article 4.2(a) that the developed countries take measures to mitigate climate change by limiting their anthropogenic emissions of greenhouse gases.³¹

²⁷ *Rudd Takes Australia Inside Kyoto*, BBC, Dec. 3, 2007, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7124236.stm>.

²⁸ The United States, the only unambiguously developed country not to have now acceded to the Kyoto Protocol, has withdrawn from the compulsory jurisdiction of the ICJ. See *infra* note 45 and accompanying text.

²⁹ Protocol to the United Nations Framework Convention on Climate Change (UNFCCC), art. 3, Dec. 11, 1997, 27 I.L.M. 32 (1998), available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf> [hereinafter Kyoto Protocol].

³⁰ *Id.* at art. 3.

³¹ United Nations Framework Convention on Climate Change, art. 4.2(a), May 9, 1992, 1771 U.N.T.S. Article 4.2(a) in its entirety reads as follows:

The developed country and other Parties included in Annex I commit themselves specifically as provided for in the following:

(a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and

Among the clearly developed Annex 1 countries that appear most on track to meet their 2008–2012 Kyoto reduction commitments are Britain, Sweden, and Iceland.³² Of the three, Britain and Sweden have acceded to the ICJ Article 36 optional clause. Austria, Belgium, Denmark, Ireland, Italy, Liechtenstein, Norway, Portugal, Spain,³³ Canada,³⁴ and New Zealand³⁵ are among the countries least on track for meeting their 2008–2012 Kyoto reduction commitments and are, therefore, arguably not in compliance with the Kyoto requirements and, more generally, with Article 4.2(a) of the UNFCCC.³⁶ All of these countries except Ireland and Italy have acceded to the optional clause of the ICJ. Complicating ICJ jurisdiction over them, however, is the fact that the Kyoto Protocol has its own dispute resolution provisions. Article 19 of the Protocol incorporates by reference *mutatis mutandis* Article 14 of the UNFCCC, which provides first under paragraph 1 that parties can jointly seek settlement of their dispute “though negotiation or any other peaceful means of their own choice.”³⁷ Alternatively, Article 14, Paragraph 2, provides that a complaining party can unilaterally refer a UNFCCC or Protocol dispute to the ICJ or to binding arbitration, providing that each of the parties has entered a prospective declaration accepting the respective forum for the type of dispute in question. If there is no unilateral referral under Paragraph 2, and if the parties are unable to resolve their dispute within twelve months under Paragraph 1, any party to the dispute can submit it to conciliation by a commission established pursuant to the UNFCCC.³⁸

appropriate contributions by each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph. *Id.*

³² See EUROPEAN ENVIRONMENT AGENCY, GREENHOUSE GAS EMISSIONS TRENDS AND PROJECTIONS IN EUROPE (2006), available at http://reports.eea.europa.eu/eea_report_2006_9/en/eea_report_9_2006.pdf.

³³ European Environment Agency, *E.U. Must Take Immediate Action on Kyoto Targets* (2006), available at <http://www.eea.europa.eu/pressroom/newsreleases/ghgtrends2006-en>.

³⁴ Ian Austin, *Canada Announces Goals for Reducing Emissions*, N.Y. TIMES, Apr. 27, 2007, at C7.

³⁵ NZ Greenhouse Gases Keep Rising, N.Z. PRESS ASS'N, May 4, 2007.

³⁶ Complicating a legal action against Austria, Belgium, Denmark, Ireland Italy, Portugal, Spain or any of the fifteen European countries that were members of the European Union at the time the Kyoto Protocol was negotiated is that pursuant to Article 4 of the Protocol those fifteen countries can fulfil their mutual reduction commitments in an aggregate way. The European Environmental Agency maintained that as of late 2008 those countries were on track to meeting their collective commitments. See European Environmental Agency, *EU-15 on Target for Kyoto, Despite Mixed Performances* (2008), available at <http://www.eea.europa.eu/pressroom/newsreleases/eu-15-on-target-for-kyoto-despite-mixed-performances>. Because of Australia's late ratification of the Kyoto Protocol at the end of 2007, it only committed to stabilizing greenhouse gases at 108% of 1990 levels by 2012. Even meeting this modified target, however, will be difficult. See Rosslyn Beeby, *Push for Quicker Green Target*, CANBERRA TIMES, Feb. 15, 2008, at A15. Japan's compliance is also questionable, but that country is making very significant efforts. See Shigeru Sato and Yuji Okada, *Japan Utilities to Buy Carbon Credits: Steel Makers Also Push to Cut Greenhouse Gases in Nation*, INT'L HERALD TRIB., Oct. 12, 2007, at 19. Both Australia and Japan have acceded to the optional clause of the ICJ.

³⁷ United Nations Framework Convention on Climate Change, art. 14.1, May 9, 1992, 1771 U.N.T.S.

³⁸ *Id.* at art. 14.6.

To date, no country has opted into binding jurisdiction before the ICJ under Article 14 and neither arbitration nor conciliation procedures called for by the UNFCCC have been established. The failure of countries to enter UNFCCC Article 14 declarations granting the ICJ jurisdiction over matters specifically under the climate change regime should not preclude the Court from adjudicating climate change claims pursuant to those countries' general acceptance of ICJ Article 36 optional clause jurisdiction. States only need consent to the jurisdiction of the Court once, and disputes over treaty interpretation are among the conflicts that the ICJ is empowered to adjudicate under Article 36.³⁹

There is, however, a problem. All of the nine countries that have accepted the compulsory jurisdiction of the ICJ under Article 36 – except for Denmark, Liechtenstein, and Norway – have entered reservations to their acceptances excepting disputes which the parties agree to settle by *other means of peaceful settlement*.⁴⁰ While the system envisioned in Article 14 would seem to constitute *other means of peaceful settlement*, the fact that no party has opted into Article 14 ICJ jurisdiction, and that neither the procedures for arbitration nor conciliation called for by Article 14 have ever been adopted by the parties, could be interpreted to mean there is, in fact, no final or implementable agreement providing for an *other means of peaceful settlement* under the parties' reservations.⁴¹

In addition, arguably the fact that the parties to a dispute had previously opted into the optional clause of Article 36 makes settlement by the ICJ an "other peaceful means of [the parties'] own choice" under Paragraph 1 of Article 14, and for parties to have opted into ICJ jurisdiction under Paragraph 2 would have been redundant. It would be harder to make this claim if the mechanisms for arbitration were ever to be established and contesting parties were to have declared their acceptance of arbitration. Of course, the relatively short twelve-month time period envisioned in Paragraph 5 for a party to submit the dispute to conciliation if the parties have not been able to "settle their dispute" would not seem to contemplate the more lengthy process of the ICJ.⁴²

³⁹ I.C.J. art. 36(2) (a), Stat. 1031, 1060, T.S. No. 993

⁴⁰ For example, the reservation in Austria's declaration reads as follows: "This Declaration does not apply to any dispute in respect of which the parties thereto have agreed or shall agree to have recourse to other means of peaceful settlement for its final and binding decision." Arguably neither negotiation under Article 14.1 nor conciliation under Article 14.6 would constitute "a final and binding decision." The Canadian formulation, on the other hand, reserves from its acceptance of compulsory jurisdiction, "disputes in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement." For the complete collection of Article 36 declarations accepting the binding jurisdiction of the ICJ, see The International Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.

⁴¹ Supporting such a restrictive reading of a *settlement by other peaceful means* reservation as not divesting the predecessor court to the ICJ of jurisdiction despite a later dispute resolution agreement between the parties, see *Electricity Co. of Sofia and Bulgaria*, Judgment, 1939 PCIJ (ser.A/B) No. 77, at 62. For further discussion of the meaning of *settlement by other peaceful means* reservations, see Bernard Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277 (2001).

⁴² One additional argument a party attempting to use an *other means of peaceful settlement* clause to divest the ICJ of jurisdiction might make is that Article 18 of the Kyoto Protocol constitutes an

My general conclusion is that a persuasive case could be made that the ICJ could assert jurisdiction over disputes under the UNFCCC and the Protocol if they involve countries that have opted into the binding jurisdiction of that Court regardless of whether they have done so subject to an *other means of peaceful settlement* provision. At the end of the day, however, whether the ICJ can assert jurisdiction under the UNFCCC and the Protocol may not be relevant to the larger question of whether it can assert jurisdiction in a climate change case generally. This is because countries attempting to formulate climate change claims so as to achieve maximum impact in an ICJ proceeding would be unlikely to conceptualize them as solely a question of compliance with the UNFCCC and the Kyoto Protocol even if they and their adversaries were party to these agreements.⁴³ As I discuss in Section 3 of this chapter, other norms of international law may also be relevant as well, and to the extent that a climate change action is framed as a broader question of State responsibility for environmental harm under international law, the dispute resolution provisions of specific treaties would most likely not be directly applicable.⁴⁴ After all, the UNFCCC and the Kyoto Protocol do not definitively settle the question of who

other means of peaceful settlement. Article 18 directs the parties to “approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of [the] protocol.” Kyoto Protocol, *supra* note 29, at art. 18. Unlike the dispute resolution provisions of Kyoto Article 19 and UNFCCC Article 14, the parties have taken action to create the compliance mechanisms called for by Article 18. Because Article 18 does not provide for parties to resolve disputes between each other, however, it can more accurately be characterized as a provision dealing with enforcement rather than dispute settlement of the sort envisioned by the declarations.

⁴³ This is likely as 170 states have now ratified the Kyoto Protocol. See Kyoto Protocol Status of Ratification, available at http://unfccc.int/files/kyoto_protocol/background/status_of_ratification/application/pdf/kp_ratification.pdf.

⁴⁴ The issues involving the relationship between the Framework Convention on Climate Change and the Kyoto Protocol and other international legal obligations is a complex one involving the relationship between these specific international agreements and more general principles of international law, including customary international law. See generally Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291 (2006). For a discussion of the implications of the relationship between treaty law and customary international law in the ICJ’s assertion of compulsory jurisdiction in the Nicaragua case, see Monroe Leigh, *Military and Paramilitary Activities in and Against Nicaragua*, 81 AM. J. INT’L L. 206 (1987).

Complicating a comprehensive determination by the ICJ of the extent to which under treaty and customary law a state party to the Kyoto Protocol may be derelict in its obligation to help remedy the global warming problem is that the Kyoto Protocol provides for a variety of financial mechanisms that states can pay into as an alternative to reducing greenhouse gas emissions. Under Article 6 of the Protocol, countries that fail to meet their domestic emissions reduction commitments may contribute financially to the reduction of emissions in other Annex 1 countries, or alternatively, they may buy the right to exceed their own emissions quotas in the form of “emissions reductions units” from other Annex 1 countries who reduce their own emissions by more than their commitments require. Kyoto Protocol, *supra* note 29, at art. 6. Also under the Clean Development Mechanism of Article 12, Annex 1 countries can compensate for exceeding their commitments by funding offsetting projects in developing countries. *Id.* at art. 12. Finally, pursuant to Article 18 of the Protocol, the parties determined that countries that fail to comply with the Kyoto Protocol will be assigned an amount from the second commitment period of a number of tons equal to 1.3 times the amount in tons of excess emissions. *Id.* at art. 18. It is unclear how the ICJ might factor in such a penalty to the overall obligations that a country might have under international law.

should bear the considerable cost of global warming which will persist even if the UNFCCC, and the Kyoto Protocol are fully complied with.

2.1.4. Jurisdiction by Way of Independent Treaty

The ICJ can also take jurisdiction under Article 36 if the parties to the litigation have agreed to an independent treaty with a dispute resolution clause specifying settlement before the ICJ. The difficulty for the purposes of this chapter is to find such a clause in a treaty whose subject matter arguably covers global warming. In my 2003 *Environmental Law Reporter* article, I specifically examined ICJ dispute resolution clauses in independent treaties that might provide for jurisdiction over the United States. Although many countries have entered into treaties with such clauses, the United States makes for the most logical focus of this study as it has rescinded its acceptance of ICJ compulsory jurisdiction.⁴⁵ In addition, it continues to be the world's largest per capita emitter of greenhouse gases, and during the Bush administration it refused to ratify the Kyoto Protocol.

In my research, I found that the United States has entered into many Friendship, Commerce, and Navigation (FCN) or other similar treaties. These are general agreements that provide that parties treat each other's citizens as favorably as they treat their own citizens in commercial transactions. Because I thought these agreements might contain generally worded obligations in the nature of good faith between the parties, I looked into FCN treaties and other similar agreements between the United States and coastal and island States⁴⁶ that provided for dispute resolution before the ICJ. Typical of the most relevant language to be found in these treaties is the passage from the United States' agreement with Greece: "Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party."⁴⁷

Other similarly situated coastal nations with which the United States has such agreements containing roughly the equivalent language and binding dispute resolution before the ICJ are Thailand,⁴⁸ the Netherlands,⁴⁹ Korea,⁵⁰ Denmark,⁵¹

⁴⁵ The United States, in response to the ICJ's determination to assert jurisdiction over it in the Nicaragua case in 1986, withdrew its acceptance of the court's compulsory jurisdiction. *Military and Parliamentary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

⁴⁶ As mentioned in Section 2.1.1, island and coastal States are thought to be particularly vulnerable to the ill effects of global warming because of rising sea levels and severe coastal weather. See *supra* note 17 and accompanying text.

⁴⁷ Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of Greece, Aug. 3, 1951, U.S.-Greece, art. I, 5 U.S.T. 1829, 1835.

⁴⁸ Treaty of Amity and Economic Relations between the United States of America and the Kingdom of Thailand, May 29, 1966, U.S.-Thail., art. XIII, para. 2, 19 U.S.T. 5843, 5859.

⁴⁹ Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of the Netherlands, Mar. 27, 1956, U.S.-Neth., art. XX25, para. 2, 8 U.S.T. 2043, 2083.

⁵⁰ Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Korea, Nov. 28, 1956, U.S.-S. Korea, art. XXIV, para. 2, 8 U.S.T. 2217, 2227.

⁵¹ Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark, Oct. 1, 1951, U.S.-Den., art. XXIV, para. 2, 12 U.S.T. 908, 923.

and Ireland.⁵² Ethiopia, although no longer a coastal State, in its Treaty of Amity and Economic Relations with the United States has particularly promising language: "There shall be constant peace and firm and lasting friendship between the United States of America and Ethiopia,"⁵³ and "The two High Contracting Parties reiterate their intent to further the purposes of the United Nations."⁵⁴ I could find no such treaties containing provisions providing for binding dispute resolution before the ICJ with small island nations.

The previously mentioned treaties attempt generally to prescribe how each party within its own country should treat the other country's nationals and their property. U.S. greenhouse gas emissions arguably harm foreign nationals and their property within their own countries. It is, of course, possible to argue something along the lines that while the parties may not have specifically contemplated such an application of these treaties, to the extent that they are meant to prescribe against harm to foreign interests inside American jurisdiction, then certainly they cannot have meant to allow a fundamentally more egregious extension of harm by the United States extending outside of its own boundaries.

The ICJ has had the opportunity to rule in a different substantive context on a similar attempt to construe a FCN treaty to provide a basis for jurisdiction in the preliminary phase of *The Case Concerning Oil Platforms (Islamic Republic of Iran v. United States)*.⁵⁵ In that case, Iran petitioned the ICJ to accept jurisdiction over a dispute involving the destruction by the U.S. Navy of three Iranian oil complexes during the Iran-Iraq War. The basis for Iran's claim that the Court had jurisdiction was found in the clause allowing for dispute resolution by the ICJ under the United States/Iran FCN treaty, the Treaty of Amity, Economic Relations and Consular Rights.⁵⁶ Iran argued that several general treaty provisions of the sort that I have identified were violated by the United States military action. The Court, in finding that it had jurisdiction, accepted the position that the FCN treaty had extraterritorial application. For example, the Court construed the requirement that a Party accord the other Party's nationals fair and equitable treatment as not applying solely within its territory. The decision is, however, somewhat more qualified in its acceptance of the sort of broad interpretation of language that would be helpful in a global warming case.⁵⁷ For example, it read the requirement of fair and equitable treatment as not including the protection of a party's nationals from military actions by the other party. The Court, on the other hand, decided that military activities which destroy

⁵² Treaty of Friendship, Commerce and Navigation between the United States of America and Ireland, Jan. 21, 1950, U.S.-Ir., art. XXIII, 1 U.S.T. 785, 795.

⁵³ Treaty of Amity and Economic Relations between the United States of America and Ethiopia, Sept. 7, 1951, U.S.-Eth., art. VIII, para. 1, 4 U.S.T. 2134, 2141.

⁵⁴ Treaty of Amity and Economic Relations between the United States of America and Ethiopia, Sept. 7, 1951, U.S.-Eth., art. I, para. 2, 4 U.S.T. 2134, 2136.

⁵⁵ *Concerning Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803.

⁵⁶ Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, 8 U.S.T. 899, 901.

⁵⁷ *Concerning Oil Platforms*, 1996 I.C.J. at 814.

or impede the transportation or storage of exports implicate the treaty's requirement that the parties uphold freedom of commerce between their territories.⁵⁸ This raises the question of whether such general language could be violated to the extent that a country's contribution to global warming can be shown to affect negatively an FCN treaty partner's ability to engage in commerce (say by indirectly damaging its economy or directly flooding a port city).

Similarly, in the *Nicaragua* case against the United States, referred to earlier, the Court also accepted jurisdiction based in part on a binding ICJ dispute resolution provision in an FCN treaty in force between the parties.⁵⁹ In that case, as in the Iran case, military activities arguably more directly impacted upon specific provisions of the treaty than would global warming. Ultimately, then, the jurisdictional question in applying FCN treaties to global warming cases would be whether treaties negotiated in the context of protecting the mutual commercial interests of countries' citizens can be construed to protect them from harm caused by global warming. The *Oil Platforms* and *Nicaragua* cases give reason to believe that such a construction by the ICJ is possible.

2.1.5. Other Procedural and Substantive Issues

In addition to jurisdictional issues, there are other very significant procedural hurdles in contentious (nonadvisory) cases that would have to be overcome before a global warming suit could proceed to the merits of the case. Most significant would be the issue of standing, whether applicants have a sufficiently individualizable interest in litigation as to be able to bring the suit. Alternatively, it could be demonstrated that countries' obligations not to cause serious harm through the emissions of greenhouse gases is an obligation *erga omnes* (i.e., that such obligation is sufficiently important that all States have a legal interest in its enforcement).

Assuming that a tribunal in a global warming lawsuit would accept the scientific consensus that human-created greenhouse gases are a major contributor to global warming, other significant proof problems would remain in bringing such a suit. A connection would need to be drawn between global warming and specific environmental effects.⁶⁰ In addition, both assessing prospective damages from global warming and apportioning the extent to which they are attributable to any specific

⁵⁸ *Concerning Oil Platforms*, 1996 I.C.J. at 819–20.

⁵⁹ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 116, 136.

⁶⁰ As the science of global warming rapidly develops, such connections are becoming easier to establish with reasonable scientific certainty. The highly credible United Nations Intergovernmental Panel on Climate Change, for example, concluded with "very high confidence" in its 4th Assessment Report that there is warming of lakes and rivers in many regions with effects on water quality and that global warming is causing earlier timing of spring events such as leaf-unfolding, bird migration and egg-laying and poleward shifts in ranges on plant and animal species. It additionally concluded with "high confidence" that changes in snow, ice, and frozen ground are increasing ground instability in permafrost regions and rock avalanches in mountain regions and that rising ocean and fresh water temperatures are causing changes in the ice cover, salinity, oxygen levels, and circulation including changes in algal, plankton, and fish abundance in high altitude oceans. See Intergovernmental Panel on Climate

country would be challenging and perhaps could render a case infeasible. The law in this area is not unique to global warming,⁶¹ and it is beyond the scope of this chapter to specifically review it. I only note these considerations here as factors to which careful consideration would have to be given in conceiving a contentious global warming case before the International Court of Justice.

2.2. *Advisory Opinions*

There is another possible avenue that would facilitate an ICJ decision on the legal responsibility of countries to participate meaningfully in the remediation of the global warming problem, but that does not require that the Court have the ability to assert jurisdiction over any specific countries. Pursuant to Article 65 of the ICJ's Statute, the Court is empowered "to give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations [U.N.] to make such a request."⁶² Article 96 of the Charter of the U.N. provides that "[t]he General Assembly or the Security Council may request the [ICJ] to give an advisory opinion on any legal question,"⁶³ and that "[o]ther organs of the [U.N.] and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."⁶⁴

Pursuing an advisory opinion was the path followed by the civil society-led initiative to get the ICJ to rule on the legality of nuclear weapons in the 1990s. In that case, both the General Assembly as well as the World Health Organization (WHO) requested an advisory opinion.⁶⁵ The Court recognized that the General Assembly

Change (IPCC), Working Group II, *Climate Change 2007: IMPACTS, ADAPTATION AND VULNERABILITY, SUMMARY FOR POLICYMAKERS 1–3* (2007), available at <http://www.ipc.ch> (last visited Feb. 27, 2008).

In addition, courts themselves seem increasingly receptive of such conclusions. In determining that the state of Massachusetts claimed sufficient injury for standing to bring suit in *Massachusetts v. EPA*, the U.S. Supreme Court observed that:

The harms associated with climate change are serious and well recognized. Indeed, the [National Research Council Report] itself – which EPA regards as an "objective and independent assessment of the relevant science," identifies a number of environmental changes that have already inflicted significant harms, including "the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years . . ." *Massachusetts v. EPA*, 549 U.S. 497, 521 (Apr. 2, 2007) (citations omitted).

⁶¹ See, e.g., *Summers v. Tice*, 199 P.2d 1 (Cal. 1948) (where two hunters negligently fired their shotguns in the direction of the plaintiff on a hunting trip, the burden of proof is on the defendant to absolve herself of liability); *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (where almost 200 manufacturers produced DES, a toxic compound that caused the plaintiffs' cancer, the court held each defendant liable for the proportion of the judgment represented by its share of the market).

⁶² I.C.J., art. 65, 59 Stat. 1031, 1063, T.S. No. 993.

⁶³ Charter of the United Nations, effective Oct. 24, 1945, art. 96(1), 59 Stat. 1031, 1052, T.S. No. 993.

⁶⁴ *Id.* at art. 96(2).

⁶⁵ The WHO was authorized by the General Assembly to request advisory opinion from the ICJ pursuant to the agreement governing its relationship to the United Nations. See *Agreement Between the United*

could request an advisory judgment in the matter, but it ruled against the WHO.⁶⁶ It explained that the WHO was authorized to “deal with the effects on health of the use of Nuclear Weapons, or of any hazardous activity, and to take preventative measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in.”⁶⁷ The Court concluded, however, that, “[w]hatever those effects might be, the competence of the WHO to deal with them is not dependent on the legality of the acts that caused them.”⁶⁸

The Court is not technically bound by prior decisions,⁶⁹ but as a practical matter, it does tend to follow them, and the global warming case would seem to be very similar. Perhaps it could be distinguished because of the WHO’s need to be involved in ongoing strategies for adapting to global warming as it relates to public health. Given global warming’s likely effect on agriculture, the other potential candidate to request an advisory opinion would be the Food and Agricultural Organization (FAO) in Rome,⁷⁰ but it would likely face the same problem as the WHO.

The Security Council, especially given the ability of any one of its permanent five members to cast a veto, would not be likely to authorize a request for an advisory opinion. The General Assembly would seem to be more promising. Pursuant to Article 18 of the U.N. Charter, “important” questions require a two-third’s majority of the General Assembly.⁷¹ The ICJ, however, agreed to render an opinion in the nuclear weapons case with only a majority (of less than two thirds) voting in favor. Even this lower threshold could, however, be difficult to achieve. Unlike the nuclear weapons case where only a handful of countries actually had nuclear weapons, many countries are significant emitters of greenhouse gases. Depending on how narrowly the question presented to the ICJ could be framed, these countries might well be reluctant to charge the ICJ with coming to a determination that could implicate the legality of their own emissions.

One disadvantage of the advisory approach is that in terms of publicity value (which is helpful for achieving the benefits I refer to in Section 1 of this chapter) identifiable applicants and respondents in contentious cases might better capture the public imagination than would a simple statement of the law in an advisory case. Recommending the advisory approach, however, is its simplicity. It requires no imaginative theories of jurisdiction, and it avoids singling out countries simply

Nations and the World Health Organization, adopted by the First World Health Assembly, 10 Jul. 1948, art. X.

⁶⁶ Legality on the Threat or Use of Nuclear Weapons (United Nations), 1996 I.C.J. 226, 235.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ I.C.J., art. 59, 59 Stat. 1031, 1063, T.S. No. 993.

⁷⁰ The FAO has also been authorized by the General Assembly to request advisory opinions from the ICJ pursuant to the FAO’s agreement governing its relationship to the United Nations. See Agreement between the United Nations and the Food and Agricultural Organization of the United Nations. Feb. 1947, art. IX. Para. 2.

⁷¹ Charter of the United Nations, art. 18, para. 3, provides that “[d]ecisions on other questions . . . shall be made by a majority of the members present and voting.” *Id.*

because they are subject to the jurisdiction of the Court. Ultimately, it has the advantage of articulating a clear legal standard equally applicable to all states.

3. A BRIEF LOOK AT THE LAW THE ICJ WOULD APPLY

With the exception of the UNFCCC and its Kyoto Protocol, the international community has not developed specific treaties to deal explicitly with the normative dimensions of the global warming problem. Asked to decide comprehensively upon the responsibility of States to ameliorate global warming, the Court would also look to other international treaties of a more general nature, customary norms of international law, and general principles of international law.⁷² To help ascertain the content of the relevant principles of customary international law and general principles of law, the ICJ would refer to such secondary materials as general restatements and codifications of the law as well as nonbinding judicial precedents from various tribunals. It would also look to multilateral declarations of States.⁷³ It is beyond the scope of this chapter to review specific conceptions of how these sources and materials interact to create a coherent body of international law or to construct a theory of state responsibility for global warming emissions. What follows, rather, is an overview of the basic building blocks for the construction of such a theory.

3.1. *General Restatements and Codifications of the Law*

Because much of international law is derived from customary international law and general principles of law, the norms as they develop in the messy world of politics and statecraft often lack the clear precision of treaties or domestic statutes. For this reason, those working within the international system rely relatively heavily on various restatements and codifications of the law that attempt to give clarity to areas where international law is amorphous. Of particular relevance to ascertaining the responsibility of States for global warming is the law on State responsibility for transboundary harm and transboundary pollution in general. Arguably global warming, which is caused by gases released mostly within the various countries causing the whole of the planetary climate system to warm, is not exactly the same as pollutants released in one country causing direct transboundary harm in another. The central legal principles that are pertinent to State responsibility for causing environmental harm outside their own borders are relevant, however, to considering the problem of global warming.

Ultimately, the principle behind holding countries liable for transboundary pollution is drawn from one of the most basic precepts of all legal systems that legal actors should be responsible for the harm that they do to others. Several expert bodies,⁷⁴

⁷² I.C.J., art. 38, 59 Stat. 1031, 1063, T.S. No. 993.

⁷³ *Id.*

⁷⁴ The views of these bodies on international law generally tend to be fairly subjective, and the relative weight which a court should accord the opinions of these bodies when they differ is not well defined.

official and unofficial, have proclaimed their own international environmental law variations on this precept.

One relevant pronouncement comes from the American Law Institute (ALI) in its Restatement (Third) of the Foreign Relations Law of the United States. The ALI is composed of eminent lawyers, judges, and law professors in the United States, and its restatements are considered by courts and legal professionals within the United States to be the most authoritative unofficial reporters of the applicable law in areas where clear statutory guidance tends to be lacking. The relevant provisions from Section 601, State Obligations with Respect to Environment of Other States and the Common Environment, are potentially helpful in the context of climate change. They assert that:

- (1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
 - (a) conform to generally accepted international rules and standards for the prevention, reduction and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
 - (b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.⁷⁵

A frequently cited similar, although arguably slightly stronger, statement of the law can be found in Article 3 of the International Law Association's Rules on International Law Applicable to Transfrontier Pollution.⁷⁶ The International Law Association is a private expert body.

The most authoritative international body of expert reporters is the U.N.'s International Law Commission. Established by the General Assembly pursuant to the U.N. Charter, the members of the Commission, international lawyers who serve in their individual capacities, attempt to both codify and "progressively develop" international law. Some of the International Law Commission's works are adopted by the General Assembly as declarations and some eventually become treaties. Over many years, the International Law Commission has been heavily involved in attempting to define the law of State responsibility. Probably most relevant is its work on recently adopted International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (Prevention of Transboundary Damage from Hazardous Activities), which according to its terms applies "to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences."⁷⁷ Its language requires States to "take appropriate measures to prevent significant transboundary harm or at any event to

⁷⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 601(1) (1986).

⁷⁶ Montreal Rules of International Law Applicable to Transfrontier Pollution, art. 3(1), Int'l Law Assn., Rep. 60th Conf., at 1-3 (1982).

⁷⁷ Draft Articles on the Prevention of Transboundary Damage from Hazardous Activities, International Law Commission, 53rd Sess., Supp. No. 10, ch. V.E. 1, art. I, U.N. Doc. A/56/10 (2001).

minimize the risk thereof" and to "cooperate in good faith and, as necessary, seek the assistance of one or more competent international organizations in preventing significant transboundary harm or at any event in minimizing the risk thereof."⁷⁸ Other works by the Commission may also be relevant.

3.2. *Precedent*

The *Trail Smelter* arbitration⁷⁹ decision is generally considered to be the lead case in the area of State liability for transboundary pollution. The dispute resulted from injuries caused in the U.S. state of Washington from sulfur dioxide discharged by a smelter plant in British Columbia, Canada, in the 1930s. Following diplomatic protests by the United States, the two countries agreed to submit the matter to arbitration. In its decision, the arbitrator proclaimed a general principle of international law that would be very helpful to establishing State liability for greenhouse gas emissions. Citing a well-known treatise of the day,⁸⁰ the arbitrator stated that "[a] State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction,"⁸¹ and later in the decision he went on to add that

[n]o state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.⁸²

State actions in more recent and well-known cases would not be as helpful in demonstrating the pervasive present-day acceptance of a principle of State liability for transboundary pollution. Most important is the Chernobyl nuclear accident, where the Ukraine refused to acknowledge liability and, in fact, the international community paid for the costs of decommissioning the reactors.⁸³ Also unhelpful is the *Sandoz Chemical Fire* case, which involved a fire at a Sandoz corporation warehouse in Switzerland. The fire resulted in thousands of cubic meters of chemically contaminated water seeping into the Rhine and constituted one of the worst environmental disasters ever in Western Europe. None of the States affected brought claims against Switzerland.⁸⁴ Finally, in the 1997–1998 *Asian Haze* case, a thick smoky haze caused by fires used to clear forests in the Indonesian provinces of Kalimantan and

⁷⁸ *Id.*

⁷⁹ *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1938, 1965 (Mar. 11, 1941).

⁸⁰ Clyde Eagleton, *RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* (1928).

⁸¹ *Trail Smelter*, *supra* note 79 at 79.

⁸² *Id.* at 90.

⁸³ See Margaret Cocker, *Chernobyl's No. 4 Reactor Remains Crumbling Threat, Mismanagement Snarls the Multibillion-Dollar Cleanup Effort in Ukraine*, ATLANTA J. & CONST., Apr. 23, 2000 (discussing the Ukraine's use of the disaster as leverage to get increased foreign aid); see also A JOINT REPORT OF THE OECD NUCLEAR ENERGY AGENCY AND THE INTERNATIONAL ATOMIC ENERGY AGENCY, *INTERNATIONAL NUCLEAR LAW IN THE POST-CHERNOBYL PERIOD* (2006).

⁸⁴ See *Sandoz to Pay Rhine Pollution Claims, Swiss Chemical Company to Reimburse Claimants*, FIN. TIMES UK, Nov. 14, 1986.

Sumatra spread across Southeast Asia. Despite the costly disruption of air travel and other business activities and significant adverse health and environmental effects, neighboring Southeast Asian countries did not make official diplomatic claims to the effect that Indonesia should be held legally responsible for the costs of the problem.⁸⁵

All of these cases may be distinguished from global warming by their unique facts. The Ukraine, for example, was poor and unable to well afford the cost of decommissioning the reactor on its own.⁸⁶ Sandoz privately provided compensation for individual victims of the disaster.⁸⁷ Finally, Southeast Asian governments, in accordance with ASEAN diplomatic protocol, used diplomacy, rather than formal legal claims, to encourage Indonesia to take action to avoid recurrence.⁸⁸ The international environmental precedent relevant to a global warming case is, therefore, inconclusive.

3.3. *Treaties and Soft Law Declarations*

Treaties are usually considered to be the most authoritative source of international law. The UNFCCC treaty standards prescribing state action related to global warming are likely to be the most generally applicable in a global warming suit because of States' almost universal participation in it, including by the United States. As discussed in Subsection 2.1.3, Article 4.2(a) of the UNFCCC specifically commits developed countries to limit their anthropogenic emissions of greenhouse gases.⁸⁹ Other "principles" of the convention specified in Article 2 are likely to be important as well in interpreting this commitment. For example, Article 3(1) provides:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.⁹⁰

⁸⁵ Instead, beginning in 1997, there has been joint ASEAN efforts at haze prevention pursuant to the Regional Haze Action Plan. In 2003, the ASEAN Agreement on Transboundary Haze Pollution entered in force. See ASEAN Agreement on Transboundary Haze Pollution, June 10, 2002, available at http://www.aseansec.org/pdf/agr_haze.pdf. The treaty provides for the use of zero burning and controlled-burning practices and for the deployment of a Panel of ASEAN Experts on Fire and Haze Assessment and Coordination. The problem, however, continues to persist. See *Indonesia Downbeat on Stopping Fires Causing Haze*, ASIAN ECON. NEWS, Dec. 11, 2006; see also Haze Online, Main Page, <http://www.haze-online.or.id/> (last visited Feb. 27, 2008).

⁸⁶ See sources *supra* note 83.

⁸⁷ See *Sandoz to Pay Rhine Pollution Claims*, *supra* note 84.

⁸⁸ See sources *supra* note 85.

⁸⁹ See *supra* note 31 and accompanying text.

⁹⁰ United Nations Framework Convention on Climate Change, art 3.1, May 9, 1992, 1771 U.N.T.S. Also helpful in supporting a climate change law suit would be Article 3.3, which provides:

The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such

The extensive state adherence to the UNFCCC is the result of the general perception that the articles that I have referenced place no precisely definable legal limitations on states. Given that treaty's obligatory language regarding remediation of the global warming problem, particularly by developed countries, it is quite possible, however, that the ICJ would decide this not to be the case.

Also discussed in Subsection 2.1.3, the Kyoto Protocol places obligations on developed countries to meet specific targets for reducing their contribution to global warming between 2008 and 2012.⁹¹ Because of the different ways in which the Kyoto obligations can be met,⁹² as well as that Protocol's more limited membership, its contribution to the theory of a global warming case is likely to be much more complex. Other treaties also could possibly be relevant to constructing an international global warming suit. Among them is the Straddling Fish Stocks Agreement examined by Wil Burns in this book, as well as the Convention on Long-Range Transboundary Air Pollution⁹³ and certain of its protocols. This latter treaty regime regulates some pollutants which affect global warming, and contains general language possibly helpful in a global warming suit.

The two primary declarations relevant to liability for emissions of greenhouse gases are the Stockholm Declaration and the Rio Declaration. The Stockholm Declaration came out of the 1972 Stockholm Conference on the Human Environment, often considered the progenitor of the modern environmental movement. It was adopted by a vote of 103 to 0 with 12 abstentions. Principle 21 of the Declaration is most apposite. It provides that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.⁹⁴

In 1992, twenty years after Stockholm, the second major global environmental conference, and one of the largest diplomatic gatherings in history, took place in Rio de Janeiro. It was the Earth Summit, officially called the United Nations Conference on the Environment and Development. One of the principal outcomes of this

measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out by interested Parties. *Id.* at art. 3.3.

⁹¹ See *supra* note 29 and accompanying text.

⁹² See *supra* note 45.

⁹³ Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, TIAS No. 10,541, *reprinted in* 18 I.L.M. 1442 (1979).

⁹⁴ Stockholm Declaration on the Human Environment, princ. 21, Report of the United Nations Conference on the Human Environment, Stockholm, June 5–16, 1972, U.N. Doc. A/CONF.48/14/Rev.1, U.N. Sales No. E.73.II.A.14, pt. 1, ch. 1 (1973), *reprinted in* 11 I.L.M. 1416 (1972).

conference was the Rio Declaration which was adopted by consensus. Principle 2 of that declaration is identical to Principle 21 of the Stockholm Declaration, except that the words “and developmental” are inserted between “environmental” and “policies.”⁹⁵ Because the legal authority of declarations, and the relationship of treaties to each other and to other sources of international law, are not well settled within the international system, there are varied conceptual possibilities for how these legal instruments can be tailored into a coherent theory of a global warming case.

4. CONCLUSION

These are hopeful times in the short history of our efforts to remediate the global warming problem. For the first time, the issue seems to have penetrated deeply into the global mass political consciousness. Foundation money is flowing into climate change initiatives. It has become fashionable for celebrities and public personalities to associate themselves with the cause. Former Vice President Gore and the Intergovernmental Panel on Climate Change won the 2007 Noble Peace Prize for their work on global warming. Venture capital and other forms of financing are flowing into researching and developing alternatives to greenhouse gas-emitting technologies. The Obama administration's commitment to climate and energy issues appears to be ushering in a new era of U.S. efforts.

Yet there is reason to be sober in our assessment. Most climate scientists agree that greenhouse gas reduction targets currently being proposed are not sufficient to avert potentially cataclysmic effects. What's more, viewing the present concern from an historical perspective gives another reason for pause. We have seen before a pattern of great environmental awakening only to be followed by mass political denial. Building upon the publication of Rachel Carson's *Silent Spring* in 1962, the modern environmental movement was born of an emerging consciousness that we share one small finite planet. After a sustained period of growing awareness and action, however, environmental matters largely went out of fashion in the 1980s. Then, heralded by *Time* magazine's choice of “endangered earth” as its “Planet of the Year” for 1989, and fueled by the end of the Cold War in the 1990s, concern for the environment again resurfaced in the popular consciousness. But this was once more followed by a decline in interest, especially after the terror attacks of September 11, 2001.⁹⁶

⁹⁵ Rio Declaration on Environment and Development, Aug. 12, 1992, U.N. Doc. A/CONF.151/5/REV.1 (1992), 31 I.L.M. 876.

⁹⁶ For a discussion of changing environmental attitudes in the United States specifically and the methodology of measuring them, see Chapter 3, *Stability: Have Environmental Attitudes Changed over Time?* in DEBORAH LYNN GUBER, *THE GRASSROOTS OF A GREEN REVOLUTION* (2003); see also TOM W. SMITH, *TRENDS IN NATIONAL SPENDING PRIORITIES, 1973–2006*, 23 (2007) (documenting results of U.S. public opinion polls demonstrating that support for environmental spending rose at the immediate end of the cold war and fell after the terror attacks of 2001). For a discussion of attitudes in the United States regarding global warming specifically, see Matthew C. Nisbet & Teresa Myers, *Twenty Years of Public*

Whatever political vagaries influence attempts to counteract global warming, there is likely a constructive role for litigation in general and perhaps for the ICJ in particular. But any such role needs to be seen as complementary to a broader political strategy. For example, the trust necessary for parties to succeed in good faith negotiations over global warming could well be undermined by certain parties initiating legal actions against others. On the other hand, as a spur to recalcitrant parties, litigation could have the benefits described in Section 1 of this chapter.

We are still in the early stages of the global warming phenomenon. There likely will be different generations of lawsuits, probably evolving over time to deal less with the raising of political consciousness and more with the allocation of losses and adaptation costs. Litigation is poised to play a role, and the ICJ with its unique status and visibility could make an important contribution. My hope in this chapter has been to further a discussion of how the door to that forum might be opened.

Opinion About Global Warming, 71 PUB. OPINION Q. 13 (Fall 2007) (reporting on Gallup Poll results showing that between 1989 and 1991 about one-third of respondents worried “a great deal” about global warming with results fluctuating in the 1990s, falling after the 2001 terror attacks and now rebounding).