

# THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE IN ADDRESSING CLIMATE CHANGE: Some Preliminary Reflections

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## INTRODUCTION

Since the emergence of the international climate change regime in the early 1990s, frustration with the slow pace of the negotiations has bubbled over from time to time in proposals to address climate change through international adjudication.<sup>1</sup> I was involved in one such episode two decades ago, as part of a team of international lawyers researching the claims that small island states might bring for climate change damages. A dozen years later, the idea of climate change litigation was revived by the Pacific island state of Palau, which proposed that the United Nations General Assembly request an advisory opinion from the International Court of Justice (I.C.J.) concerning the duties of states to ensure that greenhouse gas emissions from their territory do not harm other states.<sup>2</sup> That initiative didn't go anywhere either, but the idea of international climate litigation continued to percolate. In September 2015, the British barrister and scholar, Philippe Sands, gave a public lecture arguing that international adjudication could play a positive role in addressing climate change, as part of a symposium supported by the British government and Supreme Court, and the United Nations Environment

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1. See generally JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY (2015); ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES (William C.G. Burns & Hari M. Osofsky eds., 2009) [hereinafter ADJUDICATING CLIMATE CHANGE]; CLIMATE CHANGE LIABILITY (Michael Faure & Marjan Peeters eds., 2011); CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE (Richard Lord et al. eds., 2012); Michael G. Faure & André Nollkaemper, *International Liability as an Instrument to Prevent and Compensate for Climate Change*, 43 STAN. J. INT'L L. 123 (2007). For a critique of climate change litigation, see Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925 (2007).

2. *Palau Seeks UN World Court Opinion on Damage Caused by Greenhouse Gases*, UN NEWS CTR. (Sept. 22, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39710>.

Programme, among others.<sup>3</sup> A year later, the idea of seeking an I.C.J. advisory opinion on climate change was renewed by a resolution adopted at the International Union for Conservation of Nature (IUCN) 2016 World Conservation Congress in Hawaii.<sup>4</sup>

Proposals to adjudicate the climate change issue are not surprising, given the growing prominence of international adjudication. Courts and specialized tribunals have proliferated over the last two decades. Although compliance with judicial decisions is uneven,<sup>5</sup> adjudication now plays a major role in fields of international law as diverse as human rights law, investment law, trade law, and law of the sea.<sup>6</sup> International environmental law, although not at the forefront of these developments, has not gone untouched.<sup>7</sup> When I first began teaching the subject almost three decades ago, one could count on one hand, quite literally, the international cases involving environmental issues.<sup>8</sup> Today, the body of case law is much larger, and includes the *MOX*<sup>9</sup> and *Southern Bluefin Tuna* arbitrations,<sup>10</sup> the I.C.J. opinions in the *Gabçikovo Dam*,<sup>11</sup> *Pulp Mills*,<sup>12</sup> and *Japanese Whaling* cases,<sup>13</sup> a number of opinions of

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3. Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. ENVTL. L. 19, 23 (2016).

4. Int'l Union for Conservation of Nature [IUCN], *Request for an Advisory Opinion of the International Court of Justice on the Principles of Sustainable Development in View of the Needs of Future Generations*, WCC-2016-Res-079-EN (Sept. 10, 2016).

5. See generally Alexandra Huneus, *Compliance with Judgments and Decisions*, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 437 (Cesare P. R. Romano et al. eds., 2014) [hereinafter THE OXFORD HANDBOOK].

6. See generally THE OXFORD HANDBOOK, *supra* note 5.

7. See generally TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION (2009).

8. Writing in 1991, Peter Sand observed, "One of the many myths of environmental law is the assumption—found in many textbooks—that international disputes in this field are settled along the lines of the 1941 *Trail Smelter* arbitration. Yet over the last 50 years, there have been only two inter-governmental dispute adjudications [the *Gut Dam* and *Lake Lanoux* arbitrations] that could even remotely be compared to *Trail Smelter*—and even these claims . . . concerned classical questions of water use and flood damage, rather than a genuine environmental problem." Peter Sand, *New Approaches to Transnational Environmental Disputes*, 3 INT'L ENVTL. AFF. 193, 193 (1991).

9. *MOX Plant Case (Ir. v. U.K.)*, 23 R.I.A.A. 59 (Perm. Ct. Arb. 2003).

10. *Southern Bluefin Tuna Case (Austl. v. Japan)*, 23 R.I.A.A. 3 (Arb. Trib. constituted under Part XV, Annex VII of the U.N. Convention for the Law of the Sea 2000).

11. *Gabçikovo-Nagymaros Project (Hung. v. Slov.)*, Judgment, 1997 I.C.J. Rep. 3 (Feb. 5).

12. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14 (Apr. 20).

13. *Whaling in the Antarctic (Austl. v. Japan)*, Judgment, 2014 I.C.J. Rep. 226 (Mar. 31).

the International Tribunal for the Law of the Sea (ITLOS),<sup>14</sup> and, more recently, the South China Sea arbitral decision.<sup>15</sup>

And yet, important though these cases are, most of the action in international environmental law generally—and international climate change law, in particular—still takes place in the negotiating rather than the adjudicatory space, through the development and elaboration of both multilateral treaties and soft law instruments.<sup>16</sup> Climate change has been the subject of nearly continuous negotiations over the last twenty-five years, resulting in the 1992 U.N. Framework Convention on Climate Change (UNFCCC),<sup>17</sup> the 1997 Kyoto Protocol,<sup>18</sup> the 2009 Copenhagen Accord,<sup>19</sup> and in the span of less than a year, from December 2015 to October 2016, three new instruments: the Paris Agreement;<sup>20</sup> the Kigali Amendment to the Montreal Ozone Protocol, limiting the use of HFCs, an extremely potent class of greenhouse gases;<sup>21</sup> and the decision by the International Civil Aviation Organization (ICAO) to adopt a new market-based mechanism to cap emissions from international air travel.<sup>22</sup>

Given the intensity of the climate change negotiations, is there also a role for adjudication? When I first began working on the issue of international climate change adjudication in fall 2016, I was highly skeptical. After years of being bogged down, the international climate negotiations had finally shown significant progress with the early entry into force of the Paris

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14. Alan Boyle, *The Environmental Jurisprudence of the International Tribunal for the Law of the Sea*, 22 INT'L J. MARINE & COASTAL L. 369, 369–72 (2007).

15. In the Matter of the South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award (Perm. Ct. Arb. 2016), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>. For annual summaries of recent cases, see the reports of James Harrison, in the *Journal of Environmental Law*. E.g., 22 J. ENVTL. L. 499 (2010) (covering 2009–2010); 23 J. ENVTL. L. 517 (2011) (covering 2010–2011); 24 J. ENVTL. L. 559 (2012) (covering 2011–2012); 26 J. ENVTL. L. 519 (2014) (covering 2012–2014); 27 J. ENVTL. L. 541 (2015) (covering 2014–2015); 28 J. ENVTL. L. 533 (2016) (covering 2015–2016).

16. See generally DANIEL BODANSKY, JUTTA BRUNNÉE & LAVANYA RAJAMANI, *INTERNATIONAL CLIMATE CHANGE LAW* (2017).

17. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

18. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 148.

19. U.N. Framework Convention on Climate Change, Rep. of the Conference of the Parties at its Fifteenth Session, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010), <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf> [hereinafter Copenhagen Accord].

20. Paris Agreement, Dec. 12, 2015, 55 I.L.M. 743.

21. U.N. Env't Prog., Rep. of the Twenty-Eighth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, at 31, UNEP/OzL.Pro.28/12 (2016). The text of the Kigali Amendment is set out in Annex I. *Id.* at 46.

22. Int'l Civil Aviation Org. [ICAO], Assembly Res. A39-3 (Oct. 6, 2016).

Agreement and the Montreal Protocol and ICAO decisions to address HFCs and aviation emissions, respectively. Given this momentum, international climate litigation seemed to have a greater potential to cause mischief than to do good, by distracting from and even interfering with the negotiations.

To some degree, those concerns remain today, but the situation is cloudier. The future of the U.N. climate regime has been cast into uncertainty by political changes in the United States (and possibly Europe), so the rationale for alternative approaches, such as climate change litigation, is stronger.<sup>23</sup> The Paris Agreement pledges to reduce emissions represent an important down payment, but they do not put the world on a pathway to limit global warming to “well below” 2° C—the goal adopted in Paris.<sup>24</sup> Achieving that goal will depend on the ability of the Paris Agreement to coax states to make successively more ambitious emission pledges over time. The Agreement establishes a process for doing so (through its “cycle of contributions”), but the process is, as yet, untested, and is fraught with potential pitfalls.<sup>25</sup>

In this context, an I.C.J. opinion on climate change could potentially play a positive role, both as a prod to the negotiations and by helping to shape and stabilize normative expectations among the wider set of public and private actors engaged in climate-related work. It would not be a panacea. But it deserves consideration as part of a portfolio of approaches to the climate change problem.

This paper will not exhaustively examine the questions raised by international climate change adjudication. Instead, I will confine my remarks to four points:

- First, adjudication would represent a radical departure from the approach of the U.N. climate change regime. It is premised on a rule of law paradigm, in which norms of general application constrain actors and are applied by impartial, third-party decision-makers. The U.N. climate change regime, in contrast, reflects a “rule of negotiations” paradigm, in which agreements serve not as end points, but as “punctuation marks” in an ongoing process of debate among states.<sup>26</sup>

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23. See Menahem Zen, *President Trump’s Action Gives Uncertainty in the Entire Global Climate Change Action*, SCI. TIMES (June 1, 2017, 12:42 PM), <http://www.sciencetimes.com/articles/16475/20170601/president-trumps-action-gives-uncertainty-entire-global-climate-change.htm>.

24. Paris Agreement, *supra* note 20, art. 2.1(a).

25. See generally Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT’L L. 288 (2016) [hereinafter Bodansky, *A New Hope*].

26. See Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT’L L. 451, 493 (1993) [hereinafter Bodansky, *UNFCCC Commentary*].

- Second, although climate change adjudication, whether national or international, poses many difficult problems, international adjudication raises fewer legitimacy issues than national adjudication.
- Third, climate change adjudication should be viewed as a complement rather than a substitute for negotiation. In the long run, negotiations are likely to be more important than adjudication in addressing climate change. So adjudication should start from the Hippocratic principle, do no harm. To the extent litigation would hinder the negotiating process, it should not be pursued.
- Fourth, international courts could play a more useful role with respect to some issues than others. The question is not whether there is a case for international climate change adjudication, but rather, what issues would be most productive to litigate. This is perhaps obvious. Nevertheless, it is worth emphasizing, since much of the literature on climate change adjudication does not descend to this level of specificity.

#### I. ASSUMPTIONS AND CAVEATS

Let me start with five assumptions on which this article is based.

First, climate change is a serious problem. The most recent report of the Intergovernmental Panel on Climate Change (IPCC) concluded that:

- Evidence of global warming is “unequivocal.”<sup>27</sup>
- “Anthropogenic greenhouse gas emissions . . . are *extremely likely* to have been the dominant cause of the observed warming since the mid-20th century.”<sup>28</sup>
- “[M]any of the observed changes are unprecedented over decades to millennia.”<sup>29</sup>
- “Continued emissions of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive, and irreversible impacts for people and ecosystems.”<sup>30</sup>

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27. Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014: Synthesis Report, Summary for Policymakers*, at 2 (2014), [https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5\\_SYR\\_FINAL\\_SPM.pdf](https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf).

28. *Id.* at 4.

29. *Id.* at 2.

30. *Id.* at 8.

Although some question the gravity of the climate change problem, I will assume for the purposes of this article that the IPCC assessment is correct.

Second, significant decreases in emissions would be cost-effective—that is, their benefits in preventing climate change damages would exceed their costs.<sup>31</sup>

Third, poor, vulnerable, developing countries should receive compensation for the damages they suffer as a result of climate change, since they have contributed little to the problem and have the least capacity to respond.<sup>32</sup>

Fourth, international climate policy should, for these reasons, have three main objectives: (1) to reduce emissions of greenhouse gases, in order to limit temperature change to well below 2° C above pre-industrial levels (the goal adopted in the Paris Agreement<sup>33</sup>); (2) to promote adaptation to climate change, in order to minimize damages; and (3) to compensate the victims of climate change for their losses. An opinion by an international tribunal that helped reduce emissions or provide compensation to poor, vulnerable states would therefore be normatively desirable.

Fifth, international environmental principles, as well as the attitudes of international judges, tend to be broadly sympathetic with these policy objectives, so international adjudication would likely yield “pro-climate” decisions. That is why small island states, which stand to lose the most from climate change, have manifested the greatest interest in international climate litigation.<sup>34</sup>

Finally, an important caveat. Climate change litigation raises many difficult issues, including who has standing to sue, how to determine which damages were caused by climate change, how to allocate responsibility to particular actors, and what the standard of liability should be. There is now a voluminous literature on the potential obstacles to both national and international climate change litigation.<sup>35</sup> My goal is not to rehash these issues,

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31. See NICOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW*, at vii (2007) (recognizing costs of managing climate change are manageable, whereas delay would be “dangerous and much more costly”).

32. STEVE VANDERHEIDEN, *ATMOSPHERIC JUSTICE: A POLITICAL THEORY OF CLIMATE CHANGE* 144 (2008).

33. Paris Agreement, *supra* note 20, art. 2.1(a).

34. See generally Maxine Burkett, *A Justice Paradox: Climate Change, Small Island Developing States, and the Absence of International Legal Remedy*, in *INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH* 435 (Shawkat Alam et al. eds., 2015) (discussing difficulties small island states face when pursuing legal remedies for climate change).

35. A study of U.S. legal scholarship found 727 articles on climate change litigation as of 2012. David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15, 17 n.2 (2012). The number is presumably much higher today.

but rather to examine more generally the role that international courts might play, particularly in relation to the ongoing international negotiations on climate change.

## II. NEGOTIATING VERSUS ADJUDICATING CLIMATE CHANGE

Since climate change first emerged as an international issue in the late 1980s, it has been addressed primarily through intergovernmental negotiations. Negotiation, generally, represents a very different mode of social ordering than adjudication, by allowing the parties involved to control the outcomes, rather than making outcomes dependent on the application of pre-existing rules by a third-party decision-maker. But the contrast between negotiation and adjudication is particularly striking in the case of the U.N. climate change regime, which has sought to shield the decision-making autonomy of states from external constraints to an extraordinary degree, and epitomizes the state-centric, Westphalian approach to international law.

The concern of states in the climate negotiations to protect their sovereignty should not be surprising. Because virtually all human activities contribute to climate change in one way or another, international climate policy has the potential to impinge on virtually every aspect of domestic policy. It thus poses a greater potential threat to national sovereignty than perhaps any other international issue.

The international climate regime preserves states' decision-making autonomy in many ways, both big and small. First, after a flirtation in the Kyoto Protocol with internationally-defined emission targets, the regime has settled in the Paris Agreement on a bottom-up architecture, which allows states to define their emission reduction policies unilaterally, through "nationally determined contributions" (NDCs).<sup>36</sup> As the Kyoto experience showed, few states are willing to accept multilaterally-defined limits on their emissions. Indeed, in the Kyoto Protocol negotiations, developing countries were so concerned about the prospect of international emission targets that they opposed establishing a mechanism that would have allowed them to voluntarily undertake targets, for fear that the existence of such a mechanism would expose them to unwanted pressure.<sup>37</sup>

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36. Daniel Bodansky, *A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime*, 43 ARIZ. ST. L.J. 697, 698–701 (2011); Bodansky, *A New Hope*, *supra* note 25, at 289, 300–02; Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretive Possibilities and Underlying Politics*, 65 INT'L & COMP. L.Q. 493, 502 (2016).

37. See Joanna Depledge, *Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History*, at 102–05, U.N. Doc. FCCC/TP/2000/2 (Nov. 25, 2000).

Second, the regime is only lightly legalized.<sup>38</sup> Although three of the outputs of the negotiations have taken a legal form—the UNFCCC, the Kyoto Protocol and, most recently, the Paris Agreement—many of the key norms, including states’ nationally determined contributions to reduce emissions, the centerpiece of the Paris Agreement, are not legally binding.<sup>39</sup> Other important norms, such as the principle of common but differentiated responsibilities and respective capabilities (CBDRRC),<sup>40</sup> are extremely vague. And states have delegated relatively little decision-making authority to international institutions. Indeed, after more than a quarter century, the parties are still unwilling to adopt a voting rule that would, in effect, transfer some of their individual control to the parties collectively.<sup>41</sup> As a result, meetings of the parties operate by consensus, allowing small groups, if not individual states, to prevent outcomes with which they disagree.<sup>42</sup>

Third, the regime has generally adopted a managerial rather than an enforcement approach to compliance,<sup>43</sup> at least insofar as developing countries are concerned. Indeed, until quite recently, developing countries were unwilling even to use the words, “reporting,” “review,” or “compliance,” in connection with their climate policies, because these terms suggest modes of international enforcement.<sup>44</sup> Instead, the UNFCCC refers to reporting by the less intrusive term, “communication of information,” and proposed the establishment of a “multilateral consultative process” rather than a “compliance procedure.”<sup>45</sup> Even as late as 2009, developing countries

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38. On legalization, see generally Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401 (2000).

39. Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25 REV. EUR. COMMUNITY & INT’L ENVTL. L. 142, 146–47 (2016). Other key norms not formulated as legal obligations include the Paris Agreement’s 2° C temperature limitation objective (art. 2), its long-term goal of net zero emissions (art. 4.1), and the pledge by developed countries to mobilize \$100 billion per year in climate finance, which was contained in the Conference of Parties decision accompanying the Paris Agreement, rather than in the agreement itself. U.N. Framework Convention on Climate Change, Rep. of the Conference of the Parties on its Twenty-First Session, ¶ 53, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 26, 2015), <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf> [hereinafter Paris Agreement Decision].

40. UNFCCC, *supra* note 17, art. 3.1. On CBDRRC, see generally LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW (2006).

41. Antto Vihma, *Climate of Consensus: Managing Decision Making in the U.N. Climate Change Negotiations*, 24 REV. EUR. COMMUNITY & INT’L ENVTL. L. 58, 63–64 (2015).

42. *Id.*

43. On the managerial approach, see ABRAM CHAYES & ANTONIO CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 230 (1995).

44. See Bodansky, *UNFCCC Commentary*, *supra* note 26, at 544.

45. UNFCCC, *supra* note 17, arts. 12–13; see Bodansky, *UNFCCC Commentary*, *supra* note 26, at 544, 547–48.

still rejected the term “review,” so the Copenhagen Accord established a process of “international consultations and analysis” to consider their communications.<sup>46</sup>

Fourth, the principal instance of delegation in the regime (namely, the Kyoto Protocol’s compliance mechanism) did not involve delegation of discretion to elaborate imprecise norms; rather, it authorized the Protocol’s Compliance Committee to apply consequences that the parties had predetermined.<sup>47</sup> Precision and delegation have thus not been used as substitutes, as is common in other international regimes,<sup>48</sup> but rather as complements. To the extent vague norms have become more precise over time, it has been through further negotiations among states, rather than through their interpretation by a third-party decision-maker.

The desire by some states to exercise control extends even to the science of climate change. The IPCC, the main source of authoritative science, was established by states in 1988 in part as a response to reports on climate change coming out of the independent science community.<sup>49</sup> As the “I” in its title indicates, it is intergovernmental in character. While its technical summaries and chapters are the product of scientists, its summaries for policymakers are negotiated by government representatives in the IPCC plenary.

For the purposes of our discussion, two features of the U.N. climate regime are particularly revealing, both of which serve to protect state autonomy against external constraints. First, general principles of international environmental law, such as the duty to prevent transboundary harm, the precautionary principle, and sustainable development, have played at most only a modest role in bounding the negotiations. In part, this is because the principles are so general that they do not provide clear answers to the kinds of specific questions that come up in the climate negotiations. But perhaps more importantly, general principles have played a limited role because the U.N. climate negotiations have the ethos of a self-contained regime. To a significant degree, the regime is a world unto itself, with its own community of practice. This was brought home to me at one of the legal experts meeting convened in 2015 in the run-up to the Paris conference. In contrast to other legal expert meetings pre-Paris, which were limited to those within the

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46. Copenhagen Accord, *supra* note 19, ¶ 5.

47. U.N. Framework Convention on Climate Change, Rep. of the Conference of the Parties on its Seventh Session, at 49, U.N. Doc. FCCC/CP/2001/13/Add.1 (Jan. 1, 2002), <http://unfccc.int/resource/docs/cop7/13a01.pdf>.

48. See BARBARA KOREMENOS, *THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN* 158–99 (2016).

49. Bodansky, *UNFCCC Commentary*, *supra* note 26, at 464–65.

gravitational field of the climate change negotiations—primarily government negotiators, but also a few academic fellow travelers like myself—this meeting included several international lawyers from outside the climate sphere, who, not understanding the insular nature of the regime, repeatedly tried to interject more general principles of international environmental law into the discussions. Although no one expressly dismissed these arguments, my sense was that most saw them as beside the point. What do the I.C.J.’s opinion in the *Pulp Mills* case<sup>50</sup> or the rules on equitable allocation of natural resources have to do with the specific problems faced in the climate change negotiations? That seemed to be the general reaction of the many “frequent COP-ers”<sup>51</sup> at the meeting.

Second, states sometimes do not even feel constrained by their previous agreements. This is unsurprising when disagreements are resolved through vague formulations that allow everyone to maintain their positions.<sup>52</sup> But even when more specific language is adopted, which seemingly resolves an issue, it often serves more as a talking point in an ongoing process of negotiation than as a dispositive outcome. The willingness to reopen issues is shared by all sides. In the Kyoto Protocol negotiations, for example, the United States, European Union, and Association of Small Island States (AOSIS) sought to include a mechanism to allow developing countries to undertake “voluntary commitments” to reduce emissions, even though the mandate for the negotiations had expressly excluded any new commitments for developing countries.<sup>53</sup> In the current negotiations to elaborate the Paris Agreement’s rules, some developing countries have behaved similarly, by seeking to reintroduce the UNFCCC’s annex-based system, which the United States and European Union had worked very hard to exclude from the Paris Agreement itself.

In comparison with the U.N. climate regime, international adjudication would thus represent a paradigm shift. In the negotiations, states have sought

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50. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14 (Apr. 20).

51. COPs are the annual conferences of the parties to the UNFCCC, beginning with COP-1 in Berlin in 1995 and continuing through COP-22 in Marrakesh in 2016. *See Session Archive*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <http://unfccc.int/meetings/items/6237.php?filtbody=53> (last visited July 22, 2017).

52. For an insider’s guide to the various techniques that negotiators use to overcome their differences, see Susan Biniaz, *Comma but Differentiated Responsibilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime*, 6 MICH. J. ENVTL. & ADMIN. L. 37 (2016).

53. U.N. Framework Convention on Climate Change, Rep. of the Conference of the Parties on its First Session, ¶ 2, U.N. Doc. FCCC/CP/1995/7/Add.1 (June 6, 1995), <https://unfccc.int/resource/docs/cop1/07a01.pdf> [hereinafter Berlin Mandate]; *see* Depledge, *supra* note 37, at 102–05.

to ensure that their emission contributions are nationally determined and are not subject to multilateral review. But an international tribunal could engage in external review, assessing the adequacy of mitigation efforts in light of states' obligation to prevent transboundary harm and their obligations to future generations. In the negotiations, norms of general international law play relatively little role. But, in adjudication, they would be front and center. In the negotiations, little is ever settled definitively. A judicial opinion, in contrast, would have an existence independent of the will of the parties and would not be subject to endless renegotiation.

### III. THE GROWTH OF CLIMATE CHANGE ADJUDICATION<sup>54</sup>

The uptick of interest in climate change adjudication can be attributed to several factors. In part, it is a reaction to the slow pace until recently of the international climate negotiations; in part, it reflects the growing focus on international courts and tribunals more generally.

Much of the climate change litigation to date has come at the national level.<sup>55</sup> Cases have been brought in the United States based on the Clean Air Act,<sup>56</sup> public nuisance doctrine<sup>57</sup> and, more recently, the public trust doctrine,<sup>58</sup> in Canada for alleged violations of the UNFCCC and the Kyoto Protocol;<sup>59</sup> in Pakistan based on principles of sustainable development, precaution, and inter-generational equity,<sup>60</sup> in Nigeria on the basis of human rights law;<sup>61</sup> and in Australia and New Zealand,<sup>62</sup> among others, based on

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54. This section draws on material from BODANSKY, BRUNNÉE & RAJAMANI, *supra* note 16.

55. *See generally* UNITED NATIONS ENVIRONMENT PROGRAMME, THE STATUS OF CLIMATE CHANGE LITIGATION: A GLOBAL REVIEW (2017). A compendium of cases related to climate change is maintained by the NGO, Climate Justice. *The Climate Law Database*, CLIMATE JUST. PROGRAMME, <http://www.climatelaw.org/> (last visited July 22, 2017).

56. *E.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007).

57. *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011); Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012).

58. *E.g.*, Juliana v. United States, No. 6:15-cv-1517-TC, 2016 WL 183903 (D. Or. Jan. 14, 2016).

59. *E.g.*, Friends of the Earth v. Canada, [2008] F.C. 1183 (Can. Fed. Ct.).

60. *E.g.*, Leghari v Fed'n of Pakistan, W.P. No. 25501/2015 (Lahore High Ct.) (Sept. 4, 2015) (Pak.).

61. *E.g.*, Gbemre v. Shell Petroleum Dev. Co. Nigeria [2005] AFR. HUM. RTS. L. REP. 151 (F.H.C. Nigeria).

62. *E.g.*, Greenpeace New Zealand v. Northland Reg'l Council [2006] NZHC CIV 2006-404-004617 at [57] per Williams J. (N.Z.); Genesis Power Ltd. v. Franklin Dist. Council [2005] NZRMA 541 (N.Z.).

domestic environmental legislation.<sup>63</sup> Until recently, much of this litigation was unsuccessful. But the adjudicatory approach to climate change has scored several significant successes in the past several years, including in the *Urgenda* case in the Netherlands, where a Dutch regional court found that the government's 20% reduction target breached its duty of care to prevent dangerous climate change, and ordered the government to adopt at least a 25% reduction target by 2020 from 1990 levels.<sup>64</sup>

Internationally, fewer climate change cases have been brought thus far, and these have not been successful. In 2005, an Inuit group filed a petition in the Inter-American Commission on Human Rights, arguing that U.S. failure to reduce its emissions violated the Inuits' human rights to culture, life, health and shelter.<sup>65</sup> In addition, several non-governmental organizations filed petitions under the World Heritage Convention, arguing that climate change is a threat to World Heritage sites like the Great Barrier Reef.<sup>66</sup> Climate change cases could also potentially be brought in a number of other forums, including:

- The International Tribunal for the Law of the Sea, for damage to the marine environment, in breach of the 1982 Law of the Sea Convention or the 1995 Fish Stocks Agreement.<sup>67</sup>
- The World Trade Organization, with respect to national climate policies that implicate trade law.
- The International Centre for the Settlement of Investment Disputes (ICSID), for investment claims related to climate change.

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63. See generally CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE, *supra* note 1.

64. RB-Den Haag [Hague Dist. Ct.] 24 juni 2015, ECLI:NL:RBDHA:2015:7196 (Stichting Urgenda/Nederlanden) [Urgenda Found. v. Netherlands] (Neth.).

65. Sheila Watt-Cloutier, Inuit Circumpolar Conference, 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 (Dec. 7, 2005), <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionicc.pdf>.

66. World Heritage Comm., *Issues Relating to the State of Conservation of World Heritage Properties: The Impacts of Climate Change on World Heritage Properties*, at 7, Doc. WHC-06/30.COM/19, Dec. 30 COM 7.1 (Aug. 23, 2006); World Heritage Comm., *General Issues: Threats to World Heritage Properties*, at 36, Doc. WHC-05/29.COM/ 22, Dec. 29 COM 7B.a (Sept. 9, 2005).

67. See William C.G. Burns, *Potential Causes of Action for Climate Change Impacts Under the United Nations Fish Stocks Agreement*, in ADJUDICATING CLIMATE CHANGE, *supra* note 1, at 314, 314–15.

- The Permanent Court of Arbitration, which considered a case in 2012 concerning the transference of emission reduction units, brought by an investor in a joint implementation project.<sup>68</sup>

In this article, I focus on the role of the I.C.J., both because the I.C.J. has the most general subject matter jurisdiction of any international tribunal and hence could address climate change in a more comprehensive manner than other forums, and because it occupies a special place—in essence, that of first among equals—due to its role as the “principal judicial organ of the United Nations.”<sup>69</sup> But my discussion of the potential role of the I.C.J. is not meant to suggest that other international tribunals might not play important roles in addressing climate change.

#### IV. COMPARING THE NORMATIVE LEGITIMACY OF ADJUDICATION VERSUS NEGOTIATION

In considering the potential role of international courts in addressing climate change, many of the arguments against domestic climate litigation do not apply—or apply with less force—to international climate litigation, because the relevant comparator is negotiation, rather than legislation or administrative regulation.

Domestically, legislation is generally seen as the preferred means of addressing issues like climate change, which involve complex tradeoffs between economic, environmental, and other values. It has two prime virtues. First, legislation has democratic legitimacy, at least in countries with a well-functioning democratic system. Second, it can address problems comprehensively. By contrast, courts suffer from a democratic deficit<sup>70</sup> and due to their piecemeal, case-by-case decision-making, have trouble addressing complex, polycentric problems like climate change.<sup>71</sup> For these reasons, they play a primarily residual role domestically, as a remedy for

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68. Roda Verheyen & Cathrin Zengerling, *International Dispute Settlement*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 417, 423 (Cinnamon P. Carlarne et al. eds., 2016).

69. U.N. Charter art. 92.

70. Lucas Bergkamp & Jaap C. Hanekamp, *Climate Change Litigation Against States: The Perils of Court-Made Climate Policies*, 24 EUR. ENERGY & ENVTL. L. REV. 102, 103 (2015) (criticizing decision by Dutch court to impose national limits on greenhouse gas emissions as contrary to a “court’s role in a constitutional democracy”).

71. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

legislative failures—for example, due to public choice problems<sup>72</sup>—and even then, judicial action may be justified more as a “prod or plea” to the legislature than as an independent means of policymaking.<sup>73</sup> In the United States, common law adjudication of public nuisances was necessary a century ago, before federal legislative power had expanded to encompass environmental harms.<sup>74</sup> But now it has been largely displaced by federal environmental statutes.<sup>75</sup>

Administrative agencies, too, are usually seen as superior to courts in dealing with complex, technical, widely dispersed and diffuse problems such as climate change.<sup>76</sup> Administrative agencies have greater technical expertise than courts. Moreover, like legislatures, they can address issues in a comprehensive, calibrated manner.<sup>77</sup>

If democratic institutions could be created globally—if cosmopolitan democracy became a reality<sup>78</sup>—then legislation might also be the preferred mode of governance for international climate change policy.<sup>79</sup> But an international legislature that could address climate change does not exist (and likely never will). Instead, the alternative to litigation is intergovernmental negotiation, making it the relevant comparison.

Unlike legislation, negotiation is not obviously superior to litigation in terms of democratic legitimacy. Democratic theory says that the people of a community should be entitled to govern themselves. They should be allowed to decide how they wish to trade off different values, such as environmental protection and economic growth. If President Trump and Congress, for example, choose to promote the coal industry at the expense of water quality, by repealing a rule limiting disposal of coal wastes into rivers, that is their choice to make, as our elected representatives. But democratic theory does

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72. Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 879–80 (1991); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

73. See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 350, 352–59 (2011).

74. See, e.g., *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

75. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011).

76. See generally Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984).

77. Posner, *supra* note 1, at 1936.

78. See COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER 1–15 (Daniele Archibugi & David Held eds., 1995).

79. Apart from the utopian character of proposals for cosmopolitan democracy, the normative legitimacy of cosmopolitan democracy is also debatable, as the criticisms of the European Union’s legitimacy suggest. See generally Thorsten Hüller, *On Infeasibilities of Cosmopolitan Democracy—Lessons from the European Union*, 18 SWISS POL. SCI. REV. 249 (2012).

not say that they are entitled to make decisions that affect people in other countries, who are not represented in the U.S. electoral process and hence have no voice.<sup>80</sup> In addressing problems of global externalities, such as climate change, the deference that negotiations afford to state sovereignty thus does not have a democratic justification.

Second, negotiations are also not superior to adjudication in terms of efficiency. Of course, in the absence of transaction costs and negotiating barriers, the Coase Theorem predicts that negotiations should produce efficient outcomes, through exchanges between the emitting and victim states.<sup>81</sup> But given the undeniably high transaction costs of multilateral climate negotiations, and the difficulties of getting everyone to contribute, climate negotiations cannot be expected to produce an efficient outcome, nor do they in practice. The Paris Agreement pledges will not reduce emissions by as much as most economic analyses suggest would be efficient.<sup>82</sup> So a judicially administered liability rule, if complied with, could at least in theory produce a superior outcome.<sup>83</sup>

Third, there is no reason to expect the U.N. climate negotiations to be able to address issues of climate justice. States have an interest, in principle, to agree to reduce emissions in exchange for emission reductions by others, but emitters do not have an interest in providing compensation to victim states. Negotiations aim to find exchanges that make all parties better off, not to redistribute goods from some parties to others. So, if the initial assignment of property rights is unjust, negotiations will not solve this problem. In the climate context, emitters can *de facto* impose costs on vulnerable states, which are generally poor and have contributed little to the problem. This issue of climate (in)justice has received comparatively little attention in the climate negotiations—vulnerable states were not even able to establish a mechanism to consider the issue of “loss and damage” until 2013, more than two decades after the Framework Convention was adopted. In contrast, adjudication could readily address issues of climate justice through claims for climate change damages by victim states.

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80. DAVID HELD, *MODELS OF DEMOCRACY* 337–38 (2d ed. 1996); VANDERHEIDEN, *supra* note 32, at 89–90.

81. Fred S. McChesney, *Coase, Demsetz, and the Unending Externality Debate*, 26 *CATO J.* 179, 181–82 (2006); Tim Haab, *What Is the Coase Theorem, Really?*, *ENVTL. ECON.* (Jan. 23, 2006, 9:22 AM), [http://www.env-econ.net/2006/01/what\\_is\\_the\\_coa.html](http://www.env-econ.net/2006/01/what_is_the_coa.html).

82. See Paris Agreement Decision, *supra* note 39, ¶ 53.

83. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1106–10 (1972) (comparing property rules, which address externalities through negotiations, with liability rules).

Finally, in the absence of a global legislature, international climate adjudication would not raise separation of powers issues. Unlike peace and security issues, for which the U.N. Charter assigns the Security Council primary responsibility,<sup>84</sup> the Charter is silent about environmental issues. The General Assembly resolution that initiated the climate negotiations does not exclude other means of addressing it. Nor does general international law require exhaustion of negotiations as a precondition to litigation.<sup>85</sup> Instead, the UNFCCC itself explicitly contemplates adjudication as a method of dispute settlement,<sup>86</sup> albeit dependent on state consent. Climate change litigation would thus not be subject to the objection raised (unsuccessfully) to the I.C.J.'s consideration of the legality of Israel's separation barrier with the West Bank,<sup>87</sup> namely, that an I.C.J. advisory opinion would infringe on another institution's decision-making authority.

To be sure, international climate change litigation, like domestic litigation, faces formidable challenges, including the difficulties of establishing causation and of allocating liability to particular actors.<sup>88</sup> And the fact that international adjudication would not raise democratic legitimacy issues and could produce efficient and just outcomes does not mean that it would be likely to do so. Many other factors are also relevant in assessing whether an international tribunal would be an appropriate decision-maker. My point is only that, compared to domestic litigation, international litigation has a stronger normative justification. If we assess legitimacy on a comparative rather than an absolute basis, as I think we should—that is, if we ask, legitimate as compared to what?—then international climate litigation has a stronger claim to legitimacy than domestic climate litigation. In important respects, the situation internationally is like the situation in the United States in the early twentieth century, before federal environmental legislation was

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84. U.N. Charter art. 24, ¶ 1.

85. *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment on Preliminary Objections, 1998 I.C.J. Rep. 275, 302–03, ¶ 56 (June 11) (“Neither in the Charter nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court.”). See generally JUAN JOSÉ QUINTANA, *LITIGATION AT THE INTERNATIONAL COURT OF JUSTICE: PRACTICE AND PROCEDURE* 65–69 (2015).

86. UNFCCC, *supra* note 17, art. 14.

87. See *Legal Consequences of the Construction of a Wall in the Occupied Territories*, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9).

88. For discussions of domestic climate change litigation, see, e.g., David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 22–33 (2003); Posner, *supra* note 1, at 1929, 1933.

possible under the Commerce Clause, when litigation between states was needed to address transboundary pollution problems.<sup>89</sup>

## V. ADJUDICATION AS A COMPLEMENT TO NEGOTIATION

Despite these normative arguments in favor of litigation, litigation is likely to play, in practice, only a supporting role in addressing climate change. With relatively few exceptions, such as the European Court of Human Rights and the World Trade Organization's dispute resolution body, international tribunals command relatively little authority. States can ignore adverse decisions with few immediate consequences.<sup>90</sup> The record of compliance with international adjudication by big powers, in particular, has been poor, as evidenced by non-compliance by the United States with the I.C.J. opinions in *Nicaragua* and *Avena*,<sup>91</sup> by China in the South China Sea arbitration,<sup>92</sup> and by Russia in the *Arctic Sunrise* prompt release case under the Law of the Sea Convention.<sup>93</sup> So it is doubtful that a decision by an international tribunal would have much effect directly on U.S. or Chinese emissions.

By contrast, negotiations, despite their normative limitations, are likely to be more effective, as a practical matter, in influencing state behavior and bending the emissions curve.

There are several reasons why negotiations are likely to have a bigger impact on emissions than adjudication:

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89. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1152–54 (1995).

90. See Colter Paulson, *Compliance with the Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 457 (2004) (stating that between 1989 and 2004, unwilling defendants complied with adverse judgment in only one of five cases). *But see* Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815, 852 (2007) (stating that post-*Nicaragua*, the I.C.J. has “seen better compliance with its final judgments . . . regardless of the manner in which jurisdiction was acquired”). Empirical studies differ in their conclusions about the rate of compliance by states with I.C.J. decisions, perhaps in part, because defining what constitutes “compliance” is not always clear. See Huneeus, *supra* note 5, at 438–39.

91. Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)*, Judgment, 2004 I.C.J. Rep. 12 (Mar. 31); *Military and Paramilitary in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14 (June 27).

92. In the Matter of the South China Sea Arbitration (*Phil. v. China*), PCA Case No. 2013-19, Award (Perm. Ct. Arb. 2016), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>.

93. *Arctic Sunrise (Neth. v. Russ.)*, Case No. 22, Order of Nov. 22, 2013, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.22/published/C22\\_Order\\_221113.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/published/C22_Order_221113.pdf).

- States are likely to feel a stronger commitment to implement norms to which they have agreed, and over which they have ownership, than those imposed on them from the outside, as it were. If states negotiate in good faith, they should not agree to norms that they cannot live with or do not believe they can implement.
- The reputational costs of breaking a negotiated agreement may be higher than the costs of non-compliance with a judicial decision—for example, by making it more difficult for a state to negotiate agreements in the future—although this argument would need empirical study.
- In any event, a negotiated outcome can include specialized oversight mechanisms, such as reporting and review, which raise the reputational costs to a party of non- or under-performance.
- Finally, if negotiations are based on reciprocity, states are more likely to reciprocate or retaliate in response to under-performance by another party of their mutual agreement, than to non-compliance with a judicial decision.<sup>94</sup>

These factors suggest that a negotiated outcome on climate change will likely be more effective than adjudication, and therefore deserves priority. But they do not mean that an international judicial decision on climate change would have no value. Even if an I.C.J. decision did not directly change the emissions of countries like the United States, China, or India, it could have a range of diffuse effects, both within and beyond the negotiations.

- First, an international judicial opinion could influence the ongoing U.N. climate negotiations, by “setting the terms of the debate, providing evaluative standards . . . and establishing a framework of principles within which negotiations may take place to develop more specific norms.”<sup>95</sup> Judicial decisions serve to “redistribute argumentative burdens,”<sup>96</sup> not only in future litigation, as precedents, but also in international diplomacy. Section VI below will explore how an I.C.J. opinion might contribute to the negotiations in this way.

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94. Cf. ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 9, 63–66 (2007).

95. Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 *IND. J. GLOBAL LEGAL STUD.* 105, 119 (1995) (describing effects of “declarative international law”).

96. Armin von Bogdandy & Ingo Venzke, *The Spell of Precedents: Lawmaking by International Courts and Tribunals*, in *THE OXFORD HANDBOOK*, *supra* note 5, at 503, 507.

- Second, elaboration by an international tribunal of the relevant international norms relating to climate change could influence domestic litigation. Andre Nollkaemper notes that national courts refer to I.C.J. judgments “to support conclusions drawn on the basis of legislation, or to fill gaps in national law.”<sup>97</sup> Similarly, national courts could draw on an international opinion on the customary duties of states with respect to climate change in deciding a case for climate change damages.
- Third, an I.C.J. opinion could shape expectations about possible future litigation internationally.<sup>98</sup> It could clarify, for example, who has standing to bring a case, what showing of causation is required, and how responsibility should be allocated—all issues about which existing international law is unclear. By casting a shadow on the future, a judicial opinion might have indirect long-term effects on behavior.
- Finally, an I.C.J. opinion could serve an expressive function and thereby help change social norms and values.<sup>99</sup> As Philippe Sands notes in his essay on international climate litigation, “international courts and tribunals are one amongst many actors that occupy the large space in which global public consciousness is formed.”<sup>100</sup> They can “give meaning to, or endorse public values.”<sup>101</sup> The twists and turns of national and international climate policy make action at other levels of governance by both public and private actors all the more important, and suggest that the significance of an I.C.J. opinion might depend as much on its ability to shape public consciousness and define normative expectations for a broad variety of actors as on its direct influence on states.

These effects of judicial decisions are, of course, uncertain. They are difficult to measure and test, and tend to become significant, if at all, in the long-term. So international adjudication should not be viewed as a substitute for the U.N. climate negotiations, or come at their expense. It should not be pursued, for example, if it diverted attention away from the negotiations, or exacerbated tensions among countries, making negotiations more difficult, or

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97. André Nollkaemper, *Conversations Among Courts: Domestic and International Adjudicators*, in THE OXFORD HANDBOOK, *supra* note 5, at 523, 538.

98. José E. Alvarez, *What Are International Judges For? The Main Functions of International Adjudication*, in THE OXFORD HANDBOOK, *supra* note 5, at 158, 176.

99. See generally Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

100. Sands, *supra* note 3, at 26.

101. Alvarez, *supra* note 98, at 170.

made countries reluctant to agree to anything, for fear that an agreed provision might be used in litigation. Adjudication should follow the Hippocratic principle, do no harm. It should be undertaken in a manner that complements rather than competes with the negotiations.

## VI. IMPLICATION FOR HOW ADJUDICATION SHOULD BE PURSUED

Viewing adjudication as a complement rather than as a substitute for the negotiations has implications both for the types of issues to litigate and whether to bring a contentious case or to seek an advisory opinion.

### *A. Issues to Address*

Given the highly-politicized nature of the climate change issue and the limited authority of international tribunals, their capital would best be spent on issues not addressed directly in the negotiations—issues that are more abstract in nature and hence don't have immediate implications for particular states. For this reason, international tribunals such as the I.C.J. should avoid “hot-button” issues in the negotiations—for example, the meaning of the principle of common but differentiated responsibilities and respective capabilities. Highly political and contentious questions such as this have long divided the parties. Apart from the doctrinal problem of finding a legal basis for an opinion, an I.C.J. decision would have little upside potential but considerable dangers. It would almost certainly not sway any of the parties, given their entrenched positions. But it would inject the Court into extremely political debates, likely damaging the Court's reputation and exacerbating tensions among states in the negotiations. From a prudential standpoint, the I.C.J. would be wise to husband its limited authority and use it on issues where it might make a positive difference.

Litigation involving factual issues would be more neutral—neither here nor there, useful nor harmful. Philippe Sands argues that “probably the single most important thing [an international court] could do—is to settle the scientific dispute” about climate change.<sup>102</sup> But if the IPCC's multi-year, international assessments by hundreds of top climate scientists have been unable to settle the scientific disputes over climate change, it is hard to see how fifteen non-scientist judges could do so. On legal issues, I.C.J. opinions have authority both because of the judges' legal expertise and because of the Court's institutional place within the international legal system, as the

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102. Sands, *supra* note 3, at 29.

“principal judicial organ of the United Nations.”<sup>103</sup> But the I.C.J. has no expertise or institutional authority relating to climate science. Its scientific opinions are not deserving of any deference, nor are they likely to receive any.

In contrast, a judicial opinion about the obligations of states to ensure that their greenhouse gas emissions do not cause serious damage to other states<sup>104</sup> could potentially assist the negotiating process. The I.C.J. has already declared that the duty to prevent significant transboundary harm is part of general international law.<sup>105</sup> The International Law Commission’s commentary to its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities defines the standard as one of due diligence, which it explains as “that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance.”<sup>106</sup> But this standard is still very vague. The elaboration of more specific criteria of due diligence by an international tribunal could be helpful in encouraging countries to put forward more ambitious NDCs in the future.

The Paris Agreement establishes a five-year “cycle of contributions,” involving multilateral consideration of each party’s progress in implementing its NDC, a “global stocktake” of collective progress towards meeting the Agreement’s goals, and updated NDCs by each party.<sup>107</sup> This process is intended to exert soft peer pressure on parties to put forward progressively more ambitious NDCs over time. The elaboration of due diligence criteria by the I.C.J. would arguably work with, rather than against, the grain of this process by establishing a common language for discussing NDCs—for example, through metrics such as marginal and total abatement costs, emission reductions relative to business-as-usual, emissions per unit GDP, and emissions per capita.<sup>108</sup> The goal would not be to make judgments about individual states, but rather to provide a common basis for evaluation. Although most of the possible metrics for assessing NDCs are already

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103. U.N. Charter art. 92.

104. YALE CTR. FOR ENVTL. LAW & POLICY, CLIMATE CHANGE AND THE INTERNATIONAL COURT OF JUSTICE: THE ROLE OF LAW 2 (2012), [http://environment.yale.edu/envirocenter/files/ICJ\\_Brochure\\_Revised\\_11\\_22\\_12\\_smaller\(1\).pdf](http://environment.yale.edu/envirocenter/files/ICJ_Brochure_Revised_11_22_12_smaller(1).pdf) (suggesting the question, “What are the obligations . . . under international law of a State for ensuring that activities under its jurisdiction or control that emit greenhouse gases do not cause, or substantially contribute to, [serious] damage to another State or States?”).

105. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 242, ¶ 29 (July 8).

106. Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, at 394, U.N. Doc. A/56/10 (2001), <http://www.un.org/documents/ga/docs/56/a5610.pdf>.

107. Paris Agreement, *supra* note 20, arts. 4.9, 13.11, 14.

108. PEW CTR. ON GLOB. CLIMATE CHANGE, COMMON METRICS: COMPARING COUNTRIES’ CLIMATE PLEDGES 1–7 (2011), <https://www.e2es.org/docUploads/country-pledge-brief.pdf>.

familiar to participants in the climate negotiations, a judicial opinion identifying particular criteria would tend to serve as a focal point and give the chosen criteria greater status. It would be harder for the parties to ignore than the existing case law of the I.C.J. on international environmental issues, since it would focus specifically on climate change and clearly be relevant. For this reason, it would also likely be controversial. Some states might welcome the guidance it provides; others might argue that it undermines the nationally determined nature of states' contributions and is contrary to the spirit of the Paris Agreement. The I.C.J. would therefore be well-advised to formulate any opinion in a manner that clearly leaves states in control both to determine the content of their own NDCs and to evaluate the NDCs of others.

International adjudication on whether states are entitled to compensation for climate change damages might also be helpful, but in a very different way, by considering an issue that has been sidestepped in the negotiations, rather than directly addressed. From the outset of the climate negotiations in 1991, small island states have sought to establish a compensation regime for climate change damages.<sup>109</sup> More than twenty years later, at the Warsaw Conference in 2013, they succeeded in establishing an international mechanism to address loss and damage,<sup>110</sup> which has now been incorporated into the Paris Agreement.<sup>111</sup> But the price of including an article on loss and damage in the Paris Agreement was language in the accompanying conference decision stating that the article “does not involve or provide a basis for any liability or compensation.”<sup>112</sup> As a result, whether the big greenhouse gas emitters could potentially face liability for damage to vulnerable states remains an open question, not currently addressed in the negotiations.<sup>113</sup>

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109. Bodansky, *UNFCCC Commentary*, *supra* note 26, at 528.

110. U.N. Framework Convention on Climate Change, Rep. of the Conference of the Parties on its Nineteenth Session, at 6, U.N. Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014), <http://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf>.

111. *See* Paris Agreement, *supra* note 20, art. 8.

112. Paris Agreement Decision, *supra* note 39, ¶ 51.

113. When ratifying the Paris Agreement, a number of Pacific island states—including the Cook Islands, the Marshall Islands, Micronesia, Nauru, Niue, the Solomon Islands, Tuvalu, and Vanuatu—made declarations stating that their acceptance of the Paris Agreement “shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change and that no provision in the Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to the impacts of climate change.” *See Status of U.N. Treaties Ch. XXVII. Environment 7.d Paris Agreement*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en) (last visited July 24, 2017).

An I.C.J. decision on the issue of compensation could help influence national litigation in the nearer term and change expectations regarding the potential for future international litigation in the longer term. But it would not be without risks. For example, the provision of financial resources to developing countries under the UNFCCC has been possible for the past twenty-five years because the Convention is silent on whether financial transfers represent compensation or assistance. If the I.C.J. were to decide that international law requires compensation, maintaining this studied silence might become more difficult. Here, as elsewhere, there can be costs as well as benefits to legal clarity.

### *B. Contentious Case or Advisory Opinion?*

Although it is sometimes assumed that an I.C.J. decision on climate change would need to take the form of an advisory opinion, a contentious case would also be possible, given the acceptance of the I.C.J.'s jurisdiction under the Optional Clause by a number of big emitters, including Australia, Canada, Germany, India, Japan, Mexico, Poland, and the United Kingdom,<sup>114</sup> which together account for more than 17% of global greenhouse gas emissions.<sup>115</sup> Nevertheless, an advisory opinion would be preferable for several reasons.

- An advisory opinion would have a more general effect, since judgments in contentious cases bind only the parties to the dispute.
- All states could have their voices heard, in contrast to contentious cases, which are limited to the parties to the dispute and states permitted to intervene.
- An advisory opinion could address issues at a relatively high level of generality, leaving the specifics to be worked out through negotiations.
- An advisory opinion on the general rules of international law relating to climate change would not require the Court to make specific determinations of standing or causation, and would avoid the problem of leakage.

Perhaps, in the future, contentious cases concerning climate change might become appropriate. But, at present, they would provide little value-added. On the one hand, defendants would likely not comply, so contentious

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114. *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. JUST., <http://www.icj-cij.org/en/declarations> (last visited July 23, 2017).

115. U.N. Framework Convention on Climate Change, Rep. of the Conference of the Parties on its Twenty-First Session, at 30–34, U.N. Doc. FCCC/CP/2015/10, annex I (Jan. 29, 2016), <http://unfccc.int/resource/docs/2015/cop21/eng/10.pdf#page=30>.

proceedings would not successfully resolve disputes between countries through legally binding judgments—their chief advantage over advisory opinions. On the other hand, contentious proceedings would likely be, in a word, contentious, with possibly negative spillover effects for the negotiations. In contrast, an advisory opinion would allow the I.C.J. to perform its most important role relating to climate change, namely to clarify and elaborate the relevant norms of general international law.

Since the utility of an I.C.J. advisory opinion would depend, in part, on the issues it was asked to address, the request for an advisory opinion should be pursued by an international organization likely to formulate questions about which the I.C.J. could make a useful contribution. In this regard, the World Meteorological Organization might be a better choice than the U.N. General Assembly, since it is a more technical, less politicized forum, in which it might be easier to resist efforts to encumber the request with unhelpful baggage. Alternatively, to keep control of the issues presented to the I.C.J., two similarly-inclined states might agree to have the I.C.J. hear a “contentious” case between themselves.<sup>116</sup>

## VII. CONCLUSION

Climate change is the mother of all policy challenges. It has been called a “super wicked” problem<sup>117</sup> for good reason. It requires people to take potentially costly actions now to address a long-term and uncertain threat. It requires collective action by states with very different circumstances, interests, and priorities. And it is enmeshed in domestic politics, with all their twists and turns. Given the magnitude of the challenge, and the uncertainties about what will work, we need to be exploring all of the possible approaches that could contribute to a solution, including adjudication.

That said, the Paris process is still moving ahead, and it is premature to write its epitaph. It remains our best hope for an international solution to the climate change problem. To the extent international adjudication is pursued, it should seek to complement rather than substitute for the UN climate negotiations. It deserves a place in the governance toolbox, but one that appreciates its limits.

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116. I am grateful to Jay Butler for this suggestion.

117. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1160 (2009).