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## NEWS & ANALYSIS

# ARTICLES

## The Legal Option: Suing the United States in International Forums for Global Warming Emissions

by Andrew L. Strauss

The George W. Bush Administration's refusal to deal seriously with the problem of global warming, perhaps the greatest environmental problem of our time, requires that the international community think seriously about alternative ways of inducing or even compelling the United States to meet its global responsibilities. One strategy being considered is litigation. There are a variety of forms that global warming litigation could take. Plaintiffs harmed by global warming could bring actions in U.S. federal courts against the American government.<sup>1</sup> Alternatively, such plaintiffs could sue key American corporations whose conduct has a disproportionate impact on global warming inside U.S. or foreign courts.<sup>2</sup> Finally, the United States itself could be called to task before an international tribunal. Last year, I explored the third possibility for the London-based New Economic Foundation. I took on the project because of my concern about global warming, but also because of my commitment, as an international law professor, to the international system. One positive aspect of globalization is that it offers the possibility that law can play an increasing role in international relations. Because of capital's desire to operate in a safe and predictable environment, transnational business interests have successfully promoted legally based regimes such as the World Trade Organization (WTO) in the economic realm. The present challenge is to build on this trend so that a system of justice can replace power politics in the management of issues related to the environment, social welfare and global security. I see resorting to the evolving international dispute resolution system to

help deal with the problem of global warming as supporting the growth and development of this system.<sup>3</sup>

What follows are the conclusions drawn from my work for the New Economics Foundation. It is a preliminary attempt to "brainstorm" the issues, and it is written for an audience with only a modest background in international law. I do not attempt to come to definitive conclusions, but rather I suggest avenues that might prove promising and should be subject to further study. This Article first examines certain international tribunals in which a case against the United States might be brought, with an emphasis on the International Court of Justice (ICJ), and then looks at the relevant law which could be applied in such a case.

### Assessing the Possible International Legal Forums

#### *The International Court of Justice*

In many ways the ICJ or, as it is more commonly known, the World Court, would be a preferred forum for a global warming suit against the United States. The ICJ as previously constituted goes back to the days of the League of Nations and is the closest the international system has to a sort of high court of the world. It would likely be the most politically visible and authoritative adjudicatory forum.

#### Getting Into the ICJ

##### Contentious Cases

Only countries can bring suits against other countries before the ICJ. For a country to successfully bring a case before the ICJ, that Court would have to find that it had jurisdiction. In accordance with the principle of state sovereignty, jurisdiction by the Court over a defendant state must ultimately be based upon the consent of that state. The first way this consent can be manifest is by a generalized prospective acceptance in future cases of the compulsory jurisdiction of the Court under Article 36(2) of the Statute of the ICJ, the so-called optional clause.<sup>4</sup> Unfortunately, the United States

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1. A case was filed in late August of last year by Friends of the Earth, Greenpeace, and the city of Boulder, Colorado, in U.S. district court in San Francisco against the Export-Import Bank and the Overseas Private Investment Corporation, both U.S. government entities. The suit alleges that the defendants illegally extended billions of dollars in loans for coal-fired power plants, oil fields, and pipelines without assessing their environmental impact including their effect on global warming as required by the National Environmental Policy Act (NEPA), 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209. See <http://www.climate.lawsuit.org/>.
2. For discussion of this approach, see David Grossman, *Warming Up to a Not-so-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. TRANSNAT'L L. (forthcoming 2003).

3. For a more detailed discussion of how the WTO dispute resolution system could be used to enhance the enforcement of environmental norms, see Andrew Strauss, *From GATTzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769 (1998).
4. Statute of the International Court of Justice, effective Oct. 24, 1945, art. 36(2), 59 Stat. 1031, 1060, T.S. No. 993 [hereinafter I.C.J.].

rescinded its acceptance of compulsory jurisdiction when the Court ruled against it on jurisdiction in a lawsuit brought by Nicaragua for alleged violations of international law during the contra war in the 1980s.<sup>5</sup>

The second way that the Court could attain jurisdiction would be for the disputing Parties mutually to agree to refer a matter to it pursuant to Article 36(1) of the Statute of the ICJ.<sup>6</sup> Since the United States is unlikely to agree to voluntarily subject itself to the Court's judgment on whether its greenhouse gas (GHG) emissions constitute a violation of international environmental law, this approach can also be discounted.

The third way that the Court can gain jurisdiction, also pursuant to Article 36(1), is if the Parties have specifically provided for dispute resolution before the Court under a treaty which is in effect between the Parties.<sup>7</sup> This would appear to be the most viable approach. What is, of course, necessary here is to find treaties with such a provision. The United States has entered into many Friendship, Commerce, and Navigation (FCN) or other similar treaties. These are broad agreements which provide that each country will treat the nationals of the other favorably and generally as well as it treats its own citizens in commercial transactions. Because I thought these agreements may contain broad language expressing obligations similar to a requirement of good faith between the Parties, I looked into FCN treaties and other similar agreements that the United States had adhered to with coastal and island states<sup>8</sup> that provided for dispute resolution before the ICJ. Typical of the most relevant language to be found in these treaties is this passage from the U.S. 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."<sup>9</sup>

Other similarly situated coastal nations with which the United States has such agreements containing roughly equivalent language and binding dispute resolution before the ICJ are Thailand,<sup>10</sup> the Netherlands,<sup>11</sup> Korea,<sup>12</sup> Denmark,<sup>13</sup> and Ireland.<sup>14</sup> Ethiopia, although no longer a coastal

state, in its Treaty of Amity and Economic Relations with the United States had particularly promising language. ("There shall be constant peace and firm and lasting friendship between the United States of America and Ethiopia,"<sup>15</sup> and "The two High Contracting Parties reiterate their intent to further the purposes of the United Nations.")<sup>16</sup> I could find no such treaties containing provisions providing for binding dispute resolution before the ICJ with small island nations.

The above-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. GHG 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 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 opportunity to rule 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)*.<sup>17</sup> 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 U.S./Iran FCN treaty, the Treaty of Amity, Economic Relations, and Consular Rights.<sup>18</sup> Iran argued that several general treaty provisions of the sort I have identified were violated by the U.S. military action. The Court in finding that it had jurisdiction accepted the position that FCN treaties could be construed to have extraterritorial application, but generally rejected the type of broad interpretation of the language that would be helpful in a global warming case.<sup>19</sup> Likewise, in the *Nicaragua* case against the United States, referred to earlier, the Court accepted jurisdiction based in part on a binding ICJ dispute resolution provision in the U.S./Nicaragua FCN treaty.<sup>20</sup> In that case, as in the Iran case, military activities arguably more directly impacted upon specific provisions of the treaty than would global warming.

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

6. I.C.J., *supra* note 4, art. 36(1), 59 Stat. 1031, 1060, T.S. No. 993.

7. *Id.*

8. I choose coastal and island states because of the relatively strong scientific evidence correlating global warming with rising sea levels and severe coastal weather. See CLIMATE CHANGE 2001: IMPACTS, ADAPTATION AND VULNERABILITY (J.J. McCarthy et al. eds., 2001); William C.G. Burns, *The Possible Impacts of Climate Change on Pacific Island States Ecosystems*, in OCCASIONAL PAPER OF THE PACIFIC INSTITUTE FOR STUDIES IN DEVELOPMENT, ENVIRONMENT, AND SECURITY 8 (2000). The harms caused by global warming are likely to be extremely far ranging, however, causing other countries to have significant damages as well.

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

10. 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, ¶ 2, 19 U.S.T. 5843, 5859.

11. 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. XXV, ¶ 2, 8 U.S.T. 2043, 2083.

12. 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, ¶ 2, 8 U.S.T. 2217, 2227.

13. Treaty of Friendship, Commerce and Navigation Between the

United States of America and the Kingdom of Denmark, Oct. 1, 1951, U.S.-Denmark, art. XXIV, ¶ 2, 12 U.S.T. 908, 923.

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

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

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

17. *Concerning Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803, 811-12.

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

19. *Concerning Oil Platforms*, *supra* note 17, at 814.

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

## Advisory Opinions

There is another possible avenue which allows for a hearing before the ICJ on the legality of U.S. GHG emissions, but without requiring that the Court assert jurisdiction over the United States. 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."<sup>21</sup> 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,"<sup>22</sup> 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."<sup>23</sup>

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.<sup>24</sup> The Court recognized that the General Assembly could request an advisory judgment in the matter, but it ruled against the WHO.<sup>25</sup> 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."<sup>26</sup> The Court concluded, however, that, "[w]hat ever 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."<sup>27</sup>

The Court is not technically bound by prior decisions,<sup>28</sup> 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 ongoing nature of global warming and the WHO's need to continually respond. The other potential candidate to request an advisory opinion would be the Food and Agricultural Organization (FAO) in Rome,<sup>29</sup> but it would likely face the same problem as the WHO.

The Security Council, given the ability of the United States to exercise its 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-thirds majority of the General Assembly.<sup>30</sup> 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.<sup>31</sup> 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 GHGs. 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 political atmospherics it may be better to have an identifiable plaintiff in a contentious case where the Court could order relief (though such an order may not be complied with) rather than simply advise on the state of the law.

### *International Arbitration, Alternative Dispute Resolution, and Specialized Tribunals*

In accordance with the consensual basis of international law, states can agree ad hoc to submit their disputes to any of a variety of international arbitration forums. Again, the United States is very unlikely to agree to do this. Agreement by the United States to alternative dispute resolution procedures such as good offices, mediation, and conciliation is probably only slightly more possible, and would lack the drama and legal clarity of a more adjudicatory approach. In addition, some treaties provide prospectively for resort to their own specialized dispute resolutions systems. I discuss the three forums that I found most promising, the Conciliation Commission established under the Framework Convention on Climate Change, the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea, and the WTO's panels and Appellate Body.

#### Conciliation Commission Established Under the U.N. Framework Convention for Climate Change

Perhaps the most straightforward approach to bringing an action for global warming emissions would be to utilize the dispute resolution machinery created by the 1992 U.N. Framework Convention on Climate Change (UNFCCC).<sup>32</sup> This treaty, which was adopted at the historic Earth Summit in Rio de Janeiro, provides for nonbinding GHG emission reduction targets and establishes the framework for the Kyoto negotiations.<sup>33</sup> The United States ratified the treaty in 1992. While the treaty does not provide for binding limits on emissions, it does generally provide that Annex 2 Parties, of which the United States is one, take measures that limit their GHG emissions.<sup>34</sup>

Article 14 of the Convention provides that countries can opt into binding arbitration or dispute resolution before the ICJ. Although the United States and other countries have

21. I.C.J., *supra* note 4, art. 65, 59 Stat. 1031, 1063, T.S. No. 993.

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

23. *Id.* art. 9(2).

24. The WHO was authorized by the General Assembly to request advisory opinions from the ICJ pursuant to the agreement governing its relationship to the United Nations.

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

26. *Id.* at 235.

27. *Id.*

28. I.C.J., *supra* note 4, art. 59, 59 Stat. 1031, 1063, T.S. No. 993.

29. 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.

30. Charter of the United Nations, *supra* note 22, art. 18.

31. Article 18(3) provides that "[d]ecisions on other questions . . . shall be made by a majority of the members present and voting." *Id.*

32. United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38 (1992), 31 I.L.M. 849 (1992) [hereinafter Framework Convention].

33. For further discussion of the Rio Conference and the UNFCCC see *infra* notes 54-55 and accompanying text.

34. In addition, Article 4(4) of the UNFCCC provides that developed country parties "shall . . . assist the developing country parties that are particularly vulnerable to the adverse effects of climate change in meeting the costs of adaptation to those adverse effects."

not done this, the Article also contains a nonoptional dispute resolution mechanism providing for the establishment of a conciliation commission “which shall render a recommendatory award, which the parties shall consider in good faith.”<sup>35</sup> One problem with attempting to convene a conciliation commission is that the Convention provides that the Conference of the Parties adopt conciliation procedures, and this has not yet been done. Assuming these procedures will be forthcoming, the conciliation commission process is an avenue worth considering. While proceedings before the conciliation commission would have a much lower profile than those before the ICJ, and its determination would not be binding, a conciliation case might be able to help establish that the United States is not complying with its obligations under the UNFCCC.

### The Law of the Sea Convention

The Law of the Sea Convention (Convention), in force since 1994, has some very helpful substantive language arguably outlawing the uncontrolled emissions of GHGs. For example, Article 194(2) of the Convention provides:

States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.<sup>36</sup>

The Article goes on to specify that such measures “shall deal with all sources of pollution of the marine environment” and specifically refers to “the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping.”<sup>37</sup>

The term “pollution of the marine environment” is defined by the Convention to mean

the introduction by man, directly or indirectly, of substances or energy into the marine environment which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrances to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.<sup>38</sup>

The Convention establishes its own adjudicatory system to provide for binding resolution of conflicts that arise under its provisions. As the United States has not adhered to the Convention, however, a suit could not be brought directly against it under the Convention. An advisory opinion, however, is potentially obtainable pursuant to the requests of one or both of the political organs of states established under the Convention (the Council and the Assembly). Such a decision could implicate the legality of U.S. global warming emissions. Despite not being a signatory to the Convention, the United States is arguably bound by its environmental

provisions. Not only are these provisions generally considered to be a codification of preexisting binding customary international law, but in 1983 President Ronald Reagan specifically issued a unilateral declaration on behalf of the United States that can be interpreted as accepting the substantive provisions of the Convention other than those dealing with seabed mining.<sup>39</sup> There has not yet been an advisory opinion under the Convention, and there are many technical issues that would have to be satisfactorily resolved before such a request could proceed, but it is an approach worth exploring.

Another approach worth exploring is presented by the newly entered into force Straddling Fish Stocks Agreement.<sup>40</sup> This agreement incorporates the Convention’s system of binding dispute resolution,<sup>41</sup> and, unlike the Convention, the United States has adhered to it. While the Straddling Fish Stocks Agreement does offer a way of getting binding jurisdiction over the United States, the problem is, of course, that this agreement is not explicitly intended to deal with the problem of global warming. It does, however, provide a framework for protecting certain species of fish, and to the extent that GHG emissions can be shown to endanger such fish, its protective environmental provisions could potentially be liberally interpreted to cover global warming.<sup>42</sup>

### The WTO

I could not conceive of a strategy for challenging the United States before the highly effective WTO dispute resolution system. However, one interesting possibility would be to follow a pro-active strategy of taking multilateral remedial trade action against the United States, thereby putting that country itself in the position of choosing whether to seek relief before the WTO’s dispute resolution system. This would entail participants in the Kyoto process continuing to proceed without the United States, but introducing a provision into the regime which would allow participating countries to impose countervailing duties on products made in ways that contributed disproportionately to global warming from certain or all nonparticipating countries.

The WTO, pursuant to the General Agreement on Tariffs and Trade (GATT), currently allows countries to impose countervailing duties to offset the competitive trade advantage that foreign companies gain when they receive subsidies from their governments. The identification of a subsidy is very complex. Clearly, a cash hand-out to industry by a government qualifies, but what about equivalent tax breaks, special government services, etc.? Some environmentalists have argued that lax environmental standards externalize

35. Framework Convention, *supra* note 32, art. 14(5).

36. U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 194(2), U.N. Doc. A/Conf.62/121, 21 I.L.M. 1261 (1982).

37. *Id.* art. 194(3)(a).

38. *Id.* art. 1(1)(4).

39. Proc. No. 5030, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983); 48 Fed. Reg. 10605 (Mar. 10, 1983); 3 C.F.R. 22 (1984) (resolving to follow “most” of the Law of the Sea Convention as customary international law, but staking a U.S. claim to sea bed mining rights within 200 nautical miles of shore).

40. The Agreement for the Implementation of the Provisions of the U.N. Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, August 4, 1995, U.N. Doc. A/CONF.164/37.

41. Part VIII of the Straddling Fish Stocks Agreement provides that disputes arising under it be settled through the Law of the Sea’s Dispute Settlement provisions in Part XV. *See id.* art. 30.

42. *See id.* arts. 5, 6.

the cost of production and should be considered de facto subsidies.<sup>43</sup> It could be argued that emission of GHGs is far more insidious than most subsidies. Rather than the country's own taxpayers bearing the cost of advantaging favored industries, the cost is placed in this instance on the citizens (human and nonhuman) of the entire planet.<sup>44</sup> In addition, there is jurisprudence by WTO panels and the Appellate Body indicating that multilateral attempts to remedy environmental problems through trade restrictions would be given a deference under the WTO regime that unilateral trade actions would not be given.<sup>45</sup> The prospect of countries taking potentially embarrassing, expensive and arguably legal remedial trade action against the United States could help encourage it to engage in serious negotiations over global warming.<sup>46</sup>

### A Brief Look at the Law That a Tribunal Would Apply

#### *Other Procedural Issues*

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

#### *The Substantive Law*

While there is a considerable amount of material on the international law of transboundary pollution, it is mostly what is often times referred to as soft international law, i.e., offi-

cial declarations and the like which are not considered formally binding. There is, however, considerable commentary arguing that such instruments are demonstrative of customary international law which is generally considered binding on states.<sup>47</sup> 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 they do to others. The extent to which an international tribunal would be willing to apply this very general principle to U.S. emissions of GHG, however, may be far more a question of politics and the true ability of existing adjudicatory institutions to extend the rule of law to the powerful than of any precise evaluation of the law which follows.

### General Restatements and Codifications of the Law

Several expert bodies, official and unofficial, have reported their views of the international law applicable to transboundary pollution. The views of these bodies on international law generally tend to be fairly subjective. In addition, the relative weight which a court should accord the opinions of these bodies when they differ is not well-defined. This means that there tends to be a high degree of flexibility in how Parties can creatively use these instruments to further their positions. To give some sense of what litigants in a global warming case would have to work with, I will refer to some of the more prominent statements.

One helpful 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 helpful. 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.<sup>48</sup>

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.<sup>49</sup> 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. Char-

43. See Naomi Roht-Arriaza, *Shifting the Point of Regulations: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 *ECOLOGICAL L.Q.* 479, 521 (1995); Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 *AM. J. INT'L L.* 268, 188-89 (1997).

44. Alternatively, the charge to American made products could be conceptualized as a border tax adjustment allowed under Article III of the GATT. See generally John A. Barrett, *The Global Environment and Free Trade: A Vexing Problem and a Taxing Solution*, 76 *IND. L.J.* 829 (2001).

45. See GATT Dispute Settlement Panel Report on U.S. Restrictions on Imports of Tuna, 33 *I.L.M.* 839 (June 16, 1994) (interpreting Article XX(b) of the GATT to mean that to the extent that states can target other states with unilateral trade sanctions for failing to live up to environmental process and production method standards they must first attempt to negotiate multilateral environmental agreements); Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R (12 Oct. 1998) (interpreting the chapeau of Article XX of the GATT to mean that states must be nondiscriminatory in negotiating with other states multilateral environmental agreements as an alternative to unilateral trade sanctions); Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/RW (22 Oct. 2001) (interpreting the chapeau of Article XX to mean that states must only “make a good-faith effort to reach international agreements that are comparable from one forum of negotiation to another”).

46. See Strauss, *supra* note 3, at 808-11 (elaborating on the implementation of a countervailing duty scheme to help encourage compliance with global environmental norms).

47. See, i.e., 7 *ENCY. PUB. INT'L L.* 61, 62 (1984) (Rudolf Bernhardt ed., 1984).

48. Restatement (Third) of Foreign Relations Law §601(1) (1986).

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

ter, 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 the 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.”<sup>50</sup> Its language requires states to “take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm” and to “cooperate in good faith and, as necessary, seek the assistance of one or more international organizations in preventing, or in minimizing the risk” of, significant transboundary harm.<sup>51</sup> Other works by the commission may also be relevant. Arguably U.S. GHG could be interpreted as constituting a “serious breach[ ] of obligations under peremptory norms of general international law” under the language of its recently adopted Draft Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>52</sup>

### Precedent

Unlike some domestic systems, international tribunals, as stated earlier with regard to the ICJ, tend not to be obliged to follow precedent. Precedent is, however, influential and is not only limited to prior judicial decisions. The decisions of arbitrators and the specific actions of states can also be considered.

The *Trail Smelter* arbitration decision is generally considered to be the lead case in the area of state liability for transboundary pollution. It resulted from injuries caused in the American 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 tribunal proclaimed a general principle of international law that would be very helpful to establishing the liability of the United States for GHG emissions. It proclaimed that “[a] State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction,” and went on to say that:

No 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.<sup>53</sup>

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

51. Draft Articles on the Prevention of Transboundary Harm From Hazardous Activities, International Law Commission, 53rd Sess., Supp. No. 10, ch. V.E.1, art. III, IV, U.N. Doc. A/56/10 (2001).

52. Report of the Chairman of the Drafting Committee (P. Tomka), in A/CN.4/SR.2681, 29 May 2001, A/CN.4/SR.2682, 30 May 2001, A/CN.4/SR.2683, 31 May 2001, A/CN.4/SR.2701, 3 August 2001.

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

State actions in more recent and well-known cases would not be as helpful in demonstrating the pervasive acceptance of a principle of liability by states today. Most prominent 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. 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. Both of these cases may be distinguished by their complex set of facts. To begin with the Ukraine was poor and unable to well-afford the cost of decommissioning the reactor on its own, and Sandoz privately provided compensation for individual victims of the disaster.

### Declarations and Treaties

While they are more explicitly political and have the weight of states behind them, declarations of states are similar to the works of expert bodies in that they are not in their own right considered to be binding. This status as nonbinding, however, is fairly technical as commentators and advocates will often assert that these declarations are statements of customary international law or another source of binding international law. Such is the case with both of the primary declarations relevant to liability for emissions of GHGs, 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.<sup>54</sup>

In 1992, 20 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 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.”<sup>55</sup>

Treaties, when available, are usually considered to be the most authoritative source of international law. In addition to

54. 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).

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

the already discussed UNFCCC and Straddling Fish Stocks Agreement, the United States has adhered to the Convention on Long-Range Transboundary Air Pollution<sup>56</sup> and certain of its protocols. Some of the pollutants which are regulated affect global warming, and the treaty regime contains general language which could be helpful in a suit against the United States.

### Causation and Damages

Assuming that a tribunal in a global warming lawsuit would accept the scientific consensus that human-created GHGs are a major contributor to global warming, other significant proof problems would remain in bringing such a suit. Drawing the connection between global warming and specific environmental effects would be challenging. In addition, both assessing prospective damages from global warming and apportioning the extent to which they are attributable to the United States would not be easy. The law in this area is not unique to global warming, and it is beyond the scope of this Article to specifically review it. I only note these considerations here as factors to which careful consideration would have to be given in conceiving any suit against the United States.

### Conclusion

If generally accepted scientific assessments are accurate, global warming is likely to be the most expensive environmental problem ever.<sup>57</sup> Weather patterns will be altered. Economies will be disrupted. Habitat and landmass will be lost. And, as yet unpredictable environmental problems will result. Even if the political will is found to begin to deal seriously with the problem, a big if, global warming's

costs will still continue to escalate for the foreseeable future. Determinations are going to have to be made about who is going to bear these costs. Given the nature of the legal system, particularly within the United States, but also within many other countries, litigation will very likely play a role in this determination.

As the international system becomes increasingly legalized in response to the demands of globalization, litigation in international forums is poised also to play a role in this determination. We are still in the very early days of the global warming problem. I see many different generations of lawsuits, probably evolving over time to deal less with the raising of political consciousness and more with the concrete allocation of losses.

The Bush Administration rejection of the Protocol makes the United States the most logical first country target of a global warming lawsuit in an international forum. The United States, after all, has only 5% of the world's population, but accounts for close to 25% of global warming emissions. It is the single largest emitter of GHG. No solution to the problem is possible without the cooperation, and hopefully leadership, of the United States. That being said, no country has done enough to deal with the problem of global warming. Other developed countries' actions look vigorous only when compared with those of the United States. And, as is often argued in the United States, if the problem is to be dealt with adequately, eventually the developing world will have to take significant action as well. A serious attempt to create a comprehensive global warming litigation strategy will then necessarily ultimately implicate countries other than the United States. For the time being, however, litigation efforts need to be primarily focused on the United States as the major hindrance to beginning the remedial process. This Article will hopefully contribute to those efforts by providing a preliminary assessment of specific litigation options and more generally suggesting new possibilities for dealing with perhaps the greatest environmental threat of our time.

56. *Id.*

57. See ANDREW SIMMS, INTERNATIONAL FEDERATION OF THE RED CROSS AND RED CRESCENT, WORLD DISASTERS REPORT 98 (2002).