

## Panel: Climate Change

*Wil Burns, Moderator\**

My name is Wil Burns and I am a senior fellow here at Santa Clara University. This panel will focus on what is loosely denominated as climate change litigation.

As all of you have undoubtedly seen in press coverage the last couple of days, the summary for policymakers of the fourth assessment of the Intergovernmental Panel on Climate Change (“IPCC”) report on climate science has been released.<sup>1</sup> The new report reinforces and amplifies the findings of the third assessment report of the IPCC,<sup>2</sup> as well as more recent climatic research, concluding, with a very high degree of certainty, that the lion’s share of the warming that we’ve seen in the past 150 years is attributable to anthropogenic activities, especially the burning of fossil fuels.

The report’s most sobering conclusions are that, even under the most utopian scenario over the next century, temperatures will increase by at least 1.8 degrees Celsius from current levels. Under the more reasonable scenarios, the increase will be in the range of 2.5 to 3.5 degrees Celsius. Under the worst-case scenarios, the temperature will rise by over 6.5 degrees Celsius. This increase is over and above the approximate 0.7 degrees Celsius temperature increases that we have seen since the Industrial Revolution.

Such temperature increases will now undoubtedly exceed the well-recognized threshold of 2 degrees Celsius, where some of the direst implications of climate change are expected to be triggered for both human institutions and ecosystems. The IPCC report paints a picture of a world beset by higher levels of drought in some regions, flooding in others, an increase in the intensity of weather events, and

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1. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], *CLIMATE CHANGE 2007: THE PHYSICAL BASIS – SUMMARY FOR POLICY MAKERS* (2007), available at <http://www.ipcc.ch/SPM2feb07.pdf>.
2. IPCC, *THIRD ASSESSMENT REPORT: CLIMATE CHANGE 2001* (2001), available at <http://www.ipcc.ch/pub/online.html>.

dramatic changes in ocean circulation.

Other recent studies, including the Stern report,<sup>3</sup> projected climate change will result in trillions of dollars of damages to human institutions. A recent study by Thomas<sup>4</sup> projected that climate change could result in the loss of 30 to 50 percent of species by the middle to the end part of this century, directly attributable to climate change impacts.

In the face of these incredible threats, the institutional responses of the global community to climate change have been abject, largely due to the pressure exerted by the United States and Organization of Petroleum Exporting Countries (“OPEC”) nations. The drafters of the primary international response to climate change, the United Nations Framework Convention on Climate Change,<sup>5</sup> opted for hortatory language in terms of the reductions of greenhouse gas emissions, rather than imposing mandatory targets and timetables.

Moreover, while the Kyoto Protocol to the Framework Convention<sup>6</sup> does contain such targets and timetables, they do little to confront the specter of climate change for several reasons. First of all, the intended reductions for industrialized countries to reach by 2012 are about, on average, 5 percent below 1990 levels, and are at most a modest down payment in terms of what needs to be done. Even if fully implemented, climate researchers have estimated that the total impact would reduce projected warming in 2050 by only 1/20<sup>th</sup> of 1 degree. By contrast, stabilization of atmospheric greenhouse gasses would require the global community to reduce greenhouse gas emissions by 60 to 70 percent.

Furthermore, with the United States responsible for 25 percent of the world’s greenhouse gas emissions, opting out of Kyoto in favor of a market-based approach will, by our own admission, increase emissions by about 35 percent above 1990 levels by the year 2020, and more than 50 percent by 2030. It is difficult to be sanguine. Moreover, while the Framework Convention and the Kyoto parties are now negotiating a response beyond 2012, it is likely that that response will also be tepid.

In the face of the institutional failure to confront climate change, policymakers and members of the non-governmental organization (“NGO”) sector have begun

3. NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW* (2006).
4. Chris. D. Thomas et al., *Extinction Risk from Climate Change*, 427 NATURE 145–47 (Jan. 8, 2004).
5. United Nations Framework Convention on Climate Change, 1771 UNTS 107; S. Treaty Doc. No. 102-38; U.N. Doc. A/AC.237/18(Part II)/Add.1; 31 ILM 849 (1992).
6. Kyoto Protocol to the U.N. Framework Convention on Climate Change, U.N. Doc. FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998).

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initiating or have contemplated the initiation of what we loosely denominate climate change litigation. This litigation has been occurring, or may occur, at both the domestic and the international level. In the domestic context, we all know about the case of Massachusetts versus the Environmental Protection Agency (“EPA”),<sup>7</sup> an action under the Clean Air Act<sup>8</sup> that the U.S. Supreme Court recently heard.

Actions have been filed in the United States for nuisance, largely against utilities. An action has been filed against an export/import bank. There have also been actions filed for listings under the Endangered Species Act<sup>9</sup> for various species of corals and polar bears. Additionally, there have also been domestic actions in other countries, including Germany, Australia, New Zealand, and Nigeria.

At the international level there has been a case filed by the Inuit, which Martin Wagner will address. There were also petitions filed before the World Heritage Commission for damages to world heritage sites. And there have also been actions contemplated in front of the International Court of Justice under the United Nations Convention on the Law of the Sea,<sup>10</sup> and various other instruments.

What this panel will seek to do today is look at some of these actions at the international level. What has happened to date, what are the prospects in the future, and what it tells us about the interface of institutional responses and litigative responses to climate change.

*Martin Wagner, Panelist\**

I am going to talk about the relationship between human rights and global warming. I am going to be doing it primarily through a case we have filed with the Inter-American Commission on Human Rights.<sup>11</sup>

7. Massachusetts v. EPA, 126 S.Ct. 2960 (2006).

8. Clean Air Act, 42 U.S.C. §§7401 et seq. (2007).

9. Endangered Species Act 16 U.S.C. §1533 (2007).

10. United Nations Convention on Law of the Sea, 1833 UNTS 3; 21 ILM 1261 (1982).

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11. Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting in Global Warming Caused by Acts and Omissions of the United States, Submitted by Sheila Watt-Cloutier et al., Dec. 7, 2005.

I'm not going to spend time explaining climate change, and Wil already talked about the IPCC's recent statements. So I'm going to ask you to take it on faith that we've got a problem, and that it's a global problem which needs a global strategy. Wil highlighted some of the strategies that are being implemented now. My organization is actually in the process of looking at a number of other potential domestic and international legal strategies to address climate change. One of the areas in which we have been working since about 2000 is the relationship between human rights and global warming.

The first question one might ask in thinking about this relationship is why human rights? Why would we want to use human rights in the context of global warming? To some extent the value of human rights to address climate change depends on one's sense of the value of human rights generally. There is certainly an argument that there are a lot of international human rights instruments out there, and some human rights institutions, and that those institutions and instruments don't always cause governments, or individuals for that matter, to act the way we want them to.

I personally think there is a lot of value in human rights. For example, one reason we wanted to make the connection between global warming and human rights was our recognition that, while there had been a lot of talk about the issue, most of the discussion was in technical, jargon-y terms. Debates about how many degrees per decade global temperatures might increase, or how many centimeters per century sea levels could rise. We looked at that discourse and thought, you know, that's not really going to get people to make a change. We thought that seeing the issue in terms of human impacts would be more likely to motivate people to address the problem. So we looked to our culture's most basic expression of how we believe people should live: human rights.

Putting an issue in the context of human rights creates a rhetoric that people can use that touches people's hearts in a way that talking about the science of it just does not. It also motivates decision-makers and governments in unique ways. Obviously there is no institution internationally that can force the United States to do something the way a U.S. court can. But nevertheless, human rights have an effect on governments, who don't want to be seen as violators of human rights. Governments will sometimes justify actions they want to take if they can do it in human rights terms, especially where they might not have a good justification otherwise.

If we can establish a relationship between global warming and human rights, that relationship creates an obligation on the part of governments to take action to

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prevent violations of those rights. This can put pressure on the governments, particularly the more recalcitrant governments in the world, to begin to take action to address global warming.

So is there really a right to be cold? I mean, if climate change is occurring, what is the human right at issue? Clearly, if you are an Inuit person living in the Arctic where it's supposed to be cold, and your cultural and physical survival depends on the snow and ice, then you clearly have an *interest* in being cold. But are your *human rights* implicated?

I am going to discuss the human rights implications that are the basis for our claim that, by failing to take meaningful action to reduce its greenhouse gas emissions, the United States has violated the human rights of the Inuit.

First, though, let me define the relevant law. In this presentation, I am going to focus on the Inter-American system, but the relevant principles are not that different in other international legal systems. In the Inter-American human rights system, which is part of the Organization of American States (OAS), we begin with the American Declaration on the Rights and Duties of Man,<sup>12</sup> which is sort of the American equivalent to the Universal Declaration of Human Rights.<sup>13</sup> It was the first human rights instrument in the Americas.

As a declaration, the American Declaration does not directly create binding obligations. But in the American system, we also have the American Convention on Human Rights,<sup>14</sup> which does create binding obligations. It is relevant to the present discussion that the United States has not ratified the Convention, which in addition to establishing certain human rights obligations for nations, makes those nations subject to the Inter-American human rights institutions, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

The United States' failure to ratify the American Convention might be an obstacle to bringing a petition like ours against it, were it not for the fact that the Inter-American Commission on Human Rights has held each OAS members' commitment to the OAS Charter and the American Declaration gives the Commission jurisdiction to apply the Declaration to those states that have not ratified the Convention. Moreover, the Commission has held that it can look to the Convention as a way of understanding what the Declaration means.

12. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, OAS/Ser.L/V/1.4 Rev. 9 (2003); AJIL Supp. 133 (1949).

13. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3rd Sess., 1st Pln. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

14. American Convention on Human Rights, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

But the Commission is not even limited to the rights in the American Declaration and Convention. Both the Commission and the Court have recognized that developments in the field of international human rights law are relevant to interpreting the American documents. As a result, these institutions allow themselves to look at other international human rights instruments in interpreting the American obligations. Because of this, our petition discusses rights discussed in international instruments such as the International Covenant on Civil and Political Rights,<sup>15</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>16</sup> and other human rights instruments that we assert to be means of interpreting the obligations that are part of the Declaration and the Convention.

International environmental law is also relevant to interpreting the United States' human rights obligations. The Inter-American Court on Human Rights has said that human rights treaties are live documents – that one must consider how rights are evolving – and that a treaty can *concern* the protection of human rights regardless of its principal purpose. So we have argued that the American Declaration should be applied with regard to other relevant rules of international law applicable to the states. In the context of our petition, this means that some international environmental law obligations are relevant to understanding the United States' human rights obligations concerning an environmental issue like global warming. For example, the obligations of states not to cause trans-boundary environmental harm is relevant to interpreting human rights obligations related to such harm.

So now we come to the crux of the matter: the rights at issue in our petition. We must start by discussing the rights of indigenous peoples. The international community has recognized that indigenous peoples have a unique place in international law, that they are entitled to unique considerations and protections. In particular, the Inter-American Commission and Court have recognized that indigenous peoples have a unique relationship with their environment and that harm to the environment thus affects indigenous peoples' rights in a unique and often particularly serious way. The Inuit's relationship with the Arctic environment is a perfect example of this.

For the Inuit, the most important right at issue here is their right to culture. Although that is the first right discussed in our petition, I am going to discuss it last

15. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966).

16. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (Dec. 16, 1966).

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here, because in this short presentation it will be easier to understand after I've discussed the facts relevant to the other rights. But I wanted to make clear from the start that the Inuit's greatest concern is the impact of global warming on their culture, and that this was the issue they insisted we make primary in the petition.

The Inter-American Commission has discussed the relationship between the environment and the right to life, physical integrity and security. It is not too hard to understand. The United Nations, for example, has said that there is a fundamental right to water,<sup>17</sup> because without water we couldn't live. The same is true of other aspects of the environment: without a healthy environment, none of us would be able to survive.

The relationship between environmental harm and the right to life is starkly obvious in the case of the Inuit. For example, just the melting of the ice, one of the first impacts of global warming, affects their lives in many ways. Most directly is that the Inuit depend, for travel and for hunting, on being able to move on the ice. There are many places in the Arctic one cannot access without traveling across the ice. And there are just a few months in the year where they do not have ice to travel on, but the rest of the year they travel on the ice. They know how to read the ice; they know how to use it to get places. But this mode of transportation has become unreliable and dangerous. In the words of Lucas Ittulak of Nain, Canada, "[T]he trails we used to use or the routes we used to use to go out on the land to go hunting, some of them we can't even use anymore because there is not enough snow or the snow is not the same. We have to find new routes now even to travel out onto the land to go to our hunting grounds."

Because of the melting associated with global warming, Inuit are sometimes falling through the ice, which was extremely unusual in the past. It is very dangerous, as you can imagine. People have died or lost limbs from falling through the ice.

The ice is also a means of access to sources of food for the Inuit, for whom subsistence hunting and gathering are a major source of physical nourishment. Sources of food, such as walrus, seals, and polar bears, depend on the sea ice, and the Inuit depend on the ice to get to them. Jerry Wongitillin, an Inuk man from Savoonga, Alaska, says "The ice goes out, and the game goes out with it. No more game. Seals, walrus, they go out with the ice . . . we've been bringing in less game

17. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Economic, Social, and Cultural Rights, General Comment No. 15 (2002): The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11(26 November 2002).

nowadays, and we have to hunt further out. The game was very close before, [now it is] sometimes as far as 90 miles out.”

Even hunting whales depends on the ice. If you can not go out on the ice, you cannot get to where the whales are, and if the ice is not strong, hunting parties cannot retrieve the whales without risking collapse. So the Inuit are no longer able to depend on their knowledge about where to travel to get safely to places that are crucial to their survival.

For non-Inuit people, the igloo is sort of the icon of the Inuit. But global warming has changed the quality of the snow in the Arctic, making it frequently unsuitable for igloos. But this is not just the loss of a cultural icon; it affects the Inuit’s rights to life and physical security. Igloos are an essential for surviving if one is stranded in bad Arctic weather. In an igloo, one can live essentially indefinitely as long as one has food. With a tent, which is the Inuit’s substitute for igloos, one cannot survive nearly as long.

Global warming has also caused a change in storm patterns. As a result, the elders and other Inuit who used to be able to predict when it was safe to travel without getting caught in a storm cannot do so anymore. This is both a cultural loss and a threat to life. Even the snow drifts, the patterns of which used to be a navigational tool, have changed, making travel more difficult and less safe. An Inuk man from Baker Lake, Nunavut, Canada, lamented that “I was traveling during a storm and I started to get lost, because the pattern of the snowdrifts changed. . . . I started going the wrong direction during the storms. I felt kind of silly but I started asking, ‘Has the earth moved?’” Changes like these impact the Inuit’s right to life.

The right to a means of subsistence is related to the right to life. This right is not explicitly set out in the American Convention, but it’s the first right listed in both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural rights.<sup>18</sup> We argue that this right is relevant to the interpretation of the right to life found in the American Declaration and Convention, particularly in the context of the impacts of global warming on the Inuit’s lives.

Take for example the importance of what the Inuit call “country food.” The U.S. Congress has recognized that local food sources are extremely important to the Inuit.<sup>19</sup> The government of the majority-Inuit province of Nunavut, Canada,

18. “In no case may a people be deprived of its own means of subsistence.” International Covenant on Civil and Political Rights, Art. 1

19. “[I]n Alaska ... in most cases, no practical alternative means are available to replace the

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has found that it would cost around \$20 million a year to replace the country food that the Inuit depend on for survival. It's not just that they go out and hunt once in a while; they depend on it as an important source of food.

In addition to making it more difficult to get to the food sources, changes in the ice and snow have also affected the target species themselves. Many of the animals are not as healthy as they used to be. For example, the caribou survive through the winter by pushing their noses through the snow to get to the frozen grass underneath. Now, because the snow is interspersed with rain and cycles of thawing and freezing, there are layers of ice that the caribou cannot get through, causing them to starve. Sometimes the Inuit are unwilling to eat the meat they hunt because it looks unhealthy or is sickly in some way. This also affects the Inuit's rights to live and to a means of subsistence.

International human rights law also recognizes a fundamental right to property. Where the subjects are indigenous peoples, international law recognizes that the right to property means a right to use traditional lands, even if the people do not hold legal title to those lands. These rights are directly affected by the effects of global warming. As permafrost melts, buildings and other infrastructure are collapsing. The loss of sea ice causes storm waves to be larger, and when they hit coasts where permafrost has melted, erosion is severe. Some coastal villages are losing so much land to this effect that they have to move. The land is literally melting out from under them.

Global warming also affects the Inuit's right to preservation of health. The loss of traditional food sources has been recognized by both the Inuit and by scientists as harming Inuit health. The Arctic Climate Impact Assessment,<sup>20</sup> the Arctic version of the Intergovernmental Panel on Climate Change, has recognized that "[a] shift to a more Western diet is [also] known to increase the risks of cancer, obesity, . . . and cardiovascular diseases among northern populations."<sup>21</sup>

But there are other health effects from global warming as well. The increased temperature brings disease vectors previously unfamiliar to the Arctic. Even changes in polar bear behavior create a new threat to Inuit health. Because polar bears are increasingly unable to get to the ice flows on which they used to hunt, they are spending more time in and around Inuit villages, increasing the threat of dangerous interactions with humans. When I was in the Arctic a year and a half

food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses." 16 U.S.C. §3111(2).

20. Arctic Climate Impact Assessment, <http://www.acia.uaf.edu>.

21. *Id.* at ACIA Overview.

ago, villagers would not allow me to leave the village unaccompanied by someone with a gun because of the increased threat of polar bears.

The Inter-American Court of Human Rights has recognized here that there is a relationship between the land, the environment and the survival of cultures. As you can probably deduce, the environmental changes I have discussed thus far all touch on Inuit culture, the issue of greatest concern to them.

For example, all the impacts on the traditional hunt affect Inuit culture. The hunt is not only important as a way of obtaining food, but the most important opportunity to teach young Inuit about their culture and to pass on traditions. In the words of Sheila Watt-Cloutier, the Nobel Peace Prize-nominated lead petitioner in this case, “Generations – young and old – meet on the land. The wisdom of the land and process of the hunt teaches young Inuit to be patient, courageous, tenacious, bold under pressure, reflective to withstand stress, to focus and carry out a plan to achieve a goal.” Roy Nageak, an Inuk from Barrow, Alaska, says, “The learning curve for [young people] is getting shorter. The less time they spend out hunting, the less that they learn. Because you need to learn about the weather, the currents, the sea and the ice. . . . If they’re not out there hunting, and the ice is not there, then they’re not learning what they need to learn, and that’s through experience. . . . The experience is not there.”

Anthropologists have noted that the sharing of the food that comes in through the hunt is an essential element of building and maintaining Inuit social relationships and culture. Moreover, because the traditional knowledge is less valuable as the climate changes, the elders’ role as holders and transmitters of that knowledge is being undermined. In the words of one Inuit elder, “Things have changed so much it is hard to rely on what you knew traditionally anymore. What happened years ago is different than what it is today. For example, an elder might say by November 1 you are able to cross this area, it is now safe to cross this lake, but according to the way things are today, it may not be the case.”

In addition the rights I have discussed thus far, our petition also addresses the Inuit’s rights to residence and movement, to the inviolability of the home, and to personal and intellectual property.

We filed this petition with the Inter-American Commission on Human Rights, which, as I have said, has a process for addressing individuals’ claims of violations of human rights. There were several reasons we chose the Inter-American Commission. First, our petition was directed against the United States, so it made sense to use an American institution. Second, the Inter-American human rights system is also one of the most effective of the regional human rights systems, both

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in terms of having a process in which it can carry claims through to a resolution, and in terms of its recognition of the relationship between the environment and human rights.

We directed our petition against the United States because it is responsible for approximately 25 percent of anthropogenic carbon dioxide emissions – more than any nation in the world. As Wil mentioned, the United States has not lived up to President Bush's rhetoric about addressing climate change. For example, Bush's plan to reduce carbon intensity – a measure of economic activity versus carbon emission – would not reduce greenhouse gas emissions. In fact, this 18 percent decrease in intensity would result in a 12 percent increase in actual emissions.<sup>22</sup> We believe that this failure to take meaningful action to reduce its substantial role in causing global warming makes the United States at least partially responsible for the human rights violations being suffered by the Inuit.

In our petition, we asked the Inter-American Commission to take several steps. We asked it to conduct an on-site visit, which it does often, to understand the impacts of global warming on the Inuit; to hold a hearing on the petition; to declare that the United States had responsibility for human rights violations; and then to recommend that the United States adopt mandatory emissions limits, take the impacts upon the Inuit into account in government action, implement a plan to protect culture and resources, and provide adaptation assistance for the Inuit.

You might think that there is one omission from this list: some sort of compensation for what the Inuit have already suffered. The Inuit made an express decision not to seek such compensation because they did not want this petition to be misunderstood as being about money. Rather, they wanted the focus to be on their culture and on what they could show the world about what was happening as a result of climate change.

So what have we achieved with this petition? You might have read that the Commission officially rejected our petition, without any explanation. This was very frustrating for us. Just two days ago, however, the Commission informed us that it wants to hold a hearing on the relationship between global warming and human rights. This is a major step – the first objective of our petition, in fact. It is interesting to speculate about why the Commission requested this hearing but rejected our petition. It is possible that the Commission preferred to address the issue generally before it took it up in the context of a petition against the United

22. See, e.g., PEW CENTER ON GLOBAL CLIMATE CHANGE, *Analysis of President Bush's Climate Change Plan*, [http://www.pewclimate.org/policy\\_center/analyses/response\\_bush\\_policy.cfm](http://www.pewclimate.org/policy_center/analyses/response_bush_policy.cfm).

States. The Commission might also be concerned about what sort of responsibility the United States should have for activities that are caused in large part by private actors, such as electricity generation, automobile driving, *etcetera*. However, international law is very clear that, in addition to having a responsibility not to violate human rights themselves, nations have an obligation to prevent actors within their jurisdiction and control from causing human rights violations, so this should not be a problem.

In any case, this hearing, which is going to happen at the end of this month, is really an important step, one that would not have happened without the petition. So we do not think the petition has been a failure, even though officially, that particular process is closed.

The other thing that we have achieved is that we have contributed to a real shift in the public discourse about human rights. We didn't do this alone, but as the Inuit began discussing global warming as a human rights issue – this was done primarily by Sheila Watt-Cloutier, the Nobel Peace Prize-nominated lead petitioner – the media, global warming activists, diplomats and the person on the street have begun to recognize that global warming is not just a scientific question, but is an issue that affects *human beings*. For example, a front-page headline in the New York Times in 2005 proclaimed, “Eskimos Seek to Recast Global Warming as a Rights Issue.” In Sheila's words, “This petition is about encouraging the United States of America to join the world community to agree to deep cuts in greenhouse gas emissions needed to protect the Arctic environment and Inuit culture and, ultimately, the world. We must never forget that, ultimately, climate change is a matter of human rights.”

*Wil Burns, Moderator*

This presentation will examine an instrument that may be used in potential climate change litigation at the international level: a treaty entitled the Agreement for the Implementation of the Provisions of the UN 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 (Fish Stocks Agreement).<sup>23</sup>

Highly migratory species are fish species that have a wide geographic distribution and undertake significant migrations, frequently thousands of miles at

23. Agreement for the Implementation of the Provisions of the UN 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, Dec. 4, 1995, 34 ILM 1542, 2167 U.N.T.S. 88.

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a time. Highly migratory species include many species of tuna and tuna-like species, oceanic sharks, mackerels, swordfish, marlin, and sailfish. Straddling stocks are those stocks that occur both within and beyond the exclusive economic zones that nations can establish under the Law of the Sea Convention, within 200 miles of their coast. Altogether, migratory and straddling fish stocks comprise approximately 20 percent of the total marine catch, and include some of the most economically important fish stocks.

The Fish Stocks Agreement has great allure from the perspective of potential climate change litigation for several reasons. First, substantial impacts of climate change are likely to happen in terms of fisheries in this century, including many straddling fish stocks and highly migratory species. Second, the largest producer of greenhouse gas emissions, the United States, is actually a party to the agreement. Therefore, it provides a potential cause of action in which the U.S. may be targeted. Finally, the treaty has a binding dispute resolution mechanism which may provide a potential resolution of this action in the future.

This presentation will first briefly describe the potential impacts of climate change on fish species, most specifically straddling fish stock species and highly migratory species. Second, it will outline the history of the Fish Stocks Agreement and the provisions that would be germane to a potential cause of action for climate change damages. Finally, it will discuss the potential barriers to such a cause of action in the future.

Since fish species are exothermic, or cold-blooded, a flux in water temperature is the primary source of environmental impacts, exerting substantial influence on fish species' growth and maturity rates, distribution and migration patterns, and incidents of disease. Projected increases in ocean temperatures this century associated with climate change are likely to have adverse impacts on many fish species, including straddling stock species and highly migratory species. For example, the range of colder water migratory species, such as polar cod and Greenland halibut, are likely to shrink substantially resulting in a massive decline in abundance by the year 2050.

A decline of nutrient upwelling as a consequence of increased stratification between warmer waters and colder waters is likely to result in a substantial decline in bigeye and yellow fin tuna, which could result in a diminution of these species in the central and western Pacific, where they are economically crucial for many small island states.

Warming oceans could also change the distribution of some straddling stocks and highly migratory species, with serious implications for current fisheries

agreements. For example, rising temperatures could result in a northward shift in the distribution of herring in the North Atlantic. This phenomenon could upset a delicate agreement in the Northeast Atlantic between coastal states, who harvest herring within their exclusive economic zones, and distance water fishing nations. Strong shifts in distribution of prey species associated with these species could also adversely affect them. For example, biogeographic shifts of copepod species, which are small crustaceans, in the North Sea might ultimately spell the doom of cod stocks in those areas by the end of this century.

Finally, there may be direct biological impacts of introducing large amounts of additional carbon dioxide into the oceans. Rising CO<sub>2</sub> levels could result in substantial drops in ocean pH by the end of this century, which could imperil reef and shell building organisms. For example, it could adversely affect the terrapod, a snail species that is an important prey species of several straddling fish stock species, and, in turn, their predators, the North Pacific salmon, herring and cod.

Given these impacts, we've started looking and we actually have a potential party to initiate a cause of action for those damages under the Fish Stocks Agreement. So now I'd like to briefly talk about what that agreement does and how it could be potentially viable in this context.

The Fish Stocks Agreement was drafted in the 1990s, in response to market declines in many straddling fish stocks and highly migratory species during this time. Many of those declines were directly attributable, paradoxically, to the Law of the Sea Convention. The Law of the Sea Convention accorded coastal states a right to exclusive management, conservation, and exploitation of the fish species found within their 200 mile exclusive economic zones. Consequently, many distance water fishing nations, such as Japan, Poland and Taiwan, were forced to move outside the 200 mile exclusive economic zone to try to harvest species. They began to increasingly target with much more intensity the fish found on the high seas. As a result, by the mid 1990s, there was a substantial diminution of those species, where heretofore they were relatively underexploited.

Consequently the Fish Stocks Agreement was established. It entered into force in 2001 and currently has 62 parties, including most states with significant interests in high seas fisheries. The primary focus of the Fish Stocks Agreement is clearly on the harvesting of fish species. It seeks to engender cooperation between coastal states and those that fish for straddling stock species or migratory species on the high seas, and to establish agreements that ensure that those coastal states' interests and high seas fisheries' interests are protected.

The Fish Stocks Agreement also has several provisions that could arguably be

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used to exert pressure on parties to formulate effective climate change policies. First, the agreement clearly contemplates regulation of other threats to straddling and highly migratory stocks, beyond those that are exerted by harvesting. For example, Article 5a requires the adoption of measures to ensure long-term sustainability of these stocks and to promote the objective of their optimal utilization. It does not limit the kind of measures to those that are directly related to harvesting. Therefore, presumably any pressures that would impair optimum utilization and sustainability would fall under this rubric, including environmental stressors such as climate change.

Second, Article 5(b) provides and mandates that the parties assess the impacts of fishing as well as other human activities and environmental factors on target stocks and species belonging to the same ecosystem.

Finally, Article 5(f) mandates minimization of pollution, which could be one of the most important provisions from the perspective of climate change litigation. While the Fish Stocks Agreement does not define the term “pollution,” given the relationship to the Law of the Sea Convention, it would seem reasonable to apply its definition of pollution: “the introduction by man directly or indirectly of substances or energy into the marine environment.” Given the direct impacts of carbon dioxide in terms of ocean pH, carbon dioxide could clearly fit into the definition of substances that are pollution, and thus provide impetus for measures to reduce carbon dioxide emissions in the future. Moreover, a dispute resolution body would likely construe the heating of the oceans associated with climate change as the introduction of “energy” into the oceans as defined in the Convention. The Law of the Sea Convention has construed the introduction of heated waste-water into ocean bodies as constituting a form of pollution. Thus, to the extent that climate change may result in a diminution of certain stocks or alter their distribution in a way that adversely affects the interests of discrete parties, a cause of action could arise under the obligations of Article 5.

Rare among international environmental agreements, there is a binding dispute resolution mechanism in the Fish Stocks Agreement. The Fish Stocks Agreement applies dispute resolution mechanisms set out in part 15 of the Law of the Sea Convention to any dispute under the agreement, even where one or more of the disputants are not parties to the Law of the Sea Convention. It is important in this case because — although the United States is not a member of the Law of the Sea Convention, it is a member of the Fish Stocks Agreement — it is subject to the binding dispute resolution provisions of the Law of the Sea Convention in itself. Part 15 of the Law of the Sea Convention provides four potential fora in which a

dispute may be settled: first, the international tribunal for the Law of the Sea, established under Annex 6 of the Law of the Sea Convention; second, the International Court of Justice; third, an arbitral tribunal; or fourth, a special arbitral tribunal under Article 8.

There are two potential remedies that one could obtain under the Fish Stocks Agreement for climate change-related impacts. First, an injured party could seek to compel another party to fulfill its Article 5 obligations described above. This in itself would require the enactment of effective measures to reduce anthropogenic greenhouse gas emissions that are having potential impacts on straddling fish stocks and highly migratory species. Second, the Fish Stocks Agreement adopts the well-recognized no harm rule of international environmental law, providing for the possible collection of damages if state responsibility can be established under international law. Under Article 35, state parties are liable for damages or loss attributable to them in regard to this agreement.

There are also two ways to ascribe responsibility to a party under the Fish Stocks Agreement if they fail to address climate change. First, the United Nations Framework Convention on Climate Change provides for state responsibility in the cases where countries do not seek to control their anthropogenic greenhouse gas emissions, and it results in harm. To the extent that the United States is a party to this agreement as well as almost any other potential party that would be targeted, ascription of state responsibility would flow from the preamble of the framework convention.

Second, state responsibility for trans-boundary damage arguably now constitutes customary international law. There are numerous judicial decisions and international agreements which provide for liability for transboundary damages to the global commons or to individual states, including: International Court of Justice cases such as the Corfu Channel case or Nuclear Tests case, the Trail Smelter arbitration, soft law instruments including the Stockholm Declaration and the Rio Declaration, and a panoply of treaties in recent years that have been widely accepted, including the Framework Convention on Climate Change, the Convention on Biological Diversity, the ASEAN Haze Agreement, and the Long-Range Trans-Boundary Air Pollution Convention in Europe.<sup>24</sup>

24. Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4; Nuclear Tests Case (Australia v. France), 1974 I.C.J. 253, Nuclear Tests Case (New Zealand v. France), 1974 I.C.J. 457; Trail Smelter Case (United States v. Canada, 3 R.I.A.A. 1905 (1941); Stockholm Declaration of the United Nations Conference on the Human Environment, 16 June 1972, 11 I.L.M. 1416; Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874; Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818; ASEAN

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There is a potential cause of action in the future, not only for the traditional whipping boy the United States but for other nations that also choose not to address climate change. The US is the most reasonable potential party since it has rejected Kyoto and has acknowledged that its greenhouse gas emissions will continue to rise with no projected level of stabilization.<sup>25</sup> However, given the fact that many of the other parties to the Kyoto Protocol may not even fulfill their modest commitments in the first commitment period, they are also other potential parties. Additionally, fast-growing states, such as China, are also a potential party. China's greenhouse gas emissions will outstrip those of the United States by 2020, and in current projections by the year 2100 could exceed those of all OECD nations combined.

The potential barriers to a cause of action are the same as those found in the context of any climate change litigation. First, general causation issues may be a potential barrier. In many places the decline of fish stocks or shifts in distribution of fish stocks may be partially attributable to factors other than climate change, including overfishing, habitat destruction, or diminution of prey species. However, this should not be an absolute barrier to a cause of action on the Fish Stocks Agreement for several reasons. First, courts are increasingly employing statistical probability analysis to support a finding of liability where there is a reasonable level of possibility that an environmental stressor may have caused the harm. Also, the Fish Stocks Agreement provides for the wide application of the precautionary approach to protect living marine species. Thus, even under scenarios of uncertainty as provided for in Article 6, the absence of adequate scientific information should not be used as a reason for postponing or failing to take conservation and management measures. To the extent that there is a potential nexus between climate change and the diminution of fish stocks, the very strong provision of the precautionary provisions of the Fish Stocks Agreement should mandate a potential cause of action.

A second potential barrier to a cause of action is specific causation. The target of a climate-related cause of action might argue that climate change is caused by a multitude of anthropogenic sources and nations, and thus any specific harm to fish stocks cannot be directly attributable to a discrete state. This could prove to be an

Agreement on Transboundary Haze Pollution, 10 June, 2002, *available at* [http://www.aseansec.org/pdf/agr\\_haze.pdf](http://www.aseansec.org/pdf/agr_haze.pdf); Convention on Long Range Trans-boundary Air Pollution, 13 Nov, 1979, 1302 U.N.T.S. 271.

25. Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 Dec, 1997, 37 I.L.M. 22.

imposing barrier in terms of damages. However, the argument would not be that germane in cases where a party only seeks to compel the fulfillment of the duty to cooperate under Article 5 in conservation and management measures.

A third potential barrier is the reluctance of dispute resolution bodies to address climate change. In *Massachusetts v. EPA*,<sup>26</sup> Justice Scalia, probably only half jokingly, said that he did not really understand the science, and that is why he did not want to address these issues. We have a lot of fora where there may be problems with doing this. Fortunately, the Fish Stocks Agreement provides for the establishment of special arbitral tribunals, which can include experts in fisheries and climate change issues. Therefore, there may be dispute resolution bodies that are both qualified and not hesitant to address the issue of climate change in the future.

In conclusion, in the best of all worlds we would not take this kind of back door approach to addressing climate change. But in the real world, given the institutional responses, it is both necessary and a potential additional means of pressuring nations that clearly are not willing to do the right thing on their own. The Fish Stocks Agreement, given the substantial nexus between climate change and fisheries, and the clear dispute resolution mechanisms, is one potential viable mechanism for these causes of action in the future.

*Hari Osofsky, Panelist\**

This presentation will discuss the big theoretical picture and how we might locate climate change litigation in a broader understanding of international legal theory. If we think about climate change litigation in context, it is really part of a broader set of civil society efforts to get at the problem. There are many other such efforts, such as those by the Pew Center for Climate Change and the Clinton Global Initiative. When you consider the big picture of climate change litigation, not just the international actions but also the subnational and national cases, these lawsuits form part of a complicated state-corporate regulatory dynamic among a lot

26. *Massachusetts v. EPA*, 126 S.Ct. 2960 (Nov. 13, 2006).

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of different actors. Climate change lawsuits are happening around the world and at many different levels of governance. What they have in common, however, is that they are all conversations through these different fora about what kinds of regulatory efforts are appropriate, whether by the actors who are themselves emitting greenhouse gases or by the government entities that are supposedly regulating those actors.

This presentation will briefly summarize some of my prior work on the geography of climate change litigation and the dilemmas that it poses.<sup>27</sup> Then, I will pose a law and geography taxonomy of international legal theory that might help us think about this problem. Finally I will conclude by thinking about the implications of this taxonomy for an integrated transnational regulatory approach to this problem.<sup>28</sup>

Geography is a discipline that U.S. lawyers and law professors tend to be relatively unfamiliar with, in part because geography was kicked out of many of the elite U.S. universities in the latter half of the 20th century.<sup>29</sup> Geography is a discipline that engages the interrelationship of place, space, and scale as it varies over time. It is a counterpart to history, which looks at the vector of time. Geography unifies a diverse set of topics by focusing on spatiality. And in so doing, it cuts across the academy's traditional divides in many ways, most notably the disciplinary boundaries between the hard sciences, the social sciences, and the humanities, which has traditionally been the discipline's greatest strength and vulnerability.<sup>30</sup>

Many of the core concepts of the discipline are quite contested in the current literature. Helen Couclelis has explained:

Geography too has its basic concepts and they are expressed in common English words: location, place, region, space. Of these, space is probably the most fundamental. But unlike  $E=MC^2$ , space resists definition in formulas or words . . . . [S]pace is both expanse and confine, both what is between things and what contains them, both empty of matter and defined by the presence of matter; space

27. Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH U. L.Q. 1789 (2005).

28. This presentation is based largely on a draft article, Hari M. Osofsky, *The Geography of Climate Change Litigation Part II: Narratives of Nation-States and Thirdspace* (draft on file with author).

29. I have discussed this barrier to interchange in depth in Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 YALE J. INT'L L. \_\_\_ (forthcoming 2007).

30. See Alexander B. Murphy, *Geography's Place in Higher Education in the United States*, 31 J. GEOGRAPHY IN HIGHER EDUC. 21, 122-23 (2007).

is even a period or interval of time!<sup>31</sup>

For the purposes of my presentation, despite the ambiguous nature of all of these terms, I use them in the following way: place refers to physical location; space refers to sociopolitical and legal structures; and scale refers to level of governance. My analysis is thus geographical in the sense that I locate these actors physically, socially, and politically.

All of these cases involve intertwined actors engaged in complicated dynamics. First, they are interacting across scales: the national, subnational, and supranational. Second, they are interacting across branches of government. Finally, they are interacting with many different types of actors, governmental and nongovernmental.

These geographic dynamics represent what I have previously called a modified Westphalian geography, and more recently have explored as a pluralist legal dialogue.<sup>32</sup> If you view these as a modified Westphalian geography in the sense that the nation-states are still at the center but there are a lot of other actors that matter, there are a number of very complicated questions that come up. Basic geopolitical and cultural questions arise that ultimately impact how climate change litigation might be fit into a model of transnational regulatory governance.

On a geopolitical level, which is the focus of my remarks today, I struggled with questions like: (1) To what extent does a law and geography analysis of climate change necessitate a modified Westphalian approach? (2) How might different views of the role of the nation-state interact with a narrative of climate change that engages dynamics among place, space, and time? (3) What, if anything, does the focus on geography add to the way in which leading international legal theory approaches should conceptualize of climate change litigation?

Richard Ford,<sup>33</sup> one of the leading scholars bringing geography into the study of law, wrote a piece about cities and race, in which he talked about opaque and

31. Helen Couclelis, *Location, Place, Region, and Space*, in GEOGRAPHY'S INNER WORLDS: PERVASIVE THEMES IN CONTEMPORARY AMERICAN GEOGRAPHY 215, 215 (Ronald F. Abler, Melvin G. Marcus & Judy M. Olson, eds., Rutgers Univ. Press 1992).

32. See Osofsky, *The Geography of Climate Change Litigation*, *supra* note 27; Hari M. Osofsky, *Climate Change Litigation as Pluralist Legal Dialogue?*, STANFORD ENV. L.J. & STANFORD J. INT'L L. (forthcoming 2007) (Joint Issue). "Westphalian" refers to the treaties that constituted the Peace of Westphalia and provided the basis for the nation-state to be regarded as the primary subject and object of international law. See Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, Preamble, Oct. 24, 1648, available at <http://www.yale.edu/lawweb/avalon/westphal.htm> [hereinafter Peace Treaty].

33. Richard T. Ford, Stanford University School of Law.

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transparent spaces. He basically posited that cities were opaque spaces in the sense that we tend to view them as autonomous and organically created through community; we therefore do not really look inside them. They are, however, also transparent in the sense that they are administrative subdivisions of the state. We view the authority that legitimates them as presumed and, therefore, irrelevant and unworthy of further inquiry. We view cities as transparent in not questioning their legitimacy.<sup>34</sup>

As I played with Richard Ford's ideas, it struck me that there are many parallels between how he describes the city-state and how a Westphalian world view would describe a nation-state. Inspired by his approach, I decided to group international legal theory by how it viewed the nation-state, consider the extent to which the spaces for the nation-state in those theories were "opaque" and "transparent" as he defines the terms, and then explore both what their narratives of climate change litigation might be and how geography might interact with them.<sup>35</sup>

Before presenting my taxonomy, I should note that the way I have grouped international legal theory—namely, around the way it views the nation-state—is not the conventional way of doing so in the current literature in the United States. A more mainstream analysis would focus primarily on the category of theories I call modified Westphalian and divide them into interest-based and norm-based theories.<sup>36</sup>

So here is a quick summary of what I came up with:

Westphalian spaces reflect that dialect of opacity and transparency that Ford describes. The nation-state is an impenetrable unit. Its legitimacy, whether through the power of kings or popular sovereignty, is presumed. Basically climate change litigation would be almost irrelevant under this model, except for the cases occurring at the supra-national level. However, most climate change litigation does not occur at the supra-national level but rather at subnational or national levels. Thus, much of it would be treated as irrelevant under a formal Westphalian model.

Most contemporary international legal theory lives in the second category, modified Westphalian spaces. Basically, these spaces would treat the nation-state as far less opaque, because they deconstruct the nation-state's decision-making in a

34. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1857–60, 1887–1892 (1994).

35. The taxonomy that follows, and my analysis based on it, are described in detail in Osofsky, *The Geography of Climate Change Litigation Part II*, *supra* note 28.

36. See, e.g., FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS (Oona A. Hathway & Harold Hongju Koh, eds., Found. Press 2005).

variety of ways, but still treat it as transparent and, therefore, legitimate. The term transparent may seem a bit jargony. What I mean by that is that modified Westphalians still presume that the nation-state is central and legitimate for the most part. They are just taking apart and looking at how international law is actually made. This group would look at climate change litigation more seriously as part of the international legal process than strict Westphalians would because modified Westphalians would consider how it contributes to the process of decision-making about climate change.

The pluralists diverge from the modified Westphalian approach primarily in that they de-center the nation-state. That line is often very fine. For example, I see someone like Anne-Marie Slaughter as straddling the line, and Paul Berman or Janet Levit as more solidly part of this category. Like modified Westphalians, pluralists treat the nation-state as less opaque, but they also question its transparency somewhat by treating other entities as actual lawmakers. This de-centering has implications for explanations of the legitimacy of international law since currently international law uses the nation-state for that legitimacy. The pluralists would analyze climate change litigation similarly to the modified Westphalians except that they would view it as part of international lawmaking, rather than just part of the nation-state lawmaking. Therefore, geography could intertwine with the pluralists' emphasis on multiple normative communities and identity.

Finally critical approaches are at the other end of the spectrum from strict Westphalian approaches. They are not discussed very much in the mainstream international law discourse, but I think that they are actually important to completing this spectrum. They reject the opacity of the nation-state, not only by deconstructing relevant processes but also more fundamentally because of the problematic social dynamics that infuse it. They also question transparency at the root, noting foundational flaws in the construction of a nation-state and its birth through colonialism, racism, inequality, and subordination.

Climate change litigation would likely be viewed as a positive development by them but fundamentally constrained by current legal structures. Critical international legal scholars actually tend to end up being among those who have drawn the most from law and geography in their work.

This analysis brought me to further dilemmas. I think it is interesting that the move away from Westphalia in most international legal theory is focused more on opacity than on the transparency or legitimacy. In other words, most of international legal scholarship is more willing to look inside the nation-state than

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to question its centrality or legitimacy. This is in part because even though liberal internationalists are troubled by colonialism and racism, they basically think that the current international legal structure helps to create some order that constrains people's worst impulses. Both modified Westphalian and pluralist spaces do not throw out the nation-state in the hope that it can become more legitimate.

Now, if I am right, you get a few more questions. Can a model of transnational regulatory governance emerge that looks inside the opaque and transparent presumptions of the Westphalian model? And, more specifically, can climate change litigation represent an evolving world order that acknowledges the concerns of these narratives?

Any kind of an integrated model must engage the dialectical framing of transnational legal problems and move beyond it. The opaque/transparent grouping is just one example. There are substantive dialectics, such as disciplinary boundaries and divisions between areas of law, like law versus science or environmental versus human rights law. There are structural dialectics that invoke the structure of the international legal system, such as public versus private or sub-national versus national versus international. Finally there are conceptual ones that invoke how law, politics, and power interact in the international legal system, such as synthetic versus organic. The law's treatment of these dialectics has evolved over time and the next evolution needs to move towards more holistic thinking. By critically examining these dialectical spaces, we get a sense of where "international law" needs to move forward.

Any taxonomy of international law cannot help but highlight the schisms. The question is to what extent a law and geography approach to the dialectics underlying international law might help to shape an integrated approach that helps to reframe these schisms. There are clearly limits to what geography can do. People are still going to disagree. But maybe re-framing some of these issues can help to shift the dialogue back to where more commonalities can be built.

And that takes me back to climate change litigation. My hope is that if we play with this specific example of climate change litigation, we might be able to demonstrate what an integrated model might look like and also think constructively about climate policy. My tentative thinking is that the pluralist approaches might be able to form an important bridge. One of the core insights from this theoretical taxonomy is that maybe it does not matter so much whether something fits into the box of international law. For the purpose of understanding climate change litigation, Westphalian and modified Westphalian models might be so busy trying to fit it into these boxes of international law, these nation-state boxes, that they

might not focus on its real role in transnational regulatory governance. On the other end of the spectrum, critical approaches provide real insights into what is wrong with the nation-state boxes, but they often do not provide workable alternatives.

How do we move from the troubled system that we have to one that might not have these deep flaws? Pluralism may be able to help provide movement between these models by providing the insight that transnational regulatory governance may involve co-existing normative communities. In other words, climate change litigation may have traditional international law significance, especially if one is willing to look inside the box of the nation-state. But it also has international legal significance not grounded in the traditional structures of international law. As key actors in climate change litigation are simultaneously playing policy roles, as courts are making decisions with this swirling awareness of the policy context in which they operate, climate change litigation represents a place in which a new model of governance, less boxed in by the existing legal divisions and categories, may emerge.