

VINITA BANTHIA*

Establishing an “International Climate Court”

Abstract	111
Introduction	112
I. Background	115
A. Climate Change Facts	115
B. A Brief History of Climate Change Conferences	116
II. Argument.....	119
A. Evaluating the (Un)Success of International Climate Efforts	119
B. The Details of the Paris Deal	122
C. Limitations of the Paris Deal: A Reality Gap	122
D. Proposal of an International Climate Court: Structure, Governance, and Mandate	124
E. Challenges to Implementing the Court and Proposed Solutions	126
Conclusion	128

ABSTRACT

In light of the United States recently withdrawing its support for the Paris Climate Agreement, and the long history of unsuccessful attempts to achieve a global climate deal, this Article proposes establishing an international climate court. The international climate court would monitor nations’ progress in accomplishing their climate goals and enforce the provisions of the Paris Climate Agreement and any agreement to come after it. This Article first reviews the long history of

* Vinita Banthia is an attorney practicing civil litigation at Blackwell Burke P.A. in Minneapolis, MN. She also serves as the co-chair of the Sierra Club Northstar Chapter’s Clean Air and Renewable Energy Committee (C.A.R.E.). She thanks her firm and her alma mater, the University of Minnesota (especially Professor Charles Nauen), for providing support, guidance, and resources for the drafting of this Article.

countries struggling to arrive at a climate deal and outlines the current state of climate politics. It then discusses the specific need for an enforcement mechanism for climate agreements and offers the establishment of an international climate court as the most viable solution. This Article further proposes specific details for the structure and mandate of the climate court, addressing short-comings and barriers to its establishment. In conclusion, this Article suggests that the establishment of an international climate court would be the most effective method to reduce global environmental harm in a timely manner.

INTRODUCTION

On November 30, 2015, over 50,000 delegates from 190 countries, convened in Paris for the United Nations Conference on Climate Change, also known as the 21st Conference of the Parties (COP).¹ The conference was the most recent effort by all United Nations (U.N.) member countries to draft a plan to reduce human-induced greenhouse gas emissions. In 1972, the first U.N. environmental conference took place in Stockholm, Sweden, where member countries acknowledged a dangerous “greenhouse effect” over the earth and the likelihood that it was caused by human activities.² While member nations at that meeting agreed that a collaborated effort was needed to address global warming, little more was established in Stockholm.³ In the years to follow, more rigorous discussions took place, and stringent emission restrictions were proposed through summits, treaties, and international pressures. Although these efforts

¹ CLIMATE ACTION & UNEP, *Find Out More About COP21*, CLIMATE ACTION & UNEP, <http://www.cop21paris.org/about/cop21> (last visited Mar. 20, 2019).

² On the eve of the Paris COP, delegates received the tragic news of the death of Maurice Strong—the man who headed the first international climate conference in 1972 and is considered the father of the international climate movement. The timing of his death served as a reminder to world leaders of the on-going long road that climate negotiations have been, and may have motivated delegates to work hard to come to an agreement. Alan Neuhauser, *Primer: The Paris Climate Summit*, U.S. NEWS (Nov. 30, 2015, 12:01AM EST), <https://www.usnews.com/news/articles/2015/11/30/primer-the-un-climate-summit-in-paris>.

³ See generally A STUDENT’S GUIDE TO GLOBAL CLIMATE CHANGE, EPA, <https://www3.epa.gov/climatechange/kids/index.html> (last visited Mar. 20Jan 26, 2019).

have had mixed success, there has been growing consensus that emission levels are increasing internationally.⁴

When this Article was written, three years after the 2015 United Nations Climate Change Conference in Paris, the road to an international climate agreement continued to be a bumpy one. Developing and implementing an emission reduction plan involves complex political, social, and scientific pressures. For example, although Canada ratified and played a key role in negotiating the Kyoto Protocol (the Protocol) under a liberal government in 2002, it later backed out of the Protocol under the leadership of a conservative, oil-and-gas supporting government.⁵ Most recently, the United States withdrew from the Paris Agreement (the Agreement) under the presidency of Donald Trump, after supporting the Agreement in 2015 under Barack Obama.⁶

Unlike other political and social issues facing today’s world, climate change is unique in that a successful solution needs to be truly global. Because climate change involves greenhouse gases being mixed in the air, pollution from one region spreads and affects the environment of the whole world. Large amounts of greenhouse gases, such as carbon dioxide and methane, trap heat close to the earth’s surface leading to “global warming” and other climate changes throughout the world.⁷ Consequently, any deal to combat climate change must be international to be effective. Global warming and other effects of greenhouse gases have led to numerous environmental consequences around the world, including rising sea levels, unpredictable precipitation and weather patterns, and more extreme and frequent natural disasters.⁸ These changes in biodiversity and global temperature patterns threaten the availability of natural resources for all human activities.⁹

⁴ JOS G.J. OLIVIER ET AL., TRENDS IN GLOBAL CO₂ EMISSIONS: 2014 REPORT, NETH. ENVTL. ASSESSMENT AGENCY 4–5 (2014), http://edgar.jrc.ec.europa.eu/news_docs/jrc-2014-trends-in-global-co2-emissions-2014-report-93171.pdf.

⁵ *Canada and Kyoto: A History of the Country’s Involvement and Its Greenhouse Gas Emissions*, CBC NEWS, <http://www.cbc.ca/news2/interactives/canada-kyoto/> (last updated Dec. 12, 2011).

⁶ Jillian Ambrose, *Donald Trump Sends Barack Obama’s Climate Change Rules Up in Smoke*, THE TELEGRAPH (Aug. 21, 2018, 5:08 PM), <https://www.telegraph.co.uk/business/2018/08/21/donald-trump-sends-barack-obamas-climate-change-rules-smoke/>.

⁷ William Collins et al., *The Physical Science Behind Climate Change*, SCI. AM. (Oct. 6, 2008), <http://www.scientificamerican.com/article/science-behind-climate-change/>.

⁸ See generally NAT’L AERONAUTICS & SPACE ADMIN. (NASA), *How Climate Is Changing*, <http://climate.nasa.gov/effects/> (last updated Mar. 21, 2019).

⁹ *Id.*

The environmental impacts of climate change affect developing and least developed nations most severely, as these countries have larger and more vulnerable populations, fewer mitigations technologies, and more resource-based economies.¹⁰ Developing nations are more dependent on stable weather conditions to earn a living, grow food, and avoid sickness.¹¹ While the poorest nations often face the harshest consequences of global warming, they are not the biggest producers of greenhouse gas emissions.¹² In addition, developing nations often lack influence at international climate meetings, and are therefore unable to pressure bigger, polluting nations to adapt and adhere to strict environmental standards.¹³ For example, while the United States is the largest producer of greenhouse gases, it was one of only three countries not to ratify the Protocol.¹⁴

Despite over twenty years of failed negotiations, delegates meeting in Paris were optimistic about drafting an agreement that all member nations would accept.¹⁵ And, for a while, it seemed that the dream had come true: for the first time, the COP culminated in a legally binding climate deal to which all members had pledged support.¹⁶

The Agreement calls on nations to set emission reduction standards that will hold global temperatures to 1.5°C above pre-industrial levels.¹⁷ In addition, member parties promise to raise \$100 billion a year by 2020 to help poor countries explore newer sources of energy and adapt their economies to comply with emission reductions.¹⁸

¹⁰ *A Bad Climate for Development*, THE ECONOMIST (Sept. 17, 2009), <http://www.economist.com/node/14447171>.

¹¹ See generally M. Monirul Qader Mirza, *Climate Change and Extreme Weather Events: Can Developing Countries Adapt?*, 3 CLIMATE POL'Y 233 (2003).

¹² See generally Union of Concerned Scientists, *Each Country's Share of CO2 Emissions*, UNION OF CONCERNED SCIENTISTS, <https://www.ucsusa.org/global-warming/science-and-impacts/science/each-countrys-share-of-co2.html> (last updated Oct. 11, 2018).

¹³ See Brian Merchant, *The Only Nations That Haven't Signed 1997's Global Climate Treaty Are Afghanistan, Sudan & the U.S.A.*, TREE HUGGER (November 28, 2011), <http://www.treehugger.com/climate-change/only-nations-havent-signed-1997s-global-climate-treaty-are-afghanistan-us.html>.

¹⁴ *Id.*

¹⁵ *The Road to a Paris Climate Deal*, N.Y. TIMES (Dec. 4, 2015), <http://www.nytimes.com/interactive/projects/cp/climate/2015-paris-climate-talks/at-climate-talks-three-letters-almost-sunk-the-deal>.

¹⁶ *Id.*

¹⁷ John Vidal et al., *World Leaders Hail Paris Climate Deal as "Major Leap for Mankind"*, THE GUARDIAN (Dec. 12, 2015, 7:00 PM), <http://www.theguardian.com/environment/2015/dec/13/world-leaders-hail-paris-climate-deal>.

¹⁸ *Id.*

Finally, the Agreement aims to achieve zero net emissions globally within the century.¹⁹

The Agreement was applauded as one of history’s greatest diplomatic accomplishments because all 195 member countries finally cooperated and achieved an emission reduction mechanism. While it was a strong step in the right direction, the Agreement represented a delicate balance of diplomacy, politics, and trade-offs, putting it at risk of imploding with the first change of the international landscape. The United States’ withdrawal from the Agreement serves as a testament to the instability of any international climate agreement, and the need for an enforcement mechanism for all agreements. This Article argues that it is important to establish an international climate court that will enforce and implement the Agreement and any subsequent agreements. The climate court would ensure that nations uphold their commitments to current and future climate agreements regardless of changes in governments, economic conditions, or political relations.

I

BACKGROUND

A. Climate Change Facts

There is undeniable evidence that the world is getting warmer. The world’s temperature increased by 1.4°F over the last decade, and the ten-year period from 2001 to 2010 was the warmest in history.²⁰ This rise in temperature is correlated with human-produced carbon dioxide and other greenhouse gases, which trap heat within the earth’s atmosphere.²¹ Rising temperature is causing several adverse environmental impacts. For example, sea levels rose an average of 6.7 inches in the last century, with most of this rise concentrated in the last decade. Ocean tops (about 2,300 feet deep) have warmed 0.302°F since 1969.²² And, ice sheets and icebergs have shrunk in Greenland, Antarctica, and the Arctic.²³ The temperature rise has led to more frequent and extreme heat waves, rainfalls, floods, droughts, and

¹⁹ *Id.*

²⁰ *Climate Change: How Do We Know?*, NASA, <https://climate.nasa.gov/evidence/> (last visited Mar. 26, 2019).

²¹ *Id.*

²² *Id.*

²³ *Id.*

hurricanes.²⁴ And even when climate change does not necessarily cause natural disasters, it does exacerbate them. These not-so-natural events have depleted natural wildlife habitats and have led to rapid and widespread extinction.²⁵ Eventually, the destruction of certain species and natural landscapes will cause imbalances in ecosystems, deplete sources of fresh water, accelerate the spread of disease, and interfere with everyday human activity.²⁶

B. A Brief History of Climate Change Conferences

In 1972, after years of global pressure to address the environmental impacts of human activity, the U.N. initiated the world's first climate talks—the UN Conference on the Human Environment.²⁷ Maurice Strong served as the secretary general for the meeting, which culminated in the first international climate change agreement, the Declaration of the United Nations Conference on the Human Environment. The declaration acknowledged that “[a] point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment”²⁸ The declaration also set principles to guide governments in the “preservation and enhancement of the environment,” and offered financial and organizational advice.²⁹ It also gave birth to the United Nations Environment Programme (UNEP), to catalyze governmental implementation of environmental protection plans.³⁰ However, the UNEP lacked legal enforcement or implementation power, and any recommended action was ultimately left up to governments.³¹

In 1988, the UNEP and the World Meteorological Organization (WMO) created the Intergovernmental Panel on Climate Change (IPCC) to gather “the scientific, technical and socio-economic

²⁴ *Effects of Global Warming*, NAT'L GEOGRAPHIC, <http://environment.nationalgeographic.com/environment/global-warming/gw-effects/> (last visited Mar. 26, 2019).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Mark Allan Gray, *The United Nations Environment Programme: An Assessment*, 20 ENVTL. L. 291, 293 (1990).

²⁸ U.N. Conference on Environment and Development, *Stockholm Declaration on Environment and Development*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

²⁹ Gray, *supra* note 27, at 310.

³⁰ *Id.*

³¹ *See id.* at 312.

information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts, and options for adaptation and mitigation.”³² The IPCC ensures that U.N. climate change activities are in line with scientific understanding of climate change and that the U.N. actions incorporate the latest and most effective technologies to curb climate change.³³

Following the establishment of the IPCC, the international community reconvened, in 1992 at the Earth Summit in Rio de Janeiro, to launch a united action plan against global climate change.³⁴ The Summit ended with the finalization of the U.N. Framework Convention on Climate Change (UNFCCC), an international treaty “to stabilize greenhouse gas concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”³⁵

The 1994 UNFCCC created the Conference of the Parties (COP) as its main review body.³⁶ The COP is entrusted with promoting effective implementation of the UNFCCC and is responsible for facilitating information sharing between parties, coordinating climate measures by multiple parties, developing methods to track levels of greenhouse gases, and evaluating the effectiveness of those measures.³⁷ The parties held the first COP in Germany in 1995, which set the framework for the drafting of the Protocol at the third COP held in Kyoto, Japan, in 1997.³⁸ The Protocol was finally enforced in February 2005 and legally bound industrialized countries that ratified the Protocol to reduce emissions by 5.2% of 1990 levels by 2012.³⁹

After ratification of the Protocol, the parties met in 2007 for the thirteenth COP and drafted the Bali Road Map, which included the Bali Action Plan.⁴⁰ The Bali Action Plan renewed the goal of addressing

³² *Principles Governing IPCC Work*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <https://www.ipcc.ch/site/assets/uploads/2018/09/ipcc-principles.pdf> (last visited Mar. 26, 2019).

³³ *Id.*

³⁴ United Nations Framework Convention on Climate Change art. 2, Mar. 21, 1994, treaty source [hereinafter UNFCCC].

³⁵ *Id.*

³⁶ *History of UN Climate Talks*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, <http://www.c2es.org/content/history-of-un-climate-talks> (last visited Mar. 25, 2019).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Bali Road Map Intro*, U.N. CLIMATE CHANGE, <https://unfccc.int/process/conferences/the-big-picture/milestones/bali-road-map> (last visited Mar. 25, 2019).

climate change with a common vision, mitigation strategy, adaptation, technology, and financing mechanism.⁴¹ The Plan was followed by the Copenhagen Accord (the Accord), which was drafted and signed at the fifteenth COP in 2009.⁴² The Accord involved more non-binding emission reduction standards for industrialized nations and called for developing nations to take “nationally appropriate mitigation actions.”⁴³

In 2010, the sixteenth COP took place in Mexico and culminated in the Cancun Agreements.⁴⁴ At the sixteenth COP, countries made their previous emission pledges official, which made the Cancun Agreement the largest and most ambitious agreement to reduce emissions to date.⁴⁵ Moreover, the nations agreed to hold each other mutually accountable. The Accord also laid out comprehensive mechanisms for developed countries to assist developing countries with mitigation actions.⁴⁶ In 2011, recognizing the need for a new, legally binding agreement that extends beyond 2020, world governments held the seventeenth COP and drafted the Durban Platform for Enhanced Action.⁴⁷ In 2012—the original due date of the Protocol—parties realized their lack of progress toward the Protocol’s goals and drafted an amendment to the Protocol, known as the Doha Amendment (the Amendment).⁴⁸ The Amendment raised the emission reduction requirement to eighteen percent below 1990 levels by 2020. The parties also expressed the need for a universal climate change agreement by 2015. And hence, the 21st COP took place in Paris in 2015 with hopes to finally establish an international climate agreement.⁴⁹

⁴¹ *Id.*

⁴² *COP 15 Copenhagen*, CTR. C2ES: CTR. FOR CLIMATE CHANGE & ENERGY SOLUTIONS, <http://www.c2es.org/content/cop-15-copenhagen/> (last visited Mar. 25, 2019).

⁴³ *Id.*

⁴⁴ *Cancun Climate Change Conference – November 2010 – Meetings Page*, U.N. CLIMATE CHANGE, <https://unfccc.int/event/cancun-climate-change-conference-november-2010-meetings-page> (last visited Mar. 25, 2019).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Durban Climate Change Conference – November 2011 – Process and Meetings Page*, U.N. CLIMATE CHANGE, <https://unfccc.int/process-and-meetings/conferences/past-conferences/durban-climate-change-conference-november-2011/durban-climate-change-conference-november-2011> (last visited Mar. 25, 2019).

⁴⁸ Doha Amendment to the Kyoto Protocol, C.N.718.2012, art. 3, para. 1 bis, Dec. 8, 2012, <https://treaties.un.org/doc/Publication/CN/2012/CN.718.2012-Eng.pdf>.

⁴⁹ *Id.*

II ARGUMENT

A. Evaluating the (Un)Success of International Climate Efforts

Although the Protocol was drafted in 1997 and contained goals for countries to meet by 2012, it was not ratified until 2005—almost half way into the action term.⁵⁰ While certain European countries were on track to meet or exceed their goals during this period, other countries, such as China and the United States, had such high levels of emissions during this time that they completely obliterated any reductions by other countries.⁵¹ The United States did not ratify the Protocol and continued to emit greenhouse gases at levels higher than any other country, setting a poor precedent for the rest of the world.⁵²

Developing countries were excluded from the reduction targets because they have contributed comparatively less to the global rise in greenhouse gases.⁵³ However, many developing countries, especially emerging economies, such as India and China, currently employ older, less energy-efficient technologies that are increasing pollution levels in those regions.⁵⁴ The Common but Differentiated Responsibilities (CBDR) concept first gained legal foothold in Principle 7 of the Rio Declaration of 1992.⁵⁵ It states:

In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.⁵⁶

At Rio, the United States stated that it “does not accept any interpretation of Principle 7 that would imply a recognition or acceptance by the United States of . . . any diminution of the

⁵⁰ Robert Henson, *What Is the Kyoto Protocol and Has It Made Any Difference?*, THE GUARDIAN (Mar. 11, 2011, 5:45 A.M.), <http://www.theguardian.com/environment/2011/mar/11/kyoto-protocol>.

⁵¹ *Id.*

⁵² Gregor Erbach, *Doha Amendment to the Kyoto Protocol*, EUR. PARLIAMENTARY RES. SERV. BLOG (June 4, 2015), <http://www.europarl.europa.eu/EPRS/EPRS-AaG-559475-Doha-Agreement-Kyoto-Protocol-FINAL.pdf>.

⁵³ U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

responsibilities of developing countries under international law.”⁵⁷ On the contrary, developing countries argue that their economic growth depends on the exploitation of resources, and it is unfair to expect them to invest in costly energy-efficient technologies when other industrialized nations did not face similar restrictions during their development.⁵⁸ This ongoing debate, which concerns the level of responsibility developing nations should take to reduce emissions, is a key obstacle to any international agreement.⁵⁹

After creation of the Doha Amendment to the Protocol, key polluters, such as the United States, Russia, Canada, Japan, and some developing countries, again did not submit commitments.⁶⁰ With only forty-one countries ratifying it, the Amendment was never enforced.⁶¹

The 15th COP in Copenhagen was a similar story. The conference was marked with tensions, accusations, and embarrassing inaction, until the United States and the BASIC countries (Brazil, South Africa, India, and China) hashed out a weak last-minute agreement. While the Copenhagen Accord included specific emission reduction targets for industrialized countries, it did not include any legal framework to enforce these guidelines.⁶² Developed countries agreed to provide \$100 billion a year by 2020 to developing countries for climate improvement, but no implementation strategy was developed, and countries continue to disagree on the amount and sourcing of the funds.⁶³

The same obstacles to a climate deal reoccurred at almost all climate meetings. Many key parties, such as the United States and the BASIC

⁵⁷ U.S. interpretive statement on World Summit on Sustainable Development declaration, 2002 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW, ch. 13, §A(1)(b), at 768-69.

⁵⁸ See Carbon Brief Staff, *The UN climate talks have a responsibility problem*, CARBON BRIEF (Nov. 20, 2013, 2:30 P.M.), <http://www.carbonbrief.org/the-un-climate-talks-have-a-responsibility-problem>.

⁵⁹ See Shelley Ranii, *Do Common but Differentiated Responsibilities Belong in the Post-2015 SDGs?*, CTR. ON INT’L COOPERATION (Mar. 21, 2014), <http://cic.nyu.edu/blog/global-development/do-common-differentiated-responsibilities-belong-post-2015-sdgs>.

⁶⁰ Elena Kosolapova, *August Update on Doha Amendment Ratification*, INT’L INST. FOR SUSTAINABLE DEV. (Aug. 20, 2015), <http://climate-l.iisd.org/news/august-update-on-doha-amendment-ratification/> (stating that at least three-quarters of the nations that are party to the Kyoto Protocol needed to sign the Doha Amendment for it to go into effect.)

⁶¹ *Id.*

⁶² U.N. Framework Convention on Climate Change, Conference of the Parties, Fifteenth Session, Draft Decision -/CP.15, Copenhagen Accord, U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009), <http://unfccc.int/resource/docs/2009/cop15/eng/107.pdf>.

⁶³ *Id.*

countries, were reluctant to approve a predetermined, legally binding, emission reduction requirement. These countries advocated instead for a non-legally binding, self-directed program of emission reduction that would be informally tracked and enforced.⁶⁴ Other countries, such as countries of the European Union, advocated for a more heavy-handed approach. They argued that a watered-down agreement will fail to pressure nations to take necessary measures to reduce emissions.⁶⁵ The European Union often points to the Copenhagen Accord as evidence of the failure of a weak deal to persuade nations to take efforts to reduce emissions.⁶⁶

Despite years of climate conferences, negotiations, and international agreements, nations failed to reach a deal that is firm enough to address the issues, realistic enough to be implemented, and thorough enough to be effective. Even when diplomats understand the importance of climate change action, bureaucracies prevent timely approval and ratification of treaties. For example, the President of the United States cannot pledge emission reductions without congressional approval.⁶⁷ This required congressional approval often slows negotiations and prevents the President from speaking on behalf of the entire government.⁶⁸

Considering that any deal will be effectively worthless without the support of high-emitting countries such as the United States and Canada, delegates at the 20th COP proposed a deal that would allow discretion for countries to set their own emission reduction goals. Under this discretionary plan, countries will not have fixed deadlines for when their goal must be submitted to the COP and will not have an objective standard to evaluate whether each goal is appropriate for its country's stage of development.⁶⁹ This lack of an enforcement mechanism is perhaps the most serious challenge to implementing any international climate deal. One solution is to establish an international climate court to enforce the Agreement and any future agreements. This

⁶⁴ See Vinita Banthia, *UN Countries Strive to Develop Legal Framework for Climate Deal*, MINN. J.L., SCI. & TECH.: LAWS&CI FORUM (Oct. 28, 2015), <https://editions.lib.umn.edu/mjlst/un-countries-strive-to-develop-legal-framework-for-climate-deal/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Why Did Copenhagen Fail to Deliver a Climate Deal?*, BBC NEWS (Dec. 22, 2009, 16:33 GMT), <http://news.bbc.co.uk/2/hi/science/nature/8426835.stm>.

⁶⁸ *Id.*

⁶⁹ Oren Cass, *Why the Paris Climate Deal is Meaningless*, POLITICO (Nov. 28, 2015, 9:57 AM EST), <http://www.politico.com/agenda/story/2015/11/why-the-paris-climate-deal-is-meaningless-000326>.

court could be referred to as either the “International Climate Court,” or “International Tribunal for Climate Justice,” and would monitor the progress of all nations and advise them accordingly. It would ensure that the agreement is interpreted and applied fairly for all countries. If a nation is in violation the agreement, the court will be able to administer a judgment against the nation and employ sanctions.

B. The Details of the Paris Deal

The Agreement calls on nations to “[hold] the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels. . . .”⁷⁰ Unlike previous targets, this target in the Agreement is scientifically backed by the IPCC as the temperature reduction needed to avoid “‘catastrophic’ impacts.”⁷¹ Furthermore, developed nations are called upon to contribute at least \$100 billion a year to developing countries to assist them in transforming their technologies and economies to embrace lower-emitting options.⁷²

C. Limitations of the Paris Deal: A Reality Gap

The Agreement was originally signed by 195 countries, but in order to be legally binding, 55 countries covering at least 55% of global emissions had to ratify it before 2020.⁷³ This condition was met by the end of 2016, and the Agreement went into effect by November 4, 2016.⁷⁴ However, as many had predicted, the optimism of its ratification may once again prove to be short-lived.⁷⁵ Under the Agreement, the United States had pledged to cut its emissions between 26% and 28% below 2005 levels by 2025, and commit close to \$3

⁷⁰ U.N. Framework on Convention Climate Change, Conference of the Parties, Twenty-first session, Adoption of the Paris Agreement, ¶ 54, U.N. Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015), <http://unfccc.int/resource/docs/2015/cop21/eng/109.pdf>.

⁷¹ Peter Fairley, *How the Paris Climate Deal Happened and Why it Matters*, IEEE SPECTRUM (Dec. 16, 2015, 16:59 GMT), <http://spectrum.ieee.org/energywise/energy/policy/paris-agreement-expands-global-ambition-on-climate-action>.

⁷² *Id.*

⁷³ John D. Sutter, *Hooray for the Paris Climate Agreement! Now What?*, CNN (Dec. 14, 2015 11:57 AM EST), <http://www.cnn.com/2015/12/14/opinions/sutter-cop21-climate-5-things/>.

⁷⁴ *Paris Agreement Ratification Tracker*, CLIMATE ANALYTICS, <https://climateanalytics.org/briefings/ratification-tracker/> (last visited Mar. 20, 2019).

⁷⁵ See Eric J. Lyman, *Paris Climate Deal: Hard Work Comes Next*, USA TODAY (Dec. 14, 2015, 3:07 PM EST), <http://www.usatoday.com/story/news/world/2015/12/13/paris-climate-deal-what-comes-next/77248106/>.

billion in aid for developing countries.⁷⁶ And as the world’s second largest polluter, the United States has seriously threatened the success of the Agreement by withdrawing its support.

A further limitation of the Agreement is that parties will be independently deciding emission reduction standards. There is no minimum reduction expected, but countries are expected to reconvene every five years to tighten their reduction plans.⁷⁷ Additionally, while the Agreement calls for a 2°C limit on temperature rises, the emission reductions proposed by individual countries so far is only expected to meet half this amount.⁷⁸ This inherent discrepancy in the Agreement further points to a gap between its expectations and reality.

Furthermore, the call for developed nations to fund developing nations is not “legally binding” because it is only in the preamble of the Agreement. Although developing countries fought long for a binding fund from developed countries, they eventually relented and settled for a preamble promise.⁷⁹ Oil and gas backed economies, such as Russia’s and Saudi Arabia’s, were convinced by Angela Merkel of Germany and former United States President Barack Obama to accept a legally binding emission reduction mandate.⁸⁰ Therefore, the final document is a result of extensive negotiation and compromise, which makes it more likely for members to deviate from its mandate.⁸¹

Finally, although the Agreement is “legally-binding,” there are very few mechanisms of enforcement. The thirty-one-page Agreement does not provide for any official consequences for countries that fail to meet their emission reduction goals. Instead, the Agreement will be enforced through international pressure and shaming.⁸² This method may be effective as countries are afraid of “looking bad” to trade partners and

⁷⁶ Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

⁷⁷ Coral Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), <http://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html>.

⁷⁸ *Id.*

⁷⁹ Danny Lewis, *Four Things to Know About the Paris Climate Deal*, SMITHSONIAN.COM (Dec. 15, 2015), <https://www.smithsonianmag.com/smart-news/four-things-know-about-paris-climate-deal-180957547/>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Samantha Page, *No, The Paris Climate Agreement Isn’t Binding. Here’s Why That Doesn’t Matter.*, THINK PROGRESS (Dec. 14, 2015, 9:30 PM), <http://thinkprogress.org/climate/2015/12/14/3731715/paris-agreement-is-an-actual-agreement/>.

allies, but this method is not guaranteed to ensure compliance with climate treaties at all costs. In addition, richer nations have more power to pressure poorer nations, which is leading to an imbalance of responsibilities. Therefore, a more effective enforcement method is needed to ensure compliance with the Agreement and any agreement that comes after it.⁸³

D. Proposal of an International Climate Court: Structure, Governance, and Mandate

At the pre-Paris meeting in Bonn, Germany, the delegation from Bolivia recommended establishing a climate court as part of a deal reached in Paris. The proposal made it into the draft document to be discussed in Paris and read as follows:

An International Tribunal of Climate Justice . . . is hereby established to address cases of non-compliance [with] the commitments of developed country Parties on mitigation, adaptation, provision of finance, technology development and transfer . . . , capacity-building, and transparency of action and support, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance.⁸⁴

The proposal was intended as a mechanism to hold industrialized countries accountable for their obligations to developing nations under the deal.⁸⁵ These obligations include pledges of funding, as well as emission reductions.⁸⁶ As such, the court would only have enforcement jurisdiction over developed countries that have submitted commitments and developing countries “that have made economy wide quantified emission reduction commitments, with respect to their

⁸³ See generally Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 WASH. L. REV. 197, 244 (2010).

⁸⁴ Ad Hoc Working Group on the Durban Platform for Enhanced Action, Second Session, Part Eleven, *Draft Agreement and Draft Decision on Workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action*, art. 11(1), at 19, (Oct. 20, 2015, 4:00 AM) http://unfccc.int/files/adaptation/application/pdf/mechanical_light_editing.pdf (alteration in original) (internal brackets in original omitted) [hereinafter *Draft Agreement of Ad Hoc Working Group*].

⁸⁵ Sara Malm, *UN Planning an “International Tribunal of Climate Justice” Which Would Allow Nations to Take Developed Countries to Court*, DAILY MAIL (Nov. 2, 2015 10:40 EST), <http://www.dailymail.co.uk/news/article-3300366/UN-planning-international-tribunal-climate-justice-allow-nations-developed-countries-court.html>.

⁸⁶ *Id.*

commitments on mitigation and support.”⁸⁷ The lawsuits would be brought by developing countries.

However, the proposal of the international climate court was not ultimately adopted in the final agreement in Paris. Hence, for the proposal to be adopted, it would need to be included in a separate U.N. resolution or as an amendment to the Paris Agreement. One-third of member nations would have to sign the amendment for it to have jurisdiction and avoid infringing state sovereignty.⁸⁸ In order for the court to hold fair and consistent trials, the amendment should outline specific procedures and the mandate of the court. It should establish judicial procedures that the court will follow, as well as the elements and standards the court will apply when it makes a decision.

The document must also lay out consequences and sanctions for specific violations. For example, consequences could involve trade sanctions. To be most effective, the court should work in coordination with other U.N. bodies, such as the World Trade Organization, which has the power to impose tariffs and other economic sanctions to countries that produce products in environmentally unfriendly ways.⁸⁹ Depending on the level of deviation, the violating country may also face fines, increased reduction requirements for the following emission review cycle, or be required to provide a new environmental technology to a poorer nation.

As per the original proposal, the court would function as somewhat of a committee.⁹⁰ The committee would have two branches—a compliance branch and an implementation branch. In addition, the compliance mechanism would be further divided into two branches—an enforcement branch and a facilitative branch.⁹¹ While the enforcement branch would mainly be used against developed countries, the court would also have “a facilitative branch for developing country Parties,” which would assist with mitigation actions as opposed to punish non-compliance.⁹² The draft also noted that a decision body of the court “shall be based on equitable geographical representation, and

⁸⁷ Draft Agreement of Ad Hoc Working Group, *supra* note 84, art. 11, “Option II: 2ter,” at 20.

⁸⁸ *Id.*

⁸⁹ See Juan Cole, *After the COP21 Paris Climate Accord, What We Need is an Int’l Climate Court*, INFORMED COMMENT (Dec. 13, 2015), <http://www.juancole.com/2015/12/after-climate-accord.html>.

⁹⁰ Draft Agreement of Ad Hoc Working Group, *supra* note 84, at 24.

⁹¹ *Id.*

⁹² *Id.*

to include representation of least developed countries and small-island developing States.⁹³ The body shall comprise twelve members. Decisions of the Compliance Committee shall be made by consensus where possible and, as a last resort, by a two-thirds majority.”⁹⁴

Because countries are responsible for setting their own emission reduction standards, issues will arise if nations take advantage of the flexibility in the deal and do not set high enough standards that are in accordance with their technological capacities. High-polluting, advanced countries may set low reduction goals and leave a high burden on poorer, developing nations to pick up the slack. To counter this impact, the compliance branch of the court could offer declaratory judgments to nations that wish to evaluate their standards. The facilitative branch could offer evaluations regarding the progress nations are making. Also, the implementation branch will advise nation decision makers about setting appropriate targets based on their level of development.

Unlike in the initial proposal for the court, the court should not only have jurisdiction over developed nations but also developing nations. However, since developing nations have different emission reduction standards, the court would apply different standards when evaluating developing countries and developed countries. In addition, sanctions against developing nations would be limited and proportional to the countries' economic stature.

E. Challenges to Implementing the Court and Proposed Solutions

The first reason why the international climate court proposal was not ultimately included in the Agreement is that nations are reluctant to accept a rigid governance structure, including predetermined emission reduction requirements, and the threat of sanctions for non-compliance.⁹⁵ Therefore, one major obstacle to implementing the court will be getting countries to ratify it. While many developing countries that do not have stringent emission reduction expectations, such as China and India, were strongly in favor of an international climate court, the United States was opposed to the plan, for fear of being one of the first industrialized nations that will be dragged to court.⁹⁶

⁹³ *Id.* at 22.

⁹⁴ *Id.*

⁹⁵ See Malm, *supra* note 85.

⁹⁶ *Id.*

Therefore, the court could be built on the model of other international courts such as the International Court of Arbitration and the International Criminal Court, which have grown in importance and popularity since their creation.⁹⁷ These courts are successful because they offer all nations a mutual and neutral platform for justice.⁹⁸ While each country will be at risk of being sued, each country will also be able to take other, noncomplying nations to court. And, because there is a joint interest in reducing emissions, nations will likely eventually agree to hold each other mutually accountable. Furthermore, the reluctance of most high-polluting nations is precisely why the court is needed. While initial lawsuits may burden developed nations, allowing nations to bypass their emission requirements will perpetuate the decades-long failure of climate deals. Because nations are allowed to set their own emission reduction goals, the court will only be holding each nation to its own standards.

Concerns have also emerged over the loss of national sovereignty and self-governance of nations if the United Nations is afforded the power to punish nations that do not comply with international treaties. For example, some Americans have expressed concerns that the United Nations will be able to bypass Congress, take the President to court, and force the United States to ratify an agreement.⁹⁹ However, the United Nations will not have the power to force a country to ratify the climate court Amendment to the Agreement without the country agreeing to be a party to the Agreement first. This is how previous international courts have been implemented, which have required nations to agree to implementation of the court.¹⁰⁰ However, if a dispute comes up between nations that are not members of the amendment, and if both nations agree to use the court at the time of the dispute, they will be able to. In addition, countries will have the option of only ratifying parts of the amendment. For example, a country may initially only want to accept the implementation branch, and not sign on to the compliance

⁹⁷ See Thomas H. Oehmke, *Arbitrating International Claims—At Home and Abroad*, 81 AM. JUR. TRIALS 1, § 4 (2001).

⁹⁸ U.N. Commission on International Trade Law (UNCITRAL), *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 1958, U.N.; *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (July 1, 2002), <https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx>.

⁹⁹ Leo Hohmann, *U.N. Planning Court to Judge U.S. for “Climate Justice”*, WND (Nov. 1, 2015, 3:50 PM), <http://www.wnd.com/2015/11/u-n-tribunal-to-judge-u-s-for-climate-debt/>.

¹⁰⁰ *Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/en/jurisdiction> (last visited Mar. 25, 2019).

branch, which holds the enforcement authority. One reason international arbitration courts have been successful is because they are flexible, and all countries have a say in the location, procedure, and mechanism of proceedings.¹⁰¹

CONCLUSION

Although flexibility will water down the amendment, the court will still have immense value in incentivizing nations to comply with the Agreement. Regardless, establishing an international climate court will be a lengthy and challenging undertaking. Issues of national sovereignty, fairness, resources, and implementation pose obstacles to the creation of a climate court, even after member countries agree to sign an amendment to the Agreement. However, if the Agreement is to be enforced in a meaningful way, it is important that countries, especially richer, developed countries, face some tangible consequences for non-compliance. If the country leaders come together once again, as they did in Paris, they will be able to come up with a balanced, strategic plan to enforce the Agreement that they have worked on for too long to see go to waste.

¹⁰¹ See generally LATHAM & WATKINS, GUIDE TO INTERNATIONAL ARBITRATION (2015).