Inter-state Climate Change Litigation: 'Neither a Chimera nor a Panacea'

*Annalisa Savaresi**

The law of nations is neither a chimera nor a panacea,
but just one institution amongst others that we have at our disposal
for the building up of a saner international order.

James Leslie Brierly, *Brierly's Law of Nations:*
An Introduction to the Role of International Law in International Relations
(OUP Oxford 2012) v.

I. INTRODUCTION

In the face of the difficulties of international climate diplomacy, 'the invisible college of international lawyers' has recently been called upon to devote more efforts 'towards reviving the blunt edge of climate change-based national, regional, or international litigation, adjudication, and arbitration towards reaching sufficiency of climate pledges'.[1]

While earlier contributions in this volume focus on national and regional developments, this chapter specifically introduces the matter of international litigation concerning climate change, focusing in particular on inter-state litigation. The literature typically distinguishes between 'proactive' litigation – initiated in order to engender policy change, for example, by requesting the adoption or reform of legislation; and 'reactive' litigation – initiated to resist such change, for example, by challenging the adoption of new or reformed legislation.[2] It is furthermore possible to distinguish between litigation instigated by/against state and non-state actors.

Reactive international climate change litigation has long been common, especially in the area of investment law. Non-state actors have resorted to dispute settlement mechanisms, relying on investment treaties, for example to resist reforms of renewable energy subsidies, with increasing frequency and alternate fortunes.[3] Instead, proactive inter-state climate change litigation has hardly happened. A few non-state actors – most saliently indigenous peoples and children – have resorted to international human rights mechanisms to complain about multiple

* Annalisa Savaresi, Senior Lecturer in Law, Stirling University, UK. Annalisa.savaresi@stir.ac.uk. The author is grateful to Alan Boyle, Jacques Hartmann, Paolo Palchetti and Margaretha Wewerinke-Singh for helpful exchanges on earlier drafts of this piece. The usual disclaimers apply.

1 Diane Desierto, 'EJIL: Talk! – COP25 Negotiations Fail: Can Climate Change Litigation, Adjudication, and/or Arbitration Compel States to Act Faster to Implement Climate Obligations?' (2019) <https://www.ejiltalk.org/cop25-negotiations-fail-can-climate-change-litigation-adjudication-and-or-arbitration-compel-states-to-act-faster-to-implement-climate-obligations/> accessed 23 December 2019.

2 See for example: Christopher James Hilson, 'Climate Change Litigation: An Explanatory Approach (or Bringing Grievance Back In)' in F Fracchia and M Occhiena (eds), *Editoriale Scientifica, Naples* (Editoriale Scientifica 2010) 421; Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation* (Cambridge University Press 2015) 30–31.

3 See for example Blusun S.A. and Others v Italy (2017); Charanne and Construction Investments v Spain (2017). Freya Baetens, 'EJIL: Talk! – Renewable Energy Incentives: Reconciling Investment, EU State Aid and Climate Change Law' (*EJIL: Talk!*, 2019) <https://www.ejiltalk.org/renewable-energy-incentives-reconciling-investment-eu-state-aid-and-climate-change-law/> accessed 23 December 2019. See also the chapter by Patrick Thierry in this volume, 'Prospects for Resolving Climate-related Disputes through International Arbitration' .

human rights violations associated with the actual and projected impacts of climate change.[4] While only a handful such complaints have been lodged, none have been successful to date. In the meantime, no inter-state climate change litigation has taken place.

In spite of this lack of practice, the possibility to instigate proactive inter-state climate change litigation has been at the centre of much scholarly speculation.[5] The history of international environmental litigation shows that inter-state disputes are 'seldom, if ever brought purely to achieve legal objectives, and instead are often part of the "theatre" of environmental diplomacy.'[6] While therefore in theory the main purpose of inter-state litigation is that to settle disputes between two or more parties, in practice ulterior motives may be pursued, such as domestic political objectives, or the bolstering of international diplomatic endeavours.[7] In this connection, like any litigation, inter-state disputes are not an end in themselves, but merely 'a means to an end'.[8] In the context of climate change, the ulterior motive would be that to deliver judicial solutions to two intractable problems, namely: how to put pressure on states to intensify their response to climate change and reduce emissions, and/or to redress harm associated with the impacts of climate change.

To be sure, international diplomatic fora and processes designated to deliver inter-state cooperation on both matters already exist. The international climate change treaties – i.e. the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol and the 2015 Paris Agreement[9] –and the abundant normative production associated with each are very much part and parcel of the international legal order.[10] However, solutions to the intractable problems above have largely eluded international climate negotiations and the institutions they created in the course of almost three decades. So, could inter-state litigation make a difference? And what added value would it have?

4 See the chapters in this volume by Monica Feria Tinta, 'Prospects for Climate Change-related Cases in the Inter-American System of Human Rights and before the UN Human Rights', and by Ingrid Gubbay and Claus Wenzler, 'The First Climate Communication to the UN Committee on the Rights of the Child'.

5 Some of the most widely cited works include: Richard Tol and Roda Verheyen, 'State Responsibility and Compensation for Climate Change Damages--a Legal and Economic Assessment' (2004) 32 Energy Policy 1109; Roda Verheyen, *Climate Change Damage and International Law: Prevention, Duties and State Responsibility* (Martinus Nijhoff 2005); Michael G Faure and Andre Nollkaemper, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 26 Stanford Journal of International Law 123; Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 Nordic Journal of International Law 1; Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49 Arizona State Law Journal 659; Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing 2019); Alan Boyle, 'Litigating Climate Change under Part XII of the LOSC' (2019) 34 The International Journal of Marine and Coastal Law 458.

6 Tim Stephens, 'International Environmental Disputes: To Sue or Not to Sue?' in Natalie Klein (ed), *Litigating International Law Disputes: Weighing the Options* (Cambridge University Press 2014) 287.

7 As noted also in Alan Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' [2020] German Yearbook of International Law.

8 Vaughan Lowe, 'The Function of Litigation in International Society' (2012) 61 International & Comparative Law Quarterly 209, 221.

9 United Nations Framework Convention on Climate Change (New York, 9 May 1992; in force 21 March 1994) (UNFCCC); Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto, 11 December 1997, in force 16 February 2005) ('Kyoto Protocol'); and the Paris Agreement (Paris, 12 December 2015, in force 4 November 2016).

10 Robin R Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 The American Journal of International Law 623; Jutta Brunnée, 'COPing with Consent: Law-Making Under Multilateral Environmental Agreements' (2002) 15 Leiden Journal of International Law 1.

The literature has explored proactive inter-state litigation, focussing on three main hypothetical scenarios:

I. disputes over breaches of international obligations concerning climate change;
II. disputes over harm associated with climate change;
III. an advisory opinion interpreting international obligations on climate change.

The first two scenarios both concern the application of the law of state responsibility to climate change but deserve separate consideration because of the different litigation hurdles associated with each. The latter scenario, instead, clearly differs from the previous two because of its non-contentious nature.

This chapter critically engages with the arguments made by some of the most widely cited scholars on these litigation scenarios, in light of developments occurred since the adoption of the 2015 Paris Agreement. The objective is to ascertain whether inter-state proactive climate change litigation could make a difference, and assuming it could, its added value. It does so by exploring the three litigation scenarios identified above, considering the opportunities and the constraints of each.

The opportunities and constraints of each scenario are categorised into three groups: 'technical', 'substantive' and 'existential'. Technical opportunities and constraints are those of a procedural nature – i.e. concerning the rules on jurisdiction of international adjudicatory bodies. Substantive opportunities and constraints, conversely, concern the content of international law obligations–for example, the contours of due diligence obligations under the climate treaties. Finally, existential opportunities and constraints are those that result from the very nature of international law as a normative legal system, that is produced and implemented within the limits of state sovereignty and state consensus. Paraphrasing Brierly, the chapter concludes that, given the present state of international climate diplomacy, international litigation is 'neither a chimera nor a panacea',[11] but represents one means at our disposal for delivering better and greater climate action.

II. Disputes Over Breaches Of An International Obligation Concerning Climate Change

state responsibility typically arises when an action or omission that is attributable to a state breaches an international obligation,[12] regardless of the origin or character of the latter obligation.[13] As such, state responsibility neither requires fault nor damage. Instead, any 'injured' state, whose subjective rights have been violated by said breach, may invoke state responsibility.[14] This may occur in a bilateral setting –i.e. for the breach of an obligation owed to the aggrieved state only – or in a multilateral setting –i.e. either for the breach of an obligation due to multiple states, or indeed to all states.[15] Multilateral obligations may be

[11] James Leslie Brierly, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (OUP Oxford 2012) v.

[12] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) ('ILC Draft Articles') Art. 2.

[13] Ibid. Art. 12.

[14] Ibid. Art. 42.

[15] Including, the possibility under Art. 42.2 that the breach is 'of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.'

breached under the same circumstances as any other international obligation.[16] In both instances, therefore, the claiming state needs to be specifically affected by the breach, e.g. because the wrongful act was committed against its citizens or on its territory.[17] The injured state can claim all the remedies available under the law of state responsibility, ranging from cessation to assurances of non-repetition, restitution, compensation and satisfaction.[18]

In addition, any state may invoke state responsibility for the breach of obligations in the collective interest (*erga omnes* or *erga omnes partes*), even where it is not itself specifically affected (e.g. for wrongful acts committed against the citizens of another state and on the territory of another state).[19] In these instances, however, the applicant state can demand only cessation of the internationally wrongful act and the performance of the duty to make reparation for the benefit of any injured states.[20]

In order to instigate a dispute for a breach of an international obligation concerning climate change, therefore, a set of material conditions need to materialise:

- A state has international obligations concerning climate change;
- One or more of these obligations have been breached, through an act or omission by the same state;
- The breach is attributable to said state;
- One or more states have been injured by said breach *or* the breached obligation is *erga omnes/erga omnes partes*.

With regard to the first condition, multiple international obligations in relation to climate change clearly exist. These are primarily enshrined in international climate treaties, which have been ratified by virtually all states.[21] Climate treaties, however, leave the regulation of specific matters – e.g. emissions from aviation – to other international regimes – e.g. the International Civil Aviation Organisation.[22] Numerous other multilateral treaties may therefore be relevant for climate protection.[23] These include other multilateral environmental treaties (MEAs) – on matters such as air quality, the protection of the ozone layer, biodiversity and the law of the sea – as well as treaties in other areas – such as human rights, or international economic law.[24]

International disputes concerning the breach of obligations enshrined in MEAs are relatively rare– with the sole significant exception of disputes under the UN Convention of the Law of the Sea.[25] Conversely, inter-state litigation based on human rights and international economic

16 Christian Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations' (1999) 10 European Journal of International Law 353, 361.
17 Robert Kolb, *International Law of State Responsibility: An Introduction.* (Edward Elgar Publishing 2018) 196.
18 ILC Draft Articles, Art. 30-31.
19 ILC Draft Articles, Art. 48.
20 Ibid.
21 At the time of writing, the UNFCCC has 197 Parties; the Kyoto Protocol has 192 Parties; and the Paris Agreement has 189 Parties.
22 Kyoto Protocol, Article 2.2.
23 See for example Rosemary Rayfuse and Shirley Scott, *International Law in the Era of Climate Change* (Edward Elgar Publishing 2012); Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Edward Elgar Publishing 2014).
24 Faure and Nollkaemper (n 5) 143.
25 For a list of contentious cases before the International Tribunal on the Law of the Sea, see: <https://www.itlos.org/en/cases/list-of-cases/> accessed 3 March 2020. See also the chapter by James Harrison in this volume, 'Litigation under the United Nations Convention on the Law of the Sea: Opportunities to Support and Supplement the Climate Change Regime'

law is comparatively frequent.[26] So far, no international litigation has been instigated for a breach of an international concerning climate change. Let us therefore consider how the remainder of the material conditions to instigate an inter-state dispute for a breach of an international obligation concerning climate change may be fulfilled.

A. Material Conditions to Instigate a Dispute

Even if the Paris Agreement only entered into force in 2016, breaches of obligations enshrined in the treaty may have already occurred. The agreement requires each party to periodically prepare, communicate and maintain 'nationally determined contributions' (NDCs).[27] These are plans detailing how each party intends to reduce its emissions and by how much, in order to contribute to the global temperature goal enshrined in the Paris Agreement. The latter is set to hold the increase of the global average temperature to well below 2°C, and ideally limited to 1.5°C above pre-industrial levels.[28] NDCs therefore are the yardstick against which parties' performance under the Paris Agreement is to be reviewed.

At the *procedural* level, the obligation to submit periodical plans to be reviewed by treaty bodies is typical of MEAs.[29] Unlike the Kyoto Protocol, however, the Paris Agreement does not impose upon its parties obligations of result to achieve specific emission reductions over a certain time frame.[30] Instead, the obligations associated with NDCs are largely procedural in nature.[31] Whilst no format for NDCs could be agreed ahead of adoption of the Paris Agreement, parties have been negotiating specific guidance on this issue ever since,[32] in a process that remains ongoing at the time of writing.[33] But even if the parties had agreed to submit revised NDCs in early 2020,[34] only a handful have done so. And even though an extension is likely to be agreed, we may be faced already with a breach of *procedural* obligations under the Paris Agreement. The same may certainly be said if a party fails to submit an NDC altogether.

At the *substantive* level, even where an NDC has been submitted, Voigt suggests that the principle of 'highest possible ambition' embedded in the Paris Agreement[35] may be interpreted to imply a due diligence standard that requires states to act 'in proportion to the risk at stake and to the means at their disposal'.[36] Boyle seems to agree, by arguing that there potentially

[26] There is no single repository of the abundant international litigation in these areas, but a compilation of selected cases may be found at: <http://www.worldcourts.com >and < http://www.worldlii.org >for human rights law; and at < https://icsid.worldbank.org/en/ >and <https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm > for international economic law, accessed on 15 June 2020.

[27] Paris Agreement, Art. 4.2.

[28] Paris Agreement, Art. 2.1(a).

[29] Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2011) 238.

[30] Kyoto Protocol, Art. 3.1 and Annex B.

[31] See e.g. Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 Review of European, Comparative & International Environmental Law 142, 146.

[32] Paris Agreement, Art. 4.13; and Decision 1/CP.21, at 31.

[33] Jennifer I Allan and others, 'Earth Negotiations Bulletin: Summary of the Madrid Climate Change Conference' (IISD 2019) <https://enb.iisd.org/vol12/enb12775e.html> accessed 25 February 2020.

[34] Decision 1/CP.21 says: 'Parties shall submit to the secretariat their nationally determined contributions referred to in Article 4 of the Agreement at least 9 to 12 months in advance of the relevant session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement'. COP26 was expected to take place in November 2020, so the deadline envisioned in Decision 1/CP.21 has passed already. Only a handful of parties, however, have submitted their revised NDCs: <https://www4.unfccc.int/sites/ndcstaging/Pages/LatestSubmissions.aspx> accessed 15 June 2020.

[35] Paris Agreement, Article 4.3.

[36] Christina Voigt, 'The Paris Agreement: What Is the Standard of Conduct for Parties?' (*QIL QDI*, 24 March 2016) <http://www.qil-qdi.org/paris-agreement-standard-conduct-parties/> accessed 18 April 2016.

are justiciable parameters in the Agreement, even if the treaty deliberately leaves very considerable discretion to individual state parties.[37] In the meantime, scientists largely converge that the level of ambition embedded in NDCs submitted to date is insufficient to secure the achievement of the temperature goal envisioned in the Paris Agreement.[38] Potentially, therefore we are already faced also with breaches of *substantive* obligations concerning NDCs under the Paris Agreement.

Whether or not a breach of the above obligations concerning NDCs may be attributed to a party does not seem to pose any specific obstacles. NDCs submission is a formalised process and clearly entails state ownership. Equally, the matter of which states may claim to have been injured by said breach is relatively straightforward. states that are particularly vulnerable to the impacts of climate change and have contributed little to the problem are already singled out in the climate treaties as deserving special attention and support, and they already benefit from preferential treatment.[39] These parties may persuasively argue to be an injured state and invoke state responsibility for breaches of obligations enshrined in the Paris Agreement concerning NDCs. Alternatively, any party may claim that obligations concerning the submission of NDCs are *erga omnes partes.*

B. Opportunities and Constraints

Like many other MEAs, the Paris Agreement establishes a dedicated facilitative compliance mechanism,[40] embracing what has been described as a 'managerial' approach to compliance.[41] This means that the compliance mechanism is not endowed with powers to 'enforce', but rather to encourage compliance, facilitating parties' consultation, cooperation and peer pressure.[42] Parties, however, are not required to subject matters of compliance to the committee, before they engage in a formal dispute. Instead, as under the other climate treaties,[43] parties to the Paris Agreement may submit a dispute to an international court or tribunal, subject to a special declaration.[44] Hardly any parties have made such a declaration to date.[45]

For this reason, the literature has dedicated much attention to how to overcome the *technical* constraints to bringing a contentious climate case before the International Court of Justice (ICJ). This matter is dealt with in another chapter in this volume and will not be looked at in further detail here.[46] For the present purposes it suffices to mention that the ICJ may only adjudicate on a dispute if all states concerned have consented to its jurisdiction.[47] This limits considerably the number of states that may be engaged in a dispute, and excludes the world's largest emitters – namely China and the US.[48] The literature has therefore considered alternative fora for inter-state climate change litigation, and most saliently, the possibility to

37 Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (n 8).
38 United Nations Environment Programme, 'The Emissions Gap Report 2019' (2019) <https://www.unenvironment.org/resources/emissions-gap-report-2019> accessed 25 May 2020.
39 UNFCCC, Preamble; Arts. 3.2; 4.3 and 4.10. Paris Agreement, Preamble; Arts. 7.2; 7.5; 7.6; 7.9; 9.4 and 11.1.
40 Kyoto Protocol, Art. 18; Paris Agreement, Art. 15.
41 Bodansky, *Art and Craft* (n 29) 242.
42 Gu Zihua, Christina Voigt and Jacob Werksman, 'Facilitating Implementation and Promoting Compliance with the Paris Agreement Under Article 15: Conceptual Challenges and Pragmatic Choices' (2019) 9 Climate Law.
43 UNFCCC, Article 14.
44 UNFCCC, Article 14.1.
45 See:< https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27> accessed on 17 June 2020.
46 See the chapter by Margareta Wewerinke-Singh, Julian Aguon and Julie Hunter, 'Bringing Climate Change before the International Court of Justice: Prospects for Contentious Cases and Advisory Opinions'
47 Statute of the International Court of Justice, Art. 34(1).
48 The US withdrew its declaration in 1985 after the Court accepted jurisdiction in the Nicaragua case.

initiate litigation before the International Tribunal on the Law of the Sea (ITLOS), as we shall see in further detail below (section III). [49]

Even assuming that an expedient adjudicatory body can be identified, inter-state climate change litigation for a breach of an international obligation concerning climate change would be faced with significant *existential* constraints. As almost all parties to the Paris Agreement have failed to submit an NDC in a timely fashion, and almost all of them have failed to pledge adequate emission reductions in their NDCs, judicial proceedings involving only some of the parties would arguably not be the best way to solve problems originated by what may be regarded as a 'dysfunctional treaty system'.[50] If, in other words, there are systemic issues of non-compliance with obligations under the climate treaties, what may be needed is stronger political action at the national level, rather than more international law-making or litigation.[51] In this state of affairs, Bodansky warns, contentious proceedings could even undermine, rather than enhance, inter-state cooperation.[52] There are, in addition, even more pressing existential constraints with this type of litigation. Major global emitters – such as China, the US and the Russian Federation – have an especially lacklustre track-record in complying with international judicial decisions.[53] Celebrious examples of these states' attitude towards international courts' decisions include the US response to the Nicaragua,[54] LaGrand[55] and Avena[56] judgments; the Russian Federation's response to the Arctic Sunrise prompt release case;[57] and China's response to the South China Sea arbitration.[58]

These precedents seemingly suggest that an inter-state dispute concerning a breach of international climate change obligations would have limited added value vis-à-vis a declaration of non-compliance by the Paris Agreement's Compliance Committee. Bodansky for example notes how the reputational costs of breaking a negotiated agreement are higher than the costs of non-compliance with a judicial decision[59] — as the saga of US membership of the climate treaties suggests.[60] The climate treaties compliance mechanisms therefore may be a more congenial forum to deal with matters associated with parties' performance, which come with clear reputational implications — as the saga associated with Canada's withdrawal from the Kyoto Protocol also demonstrates.[61] Yet again, at the formal level, the advantage of litigation would be that of having an authoritative statement that an international obligation has been breached. This would enable an applicant state to claim all or some of the remedies available

49 See also the chapter by James Harrison in this volume, 'Litigation under the United Nations Convention on the Law of the Sea: Opportunities to Support and Supplement the Climate Change Regime'.
50 This point is made also in Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (n 7).
51 Ibid.
52 This point is made also in Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 711.
53 Ibid 705.
54 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* ICJ Reports, 1986.
55 *LaGrand (Germany v. United States of America)* ICJ Reports, 2001.
56 *Avena and Other Mexican Nationals (Mexico v. United States of America)* ICJ Reports, 2004.
57 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* ICJ Reports, 2019.
58 *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* Permanent Court of Arbitration, 2016.
59 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 706.
60 The US is a party to the UNFCCC but never ratified the Kyoto Protocol, in spite of having signed it on 12 November 1998. On 4 November 2019 the US gave formal notification of its intention to withdraw from the Paris Agreement: https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/
61 Canada gave formal notification of its intention to withdraw from the Kyoto Protocol on 15 December 2011, and in accordance with rules under that treaty, its withdrawal became effective on 15 December 2012.

under the law of state responsibility, depending upon which basis said state claims to have been injured.[62]

III. Disputes Concerning Harm Associated with Climate Change

The customary obligations associated with the prohibition and prevention of transboundary harm, including areas beyond national jurisdiction, and with the obligation to minimize the risk thereof,[63] apply in principle also to harm associated with climate change. In order to successfully establish state responsibility in this connection, an applicant state has to prove that another state has breached the prohibition of transboundary harm, the related obligation to prevent harm, and/or the associated procedural duties to cooperate and to carry out an environmental impact assessment.[64]

In relation to climate change, this would require demonstrating that the applicant state's territory or an area beyond national jurisdiction has suffered significant harm (i.e. loss of life, loss of property, and/or environmental damage) as a result of activities (i.e. greenhouse gas emissions) carried out under the jurisdiction or control of the respondent state.

International law does not provide strict liability for transboundary harm arising from activities that fall within the exercise of a state's sovereign rights within their jurisdiction.[65] An applicant state would therefore have to identify due diligence obligations, which have been breached by the respondent state. The fact that the respondent state has exercised reasonable diligence would be sufficient to exclude responsibility, even if some significant harm has been suffered.

International law obligations of due diligence typically are obligations of conduct, rather than of result.[66] Proof must be provided that the state has not put in place the legislative and regulatory framework which would have enabled it to become aware of the risk, to measure its probability and gravity, and to take measures aimed at preventing and mitigating the harm.[67]

Ascertaining compliance with the obligation to act with due diligence to prevent, reduce or control transboundary harm is far from straightforward. It requires assessing whether a balance has been equitably struck 'between what is possible and what is economically acceptable'.[68] Identifying the specific contours of due diligence obligations in relation to climate harms would therefore place a heavy burden of proof on prospective state litigants, to identify flaws in the discharge of due diligence obligations that are broadly worded and imprecise.[69]

As noted above, the law of state responsibility provides the possibility also to request compensation for 'financially assessable damage suffered by the injured state or its

62 ILC Draft Articles, Art. 30-31.

63 The 'no harm' principle is recognised in both the Stockholm Declaration, Principle 21, Rio Declaration, Principle 2 - Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: Resolutions adopted by the Conference, resolution 1, annex I. 858, The International Court of Justice has acknowledged the customary international law status of the no harm principle in: *Legality of the Threat or Use of Nuclear Weapons*, pp. 241–242, para. 29.

64 See for example Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 45.

65 Alan Boyle, 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17 Journal of Environmental Law 3, 6.

66 International Law Association, 'ILA Study Group on Due Diligence in International Law First Report' (2014) 26 <https://www.ila-hq.org/index.php/study-groups?study-groupsID=63> accessed 25 May 2020.

67 Ibid.

68 Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (n 7).

69 Voigt (n 5) 4; Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani (n 64) 45.

nationals',[70] whether material or moral.[71] The appropriate heads of compensable damage and the principles for quantification vary, depending upon the content of particular primary obligations.[72] In any event, the award of compensation is not aimed to punish the responsible state. Typically, damage claims in inter-state disputes are constrained by causation, remoteness, evidentiary requirements and accounting principles.[73] As a result, relatively few inter-state disputes have resulted in the award of compensation, and only one rather modest award for compensation for environmental damage has been recorded to date.[74]

In spite of these limitations in the practice of international litigation, the literature has considered hypothetical inter-state dispute scenarios for breaches of the customary obligation to prevent transboundary harm, in light of specific due diligence obligations enshrined in the Paris Agreement, the UN Convention on the Law of the Sea (UNCLOS) and international human rights treaties. The arguments made in the literature associated with each litigation scenario are analysed below, alongside their constraints and opportunities.

A. Climate Change Law

The Paris Agreement acknowledges for the first time in the history of the climate regime the need to tackle the permanent and irreversible impacts of human-induced climate change in the standalone provisions concerning 'loss and damage'.[75] It does not, however, provide means to compensate the harm to persons, property and the environment associated with climate change. Instead, parties have seemingly excluded compensation from the scope of the Paris Agreement, by adopting an interpretative declaration, stating that the provision on loss and damage 'does not involve or provide a basis for any liability or compensation'.[76] The value of declarations such as this is clearly subject to parties' continued consensus.[77] Moreover, this interpretative declaration arguably does not exclude the possibility to invoke the law of state responsibility with regard to damages caused by climate change, relying on general international law obligations, such as the provision of transboundary harm.[78] Or at least, this is the position of the nine state parties that have issued declarations stating that their acceptance of the Paris Agreement:

> shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change and that no provision in the Paris Agreement can be interpreted as derogating from principles of general international law or any claims or rights concerning compensation due to the impacts of climate change.[79]

The value of these declarations is itself doubtful, given that the Paris Agreement does not allow for reservations.[80] This state of affairs, nevertheless, poses additional and specific *technical*

[70] Ibid., commentary, para. 4.
[71] ILC Draft Articles, Art. 36.
[72] Ibid., Commentary, para. 7.
[73] Ibid., para. 32
[74] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* ICJ Reports 2018.
[75] Paris Agreement, Art. 8.
[76] Decision 1/CP.21, Adoption of the Paris Agreement, (UN Doc. FCCC/CP/2015/10, Add.1, 29 January 2016), 51.
[77] MJ Mace and Roda Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement' (2016) 25 Review of European, Comparative & International Environmental Law 197, 205.
[78] Ibid 206.
[79] Declarations by Cook Islands, Marshall Islands, Micronesia, Nauru, Niue, the Philippines, the Solomon Islands, Tuvalu, and Vanuatu. See *Status of U.N. Treaties Ch. XXVII. Environment 7.d Paris Agreement*.
[80] Paris Agreement, Article 27.

constraints to inter-state disputes for harm associated with the impacts of climate change, which are instigated on the basis of obligations enshrined in international climate change law.

At the *substantive* level Bodansky et al. suggest that the Paris Agreement may even have made it easier to demonstrate due diligence.[81] This is because the regime presently relies on individual states' NDCs, providing limited mechanisms to scrutinise these in the merits. Thus, should a state comply with the obligation to submit an NDC, it may be arduous to prove lack of diligence.[82] Still, failure to submit an NDC would in all likelihood be regarded as a breach of due diligence obligations under the Paris Agreement.

The very existence of international climate change law places chronological constraints on the definition of the relevant harm. The literature suggests that the creation of the Intergovernmental Panel on Climate Change (IPCC) in 1988 and/or the adoption of the UNFCCC in 1992 might be considered as the starting dates from which climate harms may be invoked.[83] The challenge would then be to identify the specific harms that have been produced, since the adoption of the Paris Agreement, and/or of the UNFCCC. Faure and Nollkaemper suggest that if a joint and several approach to liability is applied, uncertainty over causation would not necessarily exclude state liability for climate change harms.[84] In the case of a plurality of responsible states, the general principle is that each state is separately responsible for conduct attributable to it.[85]

At the *existential* level, however, one may question whether compensation for climate harms awarded in the context of an inter-state dispute would adequately redress the plight of those suffering for calamitous impacts of climate change. As noted above, significant awards of compensation are extremely rare in international litigation, thus making deterrence from further harm arguably 'feeble'.[86] Yet, since the matter of harm associated with the impacts of climate change damages does not fall within the remit of the Paris Agreement compliance committee, inter-state litigation would provide an expedient means to 'name and shame' those states that may be regarded as most responsible for the impacts of climate change, and to hold them at least in part accountable for the harm caused.

B. Law of the Sea

As another chapter in this volume explains in further detail,[87] UNCLOS makes parties responsible for regulating and controlling the risk of marine pollution resulting from the activities of the private sector through an obligation of due diligence.[88] Greenhouse gases may be regarded as pollutants falling within the scope of UNCLOS.[89] In fulfilling their obligations, UNCLOS parties are required to take into account 'internationally agreed rules, standards and recommended practices and procedures'.[90] The climate treaties as well as decisions and guidance by their treaty bodies may therefore be regarded as relevant normative sources to

[81] Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani (n 64) 45.
[82] In March 2020, 186 out of 189 Parties to the Paris Agreement had submitted their first NDC. See <https://www4.unfccc.int/sites/ndcstaging/Pages/Home.aspx> accessed 3 March 2020.
[83] See for example Faure and Nollkaemper (n 5) 172; Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 480.
[84] Faure and Nollkaemper (n 5) 164.
[85] ILC Draft Articles, Art. 47 commentary, para. 3.
[86] Faure and Nollkaemper (n 5) 141.
[87] See the chapter by James Harrison in this volume (n 49)
[88] UNCLOS, Arts. 192-194 and Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 6) 465.
[89] Ibid 464.
[90] UNCLOS Arts. 207.1, 212.

define the contours of the due diligence obligations derived from UNCLOS.[91] In this vein, non-compliance with the Paris Agreement's provisions concerning NDCs could be regarded as evidence of non-compliance with UNCLOS.[92]

UNCLOS parties that are coastal states and, as such, are also particularly exposed to the harmful impact of climate change, may claim to be injured by a breach of international obligations enshrined in UNCLOS, for example due to either lack of submission of an NDC, or to an NDC that is sufficiently ambitious.[93] Such a dispute could target UNCLOS parties harbouring major emitters and include a claim for compensation for harms associated with climate change as a result of breach of the obligations enshrined in UNCLOS.[94] In this context, state liability would arise from failure to carry out the respondent state's own due diligence obligations, provided that a causal link could be established between that state's failure and the existence of damage caused by a private contractor.[95] For example, the applicant state could argue that, in order to meet due diligence obligations under UNCLOS, it is not enough to merely submit an NDC, but an NDC that reflects that state's 'fair share' of the emissions reductions necessary to stay below the temperature goal enshrined in the Paris Agreement.[96]

There are some advantages associated with instigating an international dispute concerning breaches of international obligations concerning climate change under UNCLOS. At the *technical* level, UNCLOS provides compulsory binding dispute settlement procedures, which would be readily available to any of its parties to invoke state responsibility for a breach of an international obligation. At the *substantive* level, a claim for compensation for historical damage predating the Paris Agreement and the UNFCCC is unlikely to be viable, but compensation for future damage could be possible.[97] The challenge would be, however, to identify the specific harms that have been produced since the adoption of the Paris Agreement, and/or of the UNFCCC. Still, an applicant state would be faced with familiar hurdles concerning causation of harm, its foreseeability, the allocation of responsibility between multiple respondents, the possibility of defences which may preclude liability, the adequacy of available remedies to redress and compensate for damages,[98] and the inter-relationship with the climate change law, and especially with the loss and damage provision included in the Paris Agreement.[99]

Yet, McCreath suggests that requesting a finding that a state is not meeting its UNCLOS obligations without the award for compensation would bypass numerous litigation hurdles highlighted above. In turn, this would provide a platform to states that are particularly vulnerable to the impacts of climate change to demand that more is done by those states that are most responsible for causing the problem in the first place.[100] Conversely, Boyle notes that it seems unlikely that an international tribunal would find that due diligence obligations under UNCLOS are attached with some separate and additional effect, vis-à-vis those included in the

91 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 6) 466.
92 Ibid 467.
93 Ibid 479.
94 Ibid.
95 Seabed Mining Advisory Opinion, (2011) 50 ILM 458, [200] 66-184.
96 Millicent McCreath, 'The Potential for UNCLOS Climate Change Litigation to Achieve Effective Mitigation Outcomes' in Jolene Lin and Doug Kysar (eds), *Climate Change Litigation in the Asia Pacific* (Cambridge University Press 2020).
97 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 480.
98 Seokwoo Lee and Lowell Bautista, 'Part XII of the United Nations Convention on the Law of the Sea and the Duty to Mitigate Against Climate Change: Making Out a Claim, Causation, and Related Issues' (2018) 45 Ecology Law Quarterly 129, 153.
99 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 479.
100 McCreath (n 96).

climate treaties.[101] So, should the applicant state maintain that UNCLOS imposes due diligence obligations that have a separate or even a more onerous character than those included in climate treaties, it would in all likelihood be faced with *lex specialis* objections.[102]

Finally, there are significant *existential* constraints to what a court/tribunal may ask the respondent state to do in an UNCLOS-based dispute. Boyle suggests that all an international court may order is that states comply with their obligations under the Paris Agreement.[103] It would in other words seem unlikely that an international tribunal would ask the responsible state to adopt measures that are more stringent than those required under that treaty.[104] If this is true, the effects of a judicial decision would be similar to those associated with a breach of an obligation of the climate treaties. And as noted above, the added value of such a judicial decision, vis-à-vis a finding of non-compliance by the Paris Agreement Compliance Committee, would be largely reputational and political, rather than substantive. Yet, an international tribunal could take the view that the primary obligations under UNCLOS may be interpreted as going above and beyond what is required by the Paris Agreement. In that case, state obligations under the Paris Agreement would not be the parameter for the remedies that a tribunal would accord.

C. Human Rights Law

Climate change undermines the enjoyment of a wide range of human rights.[105] The relationship between climate change and human rights law has increasingly been recognised by states and international organisations, including the Human Rights Council,[106] its Special Procedures mandate holders,[107] and the Office of the UN High Commissioner for Human Rights.[108] Parties to the climate regime have acknowledged the need to interpret climate change and human rights obligations in a mutually supportive way, as noted in preamble of the Paris Agreement.[109]
It is well established in the practice of international human rights bodies that states should prevent environmental harm that interferes with the full enjoyment of human rights and reduce it to the extent possible, providing for remedies for any remaining harm.[110] Failure to submit an NDC, or to submit an NDC that is ambitious enough, could be characterised as a violation of the state's obligation to respect, protect and fulfil the rights of those within its jurisdiction. The obligation to protect human rights does not require states to prohibit all activities that may cause environmental degradation. Instead, states have discretion to strike a balance between environmental protection and other legitimate societal interests. As both the Special Rapporteurs on human rights and the environment have noted, however, this balance must not

101 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 481.
102 Ibid 480.
103 Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (n 7).
104 Ibid.
105 Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Report on the Relationship between Climate Change and Human Rights', A/HRC/10/61 (2009) 16.
106 The Human Rights Council has adopted nine resolutions on human right and climate change between 2008 and 2019. See <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx>accessed 15 June 2020.
107 See especially: Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/31/52 (2016); Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/74/161 (2019).
108 A summary of the activities of the Office of the High Commissioner is available at <www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx > accessed 15 June 2020.
109 Preamble of the Paris Agreement.
110 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (OHCHR 2018) A/HRC/37/59 para 5.

be 'unjustifiable or unreasonable' or result in unjustified, foreseeable infringements of human rights.[111] In relation to climate change, these obligations entail taking action to reduce emissions and to adapt to changes that are foreseeable. Human rights obligations furthermore require that states cooperate with each other to deal with the global and transboundary implications of climate change.[112]

Inter-state litigation would be particularly appealing for states that are particularly vulnerable to the impacts of climate change, who could claim that climate change harms represent a breach of international human rights obligations.[113] In case of success, the finding of a breach of an international human rights law obligation could be accompanied by an order to provide compensation for the harm suffered.[114] state responsibility for breaches of human rights obligations associated with climate change may be invoked in multiple ways. In addition to the possibility to instigate a dispute before the ICJ, it may be possible to make recourse to inter-state proceedings before international human rights courts – like the European Court of Human Rights. In practice, however, while there have been some inter-state complaints before regional human rights courts –especially in the European system[115] – there have been relatively few contentious human rights based contentious cases before international courts.[116]

states that are most vulnerable to the impacts of climate change could claim to be an injured party also in relation to breaches of international human rights obligations. For example, the Philippines could bring Australia before the ICJ, for human rights violations suffered by Australians, or by Pilipino citizens living in Australia. It would however be harder to bring a complaint against Australia on the basis of human rights violations suffered by Pilipino citizens in the Philippines, unless the relevant obligations may be regarded as *erga omnes* obligations. This is so because human rights treaties have been typically interpreted to protect only those within the jurisdiction of a state party, with the salient exception of the International Covenant on Cultural, Social and Economic Rights.[117] Some authors[118] and human rights bodies[119] maintain that state's human rights obligations have an extraterritorial reach.[120] An Advisory Opinion of the Inter-American Court has recently confirmed this understanding and significantly expanded the extraterritorial reach of state obligations in this regard.[121] Such an argument, however, is yet to be tested in an inter-state dispute.

At the *technical* level, inter-state human rights complaints provide clear advantages. For example, in the European Court of Human Rights system, the sole condition for the Court's competence *ratione personae* to hear an inter-state case is that both the applicant and respondent states have ratified the Convention. An applicant state, unlike an individual applicant, does not have to claim to be a 'victim' of the alleged breach. Nor does the applicant

111 Ibid 33.
112 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (OHCHR 2016) A/HRC/31/52 paras 43–44.
113 Wewerinke-Singh (n 5) 160. See also the chapter by Wewerinke-Singh a.o. in this volume (n 46)
114 Ibid.
115 See list of cases at: < https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf> accessed on 20 July 2020.
116 See for example *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* ICJ Reports 2005.
117 The ICJ has recognized that International Covenant on Civil and Political Rights applies extraterritorially, in specific circumstances (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ Advisory Opinion 9 July 2004, 107-113.
118 See for example Wewerinke-Singh (n 5) ch 9.
119 *Sergio Euben Lopez Burgos v Uruguay* (Communication no R12/52) para 12.3.
120 Wewerinke-Singh (n 5) 154.
121 See Inter-American Court of Human Rights, *Advisory Opinion OC-23/17*, 15 November 2017.

state have to justify a special interest in the subject matter of the complaint; in particular, it is not a condition that the matter complained of should have affected or prejudiced one of its nationals.[122] Another technical opportunity associated with relying on human rights obligations is that inter-state applications can also cover broad allegations, concerning for example an administrative practice, or 'the mere existence of a law which introduces, directs or authorises measures incompatible with the rights and freedoms guaranteed'.[123] Should an applicant state be successful, the finding of a violation of international human rights law could be accompanied by an order to adopt/reform domestic laws, policies and practices in line with states' human rights obligations.[124]

There are however also significant *technical constraints* to human rights-based climate litigation. Inter-state human rights complaints are allowed in some, but not all, human rights systems, and only under specific conditions.[125] These complaints are therefore only available to some parties to said treaties – thus again excluding the US and China, that are not party to any treaties enabling such litigation. There are limited precedents where the finding of a breach of an international human rights obligation has resulted in the award of compensation in the context of an inter-state dispute.[126] While some regional human rights courts have the power to award compensation to victims of human rights abuses, this has hardly been done in the context of inter-state complaints.

At the *substantive* level, inter-state disputes based on a breach of a human rights obligation are arguably particularly appealing, because the *erga omnes* character of at least some international human rights obligations.[127] In order to claim to be injured and ask for compensation, however, an applicant state must first satisfy the adjudicating body that human rights violations have occurred, and that the responsibility for such violation may be attributed to the respondent state. This entails providing evidence that human rights breaches have occurred, and of causation and attribution associated with said breaches. Admittedly discharging the burden of proof in this regard would not be easy, even though progress in attribution science concerning has made it easier to trace causal connections between particular emissions and the resulting harms.[128]

The same constraints associated with a finding of a violation of UNCLOS, however, would apply, *mutatis mutandis*. Relying on human rights would not enable an applicant state to overcome *lex specialis* arguments, and configure obligations that have a separate or even a more onerous character than those included in climate treaties.[129] Qualifying the impacts of climate change as a form of harm that justifies the payment of compensation poses a series of by now familiar obstacles, concerning disentangling complex causal relationships and

122 David Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018) 48.

123 *Ireland v UK* A 25 (1978); 2 EHRR 25 para 240 PC.

124 Wewerinke-Singh (n 5) 160.

125 See for example, European Convention of Human Rights, Article 33.

126 For example, only two such cases have been recorded in the European system, vis-à-vis a total of 24 inter-state complaints. See: https://www.echr.coe.int/Documents/Press_Q_A_Inter-State_cases_ENG.pdf Accessed 20 July 2020.

127 Wewerinke-Singh (n 5).

128 See for example Friederike EL Otto and others, 'Assigning Historic Responsibility for Extreme Weather Events' (2017) 7 Nature Climate Change 757; Sophie Marjanac and Lindene Patton, 'Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?' (2018) 36 Journal of Energy & Natural Resources Law 265; Luke J Harrington and Friederike EL Otto, 'Attributable Damage Liability in a Non-Linear Climate' (2019) 153 Climatic Change 15; R Licker and others, 'Attributing Ocean Acidification to Major Carbon Producers' (2019) 14 Environmental Research Letters 124060.

129 Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 5) 480.

projections about future impacts.[130] It seems unlikely that these arguments would be sufficient to persuade an international tribunal to award compensation for harms suffered by its citizens, and even less so for harms suffered by citizens of another state.

There are, finally, *existential* constraints that are typical of human rights law. Knox has generally cautioned about the dangers associated with merely 'treating climate change as a series of individual transboundary harms, rather than as a global threat to human rights'.[131] Even when inter-state complaints are possible, states rarely make use of them. The database of the world's most seasoned international human rights court – the European Court of Human Rights – reveals that, as of 2019, there had been only 24 inter-state cases since the European Convention entered into force, in 1953. These complaints overwhelmingly target a handful of parties with an especially lacklustre human rights track record,[132] and that, sadly, have done little to change their ways, in spite of the said inter-state complaints. Only two of such complaints have ended up in the award of rather modest amounts of compensation to the victims, and only after very lengthy judicial proceedings.[133]

In this regard, the effectiveness of any human rights-based inter-state dispute ultimately relies on a state's deference to international human rights obligations.[134] Whenever this is absent, a declaration of a breach of an international obligation would simply 'name and shame' the respondent state. Whether such a finding would have any added value, vis-à-vis a finding of non-compliance by the Paris Agreement Compliance Committee, is subject to the considerations already made above.

IV. Advisory Opinion on states' Obligations Concerning Climate Change

The literature has specifically considered the potential to ask the ICJ for an advisory opinion on international obligations concerning climate change.[135] Such an advisory opinion may be issued at the request of the United Nations (UN) General Assembly, the Security Council or of other UN organs and specialized agencies, that the General Assembly may authorise to raise questions arising within the scope of their activities.[136] Bodansky argues that such an opinion could serve to bring legal clarity and progress international diplomatic endeavours, for example concerning the contours of states' due diligence obligations to ensure that their greenhouse gas emissions do not cause serious damage to other states.[137] Such an opinion would have the potential to set the terms of the debate, provide evaluative standards and establish a framework of principles to develop more specific norms, and more generally 'shape public consciousness and define normative expectations for a broad variety of actors as on its direct influence on states'.[138]

At the *technical* level, Bodansky suggests that an advisory opinion would have multiple

130 Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61, 15 January 2009, para. 70.
131 John H Knox, 'Climate Change and Human Rights Law' (2009) 50 Virginia Journal of International Law 163, 211.
132 Of 24 complaints, 10 concern the Russian Federation, and six concern Turkey.
133 The European Court awarded compensation (just satisfaction) only in *Grand Chamber judgment Cyprus v. Turkey*, application no. 25781/94, 12 May 2014; and *Grand Chamber judgment Georgia v. Russia (I)*, application no. 13255/07, 31 January 2019.
134 As noted also in Wewerinke-Singh (n 5) ch 9.
135 Wewerinke-Singh (n 5); Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5); Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani (n 64).
136 ICJ Statute, Art. 65 and UN Charter, Art. 96.
137 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 711.
138 Ibid 706.

advantages vis-à-vis a contentious case. First, he argues, an advisory opinion would have 'a more general effect' –whereas judgments in contentious cases bind only the parties to the dispute. Yet, an advisory opinion will formally bind no-one at all, and could simply be ignored by any state particularly affected, as the United Kingdom's reaction to Chagos Islands Advisory Opinion[139] clearly demonstrates. More generally, a judgment delivered as a result of contentious proceedings is only binding on the parties insofar as it orders the parties to do/not do something. But insofar as non-parties to the dispute are concerned, and insofar as it interprets the law, it will carry the same authority as an advisory opinion. So, if the aim is to clarify the law, there would be little difference between an advisory opinion and a contentious case, especially one concerning the interpretation of a multilateral treaty to which many states are party, such as the Paris Agreement. Second, Bodansky suggests that all states could have their voices heard in an advisory opinion, whereas contentious cases are limited to the parties to the dispute and to states permitted to intervene. At least in principle, every party to a treaty has a right to intervene in a dispute concerning that treaty. Intervention in contentious proceedings are however generally rare, and states have instead more likely to intervene in advisory proceedings.[140] Third, Bodansky suggests that an advisory opinion could address general issues, leaving the specifics to international climate negotiations.[141] Yet, if the objective of the dispute is to obtain clarification concerning the contours of state obligations, surely this is not necessarily an argument against instigating a contentious case. At least at the technical level, therefore, the added value of pursuing an advisory opinion is not immediately apparent.

At the *substantive* level, determining which legal questions could be helpfully subjected to a request for an advisory opinion is not as simple as it may seem. Bodansky suggests that such an opinion should carefully avoid issues addressed directly in the climate change negotiations, especially highly political and contentious ones—for example, the meaning of the principle of common but differentiated responsibilities and respective capabilities. He cautions that an opinion on this matter 'would have little upside potential but considerable dangers,'[142] most saliently that of throwing the Court into extremely political debates, thus damaging its reputation while simultaneously exacerbating tensions in the negotiations. Instead, Bodansky reckons that an opinion on factual issues would be 'more neutral'.[143] He rejects Sands' suggestions that an international court be asked to settle the scientific dispute about climate change,[144] as this matter already falls within the remit of the IPCC, which in any event is much better equipped to deal with it. Instead, Bodansky suggests that an international tribunal could elaborate more specific criteria of due diligence, establishing 'a common language for discussing NDCs' which in turn could result into more ambitious NDCs in the future.[145]

This and similar suggestions, however, seem to fly in the face of the *existential* constraints associated with the fact that parties to the climate regime are working on this very matter already. If, in other words, the objective is to develop more/better rules concerning NDCs, the parties to the climate treaties arguably are in a better position than an international court to develop such rules. Even an advisory opinion on the due diligence obligations associated with NDCs could be regarded as undermining the nationally determined nature of states'

139 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, ICJ Reports 2019.
140 ICJ Statute, Article 63.2.
141 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 711.
142 Ibid 708.
143 Ibid 209.
144 Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28 Journal of Environmental Law 19, 29.
145 Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change' (n 5) 709.

contributions and, therefore, as contrary to the spirit of the Paris Agreement.[146] Similarly, an advisory opinion on whether financial transfers represent compensation or assistance would be at odds with the climate regime parties' 'studied silence' on this divisive matter.[147] As Bodansky observes, states are likely to feel a stronger commitment to norms to which they have agreed, and over which they have ownership, than those devised by an international adjudicatory body.[148] Indeed, the fact that parties to the Paris Agreement are still engaged in the development of rules on NDCs makes litigation seem premature and counterproductive. Yet again, recent climate change litigation at the national and regional level clearly shows the potential to put pressure on governments to deliver more ambitious climate obligations, by challenging existing laws, and even ones that have just been adopted.[149]

Ultimately, however, even an advisory opinion asserting that states have a responsibility to reduce emissions would at best put pressure on states to do the same in the context of the climate treaties, rather than directly cause them to reduce their emissions.[150] So, also at the substantive and at the existential level, the added value of an advisory opinion would seem to be far from apparent.

V. Conclusion

This chapter has selectively revisited and critically engaged with the copious body of literature on inter-state climate change litigation in light of developments since the adoption of the Paris Agreement. It evaluated the opportunities and constraints of each litigation scenario and their potential, firstly, to put pressure on states to intensify their response to climate change, and, secondly, to redress harm associated with the impacts of climate change.

In relation to the first matter, the very existence of international processes dedicated to the same purpose makes it seem unlikely that any international tribunal might be willing to venture into this minefield. Even if they did, it seems doubtful that a judicial decision – whether advisory or otherwise – would do anything more than simply reiterate that parties should comply with their obligations to reduce their emissions under the climate treaties. If anything, international adjudication would probably augment divisions and animosity, and damage an international diplomatic process that is already marred by distrust and faltering political will. Therefore, the added value of inter-state litigation to instigate litigation to put pressure on states to intensify their response to climate change would seem to be limited.

In relation to the second matter, both the literature and the present author are more hopeful. International climate negotiations have avoided dealing with climate change related harms for almost thirty years. And even though, as Bodansky notes, their silence is laden with political consequence,[151] this does not detract from the fact that the law on harm associated with climate change is on the cusp of a veritable revolution. In coming years domestic law is bound to evolve to accommodate civil liability and compulsory insurance arrangements to grapple with the impacts of climate change.[152] This shift in domestic law is likely to reverberate on international

146 Ibid 710.
147 Ibid 711.
148 Ibid 706.
149 See *Urgenda Foundation and 886 Citizens v. The State of the Netherlands*, 9 October 2018; and *Carvalho and Others v. Parliament and Council*, Official Journal of the European Union 2018/C 285/51 (2018). See also the chapters in this volume by Christine Bakker. 'Climate Change Litigation in the Netherlands: The *Urgenda* Case and Beyond', and by Marc Willers, 'Climate Change Litigation before European Courts'.
150 Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani (n 64) 289.
151 See note 142 above and corresponding text.
152 See literature review in Annalisa Savaresi, 'Human Rights Responsibility for the Impacts of Climate Change: Revisiting the Assumptions' [2020] Onati Socio Legal Series.

law, as the *Trail Smelter* arbitration exemplifies.[153] So in a few years' time, 'general principles of law recognized by civilized nations'[154] – to use the dated expression included in the ICJ Statute – on this specific matter will exist, and may also be used in the context of international adjudication. So, in the not so distant future– and perhaps with greater age and gender variety on the bench – we may indeed see some inter-state litigation for climate change related harms.

What would the added value of such litigation be? At the very least, this litigation would put pressure on states to legislate and cooperate, especially on the vexed matter of people's displacement –a real elephant in the room at international climate negotiations. And whilst not a solution, international litigation could be instrumental in bringing about a change in attitude by courts and lawmakers, eventually triggering inter-state cooperation that is sorely needed to address the plight of those vulnerable to the devastating impacts of climate change. In this regard, the *Urgenda* decision[155] provides an important example of how human rights law obligations may be relied on to put pressure on national governments to prevent dangerous climate change. Inter-state litigation could potentially have a similar effect, bolstering international cooperation on climate action.

This brings us back to Brierly's famous quote[156] and leads the present author to conclude that, like international law, inter-state climate change litigation is 'neither a chimera nor a panacea', but merely one of the tools at our disposal for delivering better and greater climate action. Only time will tell whether and how this tool will be used. But given the present state of international climate diplomacy, something needs to be done. And as this volume clearly shows, in the face of the climate emergency, 'whatever works' has increasingly become the motto of climate change litigators all over the world.

153 *Trail Smelter*, UNRIAA, vol. III (Sales No. 1949.V.2), p. 1905 (1938, 1941).
154 ICJ Statute, Article 38.1.c.
155 See note 149 and corresponding text.
156 Brierly (n 11) v.