



The Geopolitics of Climate Justice: collective interest or *raison de système*?

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Abstract

If we fail to coordinate a systemic decarbonisation of the global economy sufficient to prevent runaway climate change, no amount of effort put towards adaptation will be sufficient. Our attention to the task of mitigation, which by itself must negotiate enormous geopolitical obstacles, requires priority if we are truly concerned with alleviating the human costs of climate change. This choice of framing of the human challenges we face from climate change, however, is at odds with the standard conception of climate justice, which seeks to provide reforms to the international legal and political order to address increasing systemic inequities. What these two perspectives have in common is the recognition that climate change necessitates systemic reforms to the international order. To the extent that international law can facilitate these reforms, the question seems to be how can we better enforce equitable international obligations. This commentary asserts that the distribution of costs and benefits inherent to international regulatory standards will determine the effectiveness of any subsequent enforcement. The utility of a Climate Court, therefore, will be reflected in the ability of the operative climate treaty to produce sufficiently systemic voluntary commitments.

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Introduction

In February 2015, Bolivia proposed the creation of a Climate Justice Tribunal to be included in the negotiating text to be finalised at the December Climate Conference in Paris.¹ After years of advocating the creation of an International Court for the Environment (ICE), you might suspect I rejoiced to see this proposal formally recognised in the United Nations Framework Convention on Climate Change (UNFCCC) process, but I did not.

If I supported the use of courts and tribunals to ensure better compliance and enforcement with international environmental law, why on earth would I be disappointed with this historic proposal? The answer speaks to a serious limitation of the justice approach to addressing climate change through international law: international law is voluntary. International law requires that state actors consent to be bound by substantive actionable obligations, and then actively delegate authority to a court or tribunal to be bound by its third-party interpretation of the law.

It is not at all clear that the Bolivian delegation factored this consent constraint into its proposal for a Climate Justice Tribunal or the obligations it seeks to enforce. This omission, by anyone seeking to apply a human rights or climate justice approach, gravely reduces the problem-solving effectiveness of their policy proposal.

To its credit, the International Bar Association's excellent climate justice report *Achieving Justice and Human Rights in an Era of Climate Disruption* does not omit the influence of this crucial element for the creation of obligations. The report specifically notes the necessity of state consent to the jurisdiction of international courts and tribunals, and for non-state actors to be granted standing before those panels. In the IBA's Action Matrix, which summarises close to 60 policy proposals, state party consent is likely to be required for 74 per cent of these recommendations.² This number rises to 89 per cent if you include

¹ The Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) is a subsidiary body of the United Nations Framework Convention on Climate Change whose mandate is the negotiation of a post-Kyoto Protocol climate agreement. For more information on the Climate Justice Tribunal, see (2015) 12 (623) IISD Earth Negotiations Bulletin ADP 2-8 #4, 1, www.iisd.ca/download/pdf/enb12623e.pdf, last accessed 22 December 2015; and for a link to the 2010 submission by Bolivia delivered to the ADP Chair (p.29) <http://unfccc.int/resource/docs/2010/awglca10/eng/misc02.pdf>, last accessed 22 December 2015, which was the product of the 2010 Bolivian Conference on the Rights of Mother Earth <https://pwccc.wordpress.com/2010/04/28/submission-by-the-plurinational-state-of-bolivia/>, last accessed 22 December 2015.

² The 58 Action Matrix recommendations in the IBA's report target four specific audiences: recommendations directed explicitly towards states total 29 of 58 (or 50 per cent); recommendations directed implicitly towards states through non-state actors total 14 of 58 (or 24

recommendations to non-state actors who themselves require the consent of states to create binding obligations on others. Of these, a number of recommendations may be vulnerable to the de facto veto of the consent constraint, although I argue that this vulnerability may be reduced.

In the commentary that follows, I will make the counter intuitive assertion that a human rights approach may not be the best way to address the human costs of climate change. This is not to say human rights are unimportant; on the contrary, they can justifiably be described as the primary reason we need to address the threat of climate change. Nevertheless, the human rights approach may not be the most effective way to avoid the colossal human costs of a changing climate.

I make this assertion using a comparison of a proposal for an ICE (or Climate Court) and the Bolivian proposal for a Climate Justice Tribunal.

I make specific reference to the 'consent constraint' that reflects the voluntary nature of international obligations, as well as the 'collective-action-problem constraint' posed by climate change that necessitates the enforcement of international legal obligations sufficient to dissuade free riders. Using these two elements of international cooperation I create a model to test the likely utility of the two climate dispute settlement mechanisms (and which may be elaborated to test the enforceability of other proposals).

Ultimately, whether we pursue a human rights approach or a geopolitics of international cooperation approach to create actionable and enforceable obligations, we must strive to reconcile the fact that they must both be applied voluntarily. With the consent constraint in mind, this commentary seeks to assess the likely success of either approach.

International Court for the Environment (or Climate Court)

Setting aside the notion that it would be much easier to create a court or tribunal that does not require compulsory jurisdiction, I propose the creation of a specialised dispute resolution mechanism that facilitates the strict enforcement of mutually agreed legally binding treaty obligations. The value of proposing the strongest possible version of a Climate Court is that it meets our ambition of a court able to enforce an international rule of law. This court is not meant to punish individual polluters, nor is it intended to right historic wrongs. The purpose of this version of an ICE or Climate Court is to determine the compliance or non-compliance of state

per cent), which combined equals 43 of 58 (or 74 per cent) of the IBA recommendations; recommendations to non-state actors, which will need state involvement to produce binding obligations, total nine of 58 (15 per cent), or a new combined total of 52 of 58 (89 per cent); the remaining recommendations (six of 58 or ten per cent) propose IBA research, reporting and facilitation efforts. While not constituting statistical precision, this does produce a useful heuristic with which to identify the importance of state consent in many reform proposals. International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption*, IBA Task Force Report (IBA 2014).

actors that have accepted those clear actionable obligations. There are three main features:

- (1) subject matter expertise in international law and a demonstrable level of scientific literacy from the judiciary, supplemented by an advisory panel with specific expertise;
- (2) compulsory jurisdiction and reliance on clear treaty obligations, supplemented by, not based on, emerging custom or principle; and
- (3) in addition to inter-state disputes over compliance with reciprocal obligations, non-state actors would be granted standing to bring cases before the court, directed at their own state or others, with appropriate *de minimis* restrictions.

There are obvious benefits to a specialised tribunal, over a general court, as evidenced by a strongly worded dissenting opinion on the International Court of Justice's missed opportunity 'to demonstrate its ability to approach scientifically complex disputes in a state-of-the-art manner'³ in the Pulp Mills case.⁴ Judges Al-Khasawneh and Simma further expressed the view that the Court 'on its own is not in a position [to] adequately assess and weigh complex scientific evidence of the type presented by the Parties ... Nor is the Court, indeed any court save a specialised one, well-placed, without expert assistance, to consider ... ' highly technical competing scientific claims.⁵ I do not dismiss the problem of fragmented legal regimes, but surely we can aspire to an expert and expertly advised judiciary for specialised areas of law.

The primary benefit of compulsory jurisdiction is the reassurance that other states will be unable to ignore obligations with impunity, but it also speaks to the necessity for state parties to be confident they will be able to comply with their obligations. When obligations are negotiated with the knowledge that they will be enforced, it creates a demand for precision rather than vague hortatory policy.⁶ Again, I do not assert that a court without compulsory jurisdiction is unable to address non-compliance, but suggest that we should aim for the mechanism that most effectively reduces incentives for powerful states to defect from mutually agreed standards.

³ Pulp Mills on the River Uruguay (Argentina v Uruguay), Joint Dissenting Opinion of Judges Al-Khasawneh and Simma ICJ Rep 2010 (20 April) 98–99.

⁴ The Pulp Mills case concerns a transboundary dispute between Uruguay and Argentina that centred on the nature of the obligation by Uruguay (the upstream party) to consult with Argentina (the downstream party) on the construction and operation of a wood pulp mill, which altered the quality of the shared watercourse. It is alleged that highly technical scientific evidence on hydrodynamic modelling or the cumulative effects of contaminated sediment on various organisms, for example, may be given diminished weight next to established general principles of international law.

⁵ Pulp Mills on the River Uruguay (Argentina v Uruguay), Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, ICJ Rep 2010 (20 April) 100.

⁶ It seems likely that enforcement of a Climate Court would be linked to the Dispute Settlement Mechanism of the World Trade Organization, a regime that emphasises greater regulatory precision. The confirmation of non-implementation or non-compliance with climate treaty obligations by an individual state would then permit all states to retaliate against it under the WTO framework.

Lastly, while reciprocal state-to-state agreement is a crucial requirement for an international enforcement mechanism, the diplomatic cost of initiating climate litigation between states may prove dissuasive. Empowering non-state actors to bring cases against their own or other states provides a useful accountability mechanism in line with access to justice and *erga omnes* principles. Their claims would challenge the alleged non-implementation of, and non-compliance with, a state's treaty obligations. The expectation of a greater number of cases before the court may also serve to discourage insincere ratifiers who never intend to comply with the terms of an international treaty.⁷

What differentiates this Climate Court from the Climate Justice Tribunal is that it starts with mutually agreed treaty law and facilitates compliance with very specific obligations. While subject matter jurisdiction and expertise ensure highly technical scientific evidence will be given due consideration, the court would not be driven by a prosecutorial desire to punish despoilers ad hoc. States that agree to those specific treaty obligations need not fear that a court 'for the environment' would impose new obligations on behalf of Mother Earth.

This conception of a Climate Court would not be 'well-placed to sound the clarion call for action that climate justice requires'⁸ precisely because no state likely to be brought before such a court would agree to such a broad and uncertain mandate. The agency costs of delegating broad constitutional powers to any international court create so much risk for a state that compulsory jurisdiction becomes out of the question.⁹ The opposing incentive is also likely to be present in decisions to delegate to a court; states are more likely to delegate authority in an area of law based on regulatory precision, rather than vague (and unpredictable), but noble aspirations.

The consent constraint

This particular ICE model is certainly conservative, boring even, but it is designed to enforce international regulatory standards and to respond to the voluntary nature of international law. In an anarchic world order, one of the burdens of state sovereignty is that states may only be bound by obligations to which they implicitly (through custom) or explicitly (through treaties) consent.¹⁰ Determinations of non-compliance with those obligations tend to rely on a specific delegation of authority

⁷ Or 'false positives' described in Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009) 18.

⁸ International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption*, IBA Task Force Report (IBA 2014) 6.

⁹ The development of customary international law (CIL) is obviously more complex than this, but the great powers seem especially able to resist emerging CIL when it appears designed as a tool to impose obligations on them without their consent. The changed trajectory of emerging customary international environmental law at Rio is discussed in a later section.

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to international courts, tribunals or treaty bodies. Moreover, while states are limited in their ability to escape established customary international law, states maintain the ability to exit treaties and treaty organisations.

This is a significant constraint to the reform of the international legal order. It is also a major source of frustration for those who do not incorporate it into their reform proposals.

With consideration of this constraint in mind, we are likely to ask: why then would any state agree to be bound by a treaty that delegates compulsory jurisdiction to a Climate Court?

The primary necessary condition for a state to agree to be bound by a treaty is the belief that ratification will bring greater individual benefits than the benefits enjoyed absent ratification, or conversely that the costs of non-ratification exceed those of ratification. The secondary rationale is that the treaty provides sufficient collective benefits between states, over existing costs imposed by the status quo.

A collective interest in international cooperation coupled with a desire to avoid individual marginal costs, however, is not enough to create effective treaty regimes. The rules must facilitate behavioural change sufficient to significantly ameliorate the problem the treaty sought to address. This is nicely captured by the difference between legal effectiveness (compliance with the terms of a treaty), behavioural effectiveness (the ability of the treaty to change state behaviour) and problem-solving effectiveness (whether the behavioural change engendered by the treaty is sufficient to address the problem the international community sought to solve).¹¹

Though not needed for all treaties, those where free-riders can upset the object and purpose of the treaty require enforcement. The inclusion of an enforcement mechanism is possible when those who benefit from wide compliance with a treaty fear that others may not comply. The specific motivation here is the protection of individual benefits.

The incentive to delegate authority to a court or other compulsory mechanism is the expectation of predictability in the application of obligations. As the ICJ noted in the Nuclear Weapons opinion, '[the Court] states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.'¹² The principal (state party) must be confident that the agent (the court) will not chart an unpredictable course for the legal regime.

Unfortunately, the elegant simplicity of an effective treaty model that only requires (1) individual rationality and (2) collective rationality is attractive, but ultimately

¹¹ Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010) 254–56.

¹² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Rep 1996 (8 July 1996) para 18.

insufficient. This is due to the heterogeneous distribution of responsibility and capability of states in the international order.

If you focus on the pursuit of collective rationality, or reform proposals with the broadest possible support, there are an endless amount of policy goals to include on the wish list. Reduced global poverty, debt forgiveness, technology transfer, development finance with no conditions attached, banning nuclear weapons and so on are all undeniably just and equitable goals and can find wide support in a multilateral treaty negotiation. The problem of producing effective international law, however, is not our inability to envision a treaty that provides a collective benefit; the problem is creating sufficient individual benefit among those financing the collective benefit and those targeted to change their behaviour necessary to provide the collective benefit.

This is an important distinction. If, for example, you put some 190 state representatives in a room and ask for suggestions on problems to solve, someone may raise their hand and suggest we ban nuclear weapons. The argument is made that humanity would collectively benefit from their prohibition and the vast majority of states parties agree to codify this historic decision.¹³ This exercise is only effective, however, if it has an impact on the behaviour of those few states that actually have nuclear weapons, despite the fact that it proposes broad individual and collective benefit.

As with the nuclear example, the direction and sequence with which a treaty is negotiated may result in wide support from low and moderately polluting states, but high polluting states may come to the realisation that the costs of ratification do not outweigh the benefits of non-ratification. It is fair to say that this is what happened in the negotiation of the Kyoto Protocol and resulted in a regime with no emissions obligations for the United States, which at the time was the biggest source of greenhouse gases.

With the US refusing to consent to be bound, there was little interest from other states in increasing US benefits from ratification (providing side-payments or other incentives to secure consent) and little that could be done to make non-ratification more expensive for the US (economic sanctions, military threats, expelling ambassadors, etc). This suggests (1) that when a state has the 'capacity to pay' for the obligations in a treaty, other states may ignore consideration of that party's 'willingness to pay'; and (2) that there are very real limits on the ability of states to compel great powers to accept obligations using only normative appeals.¹⁴

From a problem-solving perspective, the crucial distinction among efforts at international cooperation is between seeking collective benefits and the provision of

¹³ Let us treat the possibility that nuclear weapons actively decrease the likelihood of world war as irrelevant for this hypothetical.

¹⁴ Deborah Saunders Davenport, *Global Environmental Negotiations and US Interests* (Palgrave Macmillan 2006) 29.

collective goods. If we forget that the benefits we want must be provided, we are more likely to produce sub-optimal cooperation.

A revised model of effective climate treaty-making, therefore, seems to require (1) individual rationality in particular among the states most able to upset the object and purpose of the treaty (that we may describe as the core participants); and (2) individual rationality of those states outside the core, which in combination produce (3) collective rationality.

In other words, if we seek to create obligations to provide benefits for the collective or majoritarian community of states, without considering the willingness of some states to pay the cost of those benefits, simply adding an enforcement mechanism is unlikely to affect the behaviour of powerful actors who view the treaty as a bad deal. We may be misperceiving US refusal to ratify Kyoto as an enforcement problem when in fact it is a distribution of costs and benefits problem. This misperception is especially likely if we assume that normative arguments should be sufficient to overcome political cost-benefit obstacles.

By contrast, if we start with a presumptive need for enforcement, changing the behaviour of the biggest polluters and receiving the support of the most powerful states become the initial concerns. Producing an agreement that benefits each of these actors addresses the most complicated aspect of the distribution problem. These hegemonic actors are incentivised to support systemic change precisely because they benefit from it. Moreover, these core states are incentivised to share the benefits of the systemic change to ensure that the majority of states also receive clear marginal benefits. Once the distribution of costs and benefits is settled, enforcement becomes far easier as the most powerful states not only stop obstructing but also actively support enforcement.

The legitimacy of this sequential coordination, first in the core, then between the core and periphery, is that it produces what may be described as *raison de système*.¹⁵ Once the major powers and major polluters coordinate their individual *raison d'état*

¹⁵ In *The Evolution of International Society*, Adam Watson proposed the idea of *raison de système* as a counterpoint to *raison d'état*. He argued that the incentive for hegemonic power cooperation was that 'it pays to make the system work'. Watson, Adam. *The Evolution of International Society: A comparative historical analysis*. (Reissue with a new introduction by Barry Buzan and Richard Little) Routledge (2009) xxvi. As I use it, *raison de système* refers to those states willing and able to determine, and then secure, the direction of the international order to address collective action problems. This conception is merged with hegemonic stability theory and Mancur Olson's *The Logic of Collective Action*, which argue that the production of a public good requires an individual actor to supply it. For problems no single state can solve, the idea of supplying a global public good through a core/concert of states or K-Group is elaborated by Thomas Schelling, Russell Hardin, Duncan Snidal and others who argue that collective goods may be supplied through unilateral coordination. My conceptual contribution to the work of Stephen Krasner, James Fearon, Lloyd Gruber, as well as Gregory Shaffer and Mark Pollack is that the bargaining core includes not only who will supply the good, but also those who can prevent the supply of the global public good. Olson, Mancur. *The Logic of Collective Action: Public Goods and the Theory of Groups*. Cambridge, MA: Harvard University Press, 1971.

(or national interests) they are then able to produce systemic change. On the presumption that the avoidance of the human costs of climate change necessitates systemic change, focusing on geopolitical considerations may counter intuitively be far more effective at preventing those human costs than normative appeals to collective interest.

Justice

*The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.*¹⁶

One of the exceedingly difficult challenges of mitigating climate change is that it is not a collective good amenable to unilateral provision. To use a popular idiom rather ironically, mitigation efforts must produce a 'rising tide to lift all boats'. Rising ambition, then, results in lowered emissions. The tide, however, is systemic; it refers to the sufficiently wide application of ambition. If we negotiate a global treaty and the EU is the only entity to lower emissions (due to regulatory comparative advantage or greater ambition), it is still insufficient to affect the tide.

In the pursuit of climate justice, there are very clear advantages to humanising the impacts of climate change. The melting ice caps, starving polar bears or bleaching coral do not create the same ethical or salient political imperatives as refugees streaming into Europe to escape a civil war directly influenced by the multiplier effect of regional freshwater scarcity.¹⁷

Moreover, a human rights approach highlights the exasperation of states unable to sway the direction of global negotiations. As stated in the Malé Declaration on the Human Dimension of Global Climate Change, the Small Island States argued, 'We are convinced that this negotiation process must not be viewed as a traditional series of government trade-offs, but as an urgent international effort to safeguard human lives, homes, rights and livelihoods'.¹⁸

Ultimately, the IBA's definition of climate justice, which seeks 'to ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment',¹⁹ reflects, in part, a desire to level the playing fields of conflicting

¹⁶ 'In the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread'. France, Anatole, *The Red Lily*. (2007 Reprint, Wildside Press) 75.

¹⁷ Marc Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33 *Harv Envtl L Rev* 439, 451.

¹⁸ Marc Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33 *Harv Envtl L Rev* 439, 442.

¹⁹ International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption*, IBA Task Force Report (IBA 2014) 2.

national and international legal orders.²⁰ As the Marshall Islands argues in a submission to the Office of the High Commissioner for Human Rights, ‘international multilateral negotiations have created a platform under which [the Marshall Islands], with limited political weight, is forced to bargain desperately against large political powers, in an attempt to preserve what should otherwise be rights entitled to all humans’.²¹ Our innate understanding of justice is that the law can and should protect the weak from the recklessness of the powerful.

How we reform the inequities of the formal application of law, suggested by Anatole France above, however, is made increasingly difficult as differentiated responsibilities, especially those affecting inter-generational distribution of rights and duties, create their own modern-day inequities.

Uneven acceptance of treaty obligations can be evidenced in a number of predictable ways—reservations, arrangements like the ‘EU Bubble’,²² specific equitable exclusions, opaque mixed-competencies for compliance, the refusal to ratify, etc — but may also be differentiated through different capacities for national enforcement. The inclusion of these tools to produce substantive justice may either be helpful to increase participation or unhelpfully upset the object and purpose of cooperative effort.

If we were to produce a universal rights-based obligation to reduce emissions codified in an international treaty, but only the US legal system was sufficiently robust to enforce that universal obligation, this would be insufficient to affect the tide of global emissions. Or perhaps more likely, depending on the degree to which a right to a clean environment included specific extraterritorial economic rights, the US would be unwilling to support such a right through ratification. Through ratification, Haiti and the US may share the same formal duty to facilitate international cooperation to fulfil those rights, but the substantive responsibilities are unlikely to reflect formal equality.

As the IBA report suggests, ‘To translate such an aspiration into concrete recommendations requires that actions be grounded in the certainties of climate science and the realities of international climate policy’.²³ There are, of course, many realities of international policy-making, but it is worth noting that the US has a uniquely robust legal system relative to many states, has refused to ratify the

²⁰ Marc Limon, ‘Human Rights and Climate Change: Constructing a Case for Political Action’ (2009) 33 *Harv Envtl L Rev* 439, 451.

²¹ *Ibid.*

²² The term ‘EU Bubble’ refers to the EU demand for a single Kyoto target for all of the states in the EU, rather than individual country targets. This allowed the UK and Germany, who had experienced significant emissions reductions since 1990, unrelated to climate change concerns, to distribute this windfall to states in the EU who wished to increase their emissions. By tying Kyoto emissions targets to a 1990 baseline rather than one from 1997, the target for the EU was much less onerous than that for the US.

²³ International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption*, IBA Task Force Report (IBA 2014) 3.

majority of other treaties imposing any form of extraterritorial economic rights²⁴ and, like all states, is not obligated to consent to a new right to the environment.

Of particular concern with a rights-centred approach is the temptation to try to get around the consent constraint by relying upon appeals to our inherent dignity or common humanity to impose universal obligations.²⁵ Despite the considerable frustration produced by the consent constraint, especially when it is used as a veto to avoid obligations, trying to produce obligations on states through a 'shortcut' exacerbates uncertainty and general distrust of international law.²⁶

Disaggregating reciprocal obligations between states to duties owed to individuals or to the wider international community is only as useful as the degree to which the ratification of treaties producing those rights is sufficiently wide. The perceived symmetry of individual rights enjoyed by everyone does not overcome the geopolitics of asymmetrical obligations on states, or the consent constraint.

Similarly, the efforts of norm entrepreneurs who seek to impose retroactive obligations, in opposition to international law's overwhelming preference for *ex nunc* obligations, are likely to be controversial.²⁷ There is a very real danger that positional bargaining reliant on claims of retroactive obligations or other general principles of equity that produce asymmetrical rights and duties may upset the object and purpose of any treaty under negotiation.

Unfortunately, this is what happened during the negotiation of the UNFCCC and Kyoto Protocol. Entirely legitimate appeals to equity considerations regarding historical emissions resulted in a treaty that exempted Brazil, Russia,²⁸ India, China and a number of other major emitters from substantive obligations. For many states in the developing world, their exclusion from emissions obligations had limited impact on global mitigation efforts; for others, like the BRIC states, this was not the case.

Ultimately, these states were understandably concerned with avoiding mitigation costs that threatened their economic development, so they exploited developed world concern that a global climate treaty required wide participation. Equity principles were used on behalf of the Global South as a shield to refuse individual costs and demand individual benefits. As a result of using principle to determine rather than guide, Kyoto failed to produce a *raison de système* coordination of major

²⁴ The US has so far refused to ratify the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the Declaration on the Right to Development. These all implicitly and explicitly refer to a duty to provide international support by states able to do so.

²⁵ Siobhán McInerney-Lankford, Mac Darrow and Lavanya Rajamani, *Human Rights and Climate Change, A Review of the International Legal Dimensions* (The World Bank 2011) 7.

²⁶ Marc Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33 *Harv Envtl L Rev* 439, 461.

²⁷ *Ex nunc* denotes obligations 'as from now on' while *ex tunc* means 'from the outset'.

²⁸ Due to an emissions cap no one expected Russia to exceed.

emitters willing to share the costs of shouldering a new regime. The firewall between North and South produced gridlock, rather than facilitating forward progress.

The legitimacy of international treaties is often measured by the number of state parties, but the legitimacy of proposed climate treaties or enforcement mechanisms should rely on the ability to bind those states most able to upset the object and purpose of the treaty. To the degree this is accurate, the legitimacy of any climate justice proposal seeking to provide a collective good is not merely collective interest, although that is a crucial end goal; it is the ability to persuade those most able to deny the achievement of the collective good to comply voluntarily out of self-interest.

It is not entirely clear that our very legitimate interest in humanising the threat of climate change, as well as humanising our mitigation and adaptation efforts through a rights-centred approach, gives us a better tool to produce sufficient *raison de système* to prevent the catastrophic human costs of climate change. The problem is that rights claims precede the acceptance of responsibility for their voluntary provision.

Norms and principles in Rio

*Around the time of the Rio Earth Summit, many in the North and South argued that sustainable development might be the trump card that the South had been seeking all along. The North's new concern for global environmental problems, it was argued, provided the South with considerable leverage and bargaining power because without participation of the developing countries many such problems cannot be addressed effectively. For example, a Caribbean official suggested that 'for the first time in more than a decade, the developing countries have an issue [the environment] where they have some real leverage,' while India's environment minister went even further to proclaim that 'the begging bowl is [now] really in the hands of the Western World.'*²⁹

The direction of international environmental law was fundamentally altered in Rio and this is perfectly captured in the text of the Framework Convention on Climate Change. Rio reversed the traditional North–South conditionality relationship where compliance with environmental regulations was facilitated by capacity-building, incremental cost allocations and technology transfer. According to the ‘common but differentiated responsibilities’ principle, developing state implementation of their

²⁹ Adil Najam, ‘The View From the South: Developing Countries in Global Environmental Politics’ in Regina Axelrod, Stacy VanDeveer and David Leonard Downie (eds), *The Global Environment: Institutions, Law and Policy* (3rd edn, CQ Press 2011) 247.

environmental commitments became conditional on receipt of direct additional financial assistance.³⁰ UNFCCC article 4(7) reads:

The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.

If the pre-Rio conditionality relationship implied that compliance by the Global South was being bought, the post-Rio implication was that the Global South was now selling compliance and demanded payment upfront. Gone was the notion that developing states might have any intrinsic interest in self-initiated environmental protection.

Unambiguous efforts to make any environmental responsibilities contingent reflect a pervasive concern that 'universal' environmental obligations would be used to restrict the economic development of the Global South. This concern is evidenced by specific exclusions built into the core of emerging environmental principles. The 'no harm' principle was modified to authorise states 'to exploit their own resources pursuant to their own environmental and developmental policies'.³¹ The precautionary principle was weakened with the addition of the caveat 'according to their capabilities'.³² And despite the fact that internalising the distorting effect of externalities is the purpose of the polluter pays principle, it was thereafter limited by the demand for it to be applied 'without distorting international trade and investment'.³³ As a result, the legacy of Rio is the acknowledgment that for the Global South 'environmental goals constrain development rather than the other way around'.³⁴ If addressing global environmental problems requires a common purpose, Rio made clear that the developed and developing worlds were at cross-purposes.

The implication of injecting double standards into emerging customary international environmental law was that neither pro-development nor pro-environment concerns were likely to be met. Specifically, this creative ambiguity has

³⁰ Anita M Halvorssen, 'Common, but Differentiated Commitments in the Future Climate Change Regime – Amending the Kyoto Protocol to Include Annex C and the Annex C Mitigation Fund' (2007) 18 *Colo J Int'l Envtl L & Pol'y* 247, 255.

³¹ Principle 2. Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/5/Rev 1 (1992).

³² Principle 15. Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/5/Rev 1 (1992).

³³ Principle 16. Rio Declaration on Environment and Development (adopted 14 June 1992) UN Doc A/CONF.151/5/Rev 1 (1992).

³⁴ David A Wirth, 'The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa' (1995) 29 *Georgia Law Review* 599, 628–29.

produced new principles that are normatively hollow, which is to say that if they suggest opposing obligations, they produce no obligations at all. The US delegation in Rio sought to avert this eventuality, noting that '[t]he United States does not accept any interpretation of Principle 7 that would imply ... any diminution in the responsibilities of developing countries'.³⁵ The impact of this statement, however, has proved negligible compared to the impact that developing world exceptionalism has had on the arrested development of effective post-Rio international environmental law. In effect, Rio prevented these 'principles' from developing into 'custom' despite considerable efforts *ex post* to codify them.

Despite the legitimacy of the equitable principles used to shield against the imposition of obligations against their consent, the developing world codified a dangerous form of exemptionalism. This creates a perverse incentive to demand a very high regulatory standard when negotiating multilateral environmental agreements, the cost for which must be paid by someone else.³⁶ Normative appeal to equitable principles has, as a result, prevented rather than encouraged *raison de système* coordination. Analysis produced in 2012 suggests that it would be impossible to meet the equity goals, as then defined by China and the G-77, as well as the effectiveness goals sufficient to protect the climate system.³⁷

The Climate Justice Tribunal

The design of the Climate Justice Tribunal is fundamentally derived from an interest in pursuing climate justice for the most vulnerable global citizens. It claims a right to enforce obligations retroactively against the industrial world and ensure the payment of reparations. The problem the tribunal is seeking to solve is the injustice of the economic and geopolitical order responsible for the inverse relationship between the source of historical emissions and those most vulnerable to climate impacts, claims that are not without merit. The problem of specifically addressing climate change, however, appears to be a mostly secondary concern.

Moreover, by seeking to enforce normative obligations derived from Rio's UNFCCC, the tribunal may seek to exempt the Global South from any obligations until reparations are fully paid. The reasoning for this rather extreme assertion is as follows: by making developing state environmental obligations contingent on reparations to address global economic inequity, a powerful incentive has been created for continued environmental inaction. Once developing states accept obligations, irrespective of the payment of climate debt, the developed world's incentive to provide reparations is weakened. In this case, despite starting with a very reasonable concern about equity, the rights-based approach has produced a

³⁵ Ibid, 650.

³⁶ Sabrina Safrin, 'The Un-Exceptionalism of US Exceptionalism' (2008) 41 Vanderbilt Journal of Transnational Law 1307, 1349.

³⁷ William R Moomaw, 'Can the International Treaty System Address Climate Change?' (2013) 37Fletcher F World Aff 105, 110.

perverse incentive.³⁸ Prioritising the provision of funds for adaptation over cooperation on mitigation exacerbates this tension.

Initially proposed at the Rights of Mother Earth Conference³⁹ in Cochabamba, Bolivia in 2010, the Climate Justice Tribunal seeks to hold accountable those responsible for historic emissions and create a legal mechanism to enforce the collection of that climate debt. On behalf of the environment and individuals marginalised by the industrialised world, tribunal designers demanded the authority to impose sanctions on climate criminals.⁴⁰ The conference set an initial target for repayment of climate debt at six per cent of developed world GNP. These reparations were to be distributed to fund developing state climate adaptation, technology transfer, capacity building and nationally appropriate mitigation actions.⁴¹

With the Andean glaciers disappearing at an unprecedented rate and contributing to increasing regional water scarcity Bolivian outrage is entirely understandable. In 2010, Pablo Solon, who was then Bolivia's ambassador to the UN, organiser of the conference, and mastermind of the tribunal proposal, explained: 'What we want to achieve is justice ... When we say climate justice tribunal, we are speaking about how to sanction actions that seriously affect the environment and have consequences for populations, for nations that may even disappear beneath the ocean.'⁴² Justice, as defined in Rio, however, does not include the possibility of sanctions for developing states even if they also seriously affect the environment.

Fast-forward to 2015, and the inclusion of the Climate Justice Tribunal in the UNFCCC's ADP negotiating text:

195. [Establishes the international climate justice tribunal to oversee, control and sanction the fulfillment of and compliance with the obligations of Annex I and Annex II Parties under this agreement and the Convention.]⁴³

³⁸ Mark A Drumbl, 'Northern Economic Obligation, Southern Moral Entitlement, and International Environmental Governance' (2002) 27 Colum J Envtl L 363, 376–77.

³⁹ This Conference represents the expression of a normative claim by the people of Bolivia that the environmental impact of clear intra- and inter-generational economic inequity creates a moral, and therefore legal, obligation for developed states to pay compensation to developing states.

⁴⁰ 'Facing the absence of an international legal framework to criminalize and punish all those crimes and climate crimes that attempt against the rights of Mother Earth and humanity, as indigenous peoples and social organizations of Bolivia, we demand the establishment of a Climate Justice Tribunal that has the binding capacity to judge and punish those states and companies that pollute and cause climate change.' <https://pwccc.wordpress.com/2010/04/16/working-group-5-climate-justice-tribunal/#more-1215>.

⁴¹ See n 1 above, and Submission by the Plurinational State of Bolivia to the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (26 April 2010) <https://pwccc.wordpress.com/2010/04/28/submission-by-the-plurinational-state-of-bolivia/>.

⁴² Andres Schipani, 'Bolivian Community Sees Its Future Melt' <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americas/8629379.stm>, last accessed 22 December 2015.

⁴³ Section K. UN Doc FCCC/ADP/2015/1 (Version of 11 June 2015 at 16:45) 66.

The proposed text does not hint at any anti-imperialist motivation; it merely seeks to apply an asymmetrical set of obligations on the developed world. A proposal for facilitating implementation and compliance is summarised here:

193. [In order to ensure compliance of developed countries and facilitate implementation for developing countries, the COP/governing body shall further elaborate the modalities of the mechanism/committee in accordance with the differentiated commitments of developed and developing countries under the Convention and on the basis of the experience with the compliance mechanism under the Kyoto Protocol. These arrangements shall include:

- a. A mandatory compliance mechanism for the commitments of developed countries on mitigation, adaptation, finance, technology development and transfer, capacity-building, and transparency of action and support;
- b. A voluntary facilitative forum for developing countries for enhanced action on mitigation, adaptation and transparency of action.]⁴⁴

What does this tell us? It is clear that an international legal regime that lowered global pollution and the threat of climate change at little to no cost for the developing world could greatly improve the lives of many millions and maybe billions of global citizens.

If the Global South were granted full reparations for the climate debt by way of adaptation funds, prior to having to regulate their own emissions, this could expedite the decarbonisation of the global economy, in a relatively pain-free way for the developing world.

If these retroactive obligations on the developed world could be enforced, they might create very real economic and social benefits for the developing world. In theory, the economic development of the Global South could increase adaptive capacity, and the expedited elimination of emissions from the developed world would delay the onset of an irreparably changed climate.

What is much less clear is whether the developed world leaders can justify voluntarily consenting to obligations that allocate asymmetric domestic costs, and which disproportionately create foreign benefits.⁴⁵ An enormous amount of optimism is needed to describe this merely as a problem of political will. A treaty codifying these obligations requires a US President, for example, to explain to his/her electorate that principles of global justice justify an asymmetrical tax on Americans.⁴⁶ Translating those international obligations into national implementing

⁴⁴ Ibid 65.

⁴⁵ Mark A Drumbl, 'Northern Economic Obligation, Southern Moral Entitlement, and International Environmental Governance' (2002) 27 Colum J Envtl L 363, 381–82.

⁴⁶ It would be difficult to justify the cost-benefit of a number of recent US-led military engagements, but it is worth noting those were framed as addressing a dangerous foreign enemy. Climate Justice

legislation would require the US Congress, traditionally not very eager to delegate tax authority to the international community, to do the same.⁴⁷

The proponents of this Climate Justice Tribunal are unambiguously identifying the climate criminals, then asking those same criminals to sponsor, legitimise and consent to the tribunal in the name of global climate justice. The unacknowledged problem with this proposal is that moral culpability does not equate to legal culpability as it relates to carbon emissions. All states must consent to be bound by international regulatory obligations.

The frustrating part of this proposed solution is that if the developing world cannot impose these obligations on the developed world, they produce no justice. In fact, to the extent that a strong version of 'common but differentiated responsibility' defeats the object and purpose of the climate regime,⁴⁸ rather than facilitate *raison de système* coordination, this rights-based approach may be inherently unjust.

Applying the *raison de système* test

The distribution of rights and responsibilities is fundamentally a political question that exists as a part of a two-level game for all state leaders: calls for the production of new global principles are limited by the willingness of the domestic audience to pay for them.⁴⁹ As such, universal principles based on collective interests, but with asymmetric allocations of rights and responsibilities, are almost certain to conflict with the individual interests of potentially crucial state parties. It may be infuriating to witness a developed state refuse to accept an obligation to provide even 0.7 per cent of its GDP to the developing world, a sum all Western states have the capacity to pay, but we forget that the consent constraint is reflected in a state's willingness to pay, which may be unaffected by entirely reasonable equity claims.

While the ability to claim a right is only limited by our imagination, it is the distribution of the corresponding responsibility that is the tricky part. If this poses a serious challenge intra-nationally, where the state has the power to steer a distributive criterion and then enforce it, it is even more challenging in an international legal order restricted by voluntary obligations. This distributive problem is compounded when the poorest 129 states in the United Nations system,

Tribunal enforcement of Rio-influenced climate obligations, on the other hand, clearly describes Americans as the enemy.

⁴⁷ It should be noted that Executive Order 12291 (and subsequent revisions) forbids Congress from enacting major rules which result in an annual effect on the economy of over \$100m, unless the potential benefits outweigh the potential costs. Military actions, not accidentally, are exempt from this regulation.

⁴⁸ Anita M Halvorssen, 'Common, but Differentiated Commitments in the Future Climate Change Regime – Amending the Kyoto Protocol to Include Annex C and the Annex C Mitigation Fund' (2007) 18 *Colo J Int'l Env'tl L & Pol'y* 247, 255.

⁴⁹ Robert D Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 *International Organization* 427.

constituting a two-thirds majority, are collectively assessed only 1.3 per cent on the UN Scale of Assessment.⁵⁰

As norm entrepreneurs, confident as we are in the merit of our proposals, it is far too easy to forget the degree to which our policy prescriptions must reflect the consent constraint. With this in mind, it is worth reiterating that 74–89 per cent of the recommendations in the IBA's climate justice report are likely to be reliant on voluntary adherence by states. Those states in turn may be concerned with the consent of other states and so delay their own consent, which produces a serious vulnerability in a number of otherwise excellent recommendations.

The voluntary nature of international law complicates the enforcement of international obligations, enforcement that most of us recognise is absolutely necessary to address climate change effectively. It is also clear that greenhouse gas emissions are causing climate change and that our collective failure to mitigate carbon pollution will lead to colossal human costs. If we ignore consideration of the historic responsibility for cumulative carbon emissions, we magnify this inequity. But if we make global emissions abatement contingent on paying that 'historic debt' in full, we may not make any forward progress at all. We need, therefore, to reevaluate our approach to incentivising the global regulation of emissions.

If, in the structure of policy proposals, we start with the need to enforce obligations, rather than design obligations we might one day hope to enforce, it changes the way we look at international problem-solving. This sequence may start with the delegation of enforcement powers to a specialised court or other non-compliance mechanism. By doing so, we soon find that this limits the type of legal obligations states are likely to accept.⁵¹ The consent constraint is a de facto veto of legal obligations for every sovereign state, and the one most states are least likely to relinquish.

In many ways, consent is the most powerful shield states will possess from interference in their domestic affairs by foreign powers. Delegation of this trump card is unlikely unless the primary legal obligations produce marginal domestic benefits, which justify the implementation and compliance with the obligation. Regulatory imprecision, uncertain distribution of domestic and international costs and benefits, and the absence of limits on a court to expand the scope of a potentially costly obligation all serve to reduce the likelihood of delegation.

Concern that the unilateral delegation of enforcement power will strengthen free-riders at your expense is a crucial reason why so much of international law is weakly enforced. A solution to this dilemma as it relates to climate change is to ensure that the great powers and major polluters work together to design an

⁵⁰ United Nations General Assembly, 'Scale of Assessments for the Apportionment of the Expenses of the United Nations' (5 February 2010) A/Res/64/248.

⁵¹ Soft law, which gained new stature after the 1992 Rio Conference when clear actionable obligations seemed impossible, may be devalued as a source of law.

agreement that eliminates incentives for free-riding. For each state able to upset the purpose and objective of the climate treaty, the benefits of compliance must be greater than the benefits of refusing to consent to the treaty. This self-enforcing approach recognises that geopolitical competition does not disappear when the major powers seek international coordination, and suggests that compliance with treaty obligations is more reliant on continued marginal benefits than moral obligation to international society.⁵²

If these powerful states are able to produce sufficient marginal benefits from compliance, they will be incentivised to distribute benefits to those outside the core of the regime. The purpose of doing so is to ensure that the majority of states enjoy marginal benefits from compliance with the treaty, which then creates a stable and legitimate collective benefit.

Provided the ambition of the core is sufficiently high, this enforcement regime has the potential to lock-in a substantive departure from business-as-usual carbon emissions. By producing a *raison de système* solution that starts with the toughest part of the process, getting agreement from the major powers and polluters on the distribution of obligations, the provision of collective benefits (including reduced human cost from climate change) from a global public good is facilitated. The compulsory jurisdiction of a specialised court links every individual state's obligation under a single systemic roof because they each constitute a duty owed to all other states and their citizens. Crucially, however, all states must accept some form of obligation to demonstrate not only a desire for rights from the system but a shared *erga omnes* responsibility for the system.

Conclusion

We need to be discussing climate justice and we need to be making policy decisions based on increasingly clarified climate rights and duties. We should be anticipating, as the IBA report does, the challenges of human-focused climate mitigation and adaptation. We should be discussing innovative ways to address these issues with the tools at our disposal, proposing reforms we envisage for existing legal mechanisms, and creating new, more effective tools. What we should not do is make international problem-solving more difficult by dismissing the impact of the consent constraint.

There are a great deal of rights-based reforms that do not require enforcement, but for those that do it is important we ask ourselves the following: if those states most likely to be held accountable to an open-ended obligation still have to consent to be bound, then to delegate specific authority to a court, tribunal or treaty mechanism, why would they choose a rights-based approach over a reciprocal inter-state treaty? More carefully defined rights and obligations should improve the likelihood of

⁵² For this argument applied to both custom and treaty law, see Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press 2005).

consent, but only if the global distribution of rights and duties does not produce onerous asymmetric domestic costs.

The international community may be able to persuade some states to internalise norms and re-evaluate domestic cost-benefit methodologies, without need of the instrumental model in this commentary, but other states will prove resistant to such pressures. This does not mean we should bend to every demand of the laggards from both North and South, but we should be realistic about the relative inviolability of the consent constraint.

Crucially, when our policy space includes actors obstructing the implementation of our solutions, we should try to engage a commitment to *raison de système*, rather than taking the easier route and simply seek to provide some moderate level of collective benefit at the margins. *Raison de système* coordination is able to produce systemic reforms by presuming the need for enforcement, then front-loading the difficult, but necessary, resolution of the distributive problem, which facilitates the resolution of the enforcement problem. The resolution of the enforcement problem, aided by a specialised court provides a much greater potential for collective benefit.

At the 2012 UNFCCC meeting in Durban, States Parties agreed to negotiate a regime that was ‘applicable to all’.⁵³ While the precise meaning of this term is still debated, it suggests a break from the asymmetric ‘firewall’ between developed and developing states, and a move towards greater symmetry of obligations. This is not meant to suggest an elimination of differentiated responsibilities, but indicates that the legal form is moving towards the creation of obligations for all parties.⁵⁴ References in the bracketed negotiating text above that developed states have legal obligations and developing states have voluntary obligations suggest that this process will take some time.⁵⁵ Nevertheless, it constitutes a crucial first step towards an enforceable climate regime that can ‘lift all boats’.

At the close of the December 2015 negotiations in Paris all mention of the Climate Justice Tribunal had been exorcized from the text. A mechanism free of a rigid firewall, but still mindful of the heterogeneity of state parties remained in its place:

1. A mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement is hereby established.
2. The mechanism referred to in paragraph 1 of this Article shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The

⁵³ Harald Winkler and Lavanya Rajamani, ‘CBDR&RC in a Regime Applicable to All’ (2014) 14 Climate Policy 102.

⁵⁴ Remi Moncel, ‘Unconstructive Ambiguity in the Durban Climate Deal of COP 17/CMP 7’ (2012) 12(2) Sustainable Development Law & Policy 6, 10.

⁵⁵ See text to nn 43 and 44 above.

committee shall pay particular attention to the respective national capabilities and circumstances of Parties.⁵⁶

A Climate Court could one day serve a valuable role in support of a climate regime able to garner sufficient state consent. Bolivia's Climate Justice Tribunal, on the other hand, is much less likely to be effective precisely because it fails to address the consent constraint.

I am not suggesting that the numerous individual recommendations in the IBA's climate justice report should be judged solely on their ability to produce the requisite state consent (my own advocacy for an ICE, for example, has produced none⁵⁷). That said, there are a number of potentially impactful recommendations in the report⁵⁸ that are likely to be vulnerable to veto. It may be possible to reduce vetoes (especially among key states) and in so doing more effectively supply climate justice, if we reflect on why states have historically been so reluctant to support the enforcement of their international obligations: the relative distribution of the costs and benefits of delegating voluntary consent.

Lastly, we should judge our recommendations on their ability to move our vision of climate justice forward. Broadening our shared understanding of the world we want, by insisting that we always consider the human costs of climate change, is a crucial part of the process of achieving climate justice. If our proposed model for producing climate justice ultimately obstructs its achievement, however, then either we should reject the model or redefine what 'climate justice' really means.

With this in mind, closer adherence to the realities of geopolitical competition may counter-intuitively imbue our policy recommendations with greater potential for achieving climate justice.

⁵⁶ Paris Agreement, Paragraph 1 and 2, Article 15, FCCC/CP/2015/L.9 (12 December 2015) 28.

⁵⁷ For more information on the work of the ICE Coalition, visit: www.icecoalition.com; and www.policyinnovations.org/ideas/innovations/data/000240.

⁵⁸ Space does not permit an evaluation of all of the IBA recommendations but, as noted previously, the US is unlikely to ratify treaties that commit it to broad extraterritorial economic responsibilities. This may limit the effectiveness of an international environmental rights-based route. Efforts to grant the WTO's Committee on Trade and the Environment the power to pre-emptively adjudicate on state party legislative conflicts with WTO law are likely to be resisted by numerous states (perhaps especially developing states). And regulation by the UNFCCC of global fossil fuel reserves based on a cumulative carbon budget is unlikely to go unchallenged (again by developing states) as it fundamentally overturns 'the sovereign right [for states] to exploit their own resources pursuant to their own environmental and developmental policies' found in Rio Principle 2. This latter proposal may also be interpreted as an attempt to 'mess with Texas', which is likely to be coolly received.