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The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance

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THE GEOGRAPHY OF CLIMATE CHANGE LITIGATION: IMPLICATIONS FOR TRANSNATIONAL REGULATORY GOVERNANCE

HARI M. OSOFSKY*

ABSTRACT

This Article aims to forward the dialogue about transnational regulatory governance through a law and geography analysis of climate change litigation. Part II begins by considering fundamental barriers to responsible transnational energy production. Part III proposes a place-based approach to dissecting climate change litigation and a model for understanding its spatial implications. Parts IV through VI map representative examples of climate change litigation in subnational, national, and supranational fora. The Article concludes by exploring the normative implications of this descriptive geography; it engages the intersection of international law, international relations, and geography as a jumping-off point for a companion article.

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I. INTRODUCTION

In December 2005, Sheila Watt-Cloutier with the support of the Inuit Circumpolar Conference filed a petition with the Inter-American Commission on Human Rights against the United States claiming that its climate change policy violates the Inuit's human rights.[1] The petition argues that despite U.S. responsibility for a substantial percentage of the world's greenhouse gas emissions, it has failed to develop adequate policies to limit its emissions.[2]

The problems that this petition addresses are well documented. The recently released report of the key findings of the Arctic Climate Impact Assessment details the rapidity and severity of climate change in the

1. *See* Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (submitted Dec. 7, 2005), *available at* http://www.earthjustice.org/library/reports/ICC_Human_Rights_Petition.pdf [hereinafter Inuit Petition]; *see also* Press Release, Earthjustice, Inuit Leader Sheila Watt-Cloutier Announces Intention to File a Human Rights Claim (Dec. 15, 2004), *available at* http://www.earthjustice.org/news/display.html?ID=935.

2. Inuit Petition, *supra* note 1.

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region;[3] average temperature increases, for example, are at almost twice the global rate.[4] The impacts on the Inuit from the environmental changes include threats to homes from storms and melting permafrost, to livelihood from changes in animal populations, to life from thinning ice that makes traditional travel routes more dangerous, and to culture from the combination of these and other changes with increased navigation through major marine routes.[5]

A geography of the actors in this case is dizzying. The Inuit Circumpolar Conference (ICC) is a regional organization representing Inuit peoples who live in the Arctic, an area which cross-cuts several existing national borders.[6] The Inuit represented by the ICC have multiscalar ties to place, ranging from their local communities to regional and international organizations and governmental bodies. The respondent is a large nation-state, the United States, but many of the criticized greenhouse gas emissions emanate from corporations with ties to particular U.S. states, as well as to several other nation-states. The adjudicator is the Inter-American Commission, which is a regional body composed of individuals from several nation-states—partly overlapping with the Arctic nation-states—acting in a regional capacity. Claims to the Commission draw from regional human rights law, which this petition applies to circumstances that connect geographically disparate localities—the ones in which emissions occur and the ones in which the climate change impacts are experienced—due to a process that occurs in the atmosphere around the globe.[7]

This Article analyzes the Inuit petition and other examples of climate change litigation from a law and geography perspective, with the aim of understanding their implications for transnational regulatory governance.[8]

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3. SUSAN JOY HASSOL, ARCTIC CLIMATE IMPACT ASSESSMENT, IMPACTS OF A WARMING ARCTIC: ARCTIC CLIMATE IMPACT ASSESSMENT 2004, *available at* http://www.amap.no/acia/index.html.

4. *Id.* at 8.

5. *Id.* at 16–17.

6. Inuit Circumpolar Conference, http://www.inuitcircumpolar.com/index.php?ID=16&Lang=En (last visited Mar. 1, 2006). "The organization holds Consultative Status II at the United Nations." *Id.*

7. For a more in-depth discussion of the actors in the case, see *infra* Part VI.B.1.

8. This Article is the second in a series exploring characterization issues that occur at international environmental intersections. The first article, Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 71 (2005), developed a model and applied it to a series of case studies in order to propose a more systematic approach to international environmental rights advocacy. My observation of the state-corporate regulatory dynamic in those cases provided the inspiration for this Article. After completing a companion piece that explores the normative implications of the geography of climate change

This type of litigation provides a particularly interesting example of adjudication to address energy production's externalities[9] because it engages multiscalar contributions to a supranational atmospheric process that causes multiscalar impacts over time. The movement from local to global to local through various governmental regulatory structures infuses the relationships among those contributing to and suffering from climate change with an unusual richness. Moreover, those impacted by climate change have brought actions in a wide range of judicial fora, which allows for comparative analysis of tribunals' approaches to these multilayered situations.

Although the existing scholarly literature analyzes international regulation of corporations in general,[10] and climate change[11] and environmental rights litigation[12] in particular, these discussions focus

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litigation, I plan to focus future articles in the series on the intersections of trade and the environment, natural disaster and the environment, and armed conflict and the environment.

9. This Article focuses predominantly on the externality of climate change and its impacts. Some of the cases it analyzes, however, focus on other externalities as well. For example, the Nigerian gas flaring case also engages the health impacts of the toxins being released. *See infra* note 65.

10. *See, e.g.*, Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309 (2004) (exploring the role that corporate social responsibility could play in international regulation of corporations); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1 (2003) (considering the inadequacy of existing international regulatory mechanisms and proposing a new one); Janelle M. Diller, *On the Possibilities and Limitations of NGO Participation in International Law and Its Processes: Corporate Applications*, 95 AM. SOC'Y INT'L L. PROC. 304 (2001) (analyzing the current and potential role of NGOs in global corporate governance); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931 (2004) (exploring direct international-level regulation of transnational corporations); Joel R. Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285 (2001) (introducing a symposium issue on transnational corporate liability).

11. *See, e.g.*, William C.G. Burns, *The Exigencies that Drive Potential Causes of Action for Climate Change Damages at the International Level*, 98 AM. SOC'Y INT'L L. PROC. 223 (2004) (introducing litigative efforts to compel more rigorous greenhouse gas emissions reductions); Richard W. Thackeray, Jr., Note, *Struggling for Air: The Kyoto Protocol, Citizens' Suits Under the Clean Air Act, and the United States' Options for Addressing Global Climate Change*, 14 IND. INT'L & COMP. L. REV. 855, 884–98 (2004) (describing various citizen suits aimed at forcing changes in U.S. climate change policy).

12. *See, e.g.*, Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1 (2003) (discussing human rights claims as proxies for environmental claims under the current Alien Tort Claims Act (ATCA) jurisprudence); Linda A. Malone & Scott Pasternack, *Exercising Environmental Human Rights and Remedies in the United Nations System*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 365 (2002) (describing how environmental rights claims can be filed in the United Nations system); Deborah Schaaf & Julie Fishel, Mary and Carrie Dann v. United States *at the Inter-American Commission on Human Rights: Victory for Indian Land Rights and the Environment*, 16 TUL. ENVTL. L.J. 175 (2002) (discussing the implications of Dann v. United States, Case No. 11.140, Inter-Am. C.H.R. 113/01 (2001)); Mariana T. Acevedo, Student Article, *The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights*, 8 N.Y.U. ENVTL. L.J. 437 (2000) (considering Guerra and Others v. Italy, 26 Eur. Ct. H.R. 357 (1998) in the context of European Court of Human Rights environmental

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primarily on specific litigative or regulatory approaches as tools for achieving corporate responsibility.[13] To the extent that state sovereignty and authority are analyzed in the context of multinational corporate responsibility, pieces tend to debate their limitations in light of the growth of non-state-based actors and regulatory mechanisms.[14]

This piece builds upon that literature by arguing that climate change litigation represents a modified Westphalian[15] geography, in which the nation-state still plays a core role but must navigate a three-dimensional spatial terrain. An analysis of individual subnational, national, and supranational cases provides a nuanced demonstration of the multiscalar places and spaces[16] that this geography entails,[17] and provides a basis for

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rights jurisprudence); Jennifer A. Amiott, Note, *Environment, Equality, and Indigenous Peoples' Land Rights in the Inter-American Human Rights System:* Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua, 32 ENVTL. L. 873 (2002) (providing an overview of The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Case No. 79, Inter-Am. Ct. H.R. Ser. C (2001)). For broader overviews of the intersection of human rights and the environment, see RUCHI ANAND, INTERNATIONAL ENVIRONMENTAL JUSTICE: A NORTH-SOUTH DIMENSION (2004) (exploring the environmental justice implications of international environmental problems); HUMAN RIGHTS & THE ENVIRONMENT (Lyuba Zarsky ed., 2002) (exploring cases studies that represent conflicts at the intersection of human rights and the environment); HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan E. Boyle & Michael R. Anderson eds., 1996) (exploring the extent to which human rights law can help forward environmental protection); LINKING HUMAN RIGHTS AND THE ENVIRONMENT (Romina Picolotti & Jorge Daniel Taillant eds., 2003) (exploring various issues at the intersection of human rights and the environment).

13. *See* sources cited *supra* notes 10–12.

14. *See supra* note 10 and accompanying text; *infra* note 27 and accompanying text. For further law and geography perspectives, see sources cited *infra* note 40.

15. *See infra* note 81 and accompanying text.

16. These terms are used in a variety of contexts in the scholarly literature, often with variant meanings as their core focus. *Compare* DAVID HARVEY, SPACES OF CAPITAL: TOWARDS A CRITICAL GEOGRAPHY 369 (2001) (using conceptions of space to engage movement of capital as part of a Marxist critique) *with* Alexander B. Murphy, *The Sovereign State System as Political-Territorial Ideal: Historical and Contemporary Considerations*, *in* STATE SOVEREIGNTY AS SOCIAL CONTRACT 81, 107 (Thomas J. Biersteker & Cynthia Weber eds., 1996) (providing a discussion of the spatial structure of the international economy that includes financial and business networks, as well as legal structures). For a thoughtful analysis of the need to reengage the concept of space in our globalizing world, see DOREEN MASSEY, FOR SPACE (2005). In this piece, I am primarily focused on legal spaces, although I acknowledge the broader spatial context in which legal spaces evolve:

> Our legal lives are constituted by shifting intersections of different and not necessarily coherently articulating legal orders associated with different scalar spaces. The relations between these different legal spaces is a dynamic and complex one, but it is a pressing and important subject of inquiry given the ways in which the codes operative at various scales intermingle.

David Delaney, Richard T. Ford & Nicholas Blomley, *Preface: Where is Law?*, *in* THE LEGAL GEOGRAPHIES READER xiii, xxi (Nicholas Blomley, David Delany & Richard T. Ford eds., 2001). To that end, in this Article, I am using "place" to connote ties to particular geographic locations, "scale" to engage the applicable level of governance (e.g., subnational, national, supranational), and "space" to describe socio-political and legal structures.

17. Some scholars have argued that geographic ties are becoming less important in the face of

further reflections on transnational regulatory governance. This Article's approach is thus primarily descriptive, but its final parts introduce a normative inquiry that will form the basis for a future companion article.

Part II begins by exploring the foundational challenges to effective regulation of the energy industry's externalities. Part III proposes a place-based approach to dissecting climate change litigation and a model for understanding its spatial implications. Parts IV through VI apply this model to specific case examples of litigation regarding global climate change occurring in subnational, national, and supranational regional and international fora. Part VII begins an engagement of the normative implications of this terrain, situating it at the intersection of international law, international relations, and geography. The Article concludes by arguing that effective transnational regulation requires an engagement of this geography and suggesting next steps for this inquiry.

II. CHALLENGES TO RESPONSIBLE TRANSNATIONAL ENERGY PRODUCTION

The vast majority of greenhouse gas emissions are caused by energy-related activities.[18] This Part provides the context in which climate change litigation is occurring by exploring foundational challenges to responsible transnational energy production. First, the structure of the energy production process reinforces the creation of numerous social and environmental externalities. Second, the corporations which produce and use the energy have an uncertain status in the international legal system. Finally, the multiscalar nature of the industry creates overlapping regulatory authority.

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globalization. In the context of international environmental law, for example, Christopher Stone has made this argument. *See* Christopher D. Stone, *Locale and Legitimacy in International Environmental Law*, 48 STAN. L. REV. 1279 (1996). The nuances of that theoretical debate are beyond the scope of this Article, which focuses on demonstrating the value of a law and geography approach through applying it to the example of climate change. I am in the process of developing a broader piece with Alexander Murphy that makes an argument for why international law needs geography and engages this literature more directly.

18. "As the largest source of U.S. greenhouse gas emissions, CO_2 from fossil fuel combustion has accounted for nearly 80 percent of GWP weighted emissions since 1990." U.S. ENVTL. PROT. AGENCY, EPA 430-R-05-003, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2003 ES-6 (2005).

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A. Nature of the Transnational Energy Production Process

The first challenge stems from the nature of the energy production process, which has multiscalar ties to place. Energy resources are extracted from a particular locality by corporate entities that may represent multiple nationalities, under the supervision of subnational and national regulatory agencies.[19]

This structure provides for complex interactions among entities that occupy variant and overlapping geopolitical spaces. Corporations wield economic clout, each level of government relies upon its sovereign regulatory authority, and the impacted populations assert legal rights and grassroots political influence. These power relationships produce problematic patterns: Governments chronically underenforce environmental standards, and the structure of resource extraction often enmeshes corporations with armed conflict or with dictatorial regimes that commit human rights violations.[20]

Moreover, the foundational structural complexities are reinforced by the socioeconomic realities of the modern energy industry. The supply of nonrenewable energy sources continues to drop,[21] the production process and usage of the final products result in significant environmental and

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19. *See* Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT'L & POL. 331 (2004).

20. For analyses of these issues in various disciplines, see, for example, ECOLOGICAL RESISTANCE MOVEMENTS: THE GLOBAL EMERGENCE OF RADICAL AND POPULAR ENVIRONMENTALISM (Bron Raymond Taylor ed., 1995) (providing an interdisciplinary analysis of global grassroots resistance to environmental degradation); MICHAEL T. KLARE, RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT (2001) (providing a political analysis of the relationship between resource scarcity and military conflict); Dufresne, *supra* note 19 (providing a legal analysis of the relationship between oil exploitation and internal armed conflict); Rebecca Hardin, *Concessionary Politics in the Congo River Basin: History and Culture in Forest Use* (World Res. Inst. Working Paper No. 6, 2002) (providing an anthropological analysis of the role that concessionary politics plays in land use that includes a discussion of struggles over mineral wealth).

21. The news continues to report new record prices. *See, e.g.*, *Perils at the Pump*, THE ECONOMIST GLOBAL AGENDA, Aug. 9, 2005, http://www.economist.com/agenda/displaystory.cfm?story_id=4268274&fsrc=nwl (describing the implications of rising prices). For a summary of the range of perspectives on when the world oil production will peak, see Robert L. Hirsch, Roger Bezdek & Robert Wendling, *Mitigating a Long-Term Shortfall of Oil Production*, WORLD OIL MAG., May 2005, *available at* http://www.worldoil.com/Magazine/MAGAZINE_DETAIL.asp?ART_ID=2594. A U.S. Energy Information Administration presentation, in an analysis it terms as relatively optimistic, predicts that world oil production will peak between 2021 and 2112. *See* ENERGY INFO. ADMIN., LONG TERM WORLD OIL SUPPLY (2000), http://www.eia.doe.gov/pub/oil_gas/petroleum/presentations/2000/long_term_supply/sld001.htm; *see also* John H. Wood, Gary R. Long & David F. Morehouse, Long Term World Oil Supply Scenarios: The Future is Neither as Bleak or Rosy as Some Assert (Aug. 18, 2004), http://www.eia.doe.gov/pub/oil_gas/petroleum/feature_articles/2004/worldoilsupply/oilsupply04.html (a more recent article by the same authors); *cf.* KLARE, *supra* note 20 (examining the relationship between resource scarcity and military conflict).

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societal externalities,[22] and the burdens and benefits of the industry are inequitably divided.[23] Each of these issues sows the seeds for conflict not only among the key actors in a particular venture, but also among the many entities that intersect with the energy production process globally.[24]

As the above description illustrates, the state-corporate regulatory relationship infuses each of these dilemmas. Because corporations directly extract and process the raw materials to produce energy, many of the externalities result directly from their choices. Corporations operate under the auspices of nation-state and sub-state governments, however, and as a result, regulatory failures also play a crucial role in conflicts and in resulting environmental degradation, including greenhouse gas emissions.

B. Corporations in the International Legal System

These energy-specific challenges occur against a backdrop of broader uncertainty over what space corporations should occupy in the international system, which poses a second barrier to fostering corporate responsibility in the energy sector. In a formal legal analysis, states appear to be the dominant actors in the international system. The processes of both treaty and customary international law creation rest on the consent of

22. Numerous books and articles have detailed the environmental and human toll of the energy production process. *See, e.g.*, IKE OKONTA & ORONTO DOUGLAS, WHERE VULTURES FEAST: SHELL, HUMAN RIGHTS, AND OIL IN THE NIGER DELTA (2001) (detailing the environmental and human consequences of Shell's oil extraction); Richard L. Ottinger, *Energy and Environmental Challenges for Developed and Developing* Countries, 9 PACE ENVT. L. REV. 55, 62–70 (1991) (exploring the unsustainability and environmental costs of energy supply strategies); Andrea Wang, *China's Energy Policy and Competing International Environmental Pressures*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 271, 273–75 (discussing the implications of China's dependence on coal); Douglas John Steding, Comment, *Russian Floating Nuclear Reactors: Lacunae in Current International Environmental and Maritime Law and the Need for Proactive International Cooperation in the Development of Sustainable Energy Sources*, 13 PAC. RIM L. & POL'Y J. 711, 718–21 (2004) (discussing environmental and safety concerns posed by Russia's proposed deployment of floating nuclear reactors); Monti Aguirre, *"The Chixoy Dam Destroyed Our Lives,"* HUM. RTS. DIALOGUE, Spring 2004, at 20 (discussing the flooding of villages due to construction of the Chixoy dam and human rights violations against protesters).

23. *See* sources cited *supra* note 22; *see also* Dufresne, *supra* note 19, at 348–63 (analyzing the way in which state sovereignty over natural resources results in petroleum corporations having rights in opposition to the population); Judith Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 COLUM. J. ENVTL. L. 289, 294–314 (2001) (discussing environmental impacts and inequity towards indigenous peoples in Ecuador's Amazon oil fields); Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425 (2004) (describing the relationship between Talisman Energy and the human rights violations in Sudan, and the impacts of that relationship).

24. *See* KLARE, *supra* note 20 (describing the resultant resource wars); Dufresne, *supra* note 19 (describing the ensuing internal conflicts).

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sovereign states.[25] The very existence of corporations—and the ability to bind them—similarly emanates from state (and sometimes sub-state) authority.[26]

This simple model revolving around the nation-state is challenged by numerous conceptual approaches that acknowledge the complex relational structures that underlie the transnational legal system.[27] Whatever theoretical version one chooses, the political and financial clout of non-state actors and their interactions with governmental actors complicate the regulatory picture.[28] Corporations often have immense resources—Shell Oil, for example, despite its failures in finding new oil fields, had a record

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25. For an overview of state sovereignty and its role in the international legal system, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 289–99 (5th ed. 1998); *see also* THE FLUID STATE: INTERNATIONAL LAW AND NATIONAL LEGAL SYSTEMS (Hilary Charlesworth et al. eds., 2005) (exploring the contours of the relationships among domestic and international legal systems); Becky Mansfield, *Beyond Rescaling: Reintegrating the 'National' as a Dimension of Scalar Relations*, 29 PROGRESS IN HUMAN GEOGRAPHY 458 (2005) (arguing for the importance of engaging the role of the national); Murphy, *supra* note 16 (placing state sovereignty's current status in historical context); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1318–19 (1996) (exploring intellectual property legal developments within evolving conceptions of state sovereignty); Antonio F. Perez, Review Essay, *Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty in International Law*, 14 WIS. INT'L L.J. 463 (1996) (providing an analysis of how the Westphalian model of state sovereignty has evolved). I have previously analyzed the role of varying sovereignty regimes in the regulation of international environmental justice problems. *See* Osofsky, *supra* note 8, at 80–86.

26. For an analysis of the multiscalar architecture of U.S. corporate law, see Melvin Aron Eisenberg, *The Architecture of American Corporate Law: Facilitation and Regulation*, 2 BERKELEY BUS. L.J. 167 (2005).

27. Numerous theories exist to explain why states behave as they do, and whether their compliance with international norms should be regarded as evidence of international law as law. Some of the major approaches include transnational legal process, *see, e.g.*, Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996), transgovernmental network theory, *see, e.g.*, Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002), cosmopolitanism, *see, e.g.*, Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002) (explicating this theory in the context of transnational jurisdiction), compliance-based approaches to international law, *see, e.g.*, Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679 (2003), and state socialization, *see, e.g.*, Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983 (2005); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004). For a recently proposed integrated theory of the impact of international treaties on state behavior, see Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 CHI. L. REV. 469 (2005). For an overview of norm-based and interest-based theories, see OONA ANNE HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS (2005) (summarizing these different theories).

28. *See* Deva, *supra* note 10 (exploring the limits of current regulatory regimes).

2004 net income of $18.5 billion[29]—that allow them substantial influence over the process of law creation.[30] Nongovernmental organizations' involvement in norm creation and the resulting accountability concerns also have been well-documented.[31] As a result of the disconnect between non-state actors' formal roles and actual level of involvement, substantial debate has occurred over basic questions, such as: (1) What obligations do corporations actually have under international law? (2) What mechanisms exist to create compliance with those obligations? (3) How effective are those mechanisms and how could they be made more effective?[32]

In the context of fostering more environmentally and socially responsible behavior by energy corporations, these questions are complicated by the relational axes detailed in Part III.B.[33] Although a consensus has emerged, for example, that corporations have direct obligations to avoid engaging in a limited set of human rights violations, questions—especially at the margin—of when their involvement with a governmental violator is sufficient to trigger liability or whether environmental harm reaches the level of a human rights obligation have

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29. Mathew Carr, Shell Cuts Oil and Gas Reserves for Fifth Time (Feb. 3, 2005), http://quote.bloomberg.com/apps/news?pid=10000080&sid=a4aFPhwVLAbY#.

30. For a discussion of the relationship between corporations and the international legal system, see sources cited *supra* note 10; *see also* TRANSNATIONAL CORPORATIONS: THE INTERNATIONAL LEGAL FRAMEWORK (A.A. Fatouros ed., 1994); TRANSNATIONAL CORPORATIONS AND NATIONAL LAW (Seymour J. Rubin & Don Wallace, Jr. eds., 1994).

31. For assessment of the important role that nongovernmental organizations (NGOs) play in a range of international law contexts and how that role might evolve, see Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 331 (1996) (arguing that NGOs can play a constructive role in both policymaking and dispute resolution in the World Trade Organization); Chiara Giorgetti, *The Role of Nongovernmental Organizations in the Climate Change Negotiations*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 115 (1998) (describing the diverse involvement of NGOs in international law and policy); Stephan Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 IND. J. GLOBAL LEGAL STUD. 191 (1997) (surveying the role of NGOs in the international community); Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 AM. J. INT'L L. 611 (1994) (analyzing the participation of NGOs in the proceedings of international tribunals); Patricia Waak, *Shaping a Sustainable Planet: The Role of Nongovernmental Organizations*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 345 (1995) (exploring the role of NGOs in international environmental and development law and policy). Some scholars have raised concerns about the accountability gap as nongovernmental organizations gain power. *See, e.g.*, Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261 (2004) (arguing for greater formal regulation of NGOs); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the "Unregulated" Marketplace*, 18 CARDOZO L. REV. 957 (1996) (raising accountability concerns with NGOs).

32. The books and articles on corporations and nongovernmental organizations cited *supra* notes 10, 30 and 31 explore each of these three questions, which I posed to participants when chairing the panel *Corporate Compliance with International Law* at International Law Weekend–West 2005.

33. *See infra* Part III.B.

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been more controversial.[34] Similarly, because the home and host countries both have regulatory claims regarding transnational energy production, issues arise about which judicial forum and governmental regulators would be most appropriate and effective for achieving compliance.[35] A clear understanding of the state-corporate dynamic in each situation is thus critical to addressing and preventing the problematic behavior.

C. Overlapping Regulatory Regimes

The above-described dilemma of how to locate corporations is compounded by a third challenge, that of addressing the appropriate level at which to regulate them. In the law and economics arena, for example, scholars and policymakers have debated the extent to which the federal government, as opposed to state governments, should be involved in U.S. environmental regulation. Substantial disagreements exist over when market failures occur, what causes them, how environmental harms might be integrated into the cost of production, and what entity should serve as the primary regulator. Both theoretical and empirical accounts have invoked conceptual approaches, such as public choice theory, to argue for radically different outcomes.[36]

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34. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (summarizing the jurisprudence on direct corporate liability and corporate aiding and abetting liability). The opinion, and more specifically the holdings regarding corporate liability, recently survived a renewed motion to dismiss based on the new developments in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003). Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005), *motion to certify appeal denied by* 2005 WL 2082847 (S.D.N.Y. Aug. 30, 2005).

35. These issues are explored in the sources cited *supra* notes 22 and 23.

36. In the mid-1990s, the debate over the appropriate governmental level at which to regulate focused on whether state or federal environmental regulation was more likely to lead to a race to the bottom, but it often contained arguments based on public choice theory. *Compare* Kristen H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "to the Bottom"?*, 48 HASTINGS L.J. 271 (1997) (arguing for the value of federal environmental regulation), Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996) (same), Joshua D. Sarnoff, *The Continuing Imperative (but Only from a National Perspective) for Federal Environmental Protection*, 7 DUKE ENVTL. L. & POL'Y F. 225 (1997) (same), and Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67 (1996) (same), *with* Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL'Y REV & YALE J. ON REG. 23 (1996) (arguing against extensive federal environmental regulation); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 7 N.Y.U. L. REV. 1210 (1992) (same); Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997) (same); Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 YALE L.J. 2039 (1993) (same). More recently, the focus has shifted from race to the bottom arguments to public choice ones. *See* Richard L. Revesz, *Federalism and Environmental*

Resolving either that controversy or the value of public choice theory more generally is beyond the scope of this article. An extension of the regulatory debate to the context of the transnational energy industry, however, provides an illustration of the complexities involved. Depending on whether the home or host state was the more appropriate regulator and on the particularities of that state, public choice analyses might dictate a different model of governmental involvement. The background politics; structure of executive, legislative, and judicial power; and types of active non-state actors all impact the internal politics of influence.

Recent literature on environmental regulation has already begun to explore these issues of overlapping regulatory spaces in the broader transnational environmental context. For example, William Buzbee has considered the role of spatial mismatches in over- and under-regulation of environmental externalities.[37] Daniel Esty has engaged related issues by analyzing the way in which emerging technologies create regulatory gaps that require new institutional responses.[38] Climate change litigation fits into this dialogue by manifesting multiscalar, multispatial regulatory dilemmas.

The relationship between state and corporate power manifested in this litigation thus represents a complex geography. The structures of the energy industry and of the transnational regulatory process provide crucial obstacles to addressing problems of corporate responsibility. The Parts that follow propose a strategy for mapping these relationships and then explore the implications of such a map in the context of efforts to address energy's externalities in judicial and quasi-judicial fora.

Regulation: A Public Choice Analysis, 115 HARV. L. REV. 553, 555–57 (2001). Public choice analysis has also been considered in the international law-making context. For examples of recent scholarship in this area, see Andrew T. Guzman, *Public Choice and International Regulatory Competition*, 90 GEO. L.J. 971 (2002) (exploring the implications of public choice theory for international cooperation); John K. Setear, *Treaties, Custom, Iteration, and Public Choice*, 5 CHI. J. INT'L L. 715 (2005) (comparing iterative and public choice perspectives on whether leaders will choose to rely upon treaties or customary international law, and concluding that the iterative perspective is more persuasive).

37. William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003) (exploring what he terms the "regulatory commons problem"). Outside of this specific law and economics environmental federalism context, numerous other scholars have explored geographic issues in transnational and international law. *See* sources cited *infra* note 42.

38. Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115 (2004).

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III. LOCATING PLACE AND SPACE IN CLIMATE CHANGE LITIGATION

A web of place-based relationships lies at the core of the above account. The actors involved in transnational energy production—from states to corporations to nongovernmental organizations to individuals—identify themselves with at least one bounded geographic entity. The externalities of the production process, such as localized pollution or climate change, involve specific impacts in particular places.

An examination of adjudication regarding these externalities reveals ties between the spaces that structure the cases and specific places. The choice of parties, fora, and substantive law each connect the case or petition to particular localities. Such decisions are rarely neutral, but rather reflect comparative assessments of litigative potential that are tied to place. For example, whether comparisons occur at a subnational, national, or supranational level, some places are perceived as having stronger regulations, more will to enforce their regulations, or a more progressive judiciary than others.[39]

Furthermore, the process of litigation creates constrained spaces. Individuals and entities are defined as inside or outside of the categories of petitioner, respondent, and adjudicator. Judicial interpretation locates the boundaries of legislatively created statutes and of administrative regulations. These categories mold the power relationships occurring within the confines of a case.

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39. Conflicts of law has a substantial literature on forum shopping issues. *See, e.g.*, Zohar Efroni, *The Anticybersquatting Consumer Protection Act and the Uniform Dispute Resolution Policy: New Opportunities for International Forum Shopping?*, 26 COLUM. J.L. & ARTS 335 (2003) (exploring forum shopping issues in cyberspace); Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping*, 25 CARDOZO L. REV. 1367, 1370 (2004) (arguing that conflicts law provides a "spontaneous order" that helps to address "the adverse selection and moral hazard problems inherent in forum shopping"); Russell J. Weintraub, *Introduction to Symposium on International Forum Shopping*, 37 TEX. INT'L L.J. 463 (2002) (introducing the forum shopping issues discussed in the symposium). Scholars also have debated how these differences affect commercial decisionmaking. *See, e.g.*, sources cited *supra* note 36; *see also*, *e.g.*, Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347 (1999) (analyzing the regulation of labor practices); Gary S. Guzy, *Reconciling Environmentalist and Industry Differences: The New Corporate Citizenship "Race to the Top"?*, 17 J. LAND USE & ENVTL. L. 409 (2002) (arguing that an environmental convergence is occurring); Tamara L. Joseph, *The Debate over Environmental Standards in the European Community: A Race to the Top Rather than a Race to the Bottom?*, 6 N.Y.U. ENVTL. L.J. 161 (1997) (arguing that competitiveness concerns have pushed standards up in the European Community); John T. Suttles, Jr., *Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry*, 16 TUL. ENVTL. L.J. 1 (2002) (exploring international environmental justice issues raised by the asbestos industry).

This Part draws from the discipline of geography[40] to present a model for unpacking the relationships that drive and limit transnational litigation to achieve socially and environmentally sound approaches to energy production. It argues that mapping adjudicative efforts to force corporate responsibility helps to unravel the complex layers of intertwinement described in Part II. A place-based analysis of actors and claims serves as a crucial tool for revealing the underlying power dynamics in these cases.[41] It demonstrates a modified Westphalian geography in which states must navigate overlapping sets of relationships in order to regulate effectively.[42]

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40. One of the relevant focuses of the geography literature is on the evolving interrelationship of place, space, and scale. This piece draws from concepts imbedded in both critical human geography and political geography, and particularly focuses on the dynamic between place and space in climate change litigation. For an introduction to critical human geography, see DEREK GREGORY, GEOGRAPHIC IMAGINATIONS (1994) (exploring issues of socialization and deep space); HARVEY, *supra* note 16 (providing a series of essays in critical geography developed over a period of years); EDWARD W. SOJA, POSTMODERN GEOGRAPHICS: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1993) (engaging the critical spatial perspective on social theory and analysis in a series of essays). For an introduction to political geography, see A COMPANION TO POLITICAL GEOGRAPHY (John Agnew, Katharyne Mitchell & Gerard Toal eds., 2003); JOHN AGNEW, MAKING POLITICAL GEOGRAPHY (2002); KEVIN R. COX, POLITICAL GEOGRAPHY: TERRITORY, STATE, AND SOCIETY (2002) (providing an overview of political geography); MARTIN IRA GLASSNER & CHUCK FAHRER, POLITICAL GEOGRAPHY (3d ed. 2004); *see also* JOHN AGNEW, GEOPOLITICS: RE-VISIONING WORLD POLITICS (2d ed. 2003) (providing an overview of geopolitics); SAUL BERNARD COHEN, GEOPOLITICS OF THE WORLD SYSTEM (2003) (same); KLAUS DODDS, GEOPOLITICS IN A CHANGING WORLD (2000) (same).

41. For an example of such an analysis, see NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHICS OF POWER 189–222 (1994) (comparing a mine closure in the town of Kimberley, British Columbia, with *Re Mia and Medical Services Commission of British Columbia*, [1985] 17 D.L.R. (4th) 385 (Can.) and *Wilson v. British Columbia (Medical Services Commission)*, [1988] 30 B.C.L.R.2d 1 (B.C. Ct. App.)).

42. For accounts of the intersection between law and geography, see generally Delaney, Ford & Blomley, *supra* note 16 (providing numerous perspectives on the intersection); BLOMLEY, *supra* note 41 (mapping the intersection between law and geography); LAW AND GEOGRAPHY (Jane Holder & Carolyn Harrison eds., 2003) (engaging numerous intersections of law and geography through a series of essays). For geographic perspectives on various legal issues, see, for example, GEOGRAPHY, ENVIRONMENT, AND AMERICAN LAW (Gary L. Thompson, Fred M. Shelley & Chand Wije eds., 1997) (discussing how geography and environmental law influence one another in the U.S. context); RACE, SPACE, AND THE LAW: UNMAPPING A WHITE SETTLER SOCIETY (Sherene H. Razack ed., 2002) (exploring the relationships among place, race, and spatial and legal practices); OLEN PAUL MATTHEWS, WATER RESOURCES, GEOGRAPHY & LAW (1984) (engaging the relationship between geography and water resources law); Keith Aoki, *Space Invaders: Critical Geography, the "Third World" in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000) (exploring how legal scholars have drawn from political geography and international law critiques of development to analyze race); Matthew R. Auer, *Geography, Domestic Politics and Environmental Diplomacy: A Case from the Baltic Sea Region*, 11 GEO. INT'L ENVTL. L. REV. 77 (1998) (arguing that geography influences international environmental negotiation through its role in shaping domestic environmental regulatory institutions); Berman, *supra* note 27 (presenting a cosmopolitan perspective on transnational jurisdiction); Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999) (providing a geographic analysis of territorial jurisdiction); Jerry Frug, *The*

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A. Connections to Place

This Part explores the potential value of mapping ties to place in climate change litigation. For each type of actor and component of claims, this analysis provides insights into the underlying spatial categories and how they relate to one another.

1. Geography of Actors

A map of the key actors in litigation to address energy's externalities reaches beyond a simple discussion of petitioners and respondents. As the deconstruction of individual cases in Parts IV though VI reveals, the structure of litigation requires characterizing similar facts in varying ways to fit applicable laws. Each action focuses on a very narrow account of the problem that includes a specific configuration of relevant parties. For instance, one of the national-level cases addressing the externality of climate change in the United States focuses on the U.S. EPA's regulatory authority under the Clean Air Act,[43] while another case directly engages corporate pollution as a public nuisance.[44]

By explicitly acknowledging each relevant actor's relationship to place, this aspect of the inquiry provides a mechanism for understanding the broader context in which adjudication occurs and, in so doing, escapes the structural confines of litigation. This type of understanding is particularly critical in the context of the generation of transnational environmental problems like climate change that represent nontraditional variations on cross-boundary pollution.[45] A geographic understanding of each actor reveals a fuller narrative of the case that exposes boundaries and strategic

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Geography of Community, 48 STAN. L. REV. 1047 (1996) (arguing that urban policy at multiple levels of U.S. government promotes metropolitan fragmentation); Kal Raustiala, *The Geography of Justice*, 73 FORDAM L. REV. 2501 (2005) (exploring conceptions of spatiality in international and U.S. law, and its implications for Guantanamo detainees); Robert R.M. Verchick, *Critical Space Theory: Keeping Local Geography in American and European Environmental Law*, 73 TUL. L. REV. 739 (1999) (applying critical space theory to transborder waste transportation and judicial standing in the United States and European Union).

43. Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 2006 WL 1725113 (U.S. Dist. Col. June 26, 2006) (No. 05-1120).

44. *See* Complaint, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) No. 04 Civ. 5669, *available at* http://caag.state.ca.us/newsalerts/2004/04-076.pdf.

45. Traditional cross-boundary pollution continues to pose significant legal challenges. For an analysis of the latest variation on the Trail Smelter dispute, see Austen L. Parrish, *Trail Smelter Deja Vu: Extraterritoriality, International Environmental Law and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363 (2005).

choices. Through this account, the power dynamics infusing the litigation emerge.

a. Petitioners

The mapping of actors begins with an analysis of those initiating the litigative dialogue in most of the case studies: the petitioners who claim to be impacted by the externalities.[46] Some cases contain an apparently straightforward geography of those harmed, by providing a tale of tangible injury in a specific locality. In the situation described in the Introduction, the physical manifestations of climate change in the Artic have translated into particular impacts on the Inuit. For example, thinning ice makes traditional travel routes more dangerous, and the ongoing changes in animal populations constrains their hunting. The Inuit thus can link the global phenomenon of climate change to localized claims about their lives, livelihoods, and traditional cultural practices.[47]

These individual geographies form a complex web. The scope of global climate change means that many parties have a wide range of claims, as represented in the diversity of petitioners in the litigation discussed in Parts IV through VI. A variety of non-state and governmental actors, each based in a particular place, argue that they have both standing and a substantive basis to challenge greenhouse gas emissions.[48] Any given group of petitioners represents a particular subset of those who suffer similar types of harm, and often a variation on their narrative could be retold in a different geographic context; for instance, low-lying island states could make parallel claims to those made by the Inuit.[49]

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46. In general, the petitioners are the ones claiming injury from the externalities. One of the subnational cases involves the energy producers as the petitioners, however. *In re* Quantification of Envtl. Costs, 578 N.W.2d 794, 796–97 (Minn. Ct. App. 1998).

47. *See supra* notes 3–5 and accompanying text.

48. *See* Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1 (2005) (exploring standing issues with respect to climate change litigation under federal environmental statutes). The organization Climate Justice provides a summary of pending climate change litigation on its website. *See* Climate Justice, Cases, http://www.climatelaw.org/cases (last visited Feb. 27, 2006).

49. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: IMPACTS, ADAPTATION AND VULNERABILITY 843–76 (2001), *available at* http://www.grida.no/climate/ipcc_tar/wg2/pdf/wg2TARchap17.pdf.

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b. Respondents

A map of the entities involved in the production process, some of whom serve as respondents in adjudication over externalities,[50] provides a converse image. A particular corporation generally extracts the natural resources and processes them into an energy source. That corporation is located in its place of incorporation, and to some extent, in every locale in which it operates.[51] Because of the distribution of natural resources around the globe, often extraction occurs in a developing country[52] through a partnership between a subsidiary of a multinational corporation and other local entities.[53]

The entities that regulate corporate behavior—from traditional governmental regulatory agencies to those involved in funding the export-import process that allows the flow of goods and capital—are each located in a particular place, and have relationships that extend into other places that provide contrasting socioeconomic and political contexts. They serve as petitioners pushing for greater regulation in some contexts and respondents fighting these efforts to force regulation in others, and regulatory entities at different levels of governance occasionally oppose one another in a lawsuit.[54] For instance, cities are among the petitioners in

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50. In one case example, however, the corporations were in the role of petitioners. *See supra* note 46 and accompanying text.

51. For a discussion of international regulation of transnational corporations, see TRANSNATIONAL CORPORATIONS: THE INTERNATIONAL LEGAL FRAMEWORK, *supra* note 30 (providing an overview of international legal efforts to regulate corporations); TRANSNATIONAL CORPORATIONS AND NATIONAL LAW, *supra* note 30 (providing an overview of national law efforts to regulate corporations); *see also supra* note 10 and accompanying text.

52. The term "developing country" is used as a short-hand in this Article for countries with fewer economic resources that tend to have more nascent or unstable political structures. In the energy production process, there is often a large socioeconomic and political contrast between the parent corporation's home country and the country in which extraction is occurring. More generally, however, a spectrum of development exists, and countries with very different histories and situations become lumped together by the terms "developed" and "developing." The boundaries, moreover, are difficult to discern. Although I use the terms "developing country" and "developed country" throughout this paper, I thus acknowledge their limitations.

53. A legal picture of the relationship among the various entities involved in the partnership can become very complex. For example, depending on the relationship between the parent or subsidiary and the various governments involved, difficult sovereign immunity questions may arise. *See* Melissa Lang & Richard Bales, *The Immunity of Foreign Subsidiaries Under the Foreign Sovereign Immunities Act*, 13 MINN. J. GLOBAL TRADE 353 (2004) (arguing for the appropriateness of a beneficial interest test in this context).

54. I discuss them in this category for convenience, and do not intend to imply that they are always in the role of respondents.

a U.S. suit against federal-level governmental entities providing assistance to overseas ventures.[55]

As in the context of corporate actors, the divide between developed and developing countries becomes relevant to mapping of governmental bodies. For example, an entity providing political risk insurance may be based in a developed country but funding ventures based in a developing country.[56] Moreover, distinctions between levels and branches of government abound, as represented in the wide range of regulators described in the cases of Part IV through Part VI.[57]

c. Adjudicators

The geography of the entity adjudicating also serves as part of the litigation's dynamics. Choices among fora almost always exist in the context of transnational energy production due to the above-described structure of the industry. The transnational and multiscalar dimensions of energy production result in substantial ambiguity about which forum is most appropriate.

Strategic forum selection reflects a cyclical process. Potential petitioners weigh the various characteristics of particular fora, but their decision-making is constrained by the options themselves. The amenability of a particular forum reflects a variety of geopolitical and socioeconomic factors beyond the control of the parties.[58] The decision does not occur in an idealized Rawlsian world,[59] but rather mirrors the factors shaping the fora.

Moreover, even in fora that reflect international standards for judicial independence and the rule of law, the adjudicators are still human beings. Their perspectives and instincts have been honed by their life experiences, which reflect their geography, broadly construed. Who they are is

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55. *See* Complaint for Declaratory and Injunctive Relief (Second Amended), Friends of the Earth, Inc. v. Watson, No. 02-4106 (N.D. Cal. Sept. 3, 2002), *available at* http://www.climatelawsuit.org/documents/Complaint_2Amended_Declr_Inj_Relief.pdf.

56. This is the scenario in the German case against Euler Hermes AG. For a description of the case, see Climate Justice, German Government Sued Over Climate Change, http://www.climatelaw.org/media/german.suit (last visited Feb. 27, 2006).

57. *See supra* Part IV.

58. The attempts to address the disaster at Bhopal exemplify these dilemmas. For an analysis of the geopolitical and socioeconomic forces making legal redress difficult in its aftermath, see JAMIE CASSELS, THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL (1993).

59. John Rawls proposed that a person structuring the social order should operate from behind a veil of ignorance that prevents knowledge of future social status. JOHN RAWLS, A THEORY OF JUSTICE 118–23 (rev. ed. 1999). Not only would such a veil be difficult to construct in our society, but those ordering society almost always do so from a privileged position.

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inescapably intertwined with their place in the world, which includes not simply the localities with which they have had significant contact, but also their socioeconomic, political, and educational experiences. Even when judges are consciously acting as neutral adjudicators, they cannot fully divorce themselves from their individually constituted values and approaches to reasoning.[60]

A place-based approach assists in an analysis of the particular regulatory role an adjudicator has been asked to play with respect to the petitioners and respondents. As described above, petitioners and respondents vary widely in litigation addressing the externalities of energy production. In the climate change cases which serve as the focus for this Article, governmental and nongovernmental entities serve on both sides of the relevant cases and reflect various levels of the regulatory process. Because the fora range from the subnational to the supranational, the dynamic between the adjudicator and the parties varies not only based on the changing structure of the parties, but also based on the changing structure of the fora.

2. *Geography of Claims*

The geography of claims in these lawsuits similarly goes beyond a detailing of legal arguments. The underlying facts and the application of law to those facts have their own connections to place that inform a deconstruction of power dynamics. For example, in the Victoria, Australia, subnational action involving the Hazelwood Mine and Power Station, the relevant facts involved localized coal burning contributing to a global phenomenon—climate change—which in turn has a multiplicity of local effects around the world.[61] The lawsuit successfully relied upon state and national legislation to challenge limitations on the scope of a state-appointed panel inquiry into environmental effects occurring under those laws. A place-based analysis of the claims in this lawsuit, as detailed

60. Several schools of thought, such as legal realism, have explored the impact of this subjectivity. The extent to which socioeconomic context and the qualities of the individual adjudicator matter remains controversial. For a historical discussion of the legal realism movement, see LAURA KALMAN, LEGAL REALISM AT YALE 1927–1960 (1986). For examples of more recent scholarly analysis of legal realism, see Michael Steven Green, *Legal Realism as a Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005); New Legal Realism Symposium, 2005 WIS. L. REV. 335.

61. Australian Conservation Found. v. Latrobe City Council, [2004] V.C.A.T. 2029 (Vict. Civ. & Admin. Trib. 2004).

further in Part IV.B.2,[62] helps to unpack the subnational, national, and supranational elements of the situation and the relationships among them.

Through a focus on the ties to place underlying the factual and legal claims in climate change lawsuits and petitions, this part of the inquiry allows for a more nuanced understanding of the litigation's substance. As the Hazelwood Mine and Power Station situation exemplifies, facts and legal claims may map somewhat differently from one another and from key actors. An exploration of those differences reveals not only issues of characterization, but also structures of power that shape these struggles over energy production's externalities.

a. Facts

A map of claims begins with the facts that underlie them. In any case, the legal claims only exist because of events that have occurred and may be continuing to occur. The facts become relevant to a geographic analysis, however, because of the dynamic between place and space that drives the interconnection between law and fact. Place does not simply determine whether a tribunal has and should accept jurisdiction, but also constrains which legal claims can be made. For example, the facts must be tied to the United States in particular ways for U.S. federal environmental law to apply,[63] or to the City of Latrobe in Victoria, Australia, for relevant local, state, and national laws to be at issue in a claim.[64]

The above-described place-based analysis of key actors begins the process of mapping facts, as many of the facts relate directly to petitioners and respondents. But the geography of the facts may be more extensive than the description of the actors provides. For example, a recently filed case in the High Court of Nigeria alleges that gas flaring by oil companies violates constitutional rights and environmental law.[65] The plaintiffs in this lawsuit not only live near the flaring and experience its extensive

62. *See infra* Part IV.B.2.

63. For a discussion of the extraterritoriality of U.S. environmental law, see Paul E. Hagen, *The Extraterritorial Reach of U.S. Environmental Laws*, SK046 A.L.I.-A.B.A. 151 (2005) (providing an overview); *see also* Browne C. Lewis, *It's a Small World After All: Making the Case for the Extraterritorial Application of the National Environmental Policy Act*, 25 CARDOZO L. REV. 2143 (2004) (arguing for the extraterritorial application of the National Environmental Policy Act).

64. For an analysis of the geography of Hazelwood Mine and Power Station case, see *infra* Part IV.B.

65. Motion Exparte Under Section 46(1) of the Constitution of the Federal Republic of Nigeria, 1999; Order 1 Rule 2(3) of the Fundamental Rights Enforcement Procedure) [sic] Rules, Statement, Barr v. Shell Petroleum Dev. Co. of Nig., No. FHC/CS/B/126/2005 (Nig. F.H.C. June 20, 2005), *available at* http://www.climatelaw.org/media/gas.flaring.suit/case.pleadings.20June2005.pdf [hereinafter Motion Exparte].

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short-range effects, but also are vulnerable to localized environmental changes due to global climate change.[66]

As in the Inuit case, however, the Nigerian plaintiffs are only one of the populations experiencing the localized effects of global climate change.[67] These specific facts thus become representative of a broader geography. The links between U.S. and European energy companies, gas flaring in Nigeria, and dangerously thin ice on traditional travel routes in the Arctic[68] begin to emerge through a geographic analysis of the facts in these lawsuits. This approach engages climate change as a phenomenon in which local behavior in one place causes local impacts elsewhere.

b. Substantive Law

The geography of the substantive claims intertwines with that of the facts, but may not be fully contiguous with it. Often the relevant law covers a broader geographic area that includes the area in which the facts are occurring. For example, the petitions to the World Heritage Committee requesting that particular sites impacted by climate change be put on the Committee's danger list focus on the impacts of climate change in those places.[69] The geographic scope of danger-listing, however, includes more than just those individual places.[70] Similarly, Victoria's Planning and Environment Act[71] covers the whole region rather than just the City of Latrobe.

A place-based analysis of the substantive claims gives critical insight into the power relations involved. It answers spatial questions about whose regulatory authority is being invoked on what grounds, and in so doing, reveals the levers of executive and legislative authority that undergird these suits. The substantive laws have been created through a particular place's political process, and were crafted broadly or narrowly through geographically bound entities. In the Minnesota state court case over

66. Motion Exparte, *supra* note 65, Verifying Affidavit; *see also* THE CLIMATE JUSTICE PROGRAMME & ENVTL. RIGHTS ACTION, GAS FLARING IN NIGERIA: A HUMAN RIGHTS, ENVIRONMENTAL AND ECONOMIC MONSTROSITY (describing the impacts of gas flaring on local communities through exposure to toxins and through resulting climate change).

67. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 49, *available at* http://www.grida.no/climate/ipcc_tar/wg2/index.htm (discussing climate change impacts around the world).

68. *See supra* note 5 and accompanying text.

69. *See infra* Part VI.B.

70. For the list of world heritage sites in danger, see World Heritage Centre, World Heritage in Danger, http://whc.unesco.org/pg.cfm?cid=158 (last visited Feb. 27, 2006).

71. Planning and Environment Act 1987, No. 45/1987 (1987), (amended 2005), *available at* http://www.austlii.edu.au/au/legis/vic/consol_act/paea1987254/.

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environmental valuation, for instance, the case hinged on whether the Minnesota Public Utilities Commission was appropriately implementing the state legislature's will in including carbon dioxide among air pollutants that have a cost value associated with them.[72]

The court's approach to the substantive legal claims similarly reflects a place's tradition of judicial interpretation and receptivity to adjudicators making decisions that constrain externalities. In the Minnesota case, for example, the court deferred to the Commission's order under a substantial evidence analysis.[73] In another variation of balancing among branches, the administrative tribunal in the Hazelwood Mine and Power Station case exercised its interpretive authority regarding whether greenhouse gas emissions should be included as part of the category of "environmental effects" in a statute created by Victoria's legislature.[74]

The substantive claims also provide insight into the petitioners' decision-making processes, and so feed into the above analysis of the actors' geography. Generally, the particular substantive claims filed represent only one potential characterization of the facts. The petitioners' choice of claim is suggestive not just of strategy, but also of the constraints under which the petitioners operate and through which they view the situation.

c. *Procedural Law*

While the application of substantive law reveals the way in which places' power dynamics result in assertions of regulatory authority over particular domains, the applicable procedural law demonstrates a place's structuring of opportunities among the various actors. Procedure can play a role through statutes that provide particular procedural rights. For example, in the German case against Hermes Euler HG, an export credit agency, the nongovernmental organizations petitioning the court claimed that the federal Environmental Information Act gave them the right to information about the extent to which Hermes provides political and economic risk insurance to projects that produce greenhouse gases.[75] The nongovernmental actors, which have both national and supranational

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72. In re Quantification of Envtl. Costs, 578 N.W.2d 794, 796–97 (Minn. Ct. App. 1998).

73. *Id.* at 802.

74. Australian Conservation Found. v. Latrobe City Council, [2004] V.C.A.T. 2029 (Vict. Civ. & Admin. Trib. 2004).

75. *See* Germanwatch & BUND, German Government Sued over Climate Change, http://www.climatelaw.org/media/german.suit/briefing.pdf (last visited Feb. 27, 2006).

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presences, are relying on a law created by the federal legislature for leverage against the credit agency.

Procedure more commonly enters into lawsuits, however, through the rules applicable to a particular forum, which must be complied with in every lawsuit and may be created at multiple levels of government.[76] Moreover, procedure is not simply used offensively by petitioners, but is also used defensively by respondents.[77] For example, in the case brought against Export-Import Bank and the Overseas Private Investment Corporation for their failure to produce an environmental impact assessment as part of their process of approving assistance for overseas projects, respondents tried to move the case to Washington, D.C., a less convenient location for petitioners, and to challenge standing.[78]

Because procedural issues are often outcome determinative—adjudicating bodies generally do not reach the merits if they find a procedural defect[79] and the level of deference to lower courts is often definitive on appeal[80]—the procedural statutes and rules represent a powerful assertion of governmental authority. The entities creating the statutes and rules are providing the parameters within which externalities can be challenged, as well as the tools for doing so. A map of the procedural claims thus provides a window into the political and social context in which the struggle over externalities is occurring.

Together, these place-based relationships reveal the spatial matrix in which the actors and claims operate and the ways in which that structure shapes and constrains the role that such suits can play. These power dynamics that underlie the litigation provide insight into the possibilities for corporate responsibility in the energy sector.

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76. For instance, filings in a civil case before the Central District of California must comply with both the Federal Rules of Civil Procedure and with local rules. *See* Central District of California U.S. District Court, General Civil Filing Information, http://www.cacd.uscourts.gov (follow "Filing Procedures" hyperlink; then follow "General Civil Filing Information" hyperlink) (last visited Feb. 22, 2006).

77. For examples of offensive and defensive uses of collateral estoppel, see Brian Levine, *Preclusion Confusion: A Call for Per Se Rules Preventing the Application of Collateral Estoppel to Findings Made in Nontraditional Litigation*, 1999 ANN. SURV. AM. L. 435.

78. *See* ClimateLawsuit.org, Media Kit, http://www.climatelawsuit.org/ (last visited Feb. 27, 2006).

79. For example, if a court lacks subject matter jurisdiction, it will not reach the merits.

80. In the climate change litigation context, the D.C. Circuit recently failed to reach the merits on the EPA's denial of a petition asking it to regulate carbon dioxide emissions by motor vehicles under the Clean Air Act. It held that the "EPA Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rulemaking." Massachusetts v. EPA, 415 F.3d 50, 58 (D.C. Cir. 2005).

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B. Spatial Implications

The diversity of actors and complex power relationships represented in climate change litigation are a far cry from the state of the treaties that constituted the Peace of Westphalia, which established the dominant power of the nation-state through an agreement between governmental representatives who had "implor'd the Divine Assistance."[81] These shifts occurring in multiple legal contexts have led some to trumpet the death of the Westphalian model, as part of the larger debate over the extent to which the nation-state still matters in our globalized world.[82]

Although factual disagreements certainly occur, scholarly views of the continued importance of nation-states often hinge on characterization of agreed-upon facts. Many entities other than nation-states matter in the modern global landscape, and non-state actors sometimes take on traditional governmental functions.[83] This growing international civil society interacts in complex ways with the consent of sovereign states, which may or may not diminish their importance depending on one's theoretical perspective.[84]

The geography of these cases exemplifies this complex landscape. A wide range of actors representing a diversity of places interact through the modality of a lawsuit. And yet governmental regulatory authority in multiple guises plays a role in every suit, beginning with the tribunals acting as adjudicators. Although national governmental entities—in their varying roles as proponents or opponents of stronger limitations on greenhouse gas emissions—do not act alone, efforts to control the

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81. Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies, Preamble, Oct. 24, 1648, *available at* http://www.yale.edu/lawweb/avalon/westphal.htm [hereinafter Peace Treaty].

82. Such trumpeting would not be new. Numerous scholars have argued that the power of the nation-state is in decline. *See* FRANCIS FUKUYAMA, THE END OF HISTORY? 8 (1989); KENICHI OHMAE, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES 12 (1995); Ali Khan, *The Extinction of Nation-States*, 7 AM. U. J. INT'L L. & POL'Y 197 (1992); John O. McGinnis, *The Decline of the Western Nation State and the Rise of the Regime of International Federalism*, 18 CARDOZO L. REV. 903 (1996). *But see* W. MICHAEL REISMAN, *Introduction* to JURISDICTION IN INTERNATIONAL LAW, at xiv (W. Michael Reisman ed., 1999); William H. Lash, III, *The Decline of the Nation State in International Trade and Investment*, 18 CARDOZO L. REV. 1011, 1025 (1996) ("To paraphrase Mark Twain, I conclude that accounts of the demise of the nation state are grossly exaggerated.").

83. *See supra* notes 30–31 and accompanying text; *see also* Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135 (2005) (exploring the implications of corporations taking on traditional functions of the armed services).

84. *See supra* note 82.

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externalities of energy production through court action ultimately must rely upon their regulatory authority.

A map of the climate change litigation reveals three sets of relationships that the regulator must navigate in order to be effective. Each of these dynamics alone provides complex spatial questions. Together, they represent a three-dimensional, intertwined morass that serves as a formidable barrier to effective regulation of energy production's externalities. Diagram 1 attempts to visually capture those relationships in a simplified, two-dimensional representation. Each element of the diagram, pictured as a simple oval, is actually made up of the overlapping entities portrayed in Diagrams 2, 3, and 4 respectively.[85]

Diagram 1

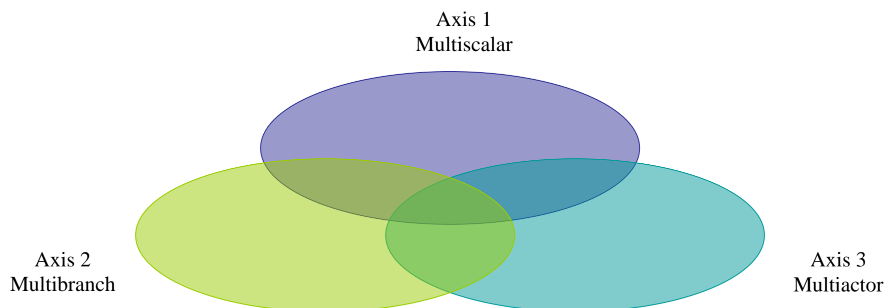

Diagram 1 illustrates the intertwined axes that define the modified Westphalian terrain.

1. Multiscalar: Supranational, National, and Subnational

The nation-state is notably present in climate change litigation at every level of government. In subnational actions, many of the corporate and nongovernmental organization organizations are nationally based.[86] The national level cases not only occur in federal tribunals, but also include

85. *See infra* Diagrams 2–4. The spatial model I derived from these cases has some similarities to the one presented by Anne-Marie Slaughter in *A New World Order* (2004). They both engage three-dimensional, overlapping spaces, and our first two axes are describing the parallel types of relationships; I use multiscalar where she uses vertical, and multibranch where she uses horizontal. My focus within those two axes, however, is somewhat broader, with a more substantial engagement of nongovernmental and subnational actors. Moreover, our third axes differ quite substantially, as she looks at disaggregated international organizations, and I look at governmental-nongovernmental dynamics. *See id.* at 18–23. An in-depth analysis of the relationship between transgovernmental network theory and this model is beyond the scope of this Article. I plan to explore this relationship in more depth, however, in the theoretical, normative companion piece to this Article.

86. *See infra* Part IV.

governmental and nongovernmental national-level actors and invoke federal statutory and constitutional law.[87] The supranational petitions rely upon treaties to which national governments are parties—the most traditionally Westphalian nation-state role—and include those parties either directly as respondents or indirectly as part of the proposed solutions.[88]

And yet these nation-state-based regulatory elements exist in interaction with other levels of government in every case. Because the phenomenon of climate change occurs within multiple regulatory domains, the tribunals themselves represent different types of governmental authority. Moreover, each case provides a unique microcosm of the subnational, national, and supranational dynamics represented in the simplified Diagram 2 below. In asserting sovereign control over energy production's externalities, nation-states thus collaborate—and sometimes conflict—with regulatory efforts at other levels of government. Although this litigation potentially serves as a regulatory gap-filler to address jurisdictional mismatches, it also embodies those spatial conflicts among governmental levels.[89]

Diagram 2

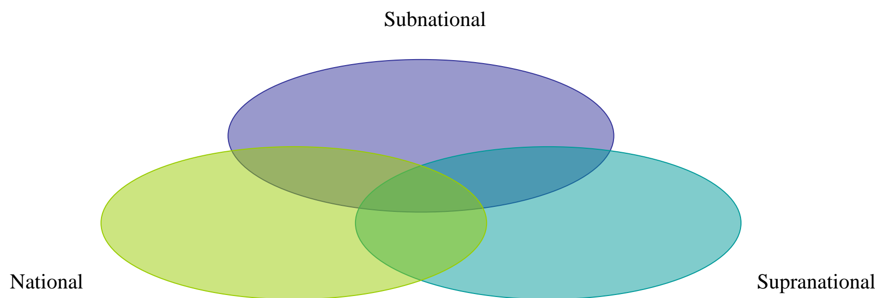

Diagram 2 illustrates the interrelated levels of governance at which the regulatory dynamics occur.

87. *See infra* Part V.
88. *See infra* Part VI.
89. William Buzbee extensively explored these mismatches in his article cited *supra* note 37.

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2. Multibranch: Executive, Legislative, and Judicial

The traditional Westphalian model relies upon national executive authority,[90] but modern nation-states with at least somewhat democratic governance structures generally also imbue legislative and judicial branches with regulatory authority relevant to transnational problems, such as energy production's externalities.[91] These cases are no exception. Each one involves the invocation of judicial power, whether to regulate corporate behavior directly[92] or to force or prevent another government entity from engaging in such regulation.[93] The more common formulation in the case studies is the latter one,[94] with the result that many of these cases represent regulatory battles among governmental branches, sometimes at different levels of government.[95]

These inter-branch dynamics, as illustrated by the simplified Diagram 3 below, provide a second axis along which regulatory conflicts and confluence emerge. Although the push and pull among branches sometimes occurs at purely the nation-state level, in which case it can be viewed as within the Westphalian actor, the cases often include inter-branch conflicts at multiple levels of government.[96] These jurisdictional mismatches and resulting regulatory gaps[97] become intertwined with dynamics among executives, legislators, and judges.

90. *See* Peace Treaty, *supra* note 81, art. CXIX.

91. For example, the U.S. Senate must ratify treaties, and the U.S. federal courts have interpreted the extent of the Executive's foreign affairs powers. For an analysis of the relationship between international law and executive power, see Janet Koven Levit, International Law Happens (Whether the Executive Likes It or Not) (draft manuscript on file with author).

92. The national-level emissions case against U.S. power companies exemplifies this version, *see infra* notes 147–49 and accompanying text, as does in part the Nigerian case against oil companies, *see infra* notes 200–02 and accompanying text.

93. The other national-level emissions case, against the U.S. EPA, exemplifies this version. *See infra* notes 168–69 and accompanying text.

94. *See infra* Parts IV–VI.

95. The U.S. vehicle emissions case is the most dramatic example of intergovernmental conflicts. *See infra* Part V.B.1.

96. The vehicle emissions case most starkly exemplifies this phenomenon. For a mapping of its actors, see *infra* Part V.B.1.

97. *See* Buzbee, *supra* note 37, at 23–24 (exploring these mismatches in the context of environmental federalism).

Diagram 3

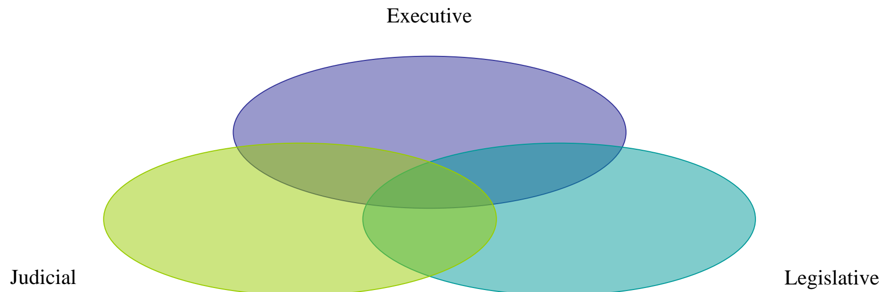

Diagram 3 illustrates the relationships among governmental branches that shape the possibilities for regulation.

3. Multiactor: Governmental and Nongovernmental

As if the convoluted dynamics among the first two axes were not sufficient to create a regulatory morass, the cases also contain a complex geography of nongovernmental actors which both force and resist regulation. These relationships among governmental and nongovernmental entities form the third axis along which nation-states must navigate in asserting their sovereign authority, as represented in simplified form in Diagram 4 below. The national and subnational governments play a key role in governing these nongovernmental entities, as a survey of the geographic structures of the nongovernmental actors indicates. For example, the nongovernmental organizations and the corporation involved in the Hazelwood Mine and Power Station Case are regulated by national, regional, and local governmental authorities.[98]

Moreover, the actors themselves often overlap. The lines between corporations and nongovernmental organizations begin to blur as corporate greenhouse gas emitters form nongovernmental organizations to advocate on their behalf.[99] As these different variations on nongovernmental, nonprofit organizations team with governmental entities on either or both sides of a lawsuit in which another governmental entity is adjudicating,[100] the distinctions among those advocating, regulating, and

98. *See infra* notes 132–40 and accompanying text.
99. *See infra* notes 187–91 and accompanying text.
100. All of the case studies present some variation of this dynamic. *See infra* Parts IV–VI.

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being regulated become less clear. And each of these entities relies upon individuals, who sometimes play a direct role in the lawsuit as well.[101] Governmental efforts at corporate regulation must navigate this convoluted terrain in order to be effective.

Diagram 4

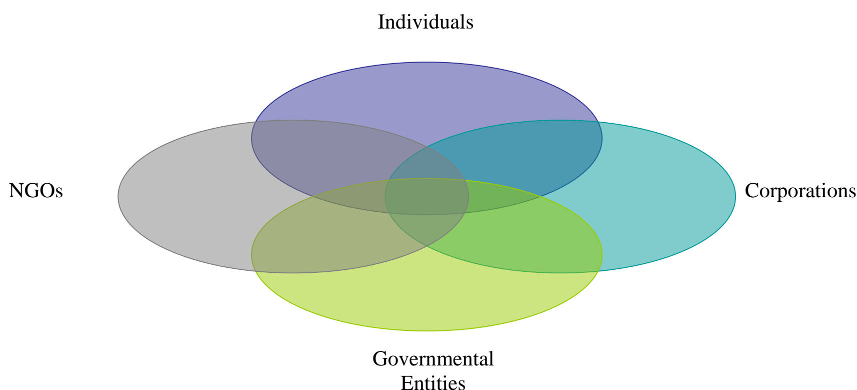

Diagram 4 illustrates the interrelated types of actors who comprise the categories of petitioners, respondents, and adjudicators.

IV. MAPPING SUBNATIONAL CLIMATE CHANGE LITIGATION

This Part and the two that follow map climate change litigation at subnational, national, and supranational levels. In dissecting this series of case studies, these Parts explore the implications of this adjudicative geography for broader issues of regulating energy production's externalities.[102] In so doing, these Parts do not aim to provide an exhaustive catalog of the ever-increasing list of cases engaging global climate change, but rather an exploration of representative cases that include a diversity of actors and legal claims.[103]

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101. The Nigerian case and some of the World Heritage Committee petitions include individuals as petitioners. *See infra* Parts V.C.1., VI.B.1.

102. The Article's aim is not to create a comprehensive summary of climate change litigation, but rather to explore the implications of it. In selecting cases for my in-depth geographic analysis, I focused on those that represented the diversity of substantive claims and the spatial variations within categories of substantive claims.

103. For a detailing of the range of pending climate change litigation, see Climate Justice, *supra* note 48.

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The two subnational cases analyzed in this Part focus on whether it is appropriate for state or local administrative bodies to include greenhouse gas emissions in environmental assessments of corporations engaged in coal-based energy production. The first two sections explore ties to place in each case, and then the third section reflects on the geography of subnational climate change litigation.

A. *Environmental Cost Valuation: Challenge to the Minnesota Scheme*

At the direction of the state legislature, the Minnesota Public Utilities Commission established interim environmental cost values for five air pollutants, one of which was carbon dioxide, which negatively impacts the environment primarily by contributing to global climate change.[104] A trade association representing lignite coal producers, users, and suppliers challenged the inclusion of carbon dioxide, but the Minnesota Court of Appeals held in 1998 that the Commission's order regarding carbon dioxide values was supported by substantial evidence.[105] The decision thus provided judicial reinforcement of an administrative body's implementation of legislative environmental regulation of corporations that produce electricity; this regulation remains in place today.[106]

1. *Actors*

The relators listed in the Minnesota Court of Appeals decision for *In re the Quantification of Environmental Costs*[107] included Western Fuels Association,[108] Dairyland Power Cooperative,[109] Minnesota Power and

104. *In re* Quantification of Envtl. Costs, 578 N.W.2d 794, 796–97 (Minn. Ct. App. 1998).

105. *Id.*

106. *See* MINN. STAT. § 216B.2422 (2004); *see also* MINN. PUB. UTILS. COMM'N, ENVIRONMENTAL EXTERNALITIES VALUES UPDATED THROUGH 2004 (2005), http://www.puc.state.mn.us/docs/eeupdate05.pdf (listing environmental externalities values in Minnesota for 1995 and 2004).

107. 578 N.W.2d 4794.

108. "Western Fuels Association, Inc. is a not-for-profit cooperative that supplies coal and transportation services to consumer-owned electric utilities throughout the Great Plains, Rocky Mountain and Southwest regions. Serving a wide variety of public power entities ranging from rural electric generation and transmission cooperatives to municipal utilities, WFA offers its Members diverse and extensive expertise in coal mining, coal procurement and transportation management." ANNUAL REPORT 2004: COAL IS WHERE YOUR POWER BEGINS, WESTERN FUELS ASSOCIATION (2004), http://www.westernfuels.org/pdf/WFA2004AnnualReport.pdf. It has an office in Colorado and an operations office in Wyoming. *Id.* Its Class A members are Basin Electric Power Cooperative (North Dakota), Sunflower Electric Power Corporation (Kansas), and Tri-State Generation & Transmission Association, Inc. (Colorado). *Id.*

109.

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Light,[110] Center for Energy & Economic Development,[111] Northern States Power Company,[112] Otter Tail Power Company,[113] and Lignite Energy Council.[114] All of these entities produce power and/or represent companies that produce power in Minnesota and the surrounding states, and many of them have a national-scale operation.[115] They have both localized and

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> With headquarters in La Crosse, Wis., Dairyland Power Cooperative is a generation and transmission cooperative (G&T) that provides the wholesale electrical requirements and other services for 25 electric distribution cooperatives and 20 municipal utilities in the Upper Midwest.
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> . . . .
>
> Dairyland's service area encompasses 62 counties in four states (Wisconsin, Minnesota, Iowa and Illinois).

Dairyland Power Cooperative, System & Cooperatives, http://www.dairynet.com/about/system.html (last visited Feb. 27, 2006).

110.

> Minnesota Power, a division of ALLETE, provides electricity in a 26,000-square-mile electric service territory located in northeastern Minnesota. Minnesota Power supplies retail electric service to 135,000 retail customers and wholesale electric service to 16 municipalities.
>
> Superior Water, Light & Power (SWL&P) sells electricity and natural gas and provides water service in northwestern Wisconsin. SWL&P has 14,000 electric customers, 12,000 natural gas customers and 10,000 water customers.

Minnesota Power, Minnesota Power Facts, http://www.mnpower.com/about_mp/facts.htm (last visited Feb. 27, 2006).

111.

> The Center for Energy and Economic Development (CEED) is a non-profit group dedicated to protecting the viability of coal-based electricity. Working at the local, state, and regional levels, CEED communicates the truth about coal-conducting research, dispelling falsehoods, and educating the public and government officials about coal-based electricity's importance to our way of life.

Center for Energy and Economic Development, About CEED, http://www.ceednet.org/ceed/index.cfm?cid=7504 (last visited Feb. 27, 2006). Its national office is in Alexandria, Virginia. Center for Energy and Economic Development, Contact CEED, http://www.ceednet.org/ceed/index.cfm?cid=7526 (last visited Feb. 27, 2006).

112. Northern States Power Company is headquartered in Wisconsin. "The Company's principal activity is the generation, transmission and distribution of electricity. The Company distributes its electricity to approximately 230,000 retail customers in northwestern Wisconsin and in the western portion of the Upper Peninsula of Michigan." Business.com Directory, Northern States Power Company Profile, http://www.business.com/directory/energy_and_environment/electric_power_utilities/northern_states_power_company/profile/ (last visited Feb. 27, 2006).

113. Otter Tail Power Company is headquartered in Minnesota. It has power plants and customers in Minnesota, North Dakota, and South Dakota. Otter Tail Power Company, Quick Facts, http://www.otpco.com/AboutCompany/QuickFacts.asp (last visited Feb. 27, 2006).

114. Although Lignite Energy Council is listed as a respondent at the beginning of the opinion, both its focus and the court's reference to it later in the opinion as a relator suggest that the respondent designation was erroneous. *See In re* Quantification of Envtl. Costs, 578 N.W.2d 794, 795–96, 799 (Minn. Ct. App. 1998). Lignite Energy Council, based in North Dakota, aims to "maintain a viable lignite coal industry and enhance development of the region's lignite coal resources for use in generating electricity, synthetic natural gas and valuable byproducts." Lignate Energy Council, About Us, http://www.lignite-energy-council.org/about/Index.htm (last visited Feb. 27, 2006).

115. *See supra* notes 108–13.

broader scale interests in minimizing the cost of power generation, and hence want to limit the substances included in environmental cost valuation.

The respondents listed in the Court of Appeals opinion included the Environmental Coalition,[116] North Dakota, the Minnesota Public Utilities Commission, the Minnesota Attorney General, the Minnesota Pollution Control Agency, and the Minnesota Department of Public Service.[117] All of the respondents are either nonprofit organizations or governmental entities that have both localized and broader scale interests in limiting the environmental impact of power generation and tend to be supportive of including greenhouse gases within the list of substances.[118] The

116. The Environmental Coalition was referenced as a respondent at the beginning of the opinion, and a relator in the middle of the opinion. *In re* Quantification of Envtl. Costs, 578 N.W.2d at 795–96, 799. Given the brief submitted by the Environmental Coalition supporting the inclusion of carbon dioxide values, Initial Brief of the Environmental Coalition on Substantive Issues, *In re* Quantification of Envtl. Costs, MPUC Docket No. E-999/CI-93-583 (Minn. Office Admin. Hearings Jan. 12, 1996), *available at* http://www.me3.org/projects/costs/ecbrf1.html, it is most logical to treat the Coalition as a respondent. "The Coalition was comprised of seven groups including: ME3 (Minnesotans for an Energy Efficient Economy), Institute for Local Self-Reliance, Izaak Walton League of America, American Wind Energy Association, Clean Water Action, American Lung Association, and the Minnesota Center for Environmental Advocacy." ME3, Environmental Costs of Energy and Electricity, http://www.me3.org/projects/costs/ (last visited Feb. 27, 2006). ME3 is a Minnesota-based nonprofit focusing on "the transition to a clean, efficient, and fair energy system." ME3, About ME3, http://www.me3.org/me3descr.html (last visited Feb. 27, 2006). The Institute for Local Self-Reliance, based in Minnesota and Washington, D.C., focuses on achieving ecologically sound communities that participate with control in the global economy. *See* Institute for Local Self-Reliance, ISLR: A 20 Year Track Record Promoting Sustainable Communities, http://www.ilsr.org/20yrhist.html (last visited Feb. 27, 2006). The Izaak Walton League of America has a national office in Maryland and a Midwest office in Minnesota. The League describes itself as "one of the nation's oldest and most respected conservation organizations. With a powerful grassroots network of over 330 local chapters nationwide, the League is dedicated to promoting common sense solutions to protecting our country's natural heritage and improving outdoor recreation opportunities for all Americans." Izaak Walton League, http://www.iwla.org/ (last visited May 26, 2006). The American Wind Energy Association is based in Washington, D.C., and "promotes wind energy as a clean source of electricity for consumers around the world." American Wind Energy Association, General Information, http://www.awea.org/aweainfo.html (last visited Feb. 27, 2006). "The mission of the American Lung Association® is to prevent lung disease and promote lung health. The American Lung Association® is the oldest voluntary health organization in the United States, with a National Office [in New York] and constituent and affiliate associations around the country." American Lung Association, About, http://www.lungusa.org (follow "About" hyperlink) (last visited Feb. 27, 2006). The Minnesota Center for Environmental Advocacy is based in Minnesota and "uses legal action and legislative advocacy, as well as research, communications and collaborations to improve Minnesota's environment." Minnesota Center for Environmental Advocacy, http://www.mncenter.org/about.html (last visited Feb. 27, 2006).

117. *In re* Quantification of Envtl. Costs, 578 N.W.2d at 795–96.

118. *See, e.g.*, Initial Brief of Minnesota Pollution Control Agency on Substantive Issues, *In re* Quantification of Envtl. Costs, MPUC Docket No. E-999/CI-93-583 (Minn. Office Admin. Hearings Jan. 12, 1996), *available at* http://www.me3.org/projects/costs/pcabrf1.html (supporting inclusion of carbon dioxide emissions); Initial Brief of the Environmental Coalition on Substantive Issues, *In re*

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governmental entities are based in Minnesota and neighboring states. The non-profit Coalition members range from those that are Minnesota-based to those that are primarily nationally based.[119]

The adjudicator was Judge Randall of the Minnesota Court of Appeals.[120] That court heard the appeal after relators petitioned for a writ of certiorari, following contested initial and reconsideration proceedings before the Minnesota Public Utilities Commission.[121] The decision-makers thus reflect a much clearer tie to local geography than the parties do.

2. Claims

The facts of the environmental cost valuation case reflect a multiscalar geography. The dispute was over an environmental cost valuation system that applied within Minnesota and just outside its borders.[122] This limited range of the system itself provides the case with a subnational geography. The reason that carbon dioxide was included in that system, however, was to address a supranational problem. The facts of the case thus cross-cut scale through a subnational environmental scheme including a supranational environmental problem.

The applicable law, however, is clearly subnational. Every statute and case relied upon by the court came from the Minnesota legislature and courts.[123] For example, the judicial analysis of transnational data, such as the quality of the evidence in support of climate change, relied upon Minnesota's judicial standards for the discretion of the Administrative Law Judge.[124] The claims, as the state court system required, thus focused on where the judicial action was taking place rather than on the broader geography of the facts.

B. Environmental Review: Expansion of Coal-Based Energy in Victoria, Australia

In Australia, the Hazelwood Mine and Power Station, which contributes approximately twenty-two percent of Victoria's base load

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Quantification of Envtl. Costs, MPUC Docket No. E-999/CI-93-583 (Minn. Office Admin. Hearings Jan. 12, 1996), *available at* http://www.me3.org/projects/costs/ecbrf1.html (same)

119. *See supra* note 116 and accompanying text.

120. *In re* Quantification of Envtl. Costs, 578 N.W.2d 794, 794 (Minn. Ct. App. 1998).

121. *Id.* at 796–97.

122. One of the contested issues was whether carbon dioxide values should apply 200 miles beyond Minnesota state borders. *Id.* at 801–02.

123. *See id.*

124. *Id.* at 800–01.

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electricity, was running out of coal and wanted to add an additional coal field, which would allow the power station to operate through 2031.[125] The Minister for Planning approved a panel inquiry into the environmental effects of the proposal, but provided terms of reference that excluded the climate impacts from the use of coal to produce energy.[126] Several environmental groups challenged this exclusion, and in October 2004, the Victorian Civil and Administrative Tribunal, Administrative Division, directed the panel to hear submissions under provisions of the Planning and Environment Act[127] on the greenhouse gas impact from the new coal field.[128] Although the expansion ultimately went forward, the ruling resulted in the first Victorian greenhouse reduction deed,[129] which establishes emissions caps, provides for surrender of some of Hazelwood's coal, calls for set milestones and reporting requirements, and encourages development of renewable energy projects.[130] Environment Victoria, with support from the Australian Conservation Foundation and Greenpeace, criticized this agreement as "window-dressing" on giving Hazelwood "the right to pump out vast amounts of additional greenhouse pollution."[131] The decision thus provided judicial forcing of administrative regulatory behavior with respect to the power station that provided the basis for innovative and controversial policy-making.

1. Actors

The petitioners before the Victorian Civil and Administrative Tribunal in *Australian Conservation Foundation v. Latrobe City Council* included the Australian Conservation Foundation,[132] World Wildlife Fund (WWF)–

125. Australian Conservation Found. v. Latrobe City Council, [2004] V.C.A.T. 2029 (Vict. Civ. & Admin. Trib. Oct. 29, 2004).

126. *Id.*

127. Planning and Environment Act, 1987 (Victoria, Austl.) (Act No. 45/1987), *available at* http://www.austlii.edu.au/aul/legis/vic/consol_act/paeal987254/.

128. *Id.*

129. Greenhouse Gas Reduction Deed, *available at* http://www.doi.vic.gov.au/DOI/Internet/Energy.nsf/AllDocs/88831B7277C9437DCA25701B00248D59?OpenDocument (last visited Feb. 7, 2006).

130. *See* Fact Sheet 1, Greenhouse Gas Reduction Deed with IPRH, *available at* http://www.doi.vic.gov.au/doi/doielect.nsf/2a6bd98dee287482ca256915001cff0c/4c055e0941b77e73ca2570740006aaa7/$FILE/Fact%20Sheet%201%20-%20Greenhouse%20reduction.pdf (last visited Feb. 7, 2006).

131. Environment Victoria, http://www.envict.org.au (follow "Climate Change" hyperlink; then follow "Hazelwood Power Station" hyperlink; then follow "Bracks' condemns Victoria to Climate Change" hyperlink).

132. Australia Conservation Foundation is a national nonprofit, membership-based organization that has a head office in Melbourne and other offices around the country. It describes itself as

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Australia,[133] Environment Victoria,[134] and Climate Action Network Australia (CANA).[135] All four of them are Australian nonprofit environmental organizations. With the exception of Environment Victoria, the organizations have a primarily national or international geographic base; both WWF and CANA are national branches of international organizations, and Australia Conservation Foundation is a national-level organization. Although they all have a presence in Victoria and hence geographic ties to the subnational level, their agendas are mostly intertwined with broader national and international objectives.[136]

The other parties in the case included the Latrobe City Council; the Minister for Planning;[137] and International Power Hazelwood.[138] Although the governmental entities are both tied to the local geography of the plant—it is located in the Latrobe Valley—International Power Hazelwood is owned by a multinational company headquartered in London.[139] The office of its Australian subsidiary, Australian National

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"Australia's leading national . . . environment organisation." Australia Conservation Foundation, About ACF, http://www.acfonline.org.au/default.asp?section_id=1 (last visited Feb. 26, 2007).

133. WWF–Australia, which has a head office in Sydney and other offices around Australia, "is part of the WWF International Network, the world's largest and most experienced independent conservation organisation [WWF] has close to five million supporters and a global network active [in] more than 100 countries." WWF–Australia, About Us, http://www.wwf.org.au/about/ (last visited Mar. 31, 2006). "With over 80,000 supporters, and active projects in Australia and the Oceana region, WWF works to conserve Australia's plants and animals by ending land clearing, addressing climate change, and preserving and protecting our freshwater, marine, and land environments." *Id.*

134. Environment Victoria, based in Carlton, Victoria, "is the state's peak non-government environment organization." Environment Victoria, About Us, http://www.envict.org.au (follow "About Us" hyperlink) (last visited Feb. 27, 2006).

135. CANA, based in Ultimo, New South Wales, "is an alliance of over 30 regional, state and national environmental, health, community development, and research groups from throughout Australia. . . . CANA was formed in 1998 to be the Australian branch of the global CAN network, with representative groups in over 70 nations." CANA, About CANA, http://www.cana.net.au/index.php?site_var=10 (last visited Feb. 27, 2006).

136. *See* sources cited *supra* notes 132–33, 135.

137. The Minister for Planning was represented by the Victorian Government Solicitor in the role of observer. Australian Conservation Found. v. Latrobe City Council, [2004] V.C.A.T. 2029 (Vict. Civ. & Admin. Trib. 2004).

138. "International Power is a leading independent power generation company with interests in 37 power stations in 18 countries around the world." International Power, The Company, http://www.ipplc.com/ipplc/thecompany/.

> International Power's Australian business region consists of the Hazelwood plant in Victoria and the Pelican Point plant in South Australia, together with the Synergen peaking units dispersed in South Australia.

Computer Business Review Online, International Power plc, http://www.cbronline.com/companyprofile.asp?guid=C94E4191-2B68-4B5E-82F9-350FFF746264&CType=Background (last visited Feb. 27, 2006). The company's head office is in London. *Id.*

139. *See* Environment Victoria, Corporate Profile of Hazelwood Power Station, http://envict.org/au/inform.php?menu=5&Submenu=475&item=492 (last visited Mar. 31, 2006); International Power, Contact Us, http://www.iplcc.com/iplcc/contactus/ (last visited Mar. 31, 2006).

Power, is located in Melbourne, Victoria.[140] Like the other governmental entities, the adjudicator—the Victorian Civil and Administrative Tribunal—is also based at the state level.

2. Claims

The factual and legal claims in *Australian Conservation Foundation v. Latrobe City Council* reflect a similar dynamic. The facts revolve around the planning process for the development of a particular coal field located within the ambit of the City of Latrobe, which is within Victoria. The geography of the coal field and contested planning process is distinctly subnational. As in the environmental cost valuation case, however, the parties disputed whether the supranational environmental problem should be included in the subnational process.[141]

The claims and opinion of the Victorian Civil and Administrative Tribunal rely upon subnational and national law. The primary statute upon which the analysis focuses is Planning and Environment Act 1987, which was created by a subnational legislature.[142] The case also references several other subnational statutes and one national statute.[143] Although the ambit of applicable law is somewhat broader in this action—including the national—the case's analysis, like the Minnesota one, has a different legal than factual geography. Subnational and national laws are applied not only to the subnational facts, but also to the supranational ones.

C. Geography of Subnational Cases

These cases' geography reflects the fundamentally local and regional character of the legal structure in which they operate; the tribunals and governmental parties all have clear connections to the places in which the environmental assessments are occurring.[144] The map of the non-state actors, however, indicates the broader implications of these cases and their interconnection with national and international power dynamics. In both cases, although most of the corporate and nongovernmental actors had

140. *See* International Power, *supra* note 139.
141. *See* Australian Conservation Found., [2004] V.C.A.T. 2029.
142. *See supra* note 127.
143. *Id.*
144. For an analysis of evolving state government approaches to climate change policy, see BARRY G. RABE, STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY (2004).

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some connection to the locality in which the suit occurred, many of them were primarily nationally or internationally based.

The scalar differences between the non-state actors involved in the regulatory process and those entities actually regulating illuminates a core challenge for local efforts to regulate the externalities of energy production. The pollution-producing behavior occurs within the domain of a locality or region. The transnational and national character of the industry itself and of the nongovernmental organizations that concern themselves with it, however, does not fit neatly within a locally focused regulatory scheme.

The petitioners and respondents were aligned oppositely in the two cases,[145] but the underlying geography of the actors in each case reflected the tension between the local character of the specific controversy and the transnational scope of climate change. The decision-makers and governmental parties all represented either the localities or states at the focus of the controversy, but the nongovernmental parties had a more complex geography. Although the corporations and nongovernmental organizations had significant ties to the subnational areas in which the disputes were taking place—and some were even locally or regionally-based—many of these non-state actors had broader national or international agendas. The spatial center of gravity of the parties and adjudicators was arguably subnational—Minnesota or Victoria—but both sets of actors clearly reflected national and international tensions over appropriate regulation of greenhouse gas emissions.

An analysis of the factual and legal claims in the two cases illuminates their geographic tensions even more starkly. In both cases, the facts have two distinct spatial elements: (1) the local environmental issue and (2) its interconnection with the supranational environmental issue. The applicable law, however, treats those facts through a primarily subnational lens. The focus of the legal analysis in each case was on the laws of Minnesota or Victoria, respectively.

In sum, not only do tribunals grapple with complex, transnational facts, but they also engage parties whose center of gravity often is not locally based. In order for subnational tribunals to engage these cases effectively, they must bridge disparate geographies. These dynamics raise questions

145. The relators in the environmental cost valuation case were challenging a legislative/administrative determination to treat carbon dioxide emissions as pollution, whereas the petitioners in the land use case were pushing for its inclusion in an environmental assessment. *Compare In re* Quantification of Envtl. Costs, 578 N.W.2d 794, 796–97 (Minn. Ct. App. 1998) *with* Australian Conservation Found., [2004] VCAT 2029.

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about subnational tribunals as transnational judicial spaces and as actors in broader dialogue about climate change.[146]

V. MAPPING NATIONAL CLIMATE CHANGE LITIGATION

The national-level cases present an even more spatially complex terrain. Geographic diversity infuses these cases, which gain a national-level characterization primarily from the federal-level designation of the tribunal in which they are brought. Although the cases that follow often address interrelated substantive issues, each case involves a unique arrangement of place-based relationships.

This analysis engages the national-level climate change cases that focus substantively on emissions reduction and project financing. The cases include a mix of public and private actors as plaintiffs and defendants, and represent a form of governmental regulation of corporations. Within each of the major substantive categories, significantly different formulations of actors, facts, and legal claims emerge. Because these cases are all brought at the same level of government and engage interrelated facts, however, a comparative analysis of their geographies is particularly useful. Paralleling the subnational analysis, this Part explores the contours of each case and then provides an analysis of the geography of national-level climate change litigation.

A. *Emissions Regulation: U.S. Power Companies*

Eight states and New York City sued six major power companies that contribute "approximately one quarter of the U.S. electric power sector's carbon dioxide emissions."[147] They claimed that these emissions' contribution to global warming injure public health, coastal resources, water supplies, the Great Lakes, and economic interests, as well as increase the risk of wildfires and catastrophic climate change;[148] as a result, these emissions constitute a public nuisance in violation of federal common law, or, in the alternative, state law.[149] The case was dismissed in September 2005 by the Southern District of New York on the grounds that

146. I explore these issues in more depth in Hari M. Osofsky, *Local Approaches to Transnational Corporate Responsibility: Mapping the Role of Subnational Climate Change Litigation*, PAC. MCGEORGE GLOBAL BUS. & DEV. J. (forthcoming 2006).

147. Complaint at 1, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (No. 04 Civ 5669), *available at* http://caag.state.ca.us/newsalerts/2004/04-076.pdf.

148. *Id.* at 30–41.

149. *Id.* at 1–2.

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it raised nonjusticiable political questions, due to the "identification and balancing of economic, environmental, foreign policy, and national security interests" requiring a policy determination by the political branches.[150] This case thus represents an effort to use the judiciary to regulate the behavior of corporations through federal common law and state-level law, an effort that this federal judicial actor objected to on the grounds that such regulation was in the political branches' purview.

1. Actors

The public nuisance case against the power companies presents the simplest geography of actors of the three emissions regulation cases. The petitioners include the states of California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin, as well as the City of New York.[151] They are all subnational governmental entities that claim to be bringing the action in order to protect their property and their citizens' health, well-being, and natural resources.[152]

The defendants include American Electric Power Company, Inc.,[153] American Electric Power Service Corporation,[154] The Southern Company,[155] Tennessee Valley Authority,[156] Xcel Energy Inc.,[157] and Cinergy Corporation.[158] They are corporations involved in electricity generation processes that rely on fossil fuels. Their operations span several states within the United States,[159] and they have an interest in minimizing

150. *Am. Elec. Power Co.*, 406 F. Supp. 2d at 274.

151. Complaint, *supra* note 147, at 1.

152. *Id.* at 3–5.

153. American Electric Power Company, Inc. (AEP) is a corporation with New York citizenship and its principal place of business in Ohio. It generates electricity in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia. *Id.* at 5.

154. American Electric Power Service Corporation is a wholly-owned subsidiary of AEP and has the same citizenship and principal place of business. Its functions include providing management and professional services to AEP's electric utility subsidiaries. *Id.*

155. The Southern Company has Delaware citizenship, with its principal place of business in Georgia. It is a registered public utility holding company with several domestic subsidiaries that generate electricity in Alabama, Florida, Georgia, and Mississippi. *Id.* at 6.

156. Tennessee Valley Authority is a federal corporation, with its principal place of business in Tennessee. It directly owns and operates facilities that generate electricity in Alabama, Kentucky, Mississippi, and Tennessee. *Id.* at *.

157. Xcel Energy Inc. has both citizenship and its principal place of business in Minnesota. It is a registered public utility holding company with four domestic subsidiaries that generate electricity in Colorado, Minnesota, New Mexico, South Dakota, Texas, and Wisconsin. *Id.* at 8.

158. Cinergy Corporation has Delaware citizenship, with its principal place of business in Ohio. It is a registered public utility holding company with two subsidiaries that generate electricity in Indiana, Kentucky, and Ohio. *Id.* at 9.

159. *Id.* at 5–10.

regulation of greenhouse gas emissions. The adjudicator is the Southern District of New York, a federal judicial entity that covers several counties—Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester—within New York State.[160]

2. Claims

The facts of this case present a multilevel geography. On the one hand, the emissions by the defendant corporations and their sub-entities are occurring in specific localities in Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, New Mexico, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.[161] Moreover, each of the defendants has citizenship in a particular state.[162] On the other hand, the suit focuses on the emissions as a substantial portion of overall national U.S. emissions and on their contribution to the supranational problem of climate change.[163]

The claims for relief are simultaneously national and subnational. Substantively, plaintiffs allege violations of the federal common law of public nuisance, and in the alternative, state law public nuisance.[164] Procedurally, they make federal law claims for subject matter and personal jurisdiction and for venue,[165] some of which rely upon connections to a particular subnational area.[166]

B. Emissions Regulation: U.S. Vehicles

Twelve states, three cities, a U.S. territory, and thirteen nongovernmental organizations are petitioners in a lawsuit under the Administrative Procedure Act and Clean Air Act against the EPA, ten other states, and nineteen industry and utility groups.[167] The plaintiffs

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160. *See* Southern District of New York, General Directory, http://www.nysd.uscourts.gov/office.htm (last visited Feb. 27, 2006).

161. *See supra* notes 153–58 and accompanying text.

162. *Id.*

163. *See* Complaint, *supra* note 147, at 1.

164. *Id.* at 43–49.

165. *Id.* at 10–21.

166. For example, the venue and personal jurisdiction claims rely on the defendants' connections to and activities in the Southern District of New York. *Id.*

167. Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005) , *cert. granted*, 2006 WL 1725113 (U.S. Dist. Col. June 26, 2006) (No. 05-1120). For a full listing of parties, see International Center for Technology Assessment (ICTA), Global Warming Petitioners, http://www.icta.org/doc/global%20warming%20petitioners%20final.pdf (last visited Feb. 27, 2006) [hereinafter ICTA Parties Listing].

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challenged the EPA's denial of a petition requesting that it regulate greenhouse gas emissions from motor vehicles under section 202(a)(1) of the Clean Air Act.[168] Without reaching the merits, the Court of Appeals for the D.C. Circuit ruled in July 2005 that the EPA acted within its discretion in deciding not to regulate the emissions,[169] and the Circuit denied rehearing en banc in December 2005.[170] Petitioners filed a Petition for Writ of Certiorari with the U.S. Supreme Court on March 2, 2006, which was granted on June 26, 2006.[171] This case thus represents an effort by local and state executive branches and nongovernmental entities to use judicial authority to force regulation by a federal executive branch agency, an effort opposed by other state-level executive branch and corporate representatives; a federal appeals court denied the case out of deference to the discretion of that federal executive branch agency, a denial which is now under review by the Supreme Court.

1. Actors

A geographic analysis of parties in the consolidated suit against the EPA over its refusal to regulate greenhouse gas emissions under section 202(a)(1) of the Clean Air Act is far more convoluted, but reveals the scope and complexity of the power dynamics involved. The governmental petitioners include twelve U.S. states: California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington; the U.S. territory of American Samoa; and three cities: Baltimore, New York, and Washington, D.C.[172]

168. Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005) , *cert. granted*, 2006 WL 1725113 (U.S. Dist. Col. June 26, 2006) (No. 05-1120).

169. *See supra* note 80 and accompanying text.

170. Massachusetts v. EPA, 433 F.3d 66 (D.C. Cir. 2005).

171. Massachusetts v. EPA, 433 F.3d 66 (D.C. Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3517 (U.S. Mar. 2, 2006), *cert. granted* 2006 WL 1725113 (U.S. Dist. Col. June 26, 2006) (No. 05-1120); *see also* Nick Miles, *Top US Court to Take on CO2 Case*, BBC NEWS, June 27, 2006, *available at* http://news.bbc.co.uk/2/hi/americas/5118792.stm; *Supreme Court to Hear Key Environment Case*, N.Y. TIMES, June 26, 2006, *available at* http://www.nytimes.com/2006/06/26/washington/AP-Scotus-Greenhouse-Gases.html?hp&ex=1151380800&en=43ce6578058bddbf&ei=5094&partner=homepage. The questions presented in the petition for writ of certiorari are: "1. Whether the EPA Administrator may decline to issue emission standards for motor vehicles based on policy considerations not enumerated in section 202(a)(1). 2. Whether the EPA Administrator has authority to regulate carbon dioxide and other air pollutants associated with climate change under section 202(a)(1)." Petition for Writ of Certiorari, *Massachusetts v. EPA*, 2006 WL 558353 (U.S.) (No. 05-1120).

172. ICTA Parties Listing, *supra* note 168; *see also* Final Brief for the Petitioners in Consolidated Cases, Massachusetts v. EPA, 415 F.3d 50 (No. 03-1361) (D.C. Cir. 2005), *available at* http://www.icta.org/doc/Petitioners'%20Final%20Brief%201.25.05.pdf.

The thirteen nongovernmental organizations that are also petitioners include Bluewater Network,[173] Center for Biological Diversity,[174] Center for Food Safety,[175] Conservation Law Foundation,[176] Earthjustice,[177] Environmental Advocates of New York,[178] Greenpeace,[179] International Center for Technology Assessment,[180] National Environmental Trust,[181] Natural Resources Defense Council,[182] Public Interest Research Group,[183]

173. Bluewater Network is a nonprofit organization based in San Francisco. *See* Final Brief for the Petitioners in Consolidated Cases, *supra* note 172, at iv; About Bluewater Network, http://www.bluewaternetwork.org/aboutus.shtml (last visited Mar. 31, 2006). Bluewater Network is a division of Friends of the Earth, *id.*, which "is the U.S. voice of an influential, international network of grassroots groups in 70 countries," Friends of the Earth International. Friends of the Earth, Who We Are, http://www.foe.org/about/whoweare.html (last visited Feb. 27, 2006).

174. Center for Biological Diversity is a nonprofit organization based in Arizona, with other offices in New Mexico, California, Oregon, and Washington, D.C. It has 13,000 members nationwide, and it works to protect endangered species. Center for Biological Diversity, Fact Sheet, http://www.biologicaldiversity.org/swcbd/aboutus/factsheet.pdf (last visited Feb. 27, 2006).

175. Center for Food Safety is a nonprofit organization with a national office in Washington, D.C., and a West Coast office in San Francisco. It was "established in 1997 by its sister organization, International Center for Technology Assessment, for the purpose of challenging harmful food production technologies and promoting sustainable alternatives." The Center for Food Safety, About Us, http://www.centerforfoodsafety.org/about_us.cfm (last visited Feb. 27, 2006).

176. "Conservation Law Foundation is a nonprofit, member-supported organization with offices in Maine, Massachusetts, New Hampshire, Rhode Island and Vermont." Conservation Law Foundation, http://www.clf.org/ (last visited Feb. 27, 2006). It focuses on advocacy involving protecting the environment in New England. *Id.*

177. Earthjustice is a nonprofit law firm that works to protect the environment. Its national headquarters are in California, and it also has offices in Alaska, Colorado, Florida, Hawaii, Montana, Washington, and Washington, D.C. *See* Earthjustice, About Us, http://www.earthjustice.org/about/ (last visited Feb. 27, 2006).

178. Environmental Advocates of New York is a nonprofit organization based in New York State that works to protect the environment in the state. Environmental Advocates of New York, About Us, http://www.eany.org/aboutus/index.html (last visited Feb. 27, 2006).

179. Greenpeace is a nonprofit organization whose national headquarters are in Washington, D.C. It engages in advocacy throughout the United States and around the world. First Amended Compliant [sic] for Declaratory Relief and Writ of Mandamus or Other Order, at 7–8, Int'l Ctr. for Tech. Assessment v. Whitman, No. 02-2376 (D.D.C. Feb. 26, 2003), *available at* http://www.icta.org/doc/CO2PetAmendCompliant.pdf.

180. International Center for Technology Assessment is a tax-exempt, nonprofit organization that is incorporated in Washington, D.C., and engages in advocacy at a local, state, and federal level throughout the United States. *Id.* at 2–5.

181. National Environmental Trust is a nonprofit organization based in Washington, D.C., that provides public education campaigns on the environment around the United States. National Environmental Trust, About Us, http://www.net.org/about/ (last visited Feb. 27, 2006).

182. Natural Resources Defense Council is a nonprofit organization with New York headquarters, as well as offices in Washington, D.C., Los Angeles, and San Francisco. Natural Resources Defense Council, Contact Us, http://www.nrdc.org/contactUs/ (last visited Mar. 31, 2006). It has over one million members around the United States and works on a range of domestic and international environmental issues. *See* Natural Resources Defense Council, About Us, http://www.nrdc.org/about/ (last visited Mar. 1, 2006).

183. The U.S. Public Interest Research Group (PIRG) is a nonprofit based in Washington, D.C., with regional field offices in Massachusetts, Georgia, Louisiana, Arizona, and Hawaii. U.S. PIRG,

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Sierra Club,[184] and Union of Concerned Scientists.[185] They are subnationally based, nationally based, and internationally based organizations engaged in environmental advocacy. Three additional nonprofit organizations filed amici briefs in support of the petitioners.[186]

The parties aligned with the respondent are similarly diverse. In addition to the initial respondent, the EPA, ten states[187] and three entities representing industry and utility companies[188] intervened in the lawsuit in support of the respondent. The ten states were Alaska, Idaho, Kansas, Michigan, Nebraska, North Dakota, Ohio, South Dakota, Utah, and Texas. The industry intervenor-respondents were grouped into three coalitions: the Vehicle Intervenor Coalition,[189] the CO2 Litigation Group,[190] and the

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Contact Us, http://uspirg.org/uspirg.asp?id2=10359 (last visited Mar. 6, 2006). It was created by state PIRGs, which operate in numerous states around the United States. It works on environmental, consumer, democracy, and higher education issues. U.S. PIRG, About Us, http://uspirg.org/uspirg.asp?id2=10115&id3=USPIRG& (last visited Mar. 1, 2006).

184. The Sierra Club is a nonprofit organization incorporated under California law that engages in advocacy throughout the United States and internationally. *See* First Amended Compliant [sic] for Declaratory Relief and Writ of Mandumus or Other Order, *supra* note 179, at 5–7.

185. Union of Concerned Scientists (UCS) is a nonprofit organization with a national office in Cambridge, Massachusetts, as well as offices in Washington, D.C., and Berkeley, California. "UCS is an independent nonprofit alliance of more than 100,000 concerned citizens and scientists. [It] augment[s] rigorous scientific analysis with innovative thinking and committed citizen advocacy to build a cleaner, healthier environment and a safer world." Union of Concerned Scientists, About UCS, http://www.ucsusa.org/ucs/about/index.cfm (last visited Mar. 1, 2006).

186. ICTA Parties List, *supra* note 168 (listing Physicians for Social Responsibility, Indigenous Environmental Network, and REDOIL (Resisting Environmental Devastation on Indigenous Lands) as Amici for the petitioners).

187. *See* Final Brief for the Intervenor States of Michigan, Texas, Idaho, North Dakota, Utah, South Dakota, Alaska, Kansas, Nebraska, and Ohio, and the Amicus State of Indiana in Support of Respondent United States Environmental Protection Agency, Massachusetts v. EPA, 415 F.3d 50 (No. 03-1361) (D.C. Cir. 2005), *available at* http://209.200.74.155/doc/StateIntervenorFinalBrief1-21.pdf.

188. For a detailed description of those three entities, see *infra* notes 189–91 and accompanying text.

189. The Vehicle Intervenor Coalition consists of four entities that represent companies involved in the automotive industry: the Alliance of Automobile Manufacturers (Auto Alliance), the National Automobile Dealers Association, the Engine Manufacturers Association, and the Truck Manufacturers Association. Joint Brief of Industry Intervenor-Respondents, *Massachusetts*, 415 F.3d 50 (No. 03-1361), *available at* http://209.200.74.155/doc/IndustryIntervenorRespondentsFinalBrief1-25.pdf. The Auto Alliance has its headquarters in Washington, D.C., and also has offices in California and Michigan. Auto Alliance, Contact the Alliance, http://www.autoalliance.org/about/contact.php (last visited Apr. 1, 2006). It "is a trade association of 9 car and light truck manufacturers including BMW Group, DaimlerChrysler, Ford Motor Company, General Motors, Mazda, Mitsubishi Motors, Porsche, Toyota and Volkswagen." Auto Alliance, About the Alliance, http://www.autoalliance.org/about/ (last visited Mar. 1, 2006). "The National Automobile Dealers Association, founded in 1917 [with its main office in McLean, Virginia], represents more than 19,700 new car and truck dealers, both domestic and international, with more than 43,000 separate franchises." National Automobile Dealers Association, About NADA, http://www.nada.org/template.cfm?Section=AboutNADA (last visited Mar. 1, 2006). "Since 1968, the Engine Manufacturers Association[, based in Chicago, Illinois,] has been the voice of the engine manufacturing industry on domestic and international public policy, regulatory, and

technical issues that impact manufacturers of engines used in a broad array of mobile and stationary applications." Engine Manufacturers Association, Who Is EMA, http://www.enginemanufacturers.org/about/ (last visited Mar. 1, 2006). The Truck Manufacturer's Association, based in Washington, D.C., represents companies "engaged in the design, development, manufacturing, marketing and sale of medium- and heavy-duty trucks, truck chassis and truck tractors." Joint Brief of Industry Intervenor-Respondents, *supra*, Corporate Disclosure Statement at 2. *Accord* Truck Manufacturers Association, Who We Are, http://www.truckmanufacturersassociation.org/WhoWeAre.asp?id=2 (last visited Mar. 1, 2006).

190. "CO2 Litigation Group is an informal organization of trade associations and business organizations formed to fund and conduct litigation concerning potential regulation of carbon dioxide emissions." Joint Brief of Industry Intervenor-Respondents, *supra* note 189, Addendum at 1. It has twelve members with an interest in the litigation. *Id.*, Addendum at 2–8. American Petroleum Institute is a nonprofit organization based in Washington, D.C., with offices in twenty-seven state capitals. It represents over 400 oil and gas companies. American Petroleum Institute, About API, http://api-ec.api.org/aboutapi/ (last visited Mar. 1, 2006). American Forest & Paper Association, based in Washington, D.C., "is the national trade association of the forest, pulp, paper, paperboard and wood products industry. . . . AF&PA's members include manufacturers of over 80 percent of the paper, wood and forest products produced in the United States." American Forest & Paper Association, About AF&PA, http://www.afandpa.org/Template.cfm?section=About_AFandPA (last visited Mar. 1, 2006). American Iron and Steel Institute, based in Washington, D.C., "represents 19 North American steel mills." Joint Brief of Industry Intervenor-Respondents, *supra* note 189, Addendum at 3. *Accord* American Iron and Steel Institute, http://www.steel.org/ (last visited Mar. 1, 2006). Business Roundtable, based in Washington, D.C., "is an association of chief executive officers of [approximately 160] leading U.S. corporations with a combined workforce of more than 10 million employees." Business Roundtable, About Us, http://www.businessroundtable.org/aboutUs/index.html (last visited Mar. 1, 2006). The U.S. Chamber of Commerce, based in Washington, D.C., represents "more than 3 million businesses of all sizes, sectors, and regions. It includes hundreds of associations, thousands of local chambers, and more than 100 American Chambers of Commerce in 91 countries." U.S. Chamber of Commerce, About Us, http://www.uschamber.com/about/ (last visited May 26, 2006). "Founded August 14, 1961 [and based in Alexandria, Virginia], the National Association of Convenience Stores (NACS) is an international trade association representing 2,352 retail and 1,991 supplier company members. NACS member companies do business in nearly 40 countries around the world, with the majority of members based in the United States." NACS Online, About NACS, http://www.nacsonline.com/NACS/TopNav/About_NACS/default.htm (last visited Mar. 1, 2006). "Seventy percent of its members sell gasoline and diesel fuel, which, in 2002, accounted for more than $280 billion in sales." Joint Brief of Industry-Intervenor Respondents, *supra* note 189, Addendum at 5. The National Association of Manufacturers (NAM) "is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country." National Association of Manufacturers, Profile and Mission, http://www.nam.org/s_nam/sec.asp?CID=26&DID=24 (last visited Mar. 1, 2006). National Petrochemical and Refiners Association is based in Washington, D.C., and its "members include more than 450 companies, including virtually all U.S. refiners and petrochemical manufacturers." NPRA, Info on NPRA, http://www.npradc.org/about/ (last visited Mar. 1, 2006). "Founded in 1916 [and based in Skokie, Illinois, with an office in Washington, D.C.], the Portland Cement Association represents cement companies in the United States and Canada." Portland Cement Association, About PCA, http://www.cement.org/pca/ (last visited Mar. 1, 2006). The Society of Independent Gasoline Marketers of America, based in Reston, Virginia, "is the premier national trade association representing independent chain retailers and marketers of motor fuel, both branded and unbranded." Society of Independent Gasoline Marketers of America, About SIGMA, http://www.sigma.org/about/about.html (last visited Mar. 1, 2006). The Specialty Steel Industry of North America (SSINA), based in Washington, D.C., "is a voluntary trade association representing virtually all the producers of specialty steel in North America." The Stainless Steel Information Center, About SSINA, http://www.ssina.com/about/index.htm (last visited Mar. 1, 2006).

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Utility Air Regulatory Group.[191] These coalitions represent a wide range of local, national, and transnational entities involved in business generally and in the processes that lead to the release of greenhouse gases in particular.[192] Congressman John Dingell of Michigan, the Washington Legal Foundation, and the State of Indiana also filed amici briefs on behalf of the respondents.[193] The petitioners and respondents thus include both governmental and nongovernmental entities that span numerous geographies at multiple levels.

The judicial actor in this case is a national-level court with a geographic tie to Washington, D.C. The adjudicator in the latest opinion in the case was the Court of Appeals for the D.C. Circuit.[194] The adjudicator currently is the U.S. Supreme Court, also based in Washington, D.C., but serving as the highest court of the nation-state.[195]

2. Claims

Although they engage multiple spaces, the claims in the motor vehicle emissions case have a far more straightforward geography than the actors do. The facts involve the U.S. EPA's denial of a national-level rulemaking petition under a national-level law, the Clean Air Act, to address emissions that contribute to the supranational phenomenon of climate change, which

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Based in Washington, D.C.,

> [t]he Steel Manufacturers Association (SMA) consists of 39 North American companies that operate 125 steel plants and employ approximately 40,000 people. The SMA also has six in countries outside of North America, comprising a total membership of 45 steel companies, worldwide.
>
> The North American member companies of the SMA are widely dispersed geographically with 33 located in the United States, three companies in Canada, and three in Mexico. The [U.S.] companies are represented in the United States Congress by 122 Congressional Districts within 37 states.
>
> The SMA is the primary trade association for scrap-based electric arc furnace (EAF) steelmakers.

Steelnet, The Steel Manufacturers Association, http://www.steelnet.org/about/index.html (last visited Mar. 1, 2006).

191. The Utility Air Regulatory Group (UARG) "is a not-for-profit trade association of individual electric generating companies and national trade associations that participates collectively in administrative proceedings, and in litigation arising from those proceedings, that affect electric generators under the Clean Air Act." Joint Brief of Industry Intervenor-Respondents, *supra* note 189, UARG Disclosure Statement at 1. UARG does not specify in its statement in the Joint Brief which of its members are participating in the consolidated proceedings. *See id.* at 1–2.

192. *See supra* notes 189–91 and accompanying text.

193. For a full listing of parties, see ICTA Parties Listing, *supra* note 168.

194. Massachusetts v. EPA, 415 F.3d 50, (D.C. Cir. 2005).

195. *See* SUP. CT. R. 10-16; sources cited *supra* note 171.

has localized effects at a subnational level.[196] The substantive and procedural claims made by the petitioners rely upon national-level statutes to address these facts that range in scale. They argue that section 202(a)(1) of the Clean Air Act authorizes the EPA to regulate greenhouse gas emissions from motor vehicles, and that the Energy Policy and Conservation Act does not preclude such regulation.[197] They appeal based on the Administrative Procedure Act, and argue that the EPA acted arbitrarily in denying the petition.[198] They claim that the court has jurisdiction based on specific provisions of federal statutes.[199]

C. Emissions Regulation: Nigerian Oil Companies' Gas Flaring

Eight individuals, each of whom lives in a different community impacted by gas flaring, sued six oil companies and the attorney general of Nigeria for violations of sections 33(1) and 33(4) of the Constitution of the Federal Republic of Nigeria—as reinforced by Articles 4, 16, and 24 of the African Charter on Human and Peoples Rights—and of the Environmental Impact Assessment Act.[200] They claimed that the gas flaring violates "their fundamental rights to life and dignity of human person," and they requested both declaratory and injunctive relief.[201] After the filing of this suit, the Executive Director of Environmental Rights Action/Friends of Earth Nigeria (ERA) was detained for two hours for questioning that included discussion of the lawsuit.[202] In November 2005, however, the Federal High Court of Nigeria in the Benin Judicial Division granted declaratory relief, enjoined the gas flaring by Shell Petroleum Development Company of Nigeria Limited (Shell Nigeria) and the Nigerian National Petroleum Corporation (NNPC), and ordered legislative processes to begin amending a problematic statute.[203] After the gas flaring continued, petitioners filed contempt of court proceedings against Shell Nigeria and NNPC.[204] On April 11, 2006, the Federal High Court of

196. *See Massachusetts*, 415 F.3d 50.

197. Final Brief for the Petitioners in Consolidated Cases, *supra* note 172.

198. *Id.*

199. *Id.*

200. Motion Exparte, *supra* note 65, Statement at 1–2.

201. *Id.*

202. Climate Justice, Executive Director of Environmental Rights Action/Friends of the Earth Nigeria (ERA), Detained for Two Hours at Lagos Airport (July 8, 2005), http://www.climatelaw.org/media/bassey.detained.

203. Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd. et al., [2005]—F.H.C.N.L.R.—(Nigeria), *available at* www.climatelaw.org/media/gas.flaring.suit.nov2005/ni.shell.nov05.decision.pdf.

204. Press Release, Shell Accused of Contempt of Court over Continued Illegal Gas Flaring, http://www.foe.co.uk/resource/press_releases/shell_accused_of_contempt_16122005.html.

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Nigeria ordered Shell Nigeria and NNPC to end the flaring by April 2007 and to appear before the court on May 31, 2006 with a detailed plan for doing so.[205] This action thus is an effort by individuals, with the support of nongovernmental organizations, to use the federal judiciary to regulate corporations directly and to force regulatory behavior by the federal executive branch, a role that the judiciary decided to play in its November 2005 and April 2006 orders.

1. Actors

The Nigerian gas flaring case represents yet another geographic variation. The plaintiffs are citizens of the Federal Republic of Nigeria and also members of eight communities within the Niger Delta State.[206] As such, they connect to place at a national level through their citizenship and at a state and local level through their residence and longstanding community ties. In filing this suit, these individuals were supported by ERA, a Nigerian nongovernmental organization that is a chapter of Friends of the Earth International, an international nongovernmental organization.[207]

The defendants include one national-level governmental actor, the Attorney General of the Federation, and six corporations: Shell Petroleum Development Company of Nigeria Limited,[208] Total/Fina/Elf Limited,[209]

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205. Press Release, Shell Ordered to Appear by Nigerian Court, http://www.foe.co.uk/resource/press_releases/shell_ordered_to_appear_by_11042006.html.

206. Those communities are Rumuekpe, Imiringi, Gbarain, Iwherekan, Eremah, Akala-Olu, Idama, and Eket. Motion Exparte, *supra* note 65, Verifying Affidavit at 1–2.

207. *See* Press Release, Climate Justice, Communities Sue Oil Companies to Stop Nigerian Gas Flaring (June 20, 2005), http://www.climatelaw.org/media/gas.flaring.suit; ERA, About Us, http://www.eraction.org/modules.php?name=About_ERA (last visited Mar. 1, 2006).

208. Shell Petroleum Development Company of Nigeria Limited (SPDC) has offices in Lagos, Port Hartcourt, Abuja, and Warri. Shell Nigeria, Contact Us, http://www.shell.com/home/Framework?siteId=nigeria (follow "Contact Us" hyperlink) (last visited Mar. 1, 2006).

> SPDC is the pioneer and leader of the petroleum industry in Nigeria. It has the largest acreage in the country from which it produces some 43 per cent of the nation's oil. The company's operations are concentrated in the Niger Delta and adjoining shallow offshore areas where it operates in an oil mining lease area of around 31,000 square kilometres. SPDC has more than 6,000 kilometres of pipelines and flowlines, 87 flowstations, 8 gas plants and more than 1,000 producing wells.

Shell Nigeria, The Shell Petroleum Development Company of Nigeria (SPDC), http://www.shell.com/home/Framework?siteId=nigeria (follow "About Shell Nigeria" hyperlink; then follow "What We Do" hyperlink; then follow "Exploration and Production" hyperlink; then follow "Shell Petroleum Development Company of Nigeria (SPDC)" hyperlink) (last visited Mar. 1, 2006). "Shell Companies in Nigeria are part of the Shell Group whose diverse activities contribute to the economies of over 135 countries." Shell Nigeria, Structure, http://www.shell.com/home/Framework?siteID=nigeria (follow "About Shell Nigeria" hyperlink; then follow "Who We Are" hyperlink; then follow

Nigerian Agip Oil Company Limited,[210] Chevron/Texaco Nigeria Limited,[211] Mobil Producing Nigeria Limited,[212] and Nigerian National Petroleum Corporation.[213] The first five corporate defendants are all joint ventures between major multinational oil corporations and the sixth defendant, Nigerian National Petroleum Corporation, that engage in oil-related activities in the plaintiff's communities.[214] As a result, these

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"Structure" hyperlink) (last visited Mar. 1, 2006).

209.

> Total Fina Elf is one of the first world's largest international oil companies. With operations in over 100 countries, Total Fina Elf's activities cover the entire oil chain, from the upstream (exploration, development and oil and gas production) through to downstream (refining and distribution of oil products and international trading of crude oil and products).

GROUPE BRUXELLES LAMBERT, ANNUAL REPORT 2001, at 25 (2001), *available at* http://en.gbl.be/Images/9_2271.pdf (last visited Apr. 5, 2006). Elf Nigeria Limited is a joint venture between Nigerian National Petroleum Corporation and Total Fina Elf that "produces about 125,000 [barrels per day], from 12 onshore and offshore fields. ELF has its operational base in Port Harcourt." Nigerian Oil & Gas Online, Major Joint Venture Companies, http://www.nigerianoil-gas.com/upstream/joint_venture_companies.htm#ELF (last visited Mar. 1, 2006).

210. The Nigerian Agip Oil Company, "[t]he fourth largest oil producer in Nigeria[,] is owned by [Nigerian National Petroleum Corporation] (60%), Agip Oil (20%), and Phillips Petroleum (20%). Current production is about 145,000 [barrels per day], from 146 producing wells. The company operates an export terminal at Brass, and has its operational base in Port Harcourt." Nigerian Oil & Gas Online, *supra* note 209.

211. "Texaco, (now ChevronTexaco) has been involved in exploration and production of Nigerian crude oil resources since 1961. Over 473 million barrels of oil have been produced since operations commenced. Texaco has its operational base at Warri, and its headquarters in Lagos." *Id.*

212.

> This is a joint venture [(JV)] that is now the second largest operation in the country. The JV also has the only condensate operation in Nigeria, and is owned by [igerian National Petroleum Corporation] (60%), and Mobil Oil (40%).
>
> Most of Mobil's production is from shallow water offshore fields, with its operating unit based in the southeast location of Eket.

Id.

213.

> The Nigerian National Petroleum Corporation [NNPC] was formed in 1977 through the merger of some of the departments of the Ministry of Petroleum Resources, and the old Nigerian National Oil Corporation. The Corporation has sole responsibility for upstream and downstream developments, and is also charged with regulating and supervising the oil industry on behalf of the Nigerian Government. In 1988, the corporation was commercialised into 12 strategic business units.

Nigerian Oil & Gas Online, The Nigerian National Petroleum Corporation, http://www.nigerianoil-gas.com/upstream/npcc.htm (last visited Apr. 5, 2006). *Accord* Nigerian National Petroleum Corporation, About NNPC, http://www.nnpcgroup.com/aboutus.htm (last visited Apr. 5, 2006), NNPC is headquartered in Abuja. Nigerian National Petroleum Corporation, Contact NNPC, http://www.nnpcgroup.com/contactus.htm (last visited Apr. 5, 2006).

214. The industry is dominated by six major joint venture operations managed by a number of well known multinationals, Shell, Mobil, Chevron, Agip, Elf, and Texaco. The production concessions are managed through joint venture companies, in which the Nigerian Government, through the Nigerian National Petroleum Company (NNPC), holds about 60% shareholding. The foreign joint venture partners manage the operations, under a joint equity financing structure regulated by a Joint

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corporate entities have local, national, and international connections to place.

The Motion Exparte and the contempt of court proceedings were brought in the Federal High Court of Nigeria in the Benin Judicial Division,[215] and that court responded to them.[216] The decision-makers are part of the national government, but are based in the particular locality of Benin City.

2. Claims

Like the other two emissions cases, the Nigerian oil-company gas flaring case contained claims that connect to multiple regulatory levels. The facts focused on the local impacts of subnational gas flaring in particular communities. These impacts were framed, however, both in terms of localized pollution and in terms of the effect on these communities from the flaring's contribution to the supranational problem of climate change.[217] The legal claims relied upon both national and supranational law. Petitioners claimed a violation of Nigeria's Constitution, as reinforced by articles of the African Charter on Human and Peoples Rights, as well as of the Environmental Impact Assessment Act. They further argued that the federal statute authorizing the flaring, the Associated Gas Re-Injection Act, is unconstitutional.[218]

D. Project Finance: U.S. Agency Assistance for Overseas Projects

Greenpeace, Friends of the Earth, and four U.S. cities brought a lawsuit under the National Environmental Policy Act and Administrative Procedure Act challenging the failure of the Overseas Private Investment Corporation and the Export-Import Bank of the United States to produce an environmental impact assessment as part of the process of approving loans, insurance, and other assistance for overseas projects.[219] Plaintiffs claimed, in particular, that these projects produce annual greenhouse gas emissions equivalent to almost two-thirds of U.S. annual carbon dioxide

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Operating Agreement. Nigerian Oil & Gas Online, Upstream, http://www.nigerianoil-gas.com/upstream/index.htm (last visited Mar. 1, 2006).

215. Motion Exparte, *supra* note 65.

216. *See supra* notes 203–07 and accompanying text.

217. Motion Exparte, *supra* note 65, Verifying Affidavit at 4–6.

218. *See id.*, Statement at 4.

219. Complaint for Declaratory and Injunctive Relief (Second Amended), Friends of the Earth, Inc., v. Watson, No. 02-4106 (N.D. Cal. Sept. 3, 2002), *available at* http://www.climatelawsuit.org/documents/Complaint_2Amended_Declr_Inj_Relief.pdf.

https://openscholarship.wustl.edu/law_lawreview/vol83/iss6/3

emissions, and thus provide a substantial contribution to global warming.[220] In August 2005, the Northern District of California denied the defendants' summary judgment motion.[221] This case thus represents an ongoing effort to use the judiciary to force administrative compliance with federal-level legislatively created law with respect to funding corporate projects.

1. Actors

The petitioners in the U.S. project finance case include four local governmental entities—the cities of Boulder, Colorado; Arcata, California; Oakland, California; and Santa Monica, California—and two nongovernmental organizations, Friends of the Earth, Inc., and Greenpeace, Inc.[222] Both of the nongovernmental organizations operate at a local, national, and international level, and are involved with other climate change litigation.[223] The defendants are two individuals being sued in their official capacity as officers of the Overseas Private Investment Corporation (OPIC)[224] and the Export-Import Bank of the United States (ExIm).[225] OPIC and ExIm are both nationally based governmental entities engaged in transnational financial operations. The lawsuit is before the San Francisco Division of the U.S. District Court for the Northern District of California. The judge is thus an individual who functions as part of the national government, but has subnational ties to place.

2. Claims

The facts in the case against OPIC and ExIm also occur at multiple levels. OPIC and ExIm are engaging in national level assistance for

220. *Id.* at 2.

221. Friends of the Earth, Inc. v. Watson, No. 02-4106, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005).

222. *See* Complaint for Declaratory and Injunctive Relief (Second Amended), *supra* note 219.

223. *See supra* notes 173, 179, 207 and accompanying text.

224. "OPIC is authorized by 22 U.S.C. §§ 2291 to 2200b [sic], a part of the Foreign Assistance Act. OPIC was created '[t]o mobilize and facilitate the participation of the United States private capital and skills in the economic and social development of less developed countries and areas.' 22 U.S.C. § 2191." Complaint for Declaratory and Injunctive Relief (Second Amended), *supra* note 219, at 5. It is a U.S. government development agency based in Washington, D.C. Overseas Private Investment Corporation, http://www.opic.gov/ (last visited Apr. 1, 2006).

225. "ExIm is the official export credit agency of the United States. It offers working capital guarantees, export credit insurance, direct loans and loan guarantees to benefit U.S. exporters. It is governed by the Export-Import Bank Act of 1945, 12 U.S.C. § 635." Complaint for Declaratory and Injunctive Relief (Second Amended), *supra* note 219, at 6. Its headquarters are in Washington, D.C. ExIm Bank, Contact Us, http://www.exim.gov/contactus.html (last visited Mar. 1, 2006).

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projects occurring in localities in other nations. Both cities and specific individuals who are based in particular substate localities and are members of the nongovernmental organizations have claimed to be affected by the contributions of these projects to global climate change.[226] The substantive and procedural legal claims rely on national level laws, but have subnational and supranational components due to the nature of the facts. Substantively, petitioners argued that OPIC and ExIm violated the National Environmental Policy Act (NEPA) by failing to conduct environmental review of the overseas projects.[227] Procedurally, they claimed the court has jurisdiction and venue based on Federal Rules of Civil Procedure, but their venue analysis had subnational dimensions, such as the fact that at least one plaintiff resides in the court's district.[228]

E. Project Finance: German Agency Assistance for Overseas Projects

In 2003, Germanwatch and Friends of the Earth Germany (BUND) submitted a request for information under the Environmental Information Act regarding the support of energy production projects by export credit agency Euler Hermes AG, which provides economic and political risk insurance for exports to developing and transitional countries.[229] The Ministry of Economics and Labour refused their request, and in June 2004, Germanwatch and BUND brought an action against the Ministry in the Administrative Court in Berlin.[230] They claimed Hermes provides significant support for projects that produce substantial greenhouse gas contributions, and that the Act provides them with the right to this information so that they can insure it is taken into account in the decision-making process.[231] A first hearing took place in July 2005, and the court issued an order that constituted part of a settlement in January 2006; the order required the defendant to provide detailed information on the greenhouse gas implications of projects in the field of energy production.[232] This case thus represents a successful effort to use the judiciary to force an administrative ministry to comply with a federal-level

226. Complaint for Declaratory and Injunctive Relief (Second Amended), *supra* note 219.
227. *Id*. at 3.
228. *Id*. at 3–4.
229. Germanwatch & BUND, *supra* note 75.
230. *Id*.
231. *Id.*
232. For relevant documents, see Climate Justice, Climate Impacts of German Export Credits to Be Disclosed, http://www.climatelaw.org/media/Germany (last visited Mar. 1, 2006).

legislatively created law in an effort to influence funding of corporate projects.

1. Actors

The petitioners in the German case, Germanwatch[233] and BUND,[234] are German nongovernmental organizations. They each have a subnational presence and ties to nongovernmental organizations operating in other countries and internationally. The respondent is the German Ministry of Economics and Labour (BMWA), a national-level government entity that is the lead supervisor of the activities of German export credit agencies.[235] The petitioners focused on this respondent because they sought information from one of the export credit agencies regulated by the BMWA, Euler Hermes AG (Hermes), which is a corporate entity active at both national and supranational levels.[236] Petitioners brought the action in the Administrative Court in Berlin, and the judge is thus a representative of the federal government based in a particular subnational geographic location.[237]

2. Claims

The action against Hermes also reflects its national-level setting while incorporating subnational and supranational elements. The action focused on Hermes' provision of export guarantees for German companies'

233. Germanwatch is a nonprofit and nongovernmental North-South initiative with offices in Berlin and Bonn. It focuses on trade, environment, and North-South relations, and it networks with organizations in developed and developing countries. Germanwatch, http://www.germanwatch.org/ (last visited Mar. 1, 2006).

234. BUND, the German branch of Friends of the Earth, began as a federation of pre-existing regional groups. It has 390,000 members who are active in 2,200 regional and local groups. BUND, http://www.bund.net/ (last visited Mar. 1, 2006).

235. Germanwatch & BUND, *supra* note 75, at 1.

236. *Id.*

> Following the incorporation of Hermes in 2002, Euler Hermes has strengthened its international position and expanded its range of products. As the leading credit insurer in Germany, Hermes has built up key positions in Eastern and Northern Europe. It is also a leading player in the bonding and guarantees business.
>
> A member of the Allianz Group, and a subsidiary of AGF, Euler Hermes benefits of [sic] the financial solidity to provide long-term support for clients. Throughout 2003, the Group integrated the name Euler Hermes in all its Business Units. Euler Hermes, today the world's leading credit insurer, employs 5400 staff members worldwide and has a market share of 34%.

Euler Hermes, The Specialist in Receivables management, http://www.eulerhermes.com/group/en/who_we_are/index.html (last visited Mar. 1, 2006).

237. *See* Germanwatch & BUND, *supra* note 75, at 1.

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exports to developing and economically transitional countries, a transnational process. The nongovernmental organizations requested information regarding the insured projects' production of greenhouse gas emissions—which contribute to supranational global climate change but occur in particular localities—from national ministries that supervise the activities of Hermes in Germany. The lawsuit resulted from those ministries' denial of the request.[238]

The legal claims have both national and supranational dimensions. The action asked the court to force the federal government to give the requested information, based on the Environmental Information Act of the Federal Republic of Germany. The petitioners further relied upon the European Court of Justice's interpretation of EU Directive 90/313, which has been transposed into German law by the Environmental Information Act.[239] The Berlin Administrative Court's January 2006 order engaged both federal and EU law, and also referenced guidelines developed by the Organization for Economic Co-operation and Development.[240]

F. Geography of National Cases

As in the subnational context, the map of the national cases uncovers complex relationships among place and space. Each of the five national-level cases considered here presents a quite different formulation of parties, but they all have a scalar diversity among their actors that raises regulatory concerns. Petitioners range from state and city governments to nongovernmental organizations to individuals. Respondents include state and national governmental entities, as well as corporations and the organizations that represent them. These national level fora, with ties to particular subnational localities, are thus being asked to engage actors whose geography does not match their own.

All of the national-level cases studied, regardless of subject matter, follow a similar spatial pattern with respect to their claims. Their facts contain subnational, national, and supranational dimensions. The resulting legal claims rely heavily on national-level statutes and cases, and outside of the U.S. context, on applicable supranational regional law.

The national tribunals, like the subnational courts analyzed in the preceding part, are thus asked to play a bridging role in these cases. The

238. *Id.* at 1–2.
239. *See id.* at 2.
240. For links to the official opinion in German and the unofficial English translation, see Climate Justice, *supra* note 232.

courts face petitioners and respondents connected to subnational and supranational interests in addition to national ones; these parties notably include conflicting governmental entities. The facts range across geographies, and often subnational or supranational law becomes relevant to the legal analysis before these national-level courts.

VI. MAPPING SUPRANATIONAL CLIMATE CHANGE LITIGATION

The pending supranational petitions involving the externality of climate change and its impacts currently focus on international human rights and protection of world heritage.[241] These petitions are being brought by nongovernmental organizations and individuals with a state as the respondent, to the extent that there are respondents, but they also involve underlying corporate behavior. This Part maps the pending petitions and then analyzes the geography of the supranational actions.

A. *International Human Rights: Inuit Petition to the Inter-American Commission on Human Rights*

The Inuit petition described in the Introduction[242] was brought against the United States in the Inter-American Commission, which only accepts petitions against nation-state parties.[243] Because energy production and use provide such a significant portion of U.S. greenhouse gas emissions, the petition's claims about the inadequacy of U.S. policy necessarily include its approach to regulating energy.[244] The petition can thus be seen as an effort to force national policy, at both an executive and legislative level, with respect to climate change generally and to greenhouse gas emissions from the energy industry in particular.

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241. Future actions to address climate change may also include claims regarding marine pollution in the International Tribunal for the Law of the Sea and claims regarding illegal subsidies in the World Trade Organization. *See* ASIL 2006 Annual Meeting Proposal, Climate Justice: Unpacking Transnational and International Litigation (on file with author).

242. *See supra* notes 1–5 and accompanying text.

243. The phenomenon represented in the Inuit case of using human rights actions against state parties to induce governmental regulation of corporate actors is not confined to the climate change context. My interest in the state-corporate regulatory dynamic arose due to a prior project I completed on environmental rights. In the thirteen environmental rights actions in international and regional tribunals I considered in that study, which also analyzed cases in U.S. courts under the Alien Tort Claims Act, all of the cases were brought against governments, as "claims were not allowed against private parties. In ten of the thirteen cases studied, however, a private entity regulated by the government was the direct cause of the harm, and in another two of those cases [as in the Inuit case discussed in this Article], corporations appeared to play some role." Osofsky, *supra* note 8, at 121–22.

244. *See infra* notes 250–51 and accompanying text.

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1. Actors

The international human rights action by the Inuit involves multiple geographies: The chair of a supranational nongovernmental organization that represents individuals in subnational localities petitioned a supranational organization against a nation-state. In particular, the petitioner is Sheila Watt-Cloutier with the support of the Inuit Circumpolar Conference, a nongovernmental organization representing the approximately 150,000 Inuit of Alaska, Canada, Greenland, and Russia.[245] It was brought "on behalf of all Inuit of the Arctic regions of the United States and Canada,"[246] who are peoples that have multiscalar ties at the levels of their local communities, states, nations, the Artic region, and international organizations. The Inuit Circumpolar Conference's Office of the Chair is located in Iqaluit, Canada,[247] and it also has offices in each of the four countries in which the Inuit live.[248] The respondent is the United States,[249] which acknowledges that almost twenty percent of the world's human-made greenhouse gases originate from within its borders[250] and projects that its emissions will continue to rise.[251] The petition is before the Inter-American Commission on Human Rights, a regional human rights body that is an organ of the Organization of American States (OAS).[252] The Commission members are elected by the OAS General Assembly and do not represent a particular country.[253]

2. Claims

The claims in the petition involve facts that cross-cut geographies. The Inuit present evidence of harm occurring in specific subnational regions of

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245. Inuit Circumpolar Conference, http://www.inuitcircumpolar.com/index.php?ID=16&Lang=En (last visited Mar. 1, 2006). "The organization holds Consultative Status II at the United Nations." *Id*.

246. *See* Inuit Petition, *supra* note 1, at cover page.

247. Inuit Circumpolar Conference, Office of the Chair, http://www.inuitcircumpolar.com/index.php?ID=248&Lang=En (last visited Apr. 6, 2006).

248. Inuit Circumpolar Conference, *supra* note 245.

249. *See supra* notes 1–2 and accompanying text.

250. President George W. Bush, Speech Discussing Global Climate Change) (June 11, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html.

251. U.S. DEP'T OF STATE, UNITED STATES CLIMATE ACTION REPORT 2002, at 73 (2002), *available at* http://unfccc.int/resource/docs/natc/usnc3.pdf.

252. *See* Statute of the Inter-American Commission on Human Rights arts. 2–3, Oct. 31, 1979, O.A.S. G.A. Res. 447 (IX-0/79), *available at* http://www.iachr.org/Basicos/basic15.htm; Inter-American Commission on Human Rights, What Is the IACHR?, http://www.iachr.org/what.htm (last visited Apr. 7, 2006).

253. *See id.*

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four nation-states and argue that this harm results from supranational climate change, to which the United States is a substantial contributor through its failure to regulate adequately.[254] The petition claims that these harms violate rights articulated in the American Declaration of the Rights and Duties of Man.[255] The Commission interprets the rights in the Inter-American human rights documents, however, based on broader international law and developments.[256] The Commission thus will apply regional supranational human rights law, relying in part on other supranational law, to address facts that have subnational, national, and supranational elements.

B. World Heritage Preservation: Danger List Petitions to the World Heritage Committee

In November 2004, nongovernmental organizations and individuals filed petitions with the World Heritage Committee requesting that Belize's Barrier Reef (Belize Petition), Peru's Huarascán National Park (Peru Petition), and Nepal's Sagarmatha (Everest) National Park (Nepal Petition) be placed on the List of World Heritage in Danger, due to the impacts of climate change.[257] They also filed a September 2005 report

254. Inuit Petition, *supra* note 1.

255. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American system, OEA/Ser. L.V/I.4 Rev. 9 (2003). The United States is not party to the American Convention on Human Rights, *see* Signatures and Current Status of Ratifications, American Convention on Human Rights, *available at* http://www.iachr.org/Basicos/basic4.htm (last visited Apr. 7, 2006), but as a member of the OAS, it is represented by the Commission and has obligations under the American Declaration of the Rights and Duties of Man. *See* Statute of the Inter-American Commission on Human Rights, arts. 1–2, *supra* note 253 (indicating the rights covered by the Commission and that it represents all OAS members).

256. *See, e.g.*, Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04 OEA/Ser.L./v/II.122, doc. 5 rev. ¶ 86 (2004), *available at* http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm:

> According to the jurisprudence of the inter-American human rights system, the provisions of its governing instruments, including the American Declaration, should be interpreted and applied in context of developments in the field of international human rights law since those instruments were first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of human rights violations are properly lodged.

257. Petition to the World Heritage Committee Requesting Inclusion of Belize Barrier Reef Reserve System in the List of World Heritage in Danger as a Result of Climate Change and for Protective Measures & Actions (Nov. 15, 2004), *available at* http://www.climatelaw.org/media/UNESCO.petitions.release/belize.barrier.reef.doc [hereinafter Belize Petition]; Petition to the World Heritage Committee Requesting Inclusion of the Huascaran National Park in the List of World Heritage in Danger as a Result of Climate Change (Nov. 17, 2004), *available at* http://www.climatelaw.org/media/UNESCO.petitions.release/peru.huascaran.national.park.doc [hereinafter Peru

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with the World Heritage Committee on climate change's impact on the Great Barrier Reef in Australia (Australia Report) that details Australia's obligations under the World Heritage Convention.[258]

At its twenty-ninth session, in July 2005, the World Heritage Committee responded to these petitions and the report by acknowledging that "the impacts of climate change are affecting many and are likely to affect many more World Heritage properties, both natural and cultural in the years to come," encouraging "all States Parties to seriously consider the potential impacts of climate change within their management planning," and requesting that the World Heritage Centre organize collaboratively "a broad working group of experts" to prepare a report on these issues for the thirtieth session.[259] In February 2006, organizations and individuals filed a similar petition regarding Waterton-Glacier International Peace Park, which is located in both the United States and Canada.[260]

If the World Heritage Committee agrees to add sites threatened by climate change to the Danger List, the sites will be able to access financial assistance from the World Heritage Fund as well as help with conservation planning.[261] If intended to address the problems fully, however, such planning would not be able to follow the typical model because the States Parties concerned include many countries beyond the host country of the site;[262] the nation-state in which the harm is occurring often is not a substantial contributor to global climate change and thus has little ability

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Petition]; Petition to the World Heritage Committee Requesting Inclusion of Sagarmatha National Park in the List of World Heritage in Danger as a Result of Climate Change and for Protective Measures & Actions (Nov. 15, 2004), *available at* http://www.climatelaw.org/media/UNESCO.petitions.release/nepal.sagarmatha.national.park.doc; *see* U.N. Educ., Scientific & Cultural Org. World Heritage Comm., Decisions of the 29th Session of the World Heritage Committee (Durban 2005), Decision 29 COM 7B.a (Sept. 9, 2005), *available at* http://whc.unesco.org/ archive/2005/whc05-29com-22e.pdf [hereinafter Decision 29 COM 7B.a]; Richard Black, *UN Investigates Everest Threat*, BBC NEWS, July 14, 2005, *available at* http://news.bbc.co.uk/1/hi/ sci/tech/4682437.stm.

258. DONALD R. ROTHWELL, SYDNEY CTR. FOR INT'L AND GLOBAL LAW, GLOBAL CLIMATE CHANGE AND THE GREAT BARRIER REEF: AUSTRALIA'S OBLIGATIONS UNDER THE WORLD HERITAGE CONVENTION (Sept. 21, 2004), *available at* http://www.law.usyd.edu.au/scigl/SCIGLFinalReport21_09_04.pdf; *see* E-mail from Peter Roderick, Co-Director, Climate Justice Programme, to author (Aug. 5. 2005) (on file with author).

259. Decision 29 COM 7B.a, *supra* note 257.

260. Petition to the World Heritage Committee Requesting Inclusion of Waterton-Glacier International Peace Park on the List of World Heritage in Danger as a Result of Climate Change and for Protective Measures and Actions (Feb. 16, 2006), *available at* http://law.lclark.edu/org/ielp/objects/Waterton-GlacierPetition2.15.06.pdf.

261. *See* World Heritage Centre, *supra* note 70.

262. *Id*.

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to address the situation beyond implementing localized mitigating measures.

Like the planned legal action by the Inuit, the petitions to the World Heritage Committee are not aimed at the regulation of specific corporate actors. These petitions, by their nature, are not structured to include a respondent, though they generally specify who should be involved in addressing the danger. For example, the petition on the Belize Barrier Reef includes a request that the Committee assist "the Government of Belize and Non-Governmental Organizations in developing a program of immediate corrective measures for the Site."[263] These cases can be viewed, however, as an effort to put pressure on State Parties to reduce their greenhouse gas emissions, which States likely would achieve in part through the process of regulating emissions from the production and use of energy.

1. Actors

The actors in the petitions and report filed in 2004 with the World Heritage Commission have parallel geographies, each of which represents a slightly different variation of relevant actors.[264] The Belize Petition was submitted by the Belize Institute of Environmental Law and Policy (BELPO), a nongovernmental organization incorporated in Belize, based on an idea presented at the Environmental Law Alliance Worldwide (E-Law) 2002 annual meeting. The University of Florida/University of Costa Rica Joint Program in Environmental Law and its Conservation Clinic assisted in the construction of the petition, which also was aided by foundation support to the Joint Program and to E-Law.[265] E-Law and the Climate Justice Programme, based in the United States and United Kingdom, respectively, advocated in support of the petition.[266]

The Peru Petition was submitted by two Peruvian nongovernmental organizations and individuals affiliated with them. Foro Ecologio del Peru is a national network of nongovernmental organizations and citizens promoting sustainable development, and Carlos Antonio Martin Soria

263. Belize Petition, *supra* note 257.

264. The 2006 Waterton-Glacier International Peace Park petition also demonstrates a multiscalar geography, but is not reviewed in depth here.

265. Belize Petition, *supra* note 257.

266. *See* Climate Justice, UNESCO Danger-Listing Petitions Presented (Nov. 17, 2004), http://www.climatelaw.org/media/UNESCO.petitions.release; E-Law, Urge UNESCO to Review Climate Change Petitions, http://www.elaw.org/campaigns/info.asp?id=2929 (last visited Mar. 1, 2006).

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Dall'Orso is a Peruvian environmental lawyer who serves at its legal advisor.[267] Foro Ciudades Para La Vida is a national network of nongovernmental organizations aiming to implement the principles and objectives of Habitat II and the Rio Conference, and Architect Liliana Miranda serves as its executive secretary.[268] E-Law and the Climate Justice Programme also advocated for action on this petition.[269]

The Nepal Petition was submitted by an even larger group of nongovernmental organizations and individuals: The Forum for Protection of Public Interest (Pro Public), a Nepalese nonprofit affiliated with Friends of the Earth, as well as the Forum's executive director; two Nepalese citizens who are accomplished mountaineers; International Public Interest Defenders, a nongovernmental organization based in Geneva; and a range of U.S. and European individuals served as the petitioners.[270] As with the other two petitions discussed, E-Law and the Climate Justice Programme were both involved as proponents.[271] The three petitions thus all resulted from the work of nationally based nongovernmental organizations, with the assistance of individuals, organizations, universities, and foundations based in the host countries and in the United States and Europe.

The Australia Report was prepared by the Sydney Centre for International and Global Law, which is part of the Faculty of Law at the University of Sydney. The report had been requested by the Environmental Defender's Office New South Wales (Ltd),[272] CANA,[273] and Greenpeace Australia Pacific.[274] It thus represents an initiative by

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267. Peru Petition, *supra* note 257.

268. *Id.*

269. *See* sources cited *supra* note 266.

270. *See* Nepal Petition, *supra* note 257.

271. *See* sources cited *supra* note 266.

272. "The Australian Network of Environmental Defenders Offices Inc (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia." Environmental Defender's Offices, National EDO Network, http://www.edo.org.au/ (last visited Mar. 1, 2006). "The Environmental Defender's Office [(NSW)] Ltd is a not-for-profit community legal centre specialising in public interest environmental law. We help the individuals and community groups who are working to protect the natural and built environment." Environmental Defender's Office, EDO New South Wales, http://www.edo.org.au/edonsw (last visited Mar. 1, 2006).

273. For a description of CANA, see *supra* note 135.

274.

> Greenpeace International began in Canada in 1971 and today has a presence in more than 40 countries across Europe, the Americas, Asia and the Pacific.
>
> Greenpeace Australia was founded in 1977 and joined forces with Greenpeace Pacific in 1998. Together we have more than 113,000 supporters who are the backbone of Greenpeace Australia Pacific.

Greenpeace Australia Pacific, About Greenpeace, http://www.greenpeace.org.au/aboutus (last visited

nongovernmental organizations operating at a subnational, national, and supranational level, assisted by a subunit of a subnationally based university that focuses on supranational issues.

Because of the structure of the petition process, there are no official respondents in any of the cases. Each petition, however, asks the Committee to involve the host country of the site, as well as to assist with both localized and international efforts to address climate change and its impacts.[275] Similarly, although the Australia Report includes a disclaimer that "[i]t does not purport to provide any advice of a legal character concerning questions of Australian law" and "should not be relied upon for the purpose of any legal process or proceedings,"[276] it analyzes steps that the Australian government needs to take with respect to climate change to comply with its obligations under the World Heritage Convention.[277] The petitions and report are thus requesting action with respect to entities at subnational, national, and supranational levels.

The Committee is an intergovernmental body created by the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).[278] The Convention dictates that States Parties, with an equitable representation of regions and cultures, serve as the members of the Committee.[279] The Committee has requested the establishment of a working group of experts—created collaboratively by the World Heritage Center, Advisory Bodies, interested States Parties, and petitioners—to address the risks posed by global climate change to World Heritage sites and to propose a management strategy.[280] The decision-makers are thus nation-states acting within a supranational structure and being advised by expert individuals from around the world.

Apr. 7, 2006) (emphasis omitted). The Australia Office of Greenpeace is based in Sydney, and the Pacific Office is based in the Fiji Islands. Greenpeace Australia Pacific, Contact Us, http://www.greenpeace.org.au/aboutus/contact_us.html (last visited Apr. 7, 2006). Other branches of Greenpeace have also been involved in climate change litigation. *See supra* note 179 and accompanying text.

275. Belize Petition, *supra* note 257; Nepal Petition, *supra* note 257; Peru Petition, *supra* note 257.

276. Australia Report, *supra* note 258, at 39.

277. *Id.* at 14–38.

278. Articles 8–14 describe the Committee in detail. *Convention Concerning the Protection of the World Cultural and Natural Heritage* arts. 8–14, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151, *available at* http://whc.unesco.org/archive/convention-en.pdf [hereinafter World Heritage Convention].

279. *Id.* art. 8.

280. Decision 29 COM 7B.a, *supra* note 257.

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2. *Claims*

The factual and legal claims in the petitions and report to the World Heritage Committee are geographically similar both to one another and to the ones in the Inuit case. The facts in each submission detail harm to a subnational resource, regulated by a State Party, which has been designated by a supranational body as belonging "to all the peoples of the world, irrespective of the territory on which they are located."[281] Each petition claims that supranational climate change is endangering the sites sufficiently to include them on a supranational danger list and to require steps to address the problem.[282] The applicable law is the supranational World Heritage Convention.[283] The claims thus involve the application of an international regulatory regime to multilevel facts.

C. Geography of Supranational Cases

Although the map of supranational cases reflects a similar spatial diversity to the subnational and national ones, the specific issues faced by the tribunals as a result are reversed. Namely, the supranational tribunals have a transnational perspective on the cross-cutting actors, facts, and claims, but must engage the subnational and national dimensions of them through governmental and nongovernmental entities at those levels.

The space created by the tribunals, and in particular the limited standing they provide for non-state actors, further shapes the geographic picture. Even tribunals such as the ones considering the above petitions, which allow for petitions from non-state actors, only allow the actions to be brought against the nation-states which are parties to the treaties that constitute them.[284] Moreover, beyond the general issues of the enforceability of international judgments that lack the state's police powers behind them, many of the relevant tribunals have not been granted the power to provide binding judgments.[285]

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281. World Heritage Centre, About World Heritage, http://whc.unesco.org/en/about/ (last visited Mar. 1, 2006). *See* World Heritage Center, World Heritage List, http://whc.unesco.org/en/list (last visited Apr. 7, 2006).

282. *See* Belize Petition, *supra* note 257; Nepal Petition, *supra* note 257; Peru Petition, *supra* note 257. *See also* Australia Report, *supra* note 258, at 1–6.

283. *See* World Heritage Convention, *supra* note 278, arts. 8–14.

284. *See* Osofsky, *supra* note 8, at 100 n.122 (citing provisions of several human rights conventions that provide this limitation).

285. For example, the Inter-American Commission on Human Rights has limited direct enforcement powers. *See* Organization of American States, American Convention on Human Rights arts. 41–51, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, *available at* http://www.iachr.org/

The geography of supranational climate change actions thus varies significantly from that of subnational and national ones. Although supranational actions aim at the same type of problems as the subnational and national cases, they generally involve individuals and nongovernmental organizations making claims against nation-states for a failure to regulate. This spatial structure—and the tribunals' reliance on national-level and sometimes subnational-level regulatory power—shapes the possibilities for influence of actions on this level.

VII. TOWARDS A REGULATORY MODEL

The above maps provide insight into the existing regulatory terrain. Except in the case in which corporate entities and representatives attempt to limit regulation,[286] the climate change litigation studied represents an effort to fill perceived regulatory gaps. The lawsuits provide a mechanism for many of the interested parties to engage regulatory questions more directly than legislative or executive decision-making processes generally allow. They also provide a space in which actors operating at different levels and from different branches can dialogue together.[287]

The flexibility and variety of judicial fora, however, also constrains the role of this litigation. The geography detailed in Parts IV through VI places decision-makers in the position of needing to make appropriate judgments in the same three-dimensional morass that confronts other actors.[288] The complexity of these actions, combined with their novelty, creates a potential for confusion that adds to uncertainty over whether this type of litigation can serve as an effective regulatory tool.

More fundamentally, this geography raises questions about whether regulatory gap-filling is the most useful way of viewing these efforts, and if so, how else these regulatory gaps might possibly be filled. The transnational treaty regime on climate change does not include the most significant greenhouse gas contributor—the United States—as a party to its more specific limitations.[289] And even the agreement that provides those limitations, the Kyoto Protocol, has been criticized as insufficient.[290] Moreover, lawyers and policy-makers are still grappling with how to

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Basicos/basic3.htm (describing the functions of the Commission).

286. *In re* Quantification of Envtl. Costs, 578 N.W.2d 794 (Minn. Ct. App. 1998).

287. *See supra* Parts IV–VI.

288. *See id.*

289. *See* Bush, *supra* note 250.

290. *See, e.g.*, Martin Parry et al., *Buenos Aires and Kyoto Targets Do Little to Reduce Climate Change Impacts*, 8 GLOBAL ENVTL. CHANGE 285 (1998) (criticizing the targets as insufficient).

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translate a belief that climate change needs to be addressed into effective regulatory approaches. The most ambitious implementation measures at national and subnational levels often fail to meet their emissions reduction goals despite well-organized and focused efforts.[291]

An engagement of these questions allows a necessary conceptual shift from describing the existing terrain to engaging its normative implications. This Part begins an exploration of these issues as a jumping off point for a companion article that sketches a proposed law and geography approach to transnational regulation of cross-cutting environmental problems like climate change. In particular, the geographic terrain represented by climate change litigation invites a normative inquiry into identity questions. At the most basic level, this terrain reframes how the litigation might be viewed, or in geographic terms, raises issues about the space the litigation should be viewed as occupying. An exploration of that space paves the way for a dialogue about other spaces underlying it, such as those occupied by core actors. Such an analysis also provides the basis for engaging the cultural discourse underlying those spaces.

A. *Transnational Litigative Spaces*

The literature at the intersection of international law and international relations regarding the process of making and enforcing transnational law provides multiple conceptions of the space that litigation occupies within it. For example, a scholar relying on a transnational judicial process approach would likely view climate change litigation as part of the vertical process through which "interaction, interpretation, and internalization" promote obedience to law.[292] A transgovernmentalist might focus in on this litigation as an instance of nascent judicial globalization; although these tribunals do not directly interact, they collectively become part of the transgovernmental networks that undergird disaggregated sovereign discourse.[293]

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291. For example, despite Portland's ambitious emissions reduction plan and per capita successes, its population growth has led to overall increases in emissions. *See* CITY OF PORTLAND & MULTNOMAH COUNTY, LOCAL ACTION PLAN ON GLOBAL WARMING (2001), *available at* http://www.sustainableportland.org/Portland%20Global%20Warming%20Plan.pdf; CITY OF PORTLAND, PORTLAND CLIMATE CHANGE EFFORTS (2003), *available at* http://www.sustainable portland.org/stp_Ptld_climate_sum_2003.pd; City of Portland Office of Sustainable Development, Sustainable Technologies and Practices, http://www.sustainableportland.org/stp_glo_home.html (last visited Apr. 7, 2006).

292. Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 339 (2004).

293. *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (describing this

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A law and geography approach to understanding the value and potential role of climate change litigation uses the ties to place and underlying spatial constructs—and their evolution over time—as a starting point for the normative inquiry.[294] Choosing a framing—whether transnational judicial process, transgovernmentalism, or an alternative theoretical approach—defines the conceptual space this litigation occupies and, as a result, suggests how it should be valued. This process must originate from an understanding of ties to place and how that space engages them.

The normative inquiry about climate change litigation as part of the process of transnational regulation would be thickened by exploring how a spatial model represented by a theoretical approach might map onto the geographic terrain represented and vice versa. Such an approach would engage the overlaps and disconnects among different approaches to litigative spaces, as well as questions of how this litigation should be viewed in the broader scheme of transnational regulatory governance. The insights from geography thus provide a framework for comparing existing theoretical approaches as defining narratives for climate change litigation.

B. Key Actors and Litigative Spaces

A disaggregation of the first inquiry leads the way to a second cluster of issues revolving around the actors that participate in climate change litigation. The actors' geography reflects that they all have layered, evolving identities, and that this litigation provides a forum for a multifaceted interchange. Moreover, the petitioners, respondents, and adjudicators each occupy different—and often multiple—spaces on the interrelated axes of power described in Part III.B.

The interchanges among key actors about multiscalar issues help to define how climate change litigation should be viewed. To the extent that there is a dynamic cycle among the actors and the process of litigation, an inquiry into the space this litigation should occupy helps to define our construction of the actors, which in terms helps to redefine the space. This nuanced dance, for example, forms a core part of the story that both transnational legal process and transgovernmentalism tell.[295]

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process in contexts of direct interaction); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 497–99 (2005).

294. *See supra* note 41 and accompanying text.

295. *See* sources cited *supra* notes 27, 292–93.

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Because those actors have ties to specific places that form a key part of who they are, a geographic understanding of transnational litigation provides a more specific account of its role. The actors connect through webs of space, place, and time, with climate change litigation serving as one mode of interaction among them. A focus on a geopolitical conception of the actors thus allows a more complete conception of the space that the litigation occupies.

C. Identity and Culture

With this inquiry into the spaces that litigation and its key actors should be viewed as occupying, questions of culture and identity emerge. The Inuit on whose behalf the Inter-American petition was filed, for example, are simultaneously members of indigenous peoples connected to specific localities with long-standing cultural traditions, citizens under multiple levels and forms of government, and members of a broader supranational organization representing interconnected indigenous peoples.[296] Each of these identities is place-specific, but also locates the Inuit petitioners in multiple cultural dialogues. A definition of the spaces those petitioners and that petition occupy would be incomplete if not informed by that cultural content, which includes exploring cultural dissent embodied in the framing of and interaction through the petition process.[297]

Geography provides a theoretical terrain which helps to integrate the first two inquiries with this third piece. Cultural geographers, for example, engage the implications of the dynamics between local and global for "the relationships between identity, meaning and place."[298] A law and geography lens thus allows for dynamics among place, space, time, culture, identity, and law to interweave with the geopolitical analysis of the litigation and its actors.

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296. For an analysis of the relationship, for example, between citizenship and identity, see Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); Leti Volpp, *"Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71 (2001).

297. For an exploration of a cultural-dissent approach to cultural conflict and its relationship to law, see Madhavi Sunder, *Cultural Dissent*, 54 STAN L. REV. 495 (2001); *see also* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003) (analyzing the interaction of law and culture in the context of women's human rights activists who work in Muslim communities and countries).

298. Linda McDowell, *The Transformation of Cultural Geography*, *in* HUMAN GEOGRAPHY: SOCIETY, SPACE, AND SOCIAL SCIENCES 146, 166 (Derek Gregory, Ron Martin, and Graham Smith eds. 1994).

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VIII. CONCLUDING REFLECTIONS

The complicated problems of regulating the transnational energy industry represent a significant departure from the primacy of state power at the time of the Treaty of Westphalia. Mapping climate change litigation provides a window into the power dynamics that influence the current regulatory process. Examining the whirling dervish of interested entities highlights the complexity of addressing these externalities, but it also provides a path for making progress.

Despite the three-dimensional morass the spatial analysis unveils, much of the fundamental framework of state sovereignty and equality remains and can help shape a modern approach to effective transnational environmental regulation. In their legislative, executive, and judicial capacities, governmental actors are playing a critical role in shaping a transnational regulatory process and dancing between domestic and international law.[299] An understanding of the multidimensional, intertwined relationships allows for more targeted, effective approaches to such litigation and broader questions of corporate responsibility.

Achieving effective regulation rests on the ability to create strategies that incorporate the multiple dimensions involved. Such strategies must rely upon governmental power, but a thick version of this power that views the nation-state in context. As Part VII suggests, this Article's descriptive analysis provides a context for a normative law and geography exploration of climate change litigation, its core actors, and issues of identity and culture. The interweaving of international law, international relations, and geography allows an engagement of this type of litigation as part of a broader dialogue about transnational regulatory approaches. The companion article that follows this one will build upon this piece's analysis to explore these issues.

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299. Scholarly debate continues over how much of the framework remains. *See, e.g.*, sources cited *supra* note 82. The key role of nation-states in this litigation suggests that a workable model of transnational regulation must engage a thick version of nation-state regulatory authority, a version I plan to explore in more depth in the companion piece.

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