Limits on International Environmental Violations: How Antitrust Law May Be a Blueprint for Future Claims of Foreign Environmental Violations

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INTRODUCTION

Countries from across the world have come together to recognize the disparate effects of climate change and the need to address such matters quickly.[1] The United States has been praised for its implementation of the Clean Air Act.[2] However, despite the continued success of the Clean Air Act in lowering emissions nationally,[3] this Note suggests the global response to climate change is currently ineffective, and that an effective global response requires that countries do more than voluntarily agree to improve their country's emissions. This Note further suggests that without an extraterritorial statute to pursue environmental violations globally, there will be no accountability for countries who have agreed to implement measures to reduce their carbon footprint. Without a global jurisdictional reach, emissions will continue to devastate our world and have irreversibly damaging effects.

The Paris Agreement, an international treaty on climate change mitigation,[4] has been instrumental in beginning the conversation of addressing climate change globally, but it has proven to be insufficient.[5] This Note discusses the need for teeth behind the Paris Agreement, and suggests that the Sherman Act, which addresses anticompetitive conduct,[6] may provide a blueprint for an extraterritorial statute that can reach offshore emissions. While this Note does not provide the precise mechanics for such a statute, it seeks to begin a conversation about

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1. *See generally* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

2. Daniel S. Greenbaum, *The Clean Air Act: Substantial Success and the Challenges Ahead*, 15 ANNALS OF THE AM. THORACIC SOC'Y 296, 296 (2018). *See also* Environmental Protection Agency, *Summary of the Clean Air Act*, EPA, https://www.epa.gov/laws-regulations/summary-clean-air-act, [https://perma.cc/6LJX-52P6] (last visited Feb. 26, 2021) (defining the Clean Air Act as a "comprehensive federal law that regulates air emissions from stationary and mobile sources").

3. Greenbaum, *supra* note 2.

4. Paris Agreement, *supra* note 1, at art. 2.

5. Yann R. Du Pont & Malte Meinshausen, *Warming Assessment of the Bottom-Up Paris Agreement Emissions Pledges*, 9 NATURE COMMUNICATIONS 1, 2 (2018).

6. *See generally* 15 U.S.C. §§ 1-2.

crafting an extraterritorial statute to combat climate change. As temperatures and sea levels continue to rise, this conversation is not only timely but urgent.

As the world continues to grapple with how to address climate change, this Note highlights the critical role lawyers play in an effective response. The American Bar Association ("ABA") *Model Rules* suggests that an extraterritorial statute is not only prudent from a global policy perspective, but is actually *necessary* from a legal perspective for lawyers who pursue international environmental claims.[7] Without such a statute, lawyers could find themselves at risk of sanctions or even disbarment.[8] As the United States moves toward legal solutions that address climate change, the legal profession must be equipped with the proper tools. The lack of an extraterritorial statute means that the legal field is limited in its ability to file complaints that fall outside the boundaries of the United States.[9] The world's response to climate change will remain confined to the voluntary actions of each country if lawyers are unable to pursue international environmental violations.

Part I explains the need for an extraterritorial statute by discussing the Paris Agreement and its limitations, how American courts have interpreted extraterritoriality, and how the Sherman Act can be viewed as a blueprint for creating an extraterritorial emissions statute. Part II explains why an extraterritorial statute is necessary for lawyers to further the goals of the *Model Rules* and comply with the ethical standards of the legal profession. Part III answers some of the questions raised by the creation of such a statute, and Part IV concludes with potential limitations.

I. THE NEED FOR AN EXTRATERRITORIAL STATUTE

A. THE PARIS AGREEMENT

In 2015, the United National Framework Convention on Climate Change (UNFCCC) enacted the Paris Agreement to combat climate change on a global level.[10] The Paris Agreement was formed in response to the Intergovernmental Panel on Climate Change's (IPCC) Synthesis Report that warned of the potential increase in global warming and long-lasting change to the climate system if greenhouse gases continued to be emitted.[11] The Synthesis Report relayed that "emissions of greenhouse gases are the highest in history" and that "human

7. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2018) [hereinafter MODEL RULES] (requiring an attorney to "not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous"). This author argues that due to the strong presumption against extraterritoriality, a lawyer would be unable to assert a basis in law for filing an international emissions claim.

8. MODEL RULES OF DISCIPLINARY ENFORCEMENT R. 10 (2020). If a lawyer is unable to assert a basis in law, *i.e.*, no basis in law for extraterritorial jurisdiction of foreign emissions, a lawyer may be subject to disciplinary enforcement for filing a frivolous claim.

9. E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

10. *See generally* Paris Agreement, *supra* note 1.

11. Intergovernmental Panel on Climate Change, Climate Change 2014 Synthesis Report Summary for Policymakers 1, 8 (2014), https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf [https://perma.cc/X7XS-4PQT] [hereinafter Synthesis Report].

influence on climate system is clear."[12] The Synthesis Report also signaled to the UNFCCC that international cooperation was necessary to address the fact that continued emissions would cause "severe, pervasive, and irreversible impacts for people and ecosystems."[13]

In an effort to respond globally to climate change, the Paris Agreement provided both overarching global goals as well as targets for individual countries.[14] One of the main goals of the Paris Agreement was to "hol[d] the increase in the global average temperature to well below 2˚C (roughly 36˚F) above pre-industrial levels and [to] pursu[e] efforts to limit the temperature increase to 1.5˚C (roughly 35˚F) above pre-industrial levels."[15] To achieve this goal, parties to the Agreement were expected to reach their global peak of greenhouse emissions as soon as possible and thereafter rapidly reduce such emissions.[16] Additionally, each country was to submit a report that outlined its "nationally determined contributions" ("NDCs"), which state the country's "highest possible ambition" for its own response to climate change.[17] NDCs were tailored to allow each country to create emissions targets that fit within their financial and technological abilities.[18]

While the Paris Agreement has been deemed the "most ambitious global climate agreement yet,"[19] it has fallen short in many ways in addressing the IPCC's concerns regarding emissions. Perhaps the largest issue with respect to the Paris Agreement is its non-binding, voluntary nature.[20] While the voluntariness of the Agreement has been key in global coordination of climate change issues,[21] it is not without shortcomings: if parties fail to reach their NDCs, there are currently no formal sanctions.[22] The Paris Agreement has been limited to the "name and shame" process, which means that if individual countries fail to meet their NDCs the consequences are limited to "diplomatic and public opinion penalties."[23] Changes will likely occur much more gradually if penalties are limited to the "name and shame" process, because compliance with NDCs are still largely left up to the voluntary actions of each country.[24] Despite the IPCC's warning that

12. *Id*. at 2.
13. *Id*. at 8.
14. Paris Agreement, *supra* note 1, at art. 2, 4.
15. *Id*. at art. 2.
16. *Id*. at art. 4.
17. *Id*. at art. 2, 4.
18. *Id.*
19. Jan E. Hall, *Paris Agreement on Climate Change: A Diplomatic Triumph – How Can it Succeed?*, 10 NEW GLOBAL STUD. 175, 176 (2016).
20. *Id*. at 175.
21. *Id*. at 176.
22. JANE A. LEGGETT, CONG. RES. SERV., IF10668, POTENTIAL IMPLICATIONS OF U.S. WITHDRAWAL FROM THE PARIS AGREEMENT ON CLIMATE CHANGE 1 (2019), https://crsreports.congress.gov/product/pdf/IF/IF10668/5 [https://perma.cc/T5E9-K7PE].
23. *Id*.
24. Hall, *supra* note 18, at 179.

there will be severe and irreversible impacts if emissions continue,[25] the Paris Agreement has limited its ability to address emissions in a meaningful way given the fact that it rests on voluntary contributions.

Therefore, an extraterritoriality statute is necessary to ensure that the Paris Agreement's goal of lowering emissions comes to fruition. Despite the fact that almost all 195 participating nations initially submitted NDCs, these NDCs if fully implemented would only limit global warming to 2.7˚C (roughly 37˚F) above preindustrial levels.[26] The Paris Agreement was signed with the assumption that countries would renew or "ratchet-up" their NDCs every five years.[27] With the initial agreement signed in 2015,[28] 2020 should have been the year marking the renewal and improvement of each party's NDC. However, to date only forty-four countries have submitted new NDC targets, and 113 countries have yet to update their targets.[29] Ten countries have stated they will not be updating their NDC with a more ambitious target.[30] These numbers are cause for concern as the Paris Agreement can only achieve its goals with both continued participation and increased commitments.

While countries across the globe have failed to renew and update their NDCs, the IPCC submitted an updated report after the adoption of the Paris Agreement urging policymakers to further decrease global temperatures.[31] The Paris Agreement initially sought to contain the increase of global temperature to below 2˚C (roughly 36˚F) above pre-industrial temperatures with an effort to pursue even a further limit of 1.5˚C (roughly 35˚F).[32] The recent IPCC report summarized that there would be lower impacts on biodiversity and ecosystems at 1.5˚C in comparison to 2.0˚C,[33] which signals the initial goal of 2˚C within the Paris Agreement is not enough. The climate-related risks will increase further at 2.0˚C when compared to 1.5˚C.[34] However, the current NDCs would not limit the global warming to 1.5˚C, even if changes were made after 2030.[35] The IPCC report clearly articulated the need for lower emissions well before 2030, which the Paris Agreement has failed to live up to.

Not only has the Paris Agreement been limited to voluntary actions by each country, but there are also no formal sanctions for countries that exit the Paris

25. Synthesis Report, *supra* note 10, at 8.

26. Hall, *supra* note 18, at 179.

27. *Id.*

28. *See generally* Paris Agreement, *supra* note 1.

29. Climate Action Tracker, *CAT Climate Target Update Tracker* (Oct. 27, 2020), https://climateactiontracker.org/climate-target-update-tracker/ [https://perma.cc/X7QQ-QQX5].

30. *Id.*

31. Intergovernmental Panel on Climate Change, *Summary for Policymakers* 1, 15 (2018), https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_HR.pdf [https://perma.cc/39KT-LRHQ] [hereinafter Summary for Policymakers].

32. Paris Agreement, *supra* note 1, at art. 2.

33. Summary for Policymakers, *supra* note 30, at 8.

34. *Id.* at 9.

35. *Id.* at 18.

Agreement.[36] For example, when former President Trump announced the United States' exit from the Paris Agreement, the consequences for that decision were limited to public condemnation, demonstrating that there is nothing to stop other countries from exiting the agreement.[37] Formal sanctions as to both compliance with NDCs and the continued financial support of each party must be incorporated into the Paris Agreement if it is to remain in full force. However, the history of American courts' responses to international matters demonstrates that to be successful, formal sanctions can only be accomplished through an extraterritorial statute.[38]

B. AMERICAN COURTS' APPLICATION OF EXTRATERRITORIALITY

American courts have long grappled with how to balance the need to address foreign activity that impacts the United States while still maintaining diplomatic foreign relations. In *S.S. Lotus*, the Permanent Court of International Justice (the "World Court") addressed whether a country could exercise jurisdiction over a foreign citizen.[39] The World Court held that there was no international law that prohibited another country from exercising jurisdiction over a foreign citizen when the effects of the citizen's actions occur in the country that seeks to exercise such jurisdiction.[40] While this case demonstrated that American courts can exercise jurisdiction over foreign activity if the effects are felt locally, it left important jurisdictional questions open.

To maintain positive foreign relations, American courts have placed limits on the jurisdictional reach of the United States through statutory interpretation.[41] The commonly invoked principle of international comity emphasizes the need to maintain friendly relations with other countries by not undermining public interest in national sovereignty.[42] While international comity has proven difficult to define, the main premise is that when U.S. courts establish substantive law and jurisdictional rules, it will refrain from questioning the acts of another sovereign and restrict itself from issuing judgments or orders that would amount to an "unjustifiable interference."[43] In *EEOC v. Arabian American Oil Co.*, the U.S. Supreme Court affirmed the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[44] The U.S. Supreme Court has

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36. Congressional Research Service, *supra* note 21.

37. *Id.* at 2.

38. Arabian Am. Oil Co., 499 U.S. at 248 (discussing American courts' "presumption against extraterritoriality").

39. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 13 (Sept. 7).

40. *Id.* at 25.

41. Thomas Schultz & Niccolo Ridi, *Comity and International Courts and Tribunals*, 50 CORNELL INT'L L. J. 577, 584 (2017).

42. William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2085 (2015).

43. Schultz & Ridi, *supra* note 41, at 578-79.

44. Arabian Am. Oil Co., 499 U.S. at 248 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85 (1949); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957)).

concluded that unless there is an express intention of Congress regarding the extraterritorial nature of a statute, the Court will presume that such restraints apply only domestically.[45]

C. USING THE SHERMAN ACT AS A BLUEPRINT FOR EXTRATERRITORIALITY

1. ASSERTING JURISDICTION WHERE THERE IS A SUBSTANTIAL EFFECT

For the Paris Agreement to meet its goal of maintaining the global temperature below 2˚C (roughly 36˚F), it is necessary to go beyond voluntary treaties and create and adopt a new statute with extraterritorial jurisdiction. While American courts operate under a presumption against extraterritoriality,[46] that presumption is not absolute. The Sherman Act offers an example of Congress expressly including extraterritorial jurisdiction in a statute to ensure reach of foreign activity.[47] A comparison between the Sherman Act—which required extraterritorial jurisdiction to effectively address anticompetitive behavior—and the Paris Agreement demonstrates why an extraterritorial statute is necessary to effectively combat climate change.

The Sherman Act was enacted in 1890 to deter unreasonable anticompetitive conduct in an effort to protect American businesses.[48] While the Sherman Act addressed domestic matters, a large focus was on foreign cartels that operated abroad.[49] The need to target foreign antitrust violations was based on the understanding that antitrust violations that occur in foreign commerce create a ripple effect,[50] ultimately impacting domestic commerce, inflating prices paid by American consumers, and affecting competition.[51] Together, these effects caused significant damage to the national market, despite the conduct occurring outside of the United States.[52] The jurisdiction of the Sherman Act was amended by the Foreign Trade Antitrust Improvements Act ("FTAIA") in 1982, which limited the courts' reach to conduct that "has a direct, substantial, and reasonably foreseeable effect" on the United States.[53] Thus, the FTAIA precluded jurisdiction over foreign activity that was viewed as too attenuated to have a disparate impact on U.S. commerce.[54]

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45. *Id.*
46. Arabian Am. Oil Co., 499 U.S. at 248.
47. Megan L. Masingill, *Extraterritoriality of Antitrust Law: Applying the Supreme Court's Analysis in RJR Nabisco to Foreign Component Cartels*, 68 AM. U.L. REV. 621, 654 (2018).
48. *Id.* at 625-26.
49. Leon B. Greenfield, Steven F. Cherry, Perry A. Lange, & Jacquelyn L. Stanley, *Foreign Component Cartels and the U.S. Antitrust Laws: A First Principle Approach*, 29 ANTITRUST 18, 19 (2015).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. Greenfield, Cherry, Lange, & Stanley, *supra* note 48 at 20.

Despite American courts' strong presumption against extraterritoriality, the fact that greenhouse gas emissions cannot be contained within a single country not only justifies but necessitates an exception to the rule.[55] Akin to foreign cartels affecting the U.S. market, the inability to contain greenhouse gas emissions demonstrates the threat foreign emissions pose.[56] Regardless of national laws, such as the Clean Air Act, the goals of the Paris Agreement will not be achieved if each country does not respond effectively and continues to release greenhouse gases into the atmosphere. The three largest emitters—China, the European Union, and the United States—constitute over half of the world's total emissions.[57] Further, the top ten emitters contribute roughly three-quarters of global emissions.[58] These numbers reflect that even if small countries contribute significantly to lowering emissions rates, other larger countries can greatly—and directly—affect their quality of life and the risks inherent from climate change. Negative impacts on crop yields, effects on water resources in terms of both quantity and quality, and rising temperatures demonstrate that climate change must be addressed now.[59]

Not only are smaller countries disproportionately affected by emissions produced by larger countries, but emissions disparately affect poorer countries.[60] Low-income countries are particularly susceptible to global warming due to their inability to adapt to climate-related events, such as extreme weather or limited crop yields, due to institutional, financial, or technological deficits.[61] A recent study showed that as per capita income increased within a country, there was a reduction of the impact of extreme weather events.[62] A higher per capita income also correlated with an increase in substitutes for adaptation, such as insurance.[63] For these reasons, lower-income countries are particularly susceptible to the effects of climate change and often do not have the means to respond adequately when faced with the extreme weather events related to global warming.[64]

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55. Heng-chi Lee, Bruce A. McCarl, Uwe A. Schneider, & Chi-Chung Chen, *Leakage and Comparative Advantage Implications of Agricultural Participation in Greenhouse Gas Emission Mitigation*, 12 MITIGATION AND ADAPTATION STRATEGIES FOR GLOBAL CHANGE 471, 472 (2007).

56. *Id.*

57. Johannes Friedrich, Mengpin Ge, & Andrew Pickens, *This Interactive Chart Shows Changes in the World's Top 10 Emitters*, WORLD RESOURCES INST. (Dec. 10, 2020), https://www.wri.org/blog/2017/04/interactive-chart-explains-worlds-top-10-emitters-and-how-theyve-changed#:~:text=The%20top%20three%20greenhouse%20gas,only%20account%20for%203.5%20percent [https://perma.cc/HFG2-UFXE].

58. *Id.*

59. Synthesis Report, *supra* note 10, at 6.

60. Samuel Fankhauser & Thomas K.J. McDermott, *Understanding the Adaptation Deficit: Why are Poor Countries More Vulnerable to Climate Events than Rich Countries?*, 27 GLOBAL ENVTL. CHANGE 9, 9 (2014).

61. *Id.*

62. *Id.* at 17.

63. *Id.* at 13.

64. This author notes that the "extreme weather events" are specifically referencing floods and tropical cyclones. *See generally* Fankhauser & McDermott, *supra* note 58.

2. ASSERTING JURISDICTION DESPITE FOREIGN COUNTRIES' LAWS

Case law lends support for exercising jurisdiction over foreign emissions even when a country has emissions laws already in place. In *Hartford Fire Insurance Co. v. California*, the Supreme Court addressed whether it could exercise jurisdiction over foreign conduct that was prohibited under the Sherman Act but permissible in the foreign country at issue.[65] The issue was whether reinsurers from London, who allegedly conspired to restrict the terms of coverage of a form of insurance available in the United States, were subject to the Sherman Act.[66] Despite the foreign defendants' argument that the Court should not exercise jurisdiction due to a conflict between U.S. and British law, the Court found that there was in fact no conflict, holding that no conflict could exist where an individual is able to comply with both regulations despite one being more strict.[67] A true conflict, the Court held, could only arise if complying with one regulation would result in being out of compliance with another country's regulation.[68] The Court found that jurisdiction was proper and concluded that it was well established that the Act applies to "foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[69]

Two keys takeaways from *Hartford Fire* lend support to the implementation of an extraterritorial statute to address climate change. First, *Hartford Fire* suggests that there is no conflict of law between two countries where one country has more stringent laws.[70] As long as an individual can comply with both laws, there is no conflict.[71] Similarly, there is likely no conflict of laws between countries who both have emissions laws in the first place, as the emissions laws likely come down to a difference in scale, rather than a true conflict as defined in *Hartford Fire*. Second, *Hartford Fire* found jurisdiction over foreign activity to be proper when there was a substantial effect on the United States.[72] If an individual, organization, or government can prove that a country's lack of compliance with decreasing emissions has caused a substantial effect on that country, jurisdictional reach over foreign activity may be permissible.

3. ASSERTING JURISDICTION TO PROTECT VALUABLE RESOURCES

While the Sherman Act has demonstrated the wide reach of an extraterritorial statute, the Act, and others like it, are limited by international relations. For

65. *See generally* Hartford Fire Ins. Co. v. Cal., 509 U.S. 764 (1993).

66. *Id.* at 770.

67. Hartford Fire Ins. Co., 509 U.S. at 799 (citing Restatement (Third) Foreign Relations Law § 403, Comment e).

68. *Id.*

69. Hartford Fire Ins. Co., 509 U.S. at 795-96.

70. Hartford Fire Ins. Co., 509 U.S. at 799 (citing Restatement (Third) Foreign Relations Law § 403, Comment e).

71. *Id.*

72. Hartford Fire Ins. Co., 509 U.S. at 796.

example, in *IAM v. OPEC*, the Ninth Circuit held that foreign policy limited its ability to address the extraterritorial application of the Sherman Act.[73] OPEC, an organization of petroleum producing and exporting nations, was originally formed to stabilize oil prices to ensure preservation of their precious resource.[74] IAM alleged that after the formation of OPEC, oil and petroleum-derived products increased.[75] OPEC countered that without the coordination of the participating countries, oil and petroleum would "rapidly deplete their only valuable resource for ridiculously low prices."[76]

In *IAM*, the Court applied the act of state doctrine to decline assertion of extraterritorial jurisdiction against OPEC.[77] The purpose of the act of state doctrine is to respect the sovereignty of each state by "not adjudicat[ing] a politically sensitive dispute which would require the court to judge the legality of the foreign act of a foreign state."[78] The act of state doctrine arises out of the separation of powers as the judiciary deems its branch of government is ill-equipped to handle an ongoing international issue that has yet to be resolved.[79] The Court found that the availability of oil significantly affected international relations and as such, the issue should be framed as a U.S. court interfering with the allocation of and ability to profit from a foreign nation's valuable natural resource.[80] The Court concluded, "[w]e are reluctant to allow judicial interference in the area so void of international consensus."[81] If the availability of oil had been an area that already achieved an "international consensus" regarding the best course of action, the Court may have been more likely to exercise jurisdiction.

While a court may not *always* find jurisdiction even with an extraterritorial statute, the *IAM* Court lends support for the exercise of jurisdiction over foreign emissions. First, *IAM* addressed matters where a government was protecting a valuable resource. Unlike *IAM*, emissions *take away* valuable resources, indicating that a claim is necessary to protect each sovereign state. Countries whose primary industry is agriculture, who have been affected by a decrease in crop yield due to global warming,[82] must have some form of redress if their livelihood is being diminished by foreign activity. Second, while the *IAM* Court found there was no international consensus over the issue of oil availability, nearly two-

73. Int'l Ass'n of Machinists and Aerospace Workers v. Org. of the Petroleum Exporting Countries, 649 F.2d 1354, 1361-62 (9th Cir. 1981).

74. *Id.* at 1355.

75. *Id.*

76. *Id.* at 1356.

77. Int'l Ass'n of Machinists and Aerospace Workers, 649 F.2d at 1358.

78. *Id.*

79. Harvard Law Review, *International Law – Act of State Doctrine – Second Circuit Holds That Acts of Genocide by Sudanese Government are not Afforded Act of State Doctrine Deference*, 133 HARV. L. REV. 1103, 1109 (2020).

80. Int'l Ass'n of Machinists and Aerospace Workers, 649 F.2d at 1361.

81. *Id.*

82. Synthesis Report, *supra* note 10, at 6.

hundred countries have signed an agreement indicating the urgent and pressing need to lower emissions.[83] The Paris Agreement provides strong documentation that courts are not interfering with matters that would be better left to the executive or legislative branch. Thus, the Sherman Act provides a blueprint on how to craft and enforce a climate change statute, and also provides support for the extraterritorial application of such a statute.

II. THE LEGAL ETHICS OF ADDRESSING GLOBAL ENVIRONMENTAL VIOLATIONS

For an attorney to avoid a violation of the *Model Rules of Professional Conduct*, an extraterritorial statute is necessary as a claim could be deemed "frivolous" if there is no basis in the law for filing an international environmental claim.[84] While lawyers can address climate change issues within the U.S., their ability to bring claims that arise outside the country appears far more limited due to the strong presumption against extraterritoriality.[85] Model Rule 3.1 states a lawyer shall not bring a claim "unless there is a basis in law and fact for doing so that is not frivolous."[86] The ABA states that an action is frivolous when a "lawyer is unable either to make a good faith argument on the merits . . . or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law."[87] Claims are not "frivolous" when they are "based on existing law or on a good faith argument for an extension of existing law."[88]

To ensure lawyers are acting within the proper scope of their profession, the Model Rules advise that every lawyer be "responsible for observance of the Rules of Professional Conduct."[89] While the *Model Rules* provide a "framework" for ethical conduct and are only advisory in nature,[90] most states have adopted some version of the *Model Rules*.[91] If a lawyer fails to abide by Model Rule 3.1, there is the potential for disciplinary measures.[92] Under the *Model Rules*, the commentary states that the term "shall" should be interpreted as an imperative.[93] Imperatives in turn "define proper conduct for purposes of professional discipline."[94] Within Model Rule 3.1,

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83. *See generally* Paris Agreement, *supra* note 1.

84. MODEL RULES R. 3.1.

85. Arabian Am. Oil Co., 499 U.S. at 248.

86. MODEL RULES R. 3.1.

87. MODEL RULES R. 3.1 Commentary.

88. James W. MacFarlane, *Frivolous Conduct Under Model Rule of Professional Conduct 3.1*, 21 J. OF THE LEGAL PROF. 231, 232 (1997).

89. MODEL RULES pmbl.

90. Dennis A. Rendleman, *"Morals and Ethics and Law, Oh My!" – An Historical Perspective on the ABA Model Rules of Professional Conduct*, 6 BALTIC J. OF L. POLITICS 1, 9 (2013).

91. American Bar Association, *Alphabetical List of Jurisdictions Adopting Model Rules*, ABA (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/CA34-3AAX].

92. MODEL RULES scope.

93. *Id.*

94. *Id.*

the language "shall not bring or defend a proceeding" indicates that if an attorney does submit a frivolous claim there is the potential for discipline.[95] The *Model Rules* do not specify the sanctions a lawyer may face if they present a frivolous claim. However, disciplinary measures may include disbarment, suspension by the court, probation, a reprimand by the court or board, or fees.[96]

Baked into the traditional reading of Model Rule 3.1 is a duty to investigate because an attorney must look to the claim itself and the existing case law to determine if a claim could reasonably be interpreted to have merit.[97] Investigations of international environmental claims are likely to be costly and time-consuming due to the difficulty of establishing the element of causation.[98] An emissions violation involves gas that flows across borders over time, which can create issues when establishing the connection between emissions and the realized harm.[99] For these reasons, it is even more important for an attorney considering bringing an international environmental violation claim to fully investigate the facts of the case.

While causation may present an issue in climate change actions,[100] the Paris Agreement may provide a shortcut to establishing a causal link. The explicit admissions within NDCs that outline safe emission levels have been used as a standard of care for establishing a case akin to negligence.[101] For example, in *Urgenda Foundation v. State of the Netherlands*, a non-profit organization along with 886 Dutch citizens filed a claim against a Dutch state for its contribution to climate change.[102] Utilizing the IPCC reports and UNFCCC joint decrees wherein the Dutch government had agreed that a 2˚C increase in global temperature from the pre-industrial temperature would be considered dangerous,[103] the Dutch citizens argued the Dutch government acted negligently in its treatment of emissions.[104] The Hague District Court found the Dutch government's climate policies to be both "inadequate and unlawful," and ordered the government to limit emissions by at least 25% by the end of 2020 in comparison to the 1990 level.[105] This ruling, although occurring in a foreign jurisdiction, demonstrates broadly that government reports, such as the statements made within the Paris Agreement, can effectively offer concrete acknowledgements by the government

95. MODEL RULES R. 3.1.

96. MODEL RULES OF DISCIPLINARY ENFORCEMENT R. 10 (2020).

97. MacFarlane, *supra* note 86, at 240.

98. Geetanjali Ganguly, Joana Setzer, & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. OF LEGAL STUDIES 841, 847 (2018).

99. Lee, McCarl, Schneider, & Chen, *supra* note 53.

100. Ganguly, Setzer, & Veerle, *supra* note 96.

101. Roger Cox, *A Climate Change Litigation Precedent: Urgenda Foundation v. The State of the Netherlands*, 34 J. ENERGY & NAT. RESOURCES L. 143, 145-46 (2016).

102. *Id*. at 143-44.

103. *Id*. at 145.

104. *Id*. at 144.

105. *Id*. at 144.

of what is considered "dangerous" temperatures and emissions levels.[106] When the government expressly states the actions that must be taken to address emissions and then provably fails to do so, it provides a shortcut to causation within a climate action.[107]

While Model Rule 3.1 has made clear that an attorney has both a duty to investigate the facts and to ensure the complaint is non-frivolous, this Note posits that a global environmental violation suit would constitute a proper extension of existing law. An extraterritorial statute would not only be proper, but it would also empower attorneys to file claims that reach foreign emissions. Model Rule 3.1 may produce a "chilling" effect on litigation due to the concern that a claim may be viewed as frivolous.[108] To remedy this chilling effect, an extraterritorial statute addressing climate change would empower attorneys to file international suits in this right. While climate change has been recognized by countries across the world, the ability to combat harms that go beyond the borders of a given country has not received as much attention. For these reasons, an environmental statute with an express extraterritorial provision would remedy these concerns and allow for the U.S. legal field to pursue environmental claims of an international scope.

III. CONSIDERATIONS REGARDING FORMATION OF AN EXTRATERRITORIAL STATUTE

When drafting an extraterritorial statute, Congress would have to consider what damages would be available to injured countries and citizens; how to address the element of causation and how it relates to injury; whether suit can be brought by government actors alone or also by private citizens; where hearings addressing such international violations would take place; and whether a separate tribunal would be needed to hear such a case. In addressing these issues, the focus must be the same as that of the Paris Agreement with an underlying goal of joint cooperation since emissions do not stay within each country's borders.[109]

For an extraterritoriality statute to be appealing to other countries, there must be limits on damages. A step above the Paris Agreement's "name and shame" process would be providing injunctive relief to countries damaged by environmental violations. The Clean Air Act, which has similar national-level goals of the Paris Agreement, provides injunctive relief as a remedy for environmental violations.[110] This form of relief would allow a court to order a country or individual to stop the actions that are causing the environmental violations. Like *Urgenda Foundation*, American courts could require a foreign country to limit their annual emissions and further monitor the government's actions to ensure the

106. *See generally* Cox, *supra* note 99.

107. *Id.* at 146.

108. MacFarlane, *supra* note 86, at 242.

109. Lee, McCarl, Schneider, & Chen, *supra* note 53.

110. Stuart Parker, *EPA, Sierra Club Defend Right to Seek Injunctive Relief for NSR Violations*, 36 INSIDEEPA.COM'S DAILY BRIEFING 1, 2 (2019).

injunction is being adhered to.[111] Injunctive relief rises above the "name and shame" process by providing direct restraints on the environmental violation, which can then be reviewed by a tribunal to ensure compliance with the court order.

One of the largest concerns regarding environmental violations is the issue of causation and how to establish that countries did in fact harm others by their emissions. *Urgenda Foundation* provides a shortcut for proving causation by utilizing the climate science of the IPCC and statements made in treaties, such as the UNFCCC's Paris Agreement.[112] This would make claims against the government much easier to prove, at least in comparison to private actors, like fossil fuel companies, because the government has made statements that are difficult to contest.[113] As climate science continues to expand, the element of causation appears to be easier to prove due to countries' admissions of what steps must be taken to limit climate change.

With an eye on cooperation, a separate tribunal would likely be necessary to limit the bias regarding the treatment of each country in bringing international environmental lawsuits. The IPCC consists of hundreds of leading experts from across the world and seeks to find a balance between both men and women, and experienced scientists versus those who have not been as exposed to writing IPCC reports.[114] The IPCC seeks to assess a full range of scientific views and protect itself from conflicts of interest.[115] The acceptance of the IPCC's climate science by countries all over the world speaks to the need for a tribunal to also be limited in conflicts of interest and made up of a wide array of diverse judges. A separate tribunal that consists of elected officials who are both well-versed in climate policy and approved by the majority of countries would limit bias and increase acceptance of court-ordered injunctive relief.

With a separate tribunal in place, private citizens and government actors alike could initiate suit against other countries. If cases were limited to only those that involved governmental agencies, many environmental violations may be left unaddressed due to each country's own government wanting to maintain diplomacy with other nations. In an effort to limit emissions and limit the effects of climate change, an extraterritorial statute would need to afford private citizens the ability to sue. As demonstrated in *Urgenda Foundation*, private citizens were assisted by the Urgenda Foundation, a non-profit agency.[116] Non-profit agencies may specifically be focused on reducing climate change worldwide and can provide a more holistic view of what steps are necessary to lower emissions rates.

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111. Cox, *supra* note 99, at 144.

112. *Id*. at 146.

113. *Id*. at 145.

114. International Panel on Climate Change, IPCC Factsheet: How does the IPCC Select its Authors? 1 (Aug. 30, 2013), https://www.ipcc.ch/site/assets/uploads/2018/02/FS_select_authors.pdf [https://perma.cc/6WXV-G5GX].

115. *Id*.

116. Cox, *supra* note 99, at 143.

Providing both private and public actors the ability to initiate suit limits concerns that countries will not take an active role in protecting their citizens against climate change's negative effects.

IV. LIMITATIONS AND POTENTIAL CONCERNS

While climate change has been deemed an urgent and serious issue, there are limits and concerns regarding the implementation of an extraterritorial statute. Despite the rapid increase in climate science, technology for cleaner air, and the push for national governance regarding emissions, there remains a concern that the U.S. is not ready for global coordination that expands past voluntariness.[117] Despite rising sea levels and rising temperatures, some may not view climate change as an urgent or pressing issue. For instance, citizens and countries abroad who observed former President Trump exiting the Paris Agreement found his actions fitting for the Administration's "'America first' approach to foreign policy."[118] While many countries are faced with a lack of funds and inability to find green alternative means, there is not a large incentive for a country to lower its emissions if other countries are not following suit.

One of the largest concerns of the Paris Agreement is the limited consequences for countries who fail to reach their nationally determined contributions as defined in the Paris Agreement. One of the reasons why former President Trump chose to exit the Paris Agreement was the requirement that the United States was to provide large financial contributions while less-developed countries were not.[119] If less-developed countries aren't held formally accountable for failures to meet their NDCs, it creates a concern that the funds provided by other countries have not been used properly. To alleviate this perceived unfairness, injunctive relief would provide a way to ensure that financial contributions are being used to limit emissions. If injunctive relief were available, countries such as the United States who have provided large financial contributions could seek redress from other countries who are not effectively curbing emissions. For these reasons, injunctive relief may provide an incentive to enter into the Paris Agreement rather than being viewed as a deterrent.

CONCLUSION

An environmental law that addresses foreign greenhouse gas emissions is not only timely, but necessary. The Paris Agreement has provided the foundation for global coordination regarding climate change, but the agreement has proven

117. Congressional Research Service, *supra* note 21, at 2 (discussing former President Trump's exit from the Paris Agreement and his concern regarding "legal liability").

118. *Id*. at 1.

119. *Trump's Speech on Paris Climate Agreement Withdrawal, Annotated*, NPR (June 1, 2017, 6:45 PM), https://www.npr.org/2017/06/01/531090243/trumps-speech-on-paris-climate-agreement-withdrawal-annotated [https://perma.cc/3FCZ-VHZU].

ineffective in its application. Without immediate action taken by foreign governments or non-profit organizations, global warming will cause further, and more devastating, harm. With an extraterritorial statute, individuals can hold countries accountable for their NDCs expressed within the Paris Agreement. The IPCC has made clear the need for an international response,[120] but this response must effectively address the needs set forth in the scientific reports. As countries continue to fail to renew and ratchet-up their NDCs,[121] more severe actions must be taken.

The ineffectiveness of the Paris Agreement has shown that surveillance as to each country's response to climate change is necessary. Injunctive relief would provide a method of monitoring countries' NDCs to ensure that action is taken if countries fail to comply. As the world works to combat the effects of emissions and develop technology to provide cleaner air, the IPCC has made clear that there are consequences associated with any delay in addressing climate change. As each country continues to grapple with climate change and emissions rates, there must be a form of monitoring that goes beyond each nation's borders.

120. Synthesis Report, *supra* note 10, at 29.
121. Climate Action Tracker, *supra* note 28.