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CLIMATE CHANGE AND CRISES OF INTERNATIONAL LAW: POSSIBILITIES FOR GEOGRAPHIC REENVISIONING

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Climate change poses a crisis for international law because addressing it requires many levels of government, types of law, and governmental and nongovernmental actors.[1] *Moreover, this governance complexity involves scientific, technical, and legal uncertainty; simultaneously overlapping and fragmented legal regimes; difficulties of balancing inclusion and efficiency; and inequality and resulting injustice.*[2] *A myriad of strategies must be employed to address both mitigation and adaptation to impacts fairly and effectively. This thought piece explores how the combination of failures by nation-states to address this problem effectively and of efforts by a wider range of actors not generally counted in international lawmaking suggest a possible way forward for international law in responding to complexity.*

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[1] I have explored these issues in depth in Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 ALA. L. Rev. 237 (2011) [hereinafter Osofsky, *Diagonal Federalism*]; Hari M. Osofsky, *Is Climate Change "International"?: Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585 (2009) [Osofsky, *Is Climate Change "International"?*].

[2] I have analyzed each of these aspects of governance complexity in more depth in the context of the BP Deepwater Horizon oil spill. *See* Hari M. Osofsky, *Multidimensional Governance and the BP Deepwater Horizon Oil Spill*, 63 FLA. L. REV. 1077 (2011).

I. THE INTERNATIONAL CLIMATE CHANGE REGIME IN CRISIS

As a formal matter, international legal efforts to address climate change fit within a traditional model of international lawmaking. The dominant multilateral climate change regime consists of the United Nations Framework Convention on Climate Change (UNFCCC)[3] and agreements negotiated under that convention. The UNFCCC provides general commitments and a structure for achieving more specific targets and timetables.[4] Parties to the UNFCCC meet regularly in conferences under its auspices, most recently in Durban in 2011, to attempt to negotiate additional agreements. The 2011 Conference of the Parties (COP) in Durban resulted in an agreement to reach a universal agreement by 2015 and established an "Ad Hoc Working Group on the Durban Platform for Enhanced Action" to begin negotiating this towards this 2015 goal.[5] In addition, thirty-five of the parties to the Kyoto Protocol, the only agreement negotiated under the UNFCCC which provides binding targets and timetables, committed to a second commitment period, which will begin in January 2013, when the first one ends.[6]

However, the international legal regime and this narrative of it are in crisis for two primary reasons. First, and least problematically for a traditional account, the existing regime and negotiations are struggling to achieve their goals.[7] Many nation-states are having difficulties meeting their Kyoto Protocol commitments, and those commitments do not go as far as scientific consensus suggests is needed to prevent the most severe risks of climate change.[8] Moreover, the United States, Canada, Japan, and Russia

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[3] *See* United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC NO. 102–38, 1771 U.N.T.S. 107 [hereinafter UNFCCC], *available at* http://untreaty.un.org/English/notpubl/unfccc_eng.pdf.

[4] *Id.*

[5] *See* Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, Draft Decision-/CP.17 (advance unedited version), *available at* http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf (last visited Feb. 9, 2011).

[6] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148 [hereinafter Kyoto Protocol]; Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol, 16th Sess., 6, Draft Decision-/CMP.7 (advance unedited version), *available at* http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_outcome.pdf (last visited Feb. 6, 2012) [hereinafter Kyoto Protocol Second Commitment Period].

[7] I have explored these failures in my prior scholarship. *See, e.g.*, Osofsky, *Is Climate Change "International"?*, *supra* note 1.

[8] For analyses of Kyoto Protocol compliance, including issues facing particular countries, see LEGAL ASPECTS OF IMPLEMENTING THE KYOTO PROTOCOL MECHANISMS: MAKING KYOTO WORK (David Freestone & Charlotte Streck eds., 2005); RUSSIA AND THE KYOTO PROTOCOL: OPPORTUNITIES AND CHALLENGES (Anna Korppoo et al. eds., 2006); Alastair R. Lucas, *My-*

were not among the thirty-five countries committing to this second period, the United States never committed to the first one, and the potential 2015 universal agreement will not result in the reductions needed now.[9]

These difficulties do not necessarily suggest the need for innovative theorizing about international law creation. A Westphalian[10] narrative of international law creation, in which international law arises from the consent of sovereign and equal nation-states, would likely acknowledge the regime as creating limited international legal obligations and assess it as not entirely successful in achieving its goals.[11] However, the substantive problem of addressing climate change effectively through international law would remain. A core question that this thought piece asks is whether current international legal efforts should focus primarily on achieving better agreements in negotiations among nation-state parties, or whether more inclusive conceptions of international law creation which shift that focus somewhat might actually serve as a tool in solving this problem.

Second and more fundamentally, there is a great deal of activity with legal significance on climate change outside of the UNFCCC structure. Some of this activity includes a wide range of additional formal international legal agreements among nation-states, which, for completeness, should be included in even a traditional account of international law creation.[12] For example, the Montreal Protocol's[13] efforts to address ozone impact green-

thology, Fantasy and Federalism: Canadian Climate Change Policy and Law, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 41, 52–56 (2007); Mindy G. Nigoff, *The Clean Development Mechanism: Does the Current Structure Facilitate Kyoto Protocol Compliance?*, 18 GEO. INT'L ENVTL. L. REV. 249 (2006). For an analysis of the ways in which the Copenhagen Accord commitments are insufficient to bring the reductions that scientists say are needed, see Kelly Levin & Rob Bradley, *Comparability of Annex I Emission Reduction Pledges* 21 (World Res. Inst., Working Paper, 2010), *available at* http://pdf.wri.org/working_papers/comparability_of_annex1_emission_reduction_pledges_2010-02-01.pdf.

[9] For commitments under the second period, see Kyoto Protocol Second Commitment Period, *supra* note 6. For an analysis of the gap in addressing emissions as of the 2011 Durban COP, see U.N. Environment Programme, Bridging the Emissions Gap: A UNEP Synthesis Report (Nov. 2011), http://www.unep.org/pdf/UNEP_bridging_gap.pdf.

[10] By "Westphalian," I mean guided by the core notions of nation states as primary subjects and objects of international law and of international law being created through the consent of sovereign and equal nation-states. For expositions of Westphalian understandings of international law, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 287–88 (6th ed. 2003); Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"—Revolutionary International Legal Theory or Return to Rule by the Great Powers*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 383 (2005).

[11] *See infra* Part II.

[12] I have discussed some of this activity in Osofsky, *Diagonal Federalism*, *supra* note 1.

[13] Montreal Protocol on Substances that Deplete the Ozone Layer art. 5, Sept. 16, 1987, 26 I.L.M. 1550.

house gas emissions significantly.[14] In addition, and less acknowledged in most of the commentary on the UNFCCC, nations have crafted many bilateral and multilateral agreements (with fewer parties) on relevant issues such as alternative/renewable energy.[15] These agreements arguably should also be included in almost any account of the creation of international law relevant to climate change.

The conceptual conundrum comes not from these additional formal agreements among nation-states—though they contribute to the simultaneous overlap and fragmentation of international law—but rather from the many other less formally binding agreements among nation-states and among a wider range of governmental and nongovernmental entities. The agreements reached among cities, states, and provinces during the Copenhagen COP in December 2009 exemplify this difficulty particularly well because they include subnational governments from nation-states which were having difficulty reaching agreement and the pledges within them represented massive quantities of emissions reductions.[16] More than fifty mayors from a wide range of nation-states, as well as some governors, signed Copenhagen Climate Communiqué, which summarizes the significant steps taken at a local level on climate change and calls for nation-state action.[17] In addition, local government leaders from fifty-nine countries registered 3,232 targets in the Copenhagen City Climate Catalogue, a transnational effort to compile local targets and achievements.[18] At a somewhat

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[14] For an analysis of the relationship between the Montreal Protocol and climate change and a proposal for the future, see Mark W. Roberts & Peter M. Grabiel, *A Window of Opportunity: Combating Climate Change by Amending the Montreal Protocol to Regulate the Production and Consumption of HFCs and ODS Banks*, 22 GEO. INT'L ENVTL. L. REV. 99 (2009).

[15] *See, e.g.*, Press Release, White House, U.S.-Mexico Announce Bilateral Framework on Clean Energy and Climate Change (April 16, 2009), *available at* http://www.whitehouse.gov/the_press_office/US-Mexico-Announce-Bilateral-Framework-on-Clean-Energy-and-Climate-Change; International Council on Clean Transportation, *Athens Resolution* (2010), http://www.transport2012.org/bridging/ressources/files/1/1138,ICCT-Athens-Resolution.PDF; Press Release, White House, U.S.-China Energy Announcements (Nov. 17, 2009), *available at* http://www.whitehouse.gov/the-press-office/us-china-clean-energy-announcements.

[16] I have previously analyzed these agreements and the dilemmas that they pose for international lawmaking in Hari M. Osofsky, *Multiscalar Governance and Climate Change: Reflections on the Role of States and Cities at Copenhagen*, 25 MD. J. INT'L L. 64 (2010).

[17] The Copenhagen Climate Summit for Mayors, Copenhagen, Den., Dec. 14–17, 2009, *Cities Act: Copenhagen Climate Communiqué* (Dec. 16, 2009) [hereinafter *Communiqué*], *available at* http://www.kk.dk/Nyheder/2009/December/~/media/B5A397DC695C409983462723E31C995E.ashx.

[18] The City Climate Catalogue, *The City Climate Catalogue: The Copenhagen City Climate Catalogue of City Commitments to Combat Climate Change, List of Commitments*, http://www.climate-catalogue.org/index.php?id=6870 (last visited Jan 3, 2012).

larger scale, leaders from states and provinces within Algeria, Canada, France, Nigeria, and the United States held a joint press conference to announce the planned launch of a Club of 20 Regions (R20) in September 2010, an arrangement which builds upon the October 2009 Governors' Climate Summit and the Global Climate Solutions Declaration signed there.[19] At more recent COPs, this trend continued, with local leaders signing the 2010 Mexico City Pact[20] and the Durban Adaptation Charter for Local Government.[21] Localities also have taken action through the World Mayors Council on Climate Change[22] and the carbon*n* Cities Climate Registry.[23]

These agreements have no formal international legal significance under traditional notions of international law. They are formed among subnational actors who, as a matter of international law, are not subjects and objects of international law and could rescind their commitments at any time. The commitments themselves involve subnational, not international, legal action. Moreover, under the Statute of the International Court of Justice, they would not serve as sources of international law. They are not treaties, and are unlikely to be treated as evidence of nation-states' customary international law obligations or of the general legal principles that they recognize.[24]

However, these subnational networks' activities have great potential significance for UNFCCC nation-state parties achieving the goals laid out in that convention, the Kyoto Protocol, and the Durban agreements. For example, the Communiqué notes that signatory cities together include more than half of the world's population and that up to seventy-five percent of global greenhouse gas emissions originate from urban areas.[25] Governor Schwarzenegger's press release announcing the formation of the R20 includes estimates by the United Nations Development Program that the subnational level will provide up to eighty percent of the pollution reduction

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[19] OFFICE OF THE GOVERNOR OF CAL., GAAS:753:09, *Gov. Schwarzenegger Announces New Coalition of Subnational Leaders to Combat Climate Change Press Release* (Dec. 14, 2009), http://gov38.ca.gov/press-release/%2014032/ (last visited Oct. 20, 2011) [hereinafter R20 Press Release].

[20] *Signatories*, THE MEXICO CITY PACT, http://www.mexicocitypact.org/en/the-mexico-city-pact-2/list-of-cities/ (last visited Feb. 9, 2012).

[21] Durban Adaptation Charter for Local Governments, *adopted* Dec. 4, 2011, http://www.iclei.org/fileadmin/user_upload/documents/Global/initiatives/LG_roadmap___COP_17_files/Durban_Adaptation_Charter_5Dec.pdf (last visited Feb. 9, 2012).

[22] *Members' List*, WORLD MAYORS COUNCIL ON CLIMATE CHANGE, http://www.worldmayorscouncil.org/members/members-list.html (last visited Feb. 9, 2012).

[23] *Reporting Cities*, CARBON*N* CITIES CLIMATE REGISTRY, http://citiesclimateregistry.org/cities/reporting-cities/ (last visited Feb. 9, 2012).

[24] *See* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

[25] *Communiqué*, *supra* note 17.

policies needed meet a new international commitment.[26] These statements take place in the context of broader transnational efforts among mayors; as of February 2010, 877 European cities had signed the Covenant of Mayors, with targets that surpass the European Union's 2020 goals,[27] and 1,017 U.S. mayors have committed to meeting or exceeding Kyoto Protocol targets and timetables.[28]

As with the first problem of insufficient formal international law, this second issue could be understood through a traditional, Westphalian approach to the creation of international law. These subnational agreements do not need formal international legal significance to help supplement the international legal efforts by nation-states under the UNFCCC. The subnational efforts can be treated as part of the nation-state meeting its commitments. However, such an understanding captures the transnational aspects of the subnational activities in a rather limited fashion; the transnational agreements are legally insignificant, and the coalitions only matter to international law-making to the extent that they influence nation-states' behavior in the UNFCCC meetings or help them to meet their commitments.[29]

II. WHY GEOGRAPHY MATTERS IN ADDRESSING THIS CRISIS

One's geographic understanding of the nation-state foundationally shapes how one understands the crisis described above. Treating the nation-state as an enclosed space, as stricter Westphalian accounts tend to, means viewing it as a singular entity with clearly delineated boundaries and viewing its internal workings as generally irrelevant to its international law commitments. Such a view of the nation-state is generally intertwined with a strong belief in the notion of sovereign equality. International law recognizes that, with very limited exceptions, states are sovereign over the space within in them, which is treated as domestic and only relevant to international law as part of the national entity. States can protect themselves against intrusions upon that enclosed space and generally can choose when to enter into consensual agreements with other states to abide by treaties and establish customary international law norms.[30] As described in Part I, under such an account, the limitations of the UNFCCC process and other climate change agreements among nation-states are an unfortunate example of international law not yet fully addressing the problem. The non-nation-state

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[26] R20 Press Release, *supra* note 19.

[27] *Covenant of Mayors*, COVENANT OF MAYORS, Feb. 10, 2009, http://www.eumayors.eu/IMG/pdf/covenantofmayors_text_en.pdf.

[28] *Mayors Leading the Way on Climate Protection*, THE UNITED STATES CONFERENCE OF MAYORS, http://www.usmayors.org/climateprotection/revised/ (last visited Jan. 3, 2012).

[29] *See supra* note 10 and accompanying text.

[30] *Id.*

agreements only have potential international legal relevance if they influence the behavior of states.[31]

But what if that portrayal of nation-state geography is inaccurate and incomplete? A number of scholars in different fields have grappled with this question. For the purposes of this Part, I focus on two such accounts, each of which challenges this narrative in different ways.[32] Judith Resnik, a legal scholar, has argued that international legal norms move across sovereign borders continuously and become part of internal, domestic understandings whether or not they are formally accepted. She claims that battles over the use of international law in domestic courts, for example, miss the fact that international norms enter domestic decisions whether or not the international law is formally accepted as part of them.[33] Julie Cidell, a geographer, has focused on the role of the individual in the creation of scale. Her work demonstrates that our delineation into scalar levels—international, national, state, local, community, individual—should take into account that the individual is not simply the smallest level, but a part of every level.[34]

Bringing together these two insights provides the basis for what I have termed a permeable model of the nation-state. The basic account of what formally constitutes international law creation does not change, but the view of the nation-state within it does. The nation-state becomes a less monolithic entity, as international legal norms flow in and out of its borders and individuals (and other entities) within it shape its course.[35] This change in viewpoint has significant implications for the narrative of international law creation generally and in the context of climate change in particular. The formal moment of international law creation becomes less central as one describes the myriad of interactions and norm evolution that precedes it and influences its implementation.

Once one recognizes the nation-state as permeable, however, further questions arise about the traditional model of international law creation. Namely, if the nation-state is constituted by individuals and entities and has borders that can be informally permeated, does the formal story also need to be changed? Should a view of the nation-state as fully enmeshed with and constituted by a wide range of actors and entities in multiple arenas change

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31 *See supra* Part I.

32 My previous work on the nation-state spaces has explored these accounts. *See* Hari M. Osofsky, *The Geography of Justice Wormholes: Dilemmas from Property and Criminal Law*, 53 VILL. L. REV. 117 (2008) [hereinafter Osofsky, *The Geography of Justice Wormholes*]; Hari M. Osofsky, *Climate Change and Environmental Justice: Reflections on Litigation over Oil Extraction and Rights Violations in Nigeria*, 1 J. HUM. RTS. & THE ENV'T 189 (2010).

33 Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1627–33 (2006).

34 Julie Cidell, *The Place of Individuals in the Politics of Scale* 38 AREA 196, 202 (2006).

35 *See* Osofsky, *The Geography of Justice Wormholes*, *supra* note 32.

the way in which international law is created? In response to questions such as these, scholarship on global legal pluralism,[36] which has an intellectual debt to the New Haven School,[37] and on new governance[38] (among other potentially relevant literatures) begins to rethink the formal story.[39] This scholarship decenters the nation-state and allows for a broader conception of what might constitute law. It provides the basis for a narrative of international law creation in which the UNFCCC negotiations might be approached more inclusively and in which agreements by subnational governments might be integrated more with treaties among nation-states.

Together, these theories open the door for nontraditional answers, which might be more effective, to the dilemmas proposed in Part I. Regarding the inadequacy of the UNFCCC processes in achieving reductions at the rate scientists say are needed, gaining more nation-state support for more serious mitigation and adaptation plans may not simply be a matter of better proposed agreements and COP negotiating strategies. Rather, a more inclusive UNFCCC process might put more pressure on the nation-states and on other actors, like subnational governments, which control a lot of emissions. If subnational governments were included more directly in negotiations, they might convince nation-states of the possibility of achieving greater reductions and commitments by nation-states based explicitly on subnational commitments would make those cities, states, and provinces more legally

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[36] For an analysis of how the legal pluralism literature can assist an understanding of the global legal environment of global legal problems, see Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1169–79 (2007).

[37] The New Haven School views law as "a process of authoritative decision by which the members of a community clarify and secure their common interests." 1 HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY xxi (1992).

[38] For an analysis of the applicability of new governance to international lawmaking, see Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance*, 42 VAND. J. TRANSNAT'L L. 501 (2009) (adapting new governance theory to the international legal context).

[39] The enmeshed model of the nation-state was first developed in Osofsky, *The Geography of Justice Wormholes*, *supra* note 32. Other strands of international legal theory, such as regulatory institutions theory, also grapple with the mix of formal and informal law and actors. For examples of scholarship from the Regulatory Institutions Network on responsive regulation at Australia National University, see generally Valerie Braithwaite, *Ten Things You Need to Know About Regulation and Never Wanted to Ask*, *in* REGULATORY INSTS. NETWORK 2006 (RegNet Occasional Paper No. 8, 2006), *available at* http://ctsi.anu.edu.au/publications/10thingswhole.pdf; Charlotte Wood et al., *Applications of Responsive Regulatory Theory in Australia and Overseas*, *in* REGULATORY INSTS. NETWORK 2010 (RegNet Occasional Paper No. 15, 2010), *available at* http://ctsi.anu.edu.au/publications/Occasional Paper_15.pdf. Integrating the wide range of potentially relevant theories is beyond the scope of this brief essay, but it explores the possibilities for creating a more comprehensive theory by integrating additional strands. For a more in depth analysis, see Osofsky, *supra* note 2.

accountable.[40] The 2011 Durban negotiations represented a step in that direction, with more language on subnational governments included in the international agreements, but these smaller governments were still limited to participating through their nation-states delegations or through joining coalitions with observer status.[41]

III. CONCLUSION

Crafting more inclusive structures would face many obstacles. Since the UNFCCC negotiations take place under a treaty signed by nation-states, those nation-states would have to agree to establish such a process for it to become a formal part of the negotiations.[42] If the nation-states do not do so, such a process could at most be a complementary side process, which might not have enough weight to accomplish the kind of integrated dialogue and agreements described above. In the scenario in which such a structure is informal, careful structuring would be needed to give it more direct impact on the UNFCCC negotiations than the current side forums and observer status do.[43]

Practical considerations would also be daunting. Who should decide who is included and excluded, and how should those decisions be made?[44] In those decisions around inclusion, how can representation be simultaneously manageable and comprehensive and avoid both democratic deficit problems and accompanying difficulties of over- and under-

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[40] Subnational governments are not all leaders. As I have discussed in my previous work, some of them push against larger-scale efforts to address climate change. *See* Osofsky, *Is Climate Change "International"?*, *supra* note 1; Osofsky, *Diagonal Federalism*, *supra* note 1. However, at this stage in the climate change negotiations, the leader cities, states, and provinces are the primary ones meeting and forming agreements to try to supplement international negotiations and there are no signs of subnational governments that oppose more stringent regulation organizing in a similar fashion at an international level. A more comprehensive exploration of including subnational entities in international negotiations more directly would need to engage this divide in more depth and how that divide would be expressed in a representative inclusion of subnational voices.

[41] *See Local Government Climate Roadmap, From Copenhagen to Cancún to South Africa: COP15 – COP16 – COP17*, ICLEI (July 2010), http://www.iclei.org/fileadmin/template/project_templates/climate-roadmap/files/Communication_Material/Towards_COP16/Concept_towards_COP16_Final_8September2010.pdf; *Durban must Urbanize Climate Agenda*, ICLEI (Dec. 12, 2011), http://www.iclei.org/fileadmin/user_upload/documents/Global/initiatives/LG_roadmap___COP_17_files/LGMA_Durban_DailyBriefing_DurbanOutcomes_LGs-Subnationals.pdf.

[42] *See* UNFCCC, *supra* note 5.

[43] *See id.*

[44] Erin Ryan has explored these interesting meta-questions of "who should decide" in her recent federalism work. *See* Erin Ryan, *Negotiating Federalism*, 51 B.C. L. REV. 1 (2011).

representation?[45] To what extent does this valuation of these smaller scale voices hinge on the presumption that they are pro-regulatory and how should our model address the possibility that fair representation likely would include anti-regulatory voices as well?[46] Who would be bound, formally or informally, and through what mechanisms? In a process centered around the governmental entities at different levels that are the focus of this piece, would nation-states and subnational governments have the same status? Should we consider such a multi-government agreement to be international law because of the agreements among nation-states or not to be international law because of its inclusion of non-nation-state actors or partially to be international law and partially not because of its hybrid status?[47]

These pluralist and new governance approaches also would be more open to according some sort of international legal status to the subnational agreements that took place at the recent COPs. Like with the example of the negotiations, that acknowledgment of legal status might not take the form of adding to what would count as formal international law. Rather, these approaches could also have value in their treatment of both the formal and informal as part of the overall process of international lawmaking. Such treatment would address the problem raised in Part I of the formal negotiations among nation-states having minimal space for meaningful acknowledgement or incorporation of subnational agreements.

This acknowledgement is a different and complementary solution to changing the negotiations themselves, and may be easier to achieve than an inclusive process under the treaty system itself. Treating transnational agreements among subnational governmental entities as a more meaningful part of the creation of the international law of climate change—even if that part is not a formal one—opens up space for the mutual pressure on both nation-states and subnational entities described above. The subnational agreements, if considered in the national negotiations more directly, might both place more pressure on the nation-states and reinforce to them the plausibility of further commitments. In turn, the national agreements, if explicitly relying upon those subnational agreements, might make them more binding upon those subnational entities as a matter of domestic, national law.

As in the context of changing the treaty-negotiating process, such an approach to the subnational agreements raises questions that lack straightforward solutions. What does it mean to take those agreements more

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[45] Assuming there is a fair approach to representation, the democratic deficit problem should not be more severe than in a nation-state context since the subnational governments, like national ones, are sovereign representatives of the people (though like at a national level, democratic deficit may be a problem due to not very democratic forms of government).

[46] *See* sources cited *supra* note 40.

[47] For an exploration of some of these issues, see Abbott & Snidal, *supra* note 38.

seriously as a practical matter? How would this approach differ from allowing side programs to take place at the time of the main meeting? To what extent do the extensive informal ties between subnational and national governments already accomplish this dynamic and, if this dynamic already exists, why is it not creating more forward motion in the negotiations? Is there any way to make transnational agreements among subnational entities binding at an international level, or would doing so simply require too much reconceptualization of international law? What exactly, as a legal matter, is being created through these processes if they are not treated as formal international law? As with the context of reconfiguring treaty negotiations, addressing these and other practical questions are critical for developing meaningful alternative approaches.

Although pluralist and new governance approaches require creative reconceptualization and careful crafting, such an effort is worthwhile. The current reliance on traditional Westphalian notions of international law is not solving the problem of climate change quickly enough. Perhaps alternative approaches would not either. But given the urgency of the problem, some conceptual blockbusting is needed. In the context of these crises of international law, openness to more inclusive approaches puts more possibilities on the table. These possibilities may not solve the problem of climate change, but they increase the hope of doing so.