

INTERNATIONAL ENVIRONMENTAL LAW

2011 Annual Report¹

I. ATMOSPHERE AND CLIMATE

A. *Climate*

Governing bodies of the United Nations Framework Convention on Climate Change and Kyoto Protocol met at the end of 2011 in Durban, South Africa.² Recognizing that the first commitment period of the Kyoto Protocol expires in 2012, Parties addressed whether the international climate regime would continue past 2012 with legally binding emission reduction targets and whether the international community would undertake the negotiation of a new climate treaty either in tandem with or in lieu of the Kyoto Protocol.

At the Durban conference, Parties agreed to a second commitment period of the Kyoto Protocol starting on January 1, 2013, though specific targets will be considered for adoption in 2012.³ However, Canada, Russia and Japan publicly stated that they would

¹ This report on developments in international environmental law during the year 2011 is jointly submitted on behalf of the International Environmental Law Committees (IELC) of the ABA Section on International Law (SIL) and Section on Environment, Energy, and Resources Law (SEER) by Vice-Chairs and co-editors Andrew B. Schatz, Associate, DLA Piper LLP (US), and Sara Vinson, Graduate Scholar, Association of Clean Water Administrators. Stephanie Altman, Attorney Advisor in the Office of General Counsel-International Law Section, National Oceanic and Atmospheric Administration, contributed on marine environmental protection. Niranjali Amerasinghe (Staff Attorney) and Kristen Hite (Interim Director, Climate Change Program) at the Center for International Environmental Law, contributed on climate and atmosphere. Derek Campbell, Attorney-Advisor, Office of General Counsel - International Law Section, National Oceanic and Atmospheric Administration, contributed on marine conservation and trade and the environment. Professor Joseph W. Dellapenna, Villanova University Law School, authored the section on water resources. Richard A. Horsch, White & Case LLP, contributed on hazardous waste developments. Finance related developments were contributed by David Hunter, Associate Professor, and Erika Lennon, Coordinator of International and Comparative Environmental Law Program at American University's Washington College of Law. Professor Erica Lyman, Lewis & Clark Law School, contributed on wildlife and biological resources. Thomas Parker Redick, with Global Environmental Ethics Counsel, contributed on international regulation of biotechnology and chemicals. R. Justin Smith, Assistant Chief, Law and Policy Section, Environment and Natural Resources Division, U.S. Department of Justice, contributed on international environmental litigation. The editors appreciate the advice and assistance of David R. Downes, co-chair of the SIL IELC, and Assistant Director for Policy in the Office of International Affairs at the U.S. Department of the Interior. Any opinions expressed in this report are those of the authors in their personal capacities and do not represent the views of their organizations. For developments in 2010, see David R. Downes et al., *International Environmental Law*, 45 INT'L LAW. 409 (2011). For developments in 2009, see David R. Downes et al., *International Environmental Law*, 44 INT'L LAW. 503 (2011).

² Durban's meeting marked the 17th meeting of the Conference of the Parties to the Framework Convention (COP-17) and 7th meeting of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP 7).

³ Conference of the Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC), Durban, S. Afr., Nov. 29-Dec. 9, 2011 [Durban Conference], *Outcome of the*

not accept commitments in a second Kyoto commitment period.⁴ Indeed, shortly after the Durban conference ended, Canada announced it would withdraw from the Kyoto Protocol, making it the first Party to the Protocol to do so.⁵

Nonetheless, some headway was made on the terms of a successor treaty to the Kyoto Protocol. Parties launched a new ad-hoc working group to create a “protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties.”⁶ The “agreed outcome” and “applicable to all Parties” language was the matter of substantial debate during the conference. At first, the “agreed outcome” language did not include the modifier “with legal force,” but that clause was added in the final moments of negotiation. While the language is vague, many have suggested that the Durban decision reflects a political shift indicating a willingness by emerging economies such as China and India to take on obligations to reduce emissions.

Negotiations in 2012 may provide more clarity regarding the contours of the new agreement. While the Parties have agreed on the timeline, they have not yet agreed to the content of the new “legal” agreement. The scope for this new agreement is slated to be decided in 2012, with negotiations scheduled to conclude by 2015 for application no later than 2020.⁷

The meetings also built on the previous year’s meetings which produced the Cancun Agreements and operationalized, *inter alia*, reporting requirements for mitigation activities and finance, the governance structure for the new Green Climate Fund, a framework for adaptation measures, modalities and guidance related to reducing emissions from deforestation and forest degradation (REDD+), and procedures for the Technology Executive Committee. The Parties also agreed to new rules to account for emissions associated with land use, land use change and forestry.⁸

Outside of the UNFCCC, several international financial institutions took steps to combat climate change. The World Bank Group’s International Finance Corporation (IFC) revised its Sustainability Policy and Performance Standards (effective January 1, 2012). The Policy provides social and environmental standards for IFC supported projects in developing countries.⁹ IFC clients now have to consider ways to “reduce

work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its sixteenth session, Draft decision -/CMP.7 (2011), available at http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_outcome.pdf.

⁴*Russia Supports Canada's Withdrawal from Kyoto Protocol*, The GUARDIAN, Dec. 16, 2011, <http://www.guardian.co.uk/environment/2011/dec/16/russia-canada-kyoto-protocol>

⁵*Id.*

⁶Durban Conference, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, ¶ 2, Draft decision -/CP.17 (2011), available at http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf.

⁷*Id.* ¶ 4.

⁸See COP to the UNFCCC, Cancun, Mex., Nov. 29-Dec. 10, 2010, *Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention*, Decision 1/CP.16 (Dec. 10, 2010), available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2>; see also COP to the UNFCCC, Cancun, Mex., Nov. 29-Dec. 10, 2010, *Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session*, Decision 1/CMP.6 (Dec. 10, 2010), available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>.

⁹See INT’L FIN. CORP. [IFC], POLICY ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY, (Jan. 1, 2012), available at

project-related GHG emissions during the design and operation of the project.”¹⁰ The IFC also reduced the threshold level at which clients have to report annual GHG emissions from 100,000 to 25,000 tons CO₂-equivalent.¹¹

Additionally, the World Bank Group’s Forest Carbon Partnership Facility (FCPF)¹² expanded in 2011. By the end of Fiscal Year 2011, the Readiness Fund (designed to help countries prepare for REDD+) received \$94.9 million, bringing the three-year total to \$181.1 million.¹³ This fund will help thirty-seven developing countries receive technical assistance to establish forest-related initiatives.

In October 2011, the Global Environment Facility (GEF) adopted the *GEF Policy on Agency Minimum Standards on Environmental and Social Safeguards* (GEF Safeguards Policy).¹⁴ Implementing agencies and accredited GEF Project Agencies must follow the GEF Safeguards Policy to use the GEF’s funds. As the financial mechanism for the UNFCCC, the GEF policy will apply to the GEF-administered Least Developed Countries Fund (LDCF) and Special Climate Change Fund (SCCF).¹⁵

B. Stratospheric Ozone

The Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer held its 23rd Meeting of the Parties in November 2011 in Bali, Indonesia. Parties reached agreement on several issues, including decisions on: (1) a \$450 million replenishment of the Multilateral Fund (MLF) for the period of 2012-2014 to help developing nations adopt alternatives to ozone depleting substances (ODS);¹⁶ (2) certain essential-use exemptions;¹⁷ (3) mitigation of ODS emissions from feedstock and process-agent uses; and (4) the treatment of ODS used to service ships.¹⁸

http://www1.ifc.org/wps/wcm/connect/7540778049a792dcb87efaa8c6a8312a/SP_English_2012.pdf?MOD=AJPERES.

¹⁰IFC, PERFORMANCE STANDARD 3, RESOURCE EFFICIENCY AND POLLUTION PREVENTION, ¶ 7 (Jan. 1, 2012) [hereinafter IFC, PERFORMANCE STANDARD 3], *available at* http://www1.ifc.org/wps/wcm/connect/25356f8049a78eeeb804faa8c6a8312a/PS3_English_2012.pdf?MOD=AJPERES.

¹¹*Id.* ¶ 8.

¹²*See* FOREST CARBON PARTNERSHIP FACILITY, <http://www.forestcarbonpartnership.org/fcp/> (last visited Jan. 18, 2012).

¹³FOREST CARBON PARTNERSHIP FACILITY, FY 2011 ANNUAL REPORT § 4.2.1 (Oct. 2011), *available at* http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Oct2011/FCPF_Carbon_AR_FINAL_10_3.pdf.

¹⁴GLOBAL ENVIRONMENTAL FACILITY (GEF), GEF POLICY ON AGENCY MINIMUM STANDARDS ON ENVIRONMENTAL AND SOCIAL SAFEGUARDS, GEF/C.41/10 (Oct. 11, 2011) [hereinafter GEF Safeguards Policy], *available at* http://www.thegef.org/gef/sites/thegef.org/files/documents/C.41.10.Rev_1.Policy_on_Environmental_and_Social_Safeguards.Final%20of%20Nov%2018.pdf.

¹⁵*Id.* ¶ 12.

¹⁶Meeting of the Parties to the Montreal Protocol, Bali, Indon., Nov. 21-25, 2011 [Montreal Protocol], XXIII/15: *2012-2014 Replenishment of the Multilateral Fund* ¶ 1 (2011).

¹⁷Montreal Protocol, XXIII/2: *Essential-Use Nominations for Controlled Substances for 2012* (2011); Montreal Protocol, XXIII/3: *Essential-Use Exemption for Chlorofluorocarbon-113 for Aerospace Applications in the Russian Federation* (2011); Montreal Protocol, XXIII/6: *Global Laboratory and Analytical-Use Exemptions* (2011).

¹⁸Montreal Protocol, XXIII/11: *Montreal Protocol Treatment of Ozone-Depleting Substances Used to Service Ships, Including Ships from Other Flag States* (2011).

The Parties deferred negotiations on proposals to amend the Montreal Protocol to include hydrofluorocarbons (HFCs), due to a lack of agreement. At issue was whether HFCs are within the mandate of the Montreal Protocol. Some Parties – led by China, India, and Brazil – argue they fall within the ambit of the Kyoto Protocol (on climate change) instead.¹⁹ Despite this setback, the 108 parties supporting the HFC phaseout in 2011 increased significantly from 91 in 2010 and 41 in 2009, indicating momentum for future action.²⁰

II. MARINE ENVIRONMENT AND CONSERVATION

A. *Marine Environmental Protection*

At its July 2011 meeting, the Marine Environmental Protection Committee (MEPC) of the International Maritime Organization (IMO), a specialized agency of the United Nations, adopted amendments to Annexes IV, V, and VI of the International Convention for the Prevention of Pollution from Ships (MARPOL).²¹ Amendments to Annex IV (regulating ship discharges of sewage) authorized the designation of “Special Areas.” Special Areas are a defined sea area where, for technical reasons, the adoption of special mandatory methods for prevention of sea pollution by sewage is required. The amendments further designated the Baltic Sea as the first “Special Area” established under the Annex.²²

Amendments to Annex V (regulating ship discharges of garbage) establish a more environmentally-protective regime for the discharge of ship-generated garbage by instituting a “reverse list” approach whereby the disposal of garbage into the sea is banned unless otherwise explicitly allowed. Exceptions to the general prohibition include food wastes and cargo residues, both of which must meet distance-from-land discharge limits. Additional notable amendments to Annex V include discharge requirements for animal carcasses and a safety exception allowing the discharge of fishing gear to protect the marine environment or for the safety of the ship or crew.²³

MEPC adopted two significant amendments to MARPOL Annex VI (regulating air pollution from ships). The first, and the issue that commanded the most attention, was the adoption of the first ever mandatory measures to reduce greenhouse gases from international shipping. The amendment requires new ships to adopt the Energy Efficiency Design Index and requires all ships to adopt the Ship Energy Efficiency Management Plan. The second set of amendments designates ocean waters proximate to Puerto Rico and the U.S. Virgin Islands as an “Emission Control Area” (ECA) to reduce allowable emissions of nitrous oxide, sulfur dioxide, and particulate matter. The treaty amendments to Annexes IV, V, and VI are expected to enter into force in January 2013, although the fuel sulfur limitations of the ECA will take effect one year later. At its July 2011 meeting, MEPC also agreed to designate the Strait of Bonifacio between Corsica and Sardinia as the thirteenth marine area to be designated a “Particularly Sensitive Sea Area” (PSSA).²⁴

On August 1, 2011, amendments to MARPOL Annex I (regulations for the

¹⁹Peter Menyasz, *Montreal Protocol Parties Fail to Agree On Phasing Out Use of Ozone-Depleting HFCs*, BNA ENV'T REPORTER, Dec. 2, 2011.

²⁰*Id.*

²¹International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, as modified by the 1978 Protocol, 34 U.S.T. 3407, 1340 U.N.T.S. 184 (on file with author).

²²*Marine Environment Protection Committee (MEPC) - 62nd Session: 11 to 15 July 2011*, IMO, <http://www.imo.org/MediaCentre/MeetingSummaries/MEPC/Pages/MEPC-62nd-session.aspx>.

²³*Id.*

²⁴*Id.*

prevention of pollution by oil) to ban the use or carriage of heavy grade oils (HGOs) by vessels in Antarctic waters (south of latitude 60 deg. S.) entered into force.²⁵ The amendment, which was adopted at the 60th Session of MEPC, increases protection of the marine environment in the Antarctic and the Southern Ocean from potential oil spills or releases.²⁶ The U.S.-proposed North American ECA, which includes most Atlantic and Coastal waters seaward to 200 nautical miles, also entered into force on August 1, 2011, although the fuel sulfur limitations will not take effect until August 2012.²⁷

B. *Marine Conservation*

In 2011, several actions were taken to improve international conservation of sharks. Domestically, the U.S. Shark Conservation Act of 2010,²⁸ signed into law in January 2011, prohibits the removal of fins at sea and the landing of fins or carcasses without the fins naturally attached in most U.S. fisheries.²⁹ It further calls on the Secretary of Commerce to support multilateral actions for the international conservation of sharks and requires the Secretary to identify nations that fish for sharks on the high seas without a regulatory program for the conservation of sharks comparable to that of the United States.³⁰ Nations identified under this statute that do not take appropriate corrective actions may be subject to trade-restrictive measures pursuant to the High Seas Driftnet Fisheries Moratorium Protection Act.³¹ In November 2011, the European Commission also proposed amendments to the European Union's shark finning regulation that would require all sharks be landed with their fins attached.³² Regional fisheries management organizations also took additional steps to conserve sharks, including the adoption of binding measures for oceanic whitetip sharks by the Inter-American Tropical Tuna Commission and for silky sharks by the International Commission for the Conservation of Atlantic Tunas (ICCAT).³³ However, proposals at

²⁵Press Release, IMO, Antarctic Fuel Oil Ban and North American ECA MARPOL Amendments Enter into Force on 1 August 2011 (July 29, 2011) [hereinafter Antarctic Press Release], <http://www.imo.org/MediaCentre/PressBriefings/Pages/44-MARPOL-amends.aspx>.

²⁶*Marine Environment Protection Committee (MEPC) - 60th Session: 22-26 March 2010*, IMO, <http://www.imo.org/MediaCentre/MeetingSummaries/MEPC/Pages/MEPC-60th-Session.aspx>.

²⁷Antarctic Press Release, *supra* note 24.

²⁸Shark and Fishery Conservation Act, Pub. L. No. 111-348, tit. I, 124 Stat. 3668 (2011), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ348/pdf/PLAW-111publ348.pdf>.

²⁹Shark and Fishery Conservation Act, Pub. L. No. 111-348, tit. I, 124 Stat. 3668, 3670 (2011), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ348/pdf/PLAW-111publ348.pdf>.

³⁰*Id.*

³¹High Seas Driftnet Fisheries Moratorium Protection Act, 16 U.S.C. § 1826k(c)(5) (2006), available at <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title16/pdf/USCODE-2010-title16-chap38-subchapIII-sec1826k.pdf>.

³²Press Release, Eur. Comm'n, Fisheries: Commission Proposes Full Ban on Shark Finning at Sea (Nov. 21, 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1384&format=HTML&aged=0&language=EN&guiLanguage=en>.

³³Inter-Am. Tropical Tuna Comm'n [IATTC], *Resolution Prohibiting the Retention of Oceanic Whitetip Sharks*, C-11-10 (July 1, 2011); Int'l Comm'n for the Conserv'n of Atl. Tuna [ICCAT], *Recommendation by ICCAT on the Conservation of Silky Shark Caught in Association with ICCAT Fisheries*, Rec. 11-08 (Nov. 19, 2011).

the 2011 ICCAT annual meeting to conserve porbeagle sharks and require sharks be landed with fins naturally attached were not adopted.³⁴ At the international level, the United Nations General Assembly, through its 2011 Sustainable Fisheries Resolution, renewed its calls for actions to conserve sharks, including measures to prohibit finning.³⁵

ICCAT also adopted several binding measures for the conservation and management of other target and bycatch species, as follows: (1) a comprehensive bycatch reporting scheme; (2) requirements for vessels to employ measures to mitigate seabird bycatch; and (3) an expanded time/area closure in the Gulf of Guinea off West Africa to protect bigeye and yellowfin tunas.³⁶ Despite these adoptions, some still consider ICCAT did not go far enough to protect these tuna species.³⁷ In addition, ICCAT adopted new measures to help combat illegal, unreported, and unregulated (IUU) fishing. For example, ICCAT members are required to report information on bi-national access agreements that allow for one nation's vessels to fish for ICCAT species in waters of another nation.³⁸ This measure is the first of its kind to be adopted by a regional fisheries management organization.

2011 also saw progress towards establishment of comprehensive port State controls to combat IUU fishing. In November 2011, President Obama submitted to the Senate, for its advice and consent, the 2009 UN Food and Agriculture Organization (FAO) Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.³⁹ Also in 2011, Norway, Sri Lanka and the European Union deposited their instruments of ratification, acceptance, or approval for the Port State Measures agreement.⁴⁰ In March 2011 a port State scheme modeled on the FAO agreement entered into force for members of the Indian Ocean Tuna Commission.⁴¹

³⁴Juliet Eilperin, *International Negotiators Rule on Shark Protection Measures*, WASH. POST, Nov. 19, 2011, http://www.washingtonpost.com/national/health-science/international-negotiators-rule-on-shark-protection-measures/2011/11/19/gIQAaznGcN_story.html.

³⁵G.A. Res. 66/68, ¶ 15, U.N. Doc. A/RES/66/68 (Dec. 6, 2011).

³⁶See Statement from Russell F. Smith III, Deputy Asst. Sect'y for Int'l Fisheries, NOAA, U.S. Priorities for Fishermen, Science and Stewardship Achieved at International Meeting, Nov. 21, 2011 [hereinafter Statement from NOAA], *available at* http://www.noaanews.noaa.gov/stories2011/20111121_iccat.html.

³⁷See Statement from Russell F. Smith III, Deputy Asst. Sect'y for Int'l Fisheries, NOAA, U.S. Priorities for Fishermen, Science and Stewardship Achieved at International Meeting, Nov. 21, 2011 [hereinafter Smith Statement], *available at* http://www.noaanews.noaa.gov/stories2011/20111121_iccat.html. Press Release, PEW Env't Grp., ICCAT: Progress, Yes. Success, No. (Nov. 19, 2011), <http://www.pewenvironment.org/news-room/press-releases/iccat-progress-yes-success-no-85899366676>.

³⁸See Smith Statement, *supra* note 34.

³⁹Press Release, U.S. Dep't of State, President Obama Submits Port State Measures Agreement to Senate (Nov. 14, 2011), <http://www.state.gov/r/pa/prs/ps/2011/11/177154.htm>.

⁴⁰*Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, FOOD AND AGRIC. ORG. [FAO], <http://www.fao.org/Legal/treaties/037s-e.htm> (last visited Jan 18, 2012).

⁴¹See Indian Ocean Tuna Comm'n [IOTC], *Implementation of IOTC Port State Measures Resolution*, IOTC 2011/35 (May 12, 2011), *available at* [http://www.iotc.org/files/circulars/2011/35-11\[E\].pdf](http://www.iotc.org/files/circulars/2011/35-11[E].pdf).

A. *Transboundary Movement of Hazardous Waste*

In October 2011, the tenth Conference of the Parties (COP 10) to the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Basel Convention)⁴² convened in Cartagena, Colombia. It saw the adoption of numerous significant decisions.

First, the Parties removed a considerable barrier to the commencement of the “Ban Amendment,” which would ban the export of hazardous waste for final disposal and recycling from Annex VII countries (OECD, EU and Liechtenstein) to developing countries.⁴³ The amendment was first adopted in 1995,⁴⁴ but it was never effectuated because of a disagreement as to the interpretation of the requirements for amending the Basel Convention.⁴⁵ In October 2011, the Basel Parties agreed to allow the ban to take effect on its 68th ratification (70 nations have already ratified the ban, which amends the Basel Convention).⁴⁶

The Parties also considered whether the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships establishes an equivalent level of control and enforcement as that established under the Basel Convention.⁴⁷ Concern was raised that the Hong Kong Convention does not adequately address the movement of ships to developing countries for disposal or recycling, and COP 10 acknowledged that the “Convention should continue to assist countries to apply the Basel Convention as it relates to ships.”⁴⁸

⁴²Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), Mar. 22, 1989, 1673 U.N.T.S. 125, 28 I.L.M. 65, available at <http://www.basel.int/text/con-e-rev.pdf>.

⁴³COP to the Basel Convention, Cartagena, Colom., Oct. 17-21, 2011 (Basel Convention COP-10), *Draft decision BC-10/[]: Indonesian-Swiss Country-Led Initiative to Improve the Effectiveness of the Basel Convention Submission*, U.N. DOC. UNEP/CHW.10/CRP.25 (Oct. 20, 2011) [hereinafter *Draft Ban Amendment Decision*], available at http://basel.int/cop10/data/COP10-CRP/documents/chw10_crp25_e_draft%20decision%20CLI.pdf.

⁴⁴COP to the Basel Convention, Geneva, Switz., *Decision III/1: Amendment to the Basel Convention*, (Sept. 22, 1995), available at <http://www.basel.int/Implementation/LegalMatters/BanAmendment/tabid/1484/Default.aspx>.

⁴⁵The breakthrough was brokered by a diplomatic working group known as the Country Led Initiative. It was decided that the Ban Amendment will go into force when 68 of the 90 countries that were Parties to the Convention in 1995 ratify the amendment. *Draft Ban Amendment Decision*, *supra* note 40. As of December 2011, 70 of the 90 countries had ratified the amendment.

⁴⁶*Historic Agreement Ends 15 Year Deadlock over Banning North-South Movements of Hazardous Waste*, EARTH SUMMIT 2012 (Nov. 14, 2011, 4:42 PM), <http://www.earthsummit2012.org/news/historic-agreement-ends-15-year-deadlock-over-banning-north-south-movements-of-hazardous-waste>.

⁴⁷See generally IMO, *Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships*, IMO DOC. SR/CONF/45 (May 19, 2009), available at <http://ec.europa.eu/environment/waste/ships/pdf/Convention.pdf>.

⁴⁸Basel Convention COP-10, *Draft decision BC-10/[]: Environmentally sound dismantling of ships*, U.N. DOC. UNEP/CHW.10/CRP.19 (October 20, 2011), available at http://basel.int/cop10/data/COP10-CRP/documents/chw10_crp19_e_draft%20decision%20ship%20dismantling.pdf.

Finally, COP 10 saw the adoption of the Cartagena Declaration on the Prevention, Minimization and Recovery of Hazardous and Other Wastes. The Declaration emphasizes the important role of the Basel Convention in the prevention, reduction and minimization of hazardous wastes at the source, in addition to the Conference's role in controlling the movement of wastes and their disposal.⁴⁹

The newly revised IFC Performance Standards require clients to avoid generating hazardous and non-hazardous waste, and, if that is not possible, to either reuse the material in a safe way or to dispose of it in an environmentally sound manner. Disposal of hazardous waste must adhere to national and international laws and standards, including the Basel Convention. Moreover, the client remains responsible for minimizing the hazardous materials and wastes involved in projects and ensuring their proper disposal.⁵⁰

B. Chemicals

Europe's regulation of chemicals (under its REACH law) and e-waste (under its Directives on Waste Electrical and Electronic Equipment (WEEE)) continued to evolve by increasing the scope and potential complexity. The EU is adding substances to the list of hazardous substances for disclosure-reduction under its Reduction of Hazardous Substance law (RoHS), and it is expanding WEEE-RoHS to encompass spare parts.⁵¹ The EU is delegating more responsibility to the Member States thereby providing the opportunity for Member States to adopt different, possibly stricter, RoHS laws. Stricter RoHS laws could potentially affect trade.⁵² In addition to European developments, the newly created GEF Safeguards Policy requires its agencies to have "safe, effective, and environmentally sound pest management," including preventing the use of "pesticides and other chemicals specified as persistent organic pollutants identified under the Stockholm Convention."⁵³

C. International Regulation of Agricultural Biotechnology

As biotech crops continue to increase worldwide acreage,⁵⁴ new national and international regulatory regimes are developing with significant implications for global agriculture. On the national level, new regulatory approval requirements for biotech crops (both for planting and food-feed-processing import approvals) are being adopted in more

⁴⁹Basel Convention COP-10, *Draft Cartagena Declaration on the Prevention, Minimization and Recovery of Hazardous Wastes and Other Wastes*, U.N. DOC. UNEP/CHW.10/CRP.3/Rev.3 (October 20, 2011), available at http://basel.int/cop10/data/COP10-CRP/documents/chw10_crp03rev3_e_draft%20cartagena%20declaration%20final.pdf.

⁵⁰IFC, Performance Standard 3, *supra* note 9, ¶ 12.

⁵¹Press Release, Eur. Comm'n, Environment: Fewer Risks from Hazardous Substances in Electrical and Electronic Equipment (July 20, 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/912&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁵²Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment, 2011 O.J. (L 174/88) 2, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:174:0088:0110:EN:PDF>.

⁵³GEF Safeguards Policy, *supra* note 13, app. A, ¶¶ 46, 49.

⁵⁴CLIVE JAMES, GLOBAL STATUS OF COMMERCIALIZED BIOTECH/GM CROPS: 2010, ISAAA BRIEF NO. 42 (2010), available at <http://www.isaaa.org/resources/publications/briefs/42/default.asp>.

nations. Trade may be coincidentally disrupted when approvals are delayed pending review of research dossiers.

Internationally, two protocols may enter into force as soon as 2011 or early 2012, each with significant implications for agriculture. First, the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety (NKLS Protocol) addresses liability relating to biodiversity harm caused by “living modified organisms,” including crops using recombinant DNA (rDNA) breeding (biotech crops).⁵⁵ As of January 2012, this treaty had 37 ratifications, three shy of the requirement for entry into force.⁵⁶

While more countries are joining the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Access Protocol),⁵⁷ new related domestic laws are also taking effect. For example, Colombia issued a WTO notice relating to its new biosafety law, which permits coordination with international standards for keeping shipments contained in transit.⁵⁸ Similarly, Viet Nam issued its biosafety law, which has a unique provision to permit faster approval where five other nations have approved a genetic event.⁵⁹

IV. NATURAL RESOURCES

A. *Water Resources*

The *UN Convention on the Law of Non-Navigational Uses of International Watercourses*⁶⁰ obtained only twenty ratifications during the decade following approval by the General Assembly in May 1997; thereafter, the pace increased with nine more nations ratifying during the following four years. The convention now needs only six more ratifications to reach the required thirty-five to enter into force.⁶¹

Controversies over dams continue to play out in 2011. In addition to building dams on the upper Mekong to the dismay of downstream states, China has undertaken to build dams on the Irrawaddy River in Myanmar to obtain hydro-electric power. The

⁵⁵Convention on Biological Diversity [CBD], Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, Oct. 15, 2010, *available at* http://bch.cbd.int/protocol/NKL_text.shtml.

⁵⁶CBD, Parties to the Protocol and Signature and Ratification of the Supplementary Protocol, <http://bch.cbd.int/protocol/parties/#tab=1> (last visited Jan. 16, 2012).

⁵⁷CBD, Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, June 5, 1992, *available at* <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

⁵⁸Notice, WTO, *Colombia Ministry of Social Welfare, Resolution No. 4254* (Oct. 12, 2011) WTO No. G/TBT/N/COL/155/Add.2, <http://www.bis.org.in/sf/Oct2011/GTbtn10COL155A2.doc>.

⁵⁹GUILLAUME P. GRUERE, INT’L FOOD POL’Y RES. INST., ASYNCHRONOUS APPROVALS OF GM PRODUCTS AND THE CODEX ANNEX: WHAT LOW LEVEL PRESENCE POLICY FOR VIETNAM? (2011), *available at* <http://www.agritrade.org/documents/LLPVietnam.pdf>.

⁶⁰Convention on the Law of Non-Navigational Uses of International Watercourses, May 21 1997, UN DOC. No. A/51/869, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf.

⁶¹Status Report, UN, *Convention of the Law of the Non-Navigational Uses of International Watercourses*, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=2&mtdsg_no=XXVII-12&chapter=27&lang=en#Participants (last visited Jan 19, 2012).

Myanmar projects provoked significant local opposition.⁶² The resistance helped bring about major political change in Myanmar, and the government cancelled the project on September 30.⁶³ China expressed outrage, threatening legal action, but ultimately the countries agreed to “properly settle matters.”⁶⁴ In a dispute between India and Pakistan over the Kishanganga dam, the International Court of Arbitration issued an interim decision that India could proceed with its preparatory work but barred any work that would interfere with the flow of the river.⁶⁵ On January 7, 2011, Syria and Turkey signed a memorandum of understanding to build a “friendship dam” on the Orontes (Asi) River along their border, with the benefits to be shared equally between the two states.⁶⁶

After more than a decade of inconclusive negotiations among the ten states sharing the Nile basin,⁶⁷ five upper-basin states—Ethiopia, Kenya, Rwanda, Tanzania, and Uganda—signed a draft agreement to create a “Permanent Nile River Commission” to manage the river, promising not to “significantly affect” the rights of other basin states but no longer recognizing an Egyptian veto over upriver projects.⁶⁸ When, on February 28, 2011, Burundi became the sixth state to sign the agreement, the way was open for the several parliaments to ratify the agreement and effectuate it.⁶⁹ The Egyptian government that took power in the spring of 2011 indicated the transition would not change Egypt’s

⁶²*Burmese Dams Fuel Ethnic Uprisings*, VANCOUVER SUN, June 20, 2011, at F3; Brahma Chellaney, *Building Resistance to China’s Dam*, WASH. TIMES, Oct. 6, 2011, at B4, available at <http://www.washingtontimes.com/news/2011/oct/6/building-resistance-to-chinas-dams/?page=all>.

⁶³Thomas Fuller, *Myanmar Backs down, Suspending Dam Project*, N.Y. TIMES, Oct. 1, 2011, at A4, available at <http://www.nytimes.com/2011/10/01/world/asia/myanmar-suspends-construction-of-controversial-dam.html>.

⁶⁴Brian Spegele, *Chinese Official Threatens Myanmar*, WALL STREET JOURNAL, Oct. 4, 2011, available at <http://online.wsj.com/article/SB10001424052970203791904576608960074071014.html>; Keith Bradsher, *China and Myanmar to “Settle” on Myitsone Dam*, N.Y. TIMES, Oct. 11, 2011, at 14, available at <http://www.nytimes.com/2011/10/11/world/asia/china-and-myanmar-to-settle-on-myitsone-dam.html>.

⁶⁵Afia Ambreen, *Water: New Conflict Generator in SA*, PAK. OBSERVER, Oct. 6, 2011, <http://pakobserver.net/detailnews.asp?id=118111>; Ravish Tiwari, *Pak Yet to Win, India Positive But Reluctant to Assert*, INDIAN EXPRESS, Oct. 3, 2011, <http://www.indianexpress.com/news/Pak-yet-to-win--India-positive-but-reluctant-to-assert/854801>.

⁶⁶*Turkey, Syria to Build ‘Friendship Dam’ on Border River*, HÜRRİYET DAILY NEWS, Jan. 7, 2011, <http://www.hurriyetdailynews.com/n.php?n=turkey-syria-to-build-8216friendship8217-dam-2010-01-07>.

⁶⁷The talks were inconclusive because of Egypt’s insistence that all existing uses must be protected, a proposition that was unacceptable to the other basin states. See Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a ‘Water Security’ Paradigm: Flight into Obscurity or a Logical Cul-de-Sac?*, 21 EUR. J. INT’L L. 421, 422 (2010), available at <http://www.ejil.org/pdfs/21/2/2014.pdf>.

⁶⁸Walter Menya, *State Signs Nile Basin Pact*, THE NATION, May 19, 2010, <http://allafrica.com/stories/201005190927.html>.

⁶⁹Ben Simon, *Treaty Denying Egypt Nile Veto Set for Ratification*, DAILY NEWS EGYPT, Mar. 1, 2011, <http://www.thedailynewsegypt.com/egypt/treaty-denying-egypt-nile-veto-set-for-ratification.html>.

stance, and it sought to strengthen ties with Sudan in opposing the agreement.⁷⁰ The emergence of South Sudan as yet another basin state further complicates the issues in this region because it sits upon some of the most sensitive reaches of the river.⁷¹

The seemingly interminable controversy between Canada and the United States over the Devils Lake outlet seemed to move toward resolution when the parties finally referred the matter for study by the International Joint Commission three years ago. The Commission regulates transboundary waters for Canada and the United States, and its findings, released in October 2011, indicate any risks to downstream fish and fisheries are low.⁷² Regarding the other U.S. border, the International Boundary and Water Commission signed a new minute on December 17, 2010 to authorize Mexico to defer delivery from the Colorado River of 260,000 ac-ft. per year for three years to allow repairs of earthquake damage to its water works.⁷³ Mexico will recover the deferred water beginning in 2014.

On November 18, 2010, Costa Rica instituted proceedings before the International Court of Justice against Nicaragua alleging unlawful appropriation of Costa Rican territory based on a disputed reading of an 1897 arbitral award demarcating the border and allocating water rights according to the shifting Río San Juan. The Court issued an order setting provisional measures on March 8, 2011 and awaits each country's memorials.⁷⁴

The World Bank Group has also implemented measures to conserve global water resources. Under the revised IFC Performance Standards, if a project has the potential to consume a significant quantity of water, then the client has to take steps to "avoid or reduce water usage so that the project's water consumption does not have significant adverse impacts on others."⁷⁵

B. *Biological Resources and Wildlife*

The rhinoceros has been prominently featured in the news this year. In November, the International Union for the Conservation of Nature (IUCN) declared the West African subspecies of black rhino (*Diceros bicornis longipes*) extinct.⁷⁶ In addition, rampant

⁷⁰*Egypt Seeks Coordination with Sudan on Nile Waters*, SUDAN TRIB., Aug. 11, 2011, <http://www.sudantribune.com/Egypt-seeks-coordination-with,39813>; Heba Fahmy, *No drastic, immediate change in Egypt's foreign relations, say analysts*, DAILY NEWS EGYPT, Mar. 29, 2011, <http://www.thedailynewsegypt.com/egypt/no-drastic-immediate-change-in-egypts-foreign-relations-say-analysts.html>.

⁷¹See Carol Gachiengo, *Fighting over the Nile Could Drown Us All*, EAST AFRICAN, Jan. 31, 2011, <http://allafrica.com/stories/201101311470.html>.

⁷²Press Release, IJC, IJC Releases Report on Fish Parasites and Pathogens in Devils Lake, the Sheyenne and Red Rivers, and Lake Winnipeg (Oct. 27, 2011), http://www.ijc.org/rel/news/2011/111027_e.htm.

⁷³International Boundary and Water Commission [IBWC], *Adjustment of Delivery Schedules for Water Allotted to Mexico for the Years 2010 Through 2013 as a Result of Infrastructure Damage in Irrigation District 014, Rio Colorado, Caused by the April 2010 Earthquake in the Mexicali Valley, Baja California*, Minute No. 318 (Dec. 17, 2010), available at www.ibwc.gov/Files/Minutes/Min_318.pdf.

⁷⁴Certain Activities Carried out by Nicaragua in the Border Region (Costa Rica v. Nicar.), Order No. 150 (Mar. 8, 2011), available at <http://www.icj-cij.org/docket/files/150/16324.pdf>.

⁷⁵IFC, PERFORMANCE STANDARD 3, *supra* note 9, ¶ 9.

⁷⁶See *Diceros bicornis*, IUCN RED LIST OF THREATENED SPECIES, <http://www.iucnredlist.org/apps/redlist/details/6557/0> (last visited Jan. 15, 2012); see also

poaching in South Africa—driven largely by Asian markets’ demand for powdered rhino horn and its alleged medicinal properties—has taken a severe toll on South Africa’s white rhino populations. As of November, poachers have killed 341 rhinos far surpassing the record 333 rhinos poached in 2010.⁷⁷ In response to these dire statistics and to the escalating value of powdered rhino horn, the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) formed a working group to identify measures to reduce the impact of illegal trade in rhino horn and conserve the species.⁷⁸

In other species-specific developments, non-governmental organizations obtained a certification from the Department of Commerce under the U.S. Pelly Amendment⁷⁹ that Iceland was undermining the effectiveness of the International Whaling Commission’s commercial whaling moratorium by continuing its whale hunt and trading endangered fin whale parts and products.⁸⁰ President Obama chose not to impose trade sanctions but instead endorsed a number of non-trade measures, including diplomatic engagement to encourage Iceland to end its whaling program.⁸¹

The tenth meeting of the Conference of the Parties to the Convention on Migratory Species (CMS) convened in late November in Bergen, Norway. Norway, as host, set the stage for the meeting by withdrawing its reservations for the great white shark (*Carcharodon carcharias*) on CMS Appendix I and all species of whales and sharks on CMS Appendix II, including great white and basking sharks and various cetaceans.⁸² The Parties adopted Ecuador’s proposal to list the giant manta ray (*Manta birostris*) on Appendices I and II.⁸³ This act represents the first international protection for manta rays. The Parties also added several bird species, including the Saker falcon (*Falco cherrug*), the red-footed falcon (*Falco vespertinus*), the far-eastern curlew (*Numenius madagascariensis*), and the bristle-thighed curlew (*Numenius madagascariensis*) to Appendix I.⁸⁴

International Financial Institutions have also taken significant measures to protect biological resources and wildlife. As the financial mechanism for the Convention on Biological Diversity, the GEF Safeguards Policy requires its partner agencies to protect natural habitats to help promote biodiversity. Under the Policy, the GEF “shall not

Daniel Boettcher, *Western Black Rhino Declared Extinct*, BBC NEWS, Nov. 9, 2011, <http://www.bbc.co.uk/news/science-environment-15663982>.

⁷⁷*South Africa Record for Rhino Poaching Deaths*, BBC NEWS, Nov. 3, 2011, <http://www.bbc.co.uk/news/world-africa-15571678>.

⁷⁸See Convention on Int’l Trade in Endangered Species of Wild Fauna and Flora [CITES], *Executive Summary*, at 1, SC61 Sum. 10 (Rev. 1) (Aug. 19, 2011), available at <http://www.cites.org/eng/com/sc/61/sum/E61-ExeSum10.pdf>.

⁷⁹Fisherman’s Protective Act of 1967, 22 U.S.C. § 1971-1980, amended by 22 U.S.C. § 1978 (Pelly Amendment), available at <http://www.gpo.gov/fdsys/pkg/USCODE-2010-title22/pdf/USCODE-2010-title22-chap25-sec1978.pdf>.

⁸⁰Letter from Gary Locke, U.S. Sec’y of Com., to President Barack Obama, U.S. President (July 19, 2011), available at http://www.noaa.gov/stories2011/pdfs/pellygrantsignedletter_final.pdf.

⁸¹See Press Release, Office of the Press Sec’y, Message from the President to Congress (Sept. 15, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/15/message-president-congress>.

⁸²International Institute for Sustainable Development [IISD], *Summary Report: Tenth Meeting of the Conference of the Parties to the Convention on Migratory Species*, EARTH NEGOTIATIONS BULL., Nov. 28, 2011, at 1, available at <http://www.iisd.ca/download/pdf/enb1846e.pdf>.

⁸³*Id.* at 12.

⁸⁴*Id.* at 13.

finance activities that degrade or convert critical natural habitats . . . [including] the introduction or use of potentially invasive, non-indigenous species.”⁸⁵ Under *Minimum Standard 2: Protection of Natural Habitats*, agencies are required to promulgate policies advancing “a precautionary and ecosystem approach to natural resource conservation and management,” avoiding “significant conversion or degradation of critical natural habitats,” and not “contraven[ing] applicable international environmental agreements.”⁸⁶

The IFC also modified its protections for natural resources in its revised Performance Standard 6.⁸⁷ IFC introduced the use of a mitigation hierarchy and the use of biodiversity offsets to ensure no net loss of biodiversity.⁸⁸ IFC clients are expected to make efforts to avoid negative impacts on priority ecosystem services and, if avoidance is impossible, to mitigate them.⁸⁹

Additionally, the IFC is trying to protect biodiversity by implementing higher standards for evaluating supply chains, especially when purchased products are coming from “regions where there is a risk of significant conversion of natural and/or critical habitats.”⁹⁰ Furthermore, the free, prior, and informed consent of indigenous peoples is required for any proposed projects that may adversely impact natural resources on their lands.⁹¹

V. TRADE AND THE ENVIRONMENT

With the World Trade Organization (WTO) negotiations on environmental issues largely stalled along with the rest of the Doha Development Agenda, most activity on trade and the environment took place at the regional level or in dispute settlement.

In October 2011, U.S. Congress approved, and President Obama signed, bilateral free trade agreements with Colombia, Panama, and South Korea.⁹² Each of these agreements contains an environment chapter establishing binding obligations, subject to dispute settlement, designed to ensure the parties do not lower their environmental standards or derogate from their environmental laws for the purpose of encouraging trade and investment.⁹³ These trade agreements, like the United States-Peru Trade Promotion Agreement which entered into force in 2009, break relatively new ground by requiring

⁸⁵ GEF Safeguards Policy, *supra* note 13, ¶ 5.

⁸⁶ *Id.*, Appendix A, ¶¶ 11-21.

⁸⁷ See generally IFC PERFORMANCE STANDARD 6, BIODIVERSITY CONSERVATION AND SUSTAINABLE MANAGEMENT OF LIVING NATURAL RESOURCES (Jan. 1, 2012), *available at* http://www1.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability+framework/2012+edition/performancestandard6.

⁸⁸ *Id.* ¶ 10.

⁸⁹ *Id.* ¶ 25.

⁹⁰ *Id.* ¶ 30.

⁹¹ IFC, PERFORMANCE STANDARD 7, INDIGENOUS PEOPLES, ¶ 13-15 (Jan. 1, 2012), *available at* <http://www.ifc.org/ifcext/policyreview.nsf/Content/PerformanceStandard7>.

⁹² See Press Release, Off. of the U.S. Trade Rep., Statement by U.S. Trade Representative Ron Kirk on Presidential Signature of Trade Legislation (Oct. 21, 2011), <http://www.ustr.gov/about-us/press-office/press-releases/2011/october/statement-us-trade-representative-ron-kirk-preside>.

⁹³ Free Trade Agreement, U.S.-Colom., Ch. 18, Nov. 22, 2006, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file_644_10192.pdf; Free Trade Agreement, U.S.-Korea, Ch. 20, June 30, 2007, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file852_12719.pdf; Trade Promotion Agreement, U.S.-Pan., Ch. 17, June 28, 2007, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file314_10400.pdf.

parties to adopt and implement laws to fulfill their obligations under seven multilateral environmental agreements.⁹⁴

Forward-looking environmental provisions are also anticipated for the Trans-Pacific Partnership (TPP), a new multilateral regional free trade agreement under negotiation between the United States and eight other countries in the Pacific region.⁹⁵ Certain participants in the negotiation and non-governmental organizations have called for addressing several “21st century” environmental issues through the TPP, including environmental goods and services, oceans and marine governance, wildlife trade, biodiversity, and climate change.⁹⁶

On September 15, 2011, the WTO dispute panel, established in Mexico’s challenge of the U.S. “dolphin-safe tuna” label scheme, issued its final report. It found the U.S. measures to be more trade restrictive than necessary to achieve their legitimate objective, in violation of Article 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT).⁹⁷ However, the panel rejected Mexico’s claims that the measures violate Articles 2.1 and 2.4 of the TBT Agreement, and exercised judicial economy in declining to examine Mexico’s claims under Articles I and III of the General Agreement on Tariffs and Trade.⁹⁸ As of December 28, 2011, the panel report has not been submitted for adoption by the WTO Dispute Settlement Body. Meanwhile, the U.S.-initiated dispute under the North American Free Trade Agreement (NAFTA) challenging Mexico’s refusal to transfer its “dolphin-safe” labeling dispute from the WTO to the NAFTA dispute forum remains stalled at the dispute panel composition stage.⁹⁹

VI. INTERNATIONAL ENVIRONMENTAL LITIGATION

In October 2011, the Supreme Court granted certiorari in *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel*),¹⁰⁰ a case that raises a question of the scope of liability under the Alien Tort Statute (ATS) and the availability of remedies against corporations under the ATS. The ATS was enacted as part of the Judiciary Act of 1789, and permits suit by

⁹⁴U.S.-Peru Trade Promotion Agreement, Feb. 1, 2009, available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa>.

⁹⁵See generally Office of the U.S. Trade Rep., Trans-Pacific Partnership, <http://www.ustr.gov/tpp> (last visited Nov. 22, 2011).

⁹⁶See Heike Manning, N.Z. Ministry of Foreign Affairs and Trade, *TPP and the Environment*, July 11, 2011, available at <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/1-TPP-Talk/0-TPP-talk-11-July-2011.php>; *Hearing Before the Senate Subcommittee on International Trade, Customs and Global Competitiveness*, 111th Cong. 6 (2010) (written testimony of Mark Linscott, Assistant U.S. Trade Rep. for Env’t and Nat. Res.), available at <http://finance.senate.gov/imo/media/doc/071410mltest.pdf>; Letter from Michael F. Hirshfield, Sr. Vice Pres. and Chief Scientist, OCEANA, to Carmen Suro-Bredie, Chairman, Off. of the U.S. Trade Rep. (Jan. 25, 2010), available at http://na.oceana.org/sites/default/files/TPP_Comment_Letter_Jan2010_FINAL.pdf.

⁹⁷Panel Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm.

⁹⁸*Id.*

⁹⁹*Disputes Roundup: Tuna Appeal at WTO Likely; Animal Welfare Groups Petition Obama*, 15 BRIDGES WKLY. TRADE NEWS DIG., no. 39, Nov. 16, 2011, available at <http://ictsd.org/i/news/bridgesweekly/118593>.

¹⁰⁰*Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).

foreign nationals for violations of the law of nations or treaties.¹⁰¹ There are a significant number of ATS cases pending in United States courts, many brought against corporations in connection with resource development in developing countries; often involving an environmental dimension. In the *Kiobel* case, members of the Ogoni people of Nigeria, now residing in the United States, brought suit alleging Shell Oil engaged in a range of human rights violations in the course of oil development in Nigeria. The Second Circuit ruled (over a vigorous dissent) that remedies are not available under the ATS against corporations, and that suits may only be brought against natural persons.¹⁰² The Supreme Court has now granted certiorari on that question along with a threshold jurisdictional issue.

Litigation continued in multiple fora between Ecuador and Chevron related to claims by indigenous groups that Chevron's activities in Ecuador caused severe environmental harm. In early 2011, an Ecuadorian court awarded \$8.6 billion against Chevron.¹⁰³ In February 2011, a panel of the Permanent Court of International Arbitration issued an order requiring Ecuador to "take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition" of that judgment, pending further orders from the tribunal.¹⁰⁴ Chevron has also sought to block enforcement of the judgment in a proceeding in United States court. A district court decision enjoining enforcement was subsequently vacated pending resolution of an appeal to the Second Circuit.¹⁰⁵ In a separate proceeding, Chevron sued plaintiffs on racketeering claims.¹⁰⁶

Finally, a group of airlines brought a challenge before the European Court of Justice (ECJ) to the inclusion of non-European airlines in the European Union's greenhouse gas trading regime. The airlines alleged the regime was inconsistent with the freedom of navigation and with applicable treaties, and that such extraterritorial regulation is barred by principles of customary international law. In December 2011, the Court upheld the application of the trading regime, rejecting these claims.¹⁰⁷ Commencing January 1, 2012, international airlines operating in Europe must now reduce their carbon emissions or purchase credits under the EU's cap-and-trade regime.¹⁰⁸

¹⁰¹ 28 U.S.C. § 1350, available at <http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partIV-chap85-sec1350.pdf>.

¹⁰² *Kiobel*, 621 F.3d at 148-49.

¹⁰³ Simon Romero & Clifford Krauss, *Ecuador Judge Orders Chevron to Pay \$9 Billion*, N.Y. TIMES, Feb. 14, 2011, http://www.nytimes.com/2011/02/15/world/americas/15ecuador.html?_r=1.

¹⁰⁴ *Chevron Corp. v. Ecuador*, PCA Case No. 2009-23 (Perm. Ct. Arb. 2011) (Order for Interim Measures), available at http://www.iisd.org/pdf/2011/procedural_order8_chevron_ecuador.pdf.

¹⁰⁵ *Chevron Corp. v. Naranjo*, No. 11-1150-CVL, 2011 WL 4375022, (2d. Cir. 2011), available at <https://www.earthrights.org/sites/default/files/documents/Chevron-v-Donziger-appeal-order-lifting-injunction.pdf>.

¹⁰⁶ *Chevron Corp. v. Donziger*, No. 11-CV-0691, 768 F. Supp. 2d 581 (S.D.N.Y. filed Feb. 1, 2011), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2011cv00691/374606/181/0.pdf?ts=1299595445>.

¹⁰⁷ *Case C-366/10, Air Transp. Ass'n of Am. v. Sec'y of State for Energy and Climate Change* (Dec. 21, 2011), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=117193&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=438>.

¹⁰⁸ *Id.*