

International Environmental Law

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I. Atmosphere and Climate

A. CLIMATE

The parties to the U.N. Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol met in Copenhagen in December 2009 following an intensive year of negotiations. This meeting included the largest gathering of heads of state in the history of the United Nations.¹ The UNFCCC parties failed to reach an agreement, however,

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1. Press Release, United Nations, Copenhagen United Nations Climate Change Conference Ends with Political Agreement to Cap Temperature Rise, Reduce Emissions and Raise Finance (Dec. 19, 2009), *available at* http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/pr_cop15_20091219.pdf.

within the two Ad Hoc Working Groups that had been negotiating over both a long-term cooperative action under the convention (AWG-LCA), and further commitments for developed country parties under the Kyoto Protocol (AWG-KP). Instead, both sets of negotiations were extended for another year, and the adoption of the Copenhagen Accord reflected that agreed outcome. The Conference of the Parties took note of the Accord, which was drafted in the closing hours of the Copenhagen meeting by a small group of heads of state,² but was not adopted nor intended to be legally binding.³

The Copenhagen Accord calls for Annex I (developed) countries to submit information on their 2020 emissions targets by January 31, 2010. It calls on non-Annex I (developing) countries to submit information on their planned mitigation actions by the same date. Developed countries are to provide new and additional financing “approaching [US\$]30 billion for the period 2010-2012” with a collective goal of US\$100 billion a year by 2020. The Accord contemplates the creation of a Copenhagen Green Climate Fund, a Technology Mechanism, a mechanism to address the role of forests (REDD-plus), and a High Level Panel to consider potential sources of climate funding. A review of the Accord’s implementation is to be performed by 2015.⁴

Deep divisions remain among the parties on a number of issues, including the legal architecture for the ultimate outcome of negotiations. Some parties favor an amendment to the Kyoto Protocol and either a parallel protocol⁵ or series of COP Decisions for the AWG-LCA outcome, while others favor a single treaty outcome.⁶ The emergence of the Copenhagen Accord not only leaves these architectural issues unresolved but also adds another variable to the equation for the post-2012 climate regime.

As noted in last year’s update, the Kyoto Protocol excludes emissions from aviation and marine bunker fuels. Efforts to address these emissions under the International Civil Aviation Association and International Maritime Organization (IMO) have remained voluntary thus far.⁷ At its July 2009 meeting, the MEPC finalized guidelines on a voluntary energy efficiency design index (EEDI) for new ships, an operational indicator for existing ships, and a ship efficiency management plan.

2. See U.N. Framework Convention on Climate Change [UNFCCC], Conference of the Parties, Decision CP.15, advance unedited version (Dec. 19, 2009), available at http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf.

3. See, e.g., The White House, Office of the Press Secretary, Remarks by the President During Press Availability in Copenhagen (Dec. 18, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-during-press-availability-copenhagen>.

4. UNFCCC, *supra* note 2.

5. See, e.g., UNFCCC, Ad Hoc Working Group on Long-term Cooperative Action under the Convention, *Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan*, Submission of Tuvalu, 9 ¶ 1, U.N. Doc. FCCC/AWGLCA/2009/MISC.4 Add.1 (May 22, 2009), available at <http://unfccc.int/resource/docs/2009/awglca6/eng/misc04a01.pdf>.

6. See, e.g., UNFCCC, Ad Hoc Working Group on Long-term Cooperative Action under the Convention, *Ideas and Proposals on the Elements Contained in Paragraph 1 of the Bali Action Plan*, Submission of Japan, 132 ¶ 1, FCCC/AWGLCA/2009/MISC.4 (Part I) (May 19, 2009), available at <http://unfccc.int/resource/docs/2009/awglca6/eng/misc04p01.pdf>.

7. See High Level Meeting on International Aviation and Climate Change, Oct. 7-9, 2009, *Summary of Discussions*, app. A ¶ 4, I.C.A.O. Doc. HLMENV/09SD/2 (Oct. 19, 2009); Note, Int’l Mar. Org., Progress Within IMO on Control of Greenhouse Gas Emissions From Ships Engaged in International Trade (Aug. 10-14, 2009), <http://unfccc.int/resource/docs/2008/smsn/igo/026.pdf>.

As the year progressed, governments have engaged on the climate change issue in a number of multi-lateral and bilateral contexts. Taken together, such summits and other meetings provide an important complement to the UNFCCC negotiations, enabling leaders to engage repeatedly on elements of the deal that may be struck in Copenhagen. An illustrative and by no means exhaustive list of such events includes the UN Summit on Climate Change,⁸ the G-8 Summit⁹ in L'Aquila, Italy, the G-20 Summit¹⁰ in Pittsburgh, the Ministerial meeting of the Greenland Dialogue,¹¹ a series of meetings of the Major Economies Forum (MEF) on Energy and Climate,¹² as well as a number of head of state meetings such as those between the United States and China¹³ and between Brazil and France.¹⁴ Additional climate change developments are discussed *infra* in Part II.B (marine environment), Part V.B (finance), and Part VI (litigation).

B. STRATOSPHERIC OZONE

The Parties to the Montreal Protocol held the 21st Meeting of the Parties (MOP) in November of 2009. The MOP noted that with the addition of Timor Leste, 196 parties have ratified the Protocol, representing universal ratification and a higher number of parties than any other treaty in history.¹⁵ In 2007, the parties agreed to an accelerated phase out of hydrochlorofluorocarbons (HCFCs), which has led to an increase in the use of hydrofluorocarbons (HFCs). While HFCs do not deplete the ozone layer, some of them have very high global warming potential. At MOP 21, the parties considered but could not agree on an amendment that would have brought HFCs under the ozone regime (HFCs are one of the covered gasses under the climate regime's Kyoto Protocol). The parties also considered how to finance environmentally sound destruction of accumulated stocks of ozone depleting substances.¹⁶

8. See Press Release, U.N., 2009 Summit on Climate Change (Sept. 22, 2009), available at <http://www.un.org/wcm/content/site/climatechange/lang/en/pages/2009summit>.

9. See G8 Summit 2008, July 8-10, 2009, *Responsible Leadership for a Sustainable Future*, ¶ 60-63, available at http://www.g8italia2009.it/static/G8_Allegato/G8_Declaration_08_07_09_final,0.pdf.

10. See generally Pittsburgh G-20 Summit, Leader's Statement, Sept. 24-25, 2009, available at http://www.g20.org/Documents/pittsburgh_summit_leaders_statement_250909.pdf.

11. See Press Release, The Greenland Dialogue, A Ministerial Gathering on Climate Change (July 5, 2009), http://www.kemin.dk/enUS/COP15/Greenland_dialogue/Sider/Forside.aspx.

12. See Press Release, U.S. Dep't of State, Major Economies Forum on Energy and Climate (Apr. 23, 2009), <http://www.state.gov/r/pa/prs/ps/2009/04/122097.htm>; Press Release, The White House, Declaration of the Leaders, The Major Economies Forum on Energy and Climate (July 9, 2009) (on file with author).

13. See Bryan Walsh, *U.S. v. China: Working Together on Global Warming*, TIME, Nov. 17, 2009, http://www.time.com/time/specials/packages/article/0,28804,1929071_1929070_1940013,00.html.

14. See Press Release, President of the Republic of France, Common Position of the Gov't of the Federative Republic of Brazil and the Gov't of the French Republic on Climate Change (Nov. 14, 2009), http://www.elysee.fr/documents/index.php?lang=fr&mode=view&cat_id=8&press_id=3097.

15. *Summary of the 21st Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer: 4-8 November 2009*, EARTH NEGOTIATIONS BULLETIN (IISD Rep. Servs, New York, N.Y.), Nov. 11, 2009, at 11, available at <http://www.iisd.ca/download/pdf/enb1973e.pdf>.

16. See *id.* at 12-13.

II. Marine Environment and Conservation

A. MARINE ENVIRONMENTAL PROTECTION

Annex VI to the International Convention for the Prevention of Pollution from Ships (MARPOL)¹⁷ regulates air pollution from ships.¹⁸ Following ratification,¹⁹ the Annex entered into force for the United States on January 9, 2009. As amended, the Annex progressively reduces allowable emissions of oxides of sulfur and nitrogen, especially in “emission control areas” (ECAs) to be designated under the Annex.²⁰ In April 2009, the United States and Canada jointly submitted an application to designate as an ECA most Atlantic and Pacific coastal waters seaward to 200 nautical miles.²¹ The proposal was favorably considered at the July 2009 meeting of the MEPC, and is expected to be adopted in at the MEPC’s March 2010 meeting.²² The EPA has finalized a rule to implement Annex VI, including the proposed ECA.²³

The Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships (Convention) was adopted in Hong Kong, China in May 2009,²⁴ after several years of negotiations under the auspices of the International Maritime Organization. The Convention is intended to ensure that ships, when being recycled after reaching the end of their operational lives, do not pose an unnecessary risk to human health and safety or to the environment. The Convention will prohibit the use of certain hazardous materials in ship construction and require ships to maintain a certified inventory of hazardous materials. Recycling may take place only at facilities authorized in accordance with the Convention, and only after preparation of a Ship Recycling Plan, issuance of a Ready for Recycling Certificate, and consent (which may be tacit) of the recycling State.

17. Int’l Convention on 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 [hereinafter MARPOL 73/78].

18. Protocol of 1997 Amending MARPOL Convention, Sept. 26, 1997, S. Treaty Doc. No. 108-7, at 3-4; see Annex VI to MARPOL 73/78, ch. III, S. Treaty Doc. No. 108-7, at 68-73 (2003).

19. Protocol of 1997 to Amend the Int’l Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto (Treaty Doc. 108-7), Sept. 26, 1997, S. Exec. Doc. No. 109-13, at 6 (2008).

20. *Id.* at 2.

21. United States & Canada, *Proposal to Designate Emission Control Area for Nitrogen Oxides, Sulphur Oxides and Particulate Matter*, ¶ 8, I.M.O. Doc. MEPC 59/6/5 (Apr. 2, 2009). France has proposed to expand the proposed ECA to cover waters adjacent to the islands of the Saint Pierre and Miquelon Archipelago off the coast of Newfoundland. See E.P.A., *Emission Control Area Designation*, <http://www.epa.gov/oms/oceanvessels.htm#emissioncontrol> (last visited Jan. 31, 2010).

22. See Meeting Summary, International Maritime Organization [Int’l Mar. Org.], Marine Environment Protection Committee (MEPC), 59th Session: July 13-17, 2009, “ECA Proposal Approved,” (2009), available at http://www.imo.org/newsroom/mainframe.asp?topic_id=109&doc_id=11123.

23. See Control of Emissions from New Marine Compression-Ignition Engines at or above 30 Liters per Cylinder, 72 Fed. Reg. 69518 (Dec. 7, 2007); see also Change in Deadline for Rulemaking to Address the Control of Emissions from New Marine Compression-Ignition Engines at or above 30 Liters per Cylinder (signed Dec. 18, 2009), available at <http://www.epa.gov/otaq/oceanvessels.htm>.

24. Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting from the Work of the Conference: Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009, ¶ 1, I.M.O. Doc. SR/CONF/45 (May 19, 2009).

The International Convention for the Control and Management of Ships' Ballast Water and Sediments (2004) (BWM Convention)²⁵ includes a phased effluent standard on the discharge of harmful aquatic organisms in ballast water. The IMO previously extended this standard's phase-in period for vessels constructed in 2009, out of concern that technology was not sufficiently available.²⁶ However, at its July 2009 meeting, the MEPC declined to further extend the timetable, noting that several ballast water management systems have been approved for use.²⁷

The 1972 Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter²⁸ and its 1996 London Protocol²⁹ govern the ocean dumping of waste and other matter. In October 2009, with a view toward promoting carbon sequestration, the Protocol's general prohibition on export for dumping at sea was amended to allow the export for disposal of "carbon dioxide streams."³⁰

B. MARINE CONSERVATION

1. *Marine Mammals*

At the conclusion of its 59th session in July 2009, the MEPC approved a *Guidance Document for Minimizing the Risk of Ship Strikes with Cetaceans*, which recommends general strategies to reduce ship strikes, including measures such as data collection, routing and reporting measures, speed restrictions, sailing race planning, and international cooperation.³¹ The International Whaling Commission (IWC) at its 61st meeting in June 2009 reviewed the status of the North Pacific gray whale and endorsed a recommendation to develop a conservation plan for this endangered species.³² In addition, the IWC adopted a resolution requesting that Contracting Governments include climate change considerations in their conservation and management plans for cetaceans.³³

25. Adoption of the Final Act and Any Instruments, Recommendations and Resolutions Resulting from the Work of the Conference: International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004, I.M.O. Doc. BWM/CONF/36 (Feb. 16, 2004) (the United States has not ratified the Convention, which is not yet in force).

26. A. Res. A.1005(25), 1 ¶ 6, I.M.O. Doc. A 25/Res.1005 (Dec. 4, 2007).

27. See Int'l Mar. Org., *supra* note 22.

28. 1972 Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120.

29. 1996 Protocol to Convention on Prevention of Marine Pollution by Dumping of Wastes, Nov. 7, 1996, S. Treaty Doc. No. 110-5 (2008) (the United States is a party to the 1972 Convention, but not the Protocol).

30. *Report of the Thirty-First Consultative Meeting and the Fourth Meeting of Contracting Parties*, Oct. 26-30, 2009, annex 5, Res. LP.3(4) on the Amendment to Article 6 of the London Protocol, 2 ¶ 1, L.C. Doc. 31/15 (Nov. 30, 2009).

31. Int'l Mar. Org., *Guidance Document for Minimizing the Risk of Ship Strikes with Cetaceans*, ¶¶ 9-14, I.M.O. Doc. MEPC.1/Cir.674 (July 31, 2009), available at http://www.imo.org/includes/blastDataOnly.asp?data_id%3D26244/674.pdf.

32. See Secretary-General, *Report of the Secretary-General on Oceans and the Law of the Sea*, ¶ 193, U.N. Doc. A/64/66/Add.1 (Nov. 25, 2009).

33. See *id.* ¶ 194.

2. Fishing

In November 2009, representatives of ninety-one countries meeting at the U.N. Food and Agriculture Organization (FAO) in Rome successfully concluded two years of negotiations of a new treaty to require stronger controls on vessels carrying fish into the world's ports.³⁴ The *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* arose in response to the unwillingness or inability of flag States to perform their fishing enforcement duties.³⁵ It represents a significant step forward in the global effort to combat illegal, unreported, and unregulated (IUU) fishing. Focusing on the key role of port States, it establishes standards for fishing vessel inspections and inspector training by port States, requires denial of port entry and/or access to port services to vessels that have been engaged in IUU fishing, and requires investigation and appropriate enforcement action in response to IUU activity detected during an inspection.³⁶ The FAO Conference approved the treaty in November 2009, and the United States became a signatory on the same date.³⁷

In December 2008, the Western and Central Pacific Fisheries Commission adopted the first international conservation and management measure imposing enforceable catch limits to reduce overfishing of two highly migratory fish species: yellowfin and bigeye tuna.³⁸ At the same session, the Commission also adopted measures designed to protect sea turtles, swordfish, and sharks,³⁹ as well as to prohibit the use of large-scale driftnets on the high seas in the Convention area.⁴⁰

Addressing the substantial decline of the Eastern Atlantic and Mediterranean bluefin tuna stock was a focus of the annual meeting in November 2009 of the International Commission for the Conservation of Atlantic Tunas (ICCAT), a treaty-based inter-governmental organization with responsibility for the conservation and management of tuna

34. See *id.* ¶ 185.

35. See *id.* ¶ 184.

36. See *id.*

37. See Press Release, Food and Agriculture Organization of the United Nations [FAO], Groundbreaking Treaty on Illegal Fishing Approved: Port State Measures Broaden the Fight Against IUU Fishing (Nov. 25, 2009), available at <http://www.fao.org/news/story/en/item/37627/icode/>.

38. Western and Central Pacific Fisheries Commission [WCPFC], *Conservation & Mgmt. Measure for Bigeye and Tuna in the Western and Central Pacific Ocean*, CMM 2008-01 (Dec. 8-12, 2008), available at <http://www.wcpfc.int/system/files/documents/conservation-and-management-measures-and-resolutions/conservation-and-management-measures/CMM%202008-01%20%5BBigeye%20and%20yellowfin%5D.pdf>.

39. WCPFC, *Conservation & Mgmt. of Sea Turtles*, CMM 2008-03 (Dec. 8-12, 2008), available at <http://www.wcpfc.int/system/files/documents/conservation-and-management-measures-and-resolutions/conservation-and-management-measures/CMM%202008-03%20%5BSea%20turtles%5D.pdf>; WCPFC, *Conservation & Mgmt. of Swordfish*, CMM 2008-5 (Dec. 8-12, 2008), available at <http://www.wcpfc.int/system/files/documents/conservation-and-management-measures-and-resolutions/conservation-and-management-measures/CMM%202008-05%20%5BSwordfish%5D.pdf>; WCPFC, *Conservation & Mgmt. of Sharks*, CMM 2008-06 (Dec. 8-12, 2008), available at <http://www.wcpfc.int/system/files/documents/conservation-and-management-measures-and-resolutions/conservation-and-management-measures/CMM%202008-06%20%5BSharks%5D.pdf>.

40. WCPFC, *Conservation & Mgmt. Measures to Prohibit the Use of Large Scale Driftnets on the High Seas in the Convention Area*, CMM 2008-04 (Dec. 8-12, 2008), available at <http://www.wcpfc.int/system/files/documents/conservation-and-management-measures-and-resolutions/conservation-and-management-measures/CMM%202008-04%20%5BDriftnets%5D.pdf>.

and tuna-like species in the Atlantic and Mediterranean oceans.⁴¹ ICCAT adopted a number of new measures, including reducing the total allowable catch from 22,000 to 13,500 metric tons⁴² and breaking new ground by formally identifying several ICCAT members for potential non-compliance issues under ICCAT's trade measures instrument, which can be the basis for future trade measures.⁴³ Nevertheless, some criticize the ICCAT for not going far enough to ensure recovery of the stock.⁴⁴

III. International Hazard Management

A. TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTE

The year 2009 marked the twenty-year anniversary of the adoption of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.⁴⁵ An Open-ended Working Group of the Parties was established to assess preliminarily whether the newly adopted Hong Kong convention on ship-breaking (discussed *supra* in Part II.A) "establishes an equivalent level of control and enforcement as that established under the Basel Convention."⁴⁶ Draft technical guidelines on the environmentally sound management of mercury waste were prepared and made available for comment by stakeholders, and an intersessional working group led by Brazil is developing technical guidelines on the environmentally sound disposal and recycling of used tires.⁴⁷

To enhance coordination among the Basel Convention, the Stockholm Convention on persistent organic pollutants, and the Rotterdam Convention concerning international trade of hazardous chemicals,⁴⁸ United Nations Environmental Programme (UNEP) directed the Executive Secretaries of the three Conventions and a representative of UNEP to work together as a Synergies Oversight Team to coordinate the three Convention Sec-

41. International Commission for the Conservation of Atlantic Tunas (ICCAT), *Recommendation by ICCAT Amending the Recommendation 08-05 to Establish a Multiannual Recovery Plan for Bluefin Tuna in the Eastern Atlantic and Mediterranean*, 09-06 BFT (Nov. 6-15, 2009), available at http://www.iccat.int/Documents/Other/2009-RECRES_ENG.pdf.

42. *Id.* ¶ 1.

43. Press Release, ICCAT, ICCAT Fortifies its Management of Bluefin Tuna Fisheries, ¶ 3 (Nov. 16, 2009), available at <http://www.iccat.int/Documents/Meetings/COMM2009/PressReleaseCom2009-ENG.pdf>; see ICCAT, Recommendation by ICCAT Concerning Trade Measures, 06-13 GEN, Nov. 16, 2009, available at <http://www.iccat.int/Documents%5CRecs%5Ccompendiopdf-e%5C2006-13-e.pdf>.

44. Frank Pope, *Fishing Quota Will Lead to Extinction of Bluefin Tuna, Warn Conservationists*, TIMES ONLINE, Nov. 17, 2009, <http://www.timesonline.co.uk/tol/news/environment/article6919249.ece>.

45. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57, available at <http://www.basel.int/text/con-e-rev.pdf>.

46. Conference of the Parties to the Basel Convention, 1st meeting of the Expanded Bureau of the 9th, Geneva, Switz., July 7, 2009, Report, U.N. Doc. UNEP/SBC/BUREAU/9/1/9 (July 7, 2009), ¶ 15, available at <http://www.basel.int/meetings/bureau/bureau%201%20cop%209/docs/09e.pdf> [hereinafter Expanded Bureau Report].

47. *Id.* ¶¶ 10-11.

48. Conference of Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants, Stockholm, Swed., May 22-23, 2001, *Final Act*, U.N. Doc. UNEP/POPS/CONF/4 (June 5, 2001), available at http://www.pops.int/documents/meetings/dipcon/25june2001/conf4_finalact/en/FINALACT-English.PDF; Conference of Plenipotentiaries on the Convention on Prior Informed Consent Procedure for Certain Hazardous Chems. & Pesticides in Int'l Trade, Rotterdam, Neth., Sept. 10-11, 1998, *Final Act*, U.N. Doc. UNEP/FAO/PIC/CONF/5 (Sept. 17, 1998), available at <http://www.pic.int/incs/dipcon/eb/English/FINALE.PDF>.

retariats' planning, including preparations for the simultaneous extraordinary meetings of the Conferences of the Parties to the three Conventions scheduled for February 22, 2010.⁴⁹

B. CHEMICALS

A notable development in 2009 was the decision by the Governing Council of the UNEP at its 25th meeting in February to launch negotiations on an international legal agreement to address the threats posed by mercury.⁵⁰ The unanimous decision included support by the United States, reversing its policy of opposition under the previous Administration.⁵¹ The Council called for negotiations to commence in 2010 and conclude in 2013.⁵² The Council called for continued international and public/private cooperation on immediate actions to protect human health and the environment from mercury releases, coordinated through the UNEP Global Mercury Partnership, whose Partnership Advisory Group (PAG) held its first meeting in March 2009.⁵³

China took a major step to implement its analog to the European directives controlling waste electrical and electronic equipment (WEEE) with publication in October 2009 of the first batch of products (including phones and computer printers) and substances they are prohibited from containing in the Phase 2 "catalogue;" these prohibitions are intended to take effect in 2011 and are developed under the leadership of the Ministry of Information Industry (MI).⁵⁴ The regulations cover the same six substances subject to regulation under the EU Reduction of Hazardous Substances (RoHS) directive and include exemptions similar to those under RoHS.⁵⁵ Enforcement is to be carried out by municipal governments, provinces, and autonomous regions; fines up to CNY 500,000 (US\$70,328.50) can be assessed for violations.⁵⁶

49. Expanded Bureau Report, *supra* note 46, ¶¶ 19-25; see Conference of the Parties to the Basel Convention, 1st meeting of the Expanded Bureau of the 9th meeting, Geneva, Switz., June 23-24, 2009 *Enhanced cooperation and coordination among the Basel, Rotterdam and Stockholm Conventions, Note by the Secretariat*, U.N. Doc. UNEP/SBC/BUREAU/9/1/2 (June 10, 2009), available at <http://www.basel.int/meetings/bureau/bureau%201%20cop%209/docs/02e.pdf>.

50. Governing Council/Global Ministerial Env'tl. Forum, 25th sess., Nairobi, Kenya, Feb. 16-20, 2009, *Proceeding*, at 19-23, U.N. Doc. UNEP/GC.25/17 (Feb. 26, 2009), available at <http://www.unep.org/gc/gc25/Docs/Proceedings-English.pdf> [hereinafter *Governing Council Proceedings*].

51. Juliet Eilperin, *Nations to Write Treaty Cutting Mercury Emissions*, WASH. POST, Feb. 21, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/20/AR2009022003378.html>.

52. Governing Council Proceedings, *supra* note 50, at 21.

53. UNEP Global Mercury Partnership, http://www.chem.unep.ch/mercury/partnerships/new_partnership.htm (last visited Jan. 9, 2010).

54. Premier, Regulations on Recovery Processing of Waste Elec. & Elec. Prods., State Council Decree No. 551 (Feb. 25, 2009) (P.R.C.), available at <http://www.chinarohs.com/chinaweee-decree551.pdf> [hereinafter *Waste Elec. Regulations*]; see also Ministry of Info. Indus. et al., *Mgmt. Methods for Controlling Pollution by Elec. Info. Prods.*, Ministry of Info. Indus. Order #39 (Mar. 1, 2007) (P.R.C.), available at http://www.aeanet.org/governmentaffairs/gabl_ChinaRoHS_final_March2006.asp (requiring labeling of all electronic and electrical products in Phase 1, effective 2007).

55. Comm'n Decision 2005/618/EC, art. 1, 2005 O.J. (L 214) 65 (EU), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=LEX:32002L0095:EN:NOT>. Restriction of use of Hazardous Substances (RoHS) regulates lead, mercury, hexavalent chromium, polybrominated biphenyls (PBBs), and polybrominated diphenyl ethers (PBDEs) above 0.1% and cadmium above 0.01%, at the level of each homogeneous part or layer of the product.

56. Waste Elec. Regulations, *supra* note 54, art. 28.

C. INTERNATIONAL REGULATION OF AGRICULTURAL BIOTECHNOLOGY

Production of genetically engineered crops (biotech crops) continued to increase worldwide.⁵⁷ At the same time, regulatory approval of biotech crops is required in more nations than ever, as the Parties to the 2003 Cartagena Protocol on Biosafety (Biosafety Protocol) increased to 156 nations,⁵⁸ and several countries implemented biosafety laws to regulate import of biotech crops, including Honduras, Kenya, and Turkey. The parties to the Cartagena Protocol on Biosafety (Protocol) continue to discuss options regarding liability and redress from damage caused by the international shipment of living modified organisms (LMOs), including biotech crops; they are working under a deadline of October 2010 (the date of the next meeting of the Parties), extended from the 2003 deadline set under Article 27 of the Protocol.⁵⁹

IV. Natural Resources

A. WATER RESOURCES

In the long run, probably the most significant development over the past year regarding water resources was the adoption by the U.N. General Assembly on December 11, 2008, of a resolution⁶⁰ regarding the law of transboundary aquifers in which the Assembly considered the *Draft Articles on the Law of Transboundary Aquifers*⁶¹ submitted by the International Law Commission after nearly ten years of work. The Assembly thanked the Commission for its efforts, encouraged governments to enter into “regional arrangements” for their transboundary aquifers taking into account the provisions of the *Draft Articles*, and returned the *Draft Articles* to the Assembly’s agenda for further consideration.⁶²

What further consideration should entail is unclear. The prospects for development of a new international legal agreement based on the Draft Articles are unfavorable in light of the failure of the 1997 *U.N. Convention on the Law of Non-Navigational Uses of International Watercourses*⁶³ to reach even half of the necessary ratifications some twelve years after the

57. Clive James, Int’l Service for the Acquisition of Agri-biotech Applications (ISAAA), Global Status of Commercialized Biotech/GM Crops, at 1, No. 39-2008 (2008).

58. With the accession of the Comoros in March 2009. See The Cartagena Protocol on Biosafety, List of Parties, <http://www.cbd.int/biosafety/parties/list.shtml> (last visited Jan. 9, 2010).

59. See Convention on Biological Diversity, COP-MOP 5, <http://www.cbd.int/mop5/> (last visited Jan. 25, 2010).

60. G.A. Res. 63/124, U.N. Doc. A/RES/63/124 (Jan. 15, 2009), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/63/124&Lang=E>.

61. Int’l Law Comm’n, *The Law of Transboundary Aquifers*, U.N. Doc. A/CN.4/L.724 (May 29, 2008), available at <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/Cn.4/L.724&Lang=E>.

62. G.A. Res. 63/124, *supra* note 60, at 1-2.

63. U.N. Convention on the Law of Non-Navigational Uses of Int’l Watercourses, Apr. 11, 1997, 36 I.L.M. 700, available at <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/51/869&Lang=E>.

General Assembly approved it by a large majority.⁶⁴ Several critics have pointed out serious failings in the *Draft Articles*.⁶⁵

The regional effort to preclude most exports of water from the Great Lakes (through the new interstate compact on the Great Lakes and St. Lawrence basin and the companion “non-binding” agreement with Ontario and Québec)⁶⁶ confronted its first real test in 2009. The city of Waukesha, Wisconsin, seeks to take water out of Lake Michigan to replace water taken from increasingly inadequate well fields with the treated wastewater to return to the lake.⁶⁷ Wisconsin’s Department of Natural Resources proposed approving the application without waiting for the adoption of the state’s rules for complying with the compact.⁶⁸ The issue is not yet resolved and raises questions regarding the practical effectiveness of implementation.

Numerous international controversies over water for the most part continued without resolution. Litigation continues before the International Court of Justice between Argentina and Uruguay over pollution from proposed paper mills on the Uruguay River—a boundary river between the two nations. Oral arguments on the case were concluded on October 2, 2009; the court’s decision is expected in 2010.⁶⁹

The water crisis in the Mekong basin continues unabated and unaddressed.⁷⁰ India and Pakistan continue their disputes over Indian management of the upstream waters of the rivers assigned to Pakistan, this time centering on the Kishanganga dam.⁷¹ India also proposes to build a dam upstream from Bangladesh, creating a new controversy there.⁷² An old dispute resurfaced between Ukraine and Romania over Romania’s pollution of the Tisa River.⁷³

64. See Salman M.A. Salman, *The U.N. Watercourses Convention Ten Years Later: Why Has Its Entry into Force Proven Difficult?*, 32 WATER INT’L 1 (2007), available at <http://www.internationalwaterlaw.org/bibliography/articles/general/Salman-UNWatercoursesConventionTenYears.pdf>.

65. The critiques are summarized in Joseph W. Dellapenna, *Int’l Law Applicable to Water Res. Generally*, WATERS AND WATER RIGHTS, § 49.06, (Robert E. Beck & Amy Kelley eds., 3d ed.).

66. *Great Lakes-St. Lawrence Basin Water Res. Compact*, §§ 1.2, 4.9, Dec. 13, 2005, http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf [hereinafter *Compact*]; *Great Lakes-St. Lawrence River Basin Sustainable Water Agreement*, arts. 103, 201, Dec. 13, 2005, http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf [hereinafter *Agreement*].

67. Joe Barrett, *City Water Problems Test Great Lakes Agreement*, WALL ST. J., Nov. 9, 2009, at A9, available at <http://online.wsj.com/article/SB125772053509137145.html>; Ernst-Ulrich Franzen, *Lake Michigan Water for Waukesha*, MIL. J. & SENTINEL, Oct. 23, 2009, at 14, available at <http://www.jsonline.com/news/opinion/65650182.html>.

68. Don Behm, *Waukesha Can Apply for Water: Process Needn’t Wait till Rules Are Set*, DNR SAYS, MIL. J. & SENTINEL, Oct. 23, 2009, at 1, available at <http://www.jsonline.com/news/waukesha/65620842.html>.

69. Press Release, Int’l Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Conclusion of the public hearings*, No. 2009/28 (Oct. 2, 2009), available at <http://www.icj-cij.org/docket/files/135/15507.pdf>.

70. *Asia: Experts Urge Countries Along Mekong to Strengthen Cooperation*, THAI PRESS REP., Oct. 20, 2009, available at 2009 WLNR 20656187.

71. *Pakistan Pushing WB to Appoint Neutral Expert over Kishanganga Dam Dispute with India*, ASIAN NEWS INT’L, Nov. 8, 2009, available at 2009 WLNR 22362522.

72. *Tipaimukh Dam: A Threat to Bangladesh*, THE NEW NATION, Oct. 5, 2009, available at 2009 WLNR 19600445.

73. *Romania Must Compensate Ukraine for Tisa River Pollution, Says Rada Committee on National Security*, UKRAINE BUS. REP. WKLY., Apr. 29, 2009, available at 2009 WLNR 9108794.

The controversy between Canada and the United States over the Devils Lake outlet also continues. North Dakota plans to expand the controversial outlet and raise allowable levels of sulfates in the water.⁷⁴ Manitoba continues to press the Canadian government to seek review of the project by the International Joint Commission,⁷⁵ thus far to no avail. Meanwhile, flooding in North Dakota caused by a dike in Manitoba has also aroused controversy.⁷⁶

B. BIOLOGICAL RESOURCES AND WILDLIFE

In Convention on Biological Diversity (CBD) news, the Working Group on Access and Benefit-sharing convened in November in Montreal to continue negotiating an international regime on access and benefit-sharing (ABS). The call for an international ABS regime, to be negotiated within the CBD framework, was made in Johannesburg in 2002 at the World Summit on Sustainable Development. At COP8, CBD Parties instructed the working group to finish its work by COP10 in 2010.⁷⁷ While central components of the agreement remain in flux, including the legal nature of the regime, the working group did adopt a heavily bracketed consolidated negotiating text that includes components on traditional knowledge, benefit-sharing and access, compliance, and capacity building.⁷⁸

The Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) will meet in Qatar in March 2010, and up for discussion will be a number of proposals submitted by Parties during 2009. Among those most likely to be contentious is a proposal by Monaco to list the Atlantic bluefin tuna (*Thunnus thynnus*) on Appendix I,⁷⁹ a listing that would prohibit international trade in the species, in light of severe reductions in the species population (down over seventy percent from fifty years ago with over half the decline in the past ten years).⁸⁰ Some Parties, such as the United States, indicate that their support for the listing would depend on the efficacy of measures taken by the relevant fisheries management organization—the ICCAT—to protect the species. Previous decisions by ICCAT were criticized as inadequate to promote stock recovery and unsupported by science.

In November 2009, the Scientific and Technical Review Panel and the Secretariat of the Ramsar Convention on Wetlands of International Importance published a briefing docu-

74. Kevin Bonham, *DL Monitoring Committee Aims to Ensure Monitoring*, GRAND FORKS HERALD, Nov. 10, 2009, available at 2009 WLNR 22569513.

75. *Scientific Review of Outlet Urged*, WINNIPEG FREE PRESS, Oct. 27, 2009, available at 2009 WLNR 21315902.

76. Kevin Bonham, *Dorgan Meets with Canadian Leaders on Road-Dike Issue*, GRAND FORKS HERALD, Sept. 25, 2009, available at 2009 WLNR 18962711; *State Turns Down Manitoba Offer in Water Disputes*, GLOBE & MAIL (Toronto, CA), May 9, 2009, available at 2009 WLNR 8852866.

77. Convention on Biological Diversity (CBD), Access and Benefit-sharing, Decision VIII/4, ¶ 6 (June 15, 2006), available at <http://www.cbd.int/doc/decisions/cop-08/cop-08-dec-04-en.pdf>.

78. See CBD, International Regime on Access and Benefit-Sharing, UNEP/CBD/WG-ABS/8/L.2 (Nov. 14, 2009), available at <https://www.cbd.int/doc/meetings/abs/abswg-08/in-session/abswg-08-1-02-en.pdf>.

79. See Proposal to Include Atlantic Bluefin Tuna (*Thunnus thynnus* (Linnaeus, 1758)) on Appendix I of CITES in accordance with Article II 1 of the Convention (Oct. 2009), available at http://www.cites.org/common/cop/15/raw_props/E-15%20Prop-MC%20T%20thynnus.pdf.

80. Press Release, U.S. Dep't of the Interior, Assistant Secretary Strickland Announces Support for Listing Atlantic Bluefin Tuna on International Trade Endangered Species List (Oct. 14, 2009), available at http://www.doi.gov/news/pressreleases/2009_10_14_releaseB.cfm.

ment⁸¹ on wetlands and climate change for use by Ramsar Convention Parties as an *aide-memoire*⁸² during the concurrent climate change negotiations (discussed in Part I.A, *infra*). The briefing note emphasized that climate change threatens wetlands and the ecosystem services they provide to people, that wetlands can play a significant role in climate change mitigation and adaptation, and that climate change policies and plans “should recognize and incorporate the role and importance of wetland ecosystems.”⁸³

V. The International Economy and the Environment

A. TRADE AND ENVIRONMENT

Negotiations in the World Trade Organization (WTO) on environmental issues continued to make little progress, as did talks generally, due to a continuing impasse on a range of issues.⁸⁴ The free trade agreement (FTA) between the United States and Peru⁸⁵ was approved by Congress in 2007 and entered into force in January 2009.⁸⁶ This FTA contains provisions, unique in international trade law to date, that require both parties to implement certain multilateral environmental agreements and require Peru to strengthen its capacity to enforce forest laws, and conduct audits and investigations of Peruvian timber producers and shipments upon the request of the United States.⁸⁷ In May 2009, President Obama directed the U.S. Trade Representative and four cabinet agencies to establish a committee to oversee the United States’ implementation of the FTA provisions relating to timber imports from Peru.⁸⁸

In dispute settlement, a panel was established to hear Mexico’s complaint concerning tuna labeling requirements under the Dolphin Protection Consumer Information Act.⁸⁹ According to Mexico, requirements by the United States as to whether tuna and tuna products are “dolphin-safe” are inconsistent with the “most-favoured-nation” and national treatment obligations of the General Agreement on Tariffs and Trade as well as provisions of the WTO Agreement on Technical Barriers to Trade (TBT).⁹⁰ The United States

81. Briefing Note from the Ramsar Scientific & Technical Review Panel (STRP) and Secretariat, Wetlands and the UNFCCC COP15 Climate Change Meeting (Copenhagen, 7-18 December 2009), available at http://www.ramsar.org/pdf/strp/strp_briefing_climate_2009_e.pdf.

82. Email from Dwight Peck, Communications Officer, Ramsar Convention on Wetlands, Nov. 13, 2009 (on file with author).

83. *Id.* at 6.

84. See Laura MacInnis, *Calls Grow to Smash WTO Deal into Digestible Pieces*, REUTERS, Dec. 3, 2009, available at <http://www.reuters.com/article/idUSTRE5B229G20091203>.

85. U.S.-Peru Trade Promotion Agreement (Office of the U.S. Trade Representative Dec. 14, 2007), available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text>.

86. See Proclamation No. 8341, 74 Fed. Reg. 4105 (Jan. 16, 2009).

87. See U.S.-Peru Trade Promotion Agreement, *supra* note 85, art. 18.2, Annex 18.3.4, Annex on Forest Sector Governance, ¶¶ 3, 5-12.

88. Memorandum from the President of the United States, Establishment of the Interagency Committee on Trade in Timber Products from Peru and Assignment of Function under Section 501 of the United States-Peru Trade Promotion Agreement Implementation Act, 74 Fed. Reg. 20865 (May 1, 2009).

89. World Trade Org., DSB Establishes Panel in US-Mexico Tuna Case, Apr. 20, 2009, http://www.wto.org/english/news_e/news09_e/dsb_20apr09_e.htm.

90. United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Request for Consultations by Mexico, WT/DS381/1 (Oct. 28, 2008), available at <http://www.worldtradelaw.net/cr/ds381-1%28cr%29.pdf>.

contends, however, that disputes between NAFTA Parties concerning certain TBT and other standards-related matters that relate to health or the environment shall be resolved solely through NAFTA dispute settlement when the responding party so requests, pursuant to NAFTA article 2005(4).⁹¹ When Mexico continued with the WTO proceeding by requesting the selection of panelists, the United States requested dispute settlement consultations under the NAFTA concerning what it alleged was a failure by Mexico to comply with NAFTA article 2005(4).⁹²

Also in dispute settlement, Canada requested WTO consultations⁹³ regarding the European Union's ban on the import and sale of seal products subject to an exception for certain products harvested by indigenous communities.⁹⁴ In addition, relevant developments in investor-state dispute settlement are discussed in Part VI.B below.

B. FINANCE AND THE ENVIRONMENT

Climate change continues to dominate environmental discussions at the major international financial institutions (IFIs). When this article was written the international financial architecture for funds to mitigate and adapt to climate change remained undetermined, while the World Bank Group⁹⁵ is positioning itself to be the primary financial institution in post-Copenhagen climate governance. The World Bank Group's two Climate Investment Funds (CIFs)⁹⁶ launched in 2008 are currently operating as an interim bridge to ensure that climate-related funding is available until a new architecture is put in place by the UNFCCC negotiations. In the meantime, the World Bank is piloting new climate change related funds. For example, the Bank created a new Pilot Program for Climate Resilience (PPCR) as a multi-donor trust fund operated under the CIFs. Under the PPCR, nine countries and two regions will each receive up to \$70 million each to

91. Press Release, Office of the U.S. Trade Representative, United States Initiates NAFTA Dispute with Mexico over Mexico's Failure to Move Its Tuna-Dolphin Dispute from the WTO to the NAFTA (Nov. 5, 2009) *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2009/november/united-states-initiates-nafta-dispute-mexico-over>.

92. *See id.*

93. European Communities-Measures Prohibiting the Importation and Marketing of Seal Products, Request for Consultations by Canada, WT/DS400/1 (2009), *available at* <http://www.worldtradelaw.net/cr/ds400-1%28cr%29.pdf>. Canada alleges that the prohibition is inconsistent with GATT most-favoured-nation and national treatment obligations (Articles I and III), the GATT prohibition on quantitative restrictions (Article XI), as well as obligations under the WTO Agreement on Technical Barriers to Trade.

94. Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009, Off. J. Eur. Union, ser. L, no. 286 at 36-39 (Oct. 31, 2009), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=LEX:32009R1007:EN:NOT>.

95. The World Bank Group is comprised of the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Center for Settlement of Investment Disputes.

96. *See* The World Bank, Climate Change, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20432982~menuPK:34480~pagePK:64257043~piPK:437376~theSitePK:4607,00.html> (last visited Jan. 31, 2010).

integrate climate resilience into national development planning consistent with poverty reduction and sustainable development goals.⁹⁷

The World Bank Group's Forest Carbon Partnership Facility (FCPF)⁹⁸ also expanded over the past year, with a current funding goal of \$385 million.⁹⁹ The goal of the FCPF is to demonstrate the feasibility of proposals under the UNFCCC to receive climate-related financing from "reduced emissions from deforestation and land degradation" (REDD).¹⁰⁰ The FCPF is providing "readiness" technical assistance and plans to compensate a limited number of developing countries for reducing emissions from deforestation below the business-as-usual baseline if they have a method deemed credible for measuring and monitoring climate-related benefits. In this way, the Bank hopes to learn lessons that will allow it to develop a larger global program of incentives for REDD over the next five to ten years.¹⁰¹

The U.S. Export-Import Bank (ExIm) released a new carbon policy in November 2009 as part of a settlement of a lawsuit brought by a coalition of environmental groups and three U.S. cities. Under the policy, which ExIm claims is the first comprehensive carbon policy for any export credit agency (ECA),¹⁰² ExIm will set up a US\$250 million facility to back the export of renewable energy technologies. Currently, support for renewable energy is less than two percent of ExIm's energy portfolio.¹⁰³ ExIm also promised to improve its tracking and reporting of carbon dioxide emissions from certain projects but did not commit to portfolio greenhouse gas emission limits.¹⁰⁴

Beyond climate change, several IFIs revised aspects of their environmental or accountability policies. By the end of November 2009, the World Bank Board of Directors was expected to adopt a new information disclosure policy: *Toward Greater Transparency: Rethinking the World Bank's Disclosure Policy*.¹⁰⁵ Assuming there will be no major changes from the draft policy that circulated publicly, the Bank will accept the general principle that all Bank information should be presumed to be publicly available. The presumption is subject to exceptions for information provided by governments or third parties and information that is part of the internal deliberative process of the Bank.

In an unprecedented decision, World Bank Group President Robert Zoellick placed a moratorium on all future International Finance Corporation (IFC) investments in the

97. The World Bank, Developing Countries Reveal Early Lessons on Climate Resilient Development, Nov. 5 2009, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/EXTCC/0,,contentMDK:22381764~pagePK:210058~piPK:210062~theSitePK:407864,00.html>.

98. For more information on the World Bank Forest Carbon Partnership Facility, see The World Bank, Forest Carbon Partnership Facility, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/ENVIRONMENT/EXTCARBONFINANCE/0,,contentMDK:21631703~menuPK:5216269~pagePK:64168445~piPK:64168309~theSitePK:4125853,00.html> (last visited Jan. 31, 2009).

99. *Id.*

100. *Id.*

101. *Id.*

102. See Export-Import Bank of the U.S., Carbon Policy, http://www.exim.gov/products/policies/environment/carbon_policy.cfm (last visited Jan. 31, 2010).

103. *Id.*

104. *Id.*

105. The World Bank, Consultation Draft, Operations Policy and Country Services, *Toward Greater Transparency: Rethinking the World Bank's Disclosure Policy* (Jan. 29, 2009), http://siteresources.worldbank.org/INFODISCLOSURE/Resources/5033530-1236640024078/English_full.pdf.

palm oil sector, pending a review of the long-term sustainable development impacts of its investments.¹⁰⁶ The decision came on the heels of an audit finding that the IFC's environmental review of certain investments in Indonesian palm oil facilities ignored its own internal experts' views of project environmental and social impacts in order to facilitate project approval.¹⁰⁷ The audit was conducted by the IFC's Compliance Advisor/Ombudsman in response to a complaint from local communities represented by the Forest Peoples Programme.¹⁰⁸ Given the systemic implications of the CAO findings, the IFC is considering similar moratoriums on its investments in soy and cocoa production.

This year marked the fifteenth anniversary of the World Bank Inspection Panel, which has been emulated in one way or another by all of the other multilateral development banks.¹⁰⁹ In May, the Board of Directors of the European Bank for Reconstruction and Development approved a new Project Complaint Mechanism (PCM) to address complaints from communities affected by EBRD-financed projects; the PCM is intended to replace the existing independent recourse mechanism.¹¹⁰

VI. Selected Litigation

A. DOMESTIC LITIGATION

In *Connecticut v. American Electric Power Co.*¹¹¹ a group of States sued a number of major utilities, alleging that their activities contributed to global climate change and therefore violated the federal common law of nuisance.¹¹² In a decision issued on September 21, 2009, the Second Circuit held that the lawsuit could proceed, rejecting the district court's decision that the claim was nonjusticiable under the political question doctrine.¹¹³ The Second Circuit disagreed with the district court's conclusion that a ruling could interfere with the President's conduct of foreign affairs, finding that the case could be decided based on "[w]ell-settled principles of tort and public nuisance law," and reasoning that the fact "[t]hat Plaintiffs' injuries are part of a worldwide problem does not mean that Defendants' contribution to the problem cannot be addressed through principled adjudication."¹¹⁴ In *Comer v. Murphy Oil USA*, a suit brought under state common law alleging that oil and energy companies had contributed to climate change, which in turn contrib-

106. See Letter from Robert Zoellick, President, World Bank Group, to Marcus Colchester, Director, Forest People Programme (Aug. 28, 2009), available at http://www.cao-ombudsman.org/cases/document-links/documents/Colchesteretal_August28_2009.pdf.

107. See *CAO Audit of IFC's Investment in Wilmar Trading* (2009), available at http://www.cao-ombudsman.org/cases/document-links/documents/CAO_Audit_Report_C_I_R6_Y08_F096_ENG.pdf.

108. *Id.*

109. See WORLD BANK INSPECTION PANEL, ACCOUNTABILITY AT THE WORLD BANK: THE INSPECTION PANEL AT 15 YEARS (2009), available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf>.

110. For information on the EBRD accountability mechanism, see generally EBRD, Review of IRM, <http://www.ebrd.com/about/integrity/irm/review.htm> (last visited Jan. 31, 2010).

111. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

112. *Id.* at 316.

113. *Id.* at 332.

114. *Id.* at 329.

uted to damage sustained as a result of Hurricane Katrina, the Fifth Circuit similarly rejected the claim that foreign affairs implications barred the suit.¹¹⁵

B. INTERNATIONAL DISPUTES

In June 2009, an arbitral tribunal convened pursuant to NAFTA Chapter 11 issued a decision in the closely-watched case of *Glamis Gold Ltd. v. United States*.¹¹⁶ A Canadian gold mining company, Glamis Gold Ltd., challenged a series of regulatory decisions by the United States government and by the State of California.¹¹⁷ The case was controversial because it involved a challenge to governmental regulation of the environmental impacts of resource extraction activities, and concerned in particular a proposed gold mine on federal land in an area sacred to the religion of the Quechen Tribe.

Evaluating the facts in the light most favorable to Glamis, the tribunal ruled that the California regulations, which effectively would have required Glamis to backfill following its proposed mining operation, did not “cause a sufficient economic impact to the Imperial Project to effect an expropriation of [Glamis’s] investment” under NAFTA article 1110.¹¹⁸ Glamis also claimed that the process by which California and the federal government had handled its efforts to obtain a mining permit violated the requirement of “fair and equitable treatment,” an aspect of the minimum standard of treatment under customary international law incorporated into NAFTA article 1105.¹¹⁹ The Tribunal determined that the standard for showing a violation of the minimum standard of treatment was that “an act must be sufficiently egregious and shocking . . . so as to fall below accepted international standards.”¹²⁰ The Tribunal found that the standard had not been met.¹²¹

115. *Comer v. Murphy Oil USA*, 585 F.3d 855, 859 (5th Cir. 2009).

116. See *Glamis Gold Ltd. v. United States* (Can. v. U.S.), __ ICSID__ (2009), available at <http://www.state.gov/s/l/c10986.htm>.

117. *Id.*

118. *Id.* ¶ 536.

119. *Id.* ¶ 616.

120. *Id.*

121. *Id.*