

International Environmental Law

SARA VINSON, KRISTEN HITE, STEPHANIE ALTMAN, KEITH BENES, DEREK CAMPBELL,
JOSEPH W. DELLAPENNA, DAVID M. GRAVALLESE, RICHARD A. HORSCH,
DAVID HUNTER, ERIKA LENNON, ERICA LYMAN, JOSHUA MELTZER,
THOMAS PARKER REDICK, AND JUSTIN SMITH*

This article surveys important developments in international environmental law during 2013.¹

* This report is jointly submitted on behalf of the International Environmental Law Committee of the ABA Section on International Law (SIL) and the International Environmental and Resources Law Committee of the Section on Environment, Energy, and Resources Law (SEER) by Vice-Chairs and co-editors Sara Vinson, Environmental Claims Associate at ACE Group, and Kristen Hite, Advisor, Climate and Land Use Alliance. Stephanie Altman, Attorney Advisor in the Office of General Counsel—International Law Section, National Oceanic and Atmospheric Administration (NOAA), contributed on marine environmental protection. Keith Benes, Attorney Adviser in the Office of the Legal Adviser, U.S. Department of State, contributed on climate change. Derek Campbell, Attorney-Advisor, Office of General Counsel—International Law Section, NOAA, contributed on marine conservation. Prof. Joseph W. Dellapenna, Villanova University Law School, authored the section on water resources. David Gravalles, Attorney Adviser in the Office of the Legal Adviser, U.S. Department of State, contributed on ozone. Richard A. Horsch, a Partner with White & Case LLP, contributed on hazardous waste developments. Finance related developments are incorporated throughout and were contributed by Prof. David Hunter and Erika Lennon, Coordinator of the Program on International and Comparative Environmental Law, at American University Washington College of Law. Prof. Erica Lyman, Lewis & Clark Law School, contributed on wildlife and biological resources. Joshua Meltzer, fellow, Global Economy and Development, Brookings Institution, contributed on trade and the environment. Thomas Parker Redick, with Global Environmental Ethics Counsel, contributed on international regulation of biotechnology. R. Justin Smith, Assistant Chief, Law and Policy Section, Environment and Natural Resources Division, U.S. Department of Justice, contributed on international environmental litigation. Opinions expressed in this report are those of the authors in their personal capacities and do not necessarily represent the views of their organizations, including the U.S. Department of State or the U.S. Government.

1. For developments during 2012, see Andrew Schatz et al., *International Environmental Law*, 47 INT'L LAW. 435 (2013). For developments during 2011, see Andrew Schatz et al., *International Environmental Law*, 46 INT'L LAW. 419 (2012).

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

436 THE YEAR IN REVIEW

I. Atmosphere and Climate

A. CLIMATE

Meetings of the U.N. Framework Convention on Climate Change (UNFCCC) considered issues under the Convention (COP) and Kyoto Protocol (CMP). The Ad Hoc Working Group on the Durban Platform (ADP) made some progress toward the adoption of an agreement in 2015, outlining several key provisions in a COP decision that define basic contours of the ultimate agreement and sets the course for negotiations in 2014. Most significantly, in paragraph 2(b), the COP decision invited all parties to

initiate or intensify domestic preparations for their intended nationally determined contributions, without prejudice to the legal nature of the contributions . . . and to communicate them well in advance of the twenty-first session of the Conference of the Parties (by the first quarter of 2015 by those Parties ready to do so) in a manner that facilitates the clarity, transparency and understanding of the intended contributions, without prejudice to the legal nature of the contributions.²

The COP decision leans toward a bottom-up structure for the mitigation elements of the 2015 agreement by noting the contributions will be nationally determined, in contrast to the top-down approach of the Kyoto Protocol. The paragraph changes “commitments” to “contributions” and references “all Parties,” which does not distinguish between Annex 1 (developed countries) and non-Annex 1 (developing countries), consistent with the Durban Platform mandate that the 2015 agreement be “applicable to all.”³

When putting forward their nationally determined contributions, parties will also provide the information necessary for other parties and the international community to understand their commitments.

One significant outcome of the Warsaw meetings was a package of decisions that focus on reducing emissions from deforestation and forest degradation (REDD+). The decisions encourage results-based finance in accordance with methodologies and safeguards by establishing detailed methodologies to measure, monitor, report, and verify emission reductions and activities.⁴ The CMP also finalized rules for reporting land use emissions associated with land use, land-use change, and forestry (LULUCF) requirements under the second commitment period of the Kyoto Protocol.⁵

Another key outcome of the Warsaw COP was the decision to establish the “Warsaw International Mechanism for Loss and Damage.” The two primary legal issues surrounding loss and damage are whether loss and damage are about compensation or otherwise imply liability of countries with high historic emissions and whether it would be under the adaptation framework in the UNFCCC. Specific consideration of compensation measures was not addressed in the text of the decision, which places the Warsaw Mechanism

2. Nineteenth Meeting of the Parties to the United Nations Framework Convention on Climate Change, Warsaw, Pol., Nov. 11-23, 2013, *Report of the Conference of Parties on its Nineteenth Session*, 4, FCCC/CP/2013/10/Add. 1 (Jan. 31, 2014) [hereinafter *COP Report*].

3. *Id.* The distinction in type of international legal commitment between Annex 1 Parties and non-Annex 1 Parties had been one of the issues of concern referenced in the Byrd/Hagel Senate Resolution adopted when the Kyoto Protocol was being negotiated. S. Res. 98, 105th Cong. (1997).

4. *COP Report*, *supra* note 2, at 24–43.

5. *Id.* at 37.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

ENVIRONMENTAL LAW 437

under the Cancun adaptation framework. Countries will review the mandate, structure, and effectiveness of the Warsaw mechanism in 2016.⁶

During COP19, the parties approved arrangements between the COP and the Green Climate Fund (GCF), with the GCF receiving guidance from the COP while also retaining sole discretion in funding decisions.⁷ Initial guidance from the COP supported a balance between adaptation and mitigation, a country-driven approach, and particular attention for vulnerable developing countries.⁸ The GCF moved toward operationalization during 2013, holding three board meetings, appointing an Executive Director,⁹ and finalizing its business model framework.¹⁰ In its Draft Decision, the GCF Board decided that four board members would be appointed along with four senior international experts¹¹ to help develop a framework for accreditation, including development of environmental and social safeguards.¹²

Another issue at COP19 was the re-capitalization of the Adaptation Fund, with a total of US\$104.3 million pledged in 2013.¹³ The Adaptation Fund Board approved a new Environmental and Social Policy in November 2013, which requires implementing entities to “have an environmental and social management system” to identify, assess, avoid, and minimize risks; to monitor and report on those measures during the project and at its completion;¹⁴ and to involve stakeholders through public disclosure and consultation from planning onward.¹⁵ All projects must comply with domestic and international laws and “provide fair and equitable access to benefits” in an inclusive and gender-sensitive manner.¹⁶ Additionally, each implementing entity must identify a grievance mechanism with an accessible, transparent, fair, and effective process that project-affected people can go to with complaints.¹⁷

6. *Id.* at 6–9.

7. Nineteenth Meeting of the Parties to the United Nations Framework Convention on Climate Change, Warsaw, Pol., Nov. 11–23, 2013, *Arrangements Between the Conference of the Parties and the Green Climate Fund*, Draft Dec.-/CP.19, ¶¶ 2, 4, 6, FCCC/CP/2013/L.10 (Nov. 22, 2013) [hereinafter *Arrangements Between the COP and GCF*].

8. Nineteenth Meeting of the Parties to the United Nations Framework Convention on Climate Change, Warsaw, Pol., Nov. 11–23, 2013, *Report of the Green Climate Fund to the Conference of the Parties and Guidance to the Green Climate Fund*, Draft Dec.-/CP.19, ¶ 9, FCCC/CP/2013/L.12 (Nov. 22, 2013) [hereinafter *GCF Report to the COP*].

9. Press Release, Green Climate Fund, Green Climate Fund Board Selects Hela Cheikhrouhou as Executive Director (June 26, 2013), available at http://www.gcfund.net/fileadmin/00_customer/documents/pdf/Press_release_ED_selection_final.pdf.

10. Press Release, Green Climate Fund, Green Climate Fund Board Sets Out Roadmap to Mobilize Resources (Oct. 11, 2013), available at http://gcfund.net/fileadmin/00_customer/documents/pdf/GCF_Press_Release_11_Oct_2013.pdf.

11. Green Climate Fund Bd., *Business Model Framework: Access Modalities–Accreditation*, Annex VI, GCF/B.05/08 (Sept. 24, 2013).

12. *Id.* Annex I(d).

13. *Id.*

14. Adaptation Fund Board, *Environmental and Social Policy*, paras. 10, 27, 30–32 (Nov. 2013), available at [https://www.adaptation-fund.org/sites/default/files/Environmental%20&%20Social%20Policy%20\(approved%20Nov2013\).pdf](https://www.adaptation-fund.org/sites/default/files/Environmental%20&%20Social%20Policy%20(approved%20Nov2013).pdf).

15. *Id.* para. 33.

16. *Id.* paras. 12–13, 16.

17. *Id.* at para. 34.

SPRING 2014

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

438 THE YEAR IN REVIEW

B. STRATOSPHERIC OZONE

At the 25th Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (MOP-25) in Bangkok, Canada, Mexico, and the United States continued to urge parties to adopt a proposal to phase down the production and consumption of hydrofluorocarbons (HFCs), potent greenhouse gases (GHGs) used as alternatives to ozone-depleting substances, including chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs), that are being phased out under the Montreal Protocol. The proposed phase down would take place over a thirty-year period for developed countries and a forty-year period for developing countries.¹⁸ It would have significant environmental benefits, reducing carbon dioxide equivalent (CO₂eq) releases by over 95,000 million metric tons through 2050.¹⁹ Over 100 Parties have expressed support for the proposed amendment. At MOP-25, the African Group officially endorsed the proposed amendment, as did a dozen Eastern European and former Soviet States, and thirteen Pacific Island States. But about two dozen countries, led by India, Kuwait, and Saudi Arabia, expressed opposition to the proposed amendment on jurisdictional or other grounds.²⁰ Parties met three times at MOP-25 in a “discussion group” on technical, financial, and legal issues related to an HFC phase-down and agreed to request the Protocol’s Technology and Economic Assessment Panel (TEAP) to assess alternatives to HFCs and other ozone-depleting substances.²¹ Discussion of the management of HFCs will continue at a workshop to be held on the margins of the next meeting of the Protocol’s Open-Ended Working Group (OEWG) during the summer of 2014.²² The Parties also approved the full critical use exemption requested by the United States for methyl bromide, an ozone-depleting substance that is used as an agricultural fumigant.²³

18. Twenty-Fifth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Bangkok, Thai., Oct. 21–25, 2013, *Proposed Amendment to the Montreal Protocol submitted by Canada, Mexico and the United States of America*, U.N. Doc. UNEP/OzL.Pro.25/6 (July 24, 2013); Twenty-Fifth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Bangkok, Thai., Oct. 21–25, 2013, *Draft Decisions*, Draft dec. XXV/[J], U.N. Doc. UNEP/OzL.Pro.25/3 (July 30, 2013), available at <http://conf.montreal-protocol.org/meeting/mop/mop-25/presession/default.aspx>.

19. *Id.*

20. Some argued that HFCs may be addressed only under the UNFCCC and its Kyoto Protocol and not under the Montreal Protocol, because they are not ozone-depleting substances. Proponents challenged this analysis, noting that Article 2(b)(2) of the Vienna Convention for the Protection of the Ozone Layer, to which the Montreal Protocol is a protocol, requires Parties to “cooperate in harmonizing appropriate policies associated with controlling ozone depleting substances.” They argued that such harmonization can include managing substitutes for CFCs and HCFCs, such as HFCs. Proponents also pointed to Article 3 of the proposed amendment, which states explicitly that the amendment would not exempt HFCs from the coverage of the UNFCCC or the Kyoto Protocol. See Twenty-Fifth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Bangkok, Thai., Oct. 21–25, 2013, *Rep. of the Twenty-Fifth Meeting of the Parties to the Montreal Protocol*, ¶146, U.N. Doc. UNEP/OzL.Pro.25/9, Annex II (Nov. 13, 2013), available at <http://conf.montreal-protocol.org/meeting/mop/mop-25/report/Draft%20Reports/MOP-25-9E.pdf>.

21. *Id.*

22. See *id.* dec. XXV/5.

23. See *id.* dec. XXV/4.

II. Marine Environment and Conservation

A. MARINE ENVIRONMENTAL PROTECTION

At its October 2013 annual meeting in Australia, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) rejected two proposals to establish marine protected areas in waters around Antarctica. The Ross Sea Region Marine Protected Area, intended to establish 1.34 million square kilometers to “conserve living marine resources; maintain ecosystem structure and function; protect vital ecosystem processes and areas of ecological significance; and establish reference areas that will promote scientific research,” was broadly supported but failed to pass.²⁴ Also defeated was a proposal to establish the East Antarctic Representative System of Marine Protected Areas, a system of seven marine protected areas to, among other things, “(i) conserv[e] areas of biodiversity that help meet objectives for comprehensiveness, adequacy and representativeness, (ii) provid[e] reference areas for determining the effects of fishing and for estimating change[s] in productivity and dynamics of Southern Ocean ecosystems, and (iii) provid[e] refuge for larval krill and juvenile toothfish.”²⁵

At its October 2013 meeting in London, parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) and the 1996 Protocol (London Protocol) adopted amendments to the London Protocol to establish a new framework for regulating marine geo-engineering activities.²⁶ The first such agreement to define “marine geo-engineering,” the amendment prohibits contracting parties from allowing “the placement of matter into the sea” for the purpose of conducting listed marine geo-engineering activities—unless authorized under a permit issued by an appropriate authority designated by that party.²⁷ As adopted, a new Annex lists only ocean fertilization, permitted only in instances of “legitimate scientific research.”²⁸ It is expected that the list will later be expanded to include other marine geo-engineering activities.

In May 2013, the Arctic Council signed the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (Agreement),²⁹ which is the second legally binding agreement negotiated via the Arctic Council. The Agreement addresses possible oil pollution that may affect the Arctic marine environment and includes, *inter alia*, the following commitments to: (1) maintain national systems for oil pollution preparedness and response; (2) notify other countries of oil pollution incidents; (3) moni-

24. Commission for the Conservation of Antarctic Marine Living Resources [CCAMLR], *Proposal for the Establishment of a Ross Sea Region Marine Protected Area, from the Delegations of New Zealand and the United States*, at 2, CCAMLR Doc. CCAMLR-SM-II/04 (2013).

25. CCAMLR, *Proposal for a Conservation Measure Establishing an East Antarctic Representative System of Marine Protected Areas, from the Delegations of Australia, France, and European Union*, at 1, CCAMLR Doc. CCAMLR-XXXII/34 Rev. 1 (2013).

26. *Marine Geoengineering Including Ocean Fertilization to be Regulated Under Amendments to International Treaty*, INT'L MAR. ORG. (Oct. 18, 2013), <http://www.imo.org/MediaCentre/PressBriefings/Pages/45-marine-geoengineering.aspx>.

27. *Id.*

28. *Id.*

29. Arctic Council, *Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic* (May 15, 2013), available at <http://www.arctic-council.org/index.php/en/document-archive/category/425-main-documents-from-kiruna-ministerial-meeting?download=1792:agreement-on-cooperation-on-marine-oil-pollution-preparedness-and-response-in-the-arctic-signed-version-with-appendix>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

440 THE YEAR IN REVIEW

tor activities to identify oil pollution incidents and facilitate effective responses; (4) exchange information and mutually assist in oil pollution preparedness and response operations; and (5) coordinate joint response operations, exercises, and joint reviews to evaluate operations.³⁰

B. MARINE CONSERVATION

In 2013, efforts by the international community to advance the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction continued in international and regional forums. At the international level, the U.N. General Assembly (UNGA), through its 2013 Resolution on Oceans and the Law of the Sea, decided to establish a process for taking a decision on the development of an international instrument under the Law of the Sea Convention to address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, and in this regard requested the UN Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction “to make recommendations to the [UNGA] on the scope, parameters and feasibility of an international instrument under the [Law of the Sea Convention].”³¹

2013 saw a number of advancements in multilateral efforts to enable and require fishing vessels to obtain a unique vessel identifier within the International Maritime Organization (IMO) numbering system. Use of an IMO number facilitates the identification and tracking of vessels and has been identified by the international community, including the UNGA, as an important tool for combating illegal, unregulated, and unreported fishing.³² In December 2013, the IMO Assembly adopted amendments to the resolution establishing the IMO Ship Identification Number Scheme that remove the exclusion of vessels solely engaged in fishing.³³ This action was complimented by CCAMLR, the International Commission for the Conservation of Atlantic Tunas (ICCAT), and the Western and Central Pacific Fisheries Commission’s (WCPFC) adoption of new binding measures to require fishing vessels subject to their jurisdiction to have an IMO number.³⁴

ICCAT parties also began negotiations of amendments to the ICCAT Convention, including amendments to reflect international fisheries management principles and approaches that have developed after adoption of the ICCAT Convention in 1969.³⁵ Issues

30. *See id.*

31. G.A. Res. 68/70, ¶¶ 197–198, U.N. Doc. A/RES/68/70 (Dec. 9, 2013).

32. G.A. Res. 68/71, ¶ 78, U.N. Doc. A/RES/68/71 (Dec. 9, 2013) (noting that the amendment of the IMO Ship Identification Number Scheme to cover fishing vessels “will aid the prevention of illegal unreported and unregulated fishing activities.”).

33. *The Preconditions of Using the IMO Number as the UVI for Vessels Have Been Met – Global Record*, FOOD AND AGRIC. ORG. OF THE U.N. (Dec. 4, 2013), <http://www.fao.org/fishery/nems/40513/en>.

34. CCAMLR, *Conservation Measure 10-02, Licensing and Inspection Obligations of Contracting Parties with Regard to their Flag Vessels Operating in the Convention Area*, ¶ 2 (2013); International Commission for the Conservation of Atlantic Tunas [ICCAT], *Recommendation by ICCAT Concerning the Establishment of an ICCAT Record of Vessels 20 Meters in Length Overall or Greater Authorized to Operate in the Convention Area*, [Rec. 13-13] (2013); Western and Central Pacific Fisheries Commission, *Conservation and Management Measure for WCPFC Implementation of a Unique Vessel Identifier*, WCPFC CMM 2013-04 (2013).

35. First Meeting of the Working Group on the ICCAT Convention Amendment, July 10–12, 2013, Sapporo, Jap., *Rep. of the 1st Meeting of the Working Group on Convention Amendment*, Sapporo, Japan.

include the scope of the ICCAT Convention (particularly with respect to shark conservation and management), voting rules and objection procedures, and non-party participation in ICCAT's work (which could allow for enhanced participation of non-State actors, such as Taiwan, that fish for ICCAT species).³⁶

III. International Hazard Management

A. TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTE

The eleventh meeting of the Conference of the Parties (COP-11) to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention)³⁷ was held in Geneva, Switzerland from April 28 to May 10, 2013, in conjunction with the COP-6 to the Rotterdam Convention³⁸ and the COP-6 to the Stockholm Convention.³⁹ A joint statement—the “Geneva Statement”—was issued, which evidences the continuing enhanced coordination of the three conventions (the “synergies process”) and affirms the intent to pursue an “overarching” approach to implementing the three conventions together.⁴⁰

The sessions resulted in further discussion on technical guidelines on persistent organic pollutants (POPs) and a decision to update the general technical guidelines on the environmentally sound management of POPs and to prepare and update specific technical guidelines with regard to POPs that recently became subject to the Stockholm Convention.⁴¹

The Partnership for Action on Computing Equipment (PACE) reported to COP-11 on activities implemented since the COP-10 in Cartagena, Colombia to assist developing countries and countries with economies in transition with the environmentally sound management of used and end-of-life computing equipment, including field testing of

36. *Id.* app. 3 (Rec. 12-10: Recommendation by ICCAT to Establish a Working Group to Develop Amendments to the ICCAT Convention).

37. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126, 28 I.L.M. 657.

38. Conference of Plenipotentiaries on the Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, Neth., Sept. 10–11, 1998, *Final Act*, U.N. Doc. UNEP/FAO/PIC/CONF/5 (Sept. 17, 1998).

39. 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).

40. Conferences of the Parties to the Basel, Rotterdam, and Stockholm Conventions, *Geneva Statement on the Sound Management of Chemicals and Waste*, U.N. Doc. EXCOPS.2/OTHER.9/HLS (May 8, 2013), available at <http://synergies.pops.int/Implementation/MediaResources/PressReleases/ExtraordinaryUNConferenceTakesHistoricStrides/tabid/3226/language/en-US/Default.aspx#LiveContent> (follow “Geneva Statement on the Sound Management of Chemicals and Waste” link).

41. See Basel Convention, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on the Work of its Eleventh Meeting*, 9, 37, U.N. Doc. UNEP/CHW.11/24 (July 23, 2013) [hereinafter *COP 11 Report*], available at <http://www.basel.int/Default.aspx?tabid=3077> (follow PDF or Word link in “UNEP/CHW.11/24” row); see also Press Release, Stockholm Convention, UN Chemical Experts Recommend Phase Out of Two Industrial Chemicals (Oct. 21, 2013), available at <http://chm.pops.int/TheConvention/Media/PressReleases/phaseoutoftwoindustrialchemicals/tabid/3483/Default.aspx>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

442 THE YEAR IN REVIEW

guidelines on environmentally sound practices.⁴² At COP-11, the sections of a guidance prepared by PACE that establish procedures for environmentally sound testing, refurbishment, repair, and recycling of used computing equipment were adopted. The section of the PACE guidance that addresses transboundary movement of used and end-of-life computing equipment, and in particular the distinction between waste and non-waste, was not adopted, and the section remains subject to further revision.⁴³ In a separate action, revised technical guidelines for the transboundary movement of electronic waste (e-waste), which address the distinction between waste (covered by the Basel Convention) and non-waste (not covered) were reviewed but not approved.⁴⁴

COP-11 also considered a revised legal analysis on the application of the Basel Convention to wastes generated on board ships.⁴⁵ Ship-generated wastes are covered by the International Convention for the Prevention of Pollution from Ships (MARPOL).⁴⁶ The revised analysis affirms that the Convention does not apply to ship-generated wastes that remain on board a ship. But because MARPOL lacks landed-waste provisions, the Basel Convention's environmentally sound management requirement would apply to offloaded ship-generated wastes and the Basel Convention's prior informed consent requirement would apply to offloaded ship-generated wastes that are the subject of transboundary movement.⁴⁷

B. INTERNATIONAL REGULATION OF AGRICULTURAL BIOTECHNOLOGY

Although biotech crops continued to increase worldwide acreage in 2013,⁴⁸ regulatory approval requirements for biotech crops (both for planting and food-feed-processing import approvals) are being adopted in more nations that are parties to the 2003 Cartagena Protocol on Biosafety (CPB) to the Convention on Biological Diversity (CBD). Trade could potentially be disrupted when approvals are delayed pending review of research dossiers. China, for example, has turned away some U.S. corn shipments this year after detecting an unapproved genetic event.⁴⁹ Also, under CPB Article 18.2(a), Vietnam is

42. *COP 11 Report*, *supra* note 41, at 20–21.

43. *Id.* at 59; *see also* Basel Convention, *Revised Guidance Document on the Environmentally Sound Management of Used and End-of-Life Computing Equipment*, UN Doc. UNEP/CHW.11/6/Add.1/Rev.1 (July 26, 2013).

44. *COP 11 Report*, *supra* note 41, at 39.

45. *Id.* at 22; *see also* Basel Convention, *Cooperation Between the Basel Convention and the International Maritime Organization*, 2, UN Doc. UNEP/CHW.11/17 (Jan. 17, 2013); Basel Convention, *Legal Analysis of the Application of the Basel Convention to Hazardous and Other Wastes Generated on Board Ships*, 4, UN Doc. UNEP/CHW.11/INF/22 (Feb. 18, 2013); *see also* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, art. 1, § 4, Mar. 22, 1989, 1673 U.N.T.S. 126, 28 I.L.M. 657.

46. *See* International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973 (as modified by the Protocol of 1978 and the Protocol of 1997), 34 U.S.T. 3407, 1340 U.N.T.S. 184.

47. Basel Convention, *Legal Analysis of the Application of the Basel Convention to Hazardous and Other Wastes Generated on Board Ships*, 4, U.N. Doc. UNEP/CHW.11/INF/22 (Feb. 18, 2013).

48. *See generally*, ISAAA Brief 44-2012: *Executive Summary, Global Status of Commercialized Biotech/GM Crops: 2012*, INT'L SERV. FOR THE ACQUISITION OF AGRI-BIOTECH APPLICATIONS, <http://www.isaaa.org/resources/publications/briefs/44/executivesummary/> (last visited Mar. 24, 2014).

49. Niu Shuping & Karl Plume, *UPDATE 2-China Rejects U.S. Corn Cargo for Unapproved GMO Variety*, REUTERS (Nov. 18, 2013, 4:37 PM), <http://www.reuters.com/article/2013/11/18/china-corn-gmo-idUSL2N0J31QG20131118?feedType=RSS&virtualBrandChannel=11563>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

ENVIRONMENTAL LAW 443

now implementing a biosafety law with a novel provision that allows expedited approval where at least five other nations have approved a genetic event.⁵⁰

The CPB now has 167 parties, while the 2010 Nagoya-Kuala Lumpur Supplemental Protocol (NKLS Protocol) on liability remains short of the ratifications needed to enter into force.⁵¹ The CBD's 2010 "Nagoya Protocol" on access to genetic resources is likely to enter into force in the next few years.⁵² The CPB and the CBD parties will meet in South Korea in September 2014.

Both of these laws on liability and access to genetic resources, if they enter into force, could shape regulatory approval processes, access to germplasm for plant breeding, and create new liability risks. For example, consistent with CPB Article 18.2(a), Vietnam is now implementing a biosafety law with a unique provision of allowing faster approval where five other nations have approved a genetic event.⁵³

C. CHEMICALS

In October 2013, a new treaty on mercury, the Minamata Convention on Mercury (Minamata Convention) was adopted in Japan; it needs fifty ratifications to enter into force. As of January 2014, ninety-four countries have signed the Minamata Convention.⁵⁴ The treaty controls products, processes, and industries using mercury and also addresses mercury mining, international trade, and safe storage and disposal of mercury waste. Article 13 of the Minamata Convention discusses financial resources and a financial mechanism for the Convention.⁵⁵ The parties established a mechanism under the COP to provide "adequate, predictable, and timely financial resources" to developing country parties and country parties with economies in transition, and each party agreed to undertake, within its capabilities, to provide resources for national activities.⁵⁶

The United States became the first country to both sign and indicate its "acceptance" of the Minamata Convention. The U.S. Department of State stated that the United States "can implement Convention obligations under existing legislative and regulatory authority" and hailed this "global step forward to reduce exposure to mercury, a toxic chemical

50. Le Thanh Binh, Head of Natural Conservation Div., Viet. Env't Prot. Agency, Overview on Legal Framework on Biosafety in Vietnam, *available at* http://www.isgmard.org.vn/VHDocs/DocsPub/ARDSectorStrategyPolicy/Presentation_Overview_on_Biosafety%20laws_inVn_E.pdf (last visited Mar. 24, 2013).

51. *See generally* Parties to the Protocol and Signature and Ratification of the Supplementary Protocol: Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress, CONVENTION ON BIOLOGICAL DIVERSITY, <http://bch.cbd.int/protocol/parties/#tab=1> (last visited Mar. 24, 2014).

52. *See generally* Parties to the Protocol and Signature and Ratification of the Supplementary Protocol: Cartagena Protocol on Biosafety, CONVENTION ON BIOLOGICAL DIVERSITY, <http://bch.cbd.int/protocol/parties/#tab=0> (last visited Mar. 25, 2014). *See also* Status of Signature, and Ratification, Acceptance, Approval or Accession, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/abs/nagoya-protocol/signatories/> (last visited Mar. 24, 2014).

53. Binh, *supra* note 50.

54. *See* Countries, UNEP MINAMATA CONVENTION ON MERCURY, <http://www.mercuryconvention.org/Countries/tabid/3428/Default.aspx> (last visited Mar. 24, 2014).

55. Minamata Convention on Mercury, art. 13 (2013), *available at* http://www.mercuryconvention.org/Portals/11/documents/conventionText/Minamata%20Convention%20on%20Mercury_e.pdf.

56. *Id.* art 13(5).

SPRING 2014

PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

444 THE YEAR IN REVIEW

with significant health effects on the brain and nervous system.”⁵⁷ Europe’s regulation of chemicals under its Registration, Evaluation, Authorization, and Restriction of Chemicals (REACH) law, and electronic waste (e-waste) under its directives on waste electrical and electronic equipment (WEEE), continued to evolve in complexity. The EU is adding more hazardous substances for disclosure-reduction under its “Reduction of Hazardous Substance” (RoHS) law and is expanding WEEE-RoHS to cover spare parts; the “RoHS Recast” or “RoHS 2” is now in effect for electronic-electrical products already covered by the original eight categories, and additional categories (such as medical devices and control equipment) take effect in July 2014.⁵⁸ More delegation to Member States is occurring, which may result in stricter RoHS laws impacting trade.

IV. Natural Resources

A. WATER RESOURCES

Three more states (Italy, Montenegro, and Niger) ratified the *U.N. Convention on the Law of Non-Navigational Uses of International Watercourses*⁵⁹ since our last report, bringing the total ratifications up to thirty-one. That is four short of the thirty-five needed to bring the Convention into force, although eleven of the ratifications occurred within the past four years, compared to twenty ratifications in the first twelve years after the Convention’s approval by the General Assembly in May 1997.

The International Court of Justice (ICJ) is engaged in proceedings regarding a border dispute between Costa Rica and Nicaragua centering on the San Juan River. In 2009, the Court upheld the Costa Rican claims of navigation rights in the river based on an 1858 treaty.⁶⁰ The Court did not comprehensively resolve the rights of the two nations, and, almost immediately, Nicaragua occupied land in connection with the proposed construction of a sea-level canal to compete with the Panama Canal. Title to this land was disputed because of changes in the course of the river. Costa Rica responded by building a road across the disputed land, and Nicaragua filed a new case which is now underway before the ICJ.⁶¹

Of particular interest to the United States and Canada is the consideration of potentially reopening the Columbia River Treaty.⁶² The International Joint Commission con-

57. Press Release, U.S. Dep’t of State, United States Joins Minamata Convention on Mercury (Nov. 6, 2013), *available at* <http://www.state.gov/r/pa/prs/ps/2013/11/217295.htm>.

58. QNET LLC, ROHS2 DIRECTIVE 2011/65/EU: WHAT MANUFACTURERS NEED TO KNOW AND DO (2013), *available at* <http://www.ce-mark.com/RoHS2.pdf>.

59. *See generally* Convention on the Law of Non-Navigational Uses of International Watercourses, G.A. Res. 229, U.N. GAOR 6th Comm., 51st Sess., U.N. Doc. No. A/51/869, reprinted in 36 I.L.M. 700 (1997) [hereinafter UN Convention].

60. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), 2009 I.C.J. 213 (July 13, 2009).

61. *See generally* Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Application Instituting Proceedings (Nov. 18, 2010), *available at* <http://www.icj-cij.org/docket/files/150/16279.pdf>.

62. *See generally* U.S. ARMY CORPS OF ENGINEERS & BONNEVILLE POWER ADMINISTRATION, COLUMBIA RIVER TREATY REVIEW, WORKING DRAFT OF A REGIONAL RECOMMENDATION: IMPROVING THE COLUMBIA RIVER TREATY POST-2024 (June 27, 2013), *available at* <http://www.crt2014-2024review.gov/Files/CRTR%20working%20draft%20recommendation,%20June%2027%202013.pdf>; Nigel Bankes, *The Flood*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

ENVIRONMENTAL LAW 445

tinues to grapple with falling levels of the Great Lakes⁶³ while taking the lead on the new Great Lakes Water Quality Agreement.⁶⁴ The new protocol will greatly strengthen the environmental standards applicable to the lakes and also enhance public participation in management decisions. Proposals to export water from British Columbia are now in court.⁶⁵

On the Mexico/U.S. border, the International Boundary and Water Commission signed Minute 319 to extend cooperative efforts in managing the Colorado River, particularly by authorizing Mexico to store water in Lake Mead behind Hoover Dam.⁶⁶ The plan allows Mexico to avoid constructing new water storage within its borders while tending to alleviate, at least a little, declines in the level of Lake Mead. Mexico is authorized to store as much as 250,000 ac-ft. per year in Lake Mead and to request delivery of up to 200,000 ac-ft. per year of the stored water. Deliveries are deferred if the surface of Lake Mead falls below certain elevations. Mexico committed to using at least 2 percent of the stored water for environmental purposes in Mexico. Other provisions apply to flood control, surplus water releases, and salinity management. It also authorizes a pilot program to evaluate joint programs to provide water for environmental needs and other joint projects in the lower Colorado.

The Nile basin continues as a major problem area.⁶⁷ Six upper-basin states have created a “Nile Basin 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 their projects.⁶⁸ The division of Sudan into two states further complicates the situation.⁶⁹ China is financing the “Grand Renaissance Dam” in Ethiopia and buying large tracts of

Control Regime of the Columbia River Treaty: Before and after 2024, 2 WASH. J. ENVTL. L. & POL'Y 1 (2012); Scott McKenzie, *A River Runs through It: The Future of the Columbia River Treaty, Water Rights, Development, and Climate Change*, 29 GA. ST. U.L. REV. 921 (2013); Rachel Paschal Osborn, *Climate Change and the Columbia River Treaty*, 2 WASH. J. ENVTL. L. & POL'Y 75 (2012).

63. See, e.g., Int'l Upper Great Lakes Study, Int'l Joint Comm'n, *Lake Superior Regulation: Addressing Uncertainty in Upper Great Lakes Water Levels* (Mar. 2012), available at http://www.ijc.org/files/publications/Lake_Superior_Regulation_Full_Report.pdf.

64. See generally Protocol Amending the Agreement Between Canada and the United States of America on Great Lakes Water Quality, U.S.-Can., Sept. 7, 2012, available at http://www.ijc.org/en/_Great_Lakes_Water_Quality.

65. See generally Susan Lazaruk, *California Firm Sues B.C. over 30-Year-Old Water Deal*, THE PROVINCE, Oct. 23, 2012, at A4, available at <http://www.canada.com/story.html?id=ED80bb02-d9ec-451a-9576-bd2f91686c73>.

66. Int'l Boundary and Water Comm'n, U.S. & Mex., *Interim International Cooperative Measures in the Colorado River Basin Through 2017 and Extension of Minute 318 Cooperative Measures to Address the Continued Effects of the April 2010 Earthquake in the Mexicali Valley, Baja California* (Nov. 20, 2012), available at http://www.ibwc.gov/Files/Minutes/Minute_319.pdf.

67. See generally Salman M.A. Salman, *Mediation in International Water Disputes—The Indus, the Jordan, and the Nile Basins Interventions*, in INT'L L. AND FRESHWATER: THE MULTIPLE CHALLENGES 393 (Laurence Boisson de Chazournes, Christina Leb & Mara Tignino eds., 2013).

68. See Agreement on the Nile River Basin Cooperative Framework, annex art. 14(b) (2010), available at http://www.internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf.

69. See generally Eric Reeves, *South Sudan: Dams, Droughts, Desertification and Water Wars*, ALL AFR. (July 1, 2013), <http://allafrica.com/stories/201307020667.html>; *South Sudan Cabinet Resolves to Join the Nile Basin Initiative*, ALL AFR. (Aug. 19, 2013) <http://allafrica.com/stories/201308191880.html>.

SPRING 2014

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

446 THE YEAR IN REVIEW

Ethiopian land on which Chinese farmers will grow food for export to China.⁷⁰ Egypt threatened war,⁷¹ but that possibility seems preempted by domestic turmoil in Egypt.⁷²

Controversy continues in the Mekong Commission. Thailand is financing the Xayaburi Dam in Laos, despite the objections of Cambodia and Vietnam, the other members of the Commission, because of the dire consequences the dam is likely to cause to fishing, biodiversity, and agriculture downstream.⁷³ The latest arbitral decision between India and Pakistan over the Kishenganga Dam allowed India to complete the dam and divert water to operate its run-of-the-river power plant but also provided safeguards for Pakistani irrigation.⁷⁴ Pakistan again asked India to defer the project to allow further arbitration.⁷⁵

B. BIOLOGICAL RESOURCES AND WILDLIFE

Wildlife crime has been a central issue for international wildlife and biodiversity law. President Obama took a leading role in addressing the poaching and trafficking crises by establishing a cabinet-wide Presidential Task Force on Wildlife Trafficking for the purpose of developing and implementing a National Strategy for Combating Wildlife Trafficking.⁷⁶ President Obama's executive order recognized the role that organized criminal syndicates play in wildlife trafficking by suggesting that wildlife trafficking should be an element of the federal government's transnational organized crime strategy.⁷⁷ To demonstrate its commitment to the poaching and trafficking crises, the United States pulverized six tons of seized elephant ivory on November 14, 2013, a first for the country.⁷⁸

The issue of wildlife crime also took center stage internationally. In April 2013, the Economic and Social Council adopted a resolution commending the efforts of the International Consortium on Combatting Wildlife Crime (ICWC)—comprising the Secretariat of the Convention on International Trade in Endangered Species of Wild Flora and

70. Harry Verhoeven, *China Shifts Power Balance in the Nile River Basin*, CHINA DIALOGUE (July 4, 2013), <https://www.chinadialogue.net/article/show/single/en/6178-China-shifts-power-balance-in-the-Nile-river-basin>; Bahakal Abate Yimer, *Competing Water Use in Large-Scale Commercial Farms: Ethiopia*, in INT'L L AND FRESHWATER: THE MULTIPLE CHALLENGES 319 (Laurence Boisson de Chazournes, Christina Leb & Mara Tignino eds., 2013).

71. See *Egypt Hopes Continuation of Cooperation Among Nile Basin Countries to Promote Common Development Efforts*, ALL AFR. (Feb. 23, 2013), <http://allafrica.com/stories/201302240127.html>; Griff Witte, *Egypt Frets and Fumes over Ethiopia's Nile Plan*, WASH. POST, June 13, 2013, at A4, available at http://www.washingtonpost.com/world/middle_east/egypt-frets-fumes-over-ethiopia-nile-plan/2013/06/12/d3ab3f4a-d1e1-11e2-9577-df9f1c3348f5_story.html.

72. See generally Andrew Natsios, *Egypt's Three Challenges*, U.S. NEWS & WORLD REP. (Aug. 2, 2013), <http://www.usnews.com/opinion/blogs/world-report/2013/08/02/egypts-three-challenges-its-coup-its-economy-and-the-nile-river>.

73. Tom Fawthrop, *Laos' Construction of Barrage Triggers Mekong Crisis*, S. CHINA MORNING POST (Jan. 19, 2013, 2:47 AM), <http://www.scmp.com/news/asia/article/1131188/laos-construction-barrage-triggers-mekong-crisis>.

74. *Controversial Project: Hague Court Issues Partial Award on Kishenganga Dam*, EXPRESS TRIB. (Feb. 19, 2013), <http://tribune.com.pk/story/509278/controversial-project-hague-court-issues-partial-award-on-kishenganga-dam/>.

75. Zafar Bhutta, *Kishenganga Dam: Legal Battle Far from Over*, EXPRESS TRIB. (Apr. 1, 2013), <http://tribune.com.pk/story/529393/kishenganga-dam-legal-battle-far-from-over/>.

76. Exec. Order No. 13,648, 78 Fed. Reg. 129 (July 5, 2013).

77. *Id.*

78. See U.S. FISH AND WILDLIFE SERV., U.S. IVORY CRUSH: QUESTIONS AND ANSWERS (Nov. 2013), available at <http://www.fws.gov/international/pdf/factsheet-ivory-crush-qa.pdf>.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

ENVIRONMENTAL LAW 447

Fauna (CITES), INTERPOL, World Bank, U.N. Office on Drugs and Crime, and World Customs Organization—to provide technical assistance in the fight against wildlife trafficking.⁷⁹ The resolution urges Member States to treat wildlife crime on par with other transnational crimes and to bring the resources and efforts of the U.N. Convention against Transnational Organized Crime and against Corruption to bear on illicit wildlife trafficking.⁸⁰

Meanwhile, a new International Environmental Compliance and Enforcement Conference, co-hosted by INTERPOL and United Nations Environment Programme (UNEP) in November 2013 in Nairobi, highlighted illegal wildlife trade as a growing concern having serious impacts on human and environmental health.⁸¹

COP-16 of CITES met in March 2013.⁸² CITES parties emphasized the need for scaled-up, collective action to reduce illegal trade, especially through enforcement measures. The understanding that there exists momentum to tackle illegal trade underscored many CITES decisions. For example, the COP adopted a decision that required forensic sampling of every ivory seizure over 500 kilograms.⁸³ Additionally, in recognizing that certain exemptions built into the treaty serve as loopholes for illegal trade, the parties agreed to exclude individuals from exporting and importing rhino horn and elephant ivory as personal effects, which are exempt from the treaty's trade rules.⁸⁴

This CITES meeting was largely viewed as one of the most successful for species conservation. The parties brought hundreds of timber species under the auspices of CITES, as well as five shark species and manta rays.⁸⁵ The inclusion of commercially valuable timber and marine species marks a new era for CITES and represents a significant advance from years past, when there was less agreement among the parties on the role of CITES in regulating species subject to large-scale commercial harvest.⁸⁶

79. See Comm. on Crime Prevention and Criminal Justice, Rep. on the 22nd Sess., Dec. 7, 2012 & Apr. 22–26, 2013, E/CN.15/2013/27 (2013) (noting adoption of Resolution on *Crime prevention and criminal justice responses to illicit trafficking in protected species of wild fauna and flora*).

80. *Id.*

81. See generally, Bulletin, INTERPOL & U.N. Env't Programme, Vol. 216, No. 1, A Summary Report of the First International Environmental and Enforcement Conference (Nov. 8, 2013), available at <http://www.unep.org/environmentalgovernance/Portals/8/documents/UNEP-INTERPOLConferenceReport.pdf>.

82. Convention on the International Trade in Endangered Species of Wild Fauna and Flora [CITES], 16th Meeting of the Conference of the Parties, Mar. 3–14, 2013, Bangkok, Thai., *Summary Record of the 13th Session of Committee II*, CoP16 Com. II Rec. 13 (Rev. 1) (Mar. 12, 2013).

83. CITES, *Decisions of the Conference of the Parties to CITES in Effect after its 16th Meeting*, Decision 16.83, Monitoring of Illegal Trade in Ivory and Other Elephant Specimens (Elephantidae spp.); *id.* at 53.2.

84. CITES Resolution, Control of Trade in Personal and Household Effects, Resolution Conf. 13.7 (Rev. CoP 16) (Mar. 2013); see also Convention on the International Trade in Endangered Species of Wild Fauna and Flora, Summary Record of the 16th mtg. of the COP, CoP16 Plen. 6 (Rev. 1) (Mar. 13, 2014) [hereinafter CoP16 Summary Record].

85. See CITES, Notifications to the Parties, *Amendments to Appendices I and II of the Convention*, No. 2013/012 (Apr. 19, 2013); CoP16 Summary Record; Convention on the International Trade in Endangered Species of Wild Fauna and Flora, Summary Record of the Seventh Plenary Session, CoP16 Plen. 7 (Rev. 1) (Mar. 14, 2013).

86. See, e.g., *CITES Governments Depart Doha Leaving Marine Species Unprotected*, ENV'T NEWS SERVICE (Mar. 25, 2010, 10:03 PM), <http://ens-newswire.com/2010/03/25/cites-governments-depart-doha-leaving-marine-species-unprotected/> (noting that the Parties rejected proposals to list four shark species, red and pink corals, and the Atlantic Bluefin Tuna).

SPRING 2014

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

448 THE YEAR IN REVIEW

In conjunction with the listing of a significant number of timber species under CITES, the EU took steps to regulate the sale of illegal wood products. In March 2013, the EU made placing any illegally sourced timber and timber products into the EU marketplace a violation of law.⁸⁷ This regulation means the EU has implemented a comprehensive record-keeping system that allows for greater traceability and thus better enforcement.

V. Trade and the Environment

In 2013, trade and environment issues were addressed in regional forums such as the Asia Pacific Economic Cooperation (APEC) Summit in October 2013, where leaders agreed to advance implementation of the commitments to reduce tariffs on the APEC List of Environmental Goods to 5 percent or less by 2015, establish the APEC Public Private Partnership on Environmental Goods and Services to enhance APEC's work to address trade and investment issues relevant to this sector, and to explore trade in products that contribute to sustainable development and inclusive growth through development and poverty alleviation.⁸⁸

In July 2013, the United States and the EU commenced negotiations for a Transatlantic Trade and Investment Partnership (TTIP) agreement. Prior to commencing TTIP negotiations, the United States and EU convened a High Level Working Group on Jobs and Growth. Led by former U.S. Trade Representative Ron Kirk and EU Trade Commission Karel de Gucht, the Working Group engaged with stakeholders to identify the key issues that a transatlantic trade and investment agreement should address. The Working Group concluded that such an agreement should include an environment chapter and address other shared global challenges such as access to raw material and energy.⁸⁹

Trade and environment issues were also raised when the EU expanded its cap and trade system (ETS) to include CO₂ emissions from domestic and international airlines entering and departing EU air space.⁹⁰ On October 4, 2013, the International Civil Aviation Organization (ICAO) made progress regulating CO₂ emissions from aviation, agreeing to develop a market-based mechanism (cap and trade scheme) for aviation by 2016 that is capable of being implemented by 2020.⁹¹ In response, the EC proposed amending its Aviation Directive to apply its cap and trade scheme to only that proportion of CO₂ emitted by airlines within European airspace.⁹² The current Directive applies to CO₂ emis-

87. See Commission Regulation 995/2010, art 4, 2010 O.J. (L 295/23), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:295:0023:0034:EN:PDF> (laying down obligations of operators who place timber and timber products on the market).

88. Asian Pacific Economic Cooperation, *The 21st APEC Economic Leaders' Declaration (Bali Declaration)*, para. 10 (Oct. 8, 2013).

89. EU-U.S. High Level Working Group on Jobs and Growth, *Final Report*, at 5 (Feb. 11, 2013).

90. Council Directive 2008/101/EC, art. 3b, 2008 O.J. (L 8/3), amending Directive 2003/87/EC to include aviation activities in the scheme for greenhouse gas emissions allowance trading within the Community 2008. Decision 377/2013/EU, art. 3b, 2013 O.J. (L 113/1); see also Connie Hedegaard, Comm'r for Climate Action, Eur. Comm'n, EU Willing to "Stop the Clock" on Aviation in the EU ETS for Flights Into and Out of Europe Until After the ICAO General Assembly Next Autumn (Dec. 20, 2012).

91. International Civil Aviation Organization, Resolution Adopted by the 38th Assembly, Provisional Edition, at 95 (Nov. 2013).

92. Memorandum from the European Commission, Commission proposal for European Regional Airspace Approach for the EU Emission Trading for Aviation-Frequently Asked Questions (Oct. 16, 2013), available at http://europa.eu/rapid/press-release_MEMO-13-905_en.htm.

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

ENVIRONMENTAL LAW 449

sions emitted by airlines for the duration of all flights entering and departing EU airspace.⁹³

During 2013, a number of trade disputes arose regarding governments' efforts to promote and protect its renewable energy industry. In November, a WTO Panel issued a decision on a challenge by Norway and Canada to an EU measure prohibiting the sale of seal products in the EU unless they conformed with specific conditions, namely, that the seals were (1) hunted by Inuit or indigenous communities, (2) obtained from seal hunters for marine resources management, or (3) brought into the EU by travelers under limited circumstances.⁹⁴ The Panel found that the EU measure treated imported seal products less favorably than like domestic seal products, and was therefore inconsistent with TBT Article 2.1,⁹⁵ but was not more trade restrictive than necessary and, therefore, did not breach TBT Article 2.2.⁹⁶ The Panel also found that the EU measure was a conformity assessment procedure that created unnecessary obstacles to international trade in breach of TBT Article 5.1.2.⁹⁷ On the GATT claims, the Panel found a breach of the most-favored nation commitment in GATT Article I and national treatment commitment in GATT Article III.4.⁹⁸ The Panel found that the measure fell within the terms of XX(a) but failed to satisfy the terms of the chapter to Article XX.⁹⁹

On May 24, 2013, the WTO Appellate Body issued its decision in the case taken by Japan and the EU against Canada regarding a Montreal law that conditions access to its feed-in-tariff for electricity generators of renewable energy on satisfying a minimum domestic content level for the development and construction of a wind or solar power generation facility.¹⁰⁰ The Appellate Body upheld the Panel's decision that the measure is a government purchase of goods under the agreement on Subsidies and Countervailing Measures (SCM), inconsistent with GATT Article III.4 and the Agreement on Trade Related Investment Matters (TRIMS) Article 2.1.¹⁰¹ The Appellate Body overturned the Panel's finding that the measure does not constitute a "benefit" under SCM Article 1.1(b) but it was unable to complete the analysis and determine whether the Canadian measure was a subsidy that breached the SCM agreement, due to a lack of "sufficient factual findings by the Panel and uncontested evidence on the Panel record."¹⁰²

Another trade dispute over renewable energy arose in June 2013 when the EU imposed antidumping duties on imports of solar panels from China. In July 2013, the EU reached agreement with China, whereby Chinese suppliers accepted a voluntary floor price for exports of solar panels to the EU up to a defined volume, and in return, the EU agreed

93. Decision 377/2013/EU, *supra* note 90, art. 3b; *see also* Hedegaard, *supra* note 90.

94. Panel Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R & WT/DS401/R, paras 7.1-7.2 (Nov. 25, 2013).

95. *Id.* paras. 7.319, 7.353.

96. *Id.* para. 7.505.

97. *Id.* para. 7.580.

98. *Id.* para. 7.609.

99. *Id.* para. 7.651.

100. WTO Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/AB/R and *Canada—Measures Relating to the Feed-in-Tariff Program*, WT/DS426/AB/R (May 6, 2013) (hereinafter *Canada-Renewable Energy*).

101. *Canada-Renewable Energy*, paras. 5.80–5.85.

102. *Id.* para. 5.246.

SPRING 2014

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

450 THE YEAR IN REVIEW

not to impose antidumping duties on these imports.¹⁰³ For imports into the EU above this annual volume, it was agreed that the EU could apply an average duty of 47.6 percent.¹⁰⁴

VI. Finance

A. G-20

The G-20 reiterated its commitment to addressing climate change and the UNFCCC process at its Ministerial Meeting in St. Petersburg, Russia in September 2013.¹⁰⁵ Leaders recognized that encouraging investment in low carbon would require better regulations¹⁰⁶ and, in regards to nuclear energy, will require multilateral cooperation to create a global nuclear liability regime to safely increase nuclear energy capacity.¹⁰⁷ The outcome declaration also supported the phase out of HFCs and decided to continue counting HFCs in the accounting and reporting of emissions under the UNFCCC and its Kyoto Protocol.¹⁰⁸

B. WORLD BANK

The World Bank is updating its environmental and social safeguards and concluded its first round of comments and consultations in April 2013.¹⁰⁹ Since then, the Bank has been working on drafting the proposed safeguards. The process has been delayed partly due to overall restructuring of World Bank operations.

The World Bank Group's Forest Carbon Partnership Facility (FCPF)¹¹⁰ expanded operations, enjoying new pledges primarily for its Carbon Fund, which adopted a new methodological framework in December 2013.¹¹¹ In September 2013, Costa Rica and the World Bank (for the FCPF) signed a letter of intent for the FCPF to buy carbon emissions reductions (or carbon credits) up to USD 63 million,¹¹² making Costa Rica the first country to receive the large-scale performance-based payments from the Carbon Fund.¹¹³ The Carbon Fund adopted "Guiding Principles on the key Methodological Framework for the Carbon Fund" to help provide guidance for what criteria REDD+ programs must demon-

103. Memorandum from the European Commission, Statement by the EU Trade Commissioner Karel De Gucht on the Amicable Solution in the EU-China Solar Panels Case, 1 (July, 29, 2013), available at http://europa.eu/rapid/press-release_MEMO-13-730_en.htm.

104. *Id.*

105. Russia G20, *G20 Leaders' Declaration*, at para 100 (Sept. 5–6, 2013), available at https://www.g20.org/sites/default/files/g20_resources/library/Saint_Petersburg_Declaration_ENG.pdf.

106. *See id.* para. 96.

107. *See id.* para. 97.

108. *See id.* para. 101.

109. All submitted comments and the summaries of the consultations can be found on the website for the Review and Update of the World Bank Safeguard Policies: *Review and Update of the World Bank Safeguard Policies*, WORLD BANK, www.worldbank.org/safeguardsconsultations (last visited Mar. 25, 2014).

110. *See* FOREST CARBON PARTNERSHIP FACILITY, <http://www.forestcarbonpartnership.org/fcp/> (last visited Mar. 25, 2014).

111. Forest Carbon Partnership Facility, *Carbon Fund Methodological Framework* (Dec. 20, 2013), available at <https://www.forestcarbonpartnership.org/carbon-fund-methodological-framework>.

112. *Letter of Intent Signed with Costa Rica*, FOREST CARBON PARTNERSHIP FACILITY, <https://www.forestcarbonpartnership.org/letter-intent-signed-costa-rica> (last visited Mar. 25, 2014).

113. *Id.*

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

ENVIRONMENTAL LAW 451

strate to receive results-based payments. Amongst other criteria, the Methodological Framework called for programs to meet the World Bank environmental and social safeguards, promote the safeguards included in UNFCCC guidance for REDD+, and assess and address land tenure issues.¹¹⁴

VII. International Environmental Litigation

The Alien Tort Statute (ATS) permits U.S. district courts to hear suits by foreign nationals for torts “committed in violation of the law of nations or a treaty of the United States.”¹¹⁵ The ATS has been used as the basis for suits brought in U.S. court to vindicate human rights claims, including some that involved environmental harm. The Supreme Court issued a key ATS decision in 2013, finding unanimously in *Kiobel v. Royal Dutch Petroleum* that the ATS could not provide a remedy for plaintiffs in that case because of the extraterritorial nature of the underlying claims, which involved allegations of human rights violations by Shell Oil in the course of oil development in Nigeria.¹¹⁶ The Court agreed on this result but was divided as to the applicable reasoning, with a total of four opinions providing distinct rationales. The Court’s decision has already been discussed at length in scholarly literature; commentators have suggested a range of readings with varying implications.¹¹⁷ The courts are also beginning to apply the decision, a process that will provide additional insight and clarify the extent to which the Court’s decision will curtail ATS litigation.¹¹⁸

Even while the ATS appears to be contracting in scope, the European Court of Justice (ECJ) has become an increasingly important forum for litigation involving environmental issues. An example is a recent decision relating to public participation in environmental decision-making.¹¹⁹ The Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention) provides for public access to procedures for review of certain governmental proceedings and states that the cost of such procedures shall not be “prohibitively expensive.” The ECJ recently applied this provision in a case involving efforts by individuals who resided near a cement plant to challenge a local permitting decision for the plant based on an inadequate environmental impact analysis.¹²⁰ The residents lost on the merits and were ordered to pay almost 90,000 pounds in fees and costs under the United Kingdom’s fee-shifting rules.¹²¹ The ECJ found that the Aarhus Convention and related EU directives required that the individuals involved “should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of

114. Forest Carbon Partnership Facility, *supra* note 111, at 17–19.

115. Alien’s Action for Tort, 28 U.S.C. § 1350 (1948).

116. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

117. See, e.g., Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601, 603 (2013). Volume 28, issue 1 of the *Maryland Journal of International Law* is devoted almost entirely to viewpoints on the significance of the *Kiobel* decision. See generally 28 MD. J. INT’L L. (2013).

118. See, e.g., Balintulo v. Daimler A.G., 727 F.3d 174, 182 (2d. Cir. 2013).

119. Case C-260/11, David Edwards et al., v. Env’t Agency (2013), available at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-260/11>.

120. *Id.* para. 11.

121. *Id.* para. 17.

SPRING 2014

**PUBLISHED IN COOPERATION WITH
SMU DEDMAN SCHOOL OF LAW**

THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

452 THE YEAR IN REVIEW

the financial burden that might arise as a result” and provided a list of factors to consider.¹²² This decision is significant against the backdrop of the increasing development of private enforcement of environmental norms.¹²³

122. *Id.* para. 35.

123. See PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 139–140 (3d ed. 2012) (discussing citizen enforcement with respect to international environmental law).