

International Environmental Law

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This chapter provides an overview of international legal developments in a number of topics of interest to international environmental law (IEL) practitioners and scholars including air and climate law, marine protection law, freshwater protection law, waste and chemical management law, biodiversity law, trade and investment law related to the environment, general principles of IEL, and environmental information treaties.

I. Air and Climate Developments

2017 brought substantial positive and negative developments in climate law and policy. The role of sub-national, corporate, and non-governmental actors played a significant role in moving climate change action forward.

A. PARIS AGREEMENT

In November 2017, under the presidency of Fiji, climate talks continued in Bonn, Germany as parties to the Paris Agreement negotiated further on implementation questions. States agreed that in 2018, a “Facilitative Dialogue” would be held in Katowice, Poland to take stock as to whether actions promised by parties to the Paris Agreement would be capable of achieving the goal of not exceeding two degree Celsius increase compared to pre-industrial baselines and what additional measures would need to be taken to restrict temperature increases to no more than 1.5 degree Celsius.¹ States also agreed during negotiations that in 2018 developing states should also be prepared to report on climate financing and technology transfer that they are providing to developed states.² The process the states will apply is being called the “Talanoa Dialogue” after Fijian and Pacific Island practices where individuals tell stories and avoid assigning blame in order to build mutual respect and achieve common goals.³

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1. U. N. Framework Convention on Climate Change, *Preparations for the Implementation of the Paris Agreement and the First Session of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement* (Nov. 18, 2017), <http://unfccc.int/resource/docs/2017/cop23/eng/l13.pdf>.

2. *Id.* at para. 16.

3. *Id.* at annex II; see also U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on its Twenty- Second Session, Held in Marrakech from 7 to 18 November 2016*, U.N.F.C.C.C. Dec. 1/CP.22, U.N. Doc. FCCC/CP/2016/10/Add.1, available at http://unfccc.int/focus/talanoa_dialogue/items/10265.php; U.N. Framework Convention on Climate

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In conjunction with the Bonn meeting, a number of groups announced additional commitments in support of the Paris Agreement. The Powering Past Coal Alliance, composed of a number of states, sub-national groups, and corporations, announced their intention to phase out coal by 2030.⁴ As a “big ocean” state who chaired the Ocean Conference in June 2017 (described below), Fiji also spearheaded at the Bonn meeting, an effort called the “Ocean Pathway Partnership” to ensure that the UNFCCC process is “ocean inclusive.”⁵ This multi-stakeholder partnership of states is expected to work within the UNFCCC Conference of Parties to “[c]all for the need to establish the role of a healthy ocean and climate change within the UNFCCC process by 2020” as well as to coordinate with the UN Special Envoy for the Ocean on the implementation of the 2030 sustainable development goal agenda.⁶

B. UNITED STATES AND THE PARIS AGREEMENT

On August 4, 2017, the United States, under the administration of President Trump, communicated to the United Nations its intention to withdraw from the Paris Agreement.⁷ Triggering Article 28 of the Paris Agreement, a formal notice of withdrawal cannot be submitted to the U.N. depositary until November 4, 2019.⁸ The U.S.’s withdrawal would become effective on November 4, 2020.

In response to President Trump’s announced intention to leave the Agreement, the governors of California, Colorado, Connecticut, Delaware, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Oregon, Puerto Rico, Rhode Island, Vermont, Virginia, and Washington created the United States Climate Alliance on June 1, 2017.⁹ Together these states (excluding Puerto Rico) were responsible for 22.3 percent of the U.S.’s

Change, *Report of the Conference of the Parties on its Twenty- Second Session, Held in Marrakech from 7 to 18 November 2016*, U.N.F.C.C.C. Dec. 1/CP.23, U.N. Doc. FCCC/CP/2016/10/Add.1, available at http://unfccc.int/focus/talanoa_dialogue/items/10265.php.

4. *Powering Past Coal Alliance: Declaration*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/660041/powering-past-coal-alliance.pdf (last visited Nov. 16, 2017) (Describing state participation by Angola, Belgium, Canada, Costa Rica, Denmark, Finland, Fiji, France, Italy, Luxembourg, Marshall Islands, Mexico, the Netherlands, New Zealand, Niue, Portugal, Switzerland, and the United Kingdom).

5. COP21, *The Ocean Pathway a Strategy for the Ocean into COP23 Towards an Ocean Inclusive UNFCCC Process*, (evolving document) <https://cop23.com/fj/wp-content/uploads/2017/11/The-Ocean-Pathway-Strategy-8.11.2017.pdf> (last visited Jan., 22, 2018).

6. *Id.*

7. U.S. Dep’t of State, *Communication Regarding Intent to Withdraw from Paris Agreement*, U.S. DEP’T OF STATE (Aug. 4, 2017), <https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm>.

8. Paris Agreement, art. 28, Nov. 4, 2016, available at http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf (last visited Feb. 3, 2018).

9. U.S. CLIMATE ALLIANCE, <https://www.usclimatealliance.org> (last visited Jan. 30, 2018); *Governors*, U.S. CLIMATE ALLIANCE, <https://www.usclimatealliance.org/governors-1/> (last visited Jan. 30, 2018).

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emissions in 2015.¹⁰ The stated objective of the Alliance is to set appropriate greenhouse gas targets that cumulatively would contribute to achieving the U.S. targets under the Paris Agreement. While not members of the alliance, governors from Illinois, Iowa, Maryland, Maine, Montana, New Mexico, Ohio, and Pennsylvania have pledged in various statements to support efforts within their area to achieve the Paris Agreement targets. These additional areas were collectively responsible for approximately 14 percent of the U.S.'s 2015 emissions.¹¹

C. GLOBAL COVENANT OF MAYORS

In January 2017, the European Union's Covenant of Mayors and the Compact of Mayors, the two largest local government initiatives, formed a new group called the Global Covenant of Mayors for Climate & Energy.¹² With participation from 7,400 cities and local governments from 121 states, the initiative focuses on planning to reduce greenhouse gas emissions and improve long-term climate resilience.¹³ In June 2017, the Global Covenant of Mayors held its first meeting and committed to working towards the emission reductions needed to achieve the Paris Agreement. Michael Bloomberg (former mayor of New York City), the U.N. Special Envoy for Cities and Climate Change indicated that Bloomberg Philanthropies would be hosting the 2017 Mayors' Challenge where U.S. cities with populations of 30,000 or more residents could compete for \$17.5 million to support implementation of innovative plans to achieve emission reductions that the federal government would not be supporting.¹⁴

D. CLIMATE CHANGE CASES

New plaintiffs have been initiating cases across the globe to seek better government and corporate mitigation and adaptation strategies. In November 2015, a law student brought a case against the New Zealand government alleging a failure of the Climate Minister to review a 2050 target that it had set under domestic legislation on the basis of new scientific information and to set more ambitious targets than the current NZ's Paris Agreement commitment of an 11 percent reduction below 1990 levels by

10. U.S. Energy Information Administration, *State Carbon Dioxide Emissions Data*, U.S. ENERGY INFORMATION ADMINISTRATION, available at <https://www.eia.gov/environment/emissions/state/> (last visited Feb. 3, 2018).

11. *Id.*

12. *History of the Global Covenant*, GLOBAL COVENANT OF MAYORS FOR CLIMATE & ENERGY, <https://www.globalcovenantofmayors.org/about/history-compact-of-mayors/> (last visited Jan. 30, 2018).

13. *Id.*

14. Bloomberg Philanthropies, *Michael R. Bloomberg Announces \$200 Million American Cities Initiative to Help U.S. Cities Innovate, Solve Problems, and Work Together in New Ways*, BLOOMBERG PHILANTHROPIES (Jun. 26, 2017), <https://www.bloomberg.org/press/releases/michael-r-bloomberg-announces-200-million-american-cities-initiative-help-u-s-cities-innovate-solve-problems-work-together-new-ways/>.

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2030.¹⁵ In a decision issued in November 2017, the High Court agreed that the New Zealand government had failed to properly review its 2050 emission target on the basis of new information from the Intergovernmental Panel on Climate Change's 5th assessment report. But a change in New Zealand government to one that is more proactive on climate change issues made court-ordered relief unnecessary.¹⁶ The High Court disagreed with the plaintiff that NZ's Paris Agreement target had been improperly set by the government ministries.¹⁷

In Austria, a coalition of NGOs and individuals brought a case before a panel of the Austrian Federal Administrative Court to overturn an approval of a runway expansion at the Vienna airport because it would interfere with Austria achieving its Paris Agreement targets. Relying on Austria's Climate Protection Act of 2011, the Court in February 2017 rejected the government's decision to expand the airport.¹⁸ In July 2017, the Austrian constitutional court ruled that the Administrative Court had improperly relied on Austrian regional and international greenhouse gas emissions reduction targets in a manner that interfered with legal rights and obligations arising under the federal Air Traffic Law.¹⁹

In Australia, shareholders of the Commonwealth Bank of Australia brought a case in August 2017 against the bank alleging that the bank was in violation of the Corporations Act of 2001 for failure to report climate change-related business risks in the 2016 report.²⁰ The shareholders subsequently dropped their suit after the bank acknowledged in its 2017 report that climate change posed a significant risk to the bank's operation and that the bank needed to properly assess the level of risk to investors.²¹

In India, a youth filed a petition with the National Green Tribunal of India requesting inclusion of climate change in the issues considered by environmental impact assessments, preparation of a national greenhouse gas emissions inventory, and preparation of a national carbon budget against

15. Statement of the Claim for Plaintiff, *Sarah Thomson v. Minister of Climate Change*, [2017] NZHC 733, available at http://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Resources/Non-US-Climate-Change-Litigation-Chart/nz_case_statement_of_claim.pdf.

16. *Id.* at [178].

17. *Id.* at [179].

18. *Dritte Piste des Flughafens Wien-Schwechat Darf Nicht Gebaut Warden*, BUNDESVERWALTUNGSGERICHT REPUBLIK ÖSTERREICH, https://www.bvwg.gv.at/presse/dritte_piste_des_flughafens_wien.html (last visited Jan. 30, 2018).

19. *UPDATE 1- Austria's Top Court Overturns Ban on Vienna Airport Expansion*, REUTERS (June 29, 2017), <https://www.reuters.com/article/flughafen-wien-court/update-1-austrias-top-court-overturns-ban-on-vienna-airport-expansion-idUSL8N1JQ1X1> (last visited Feb. 3, 2018).

20. Concise Statement of Claim, *Abrahams v. Commonwealth Bank of Australia*, [2017], available at <https://www.informea.org/sites/default/files/court-decisions/Abrahams%20v%20Commonwealth%20Bank%20of%20Australia%20Concise%20Statement.pdf>.

21. Gareth Hutchens, *Commonwealth Bank Shareholders Drop Suit Over Nondisclosure of Climate Risks*, THE GUARDIAN (Sept. 21, 2017), <https://www.theguardian.com/australia-news/2017/sep/21/commonwealth-bank-shareholders-drop-suit-over-non-disclosure-of-climate-risks>.

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which particular projects' emissions impacts can be assessed.²² The petition argues that "Public Trust Doctrine, India's commitments under the Paris Agreement, and India's existing environmental laws and climate-related policies demand further action from the Indian government on preventing future injury from climate change."²³

In Peru, plaintiff Saúl Luciano Lliuya has brought an appeal in a case against the German energy company RWE, one of Europe's largest emitters, seeking \$20,000 of funds as contribution to a \$4 million local government adaptation effort to prevent flood damage to villages from glacial melt. RWE does not have operations in Peru.²⁴ The German lower court rejected Luciano's claim in part because RWE does not have a physical operation in Peru. The plaintiff's lawyers argued RWE should still be held responsible because it has contributed approximately 0.5 percent of global historical industrial emissions. On November 30, 2017, the German Regional Court in Hamm decided that it would hear the case in this potentially precedent-setting case.²⁵

In South Africa, the court decided in *EarthLife Africa Johannesburg v. Minister of Environmental Affairs and Others* that the environmental impact of a 1200 MW coal-fired plant includes climate change impacts that must be assessed as part of South Africa's National Environmental Management Act.²⁶ The court recognized in this case that South Africa infrastructure projects must to some degree take into account South Africa's commitments under the Paris Agreement.²⁷ Additional cases have been filed by NGOs in South Africa to oppose new coal-fired power plants in South Africa.²⁸

In Ireland, Friends of the Irish Environment, inspired by the Dutch civil society group, filed a lawsuit against the Government of Ireland alleging that Ireland's National Mitigation Plan is inadequate to meet Ireland's commitment to the Paris Climate Agreement and that the Plan also violates

22. Brief for Applicant, *Pandey v. Union of India and Central Pollution Control Board*, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20170325_Original-Application-No.-__-of-2017_petition-1.pdf.

23. *Pandey v. India Summary*, CLIMATE CHANGE LITIGATION DATABASES, <http://climatecasechart.com/non-us-case/pandey-v-india/>.

24. Sophie Hares, *Climate Lawsuit Pits Peruvian Farmer Against German Power Giant*, IOL (Nov. 10, 2017) <https://www.iol.co.za/news/world/climate-lawsuit-pits-peruvian-farmer-against-german-power-giant-11953497>.

25. Uclia Wang, *German Courts OKs Potentially Groundbreaking Climate Lawsuit*, CLIMATE LIABILITY NEWS (Nov. 30, 2017) <https://www.climateliabilitynews.org/2017/11/30/germany-rwe-peru-farmer-saul-luciano-lliuya/>.

26. *Earthlife Africa Johannesburg v. Minister of Environmental Affairs and Others* 2017 (2) All SA 519 (S. Afr.).

27. *Id.* at para. 90.

28. *Trustees for the Time Being of GroundWork v. Minister of Environmental Affairs, ACWA Power Khanyisa Thermal Power Station RF (Pty) Ltd, and Others*, South Africa High Court, Case no. 61561/17 (Sept. 5, 2017); *Trustees for the Time Being of the GroundWork Trust v. Minister of Environmental Affairs, KiPower (Pty) Ltd, and Others*, South Africa High Court, Case no. 54087/17 (Aug. 7, 2017).

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the country's Climate Act, the Irish Constitution, and international human rights obligations.²⁹

2017 was an active year for climate change litigation in the United States at the federal, state, and municipal level.

- In a case brought by U.S. youth against the federal government in 2015 for public trust violations and equal protection violations that the Oregon District Court had agreed to hear on the merits,³⁰ the United States government asked for a writ of mandamus from the Ninth Circuit on June 9, 2017 on the basis that the Oregon District Court was exceeding its jurisdiction by allowing the case to continue.³¹
- U.S. states continue to seek information from major oil companies regarding what knowledge they have had regarding fossil fuel impacts on climate. In 2017, the New York Court of Appeal denied Exxon request for an appeal to protect documents with climate-related disclosures held by its accounting firm that had been requested by New York prosecutors who are investigating a potential violation of a state law on securities.³²
- In a set of cases that will be followed with great interest, U.S. cities have brought cases against several “carbon majors” that are alleged to be responsible for 70 percent of global emissions.³³ San Francisco and Oakland have filed lawsuits in state court alleging that Chevron Corp, ConocoPhillips, Exxon Mobil Corp, BP, and Royal Dutch Shell have created a public nuisance and that the cities should be compensated for the funds they will need to expend in order to adapt infrastructure to climate change threats.³⁴

E. INTERNATIONAL CIVIL AVIATION ORGANISATION (ICAO) AND INTERNATIONAL MARITIME ORGANISATION (IMO)

In March 2017, the ICAO adopted the first global certification carbon dioxide standard for airplanes to be applied starting with new airplane

29. Tony Lowes, *Irish Government taken to court in landmark climate case*, FRIENDS OF THE IRISH ENVIRONMENT (Oct. 23, 2017), <http://www.friendsoftheirishenvironment.org/climate-case/17459-irish-government-taken-to-court-in-landmark-climate-case>.

30. *Kelsey Cascadia Rose Juliana v. United States*, 217 F.Supp.3d 1224 (D. Or. 2016).

31. Petition for Writ of Mandamus to the United States District Court for the District of Oregon and Request for Stay of Proceedings in District Court, *United States v. United States Dist. Court for the Dist. of Ore. And Kelsey Cascadia Rose Juliana et al.*, No. 6:15-cv-01517-TC-AA (D. Or. 2017).

32. *Master of People of the State of New York v. PricewaterhouseCoopers LLP*, 83 N.E.3d 850 (N.Y. 2017).

33. Paul Griffith, *The Carbon Majors Database*, <https://b8f65cb373b1b7b15feb-c70d8ead6ced550b4d987d7c03fcdd1d.ssl.cf3.rackcdn.com/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1499691240> (last visited Jan. 31, 2018).

34. Complaint for Public Nuisance, *People of California acting by and through the Oakland City Attorney v. BP et. Al.*, No. RG17875889 (2017); Complaint for Public Nuisance, *People of California acting by and through the San Francisco City Attorney v. BP et. Al.*, No. OGC-17-561370 (2017).

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designs from 2020 and covering airplane design types that are already in production starting in 2023.³⁵ In September 2017, the ICAO Council's Committee on Aviation Environmental Protection drafted rules and guidance for monitoring, reporting, and verifying CO₂ emissions from international aviation.³⁶ ICAO also endorsed a "Vision for Sustainable Aviation Fuels" to urge states, industry, and other stakeholders to seek a replacement of conventional aviation fuels (with sustainable aviation fuels by 2050).³⁷

The IMO held a second meeting of the Intersessional Working Group on Reduction of Greenhouse Gas Emissions from Ships to continue drafting a strategy to reduce carbon emissions from the shipping sector.³⁸

**F. MONTREAL PROTOCOL AMENDMENT TO PHASE OUT HFCs
COMES INTO FORCE**

The Montreal Protocol on Substances that Deplete the Ozone Layer has been heralded as one of the most successful international environmental law instruments in terms of nearly universal membership of 197 states and major cooperative success.³⁹ In November 2017, states celebrated the 30th anniversary of the protocol, but more work remains to be done including the phasing out of hydrofluorocarbons (HFCs). The Montreal Protocol facilitated the scaling up of HFCs into refrigeration and air conditioning units to replace other substances that were ozone-depleting substances which lead to the unintended consequence of HFCs becoming large contributors to greenhouse gas emissions. In 2016, in Kigali, Rwanda, states agreed to phase out HFCs with different schedules for different states. In 2017, the Kigali Amendment met the threshold of ratifications by twenty parties in order to come into force in 2019.⁴⁰

II. Marine Protection

2017 was a significant year for global attention focusing on the oceans with a number of hopeful developments.

35. Chicago Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (amended on March 6, 2017).

36. U.N. Framework Convention on Climate Change, *Submission by International Civil Aviation Organisation to UNFCCC Subsidiary Body for Scientific and Technological Advice*, U.N. Doc. SBSTA47 (Nov. 15, 2017), https://www.icao.int/environmental-protection/Documents/SBSTA47%20ICAO%20submission_Final.pdf.

37. *Id.* at Appendix A.

38. *Progress Made in Developing GHG Strategy for International Shipping*, INTERNATIONAL MARITIME ORGANIZATION (October 30, 2017), http://www.imo.org/en/MediaCentre/PressBriefings/Pages/28-Progress_made_in_developing_GHG_strategy.aspx.

39. *The Montreal Protocol on Substances that Deplete the Ozone Layer*, U.S. DEPT. OF STATE, <https://www.state.gov/e/oes/eqt/chemicalpollution/83007.htm> (last visited Feb. 3, 2018).

40. *EU Countries Trigger Entry into Force of Kigali Amendment to Montreal Protocol*, EUROPEAN COMMISSION (Nov. 17, 2017), https://ec.europa.eu/clima/news/eu-countries-trigger-entry-force-kigali-amendment-montreal-protocol_en.

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A. U.N. OCEAN CONFERENCE

Between June 5-9, states convened a high-level “United Nations Conference to Support the Implementation of Sustainable Development Goal 14 (SDG 14)” designed to conserve and sustainably use the oceans. Fiji and Sweden jointly hosted the conference which included participation from multiple stakeholders who were encouraged to enter into partnerships or make commitments to furthering SDG 14. At the conference conclusion, states issued an outcome document that was adopted as a resolution by the General Assembly.⁴¹ States agreed to a number of key action efforts including:

- improving education about the state of the oceans;
- dedicating more resources to marine scientific research including research based on traditional knowledge;
- implementing strategies to reduce the use of plastics, especially single-use plastic bags;
- supporting area-based management tools that apply the precautionary and ecosystem approaches;
- developing adaptation and mitigation measures capable of enhancing resilience to climate impacts such as ocean and coastal acidification and warming oceans;
- enhancing sustainable fisheries management;
- ending IUU fishing and ensuring that actors and other beneficiaries are held accountable;
- improving “interoperability” of catch documentation schemes and traceability efforts;
- improving socioeconomic conditions for small-scale fishermen;
- eliminating subsidies that contribute to overcapacity by accelerating work at the WTO; and
- generally supporting sustainable ocean-based economies for small island developing states and least developed countries.

In addition to the formal state commitments through the U.N. General Assembly, as of December 2017, over 1,400 organizations including national governments, intergovernmental organizations, and non-governmental organizations, made voluntary commitments designed to contribute to the achievement of SDG-14. For example, the Food and Agriculture Organization agreed to contribute half of a million dollars to the development and implementation of specific blue prints for rebuilding fisheries by 2020 particularly for small island developing states and for least developed countries. As another example, Jamaica has agreed to strengthen its national policy frameworks for marine protected areas including new policy and legislation to be adopted by 2020. From the private sector, commitments have been made for the development of “autonomous refuse collection and shipping” vessels to be designed to collect waste from the ocean and process it.

41. G.A. Res. 71/312 (July 14, 2017).

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B. 2017 OUR OCEANS CONFERENCE

In October 2017, the European Union hosted in Malta the “Our Ocean Conference” that led to 437 tangible and measurable commitments, 7.2 billion euros in financial pledges (2.8 billion euros from the European Union), and the addition of 2.5 million square kilometers of additional Marine Protected Areas.⁴² The meeting was particularly noteworthy in securing commitments from 100 corporate actors.

States and companies offered a number of commitments to reducing marine pollution, improving sustainable fishing, improving marine security, growing a blue economy, and establishing marine protected areas. The commitments on reducing marine plastics were particularly significant in light of reports indicating millions of tons of plastic litter being released into the oceans:

- The European Union would draft measures to be concluded in 2017 to reduce the leakage of plastic into the environment.
- Australia would update its threat abatement plan by 2018 to provide specific national guidance on actions to prevent and mitigate the impacts of marine debris.
- Bangladesh announced a law to ban single use plastic bags with a reduction of plastic bag production by 60 percent by 2019.
- Belgium indicated that by the end of 2017 it will adopt its federal action plan to combat marine litter.
- Canada shared that in June 2017 it had published the “Microbeads in Toiletries Regulations” to prohibit the use of plastic microbeads in toiletries and cosmetics. France, Ireland, New Zealand, and the United Kingdom are committed to banning microbeads by 2018.
- Chile indicated a ban on plastic bags in coastal cities.
- As the nation named in a 2015 study as the second most mismanaged marine litter problem,⁴³ Indonesia will reduce by 70 percent the plastic debris by 2025 in comparison to 2017.
- Ireland has a “fishing for litter” program so that fishermen bring litter back to shore for proper disposal.
- Malta is introducing a refund program for beverages by 2019 to ensure that at least 70 percent of containers are recovered.
- The Philippines will adopt in 2017 the Coastal and Marine Ecosystem Management Program that is expected to reduce spot pollution sources by 50 percent as compared to 2017 and increase by 20 percent the number of households adopting eco-waste management by 2028.
- Sri Lanka will become polythene free and will ban the import, manufacture, and sale of harmful polythene products.

42. *OUR OCEAN 2017 commitments* (Oct. 6, 2017), http://www.ourocean2017.org/sites/default/files/ooc-2017-list-of-commitments_en.pdf.

43. Jenna Jambeck et al., *Plastic Waste Input from Land into the Ocean*, *SCIENCE*, Feb. 13, 2015 at 768.

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- Turkey will develop Marine Litter Action Plans for all coastal cities by the end of 2018.
- Forty-three Mediterranean states will participate in the H2020 Initiative for a Cleaner Mediterranean to take steps to reduce pollution from 80 percent of the sources of pollution of the Mediterranean Sea by the year 2020.⁴⁴

The United States through the National Oceanic and Atmospheric Administration and U.S. Agency of International Development announced several commitments:

- A contribution of up to \$500,000 to the New Plastics Economy Initiative's Circular Design Challenge to produce alternatives to conventional plastics.
- A contribution of up to \$9.1 million over four years for the establishment of a small grants portfolio on waste recycling that will focus on municipal waste management and recycling efforts in Indonesia, the Philippines, Sri Lanka, and Vietnam.
- Designation of the He'eia National Estuarine Research Reserve in Hawaii in January 2017 as a new marine protected area.
- A guarantee to support 50 percent of the loan portfolio of the Althelia's Sustainable Ocean Fund to finance up to \$50 million in private debt investments in sustainable fisheries, supply chain improvement, and marine conservation.
- Public-private partnership with the Walton Family Foundation to support long-term conservation work by investing \$5 million in the Bird's Head Seascape area of the West Papua and Papua provinces of Indonesia.
- A contribution of up to \$5 million to combat forced labor and human trafficking on fishing vessels in the Asia-Pacific region.
- An allocation of \$433,875 through the International Atomic Energy Agency's Peaceful Uses Initiative to the Ocean Acidification International Coordination Center (OA-ICC) located at the Environment Laboratories in Monaco.
- Initiation of Arctic Observing Network initiative to link existing U.S. agency contributions in Arctic research towards better integrated pan-Arctic observing networks in marine and terrestrial environments.

The next "Our Ocean Conference" will be held in Indonesia in 2018. While there is a direct accountability mechanism associated with the voluntary commitments made at the 2017 conference, the subsequent meetings offer a platform for states and other entities to report on the progress made toward achieving their commitments.

44. *OUR OCEAN 2017 commitments*, *supra* note 42.

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C. NEGOTIATIONS FOR A TREATY ON BIODIVERSITY BEYOND NATIONAL JURISDICTION

In July 2017, the U.N. Preparatory Committee tasked with considering how to promote the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction recommended that the U.N. General Assembly convene an intergovernmental treaty negotiation to protect the high seas.⁴⁵ Currently under the Law of the Sea, there is no comprehensive governance structure to protect living marine resources on the high seas. On December 5, 2017, the General Assembly considered whether to convene an intergovernmental conference on the high seas after considering reports from the Secretary-General and the informal working group on oceans and the law of the sea.⁴⁶

D. INTERNATIONAL SEABED AUTHORITY

The International Seabed Authority (ISA) created under the UN Convention on the Law of the Sea (UNCLOS) has continued to meet and refine regulations for mining. In 2017, it released for comment from stakeholders the “Draft Regulations on Exploitation of Mineral Resources in the Area.”⁴⁷

Under Article 154 of UNCLOS, the ISA received a periodic review on its operations under Part XI of UNCLOS.⁴⁸ The report recommended that the ISA set performance standards for mining technology; the Authority increase its use of working groups, including introducing one on environmental issues; that the ISA Assembly play an increased role in setting policy; that the Authority increase its transparency; and that meetings should promote broader participation.

E. BALLAST WATER CONVENTION IN FORCE

The International Convention for the Control and Management of Ships’ Ballast Water and Sediments that was drafted in 2004 entered into force on

45. Rep. of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, http://www.un.org/depts/los/biodiversity/prepcom_files/Procedural_report_of_BBNJ_PrepCom.pdf.

46. Meetings coverage, Adopting Two Texts on Oceans, Seas, General Assembly Also Tackles Sustainable Management, Conservation of Marine Life beyond National Jurisdiction, U.N. Meetings Coverage GA/11985 (Dec. 5, 2017).

47. *Draft Regulations on Exploitation of Mineral Resources in the Area*, ISBA/23/LTC/CRP.3. (Aug. 8, 2017), <https://www.isa.org.jm/files/documents/EN/Regs/DraftExpl/ISBA23-LTC-CRP3-Rev.pdf>.

48. Letter dated 3 February 2017 from the Chair of the Committee established by the Assembly to carry out a periodic review of the international regime of the Area pursuant to article 154 of the United Nations Convention on the Law of the Sea to the Secretary-General of the International Seabed Authority, ISBA/23/A/3 (Feb. 8, 2017).

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September 8, 2017.⁴⁹ At the time of entry, the Convention had sixty-three Contracting Parties representing 68.51 percent of world merchant shipping tonnage.⁵⁰ The Convention requires all ships undertaking international trade under a state Parties' flag to manage their ballast water and sediments according to a ship-specific ballast water management plan that will lead to either an exchange of ballast water far from the coast or treatment of the water before release.⁵¹

III. Freshwater Protection Law

Organized by the Italian government with other partners, the “Water and Climate: Meeting of the Great Rivers of the World Summit” was held in Rome on October 23-25, 2017, and included participation of representatives from river and lake basins around the world. Highlighting the importance of cooperation between such water basins to address climate change mitigation and adaptation, the Summit issued a statement urging representatives at the UNFCCC Conference of Parties held in November 2017, to focus greater attention on mitigation and adaptation issues involving freshwater. Specifically, the participants in the Water and Climate Summit issued a declaration that called upon UNFCCC states to support the “Paris Pact on Adaptation to Climate Change in the Basins of Rivers, Lakes and Aquifers.”⁵² The Rome Declaration noted that regional and transboundary cooperation is increasingly critical to ensure that both surface water and groundwater resources are adequately protected and managed. The Declaration further emphasized the need to take a risk prevention approach to water supply in light of climate change by investing in “Nature-Based Solutions” that link management with science including “Natural Flood Management.”⁵³ Italy offered \$5 million in funding for a “transboundary climate readiness initiative” for African states that would be spent not just on infrastructure but also on ways to improve capacity building and knowledge.

In June 2017, Ukraine ratified the Treaty negotiated between Moldova and Ukraine on the conditions of cooperation for protection and sustainable development of the Dniester River Basin, one of Europe's longest river

49. International Maritime Organization, *Global Treat to Halt Invasive Aquatic Species Enters into Force* (Sept. 8, 2017), <http://www.imo.org/en/mediacentre/pressbriefings/pages/21-bwm-eif.aspx>.

50. *Id.*

51. International Conference on Ballast Water Management for Ships, *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*, BWM/CONF/36 (Feb. 16, 2004).

52. *Rome Declaration*, <http://www.minambiente.it/water-and-climate-summit> (last visited Feb. 2, 2018).

53. *Id.* at ¶ 8.

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systems.⁵⁴ The conclusion of this treaty fulfilled the states' duty to cooperate under the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

The U.S. (state of California) cities of Imperial Beach, Chula Vista, and the Port of San Diego filed a notice of intent to sue in September 2017, to U.S representatives of the International Boundary and Water Commission (IBWC) for failure to prevent wastewater and untreated sewage from flowing across the U.S. and Mexico border in spite of transboundary efforts to clean up the pollution.⁵⁵ By early November 2017, the Commission should have issued a plan to cease pollution or face a Clean Water Act lawsuit. An investigation by the IBWC found that \$500 million in infrastructure repairs were needed in Tijuana, Mexico. On November 2017, the IBWC called for a workshop with the California cities.

IV. Waste and Chemical Management Law

2017 turned out to be an important year for addressing waste. On August 28, 2017, the Kenya ban on plastic carrier and flat bags introduced by Gazette Notice No. 2356 became effective.⁵⁶ Kenya's National Environmental Authority has interpreted the Gazette and concluded that manufacturing or selling plastic bags could lead to imprisonment of up to four years or fines of four million Kenyan shillings (\$40,000).⁵⁷ Implementation is focused on manufacturing facilities and the ban may have a regional impact because 176 plastic bag manufacturers are located in Kenya.⁵⁸

The Minamata Convention on Mercury entered into force on August 16, 2017. The first Conference of the Parties was held in September 2017. The meeting concluded with a statement calling for states to strengthen national policies, legislation, and institutions designed to phase out mercury. Parties were called upon to invest in affordable alternative technologies to eliminate mercury. Recognizing that the private sector asserted a great deal of control

54. UNECE, *Treaty on Sustainable Management of the Transboundary Dniester River Basin Enter into Force* (July 6, 2017), <https://www.unece.org/info/media/presscurrent-press-h/environment/2017/treaty-on-sustainable-management-of-the-transboundary-dniester-river-basin-can-enter-into-force/doc.html>.

55. Joshua Emerson Smith, *San Diego Joins South Bay in Legal Fight Against Feds on Tijuana Sewage Spills*, THE SAN DIEGO UNION-TRIBUNE (Oct. 4, 2017), <http://www.sandiegouniontribune.com/news/environment/sd-me-san-diego-sewage-ibwc-20171004-story.html>.

56. The Environmental Management and Co-ordination Act No. 2356 (2017) KENYA GAZETTE Cap. 387. (Kenya).

57. Press Release, Geoffrey Wahungu, *Press Statement on Total Ban on All Plastic Bags*, NATIONAL MANAGEMENT AUTHORITY, Statement on Total Ban on All Plastic Bags, https://www.nema.go.ke/images/Docs/Awarness%20Materials/PRESS_STATEMENT_ON_TOTAL_BAN_ON_ALL_PLASTIC_BAGS.pdf.

58. Katharine Houreld, John Ndiso, *Kenya Imposes World's Toughest Law Against Plastic Bags*, REUTERS (Aug. 28, 2017), <https://www.reuters.com/article/us-kenya-plastic/kenya-imposes-worlds-toughest-law-against-plastic-bags-idUSKCN1B80NW>.

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in this area, the ministers attending the meeting called for subsidies “to encourage and assist manufacturers to make the move to best alternative technologies and best environmental practices.”⁵⁹

The Parties of the Basel, Rotterdam, and Stockholm Conventions held back to back meetings from April 24 to May 5 in Geneva. This mega-meeting of the Chemical and Waste Convention was the largest meeting of the Conventions with over 1,400 participants from 170 countries and over sixty decisions made by the state Parties. The parties to the Basel Convention continued to support the efforts of a working group to promote environmentally sound management of waste and the implementation of the Cartagena Declaration on the Prevention, Minimization and Recovery of Hazardous Wastes and Other Wastes.⁶⁰ Parties to the Basel Convention also adopted a number of technical guidelines and agreed to set up a working group to further examine a technical guideline on transboundary movements of electrical and electronic waste and used electrical and electronic equipment.⁶¹ Finally, the Basel Convention parties agreed to a resolution to promote synergies with Rotterdam and Stockholm regarding illegal trade and traffic in hazardous chemicals and waste.⁶²

Under the Rotterdam Convention, parties listed a number of additional chemicals (carbofuran, trichlorfon, short-chain chlorinated paraffins, and tributyltin) and provided in decision RC-8/14 for enhanced cooperation and coordination with the Basel and Stockholm Convention.⁶³ Under the Stockholm Convention, states took decisions regarding specific chemicals including efforts to transition away from DDT for disease vector purposes and also sought to enhance cooperation and coordination with the Basel and Rotterdam Conventions in decision SC-8/21.⁶⁴

59. Conference of the Parties to the Minamata Convention on Mercury, *Key Take Home Messages from the President of the First Meeting of the Conference of the Parties to the Minamata Convention on Mercury* (Sept. 29, 2017), <http://www.mercuryconvention.org/Portals/11/documents/meetings/cop1/KTM%20FINAL%202909.pdf>.

60. Basel Convention Dec. 13/2, annex 1 UNEP/CHW.13/28 (2017); Basel Convention Dec. 13/3, annex 1 UNEP/CHW.13/28 (2017), available at <http://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>.

61. Basel Convention Dec. 13/5, annex 1 UNEP/CHW.13/28 (2017), available at <http://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>.

62. Basel Convention Dec. 13/21, annex 1 UNEP/CHW.13/28 (2017), available at <http://www.basel.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/3303/Default.aspx>.

63. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, *Report of the Conference of the Parties to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade on the work of its eight meeting*, UNEP/FAO/RC/COP.8/27 (2017).

64. Stockholm Convention on Persistent Organic Pollutants, *Report of the Conference of the Parties to the Stockholm Convention on Persistent Organic Pollutants on the Work of its Eighth Meeting*, UNEP/POPS/COP.8/32 (2017).

The high-level meeting of representatives from the Basel, Rotterdam, and Stockholm Convention concluded that the three treaties could work effectively together toward achieving targets for a number of the sustainable development goals.⁶⁵ Ministers called for strong regulatory frameworks and technical expertise to ensure that waste products do not have an adverse impact on human health and the environment and that where possible states seek circular economy principles to reduce waste and pollution. In this high-level statement, states directed an additional message towards the private industry “to develop chemicals and products based upon green and sustainable chemistry principles taking into account the precautionary principle, in particular in the case where persistence, bioaccumulation and long-range transport are of concern, in order to prevent further damage to human health and the environment.”⁶⁶

V. Biodiversity Developments

In 2017, the Compliance Committee for the Cartagena Protocol met and submitted a report on how well states were complying with their obligations. The Committee observed that among the reasons states had difficulty complying were the existence of a multiplicity of treaty reporting standards and a lack of national priority being assigned to biosafety.⁶⁷

The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol needs one more ratification to go into force after Congo deposited its instrument of ratification on October 4, 2017.⁶⁸

In November 2017, before the UNFCCC Conference of Parties, the Executive Secretaries of the Biological Diversity, Climate Change, and Desertification Conventions hoped that states would support a “Project Preparation Facility” to secure finance for large projects that will help to address common issues.⁶⁹

On a positive note, the CBD Secretariat announced that based on the progress in 2017 and the promises from states, the Aichi target to protect 10

65. 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 Thirteenth Meeting*, UNEP/CHW.13/28, annex II (Aug. 16, 2017).

66. *Id.* at ¶ 22.

67. Convention on Biological Diversity, *Report of the Compliance Committee under Cartagena Protocol on Biosafety on the Work of its Fourteenth Meeting*, CBD/CP/CC/14/5 (May 18, 2017).

68. Press Release, Convention on Biological Diversity Secretariat, *Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Biosafety Protocol Edges Closer to Entering into Force* (Oct. 14, 2017), <https://www.cbd.int/doc/press/2017/pr-2017-10-12-bs-en.pdf>.

69. *Joint Statement by the Executive Secretaries of the Rio Conventions Calling for the Establishment of a Project Preparation Facility (PPF) to Increase Financing for Large-Scale, Transformative Project which Integrate Action on Land Degradation, Biodiversity Loss, and Global Warming* (Nov. 6, 2017), <https://www.cbd.int/cooperation/joint-statement-rio-convention-2017-en.pdf>.

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percent of global marine areas by 2020 that also became part of the Sustainable Development Goals targets will be achieved.⁷⁰

VI. New International Negotiations and Notable Litigation

At the beginning of 2017, a number of government practitioners and scholars drafted the Global Pact for the Environment for adoption by states as an attempt to unify and harmonize the body of international environmental law.⁷¹ The document is intended to be the first internationally legally binding document on general environmental principles. It contains articles generally describing:

- obligations to take care of the environment and to adopt and enforce effective environmental laws (Article 2 and 15);
- integration of environmental protection into planning and pursue sustainable development (Article 3);
- need to apply intergenerational equity (Article 4);
- need to prevent environmental harm (Article 5);
- need to apply precaution (Article 6);
- need to remediate environmental damages (Article 7);
- obligations to respect and protect rights to an “ecologically sound” environment, access to environmental information, and participation in decision-making with consequences for the environment (Article 1, 9, 10);
- rights to effective and affordable access to administrative and judicial procedures (Article 11);
- obligations to “maintain and restore the diversity and capacity of ecosystems and human communities to withstand environmental disruptions and degradation and to recover and adapt” (Article 16);
- requirement to “refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law” (Article 17); and
- need to adhere to international obligations to protect the environment during armed conflict (Article 19).⁷²

States are expected to “take the necessary measures to encourage” participation by non-state actors in the implementing the Pact.⁷³ There is no dispute settlement mechanism in the Pact but implementation will be monitored as part of a compliance procedure that includes a non-compliance mechanism operated by a committee of international experts.⁷⁴ France has

70. Press Release, Convention on Biological Diversity Secretariat, *Global marine protected area target of 10% to be achieved by 2020* (June 5, 2017), available at <https://www.cbd.int/doc/press/2017/pr-2017-06-05-mpa-pub-en.pdf>.

71. *Draft Project Global Pact for the Environment* (June 24, 2017), <http://www.leclubdesjuristes.com/wp-content/uploads/2017/05/Draft-project-of-the-Global-Pact-for-the-Environment-24-June-2017.pdf>.

72. *Id.*

73. *Id.* at art. 14.

74. *Id.* at art. 22.

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stepped behind this initiative and launched the Global Pact at the United Nations General Assembly in September 2017.

In addition to the climate change cases discussed above, 2017 featured a number of other interesting cases with implications for International Environmental Law. In September, four Swedish and Tanzanian companies sued Tanzania on the basis of a Sweden-Tanzania Bilateral Investment Treaty after Tanzania allegedly expropriated EcoEnergy's sugar and ethanol investments.⁷⁵ The question for the arbitration tribunal is whether Tanzania must pay for effects caused by illegal action when the Ministry of Lands, Housing, and Human Settlements Development illegally sold 3,000 hectares to companies in 2008 that were designated part of Saadani National Park in 2005.⁷⁶ In November 2017, the Tanzanian government revoked the title deed for the remaining lands.⁷⁷

In the United States, multinational Resolute Forest Products sued Greenpeace under the Racketeer Influenced and Corrupt Organizations (RICO) Act on the basis of federal racketeering claims as well as common law and state law claims. The original claim was filed in 2016 in federal district court in Georgia but was moved to California because the court failed to find that it was the proper forum for the case.⁷⁸ Specifically, Resolute alleges that Greenpeace's ad campaign "Resolute: Forest Destroyer" falsely accuses the company of damaging forest habitats and threatening endangered species and has caused serious financial damage to the company.⁷⁹ Resolute claims that Greenpeace's goal is to maximize profits, not save the environment, so it fraudulently induces donations to run false campaigns. Resolute intends to introduce evidence that Greenpeace is involved in money laundering and misappropriation of confidential information. The company advanced state common law claims of defamation, trade libel, tortious interference with prospective business relations, tortious interference with contractual relations, and violations of California's unfair business practices laws.⁸⁰ The original California

75. *EcoDevelopment in Europe AB & others v. United Republic of Tanzania*, ICSID Case No. ARB/17/33, Agribusiness project (Sept. 11, 2017), available at <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/17/33>.

76. David Kisanga, *Tanzania: Ministry Ordered to Recover 3,000ha at Saadani Park* (Jan. 20, 2015), <https://www.farmlandgrab.org/post/view/24442-tanzania-ministry-ordered-to-recover-3-000ha-at-saadani-park>.

77. Citizen Reporter, *EcoEnergy lodges \$500m claim after govt revoked its land title*, THE CITIZEN (Sept. 20, 2017), <http://www.thecitizen.co.tz/News/EcoEnergy-lodges-500m-claim-after-govt-revoked-its-land-title/1840340-4103646-npsmr3z/index.html>.

78. Colin Perkel, *Resolute U.S. Racketeering Lawsuit Against Greenpeace Moved to California*, NATIONAL OBSERVER (May 17, 2017), <https://www.nationalobserver.com/2017/05/17/news/resolute-us-racketeering-lawsuit-against-greenpeace-moved-california>.

79. Plaintiff's Amended Complaint, *Resolute Forest Products v. Greenpeace International*, No. 3:17-CV-02824-JST (N.D. Ca. 2017), available at <https://static1.squarespace.com/static/57338226f8baf3b63bbca47c/t/5a0616c0652deacb4c5e71d2/1510348481499/Amended+Complaint.pdf>.

80. *Id.*

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complaint was dismissed in October 2017 on the basis of the case violating Georgia's and California's Strategic Lawsuits Against Public Participation Acts (anti-SLAPP act). The judge commented that Greenpeace's campaign "constituted the expression of opinion, or 'different viewpoints that are a vital part of our democracy.'"⁸¹ Resolute Forest Product was given leave to amend its complaint.⁸²

VII. Trade, Investment, and Environment

During 2017, WTO member states have made progress towards prohibiting subsidies that contribute to illegal, unreported, and unregulated fishing, as well as general overfishing due to overcapacity.⁸³ These documents will be used as the basis for negotiations on fishery subsidies at the WTO meeting in December 2017. The negotiations are expected to recognize special and differential treatment for developing state members.

Over the last few years, over twenty-five investment cases involving renewable energy investments have been heard by the tribunal or are in the process of being heard.⁸⁴ Most of these cases involve the interpretation of the fair and equitable standard under the Energy Charter Treaty and the question of what rights a state has to change its regulatory framework without incurring an expropriation challenge. In one case decided this year, the tribunal decided that Spain needed to pay a Luxembourg investor for changes in Spanish renewable energy law that removed feed-in tariffs after twenty-five years and changed access rules to the Spanish electricity grid.⁸⁵

VIII. Environmental Information

The second amendment to the Espoo Convention on Environmental Impact Assessment in a Transboundary Context went into force in 2017. The Convention seeks cooperation between states working on projects that are likely to have transboundary impacts through the development of impact assessments. The second amendment to the Espoo Convention extended the reach of the Convention to include transport infrastructure, energy infrastructure, and industrial installations and allowed for the country that

81. *Resolute Forest Products et al. v. Greenpeace International et al.*, No.3:17-cv-02824-JST, at 15-16 (N.D. Ca. 2017), available at <http://www.greenpeace.org/usa/wp-content/uploads/2017/10/MTD-Decision-GP-RFP-1.pdf>.

82. *Id.* at 27.

83. Negotiating Group on Rules, *Working Document on Prohibited Subsidies Relating to IUU Fishing and Overfished Stocks*, WTO Doc. TN/RL/W/274 (Nov. 30, 2017).

84. Carmen Otero Garcia-Castrillon, *SPAIN AND INVESTMENT ARBITRATION: THE RENEWABLE ENERGY EXPLOSION*, (Investor-State Arbitration Series, Paper No. 17) (Nov. 2016), <https://www.cigionline.org/sites/default/files/documents/ISA%20Paper%20No.17.pdf> (claims have also been filed at ICSID against Italy and Bulgaria for issues involving changes in renewable energy policies).

85. *Fiser Infrastructure Limited and Energia Solar Luxembourg v. Spain*, ICSID Case No. ARB/13/36, <https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf>.

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was likely to be impacted by a major project to participate in the scoping process for the environmental assessment.⁸⁶

86. Press Release, United Nations Economic Commission for Europe, Entry into Force of the Second Amendment to the Espoo Convention to Further Support Environmental Impact Assessment in the Region, UN Press Release CH-1211 (Oct. 23, 2017); <https://www.unece.org/?id=47200>.

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