

## International Environmental Law

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This article reviews developments in international environmental law during 2012.<sup>1</sup>

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\* Any views or opinions expressed in this report are those of the authors in their personal capacities and do not represent the views of their organizations, including the Department of State or the U.S. Government. 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 Andrew Schatz, Associate with DLA Piper LLP (US), and Sara Vinson, Environmental Claims Associate at ACE Group. Stephanie Altman, Attorney Advisor in the Office of General Counsel, International Law Section, National Oceanic and Atmospheric Administration (NOAA), contributed on marine environmental protection. Derek Campbell, Attorney-Advisor, Office of General Counsel, International Law Section, NOAA, contributed on marine conservation and trade and the environment. Lee A. DeHihns, III, Senior Counsel with Alston & Bird LLP, and Ann Powers, Associate Professor of Law at Pace University Law School contributed on sustainability. Joseph W. Dellapenna, Professor of Law at Villanova University Law School, authored the section on water resources. Royal Gardner, Professor of Law and Director, Institute for Biodiversity Law and Policy, Stetson University College of Law, contributed on the Ramsar Convention. David Gravallesse, 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 David Hunter, Professor, and Erika Lennon, Coordinator of the Program on International and Comparative Environmental Law, at American University Washington College of Law. Erica Lyman, Clinical Professor of Law at Lewis & Clark Law School, contributed on wildlife and biological resources. Thomas Parker Redick, with Global Environmental Ethics Counsel, contributed on international regulation of biotechnology. Andrew Schatz contributed on climate change. R. Justin Smith, Assistant Chief, Law and Policy Section, Environment and Natural Resources Division, U.S. Department of Justice, contributed on international environmental litigation.

1. For developments during 2011, see Andrew Schatz et al., *International Environmental Law*, 46 INT'L LAW. 419 (2012). For developments during 2010, see David R. Downes et al., *International Environmental Law*, 45 INT'L LAW. 409 (2011).

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**I. Atmosphere and Climate**

A. CLIMATE

In late 2012, the parties to the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol met in Doha, Qatar.<sup>2</sup> The negotiations formalized a second round of commitments under the Kyoto Protocol and built on measures to support a more comprehensive global framework for combatting climate change under the UNFCCC.

Doha's most significant achievement was the extension of the Kyoto Protocol, creating a second commitment period (KP2) from 2013-2020.<sup>3</sup> Pursuant to an amendment to the Protocol, thirty-seven nations—Australia, Belarus, Croatia, the twenty-seven members of the European Union, Iceland, Kazakhstan, Liechtenstein, Monaco, Norway, Switzerland, and Ukraine—agreed to reduce aggregate greenhouse gas (GHG) emissions 25 to 40 percent below 1990 levels by 2020.<sup>4</sup> Parties may revisit and strengthen their targets by 2014. Four original signatories to Kyoto—Canada, Japan, New Zealand, and Russia—opted out of the second commitment period. The amendment also imposes new rules that restrict the ability of parties to use emissions allowances from the first commitment period and trade with non-KP2 signatories.<sup>5</sup>

The parties to the UNFCCC also adopted a series of decisions, named the “Doha Climate Gateway,”<sup>6</sup> in support of a comprehensive legal framework covering all 195 member states. Reaffirming commitments at Durban, they agreed to develop a draft protocol applicable to all parties by December 2014 that will be finalized by December 2015 and implemented by 2020.<sup>7</sup>

The Conference of the Parties (COP) moved closer to developing a framework of various approaches (FVA), including a new market mechanism (NMM), to support mitigation, adaptation, finance, and technology development and transfer. The parties agreed to develop a framework by COP-19 in November 2013 that would create modalities and proce-

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2. Doha's meeting marked the eighteenth meeting of the Conference of the Parties to the Convention (COP-18) and the eighth meeting of the Conference of the parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP-8). See *Doha Climate Change Conference – November 2012*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE [UNFCCC], [http://unfccc.int/meetings/doha\\_nov\\_2012/meeting/6815.php](http://unfccc.int/meetings/doha_nov_2012/meeting/6815.php) (last visited Feb. 5, 2013).

3. U.N. Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Doha, Qatar, Nov. 26-Dec. 7, 2012, *Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol*, ¶ 4, U.N. Doc. FCCC/KP/CMP/2012/L.9 (Dec. 8, 2012), available at <http://unfccc.int/resource/docs/2012/cmp8/eng/l09.pdf>.

4. *Id.* ¶ 7, Annex I.

5. See *id.* ¶¶ 12-27. Almost all of the KP2 Parties also agreed not to purchase Assigned Amount Units (AAUs) carried over from the first commitment period. See *id.* Annex II.

6. See Press Release, UNFCCC, At U.N. Climate Change Conference in Doha, Governments Take Next Essential Step in Global Response to Climate Change (Dec. 8, 2012), available at [http://unfccc.int/files/press/press\\_releases\\_advisories/application/pdf/pr20120812\\_cop18\\_close.pdf](http://unfccc.int/files/press/press_releases_advisories/application/pdf/pr20120812_cop18_close.pdf). For a list of decisions, see *Doha Climate Change Conference – November 2012*, *supra* note 2.

7. UNFCCC, Doha, Qatar, Nov. 29-Dec. 10, 2012, *Advancing the Durban Platform*, ¶¶ 4, 9, U.N. Doc. Draft Decision -/CP.18, available at [http://unfccc.int/files/meetings/doha\\_nov\\_2012/decisions/application/pdf/cop\\_advanc\\_durban.pdf](http://unfccc.int/files/meetings/doha_nov_2012/decisions/application/pdf/cop_advanc_durban.pdf).

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dures enabling such a NMM to begin operation.<sup>8</sup> Once developed, a NMM and other programs, such as REDD+ (for reducing emissions from deforestation in developing countries) could be used by both KP2 and UNFCCC parties to meet their respective obligations and targets.

The parties closed the Ad-Hoc Working Group on Long-Term Cooperative Action, moving issues under its jurisdiction to other subsidiary bodies. With respect to developing country issues, parties created a registry for Nationally Appropriate Mitigation Actions (NAMAs) by developing countries that seek recognition or matching financial support from developed countries or institutions.<sup>9</sup> Minimal progress was made on developing a fully operational REDD+ program, although the parties agreed to develop a work program on results-based finance in 2013 to reduce emissions from deforestation and degradation in developing countries that also incentivizes non-carbon benefits.<sup>10</sup>

The parties also agreed to address “loss and damage associated with climate change,”<sup>11</sup> calling for institutional arrangements, including a potential new mechanism, to be established at COP-19, subject to the availability of financial resources.<sup>12</sup> Developed countries were requested to provide developing countries with finance, technology, and capacity-building to address such loss in light of their “common but differentiated responsibilities and respective capabilities.”<sup>13</sup>

Following the approval of the governing instrument for the Green Climate Fund (GCF) at COP-17 in Durban,<sup>14</sup> the GCF Board began operationalizing the GCF in 2012 to support mitigation and adaptation activities. The Board selected Songdo, Incheon City, Republic of Korea, as the host city for the GCF,<sup>15</sup> which the parties endorsed during COP-18.<sup>16</sup> Significant work remains to operationalize the GCF, including capitalizing it and establishing environmental and social safeguards, but the basic structure is in place.

No significant breakthroughs were made on finance at Doha. Several countries pledged continued financial resources now that the fast-start finance period is over, and the parties extended through 2013 the work program on long-term finance that is tasked with identi-

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8. See UNFCCC, Doha, Qatar, Nov. 29-Dec. 10, 2012, *Agreed Outcome Pursuant to the Bali Action Plan*, ¶¶ 19, 21, U.N. Doc. Draft Decision -/CP.18, available at [http://unfccc.int/files/meetings/doha\\_nov\\_2012/decisions/application/pdf/cop18\\_agreed\\_outcome.pdf](http://unfccc.int/files/meetings/doha_nov_2012/decisions/application/pdf/cop18_agreed_outcome.pdf).

9. *Id.* ¶ 19.

10. *Id.* ¶¶ 25-33.

11. UNFCCC, Doha, Qatar, Nov. 29-Dec. 10, 2012, *Approaches to Address Loss and Damage Related to Climate Change Impacts in Developing Countries that are Particularly Vulnerable to the Adverse Effects of Climate Change to Enhance Adaptive Capacity*, U.N. Doc. Draft Decision -/CP.18, available at [http://unfccc.int/files/meetings/doha\\_nov\\_2012/decisions/application/pdf/cmp8\\_lossanddamage.pdf](http://unfccc.int/files/meetings/doha_nov_2012/decisions/application/pdf/cmp8_lossanddamage.pdf).

12. *Id.* ¶¶ 9, 14

13. *Id.* ¶¶ 6, 8.

14. UNFCCC, Durban, S. Afr., Nov. 28-Dec. 11, 2011, *Launching the Green Climate Fund*, ¶ 2, U.N. Doc. FCCC/CP/2011/9/Add.1 Decision 3/CP.17 (Mar. 15, 2012), available at <http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf>.

15. See Press Advisory, Green Climate Fund, Republic of Korea Selected to Host Green Climate Fund (Oct. 20, 2012), available at [http://gcfund.net/fileadmin/00\\_customer/documents/pdf/GCF\\_-\\_Press\\_20Oct\\_final.pdf](http://gcfund.net/fileadmin/00_customer/documents/pdf/GCF_-_Press_20Oct_final.pdf).

16. See United Nations Conference of the Parties and Guidance to the Green Climate Fund, Doha, Qatar, Nov. 26-Dec. 7, 2012, *Report of the Green Climate Fund to the Conference of the Parties and Guidance to the Green Climate Fund*, ¶ 3, U.N. Doc. FCCC/CP/2012/L.17 (Dec. 8, 2012), available at <http://www3.unog.ch/doha/climatechange/sites/default/files/FCCCCP2012L17.pdf>.

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fying ways to mobilize funds from public, private, and alternative sources.<sup>17</sup> Much work remains to develop the GCF, including the development of means for measuring and tracking climate finance and ways to ensure that climate finance will reach US \$100 billion per year by 2020.

The World Bank Group's Forest Carbon Partnership Facility (FCPF) also expanded operations. During Fiscal Year (FY) 2012, four countries—El Salvador, Mozambique, Nicaragua, and Thailand—received Readiness Preparation Proposal formulation grants.<sup>18</sup> Additionally, the FCPF started incentivizing midterm reporting by granting countries an additional US \$5 million if they demonstrate significant progress in a midterm report.<sup>19</sup> The FCPF also scaled up its financing for capacity-building for forest-dependent indigenous peoples, measures to redress grievances, and Southern civil society organizations and local communities.<sup>20</sup> By the end of FY 2012, the Readiness Fund, which is designed to help countries in their preparation for REDD+, had received US \$31.5 million, bringing the total contributions to US \$212.6 million.<sup>21</sup> Additionally, the Carbon Fund, which is designed to pilot performance-based payments for verified emissions reductions from REDD+ programs, had received pledges amounting to US \$218.4 million.<sup>22</sup>

The European Union's inclusion of aviation emissions in its Emissions Trading Scheme for flights into and out of Europe commenced in January 2012, raising protests from non-EU nations such as India, which forbade its airlines from paying any carbon taxes.<sup>23</sup> After much wrangling, the European Union agreed to suspend the enforcement of any carbon taxes for flights to and from non-European countries for one year, but kept the tax in effect for domestic flights by EU-domiciled carriers.<sup>24</sup> If the U.N. International Civil Aviation Organization (ICAO) does not make progress towards a global deal to address aviation emissions within a year, the carbon tax will be reintroduced.<sup>25</sup>

**B. STRATOSPHERIC OZONE**

The parties to the Montreal Protocol on Substances that Deplete the Ozone Layer held their twenty-fifth Anniversary Meeting (MOP-24) from November 12–16, 2012 in Geneva. A central focus of discussion was on proposals by the Federated States of Microne-

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17. See UNFCCC, *Outcome of Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention*, ¶ 69, U.N. Doc. FCCC/CP/2012/L.14/Rev.1 (Dec. 8, 2012); UNFCCC, Doha, Qatar, Nov. 26–Dec. 7, 2012, *Work Programme on Long Term Finance*, ¶ 2, U.N. Doc. FCCC/CP/2012/L.15 Draft Decision -/CP.18 (Dec. 8, 2012), available at <http://www3.unog.ch/dohaclimatechange/sites/default/files/FCCCCP2012L15.pdf>.

18. FOREST CARBON PARTNERSHIP FACILITY, 2012 ANNUAL REPORT § 2.1.1 (2012), available at <https://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Oct2012/FCPF%20FY12%20Annual%20Report%20FINAL%20Oct8.pdf>.

19. *Id.* § 2.1.3.

20. *Id.* § 2.2.1.

21. *Id.* § 5.2.1.

22. *Id.* § 5.3.1.

23. See *EU Suspends Extension of Plane Emissions Trading Rules*, BBC NEWS (Nov. 12, 2012, 4:35 PM), <http://www.bbc.co.uk/news/business-20299388>.

24. See Memorandum from the European Commission for Climate Action, *Stopping the Clock of ETS and Aviation Emissions Following Last Week's International Civil Aviation Organisation (ICAO) Council*, MEMO/12/854 (Nov. 12, 2012), available at [http://europa.eu/rapid/press-release\\_MEMO-12-854\\_en.pdf](http://europa.eu/rapid/press-release_MEMO-12-854_en.pdf).

25. See *id.*

sia<sup>26</sup> and by Canada, Mexico, and the United States<sup>27</sup> to phase down the consumption and production of hydrofluorocarbons (HFCs) and potent GHGs used as alternatives to ozone-depleting substances that are being phased out under the Montreal Protocol. As was the case at prior meetings, the HFC phase down proposals were met with opposition, particularly from India, Brazil, and China. There was support, however, from over 100 parties.<sup>28</sup> In a sign of possible progress towards future negotiations, the parties agreed to form a “discussion group” to consider the HFC phase down proposals<sup>29</sup> and to conduct a technical review of HFC alternatives that will inform discussions at the next Meeting of Parties.<sup>30</sup> The parties also approved the critical use nomination by the United States for methyl bromide, an ozone-depleting substance used as an agricultural fumigant.<sup>31</sup>

## II. Sustainability: Rio+20

Twenty years after the 1992 UN Conference on Environment and Development (the Rio Earth Summit), environmental leaders from around the world met again in Rio De Janeiro, Brazil at the U.N. Conference on Sustainable Development (Rio+20) to plot out the agenda for the next era of environmental protection and sustainability. On June 22, 2012, the Conference approved an outcome document titled *The Future We Want*,<sup>32</sup> which sets forth a common vision for how the United Nations will deal with sustainable development issues in the future. The report also calls for significantly increased funding towards sustainability efforts and projects, which was supported by a pledge of US \$513 billion from governments, the private sector, and others.<sup>33</sup>

Not all stakeholders were satisfied with the Conference’s outcome, with many viewing it as largely aspirational. From a legal standpoint, the document lacks binding commitments, but it reflects agreement on a variety of issues that may be viewed as baselines in the development of transnational norms and perhaps customary international law. Implementation of the conference’s goals will be key, as reflected in *The Future We Want*, which

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26. Twenty-Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Geneva, Switz., Nov. 12-16, 2012, *Proposed Amendment to the Montreal Protocol Submitted by the Federal States of Micronesia*, U.N. Doc. UNEP/OzL.Pro.24/5 (Sept. 24, 2012), available at <http://conf.montreal-protocol.org/meeting/mop/mop-24/presession/PreSession%20Documents/MOP-24-5E.pdf>.

27. Twenty-Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Geneva, Switz., Nov. 12-16, 2012, *Proposed Amendment to the Montreal Protocol Submitted Jointly by Canada, Mexico and the United States*, U.N. Doc. UNEP/OzL.Pro.24/6 (Sept. 24, 2012), available at <http://conf.montreal-protocol.org/meeting/mop/mop-24/presession/PreSession%20Documents/MOP-24-6E.pdf>.

28. The June 2012 Rio+20 outcome document (*The Future We Want*) also expressed support for a phase down of hydrofluorocarbons. See G.A. Res. 66/288, ¶ 222, U.N. Doc. A/Res/66/288 (Sept. 11, 2012).

29. See Twenty-Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Geneva, Switz., Nov. 12-16, 2012, *Report of the Twenty-Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, ¶ 152, U.N. Doc. UNEP/OzL.Pro.24/10 (Nov. 22, 2012), available at <http://conf.montreal-protocol.org/meeting/mop/mop-24/final-report/PreSession%20Documents/MOP-24-10E.pdf>.

30. See *id.* at 40 (Decision XXIV/7).

31. See *id.* at 37 (Decision XXIV/5).

32. Rio+20 U.N. Conference on Sustainable Dev., Rio de Janeiro, Braz., June 20-22, 2012, *The Future We Want*, U.N. Doc. A/CONF.216/L.1 (June 19, 2012) [hereinafter *The Future We Want*], available at [https://rio20.un.org/sites/rio20.un.org/files/a-conf.216l-1\\_english.pdf](https://rio20.un.org/sites/rio20.un.org/files/a-conf.216l-1_english.pdf).

33. *Rio+20: \$513 Billion Pledged Towards Sustainable Development*, UN NEWS CENTRE (June 22, 2012), [http://www.un.org/apps/news/story.asp?NewsID=42312#\\_UJlvVH51No](http://www.un.org/apps/news/story.asp?NewsID=42312#_UJlvVH51No).

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noted that each country has primary responsibility for its own economic and social development, and consequently sustainable development.<sup>34</sup>

### III. Marine Environment and Conservation

#### A. MARINE ENVIRONMENTAL PROTECTION

At its October 2012 meeting, the Marine Environmental Protection Committee (MEPC) of the International Maritime Organization (IMO) designated the Saba Bank, a Caribbean area of the Kingdom of the Netherlands, as a Particularly Sensitive Sea Area (PSSA). Saba Bank is the thirteenth marine area designated as such.<sup>35</sup>

The U.S.-proposed North American Emission Control Area (ECA) entered into effect on August 1, 2012, mandating reductions in allowable emissions of nitrogen oxides, sulphur oxides, and particulate matter from ships within the area.<sup>36</sup> The ECA, which includes most Atlantic and Pacific coastal waters seaward of 200 nautical miles, was adopted by the MEPC in March 2010.<sup>37</sup> The North American ECA is only one of four ECAs designated by the IMO, the other three being the Baltic Sea area, the North Sea area, and the U.S. Caribbean.<sup>38</sup>

On October 11, 2012, the Arctic Council's Task Force on Oil Pollution Preparedness and Response successfully concluded its final round of negotiations of an Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (Agreement).<sup>39</sup> The legally binding Agreement addresses possible oil pollution that may affect the Arctic marine environment and includes, inter alia, the following commitments: (1) maintenance of national systems for oil pollution preparedness and response; (2) notification to other countries of oil pollution incidents; (3) monitoring activities to identify oil pollution incidents and facilitate effective response to them; (4) information exchange and mutual assistance in oil pollution preparedness and response operations; and (5) coordination of joint response operations, exercises and joint reviews to evaluate operations.<sup>40</sup> Signature of the Agreement by the eight Arctic States is anticipated at the May 2013 meeting of the Arctic Council Ministers in Sweden.<sup>41</sup>

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34. *The Future We Want*, *supra* note 32, ¶ 252.

35. Press Release, International Maritime Organization [IMO], Saba Bank Designated Particularly Sensitive Sea Area by IMO Marine Environment Protection Committee (Oct. 9, 2012), *available at* <http://www.imo.org/MediaCentre/PressBriefings/Pages/42-MEPC-64.aspx>.

36. See Press Release, IMO, North American Emission Control Area Comes into Effect on 1 August 2012 (July 31, 2012), *available at* <http://www.imo.org/MediaCentre/PressBriefings/Pages/28-eca.aspx>.

37. IMO & Marine Environmental Protection Commission [MEPC], 60th Sess., Meeting Summary (Mar. 26, 2012), *available at* <http://www.imo.org/MediaCentre/MeetingSummaries/MEPC/Pages/MEPC-60th-Session.aspx>.

38. See Press Release, IMO, *supra* note 36. The U.S. Caribbean ECA will enter into force in January 2013 and take effect in January 2014. *Id.*

39. See Zoë Robert, *Agreement on Arctic Spill Close to Completion*, ICE. REV. ONLINE (Oct. 11, 2012, 4:45 PM), [http://www.icelandreview.com/icelandreview/daily\\_news/Agreement\\_on\\_Arctic\\_Oil\\_Spill\\_Close\\_to\\_Completion\\_0\\_394301.news.aspx](http://www.icelandreview.com/icelandreview/daily_news/Agreement_on_Arctic_Oil_Spill_Close_to_Completion_0_394301.news.aspx).

40. Arctic Council, *Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic, Appendix IV: Operational Manual*, draft, at 3-11 (Sept. 27, 2012), [http://www.arctic-council.org/eppr/wp-content/uploads/2012/10/NCR-4620780-v4-OPERATIONAL\\_GUIDELINES\\_-\\_AGREEMENT\\_ON\\_COOPERATION\\_ON\\_MARINE\\_OIL\\_POLLUTION\\_PREPAREDNESS\\_AND\\_RESPONSE.doc](http://www.arctic-council.org/eppr/wp-content/uploads/2012/10/NCR-4620780-v4-OPERATIONAL_GUIDELINES_-_AGREEMENT_ON_COOPERATION_ON_MARINE_OIL_POLLUTION_PREPAREDNESS_AND_RESPONSE.doc).

41. See Robert, *supra* note 39.

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At its June 2012 meeting, the G20 established a Global Marine Environment Protection Best Practices Sharing Mechanism website.<sup>42</sup> This website will serve as a forum for sharing best practices and information related to legal frameworks, prevention and management of accidents and disasters involving offshore oil and gas drilling, maritime transportation, and environmental protection.

**B. MARINE CONSERVATION**

In 2012, several actions were taken to advance international conservation of migratory species under the framework of the Convention on the Conservation of Migratory Species of Wild Animals (CMS). At the First Meeting of Signatories to the Memorandum of Understanding (MOU) on the Conservation of Migratory Sharks, Signatories agreed on a Conservation Plan to implement the MOU through, inter alia, information sharing, research, cooperation through regional fisheries management organizations, and regulations requiring sharks to be landed with fins naturally attached.<sup>43</sup> At the Third Meeting of Signatories to the MOU for the Conservation of Cetaceans and Their Habitats in the Pacific Islands Region (Pacific Cetaceans MOU), signatories adopted the South Pacific Regional Environment Programme's Whale and Dolphin Action Plan (2013–2017) as the new Action Plan for the Pacific Cetaceans MOU and approved a recovery plan for endangered humpback whales in the Oceania region.<sup>44</sup> At this meeting, the United States signaled its intention to become a Signatory to the Pacific Cetaceans MOU, which it subsequently signed on September 27, 2012.<sup>45</sup>

In 2012, two regional fisheries management organizations strengthened their rules on the inspection of fishing vessels in port. At its October 2012 meeting, the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) expanded its port inspection scheme, which previously only covered vessels carrying toothfish, to all vessels carrying Antarctic marine living resources.<sup>46</sup> At its November 2012 meeting, the International Commission for the Conservation of Atlantic Tunas (ICCAT) revised its port inspection scheme to require ICCAT member port States to designate ports at which landing of ICCAT species by foreign flagged vessels is allowed, require such vessels seek-

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42. See G20, Global Marine Environment Protection [GMEP], *Progress Report on Best Practices Sharing Mechanism*, at 1 (June 18, 2012), available at <http://www.g20.org/load/780979669>.

43. See Press Release, U.N. Environment Programme [UNEP], Countries Agree New Plan for Global Shark Conservation (Sept. 27, 2012), <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=2694&ArticleID=9285&l=en>; Convention on Migratory Species of Wild Animals, *CMS Memorandum of Understanding on the Conservation of Migratory Sharks, Annex 3: Conservation Plan*, CONSERVATION MIGRATORY SPECIES (Sept. 27, 2012), [http://www.cms.int/species/sharks/pdf/CP\\_Conservation\\_Plan\\_Final\\_Eng.pdf](http://www.cms.int/species/sharks/pdf/CP_Conservation_Plan_Final_Eng.pdf).

44. See Press Release, Convention on the Conservation of Migratory Species of Wild Animals & Secretariat of the Pacific Regional Environment Programme [SPREP], 3rd Meeting of the Signatories to the Pacific Cetaceans MOU (Sept. 8, 2012), available at [http://www.cms.int/news/PRESS/nwPR2012/09\\_sep/pic3\\_new-release.pdf](http://www.cms.int/news/PRESS/nwPR2012/09_sep/pic3_new-release.pdf).

45. See Press Release, Conservation of Migratory Species [CMS], United States of America Signs Pacific Islands Cetaceans MoU (Sept. 27, 2012), <http://www.pacificcetaceans.org/feature.php?select=28>.

46. See COMMISSION FOR THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES [CCAMLR], CONSERVATION MEASURE 10-03, PORT INSPECTIONS OF FISHING VESSELS CARRYING ANTARCTIC MARINE LIVING RESOURCES (2012), available at [http://www.ccamlr.org/sites/drupal.ccamlr.org/files/10-03\\_2.pdf](http://www.ccamlr.org/sites/drupal.ccamlr.org/files/10-03_2.pdf).

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ing to enter port to provide advance notification to the port State, and inspect 5 percent of such vessels.<sup>47</sup> Such actions bring regional rules on port inspection into closer alignment with norms reflected in the 2009 Food and Agriculture Organization Agreement on Port State Measures to Prevent, Deter and Combat Illegal, Unreported and Unregulated Fishing.<sup>48</sup>

The year 2012 also saw advancements in multilateral efforts to establish new, and improve existing, regional fisheries management organizations and arrangements. On August 24, 2012, the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean entered into force, establishing the South Pacific Regional Fisheries Management Organisation,<sup>49</sup> and on June 21, 2012, the Southern Indian Ocean Fisheries Agreement entered into force.<sup>50</sup> In November 2012, ICCAT members agreed on a process to amend the ICCAT Convention, including amendments to reflect international fisheries management principles and approaches that developed after the Convention's adoption in 1969.<sup>51</sup> These developments represent significant progress by the international community towards closing jurisdictional gaps in international conservation and management of highly migratory, shared, and straddling fish stocks, and the ecosystems in which they occur.

#### **IV. International Hazard Management**

##### **A. TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTE**

In September 2012, the eighth session of the Open-Ended Working Group (OEWG8) of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Convention)<sup>52</sup> was held in Geneva, Switzerland, during which decisions, intended to strengthen environmentally sound management of hazardous wastes, were adopted.<sup>53</sup> Work continued on technical guidelines for environmentally sound management of wastes containing persistent organic pollutants (POPs), particularly those new POPs added to the Stockholm Convention<sup>54</sup> in 2009. Technical guidelines for the transboundary movement of electronic waste (e-waste), which address the distinction

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47. INTERNATIONAL COMMISSION FOR THE CONSERVATION OF ATLANTIC TUNAS [ICCAT], REC. 12-07, RECOMMENDATION BY ICCAT FOR AN ICCAT SCHEME FOR MINIMUM STANDARDS FOR INSPECTION IN PORT 1-3 (2012), available at <http://www.iccat.int/Documents%5CRecs%5Ccompendiopdf-e%5C2012-07-e.pdf>.

48. *Id.* at 1.

49. See *Status of the Convention*, S. PAC. REGIONAL FISHERIES ORG., <http://www.southpacificrfo.org/status-of-the-convention/> (last visited Feb. 26, 2013).

50. *Regional Fishery Bodies Summary Descriptions: South Indian Ocean Fisheries Agreement*, U.N. FOOD & AGRIC. ORG., <http://www.fao.org/fishery/rfb/siofa/en> (last visited Feb. 26, 2013).

51. See ICCAT, REC. 12-10, RECOMMENDATION BY ICCAT TO ESTABLISH A WORKING GROUP TO DEVELOP AMENDMENTS TO THE ICCAT CONVENTION 1 (2012), available at <http://www.iccat.int/Documents%5CRecs%5Ccompendiopdf-e%5C2012-10-e.pdf>.

52. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126.

53. See Press Release, Basel Convention, Eighth Session of the Open-Ended Working Group, UN Experts Consider New Measures for End-of-Life Goods Destined for Recycling or Recovery (Oct. 4, 2012), <http://www.basel.int/TheConvention/PressRoom/PressReleases/OEWG8PressRelease/tabid/2874/Default.aspx>.

54. Conference of Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants, Stockholm, Swed., May 22-23, 2001, *Final Act*, ¶ 1, U.N. Doc. UNEP/POPS/CONF/4 (June 4, 2001), avail-



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between waste and non-waste, were reviewed and will be further revised and considered for adoption at the eleventh meeting of the Conference of the Parties (COP-11) in 2013.<sup>55</sup> Technical guidelines on tires and mercury wastes have also been published.

In accordance with a decision adopted by COP-10, the Secretariat of the Convention finalized a “revised legal analysis” on the application of the Convention to wastes generated onboard ships. The finalized analysis concludes that the Convention does not apply to ship-generated wastes that remain onboard a ship. However, the Convention’s environmentally sound management requirements would apply to such wastes that are off-loaded from a ship and subsequently the object of a transboundary movement.<sup>56</sup>

The Partnership for Action on Computing Equipment Working Group (PACE) has made progress in the area of e-waste this year. As of September 2012, PACE approved guidance on procedures for environmentally sound testing, refurbishment, recycling, recovery, and management of used and end-of-life computing equipment, and commenced a pilot project for waste management in Jordan.<sup>57</sup>

An effort to enhance coordination among the Basel, Stockholm, and Rotterdam<sup>58</sup> Conventions (the “synergies process”) continued to gain traction in 2012 with the advancement of numerous decisions previously made by the Conferences of the Parties (COPs) to the three conventions in 2010 and 2011. Recent activities include intergovernmental meetings on a proposed legally binding instrument on mercury that were held in Nairobi, Kenya in November 2011 and Punta del Este, Uruguay in June 2012, and the development of legal and technical guidelines on the transboundary movement of e-waste in coordination with the U.N. Environment Programme and other U.N. agencies.<sup>59</sup>

**B. INTERNATIONAL REGULATION OF AGRICULTURAL BIOTECHNOLOGY**

The parties to the Cartagena Protocol on Biosafety (CPB) and the Convention on Biodiversity (CBD) held their sixth and eleventh meetings, respectively, in Hyderabad, India in early October 2012. These meetings included discussion of the imminent entry into force of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to

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able at [http://www.pops.int/documents/meetings/dipcon/25june2001/conf4\\_finalact/en/FINALACT-English.pdf](http://www.pops.int/documents/meetings/dipcon/25june2001/conf4_finalact/en/FINALACT-English.pdf).

55. Open-Ended Working Group of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal Eighth Meeting [OEWG8], Geneva, Switz., Sept. 25-28, 2012, *Technical Guidelines on Transboundary Movements of Electronic and Electrical Waste (E-Waste), in Particular Regarding the Distinction Between Waste and Non-Waste*, at 9-18, U.N. Doc. UNEP/CHW/OEWG.8/INF/9/Rev.1 (Oct. 5, 2012).

56. See Secretariat to the Basel Convention, *Application of the Basel Convention to Hazardous Wastes and Other Wastes Generated on Board Ships*, at 20-23, U.N. Doc. UNEP/CHW/COP10FU/COMM/LEG/SHIPS (Apr. 30, 2012).

57. Basel Convention, Eighth Sess. Dec. OEWG-8/3, Rep. of the Open-ended Working Group of the Basel Convention, Eighth Session, ¶ 33, U.N. Doc. UNEP/CHW/OEWG.8/16 (Oct. 31, 2012), available at [http://www.basel.int/TheConvention/OpenendedWorkingGroup\(OEWG\)/LatestMeeting/OEWG8/MeetingDocuments/tabid/2793/Default.aspx](http://www.basel.int/TheConvention/OpenendedWorkingGroup(OEWG)/LatestMeeting/OEWG8/MeetingDocuments/tabid/2793/Default.aspx).

58. 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), available at [http://www.pic.int/Portals/5/incs/dipcon/eb\)/English/FINALE.pdf](http://www.pic.int/Portals/5/incs/dipcon/eb)/English/FINALE.pdf).

59. OEWG8, Geneva, Switz., Sept. 25-28, 2012, *Report on International Cooperation and Coordination and on the Basel Convention Partnership Programme*, U.N. Doc. UNEP/CHW/OEWG.8/INF/20 (July 20, 2012).

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the Cartagena Protocol on Biosafety (NKLS Protocol). The NKLS Protocol will address liability relating to harm to biodiversity caused by living modified organisms (LMOs), including biotech crops.<sup>60</sup> As of December 31, 2012, this law had fifty-one signatures, but only seven of the necessary forty ratifications to enter into force.<sup>61</sup>

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Access Protocol), an international agreement aimed at distributing the benefits of the use of genetic resources in a fair and equitable way by ensuring appropriate access to genetic resources and appropriate transfer of relevant technologies has been signed by ninety-two, but only ratified by eleven of the fifty nations necessary to enter into force by the end of 2012.<sup>62</sup> Assuming all the signatories ratify this treaty, it may enter into force in 2013. The Nagoya Access Protocol could lead to increased protection for genetic resources within nations like China.

These laws on liability and access to genetic resources, should they enter into force, could shape regulatory approval processes, access to germplasm for plant breeding, and create new liability risks. Although the U.S. has not ratified any of the new treaties, nor the CBD, 193 CBD parties (all U.S. trading partners) will be moving to write laws implementing new treaties related to agricultural biotechnology.

## V. Natural Resources

### A. WATER RESOURCES

The *United Nations Convention on the Law of Non-Navigational Uses of International Watercourses*<sup>63</sup> has obtained twenty-nine ratifications, as of the end of 2012, since its approval by the General Assembly in May 1997. Five states—Benin, Chad, Denmark, Italy, and Luxembourg—ratified the convention in 2012.<sup>64</sup> The Convention is now only six short of the thirty-five ratifications necessary to enter into force. In addition, four states have signed the Convention but not ratified it, while Ireland and the United Kingdom have committed to ratifying it.<sup>65</sup>

Work remains suspended on China's projected hydropower dam at Myitsone on the Irrawaddy River in Myanmar (Burma) after intense local opposition.<sup>66</sup> Although China

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60. Secretariat of the Convention on Biological Diversity, *Nagoya – Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety*, 1 (Oct. 15, 2010), available at [http://bch.cbd.int/protocol/NKL\\_text.shtml](http://bch.cbd.int/protocol/NKL_text.shtml).

61. *Parties to the Protocol and Signature and Ratification of the Supplementary Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://bch.cbd.int/protocol/parties/#tab=1> (last visited Feb. 25, 2013).

62. Secretariat of the Convention on Biological Diversity, *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity*, 1 (2011), available at <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

63. United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, May 21, 1997, 36 I.L.M. 700.

64. U.N., *Status, Convention on the Law of the Non-Navigational Uses of International Watercourses*, U.N. TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-12&chapter=27&lang=en#bottom](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en#bottom) (last visited Feb. 26, 2013).

65. *Id.*

66. S.P. Seth, *Myanmar: A Ray of Hope at Last*, DAILY TIMES (May 2, 2012), [http://www.dailytimes.com.pk/default.asp?page=2012%5C05%5C02%5Cstory\\_2-5-2012\\_pg3\\_2](http://www.dailytimes.com.pk/default.asp?page=2012%5C05%5C02%5Cstory_2-5-2012_pg3_2).

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has expressed outrage and has demanded billions in compensation,<sup>67</sup> work is unlikely to resume as long as the Kachin people who live in the area are still in revolt against the government.<sup>68</sup>

Chinese dams on the upper Mekong have long been a concern to the lower basin states, as they not only disrupt the flow of water, but also cut off the flow of silt needed to replenish the delta in southern Vietnam and Cambodia.<sup>69</sup> This year, the Chinese offered aid to Laos to build the largest dam on the lower Mekong, much to the alarm of Vietnam and Cambodia<sup>70</sup> and without clearing the procedures required by the Mekong Agreement.<sup>71</sup>

The International Court of Arbitration, in a dispute between India and Pakistan over the Kishanganga dam, has decided that India must take steps to remove three of the four Pakistani technical objections to the project.<sup>72</sup> India has agreed to stop work on the project, pending its redesign.<sup>73</sup>

Differences continued in the Nile Basin between Egypt and Sudan, on the one hand, and those states that have signed the Nile Cooperative Framework Agreement (Burundi, Ethiopia, Kenya, Rwanda, Tanzania, and Uganda), on the other. Egypt, however, has chosen to use the carrot rather than to threaten the stick, perhaps because it has been weakened by the political turmoil in the country.<sup>74</sup>

The International Joint Commission has several issues on its plate, including the declining levels in the Great Lakes<sup>75</sup> and the impending reopening of the Columbia River

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67. Keith Bradsher, *China and Myanmar to "Settle" on Myitsone Dam*, N.Y. TIMES, Oct. 11, 2011, at A14, available at [http://www.nytimes.com/2011/10/11/world/asia/china-and-myanmar-to-settle-on-myitsone-dam.html?\\_r=0](http://www.nytimes.com/2011/10/11/world/asia/china-and-myanmar-to-settle-on-myitsone-dam.html?_r=0).

68. *Is Myanmar About to Rejoin the World?*, CHRISTIAN SCI. MONITOR (Apr. 29, 2012), <http://www.csmonitor.com/World/Asia-Pacific/2012/0429/Is-Myanmar-about-to-rejoin-the-world>; Tom Fawthrop, *Kachin 'Victims of a Split at Top'*, S. CHINA MORNING POST (Apr. 16, 2012, 12:00 AM), available at 2012 WLNR 7939195.

69. Milton Osborne, *Blocking Flow to Asia's Bread Basket*, THE AUSTRALIAN (Nov. 13, 2012, 12:00 AM), <http://www.theaustralian.com.au/opinion/world-commentary/blocking-flow-to-asias-bread-basket/story-e6frg6ux-1226515396838>.

70. *Id.*

71. Thomas Fuller & Poypiti Amatatham, *Laos to Proceed with Dam Project on Mekong River*, N.Y. TIMES, Nov. 7, 2012, at A3, available at 2012 WLNR 23677206. A version of this article is also available on the website of the New York Times: <http://www.nytimes.com/2012/11/07/world/asia/laos-presses-ahead-with-mekong-dam-project.html>.

72. Zaheerul Hassan, *Conflict over Kishenganga Project*, FRONTIER POST (Oct. 30, 2012), <http://www.thefrontierpost.com/article/189270/>.

73. *Pak Happy at India Stopping Work at Kishanganga Dam*, ZEE NEWS (Oct. 21, 2012, 2:46 PM), available at 2012 WLNR 22378253. A version of this article is also available online at: [http://zeenews.india.com/news/south-asia/pak-happy-at-india-stopping-work-at-kishanganga-dam\\_806632.html](http://zeenews.india.com/news/south-asia/pak-happy-at-india-stopping-work-at-kishanganga-dam_806632.html).

74. Peter Salisbury, *Water Deals Under Scrutiny: As New Governments and Leaders Are Elected in the Region, Calls to Renegotiate Current Water-Sharing Agreements Are Likely to Increase*, MIDDLE EAST ECON. DIG., June 8, 2012, at 36.

75. Cynthia Dizikes, *Dry Summer Helps Push Lake Michigan Water Levels to Near-Record Lows*, CHI. TRIB. (Oct. 19, 2012), available at 2012 WLNR 22181746. A version of this article is also available online at: [http://articles.chicagotribune.com/2012-10-19/news/ct-met-lake-michigan-water-drop-20121019\\_1\\_water-levels-lakes-michigan-and-huron-river-water](http://articles.chicagotribune.com/2012-10-19/news/ct-met-lake-michigan-water-drop-20121019_1_water-levels-lakes-michigan-and-huron-river-water).

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Treaty.<sup>76</sup> On the other U.S. border, the International Boundary and Water Commission authorized the early release of water to Mexico from the Elephant Butte Reservoir on the upper Rio Grande because of the need to shut down wells in Mexico while they are being rehabilitated. This occurred over the protests of interests north of the border.<sup>77</sup>

**B. BIOLOGICAL RESOURCES AND WILDLIFE**

Two years into the United Nation's Decade on Biodiversity, wildlife, more than in recent years, is an issue at the forefront of the world's leaders' minds. At Rio+20, world leaders reaffirmed the intrinsic value of biodiversity and recognized the dangers of illegal wildlife trafficking as a component of *The Future We Want*.<sup>78</sup> U.S. Secretary of State Hillary Clinton's remarks at a Wildlife Trafficking Awareness event hosted by the U.S. State Department highlighted the gravity of recent upsurges in wildlife poaching and seizures of wildlife contraband.<sup>79</sup> Russian President Vladimir Putin has also publicly drawn attention to wildlife conservation issues, though with a markedly different, and hotly debated, approach.<sup>80</sup> Despite this high-level attention, however, on-the-ground realities and the complications of international politics and negotiations continue to challenge wildlife conservation.

Perhaps more than any other species, rhinos and elephants have suffered at the hands of wildlife traffickers. Both have endured increasingly high rates of poaching, and the populations of each species face precipitous declines.<sup>81</sup> Numerous international resources and efforts have been directed toward reversing these trends, including proposals to curb illegal trade in elephant ivory and rhinoceros horn submitted to the parties of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>82</sup>

Sharks and other marine species continue to suffer steep declines, and at the CITES meeting in March 2013, the international community is faced with making decisions about

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76. Scott Simpson, *Columbia River Rolls on to Treaty Deadline*, VANCOUVER SUN (Oct. 7, 2012), available at 2012 WLNR 21217893. A version of the article is also available online at: <http://www.vancouversun.com/business/Columbia+River+rolls+treaty+deadline/7352012/story.html>.

77. See, e.g., Lynn Brezosky, *Tempers Boil over Border Water Battle*, SAN ANTONIO EXPRESS-NEWS, Apr. 15, 2012, at 1B, available at <http://www.mysanantonio.com/news/article/Tempers-boil-over-border-water-battle-3482548.php>.

78. *The Future We Want*, supra note 32, ¶¶ 61, 111, 130, 158, 162-63, 177, 197-204. See also G.A. Res. 66/288, supra note 28, ¶ 222 (U.N.'s General Assembly endorsing *The Future We Want*).

79. See Hillary Clinton, U.S. Sec'y of State, U.S. Dep't of State, Remarks at the Partnership Meeting on Wildlife Tracking (Nov. 8, 2012), available at <http://www.state.gov/r/pa/ei/speeches/index.htm>.

80. See Gleb Bryanski & Denis Dyomkin, *Russia's Vladimir Putin Admits Wildlife Stunts Are Staged*, REUTERS (Sept. 13, 2012, 3:55 PM), <http://www.reuters.com/article/2012/09/13/us-russia-putin-critic-idUSBRE88C17T20120913>.

81. See Conference of the Parties, Bangkok, Thai., March 3-14, 2012, *Consideration of Proposals for Amendment of Appendices I and II*, at 4-6, Doc. COP16Prop.12 (Oct. 6, 2012) [hereinafter COP16Prop.12] (submitted by Kenya, Mali, Togo, and Burkina Faso), available at <http://www.cites.org/eng/cop/16/prop/E-CoP16-Prop-12.pdf> (proposing to amend the annotation for *Loxodonta africana*); Conference of the Parties, Bangkok, Thai., March 3-14, 2012, *Consideration of Proposals for Amendment of Appendices I and II*, at 4, Doc. COP16Prop.10 (Sept. 30, 2012) [hereinafter COP16Prop.10] (submitted by Kenya), available at <http://www.cites.org/eng/cop/16/prop/E-CoP16-Prop-10.pdf> (proposing to amend the annotation for *Ceratotherium simum simum*).

82. See COP16Prop.12, supra note 81; see also COP16Prop.10, supra note 81; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

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future trade in parts and derivatives of scalloped, great, and smooth hammerhead sharks; oceanic whitetip shark; porbeagle; manta; and sting rays.<sup>83</sup>

In other marine species news, the International Whaling Commission (IWC) met in July in Panama City.<sup>84</sup> In many ways, the meeting was much the same as ever: The Contracting Governments rejected Japan's small-type coastal whaling proposals and rejected a proposal for a Southern Atlantic Ocean sanctuary.<sup>85</sup> But it was also historic in that the Contracting Governments approved moving to biennial meetings and rejected Greenland's application for a renewal of its aboriginal subsistence quota.<sup>86</sup> In other whaling news, South Korea will notify the international community whether it will begin "scientific" whaling—an endeavor that will surely enliven and further cleave the already divided IWC.

At COP-11 of the CBD, the parties decided to, by 2015, double the "total biodiversity-related international financial resource flows to developing countries,"<sup>87</sup> namely to the least developed countries and Small Island Developing States and to maintain at least this level until 2020.<sup>88</sup> Additionally, the parties agreed to seek to try and have all, or at least 75 percent, of countries make adequate financial provisions for biodiversity conservation in their national development plans by 2015.<sup>89</sup> The parties also stressed the need for at least 75 percent of the countries receiving financial resources to report on expenditures and prepare national financial plans for biodiversity by 2015.<sup>90</sup>

Parties to the Ramsar Convention on Wetlands of International Importance gathered in Bucharest, Romania from July 6–13, 2012, for the Eleventh Conference of the Parties (COP-11). Under the Convention, parties are required to designate sites as "Wetlands of International Importance" (known as Ramsar Sites) for conservation.<sup>91</sup> When designating a site, the party must fill out (and update every six years) a Ramsar Information Sheet (RIS) that describes the site's history, condition, and protection status in detail.<sup>92</sup> The COP adopted Resolution XI.8, which revised the reporting requirements for Ramsar Sites, shifting to an online model that will allow greater transparency, information shar-

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83. See generally *Proposals for Amendment of Appendices I and II*, CITES, <http://www.cites.org/eng/cop/16/prop/index.php> (follow hyperlinks for proposals forty-two through forty-eight under the Amphibia subheading) (last visited Feb. 26, 2013).

84. See Press Release, Int'l Whaling Comm'n, 64th Annual Meeting of the International Whaling Commission (June 8, 2012), available at <http://www.iwcoffice.org/meeting2012>.

85. See Int'l Whaling Comm'n, June 8–July 6, 2012, *Status of Agenda Items at IWC/64 as of Friday 6 July 2012 17.30*, 64/15/Rev. (June 7, 2012), available at <http://iwc.int/iwc64docs>.

86. See *id.*

87. Conference of the Parties to the Convention on Biological Diversity, Hyderabad, India, Oct. 8–19, 2012, *Review of Implementation of the Strategy for Resource Mobilization, Including the Establishment of Targets*, ¶ 7(a), U.N. Doc. UNEP/CBD/COP/DEC/XI/4 (Dec. 5, 2012).

88. See *id.*

89. *Id.* ¶ 7(b).

90. *Id.* ¶ 7(c)–(d).

91. See Convention on Wetlands of International Importance Especially as Waterfowl Habitat, art. 2.1, Feb. 2, 1971, 996 U.N.T.S. 243, reprinted in 11 I.L.M. 963 [hereinafter Ramsar Convention], available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20996/volume-996-I-14583-English.pdf>.

92. See RAMSAR CONVENTION SECRETARIAT, THE RAMSAR CONVENTION MANUAL: A GUIDE TO THE CONVENTION ON WETLANDS (RAMSAR, IRAN, 1971) 50–52 (6th ed. 2013), available at [http://www.ramsar.org/cda/en/ramsar-pubs-manual-manual5/main/ramsar/1-30-35%5E25489\\_4000\\_0\\_\\_#sec43](http://www.ramsar.org/cda/en/ramsar-pubs-manual-manual5/main/ramsar/1-30-35%5E25489_4000_0__#sec43).

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ing, and monitoring of wetlands.<sup>93</sup> The COP also adopted Resolution XI.9, which encouraged countries to continue to use a “no loss” approach to wetlands where the primary imperative is to avoid wetland impacts.<sup>94</sup> In doing so, Resolution XI.9 noted that “no net loss” policies, which require offsets to wetland impacts, may not fully replace lost wetland functions and thus require further monitoring.<sup>95</sup>

## VI. Trade and the Environment

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

In 2012, three bilateral free trade agreements between the United States and South Korea, Colombia, and Panama, respectively, entered into force.<sup>96</sup> Each of these agreements contains binding obligations, subject to dispute settlement, designed to ensure that parties do not lower their environmental standards or derogate from their environmental laws to encourage trade and investment.<sup>97</sup> The agreements also require parties to adopt and implement laws to fulfill their obligations under seven multilateral environmental agreements that address, inter alia, marine pollution, wetland conservation, and fisheries management.

In January 2012, both Mexico and the United States appealed a 2011 WTO dispute panel report issued in Mexico’s challenge of the U.S. “dolphin-safe tuna” label scheme implemented pursuant to the Dolphin Protection Consumer Information Act, 16 U.S.C.

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93. See generally Eleventh Meeting of the Conference of the Parties to the Convention on the Wetlands, Bucharest, Rom., July 6-13, 2012, *Resolution XI.8: Streamlining Procedures for Describing Ramsar Sites at the Time of Designation & Subsequent Updates*, available at <http://www.ramsar.org/pdf/cop11/res/cop11-res08-e.pdf>.

94. See Eleventh Meeting of the Conference of the Parties to the Convention on the Wetlands, Bucharest, Rom., July 6-13, 2012, *Resolution XI.9: An Integrated Framework & Guidelines for Avoiding, Mitigating, & Compensating for Wetland Losses*, ¶¶ 14, 28-29, 89-91, available at <http://www.ramsar.org/pdf/cop11/res/cop11-res09-e.pdf>.

95. See *id.* ¶ 95.

96. See United States-Panama Trade Promotion Agreement Implementation Act, Pub. L. No. 112-43, § 101(b), 125 Stat. 497 (2011) (granting the President authority to initiate contact with other party to the agreement so the agreement can enter into force); United States-Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, § 101(b), 125 Stat. 428 (2011) (same); United States-Colombia Trade Promotion Agreement Implementation Act, Pub. L. No. 112-42, § 101(b), 125 Stat. 463 (2011) (same). See also Press Release, Office of the U.S. Trade Representative, United States, Korea Set Date for Entry into Force of U.S.-Korea Trade Agreement (Feb. 21, 2012), <http://www.ustr.gov/about-us/press-office/press-releases/2012/february/united-states-korea-set-date-entry-force-us-korea>; Press Release, Office of the U.S. Trade Representative, U.S. and Panama Set Date for Entry-Into-Force of the U.S.-Panama Trade Promotion Agreement (Oct. 23, 2012, 11:57 AM), <http://www.ustr.gov/about-us/press-office/blog/2012/october/us-panama-set-date-eif-tpa>; Press Release, Office of the U.S. Trade Representative, U.S. Representative Ron Kirk Statement on Entry into Force of the U.S.-Colombia Trade Agreement (May 15, 2012), <http://www.ustr.gov/about-us/press-office/press-releases/2012/may/us-trade-representative-ron-kirk-statement-entry-force>.

97. See U.S.-Colombia Free Trade Agreement, ch. 18, Nov. 22, 2006, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset\\_upload\\_file644\\_10192.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file644_10192.pdf); U.S.-Korea Free Trade Agreement, ch. 20, June 30, 2007, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file852\\_12719.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file852_12719.pdf); U.S.-Panama Trade Promotion Agreement, ch. 17, June 28, 2007, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset\\_upload\\_file314\\_10400.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file314_10400.pdf).

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§ 1385.<sup>98</sup> The WTO panel found the U.S. measures to be more trade restrictive than necessary to achieve their legitimate objective, in violation of Article 2.2 of the WTO Agreement on Technical Barriers to Trade (TBT), but did not agree with Mexico's claims that the measures violate TBT Articles 2.1 and 2.4 and Articles I and III of the General Agreement on Tariffs and Trade.<sup>99</sup> On May 16, 2012, the WTO Appellate Body issued its final report that rejected the panel's finding of a TBT Article 2.2 violation and instead found the U.S. measures to afford less favorable treatment to Mexican tuna products in violation of TBT Article 2.1.<sup>100</sup> The appellate body found that the United States did not demonstrate that the detrimental impact of its measure on Mexican tuna products stemmed exclusively from a legitimate regulatory distinction. The appellate body noted "in particular, the [United States'] measure *fully* address[ed] the adverse effects on dolphins resulting from setting on dolphins in the [Eastern Tropical Pacific], whereas it does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the [Eastern Tropical Pacific]."<sup>101</sup> The Panel and Appellate Body Reports were adopted by the WTO Dispute Settlement Body on June 13, 2012,<sup>102</sup> and the United States and Mexico subsequently agreed on a deadline of July 13, 2013, for the United States to bring its measures into compliance with WTO requirements.<sup>103</sup>

## VII. Finance and the Environment

Environment, especially green growth, was one of the issues discussed at the Seventh G20 Leadership Summit held in Mexico in June 2012.<sup>104</sup> Parties discussed various environmental topics, including eliminating fossil fuel subsidies,<sup>105</sup> increasing fuel efficiency standards,<sup>106</sup> and creating practical, voluntary measures and actions to help countries define how they will achieve sustainable development.<sup>107</sup> Additionally, the parties launched

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98. See Notification of an Other Appeal by Mexico, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/11 (Jan. 27, 2012), available at <http://www.worldtradelaw.net/na/ds381-11%28na-other%29.pdf>; Notification of an Appeal by the United States, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/10 (Jan. 24, 2012), available at <http://www.worldtradelaw.net/na/ds381-10%28na%29.pdf>.

99. See Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 4.53, 4.111, WT/DS381/R (Sept. 15, 2011), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/381r\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/381r_e.pdf).

100. See Appellate Body Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 407, WT/DS381/AB/R (May 16, 2012), available at <http://www.worldtradelaw.net/reports/wtoab/us-tunamexico%28ab%29.pdf>.

101. *Id.* ¶ 297 (internal quotation marks omitted).

102. Appellate Body and Panel Report, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/15 (June 15, 2012), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds381\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm).

103. See Agreement Under Article 21.3(b) of the DSU, *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/17 (Sept. 19, 2012), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/\\_e/ds381\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/_e/ds381_e.htm).

104. See Press Release, Office of the Press Sec'y, The White House, G20 Leaders Declaration, ¶¶ 69-76 (June 19, 2012), <http://www.whitehouse.gov/the-press-office/2012/06/19/g20-leaders-declaration>.

105. See *id.* ¶ 74.

106. See Press Release, G2012 Mex., The VII G20 Leaders' Summit Concludes (June 19, 2012), <http://www.g20mexico.org/index.php/en/press-releases/460-concluye-la-vii-cumbre-de-lideres-del-g20>.

107. See G20 Leaders Declaration, *supra* note 104, ¶ 72.

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the Dialogue Platform on Inclusive Green Investments to bring together public and private sector parties to discuss green growth investment opportunities.<sup>108</sup>

In October 2012, the World Bank launched a two-year-long review and update of its environmental and social safeguard policies.<sup>109</sup> The World Bank recently released its Approach Paper,<sup>110</sup> which lays out its plan for updating and revising its policies and indicates that the World Bank is moving away from clear standards to policies that provide guidance and defer to a borrower's own policies. The current safeguard policies provide important baseline standards to protect vulnerable communities affected by international development projects. This ongoing review will have significant impacts on international development projects and the communities that live near them.

### VIII. International Environmental Litigation

Many cases involving international environmental legal issues over the past year have turned on a similar theme: What is the appropriate forum for vindicating these disputes?

The U.S. Supreme Court is currently considering *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel*),<sup>111</sup> examining the scope of liability under the Alien Tort Statute (ATS) and the availability of remedies against corporations under the ATS. The ATS was enacted as part of the Judiciary Act of 1789 and permits 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."<sup>112</sup> There are a significant number of ATS cases pending in United States courts, including many that have been brought against corporations in connection with resource development in developing countries and that often involve an environmental dimension. The *Kiobel* case itself involves allegations of human rights violations by Shell Oil in the course of oil development in Nigeria. Following oral argument in February 2012, the Court ordered that the case be reargued, with argument directed to the question of whether the ATS "allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."<sup>113</sup> The subsequent briefing and argument touched on, on the one hand, the need to avoid intrusion into the judicial system of another sovereign and the need to allow the Executive Branch to manage relations with those sovereigns, and, on the other hand, the desire to afford a remedy for potentially very compelling claims.<sup>114</sup> Such re-arguments are quite unusual, and the Court's eventual decision could be significant.

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108. See *id.*

109. See *Review and Update of the World Bank Safeguard Policies: Consultation Phase 1*, WORLD BANK, [www.worldbank.org/safeguardsconsultations](http://www.worldbank.org/safeguardsconsultations) (last visited Feb. 26, 2013).

110. See THE WORLD BANK, THE WORLD BANK'S SAFEGUARD POLICIES PROPOSED REVIEW AND UPDATED, APPROACH PAPER (2012), available at <http://siteresources.worldbank.org/EXTSAFEOPOL/Resources/584434-1306431390058/SafeguardsReviewApproachPaper.pdf>.

111. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491).

112. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73 (codified as 28 U.S.C. § 1350) (granting federal district courts original jurisdiction to hear causes that involve an alien suing for a tort incurred in violation of the law of the United States); see also David Wallach, *The Alien Tort Statute and the Limits of Individual Accountability in International Law*, 46 STAN. J. INT'L L. 121, 123 n.2 (2010) (discussing the history of the Alien Tort Statute).

113. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.).

114. See Lyle Denniston, *Argument Recap: In Search of an ATS Compromise*, SCOTUSBLOG (Oct. 1, 2012, 2:35 PM), <http://www.scotusblog.com/2012/10/argument-recap-3/>.



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Additional cases illustrate the exceptional complexities that can arise in international environmental law disputes. Litigation is pending in multiple forums between Ecuador and Chevron related to claims by indigenous groups that Chevron's activities in Ecuador caused severe environmental harm, as well as a ruling by an Ecuadorian court awarding US \$18 billion against Chevron.<sup>115</sup> An arbitral tribunal appointed by the Permanent Court of International Arbitration issued a series of orders relating to this award, with the most recent ruling requiring Ecuador to take steps to prevent the award from becoming enforceable.<sup>116</sup> The Ecuadorian plaintiffs responded by initiating proceedings before the Inter-American Commission on Human Rights, asserting that any compliance with this order by Ecuador would violate Ecuador's obligations under human rights treaties.<sup>117</sup> These plaintiffs have also sought to enforce the judgment against Chevron in Argentina and Brazil. The courts in Argentina, in response, have issued a preliminary order freezing Chevron's assets in Argentina.<sup>118</sup> Chevron obtained an order from a U.S. district court barring enforcement of the judgment, but that order was subsequently vacated by the Second Circuit, which found that no such remedy was available until the plaintiffs sought to enforce the order.<sup>119</sup> A racketeering dispute alleging fraud in the Ecuador litigation is also pending in U.S. courts.<sup>120</sup>

The Chevron-Ecuador case is one in a group of similar recent disputes. Another example involves proceedings, including criminal charges, filed against Chevron in Brazil in connection with an oil spill that occurred in November 2011.<sup>121</sup> The Brazilian government is seeking over US \$12 billion in damages for the spill.<sup>122</sup> In 2012, Canadian courts dismissed a similar case filed against a Canadian mining company,<sup>123</sup> and another case was recently brought in the United Kingdom against Royal Dutch-Shell.<sup>124</sup>

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115. See Roger Parloff, *Chevron Claims Patton Boggs Tried to Cover up Fraud: The Oil Giant Has Subpoenaed the Big DC Firm Concerning Its Role in a Fraud-Tainted Case*, FORTUNE (Sept. 25, 2012, 9:12 AM), <http://features.blogs.fortune.cnn.com/2012/09/25/chevron-patton-boggs/>.

116. See Chevron Corp. v. Republic of Ecuador, Case No. 2009-23, Second Interim Award on Interim Measures, Feb. 16, 2012, ¶¶ 3-4 (Perm. Ct. Arb. 2012), available at <http://www.chevron.com/documents/pdf/ecuador/SecondTribunalInterimAward.pdf>.

117. See Lise Johnson, *Case Note: How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority*, IISD INVESTMENT TREATY NEWS (Apr. 13, 2012), [http://www.iisd.org/itm/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/#\\_ftn7](http://www.iisd.org/itm/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/#_ftn7).

118. See Jude Webber, *Chevron Units Appeal Argentine Asset Freeze*, FIN. TIMES (Nov. 9, 2012, 10:54 PM), <http://www.ft.com/cms/s/0/0d6b7240-2abc-11e2-99bb-00144feabdc0.html#axzz2DUEsjwU>.

119. See Chevron Corp. v. Naranjo, No. 11-1150-cv(L), 2011 WL 4375022, at \*1 (2d Cir. Sept. 19, 2011). See also Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012).

120. Parloff, *supra* note 115.

121. See Matthew Cowley & Daniel Gilbert, *Brazil Charges Chevron: Oil Giant, Transocean and Executives Accused of Environmental Crimes in Leak*, WALL ST. J. (Mar. 21, 2012, 8:40 PM), <http://online.wsj.com/article/SB10001424052702304724404577295781785603386.html#articleTabs%3Darticle>.

122. *Id.*

123. See *Supreme Court Won't Hear Appeal in Congo Massacre Case*, CANADIAN PRESS (Nov. 1, 2012, 8:15 PM), <http://www.cbc.ca/news/canada/montreal/story/2012/11/01/quebec-anvil-mining-appeal-refused-supreme-court.html>.

124. See Associated Press, *Nigeria: Villages Sue Shell Oil*, N.Y. TIMES, Mar. 24, 2012, at A5, available at [http://www.nytimes.com/2012/03/24/world/africa/nigeria-villages-sue-shell-oil.html?\\_r=0](http://www.nytimes.com/2012/03/24/world/africa/nigeria-villages-sue-shell-oil.html?_r=0).

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