

# Beyond Territoriality

Transnational Legal Authority in an Age of  
Globalization

*Edited by*

Günther Handl, Joachim Zekoll and Peer Zumbansen

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PART VI

EMERGING GLOBAL GOVERNANCE STRUCTURES FIRMLY ROOTED IN  
THE STATE SYSTEM

*PART VI.D GLOBAL WARMING*



## CONSTRUCTING TRANSNATIONAL CLIMATE REGIMES

*Eric Dannenmaier\**

### I. INTRODUCTION

Extra-territoriality is often framed as the application of a state's law beyond its own borders.<sup>1</sup> Although the doctrinal challenges of this jurisdictional reach are complex, the factual predicates can be straightforward. Examples include applying antitrust law to overseas business practices,<sup>2</sup> imposing domestic design safety-standards on exports,<sup>3</sup> enforcing civil rights laws on domestic corporations that employ citizens overseas,<sup>4</sup> finding liability for human rights violations committed by armed forces operating outside territorial limits,<sup>5</sup> limiting the conduct of law enforcement

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\* The author's research on institutional alternatives in "non-climate forums" described in this chapter was presented at the Second UNITAR/Yale Conference on Environmental Governance and Democracy in September 2010, and was published, in part, in Eric Dannenmaier, "The Role of Non-State Actors in Climate Compliance", in: Jutta Brunnée, Meihard Doelle & Lavanya Rajamani (eds), *Promoting Compliance in an Evolving Climate Regime*, (Cambridge, Cambridge University Press, 2011), p 149. The author wishes to thank participants in that conference, and the editors of that volume, for their insights regarding the significance those non-climate forums. The author is also greatly indebted to the editors of this volume, and, in particular, Günther Handl, for valuable insights and substantive guidance in preparing this chapter.

<sup>1</sup> Günther Handl, "Introduction: Extra-territoriality and Transnational Legal Authority", in this volume.

<sup>2</sup> *United States v Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945); *Hartford Fire Ins. Co. v California*, 509 US 764 (1993). See, also, Detlev F Vagts, "Editorial Comment: Extraterritoriality and the Corporate Governance Law", (2003) 97 *American Journal of International Law*, p 289.

<sup>3</sup> *In re Westinghouse Elec. Corp.*, 11 NRC 631 (1980) (The Nuclear Regulatory Commission (NRC) lacked jurisdiction to consider the effects of an exported reactor on citizens of a recipient country, or U.S. citizens residing in that country); *Natural Res. Def. Council, Inc. v Nuclear Regulatory Comm'n*, 647 F.2d 1345, 1352 (DC Circ. 1981) (Upholding the NRC's decision that it lacked jurisdiction). See, also, Anthony D'Amato & Kirsten Engel, "State Responsibility for the Exportation of Nuclear Power Technology", (1988) 74 *Virginia Law Review* p 1011, at 1021.

<sup>4</sup> *EEOC v ARAMCO*, 499 US 244 (1991) (holding that the Civil Rights Act did not apply extra-territorially). Congress later amended the Act to reverse the effect of *ARAMCO*.

<sup>5</sup> *Bankovic v Belgium*, App. No. 52207/99 (European Court of Human Rights 2001), reprinted in (2001) 123 *International Law Reports*, p 94 (European Court of Human Rights

officers working out of country,<sup>6</sup> and holding foreign producers of transboundary pollution accountable to the environmental standards of an affected country.<sup>7</sup>

Each of these examples raises questions about the extent to which a state may reach beyond its borders – and into the territory of another state – to enforce its own norms. Much of the jurisprudence and scholarship on extra-territoriality is focused on the extent and propriety of this reach. And much of the work of international law in this area is aimed at creating a framework to sanction or to limit the scope of this reach within bilateral or multilateral agreements or institutional arrangements. This recognises the practical need for occasional state action beyond borders in service of domestic norms even while acknowledging the practical challenge that such action presents to the idea of territorial sovereignty. Co-ordinating institutions and shared or negotiated normative frameworks alleviate the challenge to sovereignty while mitigating sovereignty's constraining effects.

Although many examples of extra-territoriality fit this somewhat linear model, there are instances in which state interests cannot be satisfied by a narrow reach across borders. Problems that arise from global, cumulative, or systemic consequences of human conduct and problems that implicate deeply-held ethical constructs raise more complex challenges. Efforts to protect the environment are often of this kind because they present both systemic and ethical challenges. The protection of migratory species and the non-navigational use of transboundary waters, for example, each deal with resources that can be affected and degraded within a state's borders, and also beyond those borders where it is subject to further impact or degradation. A single river or a single species crossing a single border may present an extra-territorial challenge. But rivers that flow and species that migrate through multiple jurisdictions are subject to multiple demands and forms of impact, and also subject to natural forces that may ameliorate or aggravate the consequences of those demands and forms of impact.<sup>8</sup> The challenge is even clearer with coastal resources, regional

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dismissing an application concerning the effects of NATO airstrikes because it lacked territorial jurisdiction).

<sup>6</sup> *United States v Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir. 2002), cert. denied 537 US 1038 (2002).

<sup>7</sup> See, for example, *Trail Smelter Arbitration (US v Can.)*, (1941) 3 UN Reports of International Arbitral Awards 1905.

<sup>8</sup> Rivers will “cleanse” themselves of biological contaminants over time through the action of biota and aeration and through dilution from rainwater and runoff. They may also become further degraded from new sources of contamination.

seas, and atmospheric phenomena, where interactions are more complex and resources are, essentially, commons. This creates an extra-territorial problem with a multi-linear aspect which is not present, for example, in a state's desire to hold its citizens or registered corporations to account for overseas conduct. Some environmental problems also share the feature of human rights standards that are value-laden and call upon more deeply-shared ethical constructs to motivate concerted action. A concern over fishing practices that harm marine mammals, for example, may be more difficult to assuage through negotiated norms than a concern over toxic releases that threaten human populations because an ethical framework that values non-human species is less universal.

Concerns about climate change focus on the risk to human and non-human species as well as to habitat and natural landscapes; they also (inevitably) focus on the impact that measures to mitigate anthropogenic climate forcings might have on human economies and social prosperity. Climate is an inherently extra-territorial problem with solutions that will require intra- and inter-state action, as well as action by non-state actors both within and outside of state institutions. For these reasons, the problem of climate change presents unique challenges to the paradigm of sovereign territoriality. This chapter examines efforts to address the climate-change problem by territorially-bounded states through international negotiations and institutions. It analyses the implications of these efforts for claims about territorial paradigms in international law, the sovereignty of states, and the need for "de-territorialised" action.

The author finds that transnational climate responses have driven, at least in some instances, an expansion of transnational legal authority, even a re-allocation of that authority, but not a re-location of the source of authority. That is, multilateral institutions and processes have grown, even achieved a level of autonomous operation, but without threatening the state's sovereign prerogative. Although embryonic and incomplete, transboundary climate responses have tended to be multilateral rather than unilateral, and they have been co-ordinated, if not well choreographed. Formal institutions have been constructed by states to address climate concerns, and these institutions are making headway, albeit slow and painstaking. In addition, transboundary networks and dialogues – among states and non-state actors – have worked to shape and animate these and other new climate institutions. These informal arrangements have given rise to institutional alternatives that might be described as "soft" forums – negotiation and co-operation spaces that some endorse as forging stronger climate-change governance, and some deride as undermining

a universal solution. Institutional alternatives have also been pursued through international institutions that do not have explicitly climate- or environment- driven mandates, but have binding (“hard”) features which can advance environmental values while calling attention to the need for more universal solutions.

These examples of international climate governance demonstrate a move towards transnational decision-making that respects state sovereignty, disfavours unilateral actions, and builds upon regional and global solutions designed on a co-operative basis even while leaving room for creative collateral approaches, particularly at a regional level. Although some might argue that even these co-operative climate-solutions may challenge ideas of territorial sovereignty, the argument falls short. The construction of a multi-faceted transnational climate regime has not threatened core precepts of sovereign prerogative because states are ultimately shaping and managing the processes, and constructing and directing the institutions (albeit co-operatively). Moreover, states rely upon these processes and institutions to protect territorial integrity threatened by the climate-change phenomenon. Sovereign state interests – in resources, economies, even physical boundaries – are secured, rather than threatened, through co-operative action. The inherent tensions between the unilateral (be they concerted or not) measures of states and the idea of territorial sovereignty are thus allayed by global and regional approaches to climate change.

## II. CLIMATE AS AN EXTRA-TERRITORIAL PROBLEM

Climate change is a natural phenomenon that occurs in response to natural cycles. But evidence has mounted in recent decades – now confirmed by extensive scientific study of multiple data points – that human activity can, and does, also affect climate.<sup>9</sup> These so-called “anthropogenic forcings” of the climate system (which compound the effect of background “natural forcings”) result from a range of development and industrial

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<sup>9</sup> A discussion of the science of climate change can be found at the Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report, S D Solomon et al., (eds), *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, (Cambridge, Cambridge University Press 2007), (hereinafter IPCC FAR), available at: [http://www.ipcc.ch/publications\\_and\\_data/ar4/wg1/en/spm.html](http://www.ipcc.ch/publications_and_data/ar4/wg1/en/spm.html).

activities that emit greenhouse gases (GHGs).<sup>10</sup> As industrial activity has grown, anthropogenic forcings have become a more prominent climate influence. Despite persistent ideological challenges to political action on climate (especially in the United States), there is a broad scientific consensus that human activity is driving climate change on a scale that will lead to serious atmospheric disturbance.<sup>11</sup>

The most problematical anthropogenic GHG, because of the volume emitted, is carbon.<sup>12</sup> Carbon is released into the atmosphere chiefly from the burning of fossil fuels<sup>13</sup> and the destruction of plant material that contains, or sequesters, carbon.<sup>14</sup> In most countries, the dominant forms of energy consumption and transportation – which are fossil-fuel based – are important sources of atmospheric carbon. Development patterns that encourage greater energy consumption, encourage more transit of people or goods, or encourage the clearing of forests for timber, grazing land, or urbanisation, also drive greater carbon emissions and eliminate sequestered carbon (so-called carbon “sinks”).<sup>15</sup>

The introduction of high levels of carbon and other GHGs into the atmosphere is already producing measurable effects, and is expected to

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<sup>10</sup> For a basic introduction to climate change dynamics, including the science, see *Climate Change 101: Understanding and Responding to Global Climate Change* (Pew Center for Global Climate Change) available at: [http://www.pewclimate.org/global-warming-basics/climate\\_change\\_101](http://www.pewclimate.org/global-warming-basics/climate_change_101); see, also, Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report (FAR) (2007) available at: <http://www.ipcc.ch>.

<sup>11</sup> IPCC FAR, note 9 above.

<sup>12</sup> Carbon is considered the most problematic greenhouse gas because of its volume. The climate problem is aggravated by the introduction of carbon into the atmosphere both through the combustion of fossil fuels, and the destruction of “carbon sinks”, such as forests, where carbon is fixed in living plant material. See, generally, US National Oceanic and Atmospheric Administration (NOAA) “The NOAA Annual Greenhouse Gas Index” (10 September 2010) available at: <http://www.esrl.noaa.gov/gmd/aggi>.

<sup>13</sup> Over eighty per cent (80%) of the global energy supply is derived from fossil fuels. See International Energy Agency, *Key World Energy Statistics*, (OECD/IEA, Paris, 2010), (available at: <http://www.iea.org/index.asp>); See, also, BP plc, *BP Statistical Review of World Energy June 2010*, London (available at: <http://www.bp.com/productlanding.do?categoryId=6929&contentId=7044622>), indicating fossil fuels account for over eighty-six per cent (86%) of global fuel consumption, while renewables such as geothermal, wind, and solar energy account for less than two per cent (1.7%) of global energy production.

<sup>14</sup> The latter problem is driven, in large part, by cutting forests, and, increasingly, the loss of marine phytoplankton. See “Climate Change 101: Understanding and Responding to Global Climate Change”, Pew Center on Global Climate Change, January 2009 update, available at: [http://www.pewclimate.org/global-warming-basics/climate\\_change\\_101](http://www.pewclimate.org/global-warming-basics/climate_change_101) (last accessed 7 September 2010).

<sup>15</sup> Other development choices, such as relying on raw materials, rather than recycling, and investing in fossil fuel electricity production, rather than moving to renewable sources, also increase carbon emissions per unit of domestic production.

cause increasing harm on a global scale.<sup>16</sup> The impact will be worldwide, although the degree of harm will be realised differentially by local populations.<sup>17</sup> The effects of climate change already observed include glacial melting, the warming of lakes and rivers, the poleward and upward shift in ranges in plant and animal species, and changes in marine salinity, oxygen, and circulation.<sup>18</sup> Future impact predicted by climate modelling includes decreased water availability in mid-latitude and dry regions, increased heatwaves, floods, storms, fires and droughts, increased malnutrition and diarrhoeal disease, the expanded spatial distribution of some infectious disease vectors, decreased resilience of ecosystems, changes in the timing and regional distribution of rainfall, increased coastal erosion and sea-level rise, and the extinction of species at a much higher rate than would occur naturally.<sup>19</sup>

Climate change is intrinsically linked to state sovereignty, both in a territorial sense and in a human security sense.<sup>20</sup> Anthropogenic forcings arise from territorially-bounded conduct but their impact is not territorially-limited. Because of cumulative atmospheric dynamics, no direct cause and effect between any specific behaviour and any specific harm can be readily proved. Although activity types are understood as climate forcing, and inventories can identify states that are dominant GHG emitters, the impact of specific emissions from specific states or enterprises cannot be traced to specific outcomes. This suggests yet another dimension of complexity not shared by many other environmental problems (such as whaling, shrimping, tuna fishing, mining, logging, or the production of ozone-depleting substances, persistent organic pollutants, carcinogens, and other hazardous substances) that arise from discrete industries or industry groups. A market-share liability approach has been discussed as a means of working around the contribution question with regard to

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<sup>16</sup> A discussion of climate change impact can be found at the IPCC FAR, ML Parry et al., (eds), *Climate Change 2007: Impacts, Adaptation and Vulnerability, Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, (Cambridge, Cambridge University Press, 2007), available at: [http://www.ipcc.ch/publications\\_and\\_data/ar4/wg2/en/contents.html](http://www.ipcc.ch/publications_and_data/ar4/wg2/en/contents.html).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, Summary for Policymakers, Part B, "Current knowledge about observed impacts of climate change on the natural and human environment".

<sup>19</sup> *Ibid.*, Part C, "Current knowledge about future impacts".

<sup>20</sup> See, for example, *World Resources Institute, Energy Security and Climate Change*, (available at: <http://www.wri.org/project/energy-security-climate-change>); Brookings Institution, *Energy Security Initiative*, (available at: <http://www.brookings.edu/projects/energy-security.aspx>); Department of Defense, *Quadrennial Defense Review Report*, February 2010 (available at: <http://www.defense.gov/qdr>).

private parties,<sup>21</sup> but the tactic faces conceptual problems in the climate context because, among other things, “each emission contributes to a single global process that causes all harms”.<sup>22</sup> Although the literal application of a market-share approach is problematic,<sup>23</sup> a construction analogous to market-share liability might assign accountability to GHG-source states upon the basis of inventories.

Climate is a classic commons dilemma because incremental atmospheric contributions of greenhouse gases from within individual states will mix, react, and cause changes to the undifferentiated shared space of the planet’s atmosphere. These changes will, in turn, affect global climate systems, and, consequently, will affect human health, welfare, and enterprise. But individual actors and individual states have limited incentives to reduce their contribution of greenhouse gases to the atmosphere where others fail to do so.

A meaningful reduction of GHG emissions will require fundamental changes in the way that states and private actors approach deeply-engrained policies and practices – particularly relating to energy, transportation, and the design of the built environment. It will also require substantial international co-ordination (to assure broad adoption and compliance) and co-operation (to support compliance-monitoring as well as mitigation and adaptation in less developed countries). The only existing international regime that comes close to seeking this degree of universality and domestic policy penetration is the human rights regime. But human rights norms do not necessarily entail wholesale shifts in the means of powering production, transportation, and development, and the potential economic consequences that these shifts will bring. Furthermore, even the most aspirational and economically-penetrating human rights norms – those that call for the affirmative construction of domestic frameworks that would advance economic, social, and cultural rights such

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<sup>21</sup> See, for example, Daniel J Grimm, “Note. Global Warming and Market Share Liability: A Proposed Model for Allocating Tort Damages Among CO<sub>2</sub> Producers”, (2007) 32 *Columbia Journal of Environmental Law*, p 209, at 211.

<sup>22</sup> Douglas A Kysar, “What Climate Change can do about Tort Law”, (2011) 41 *Environmental Law*, p 1, at 37.

<sup>23</sup> Emissions within a state’s territory are not tied to that state’s “market share” in a direct economic sense or in reciprocal cost-benefit terms, so the market is a questionable proxy for liability. Are emissions from the operations of multinational corporations based in India, for example, more fairly attributed to the country of residence of the subsistence wage earners within local facilities, to the corporation’s country of registration, to the residence of its investors, or to the location of the end products’ consumers? Unlike a private sector context, market share offers no straightforward link between profit and harm.

as housing, education, and health care – are understood to be progressively realised.<sup>24</sup> While these goals are fundamental, there is, arguably, greater urgency in the adoption of domestic policies on energy, transportation and construction (all fundamental development patterns) if climate concerns are to be addressed before serious and irreversible<sup>25</sup> harm is realised.

All of this raises questions about whether the traditional model of state sovereignty and territorial integrity is even apposite to the climate problem – let alone capable of addressing the problem. Unlike Spanish King Charles V's pretence that the use of Protestant prayer books by English King Edward VI's ambassadors to Spain's Catholic court took place on little bits of England in the heart of Spanish territory,<sup>26</sup> the climate problem does not allow such neatly carved exceptions to territorial space. Climate change threatens sovereignty through rising coastal waters, changing precipitation patterns, new disease vectors, and increased storm events. Climate, and the aspects of nature affected by it, penetrates every part of every state. Yet the human conduct helping to drive climate change takes place within sovereign states. The problem thus defies territorial limits, while the solution must arise from within territorial boundaries. This begs the question of how territorially-bound regimes respond to an extra-territorial – perhaps a-territorial – threat.

### III. THE REACH OF UNILATERALISM – DOMESTIC INSTITUTIONS THAT SEEK TO PUNISH OR ASSIST

Climate concerns have not generally sparked direct action by states seeking to extend the reach of their legal regimes into the territories of others. One could imagine trade barriers to fossil fuels, production standards that disfavour large carbon footprints, or restrictions on domestic fossil fuel enterprises operating overseas. But none of these strategies have been deployed. The economic consequences of these and similar actions would be striking, and it is not difficult to imagine the lack of political will to

<sup>24</sup> See, for example, International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, 993 UNTS 3 Articles 2 (1) ("Each State Party to the present Covenant undertakes to take steps ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant ...").

<sup>25</sup> At least in human time scales with respect to human populations.

<sup>26</sup> This legal construct avoided the application of rules that would otherwise proscribe the use of non-Catholic liturgical texts. See John Gerard Ruggie, "Territoriality and Beyond: Problematising Modernity in International Relations", (1993) 47 *International Organization*, p 139, at 165.

impose such measures even among the most climate-conscious states. Moreover, trade rules of the World Trade Organisation (WTO) and regional or bilateral accords, would likely serve as a further barrier to a policy of climate unilateralism.<sup>27</sup>

Some have argued that the European Union's decision to require non-EU airlines operating in European airspace to comply with the EU Emissions Trading Scheme (EU-ETS) is an impermissible extra-territorial measure.<sup>28</sup> The argument, raised by US airlines and others, was recently rejected by the Court of Justice of the European Union.<sup>29</sup> The court reasoned that the rule:

[d]oes not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union.<sup>30</sup>

Although this characterisation of the rule is defensible, the operation of the EU-ETS clearly has implications beyond EU territory. Compliance by non-EU airlines will require behaviour, including investment, beyond the EU, much in the same way that a port state shipping rule would require foreign-flagged vessels to meet equipment or documentation standards before entering a port. Thus, while the rule may not be explicitly extra-territorial, its practical reach exceeds state boundaries.

There have also been efforts to address climate change through claims brought in domestic forums under existing legal frameworks, and these actions might be seen as unilateral efforts to apply rules extra-territorially. These efforts have not, however, been on the initiative of states. In the wake of Hurricane Katrina, for example, a group of private parties residing in southern Mississippi who suffered property damage sued two dozen oil and coal companies on the grounds that the defendants' activities release "substantial quantities" of greenhouse gases<sup>31</sup> which contribute to the

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<sup>27</sup> See, generally, Steve Charnovitz, "Trade and Climate: Potential Conflict and Synergies", in: *Beyond Kyoto: Advancing the International Effort Against Climate Change*, White Paper, Pew Center on Global Climate Change (December 2003).

<sup>28</sup> See, for example, Eckhart Reh binder, "Extra-territoriality of Pollution Control Laws from a European Perspective", Chapter 5 in this volume.

<sup>29</sup> *Air Transport Association of America v Secretary of State for Energy and Climate Change*, Court of Justice of the European Union, Grand Chamber, Case C-366/10 (21 December 2011).

<sup>30</sup> *Ibid.*, p 125, pg. I-35.

<sup>31</sup> *Ned Comer, et al. v Murphy Oil USA, et al.*, Case No: 1:05-cv-00436-LTS-RHW, US District Court, Southern Dist Miss., Third Amended Complaint (2006), p 3, pg 7.

harms caused by climate change, including an increase in the “frequency and intensity” of hurricanes.<sup>32</sup> The case has had a tortured procedural history<sup>33</sup> which ended when the US Supreme Court denied a petition for a writ of mandamus, but the highest court to rule on the merits held that the plaintiffs had standing to assert public and private nuisance, trespass, and negligence claims, and that those claims were not political questions.<sup>34</sup>

<sup>32</sup> *Ibid.*, p 6, pg. 8. Plaintiffs in *Comer* named as defendants a number of US-based corporations with substantial overseas operations as well as three foreign corporations (*BP plc*, *Scottish Power plc*, and *E.ON AG*). Named US defendants were *Murphy Oil USA, Inc.*; *Universal Oil Products*; *Shell Oil Company*; *Chevron Corp.* d/b/a [doing business as] *Chevron USA, Inc.*, and *Texaco, Inc.*, now merged as *ChevronTexaco Corp.*; *ExxonMobil Corporation*; *BP plc* d/b/a *BP Amoco Chemical Company* and *BP Energy Company*; *ConocoPhillips Company*; *American Petroleum Institute*; *American Electric Power Co. Inc.*; *Southern Company Services, Inc.*; *Tennessee Valley Authority*; *Xcel Energy Inc.*; *TXU Corp.*; *Cinergy Corp.*; *Reliant Energy Inc.*; *Edison International*; *E.ON AG*, (d/b/a/ *Powergen and LG&E Operating Services*); *Progress Energy Inc.*; *Ameren Corp.*; *Scottish Power plc*, (d/b/a *MidAmerican and PacifiCorp*); *Energy Corp.*; *Allegheny Energy Inc.*; *Duke Energy Corp.*; *Firstenergy Corp.*; *Dominion Resources Inc.*; *DTE Energy Co.*; *FPL Group Inc.*; *Mirant Corp.*; *AES Corp.*; *International Coal Group, Inc.*; *Alliance Resource Partners LP*; *Alpha Natural Resources Inc.*; *CONSOL Energy Inc.*; *Foundation Coal Holdings Inc.*; *Massey Energy Co.*; *Westmoreland Coal Co.*; *Peabody Energy Corp.*; and *Natural Resource Partners LP*. The complaint also named as “John Doe” defendants “Oil and Refining Entities 1–100”.

<sup>33</sup> *Comer* was dismissed by the District Court and then reinstated on appeal by a three-judge panel of the Fifth Circuit Court of Appeals only to have the appellate decision vacated when the Fifth Circuit decided to rehear the case en banc. The Fifth Circuit had barely enough judges able to hear an en banc appeal because all but nine who may have had potential ties to the oil industry recused themselves from the case. Personal conversation by author with plaintiffs’ counsel in *Comer v Murphy Oil*, January 2010. Notes on file with author. After the *en banc* panel heard oral argument, another judge recused herself and the panel was left without a quorum. At that point, the Chief Judge decided that the court lacked jurisdiction to take any further action – apart from confirming that the procedural rule which vacated the three judge panel’s decision could not be reviewed, so the District Court’s decision to dismiss was reinstated despite having been overturned on appeal. As this essay is written, a Petition for a Writ of Mandamus filed by *Comer*’s counsel is pending before the US Supreme Court. The petition asks alternatively that the three judge panel’s decision be reinstated or that the Fifth Circuit be ordered to assemble a quorum and hear the appeal *en banc*.

<sup>34</sup> *Comer v Murphy Oil*, Petition for Writ of Mandamus to US Supreme Court, Docket No. 10–294 (filed August 26, 2010). Although this decision was vacated by operation of circuit procedural rules, *Comer v Murphy Oil USA*, 585 F.3d 855 (2009) vacated by, rehearing granted by, *En banc Comer v Murphy Oil USA*, 598 F.3d 208 (2010), the case represented an effort to hold foreign actors accountable to domestic courts for their climate-related conduct under common law tort theories. Many of the defendants’ activities – even the actions of US-based defendants – were overseas and in this sense the case had extraterritorial reach. Claims for liability associated with climate change are increasing at the domestic level. In the United States, for example, the National Agriculture Law Center maintains a web site with citations to fifty climate cases past or pending in state and federal courts – most based on negligence or other tort theories. National Agricultural Law Center, Case Law Index Climate Change, 1 January 2002–1 December 2010, available at: <http://www.nationalaglawcenter.org/assets/caseindexes/climatechange.html>. See, also, David Hunter,

In 2006, a US environmental group sued to compel the US Overseas Private Investment Corporation (OPIC) and the US Export-Import Bank (Ex-Im Bank) to conduct environmental impact assessments under the US National Environmental Policy Act (NEPA) where lending and financing decisions supported fossil-fuel exploration and extraction projects. The court in *Friends of the Earth v Mosbacher*,<sup>35</sup> held that that the procedures sought by Friends of the Earth (FOE) should not be seen as an “extraterritorial application of NEPA” because the decisions by the agencies “purportedly significantly affect the domestic environment”.<sup>36</sup> The case was later settled by the incoming Obama administration, which agreed that the agencies would conduct NEPA analysis, before it could proceed further,<sup>37</sup> but the trial court’s finding regarding extra-territoriality lingers as something of an anomaly. The projects financed by OPIC and Ex-Im Bank clearly have an extra-territorial aspect, and the analysis of GHG emissions associated with these projects calls for an assessment of local practices, operating conditions, and feedstock outside the United States. While US funds are used to finance the projects, and thus US rules will apply to the availability and conditions of finance, the projects themselves will ultimately be operated under the jurisdiction of foreign governments. Yet the decision-making and financing institutions remain domestic, and the decision-making process itself (consultations with counterparts aside) is domestic.

These domestic cases have yielded no proven legal theory for extra-territorial liability that would subject the relevant actors to any state’s domestic courts. Some have argued that this litigation has a consciousness-raising effect, and it is difficult to deny the symbolic and motivational value of unilateral actions.<sup>38</sup> But, despite the temptation to address GHG problems by using the law of an individual state to reach across borders and address legal wrongs or impose standards, the practical reach of any single state’s judicial system has proven limited.

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“The Implications of Climate Change Advocacy for International Environmental Law-Making”, in: William CG Burns & Hari M Osofsky (eds), *Adjudicating Climate Change: Sub-National, National and Supra-National Approaches*, (Cambridge, Cambridge University Press, 2007).

<sup>35</sup> *Friends of the Earth v Mosbacher*, 488 F. Supp. 2d 889 (2007).

<sup>36</sup> *Ibid.*, 488 F. Supp. at 908.

<sup>37</sup> See Environmental Law Institute, Endangered Environmental Laws Program, “RECENT CASES: Friends of the Earth v. Mosbacher”, available at: [http://www.endangeredlaws.org/case\\_mosbacher.htm](http://www.endangeredlaws.org/case_mosbacher.htm).

<sup>38</sup> See, also, Margaret Witherup Tindall, “Global Warming Litigation Heating Up”, *Maryland Bar Bulletin* (June 2007), available at: <http://www.msba.org/departments/>

#### IV. EFFORTS TO ACHIEVE MULTILATERAL CONSENSUS: CONSTRUCTING A CLIMATE REGIME

Climate has been explicitly addressed as a multilateral problem since at least 1979, when the World Meteorological Organization (WMO) convened the “first World Climate Conference”<sup>39</sup> in response to concerns over a series of droughts and extreme weather-events, the potential impact of an increasing human population and, in the words of the conference’s keynote, “a growing apprehension that not only is humanity vulnerable to variations in climate, but climate is vulnerable to the acts of humanity”.<sup>40</sup>

In 1990, at the second World Climate Conference, the first Intergovernmental Panel on Climate Change (IPCC)<sup>41</sup> report was presented and discussed by over 700 scientists and technical experts.<sup>42</sup> Discussions among heads of government and ministers from 137 states and from the European Community produced a declaration of concern, but no agreed emission-reduction targets.<sup>43</sup> This second conference gained considerable public attention. One report on the proceedings noted that the conference was attended by “400 media people [and] about 100 Greenpeace demonstrators”,<sup>44</sup> and other non-governmental organisations (NGOs) were also present. A number of small island states vulnerable to the sea-level rise expected to accompany climate change joined forces during this second conference to form the Alliance of Small Island States (AOSIS) as a vehicle to promote greater progress on climate commitments.<sup>45</sup>

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commpubl/publications/bar\_bult/2007/jun/warming.asp, (concluding that: “Even if these lawsuits do not ultimately succeed in court, they are focusing more public attention on the consequences of global warming.”)

<sup>39</sup> World Meteorological Organization, “Milestones”, available at: [http://www.wmo.int/pages/about/milestones\\_en.html](http://www.wmo.int/pages/about/milestones_en.html). The WMO traces its origins to 1873.

<sup>40</sup> Proceedings of the World Climate Conference: A Conference of Experts on Climate and Mankind, held in Geneva, Switzerland, 12–23 February 1979, (World Meteorological Organization Publication No. 537.) available at: <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=5952244>, keynote address of Robert M White.

<sup>41</sup> The IPCC had been formed in 1988 by WMO and the United Nations Environment Programme (UNEP).

<sup>42</sup> UNFCCC Fact Sheet, The Second World Climate Conference, available at <http://unfccc.int/resource/ccsites/senegal/fact/fs221.htm>.

<sup>43</sup> *Ibid.*

<sup>44</sup> John C Rodda, “Second World Climate Conference Geneva, Switzerland, 29 October–7 November 1990,” (1991) 36 *Hydrological Sciences Journal*, pp 83–84, available at: [http://pdfserve.informaworld.com/907228\\_918133313.pdf](http://pdfserve.informaworld.com/907228_918133313.pdf).

<sup>45</sup> Edith Brown Weiss, “International Environmental Law: Contemporary Issues and the Emergence of a New World Order”, (1993) 81 *Georgetown Law Journal* p 675, at 693–94;

Following this second conference, as states were preparing for the United Nations Conference on Environment and Development in Rio de Janeiro (the Rio Conference), AOSIS was pressing hard for a concrete commitment. The AOSIS, with NGO advocates serving as advisors, reportedly played a “prominent role in galvanizing support” for the UN Framework Convention on Climate Change (UNFCCC) that emerged from Rio.<sup>46</sup> The AOSIS has continued to play a prominent role in advancing climate concerns in international negotiations and other forums. Other groupings of states, such as the G-77, the G-20, and, more recently, BRIC (an ad hoc coalition of Brazil, Russia, India and China), have also played a continuing and prominent role in shaping negotiations and framing a global climate response.

#### IV.1. *The UN Framework Convention*

The UNFCCC achieved broad consensus on the need for greater international attention to the climate issue. It has been signed by 194 countries, including the United States,<sup>47</sup> and acknowledges “that change in the Earth’s climate and its adverse effects are a common concern of humankind”.<sup>48</sup> Yet its signatories would only commit themselves to address this “common concern” through study and voluntary co-operation. The Framework Convention creates no binding obligations to reduce greenhouse-gas emissions, and it has no monitoring or enforcement mechanisms. The UNFCCC was, nevertheless, an important catalyst. Under the Framework Convention, state parties meet annually through a Conference of the Parties (COP) process that has institutionalised implementation

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Willem J. Kakebeeke, Winfried Lang, Willy Kempel, & Scott A. Hajost, “The Year in Review: Air and Atmosphere”, (1990) 1 *Yearbook of International Environmental Law*, pp 93–104 (Oxford, Oxford University Press).

<sup>46</sup> “Combating Global Warming: The Climate Change Convention”, Background Paper for Earth Summit +5, Special Session of the UN General Assembly to Review and Appraise the Implementation of Agenda 21, (1997) available at: <http://www.un.org/ecosocdev/geninfo/sustdev/climate.htm>; see, also, John W Ashe, Robert van Lierop & Anilla Cherian, “The role of the Alliance of Small Island States (AOSIS) in the negotiation of the United Nations Framework Convention on Climate Change (UNFCCC)”, (1999) 23 *Natural Resources Forum*, pp 209–220; Steve Lerner, *Beyond the Earth Summit: Conversations with Advocates of Sustainable Development*, (Bolinas, Commonweal, 1993), p 89 & 144.

<sup>47</sup> “UNFCCC Status of Ratification”, available at: [http://unfccc.int/essential\\_background/convention/status\\_of\\_ratification/items/2631.php](http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php), (last accessed 1 August 2010).

<sup>48</sup> UN Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107, 31 ILM 849, 851 (1992) (hereinafter UNFCCC).

efforts and provided a forum for negotiating further commitments.<sup>49</sup> Two permanent subsidiary bodies to the UNFCCC have been established by the COP: the Subsidiary Body for Scientific and Technological Advice (SBSTA), which supports the work of the parties through the provision of information and advice on scientific and technological matters, and the Subsidiary Body for Implementation (SBI), which supports the assessment and review of the effective implementation of the Convention. Despite the lack of hard targets or binding mandates, the Framework Convention has thus given rise to multiple formal and informal institutions and networks for study, advocacy, negotiation, action and implementation, which have advanced a co-ordinated international response to climate.

#### IV.2. *The Kyoto Protocol*

A step towards explicit international commitments – in the form of greenhouse-gas emission reduction targets – was made in 1997 when the Kyoto Protocol was adopted. The Protocol calls for industrialised countries to reduce greenhouse-gas emissions by an average of 5.2% below 1990 emission levels by the year 2012.<sup>50</sup> As of 2009, 187 countries had signed and ratified the Protocol.<sup>51</sup> Despite the decision by the Bush administration to keep the United States on the sidelines, the Kyoto Protocol was welcomed by some as a “small but essential first step”,<sup>52</sup> and it has motivated co-operation and domestic policy changes among at least some of the signatory states. But it has also been criticised for a failure to achieve measurable reductions in GHG emissions among many signatories.<sup>53</sup>

The Kyoto Protocol sets targets for greenhouse-gas emissions, but it remains essentially a voluntary agreement and it lacks an enforcement mechanism other than the loss of eligibility to participate in the offset and

<sup>49</sup> UNFCCC Article 7. The COP also serves as the Meeting of the Parties to the Kyoto Protocol (CMP). Parties to the Kyoto Protocol are represented, and non-party states are observers.

<sup>50</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998), available at: <http://unfccc.int/resource/docs/convkp/kpeng.pdf>. (Hereinafter Kyoto Protocol). Different countries made different reduction commitments, but the aggregate reduction commitment was 5.2 per cent. See Kyoto Protocol Annex B.

<sup>51</sup> “Kyoto Protocol Status of Ratification”, available at: [http://unfccc.int/files/kyoto\\_protocol/status\\_of\\_ratification/application/pdf/kp\\_ratification.pdf](http://unfccc.int/files/kyoto_protocol/status_of_ratification/application/pdf/kp_ratification.pdf) (last accessed 1 August 2010).

<sup>52</sup> Editorial, “The Science of Climate Change”, (2001) 292 *Science*, p 1261.

<sup>53</sup> Gwyn Prins et al., “The Hartwell Paper: A New Direction for Climate Policy after the Crash of 2009”, London School of Economics (May 2010) [Institute for Science, Innovation & Society, University of Oxford; LSE Mackinder Programme, London School of Economics and Political Science, London, UK].

trading mechanisms of the Protocol, which can be used to meet reduction and limitation targets.<sup>54</sup> Other than ineligibility to participate in what amount to compliance-assistance mechanisms, the Protocol provides for no binding legal consequences for countries that committed themselves to reductions or limitations and have fallen behind (as many have already done) or for failure to meet their 2012 targets.<sup>55</sup>

### IV.3. *Kyoto Compliance*

Despite the lack of robust consequences, the Kyoto compliance mechanisms can be seen as a tentative step towards internationalising climate-related enforcement measures. An expert review process staffed by foreign nationals is managed by an international secretariat with a multilateral group of state parties sitting as a plenary juridical body. Kyoto compliance mechanisms are essentially instruments for domestic compliance managed multilaterally. This transboundary process is complemented by the offset and trading mechanisms that promote compliance with Protocol emission reduction and limitation targets and the co-operative mechanisms aimed at supporting non-Annex I developing countries.<sup>56</sup> This represents a fundamental allocation of legal authority away from states to a multilateral body.

The Kyoto Protocol also integrates into its compliance features, at least to some extent, the non-state actors that have been protagonists for progress since the climate issues entered the international discourse. Under the Protocol, NGOs cannot file complaints, initiate investigations, challenge compliance data which they believe to be incomplete or inaccurate, or request compliance documentation beyond *pro forma* submissions.<sup>57</sup> But the Protocol provides that “competent nongovernmental organizations” may submit “relevant factual and technical information” relating to

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<sup>54</sup> This includes a so-called joint implementation mechanism (Kyoto Protocol Article 6); a clean development mechanism (Kyoto Protocol Article 12), and an emission trading mechanisms (Kyoto Protocol Article 17).

<sup>55</sup> A defaulting or withdrawing state might face claims for international wrongfulness in accordance with general international law. See, for example, draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Session, Supp. No. 10, at 43, UN Doc. A/56/10 (2001). It is not clear how a state's obligation would be framed in a manner complementary of the climate accords, or what legal consequences would follow where none are specified in relevant climate agreements.

<sup>56</sup> Indeed, the entire purpose of Annex II is to identify a support group for developing countries.

<sup>57</sup> UNFCCC, Procedures and mechanisms relating to compliance under the Kyoto Protocol.

“questions of implementation” where a matter has already been commenced by a state party.<sup>58</sup> Non-state actors may also support monitoring and implementation of Emission Trading, Joint Implementation (JI) and the Clean Development Mechanisms (CDM)<sup>59</sup> because the nature of these mechanisms relies on their partnership and participation. Although non-state actors have no right to initiate procedures where states fail or refuse to implement Kyoto obligations – even where those procedures are designed to be co-operative in nature,<sup>60</sup> their ability to make submissions on pending questions of implementation is significant; it is something akin to an *amicus* brief process that many international dispute procedures do not afford for non-state actors.<sup>61</sup>

These features of Kyoto compliance represent a shift to transboundary legal authority, even if this shift is tentative and incomplete. The institutionalisation of a multilateral compliance mechanism with both corrective and co-operative features is a significant extra-territorial feature.

#### IV.4. *Copenhagen, Cancún and Durban*

Negotiations to expand and extend climate commitments proceeded after Kyoto on two tracks. The first, started in 1995, conducted through the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP). The second, initiated at the Conference of the Parties in Bali, conducted through the Ad Hoc Working Group on Long-Term Co-operative Action under the Convention (AWG-LCA).<sup>62</sup> Both working groups anticipated completing their work at the 2009 Copenhagen Conference of the Parties/Meeting of the Parties (COP/CMP),<sup>63</sup> but negotiations did not produce any further binding commitments. The Copenhagen Accord, instead, affirms “that deep cuts in global emissions are required ... with a view to reduce global emissions so as to

<sup>58</sup> Ibid.

<sup>59</sup> Peggy Rodgers Kalas & Alexia Herwig, “Dispute Resolution under the Kyoto Protocol”, (2000) 27 *Ecology Law Quarterly*, p 53.

<sup>60</sup> Kyoto compliance mechanisms emphasise both facilitation and enforcement.

<sup>61</sup> The ability to participate in trading, JI, and CDM implementation is also important, even if merely pragmatic. Non-state actors will often have a direct stake in funding or implementing these mechanisms.

<sup>62</sup> Bali Action Plan, Decision 1/CP.13 (Dec. 14–15, 2007), in Conference of the Parties Report No. 13, Addendum, p 2, pg. 5, UN Doc. FCCC/CP/2007/6/Add.1 (re-issued 14 March 2008) (hereinafter the Bali Action Plan).

<sup>63</sup> With respect to the AWGLCA, see Bali Action Plan, p 2; with respect to the AWGKP, see Advancing the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, Decision 3/CMP.4, para. 4, in CMP Report No. 4, UN Doc. FCCC/KP/CMP/2008/11/Add.1 (19 March 2009).

hold the increase in global temperature below 2 degrees Celsius”,<sup>64</sup> and takes what a number of commentators have termed a more “bottom up” approach than Kyoto had,<sup>65</sup> leaving the parties free to determine the level of their own state commitment to meeting GHG reduction and limitation targets. The Copenhagen Accord relies on Annex I parties to set their own emission targets, base year, and accounting procedures, rather than detailing targets arrived at through negotiation.<sup>66</sup> At the Cancún Conference of the Parties, in December 2010, the parties agreed to continue the work of both Ad Hoc Working Groups with a view to reaching a possible agreement to extend Annex I party commitments beyond 2012.<sup>67</sup> An agreement on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD) was also reached.<sup>68</sup>

At the most recent COP/CMP in Durban, South Africa, the prospects for a UN-based multilateral approach to GHG emission-limitations brightened. Although progress at the December 2011 meeting was incremental, it was, in the context of the difficult 18-year process that began with the UNFCCC, significant. The parties made new commitments on issues such as land use change and forestry,<sup>69</sup> and the impact of response measures on

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<sup>64</sup> Copenhagen Accord, Decision 2/CP.15, U.N. Doc. FCCC/CP/2009/11/Add.1 (18 December 2009), p 2. (hereinafter Copenhagen Accord).

<sup>65</sup> See Daniel Bodansky, “Current Development: The Copenhagen Climate Change Conference: A Postmortem”, (2010) 104 *American Journal of International Law*, p 230, at 236 (2010); Hannah Chang, “International Executive Agreements on Climate Change”, (2010) 35 *Columbia Journal of Environmental Law*, p 337, at 338; Rachael Rawlins & Robert Paterson, “Sustainable Buildings and Communities: Climate Change and the Case For Federal Standards”, (2010) 19 *Cornell Journal of Law & Public Policy*, p 335, at 341. For a comparative example of “bottom up” approach, see Janet Koven Levit, “Bottom-up Law-Making: The Private Origins of Transnational Law”, (2008) 15 *Indiana Journal of Global Legal Studies*, p 49, (discussing the role of the International Chamber of Commerce in the international rule-making process).

<sup>66</sup> Copenhagen Accord, p 4.

<sup>67</sup> With respect to the AWG-KP see Draft decision [-/CMP.6] “Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session”, advance unedited version available at: [http://unfccc.int/files/meetings/cop\\_16/application/pdf/cop16\\_kp.pdf](http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_kp.pdf); with respect to the AWG-LCA see Draft decision -/CP.16, “Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention” (December 2010), advance unedited version available at: [http://unfccc.int/files/meetings/cop\\_16/application/pdf/cop16\\_lca.pdf](http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf).

<sup>68</sup> Draft decision [-/CMP.6] “Land use, land-use change and forestry”, advance unedited version available at: [http://unfccc.int/files/meetings/cop\\_16/application/pdf/cop16\\_lulucf.pdf](http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lulucf.pdf).

<sup>69</sup> Land use, land-use change and forestry Decision -/CMP.7 (advance unedited version) available at: [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/awgkp\\_lulucf.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_lulucf.pdf).

developing economies.<sup>70</sup> States also adopted the blueprint for a \$100 billion “Green Climate Fund” financed by public and private sector contributions and managed in accordance with procedural safeguards to assure proportional representation and a degree of operational transparency.<sup>71</sup> An agreement was also reached to extend the Kyoto Protocol, set to expire in 2012, for a flexible period until at least 2017, and up to 2020.<sup>72</sup> Most significantly, the parties to the UNFCCC agreed “to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties, through a subsidiary body under the Convention hereby established and to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action”.<sup>73</sup> China and India – the largest growing GHG producers and noticeably omitted from the Kyoto Annex I emission limitation commitment – along with other large and growing contributors to the climate problem, such as Brazil, have agreed, in principle, to be bound by this new set of emission-limitation targets and this has important implications for the relevance of the UN-driven multilateral process.

#### IV.5. *A Work Still in Progress*

The effort to construct a formal multilateral climate regime so far has, at best, been a mixed bag. Despite halting progress towards emission

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<sup>70</sup> Consideration of information on potential environmental, economic and social consequences, including spillover effects, of tools, policies, measures and methodologies available to Annex I Parties, Draft decision -/CMP.7 (advance unedited version) available at: [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/awgkp\\_consideration.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_consideration.pdf).

<sup>71</sup> Green Climate Fund, Report of the Transitional Committee, Draft decision -/CP.17 (advance unedited version) available at: [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/cop17\\_gcf.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_gcf.pdf). The Green Fund establishes the financial mechanism originally contemplated by Article 11 of the Framework Convention to support implementation and compliance with obligations of the Convention. The fund's proposed governance structure advances the Framework Convention's aspiration for “an equitable and balanced representation of all Parties within a transparent system of governance”, UNFCCC Article 11(2), by apportioning representation on a regional basis, establishing a process for the Trustee to be selected through competitive bidding, and approving a Governing Instrument with operational and procedural safeguards. *Ibid.*

<sup>72</sup> Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its sixteenth session, Draft decision -/CMP.7, 1 (advance unedited version) available at: [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/awgkp\\_outcome.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_outcome.pdf).

<sup>73</sup> “Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action”, Draft decision -/CP.1, 2 (advance unedited version) available at: [http://unfccc.int/files/meetings/durban\\_nov\\_2011/decisions/application/pdf/cop17\\_durbanplatform.pdf](http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf).

reduction,<sup>74</sup> many countries will not meet their Kyoto targets. Moreover, despite the progress represented by the Durban platform, a “commitment to pursue a commitment” still leaves no clear, binding mechanism to build upon even the modest beginning of Kyoto. One might argue that the climate-accord process is a disappointment to those hoping for a meaningful, binding, international framework, for the same reason that many international frameworks fall short. Because the international system is founded on reciprocal sovereignty, there is no way, short of a broad consensus, to advance new (even necessary) commitments. Negotiations reflect an effort to be multilateral, and yet they reveal the flaws inherent in a multilateral approach.

Despite substantial scepticism about the UNFCCC process, there is progress, some of which is reflected in the most recent outcomes in Cancún and Durban. Durban was short on binding detail, but the outcome shows a renewed commitment to a universal approach in responding to a clearly universal problem. Even some sceptics of a multilateral approach to climate change reveal a degree of faith in multilateralism in the scope of their efforts to derail the UNFCCC process.<sup>75</sup> One prominent climate critic, for example, US Representative James Inhofe (Republican of Oklahoma) took the time to travel to and participate in the public climate dialogue that took place at Copenhagen in 2009.<sup>76</sup> Inhofe’s fight against a multilateral agreement on climate demonstrates in itself an appreciation of the potential impact of multilateralism.

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<sup>74</sup> After modest GHG declines in the early part of the decade, see National Greenhouse Gas Inventory Data from Parties included in Annex I to the Convention for the period 1990–2008, Subsidiary Body for Implementation 33rd Session, Cancún, Item 3 (a) of the provisional agenda, U.N. Doc. FCCC/SBI/2010/18 (4 November 2010) available at: <http://unfccc.int/resource/docs/2010/sbi/eng/18.pdf>, CO<sub>2</sub> emissions appear to have spiked in 2010, see Global Carbon Project “Carbon Budget Highlights,” available at: <http://www.globalcarbonproject.org/carbonbudget/10/hl-full.htm>.

<sup>75</sup> One prominent example of this public relations effort came to light through a memo laying out a “Global Climate Science Communications Plan” forwarded by the American Petroleum Institute public relations representative, Joe Walker, in 1998. The memo expresses alarm for public support of the Kyoto Protocol and calls for a campaign to promote the “recognition of uncertainties” about climate science become part of the “conventional wisdom” among “average citizens”. An article about the memo was written by John H Cushman, Jr., “Industrial Group Plans to Battle Climate Treaty”, *New York Times* (26 April 1998). The Walker memo and cover e-mail are available at: [http://www.euronet.nl/users/e\\_wesker/ew@shell/API-prop.html](http://www.euronet.nl/users/e_wesker/ew@shell/API-prop.html), (last accessed 20 June 2011).

<sup>76</sup> See the text of the James Inhofe Press Conference on the website of US Senate Committee on Environment and Public Works, “Inhofe in Copenhagen: ‘It Has Failed ... It’s Déjà Vu All Over Again’”, available at: [http://epw.senate.gov/public/index.cfm?FuseAction=Minority.Speeches&ContentRecord\\_id=9cac1e35-802a-23ad-4540-3e4706eab1bd&Region\\_id=&Issue\\_id=](http://epw.senate.gov/public/index.cfm?FuseAction=Minority.Speeches&ContentRecord_id=9cac1e35-802a-23ad-4540-3e4706eab1bd&Region_id=&Issue_id=) (last accessed 20 June 2011).

V. INSTITUTIONAL ALTERNATIVES – COLLATERAL AND REGIONAL  
CLIMATE FORUMS

One of the most important emerging phenomena in international climate governance has been the rise of climate forums outside of the UNFCCC process. These alternative forums, referred to by one set of recent authors as “UN+”,<sup>77</sup> and decried by others as what might be characterized as “UN-”,<sup>78</sup> are essentially “extra-UN”,<sup>79</sup> and they vary in their ambition and in their connection to the formal UN process. Some efforts (which are essentially “collateral”) have explicit regard for UN climate processes – seeking to inform official negotiations or to implement co-operative features of formal commitments. Others (which are “independent”) pursue agendas not tied to the UNFCCC and advance alternative frameworks for co-operation or for mitigating or adapting to climate change. Some alternative institutions have more than one feature, simultaneously serving to shape or implement UNFCCC commitments even as they advance a regime that is not directly connected to the UNFCCC.

Examples of collateral forums include mechanisms and processes tailored to climate change, such as the emission-trading system of the European Union (EU ETS), the Asia-Pacific Partnership on Clean Development and Climate (APP),<sup>80</sup> G-8 Gleneagles Dialogue on Climate Change, Clean Energy and Sustainable Development (G-8),<sup>81</sup> and the Regional Greenhouse Gas Initiative (RGGI).<sup>82</sup> Collateral discussions of climate change also emerge from time to time within existing international forums

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<sup>77</sup> See, for example, Bruce Au et al., “Beyond a Global Deal: A UN+ Approach to Climate Governance”, *Global Governance 2020* (January 2011), available at: [http://www.gg2020.net/products/climate\\_change\\_report](http://www.gg2020.net/products/climate_change_report).

<sup>78</sup> See notes 88 and 89 below and accompanying text.

<sup>79</sup> To complicate matters further, in some cases, extra-UN processes are designed or facilitated by UN agencies.

<sup>80</sup> APP Overview, available at: <http://www.asiapacificpartnership.org/english/default.aspx>.

<sup>81</sup> Chairs’ Conclusions, Gleneagles-Dialogue on Climate Change, Clean Energy and Sustainable Development, 3rd Ministerial Meeting, Berlin, 9–11 September 2007, available at: [http://www.bmu.de/files/pdfs/allgemein/application/pdf/gleneagles\\_chairsconclusions.pdf](http://www.bmu.de/files/pdfs/allgemein/application/pdf/gleneagles_chairsconclusions.pdf).

<sup>82</sup> Although RGGI is a forum of states internal to the United States, it nevertheless represents a significant commitment by nine states to cap and reduce CO<sub>2</sub> emissions from the power sector 10 per cent by 2018. See <http://rggi.org>.

such as the World Economic Forum held annually in Davos, Switzerland (WEF),<sup>83</sup> and the G-20.<sup>84</sup>

Some collateral forums clearly fall into the UN+ category. The EU ETS, for example, is aimed at helping EU countries meet GHG emission-reduction targets by allowing trading among approximately 11,000 facilities in thirty countries.<sup>85</sup> Similar, but less ambitious and much smaller scale, efforts exist in North America, where some Canadian provinces have joined some US states in sub-regional accords.<sup>86</sup> EU ETS has been criticised for failing to achieve target reductions,<sup>87</sup> but it is difficult to fault

<sup>83</sup> See, for example, World Economic Forum Annual Meeting 2011, "Shared Norms for the New Reality", Davos-Klosters, Switzerland (26–30 January).

<sup>84</sup> See, for example, "Report to Leaders on the G20 Commitment to Rationalize and Phase Out Inefficient Fossil Fuel Subsidies", (2010), available at: [http://www.g20.org/Documents2010/expert/Report%20to%20Leaders\\_G20\\_Inefficient%20Fossil\\_Fuel\\_Subsidies.pdf](http://www.g20.org/Documents2010/expert/Report%20to%20Leaders_G20_Inefficient%20Fossil_Fuel_Subsidies.pdf); "G20 Initiative on Rationalizing and Phasing Out Inefficient Fossil Fuel Subsidies Implementation Strategies & Timetables", (2010), available at: [http://www.g20.org/Documents2010/expert/Annexes\\_of\\_Report\\_to\\_Leaders\\_G20\\_Inefficient\\_Fossil\\_Fuel\\_Subsidies.pdf](http://www.g20.org/Documents2010/expert/Annexes_of_Report_to_Leaders_G20_Inefficient_Fossil_Fuel_Subsidies.pdf).

<sup>85</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (13 October 2003), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003L0087:20090625:EN:PDF>; EU ETS Briefing Sheet, available at: [http://ec.europa.eu/clima/policies/ets/index\\_en.htm](http://ec.europa.eu/clima/policies/ets/index_en.htm) (last visited 2 April 2011); A Kruger & William A Pizer, "Greenhouse Gas Trading in Europe: The New Grand Policy Experiment," (2004) 46 *Environment: Science and Policy for Sustainable Development*, pp 8–23; A Denny Ellerman & Paul L Joskow, *The European Union's Emissions Trading System in Perspective*, (Arlington VA, Pew Center on Global Climate Change, 2008); Farhana Yamin (ed), *Climate Change and Carbon Markets: A Handbook of Emissions Reduction Mechanisms*, (London-Sterling VA, Earthscan, 2005), Cong. Res. Service, *Climate Change: The European Union's Emissions Trading System (EU-ETS)* 1 (2006).

<sup>86</sup> See, generally, Pew Climate's summary of regional initiatives at: [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_states/regional\\_initiatives.cfm#wci](http://www.pewclimate.org/what_s_being_done/in_the_states/regional_initiatives.cfm#wci). The Midwest Greenhouse Gas Reduction Accord (MGGRA) is a 2007 commitment by the governors of six Midwestern states and the premier of Manitoba to reduce greenhouse gas (GHG) emissions through a regional cap-and-trade program and complementary policy measures. The Accord is available at: [http://www.midwesterngovernors.org/Publications/Greenhouse%20gas%20accord\\_Layout%201.pdf](http://www.midwesterngovernors.org/Publications/Greenhouse%20gas%20accord_Layout%201.pdf). A summary is available at: [http://www.pewclimate.org/what\\_s\\_being\\_done/in\\_the\\_states/mggra](http://www.pewclimate.org/what_s_being_done/in_the_states/mggra). The Western Climate Initiative includes seven US states and four Canadian provinces that have signed a Memorandum of Understanding pledging to jointly set a regional emissions target and establish a market-based system to aid in meeting this target. To date, a target has been set but no market mechanism is in place. See <http://www.westernclimateinitiative.org/organization>. A similar accord, the Regional Greenhouse Gas Initiative, exists among ten US states in the Northeast and Mid-Atlantic, but participation is, for now, limited to US states.

<sup>87</sup> The Friends of the Earth, Europe, "EU Emissions Trading System: failing to deliver," (October 2010) available at: [http://ec.europa.eu/clima/consultations/0005/registered/9825553393-31\\_friends\\_of\\_the\\_earth\\_europe\\_en.pdf](http://ec.europa.eu/clima/consultations/0005/registered/9825553393-31_friends_of_the_earth_europe_en.pdf).

as undermining the UN climate process because there is no evidence that it has impaired UN negotiations or outcomes.

Other collateral efforts evince a less enthusiastic commitment to addressing climate and supporting the formal UN process. The Major Economies Meeting on Energy Security and Climate Change (MEM), for example, has been cited by some as a deliberate attempt to elide, perhaps supplant, the UN process.<sup>88</sup> The APP has also been criticised as being more show than substance,<sup>89</sup> although it was not born of hostility towards the UNFCCC, and its emphasis on clean energy technology is a pragmatic approach to GHG emission-reduction that is hard to view as obstructive. Another example of collateral action (although based upon a geographic affinity not tied to proximity) is the “Malé Declaration on the Human Dimension of Global Climate Change”, which calls upon for The Office of the United Nations High Commissioner for Human Rights (OHCHR) “to conduct a detailed study into the effects of climate change on the full enjoyment of human rights ...”.<sup>90</sup> The OHCHR completed the study and issued a report in January 2009 finding that “climate change has obvious implications for the enjoyment of human rights”,<sup>91</sup> but concluding that “it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense”.<sup>92</sup>

Although it is still too soon to tell how alternative institutions will contribute to meaningful climate governance – either through the UN process or apart from it – they appear to be, on balance, an important net positive. Some have offered a general critique of these alternatives,<sup>93</sup> and pointed

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<sup>88</sup> See, for example, “Bush Major Emitter Meetings (MEM): wrong way on climate change” (January 2008) Greenpeace Briefing Paper, available at: <http://www.greenpeace.org/raw/content/international/press/reports/bush-mem.pdf>.

<sup>89</sup> See, for example, Sierra Club of Canada, “Backgrounder on the Asia Pacific Partnership”, available at: <http://www.climateactionnetwork.ca/e/publications/asia-pacific-partnership-info.pdf>; World Wildlife Fund “Asia-Pacific Partnership sets world up for massive global warming,” (12 January 2006), available at: [http://wwf.panda.org/wwf\\_news/?56020/Asia-Pacific-Partnership-sets-world-up-for-massive-global-warming](http://wwf.panda.org/wwf_news/?56020/Asia-Pacific-Partnership-sets-world-up-for-massive-global-warming); Av Steiner Alston, “Opinion: The Asia-Pacific Partnership: Political window dressing or alternative to Kyoto Protocol?”, (2006) 1 *Cicerone*, available at: <http://www.cicero.uio.no/fulltext/index.aspx?id=4209&lang=no>; Ros Taplin & Jeffrey McGee, “The Asia-Pacific Partnership: implementation challenges and interplay with Kyoto”, (2009) vol. *Wiley Interdisciplinary Reviews* 10.1002/wcc.10 (Dec 2009).

<sup>90</sup> Malé Declaration on the Human Dimension of Global Climate Change, 14 November 2007, available at: [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf).

<sup>91</sup> *Ibid.*, p 70.

<sup>92</sup> *Ibid.*

<sup>93</sup> Antto Vihma, “Friendly neighbor or Trojan Horse? Assessing the Interaction of Soft Law Initiatives and the UN Climate Regime”, (2009) 9 *International Environmental Agreements*, p 239.

to the need to strengthen their processes for engaging non-state actors,<sup>94</sup> but there is an organic inevitability to the rise of alternatives that engage geographically and culturally<sup>95</sup> distinct constituencies, and address issues in a way that can be more flexible and experimental<sup>96</sup> than the formal UN process will allow. How can one argue, for example, that the G-20's focus on reducing energy subsidies harms GHG reduction efforts?<sup>97</sup> There are certainly questions of process that must be addressed because the G-20 lacks many of the transparency and public-participation opportunities that have become a trademark of the UNFCCC process. This raises broader questions of international governance through summits, and the need to integrate democratic features within the informal policy-making space that they provide.<sup>98</sup>

Indeed, one might argue that any alternative forum has the potential to influence the UNFCCC process, whether or not it is explicitly designed to do so. Processes which are nominally divorced from the UN framework may affect its continuing evolution because state and non-state actors move between processes and carry ideas from outside the UN process into formal discussions, and *vice versa*.<sup>99</sup> There is room for strengthening access, accountability and transparency, but regardless of whether they seek to complement or go their own way, any of these forums can be seen to complement *or* to compete with the UN process – or merely to distract from it.

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<sup>94</sup> Philipp Pattberg & Johannes Stripple, "Beyond the Public and Private Divide: Remapping Transnational Climate Governance in the 21st Century", (2008) 8 *International Environmental Agreements*, p 367.

<sup>95</sup> In the broadest sense of the term culture – for example, the business culture, the public interest culture.

<sup>96</sup> For an argument that experimentalism has instrumental value (at least in sub-national governance), see Michael C Dorf & Charles F Sabel, "A Constitution of Democratic Experimentalism", (1998) 98 *Columbia Law Review*, p 267.

<sup>97</sup> See, for example, "Analysis of the Scope of Energy Subsidies and Suggestions for the G-20 Initiative", IEA, OPEC, OECD, World Bank Joint Report, Prepared for submission to the G-20 Summit Meeting Toronto (Canada) (26–27 June 2010).

<sup>98</sup> For a general discussion of the summit process and its democratic potential, see Eric Dannenmaier, "Lawmaking on the Road to International Summits", (2009) 59 *DePaul Law Review*, p 1.

<sup>99</sup> See, generally, Harold Hongju Koh, "The 1994 Roscoe Pound Lecture: Transnational Legal Process", (1996) 75 *Nebraska Law Review*, p 181, at 183–86 (discussing transnational legal process as the "theory and practice of how public and private actors ... interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law").

## VI. INSTITUTIONAL ALTERNATIVES – NON-CLIMATE FORUMS

In addition to the emerging extra-UN climate forums that explicitly seek to address climate concerns outside the UNFCCC process, there has also been a proliferation of efforts to bring climate considerations onto the agenda of international organisations and tribunals not explicitly mandated to address climate concerns. In most of these cases, non-state actors have innovated to create channels for addressing climate concerns, and the channels include the World Bank's Inspection Panel, UNESCO's framework for protecting World Heritage Sites, and the complaint mechanisms of human-rights bodies. These alternative forums show an important facet of extra-territorial norms – constructed through multilateral processes – being deployed to address the issue of climate change.

In April of 2010, a request for inspection was filed by local NGOs to the World Bank's Inspection Panel regarding a proposed \$3.75 billion loan for the construction of the 4800 Megawatt coal-fired power plant by the utility company *Eskom* in the Midupi, South Africa (World Bank Inspection Panel Request, 2010).<sup>100</sup> The affected parties cited a range of concerns with the *Eskom* project, including the project's impact on climate, and asserted that "World Bank support for the project would be in contravention of its own criteria for support to coal plants".<sup>101</sup>

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<sup>100</sup> World Bank Inspection Panel Request for Inspection of Eskom Investment Support Project (Project ID: P116410) (6 April 2010). For a more complete description of the Inspection Panel, see World Bank (International Bank for Reconstruction and Development) Resolution No. IBRD 93-10; International Development Association Resolution No. IDA 93-6 "The World Bank Inspection Panel", (22 September 1993); see, also, Daniel D Bradlow, "International Organizations and Private Complaints: The Case of the World Bank Inspection Panel", (1994) 34 *Virginia Journal of International Law*, p 553. For more information on the relationship between climate policy and international financial institutions, see Kirk Herbertson & David Hunter, "Sustainable Energy: Emerging Standards for Sustainable Finance of the Energy Sector", (2007) 7 *Sustainable Development Law & Policy*, p 4; see, also, Benjamin J Richardson, "Reforming Climate Finance through Investment Codes of Conduct", (2009) 27 *Wisconsin International Law Journal*, p 483; Steven Ferrey, "The Failure of International Global Warming Regulation to Promote Needed Renewable Energy", (2010) 37 *Boston College Environmental Affairs Law Review*, p 67; David Takacs, *Carbon Into Gold: Forest Carbon Offsets, Climate Change Adaptation, and International Law*, (2009) 15 *Hastings Journal of Environmental Law & Policy*, p 39 (2009); Press Release, Bretton Woods Project, Briefing "Clean Energy Targets for the World Bank: Time for a Recount" (May 2010), available at: <http://www.brettonwoodsproject.org/doc/env/energytargets.pdf>.

<sup>101</sup> *Ibid.*

The Inspection Panel concluded that the request meets eligibility requirements and recommended a limited investigation (World Bank Inspection Panel Report and Recommendation 2010).<sup>102</sup>

In 2005, the Inuit Circumpolar Conference (now the Circumpolar Council)<sup>103</sup> filed a petition with the Inter-American Commission on Human Rights<sup>104</sup> alleging that the United States has made a “major and disproportionate contribution to [the] transboundary environmental impacts of climate change”<sup>105</sup> and that the US government “has violated its international responsibility for preventing activities within its jurisdiction from damaging the environment outside its borders [and failed] to take effective action to minimize these impacts ...”.<sup>106</sup> Although no findings or report has been published by the Commission upon the basis of this hearing,<sup>107</sup> the petition opened the door for the Circumpolar Conference and its counsel to speak directly with the Commission on the relationship between climate and human rights issues.

Also in 2005, a series of NGO petitions to the United Nations Educational, Scientific and Cultural Organisation (UNESCO), which supports the implementation of the Convention, sought to have World Heritage Sites included on the List of World Heritage in Danger because of the

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<sup>102</sup> World Bank Inspection Panel Statement of Mr Roberto Lenton, Chairperson of the Inspection Panel Read at Board Meeting on South Africa – Eskom Investment Support Project (29 July 2010).

<sup>103</sup> The Circumpolar Council describes itself as an “international non-government organization representing approximately 150,000 Inuit of Alaska, Canada, Greenland, and Chukotka (Russia)”. See [http://inuitcircumpolar.com/index.php?auto\\_slide=&ID=16&Lang=En&Parent\\_ID=&current\\_slide\\_num=](http://inuitcircumpolar.com/index.php?auto_slide=&ID=16&Lang=En&Parent_ID=&current_slide_num=). It was represented by the Center for International Environmental Law (CIEL), available at: [http://www.ciel.org/Climate/Climate\\_Inuit.html](http://www.ciel.org/Climate/Climate_Inuit.html); and Earthjustice, available at: <http://www.earthjustice.org/features/inuit-human-rights-and-climate-change>.

<sup>104</sup> The Commission serves a sort of a gatekeeper for the Inter-American Court for Human Rights, and conducts and initial investigation of petitions filed within the regional system. If the Commission believes the petition has sufficient merit to move forward, it essentially represents to petitioner’s position before the Court.

<sup>105</sup> Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, Dec. 7, 2005 [hereinafter Inuit Circumpolar Petition], available at: <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>, p 100.

<sup>106</sup> *Ibid.*

<sup>107</sup> This is based upon a review of the Commission’s public records as of the date this chapter was written. See, also, Letter from Ariel E Dulitzky, Assistant Executive Secretary, Inter-American Commission on Human Rights to Sheila Watt-Cloutier, “Ref: Global Warming and Human Rights, Hearing – 127th Ordinary Period of Sessions, Feb. 1, 2007”, available at: [http://www.ciel.org/Publications/IACHR\\_Response\\_1Feb07.pdf](http://www.ciel.org/Publications/IACHR_Response_1Feb07.pdf).

effects of climate change.<sup>108</sup> UNESCO's World Heritage Committee (WHC) has taken note of these petitions and asked the World Heritage Centre to work with interested state parties and petitioners to establish an expert working group to "a) review the nature and scale of the risks posed to World Heritage properties arising specifically from climate change; and b) jointly develop a strategy to assist States Parties to implement appropriate management responses".<sup>109</sup> The World Heritage Committee later adopted changes to its Operational Guidelines which reflected the link between climate and threats to World Heritage Sites.<sup>110</sup> The Committee also asked the "World Heritage Centre and the Advisory Bodies to develop in consultation with States Parties criteria for the inclusion of those properties which are most threatened by climate change on the List of World Heritage in Danger".<sup>111</sup>

In 2007, the NGO *Germanwatch* filed a complaint alleging that Germany-based *Volkswagen*, part of an automobile sector "responsible for 20 to 28 percent of worldwide CO<sub>2</sub> emissions",<sup>112</sup> had pursued technology and a market-strategy destined to increase emissions from its products. The group claimed that Volkswagen's failure to pursue a more aggressive effort to reduce the carbon emissions from its products violated OECD Guidelines,<sup>113</sup> including provisions regarding adequate environmental management,<sup>114</sup> transparency,<sup>115</sup> and deceptive marketing,<sup>116</sup> and the

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<sup>108</sup> Petitions were filed concerning Sagarmatha National Park (Nepal), Huascarán National Park (Peru), the Great Barrier Reef (Australia) and the Belize Barrier Reef Reserve System (Belize) (UNESCO 2005). A later petition was filed concerning the Waterton-Glacier International Peace Park (Canada and the United States) (UNESCO 2006).

<sup>109</sup> United Nations Educational, Scientific and Cultural Organisation (UNESCO), World Heritage Committee 29th Sess., (10–17 July 2005), UN Doc. WHC-05/29.COM/22 at 36–37, Decision 29 COM 7B.a, (17 July 2005).

<sup>110</sup> United Nations Educational, Scientific and Cultural Organisation (UNESCO), World Heritage Committee, 31st Sess., (31 March 2009), WHC-08/32.COM/24Rev at 40–41, Decision 32 COM 7A.32, (2–10 July 2008).

<sup>111</sup> In 2008, climate was added as a factor affecting the preservation of four properties already inscribed and four properties newly inscribed (UNESCO 2008). In 2009, climate was added as a factor affecting the preservation of twelve properties already inscribed and one property newly inscribed (UNESCO 2008).

<sup>112</sup> *Germanwatch*, Germanwatch Complaint Against Volkswagen AG Under the OECD Guidelines for Multinational Enterprises (2000) – Request to the German National Contact Point (Federal Ministry of Economics and Technology) to Initiate the Procedures for the Solution of Conflicts and Problems in the Implementation of the Guidelines (7 May 2007), available at: [www.germanwatch.org/corp/vw-besch-e.pdf](http://www.germanwatch.org/corp/vw-besch-e.pdf).

<sup>113</sup> Press Release, OECD, "Guidelines for Multinational Enterprises: Specific Instances Considered by National Contact Points" (Oct. 7, 2009), available at: <http://www.oecd.org/dataoecd/15/43/33914891.pdf>.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

responsibility of industry to “contribute to the development of environmentally meaningful and economically efficient public policy”.<sup>117</sup> Although the *Germanwatch* complaint was dismissed following an initial assessment by the National Contact Point for Germany, the NGO was able to use OECD Guidelines to call attention to the climate impact of one of the leading actors in the automobile industry and may also have provided indirect input into the OECD’s broader programme of study and co-operation on climate change.

Each of these examples demonstrates the potential utility of existing multilateral or regional forums for addressing some of the effects of climate change even where the forum has no explicit mandate to respond to climate change. Although they do not offer comprehensive or universal solutions, they do show the flexibility of international institutions and their potential viability as climate-relevant forums.

## VII. CONCLUSIONS

Climate change is a complex problem that calls for collaborative global *and* local solutions. The challenge cannot be met by sovereign states acting independently regardless of their ability to project power beyond their territory. It requires, instead, sustained co-operation. In responding to the challenge to date, states have moved tentatively to construct a dedicated transboundary framework. The process does not contest territorial sovereignty but, instead, relies on sovereign states as architects and executors. It exemplifies the spatially co-existing and overlapping jurisdictional architecture that Handl posits. The recent move towards a more “bottom up” approach to seeking GHG reduction commitments in Copenhagen and Cancún<sup>118</sup> further affirms the sovereign prerogative even while extending the search for multilateral commitment to institutions that will work both within and outside state territories.

The international climate process also reveals the growing importance of non-state actors in international lawmaking – a phenomenon with even greater long-term implications for the idea of state sovereignty and territorial exclusivity in international law. Some might argue that this demonstrates a re-location of transnational legal authority in the climate-change context away from states and towards more dynamic and responsive (or, on the other hand, more chaotic, less accountable) actors.

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<sup>117</sup> Ibid.

<sup>118</sup> See note 65 above and accompanying text.

But their participation, far from arrogating legal authority, has re-enforced the location of authority in states.

The impact of these new transboundary institutions (and the impact of non-state actors helping to construct and animate them) does not appear to be on a trajectory towards some Asimovian “I, Robot” nightmare where an unwitting population embraces a machine that learns to think for itself and ultimately threatens its creators and benefactors. There is, perhaps, evidence of a sort of institutional sentience in the emerging treatment of climate issues by multilateral institutions and forums. But this merely demonstrates that structures designed by states can adapt organically to problems such as climate even while states are still struggling to manage the issue through more traditional means.

To argue that transboundary climate institutions have a growing instrumental role in addressing climate is not to suggest that they are a substitutable alternative to the state,<sup>119</sup> or that there is “fundamental discontinuity in the international system”.<sup>120</sup> Evolving modes of international climate governance provide some evidence of Jessica Mathews’ argument that “states may simply no longer be the natural problem-solving unit”.<sup>121</sup> But supporting her thesis that “[t]he *absolutes* of the Westphalian system ... are all dissolving”<sup>122</sup> does not presage the dissolution of the Westphalian model itself, or the obsolescence of states; instead, it suggests a shift within state-centric international systems to accommodate a more active, capable, and demanding public that is increasingly pursuing action *with and through* state-sponsored systems.

In sum, states are decidedly transboundary actors on climate, but not the exclusive actors. They have allocated transnational authority to systems of their design and they have embraced the catalytic role of their own citizens. But states have not abrogated their sovereign authority. States are essential progenitors and sustainers of networks, negotiation processes, regime construction, and systems for monitoring, reporting, and verification – and they are increasingly building an extra-territorial framework within which they may operate without losing the essence of their sovereignty. States appear to recognise the importance of

<sup>119</sup> Ruggie, note 26 above, p 167.

<sup>120</sup> Ibid., p 144. (“The long and the short of it is, then, that we are not very good as a discipline at studying the possibility of fundamental discontinuity in the international system; that is, at addressing the question of whether the modern system of states may be yielding in some instances to postmodern forms of configuring political space.”)

<sup>121</sup> Jessica T Mathews, “Power Shift”, (1997) 76 *Foreign Affairs*, p 55 (emphasis added).

<sup>122</sup> Ibid., p 50 (emphasis added).

transnational decision-making in the climate context even though the evolution of co-ordinated transboundary institutions is painstaking and incomplete, and, ultimately, the willingness of states to embrace a universal framework with meaningful enforcement of binding commitments remains unproven.

None of this heralds the abandonment of a state-centred territorially-exclusive system. States have not ceded control of the international response to climate, nor have they ceded their territory to the exigencies of climate-change mitigation. But states do appear to recognise that the response to a fundamentally extra-territorial problem should not be constrained by an excessively narrow understanding of sovereign territoriality.