The Role of Non-state Actors in Climate Compliance

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Introduction

Non-state actors have helped to advance the international climate regime since its inception.[1] They breathed life into initial commitments in 1992, playing a "prominent role in galvanizing support" for the UN Framework Convention on Climate Change

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[1] This chapter deals with the broadest category of non-state actors, including all nine major groups identified as stakeholders in Agenda 21 (business and industry non-governmental organizations (BINGO); environmental non-governmental organizations (ENGO); indigenous peoples organizations (IPO); farmers non-governmental organizations (Farmers); local government and municipal authorities (LGMA); research and independent non-governmental organizations (RINGO); trade unions non-governmental organizations (TUNGO); women and gender non-governmental organizations (Women and Gender); and youth non-governmental organizations (YOUNGO)) as well as parliamentarians, individual citizens, and any other non-state stakeholder or constituent in climate change issues. The author makes no distinction among these groups or individuals for purposes of access rights. Although these distinctions may be relevant within a given institution, forum, or process, they are beyond the scope of this chapter.

(UNFCCC) that emerged from the Rio Conference.[2] By one account of Rio, "the ratio of NGO participants to UN and government officials was one to one."[3] Jessica Mathews has noted that "NGOs set the original goal of negotiating an agreement to control greenhouse gases long before governments were ready to do so, proposed most of its structure and content, and lobbied and mobilized public pressure to force through a pact that virtually no one else though possible before the talks began." Mathews argues that NGOs "penetrated deeply into official decision-making" at the 1992 Conference.[4] Non-state actors have been active demandeurs of negotiators ever since – supporting (and in some cases opposing) a robust climate regime. They have even participated directly in negotiations, to a point.[5] While this level of non-state participation is not universally acclaimed (indeed it is contested by some states and scholars) [6] many states have welcomed and facilitated non-state access.

Non-state actors have also been welcomed as observers of the compliance process as commitments to cooperative action and

[2] "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. Ashe1, Robert Van Lierop, and 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)," 23 Natural Resources Forum 209-220 (1999); Steve Lerner, "Beyond the Earth Summit: Conversations With Advocates Of Sustainable Development" 89, 144 (1992).

[3] Chiara Giorgetti, "The Role of Non-governmental Organizations in the Climate Change Negotiations," 9 Colo. J. Int'l Envtl. L. & Pol'y 115 (1998); *see also* Dan Tarlock, "The Role of Non-Government Organizations in the Development of International Environmental Law," 68 Chi.-Kent L. Rev. 61, 61(1992);

[4] Jessica T. Mathews, "Power Shift," Foreign Affairs (Jan/Feb 1997) at 55.

[5] For example, a public interest environmental NGO, the Centre for International Environmental Law (now the Foundation for International Environmental Law and Development (FIELD) in London and the Center for International Environmental Law (CIEL) in Washington, DC), represented small island states early in the process.

[6] *See* discussion at Part A *infra*.

Greenhouse Gas (GHG) reductions emerged in 1998 at Kyoto and have continued to evolve in negotiations for a climate change framework beyond 2012. Transparency has become a key feature of climate compliance. As Jennifer Morgan notes in her contribution to this volume, "on a high level, all parties have agreed to a greater level of reporting, review and verification than ever before."[7] This commitment to openness is vital. In addition to facilitating cooperative or enforcement interventions to resolve noncompliance, information access promotes broader public awareness of the climate change problem and informs debate about the effectiveness of measures designed to address that problem. It also, not coincidentally, links constituents to the work of their state representatives and facilitates more articulate public demands for action (as noted above, these demands have been a critical feature of constructing the climate regime since its inception). [8]

Unfortunately, despite this level of non-state participation and transparency, compliance mechanisms emerging from climate change negotiations create very limited formal space for non-state actors in assuring international climate law compliance through direct action. Non-state actors have created a space for themselves (with state acquiescence) in negotiations, and states have assured a degree of transparency with respect to both negotiating and implementing climate regimes constructed so far. But failing to integrate non-state actors into the principal mechanisms for climate law compliance misses an important opportunity. This is not to say that greater non-state participation in compliance is an unalloyed good, nor to deny the importance of state-to-state

[7] Jennifer L. Morgan, "The Emerging Post-Cancun Climate Regime," in this volume at XX *citing* Fransen, Enhancing Today's MRV Framework to Meet Tomorrow's Needs: The Role of National Communications and Inventories (Working Paper) (Washington: World Resources Institute, June 2009); H. Winkler and J. Beaumont, 'Fair and Effective Multilateralism in the Post-Copenhagen Climate Negotiations', Climate Policy, 10.6 (2010), 638-654.

[8] An informed public can better assess the effectiveness of regimes their governments have constructed and thus reward success or press for reform. This can include pressing for additional policy changes at home in a domestic context or promoting regime strengthening in international negotiations.

procedures. But it can be reasoned, consistent with the increasing weight of international authority, that non-state access to compliance actions has important intrinsic and instrumental value that is of particular relevance in the climate change context.

This chapter highlights that value and documents progress to date in providing that access. The chapter offers examples of non-state access to existing multilateral environmental agreements that have features which may be relevant for the evolving climate change regime. In order to emphasize the utility – and creativity – of non-state actors in advancing climate concerns through the compliance provisions of international regimes, the author also details a number of recent cases where NGOs have advanced climate change concerns before "non-climate" institutions. These cases not only illustrate the ability of non-state actors to promoting climate compliance (even where legal tools are not originally so designed or particularly well suited) but also provide models of how they might be engaged in post-2012 climate compliance institutions. The author concludes that the positive impact of non-state participation in advancing climate change concerns is an important feature of the evolving climate regime, and recommends that negotiators embrace a even more substantive role for non-state actors in post-2012 climate compliance mechanisms and institutions.

A. Access as an Emerging International Norm

Non-state access to the institutions and processes of international law serves both intrinsic and instrumental values.[9]

[9] For a discussion of these democratic process concerns in greater detail *see, e.g.,* Eric Dannenmaier, "Lawmaking on the Road to International Summits," 59 DePaul L. Rev 1 (2009) [hereinafter International Summits] at 2-6; Mary Ellen O'Connell, "New International Legal Process," in THE METHODS OF INTERNATIONAL LAW (Steven R. Ratner & Anne-Marie Slaughter eds., 2005), at 84–86; see also Harold Hongju Koh, "The 1994 Roscoe Pound Lecture: Transnational Legal Process," 75 NEB. L. REV. 181, 183-86 (1996) (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

Public participation advances concerns about democratic process and the legitimacy of international rules[10] even as it promotes the integration and acceptance of legal norms on a transboundary basis.[11] It supports the construction of international legal frameworks that more closely fit social norms and promotes greater compliance with those frameworks once constructed. Broader access also helps to assure that information responds to priority public concerns and that communication occurs bi-directionally.[12] Participatory and democratic models rely not only on citizens knowing what the state is up to. State leaders must know what their constituents value. Non-state access to decision-making and compliance has particular salience within a framework such as climate where the policies and measures that will assure success must be embraced and implemented locally.

As the Framework Convention on Climate Change was approved at the 1992 Rio Summit, delegates also produced an action programme for the United Nations, known as Agenda 21, and a Declaration on Environment and Development (Rio Declaration). Each document highlighted the commitment of states to critical principles for assuring long term sustainable

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fora to make, interpret, enforce, and ultimately, internalize rules of transnational law")

[10] *See generally* Thomas Franck, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

[11] *See* generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) (advancing a "managerial" model of treaty compliance that relies on a continuing dialogue between the parties, international officials, and NGOs); Jutta Brunnée, "The Kyoto Protocol: Testing Ground for Compliance Theories?" in this volume at XX.

[12] Communication in fact occurs multi-directionally through many formal and informal means. But if one thinks in terms of a vertical governance model with a top (state leadership) and bottom (constituents), then it is not enough for communication to be top down; it must also be bottom up. In reality such a simple model fails to describe the many complex interactions and dialogues that inform state policy. But, unfortunately, there is still a tendency to fall back on this simple bilateral hierarchy when constructing formal legal systems at international law.

development. Agenda 21 recognizes the importance of "national strategies, plans, policies and processes" and "international cooperation" in facing "the challenges of the next century" even as it encourages the "broadest public participation and the active involvement of non-governmental organizations and other groups."[13] Principle 10 of the Rio Declaration goes further, acknowledging that "environmental issues are best handled with the participation of all concerned citizens, at the relevant level."[14] Using relatively prescriptive, Principle 10 of the Rio Declaration states:

> At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[15]

The "Rio Access Principles" embodied in Principle 10 can be described in shorthand as: [16]

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[13] Report of the United Nations Conference on Environment and Development, Annex 2, Agenda Item 21, U.N. Doc. A/Conf. 151/26/Rev.1 (1992) at ¶1.3 [hereinafter Agenda 21].

[14] Report of the United Nations Conference on Environment and Development, Principle 10, U.N. Doc. A/CONF. 151/26/Rev.1 (1992) (emphasis added) [hereinafter Rio Declaration].

[15] *Id*., Principle 10.

[16] *See, e.g.*, Eric Dannenmaier, "Democracy in Development: Toward a Legal Framework for the Americas," 11 Tulane Envtl. Law J. 1, 8 (1997). The alternative formulation of the second principle (participation in decision-making) has been adopted by, for example, World Resources Institute's Access Initiative. *See, e.g.,* Joseph Foti, et al., "Voice and Choice: Opening the Door to

1. Access to information;
2. Access to the process of (or "participation in") decision-making; and
3. Access to justice.

These principles are increasingly recognized in practice – particularly within multilateral environmental agreements.

In 2002, the environmental research group Eco-Logic conducted a study of NGO participation in international environmental co-operation on behalf of the German Federal Environment Agency (*Umweltbundesamt*).[17] The study included an examination of MEA practices as well as economic institutions and other international institutions and relied on interviews as well as an examination of institutional agreements. It concluded that "all international institutions relevant to the environment – be it formal organisations or treaty systems – appear to have at their disposal some kind of NGO consultation."[18] In 2006, the UN Economic Commission for Europe's (UNECE) Aarhus Secretariat circulated a questionnaire among more than one hundred 'international forums' (defined broadly to include institutions, secretariats, commissions, etc.) in an effort to catalogue current approaches to public participation.[19] Respondents included most of the major global institutions with environmental policy relevance as well as secretariats of global environmental conventions and a number of regional forums. The questionnaire responses reveal widespread practices that emphasize access to information and procedures granting observer status to non-state

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Environmental Democracy," World Resources Institute (2008) at 2, *available at* http://www.accessinitiative.org/sites/default/files/voice_and_choice.pdf.

[17] Sebastian Oberthur, et al., Participation of Non-Governmental Organisations in International Environmental Governance: Legal Basis and Practical Experience, Final Report.

[18] Id. At 206-07.

[19] United Nations Economic and Social Council, and Economic Commission for Europe (UNECE), Synthesis of Responses Received from International Forums to the Written Questionnaire in the Consultation Process on the Almaty Guidelines: UN/ECE/MP.PP/WG, 2007 (hereinafter UNECE Synthesis of Responses).

actors. The questionnaire responses also show that several forums have committees or groups that place non-state actors in an advisory role to the forum – either directly or through a sort of joint committee which includes key state actors alongside non-state actors – variously called "global steering committee,"[20] "organizing partners,'[21] and "advisory networks."[22] Responses also revealed "formalized compliance mechanisms that allow NGOs to present issues of compliance" to several bodies.[23] In addition, the secretariat of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) reported "draft operating rules then being drawn up" to assure that the Committee could consider compliance information from the public.[24]

The Aarhus Convention Secretariat itself has created a "Compliance Committee for the review of compliance by the Parties with their obligations under the Convention,"[25] and established procedures whereby "communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the convention."[26] The compliance committee is required to consider these

[20] Response of United Nations Environment Programme (UNEP) to the Aarhus Secretariat Questionnaire (copy on file with author).
[21] Response of the United Nations Commission on Sustainable Development (UNCSD) to the Aarhus Secretariat Questionnaire (copy on file with author).
[22] Response of the United Nations ECE Committee on Housing and Land Management (CHLM) to the Aarhus Secretariat Questionnaire (copy on file with author).
[23] The Secretariats for the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention), the Convention on the Protection of the Alps (Alpine Convention), and the Bureau of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention).
[24] UNECE Aarhus Secretariat Questionnaire Response Synthesis, *supra* note XX at 7, ¶21.
[25] "Review of Compliance," annex to decision I/7 of the first session of the Meeting of the Parties to the Aarhus Convention, U.N. Doc. ECE/MP.PP/2/Add.8 (Apr. 2, 2004) at ¶1.
[26] Id. at ¶8.

communications, unless they are anonymous or found to be abusive, unreasonable, or "inconsistent with the provisions" of the convention.[27] The committee may hold hearings[28] and gather information relating to the communication,[29] and is directed to bring the communication "to the attention of the Party alleged to be in non-compliance,"[30] which must "submit to the Committee written explanations or statements clarifying the matter and describing any response that it may have made."[31]

Another regional MEA, the environmental side agreement to the North American Free Trade Agreement (NAFTA),[32] established a relatively robust system that gives NGOs direct access to policymaking processes. The side agreement also gives citizen groups and individuals within a state party that are concerned about their government's enforcement of its environmental laws access to a petition procedure.[33] One of the concerns driving the side agreement was the possibility that a party might weaken its domestic environmental enforcement as a means of encouraging the relocation of businesses to a legal system less likely to enforce environmental laws seen as costly.[34] In response to this concern, the side agreement invites submissions to the North American Commission on Environmental Cooperation[35] "from any non-governmental organization or person asserting that

[27] Id. at ¶22.
[28] Id. at ¶24.
[29] Id. at ¶25.
[30] Id. at ¶22.
[31] Id. at ¶23.
[32] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 (1993).
[33] North American Agreement for Environmental Cooperation, U.S.-Can.-Mex., 32 I.L.M. 1480, Arts. 14-16 (1993).
[34] The concern was aimed particularly at Mexico which was perceived as having weaker environmental laws and environmental enforcement.
[35] The NAFTA Commission for Environmental Cooperation, also created under the side agreement, supports both collaborative inter-party measures to address trade-environment issues and manages the citizen petition process through a Secretariat based in Montreal.

a Party is failing to effectively enforce its environmental law …"[36] The Commission Secretariat is tasked with reviewing submissions – a process which can include expert review, hearings, and requests for response from the parties – and issuing a report (a "factual record") where it "considers that the submission, in the light of any response provided by the Party, warrants developing a factual record." Since the creation of the article 14/15 submission process in 1995, dozens of submissions have been filed and dozens of factual records have been prepared.[37] Although the process has been criticized as having no real enforcement teeth,[38] its published factual records, and even the investigatory and response process, have had some positive effect on parties' behaviour.[39] The NAFTA environmental side agreement also created a "Joint Public Advisory Committee" (JPAC) comprised of five head of government appointees from each party which oversees the

[36] Id. Art. 14.

[37] The Commission maintains a registry of submissions at http://www.cec.org/Page.asp?PageID=751&SiteNodeID=250&BL_ExpandID=99 (last visited Feb. 15, 2011)

[38] *See, e.g.,* Laura Carlsen and Hilda Salazar, "Limits to Cooperation: A Mexican Perspective on the NAFTA's Environmental Side Agreement and Institutions," in GREENING THE AMERICAS: NAFTA'S LESSONS FOR HEMISPHERIC TRADE 224-26 (Carolyn L. Deere & Daniel C. Esty eds., 2002) (arguing that a lack of political will left NAFTA environmental institutions with a restricted scope of authority on enforcement issues and insufficient independence to carry out investigations).

[39] *See, e.g.,* Paul Stanton Kibel, "The Paper Tiger Awakens: North American Environmental Law After the Cozumel Reef Case," 39 Colum. J. Transnat'l L. 395, 470 (2001) citing Prepared Testimony of Ambassador Richard Fisher Deputy United States Trade Representative Before the Senate Committee on Foreign Relations, Subject - Economic Effects of NAFTA, Fed. News Serv. (Apr. 13, 1999) (noting Mexico's pledge to undertake environmental management study and strengthen laws protecting endangered coral reefs following the resolution of a NAFTA environmental citizen submission); Gustavo Alanis-Ortega, "What Can We Learn from NAFTA," in ASIAN DRAGONS AND GREEN TRADE XX (Simon S.C. Tay & Daniel C. Esty eds., 1996).

cooperative work plan of the commission and monitors compliance issues and the citizen submissions process. [40]

These examples all show an emerging state practice, particularly within environmental agreements, to provide non-state actors with robust access to information, and to the process of decision-making (even if only as observers). There is also an emerging practice of granting justice – or redress – that allows non-state actors to be part of the compliance process. The final model, emerging from the North American context, might be especially relevant to a future climate regime because the emerging 'bottom-up' approach seems to contemplate reliance on a state's own environmental laws to meet targets and assure cooperation. Allowing citizens to have access to a multilateral mechanism within which they might challenge their government's compliance with or commitment to domestic climate policies and measures would complement this emerging bottom-up model.

B. Climate Access Commitments to Date

Information exchange and information access features are present in the 1992 Framework Convention commitment to "[t]he full, open and prompt exchange of relevant scientific, technological, technical, socio-economic and legal information related to the climate system and climate change,"[41] to "[e]ducation, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations,"[42] and to "[c]ommunicate to the Conference of the Parties information related to Implementation."[43] Access is also implicit in the

[40] See Eric Dannenmaier, "The JPAC at Ten: A Ten-Year Review of the Joint Public Advisory Commission of the North American Free Trade Agreement," NAFTA Commission on Environmental Cooperation (2005)

[41] United Nations Framework Convention on Climate Change, U.N. Doc. A/AC.237/18 (Part II)/Add.1 and Corr. 1 (1992) [hereinafter the Framework Convention] at Art. 4 ¶ 1(h).

[42] Id. at Art. 4 ¶1(i).

[43] Id. at Art. 4 ¶1(j).

promise to establish a financial mechanism "within a transparent system of governance."[44]

Information sharing and access are features of the 1998 Kyoto Protocol, which encourages domestic policies and measures to achieve emission reduction targets in part by committing parties to "take steps to share their experience and exchange information on such policies and measures, including developing ways of improving their comparability, transparency and effectiveness."[45] Kyoto parties also agree that "greenhouse gas emissions by sources and removals by sinks associated with those activities shall be reported in a transparent and verifiable manner and reviewed" through "modalities and procedures" that ensure "transparency, efficiency and accountability through independent auditing and verification."[46] Kyoto parties commit to "[c]ooperate in and promote … education and training programmes … and facilitate at the national level public awareness of, and public access to information on, climate change."[47]

These commitments to transparency are laudable. Yet they remain one-dimensional. There is no promise in the Framework Convention or the Kyoto Protocol to engage civil society in constructing the system of climate governance and only limited efforts to integrate the public into compliance measures.[48] The

[44] Id. at Art. 11 ¶2.

[45] Kyoto Protocol to the United Nations Framework Convention on Climate Change, UNFCCC, COP-3, UN Doc. FCCC/CP/1997/L.7/Add.1 (1998) [hereinafter the Kyoto Protocol] at Art. 2 ¶1(b).

[46] Id. at Art. 3 ¶3, Art. 12 ¶7.

[47] Id. at Art. 3 ¶3, Art. 10(e).

[48] Non-state actors have access to information regarding compliance proceedings through Secretariat report, (*see* Secretariat web page at http://unfccc.int/kyoto_protocol/compliance/items/5470.php (last visited March 10, 2011)). "Competent" NGOs may also provide factual information to the Committee. Rule 20.1, "Consolidated Rules of Procedure of the Compliance Committee of the Kyoto Protocol," adopted at UNFCCC Dec. 27/CMP.1, "Procedures and mechanisms relating to compliance under the Kyoto Protocol," Conference of the Parties 8th Sess., FCCC/KP/CMP/2005/8/Add.3, pg. 93 (2006) [Hereinafter Kyoto Compliance Procedures]. But these mechanisms offer no guarantee that non-state concerns will be heard and give non-state

present regime has two branches intended to promote compliance: an Enforcement Branch and a Facilitative Branch.[49] As their titles suggest, the Facilitative Branch is "responsible for providing advice and facilitation to Parties in implementing the Protocol, and for promoting compliance by Parties with their commitments,"[50] while the Enforcement Branch confirms whether emission limitation or reduction commitments are met and whether GHG inventory adjustments or accounting corrections need to be made.[51] The Enforcement Branch is also responsible for "applying the consequences" of non-compliance[52] which can include remedial measures and a suspension from participation in the Protocol.[53] In essence, while the compliance branches are called "enforcement" and "facilitative," (implying both a "stick" and a "carrot" approach) the protocol's primary enforcement sanction is to withhold facilitation (that is, the principal "stick" is no "carrot").[54]

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actors no standing to pursue compliance failures that states choose not to raise. The very real likelihood that states may – for reasons unrelated to the merits – choose to refrain from pursuing compliance matters should not be discounted. As Meinhard Doelle notes in his contribution to this volume, the only Facilitate Branch case brought to date was brought by South Africa as chair of the Group of 77 and China but the case faltered on the question of whether the case could be brought in such a representative capacity versus directly by a party. Doelle explains that "[t]he broader concern is the difficulty of bringing matters before the FB. The fact that no party was willing to follow up the South Africa submission on its own is telling in this regard. It suggests a fear of reprisal by individual parties." Doelle at XX, note 5. Such a fear of reprisal is one of many reasons a state may refrain from complaining about the performance of another party, and one can well imagine broader strategic interests could lead a state to avoid confrontation. Non-state actors, on the other hand, are often more at liberty to be single-minded in their pursuit of compliance.

[49] Kyoto Compliance Procedures, *supra* note 48; *see also* David M. Driesen, *Free Lunch or Cheap Fix?: The Emissions Trading Idea and The Climate Change Convention*, 26 B.C. ENVTL. AFF. L. REV. 1 (1998).

[50] Kyoto Compliance Procedures Art. IV.4

[51] Id. at Art. V.4 & V.5.

[52] Id. at Art V.6.

[53] Id. at Art XV.

[54] For a more complete discussion of *see* Meinhard Doelle, "Experience with the Facilitative and Enforcement Branches of the Kyoto Compliance System," and

These compliance mechanisms integrate non-state actors to only a limited extent. NGOs cannot file complaints, initiate investigations, challenge compliance data they believe to be incomplete or inaccurate, or request compliance documentation beyond *pro forma* submissions.[55] Instead, the Kyoto Protocol provides that "competent nongovernmental organizations" may submit "relevant factual and technical information" relating to "questions of implementation" where a matter has already been commenced by a state party.[56] Non-state actors may also support monitoring and implementation of Emission Trading, Joint Implementation (JI) and the Clean Development Mechanisms (CDM)[57] because the nature of these mechanisms relies on their partnership and participation.

The ability to make submissions on pending questions of implementation is important; it is something akin to an *amicus* brief process that many international dispute procedures do not afford for non-state actors. And the ability to participate in trading, JI, and CDM implementation is practical. After all, non-state actors will often have a direct stake in funding or implementing these mechanisms. But it is notable that non-state actors have no right to initiate procedures where states fail or refuse to implement Kyoto obligations[58] – even where those

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René Lefeber and Sebastian Oberthür, "Key Features of the Kyoto Protocol's Compliance System," both of which appear in this volume. As Doelle, Lefeber, and Oberthür discuss, the degree of force behind other compliance 'sticks' remains to be seen.

[55] Kyoto Compliance Procedures, *supra* note 48. As noted above, and detailed below in part B, *infra*, a number of other international accords and institutions, including multilateral environmental agreements, provide such opportunities.

[56] Rule 20.1, Kyoto Compliance Procedures, *supra* note 48.

[57] Peggy Rodgers Kalas & Alexia Herwig, *Dispute Resolution Under the Kyoto Protocol*, 27 ECOLOGY L.Q. 53 (2000).

[58] Expert Review Teams, selected by the Secretariat from experts nominated by Parties, support the annual review of individual inventories of each Annex I Party. Decision 19/CP.8, UNFCCC guidelines for the technical review of greenhouse gas inventories from Parties included in Annex I to the Convention, U.N. Doc. FCCC/CP/2002/7/Add.2, at 15, 28; UNFCCC Guidelines on

procedures are designed to be cooperative in nature.[59] This means that NGOs and other private actors cannot raise questions about a state's failure to adopt appropriate policies and measures for Greenhouse Gas (GHG) reduction or a state's failure to achieve reduction targets. These are the dominant means and ends of the climate regime, yet the ability of citizens to actively police them is foreclosed.

As negotiations to extend and expand the Kyoto commitments within the framework of the UNFCCC continue, states have highlighted information exchange among parties, but they have been less careful to reiterate a commitment to non-state information access. The Copenhagen Accord, while failing to renew or strengthen emission reduction targets, does promise that the "delivery of reductions and financing by developed countries" that may be agreed to in the future "will be measured, reported and verified" under guidelines that, at the least, "will ensure that accounting of such targets and finance is rigorous, robust and transparent."[60] The Accord also calls for a "context" of "transparency" with respect to funding mechanisms for mitigation

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Reporting and Review, Review of the Implementation of Commitments and of Other Provisions of the Convention National Communications: Greenhouse Gas Inventories from Parties Included in Annex I to the Convention, Conference of the Parties, Eighth session, New Delhi, 23 October – 1 November 2002, U.N. Doc FCCC/CP/2002/8 (28 Mar. 2003). But expert participation in these teams – even if the expert is drawn from an advocacy NGO – is explicitly designed to be divorced from any policy perspective that the expert and his or her organization may have. Expert reviewers are required to sign an agreement that specifies "terms and conditions" including, among other things, the requirement that "In conducting review activities, the expert shall perform duties in an objective, neutral and professional manner and serve in the best interest of the Convention. The expert shall notify the secretariat of any known potential conflict of interest relating to a specific review activity in which the expert has been invited to participate." "Agreement for Review Services" at ¶2, *available at* http://unfccc.int/files/national_reports/annex_i_ghg_inventories/application/pdf/agr_exprev.pdf (last visited March 10, 2011).

[59] Kyoto compliance mechanisms emphasize both facilitation and enforcement.

[60] Copenhagen Accord, Decision 2/CP.15, U.N. Doc. FCCC/CP/2009/11/Add.1 (Dec. 18, 2009) at ¶4.

and adaptation.[61] But Copenhagen says nothing specific about the participation of non-state actors in cooperative action and there is no opening for access to compliance and enforcement processes.

C. Emerging Access Post-Kyoto

To negotiate commitments beyond the Kyoto Protocol's target year of 2012, states established ad hoc working groups to further greenhouse gas targets of the Kyoto Protocol (the "Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol," or AWG-KP) and to advance cooperative action (the "Ad Hoc Working Group on long-term Cooperative Action under the Convention," or AWG-LCA).[62] The proposals emerging from these two working groups at the 16th Conference of the Parties (the 6th Meeting of the Parties to Kyoto) in Cancun in 2010 show divergent approaches to non-state actor access.

i. The Non-State Role in Cooperative Action

The AWG-LCA explicitly "[r]ecognize[d] the need to engage a broad range of stakeholders at global, regional, national and local levels, be they government, including subnational and local government, private business or civil society, including youth and persons with disability, and that gender equality and the effective participation of women and indigenous peoples are important for effective action on all aspects of climate change."[63]

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[61] Id. at ¶9.

[62] The AWG-KP was established in Montreal in 2005. Decision 1/CMP.1. "Consideration of commitments for subsequent periods for Parties included in Annex I to the Convention under Article 3, paragraph 9, of the Kyoto Protocol," UN Doc. FCCC/KP/CMP/2005/8/Add.1 (Mar. 30, 2006). The AWG-LCA was created in Bali in 2007. "Bali Action Plan," Decision 1/CP.13 (Dec. 14-15, 2007), in COP Report No. 13, Addendum, at 3, UN Doc. FCCC/CP/2007/6/Add.1 (reissued Mar. 14, 2008).

[63] United Nations Climate Change Conference in Cancun, COP 16 / CMP 6, 29 November - 10 December 2010, Draft decision [-/CP.16], "Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the

The LCA group also affirmed the importance of a "participatory and fully transparent approach,"[64] and invited views on engaging "[s]takeholders with relevant specialized expertise" in the development of the committee's work programme.[65] In the context of reducing emissions from deforestation and forest degradation (REDD), the LCA working group also asked that developing country parties ensure "the full and effective participation of relevant stakeholders, inter alia, indigenous peoples and local communities," in "developing and implementing their national strategies or action plans."[66] The LCA working group invited accredited observers to submit views on the development of market-based mechanisms to promote mitigation,[67] and decided that meetings of the Transitional Committee created to design a new "Green Climate Fund" would be open to observers.[68] The working group also acknowledged the importance of coordinating technology development and transfer initiatives with non-state stakeholders and organizations,[69] called upon a newly-created Technology Executive Committee to "seek input from civil society,"[70] and "reaffirmed" that capacity-building should be "participatory."[71]

Convention," Advance unedited version *available at* http://unfccc.int/meetings/cop_16/items/5571.php (last visited Feb. 12, 2011) at ¶7.

[64] Id. at ¶12.

[65] Id. at ¶28(d)

[66] Id. at ¶72. See also Id. at Annex I ¶2(c), (d) (guidelines for policy approaches to REDD emphasize respect for knowledge and rights of indigenous peoples and the "full and effective participation of relevant stakeholders").

[67] Id. at ¶¶82, 86, 87.

[68] Id. at ¶110. See also Id. at Annex III ¶1(j) ("Terms of Reference for the design of the Green Climate Fund" call upon Transitional Committee to develop "mechanisms to ensure stakeholder input and participation") & 2(b) (the Transitional Committee is called upon to "[e]ncourage input … from relevant international organizations and observers.")

[69] Id. at ¶¶121(f) & (g) and 123(c)(ii).

[70] Id. at Annex IV ¶10. In addition, meetings of the committee are to be open to accredited observers. Id. at ¶11.

[71] Id. at part IV(C) (preamble to ¶¶130-37).

ii. The Non-State Role in Compliance with Further Commitments

In contrast to the acknowledgement of the role of non-state actors in cooperative measures by the LCA working group, the AWG-KP made not a single mention of non-state actors, stakeholders, non-governmental organizations, civil society, relevant experts, or even accredited observers, in the formal document approved in Cancun.[72] Notably, even the draft negotiating text of the AWG-KP – the revised proposal by the Chair that was presented in Cancun – makes no mention of non-state actors, stakeholders, non-governmental organizations, civil society, or observers (accredited or otherwise). Bracketed provisions of the draft text's chapter on land use, land-use change and forestry (LULUCF) "[e]ncourages Parties to invite their land use, land-use change and forestry experts to apply for the UNFCCC roster of experts, with a view to increasing the number of land use, land-use change and forestry reviewers."[73] This suggests that experts outside of formal governmental institutions may be invited to join the LULUCF roster, and they would certainly bring an outside perspective to the role. But, as with the Expert Review Teams established to review Annex I Party GHG

[72] United Nations Climate Change Conference in Cancun, COP 16 / CMP 6, 29 November - 10 December 2010, 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 (last visited Feb 18, 2011).

[73] Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, Fifteenth session
Cancun, 29 November, Agenda item 3 Consideration of further commitments for Annex I Parties under the
Kyoto Protocol, Revised proposal by the Chair, U.N. Doc. FCCC/KP/AWG/2010/CRP.4/Rev.4 at Ch. 2 ¶17.
review of the national greenhouse gas inventory reports submitted by Parties.]

inventories, the function of experts acting in their expert capacity is not to directly advance civil society or stakeholder concerns.[74]

D. Climate Compliance through Non-Climate Mechanisms

As negotiators continue to construct a post-2012 approach, they may wish to take note of climate-related compliance actions that have been pursued through other, "non-climate" channels – the use of compliance mechanisms within international forums and tribunals outside of the formal climate regime. The examples below reveal both openness to non-state access and a remarkable degree of innovation by non-state actors in creating channels to address climate concerns. Examples include the World Bank's Inspection Panel, UNESCO's framework for protecting World Heritage Sites, and the compliance mechanisms of human rights bodies. These forums, though limited and still evolving, are being deployed to address at least some concerns relating to climate

[74] Arguments have been made that the identity or affiliation of experts necessarily influences the advice that they give to a governmental body. *See, e.g.*, Yiorgos Vassalos, Corporate Europe Observatory, "Expert Groups – Letting Corporate Interests set the Agenda" *available at* http://www.alter-eu.org/sites/default/files/bbb-chap-06.pdf (last visited March 5, 2011) (arguing that "the composition of expert groups involving nongovernmental actors demonstrates the European Commission's clear preference to consult with corporate interests"); Torbjörn Larsson, Stockholm University "Precooking - The Function and Role of Expert Groups in the European Union" *available at* http://aei.pitt.edu/6516/1/001507_1.pdf (last visited March 5, 2011) (noting difference between expert groups comprised of "highly specialised people often academics and scientists" and groups composed of "interest group" and "stakeholders"). It is certainly true that identity and affiliation create perspective, even bias. But non-state actors who have been called upon for their expertise are not acting as civil society 'representatives' of 'voices' in any meaningful sense; they are instead seeking to act as 'neutrals' (even if imperfectly neutral) with relevant expertise. Procedural rules and explicit conditions of service (such as the Expert Review Team rules discussed *supra* at note 58) coupled with the scientific and technical nature of the task and the balance of experts called upon in the climate change context likely go a long way to minimize individual biases. At the very least, they are in most cases a constraint on open position advocacy.

change and may serve as models for a mechanism for engaging non-state actors in climate compliance mechanisms.

i. International Financial Institutions (energy financing)

International financial institutions have substantial potential to affect GHG emissions and the creation and preservation of carbon sinks because they finance development projects throughout the world. Financial institutions can encourage investments that reduce carbon footprints, and discourage, condition, or withhold financing for inefficient projects with a large carbon footprint such as timber and fossil fuel extraction. They can leverage their investments even if they are only providing partial financing or seed money for a project and, unlike private financiers, their investments decisions are subject to direct oversight by public officials. Unfortunately, the record of international financial institutions as a positive force for climate policy has been mixed.[75] At the World Bank, for example, climate change is now seen as a development concern, climate impact must be considered as part of the Environmental Assessment process,[76] and the bank has increased its renewable energy portfolio.[77] But this has not resulted in a fundamental change in the bank's lending portfolio, and it has done little to blunt criticism of the bank's continuing support for fossil fuel projects, timber projects, and other carbon-regressive development.[78]

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[75] Kirk Herbertson & David Hunter, *Sustainable Energy: Emerging Standards for Sustainable Finance of the Energy Sector*,7 SUSTAINABLE DEV. L. & POL'Y 4 (2007).; *see also* Benjamin J. Richardson, *Reforming Climate Finance through Investment Codes of Conduct*, 27 WIS. INT'L L.J. 483 (2009).

[76] World Bank, Operational Policy 4.01, Environmental Assessment, (Jan. 1999) at ¶3 note 5.

[77] Xiaodong Wang, *Legal and Policy Frameworks for Renewable Energy To Mitigate Climate Change*, 7 SUSTAINABLE DEV. L. & POL'Y 17 (2007).

[78] Steven Ferrey, *The Failure of International Global Warming Regulation to Promote Needed Renewable Energy*, 37 B.C. ENVTL. AFF. L. REV. 67 (2010).; *see also* David Takacs, *Carbon Into Gold: Forest Carbon Offsets, Climate Change Adaptation, and International Law*, 15 HASTINGS J. ENV. L. & POL'Y 39

As NGOs press for improvements in lending policies to address environmental concerns such as climate, the ability to of non-state actors to review, challenge, and dispute lending practices and priorities has become increasingly important. And a dispute mechanism has been formed in response to this need. In 1993, the bank established an Inspection Panel to consider NGO challenges to bank lending decisions.[79] The Inspection Panel can review decisions of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) upon receipt of a Request for Inspection from parties "in the territory of the borrower" claiming that "rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank."[80] Procedures can lead to an investigation, if approved by the Bank's Board of Directors, and a report to Bank management. Management responds to reports with recommendations to bring a project into compliance with Bank policies and procedures, and these recommendations must be approved by the Board.[81]

The Panel process has been used to address climate concerns. In April of 2010, a request for inspection was filed by

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(2009).; *see also* 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).; *see also* Matthew Berger, "Civil Society Calls on World Bank to Reform its Energy Lending Source: Inter Press Service (April 26, 2010).

[79] 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," (Sep. 22, 1993).; *see also* Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994).

[80] 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," (Sep. 22, 1993).

[81] Id.

local NGOs regarding a proposed $3.75 billion loan for construction of the 4800 Mega Watt coal-fired power plant by the utility company Eskom in the Midupi, South Africa (World Bank Inspection Panel Request, 2010).[82] The affected parties cited concerns including health impacts, water demand and scarcity, cultural impacts, and involuntary resettlement as well as concern over the project's impact on climate:

> The proposed loan will compromise the World Bank's commitments on climate change, and make it more difficult for South Africa to meet its own greenhouse gas reduction commitments. Despite claims that the Medupi plant will use 'cleaner coal technology' and will be 'carbon capture and storage-ready,' there is no certainty whether these measures will be sufficient to control the enormous amounts of pollutants.[83]

The Inspection Panel recently concluded that the request meets eligibility requirements and has recommended an investigation.[84] The Panel's Chair explained that bank policy:

> [c]alls for the Bank to consider if the borrower's system is designed to achieve, among other elements, the operational principle to "assess potential impacts of the proposed project on physical, biological, socio-economic and physical cultural resources, including transboundary and global concerns" … The Panel will be guided by this policy provision in assessing, for instance, issues relating to greenhouse gas emissions of the Project, and the potential

[82] World Bank Inspection Panel Request for Inspection of Eskom Investment Support Project (Project ID: P116410) (Apr. 6, 2010).

[83] Id.

[84] World Bank Inspection Panel Report and Recommendation South Africa: Eskom Investment Support Project (IBRD Loan No. 78620) (INSP/R2010-0003) (June 28, 2010).

> mitigation actions contained in the Project to address these concerns.[85]

The panel's eligibility finding is encouraging even though the scope of review will be limited to assessing compliance with formal bank policies. Although the panel has no enforcement or sanctioning authority, its reporting function has at times led to decisions by the bank's board to withdraw or withhold funding where bank policies are clearly not being followed. The panel's public reporting function also serves to raise awareness of compliance problems and one cannot discount the deterrent effect that a report can have on bank officials who might consider evading bank policies or borrower countries that might seek to ignore environmental policy constraints on their borrowing.

In addition to World Bank's inspection panel procedures, a number of regional development banks also have related processes. The African Development Bank (AfDB), Inter-American Development Bank (IADB), and the European Bank for Reconstruction and Development (EBRD) each offer some opportunity for non-state actors to raise concern about compliance with policies.[86] It is not difficult to imagine the potential that such

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[85] 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 (July 29, 2010). The Panel went on to caution that it would not "investigate other climate change related claims mentioned in the Request that do not raise issues of compliance under Bank policy, such as for example whether the Project meets the requirements of the Bank strategy document on "Development and Climate Change: A Strategic Framework for the World Bank Group." Id.

[86] U.N. Economic and Social Council, Economic Commission for Europe, "Synthesis of Responses Received From International Forums to the Written Questionnaire in the Consultation Process on the Almaty Guidelines," Meeting Of The Parties To The Convention On Access To Information, Public Participation In Decision-Making and Access to Justice in Environmental Matters, Working Group of the Parties Seventh Meeting Geneva, 2–4 May 2007 Item 5 of the Provisional Agenda, Public Participation in International Forums, U.N. Doc ECE/MP.PP/WG.1/2007/L.2 (Feb. 16 2007) at p. 7 ¶21. (hereinafter "UNECE Aarhus Secretariat Questionnaire Response Synthesis").

mechanisms might hold in the context of climate compliance, or to understand the importance of these mechanisms as a model for public oversight of future climate commitments.

ii. International Economic Cooperation Institutions

International Economic Cooperation Organizations[87] are increasingly embracing the language of sustainability and some have even made modest commitments to environmental goals or created guidelines that call for greater attention to environmental – and climate – issues.

The OECD, for example, has issued "Guidelines for Multinational Enterprises" that offer voluntary recommendations for governments and multinational enterprises "operating in or from adhering countries."[88] The Guidelines call for enterprises to focus on issues of environmental management and performance, and to operate with some degree of transparency. Enterprises are called upon to "assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full

[87] Examples include the Economic Cooperation Organization (ECO) a forum for seven members from Central Asia Treaty of Izmir, Mar. 12, 1977, *available at* http://www.ecosecretariat.org/; Asia-Pacific Economic Cooperation (APEC) a forum for 21 Pacific Rim countries Canberra Ministerial Statement, "First APEC Ministerial Meeting. Canberra, Australia, Joint Statement" (November 1989) at 6-7.; Latin American Economic System, (SELA), a forum for 27 Latin American and Caribbean States Panama Convention (*Convenio de Panamá Constitutivo del Sistema Económico Latinoamericano*) (SELA) (Oct. 17, 1975) *available at* http://216.122.62.22/attach/258/default/T023600000397-0-Convenio_de_Panama_(enero_2006).pdf; and the Organization for Economic Cooperation and Development (OECD), a forum for 32 members from various regions Convention on the Organisation for Economic Co-operation and Development (Dec. 14, 1960) *available at* http://www.oecd.org/document/7/0,3343,en_2649_201185_1915847_1_1_1_1,00.html.

[88] 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.

life cycle,"[89] and more generally to "minimize aspects of their activity that may have negative impacts on the environment."[90]

The OECD has also established a complaint process that non-state actors can use where they believe that the guidelines have been ignored, and the process has been used at least once in the climate context. In 2007, Germanwatch filed a complaint against Germany-based Volkswagen alleging that Volkswagen was representative of a transport sector "responsible for 20 to 28 per cent of worldwide CO_2 emissions"[91] and that the company had pursued technology and a market strategy destined to increase emissions from its products. The NGO alleged fifteen violations of OECD Guidelines,[92] including provisions regarding adequate environmental management,[93] transparency,[94] deceptive marketing,[95] and the responsibility of industry to "contribute to the development of environmentally meaningful and economically efficient public policy."[96] Germanwatch asked that the National Contact Point for Germany[97] undertake public mediation

[89] Id.

[90] Press Release, OECD, "Environment and the OECD Guidelines for Multinational Enterprises Corporate Tools and Approaches," (2004), *available at* http://www.oecd.org/dataoecd/12/1/34992954.pdf.

[91] 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 (May 7, 2007), *available at* www.germanwatch.org/corp/vw-besch-e.pdf.

[92] 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.

[93] Id.

[94] Id.

[95] Id.

[96] Id.

[97] "The National Contact Point (NCP) is a government office responsible for encouraging observance of the Guidelines in a national context and for ensuring

proceedings aimed at bringing Volkswagen into compliance with OECD Guidelines.

An initial assessment by the National Contact Point for Germany "found that the company had not violated the Guidelines"[98] and thus Germanwatch did not get the public mediation they had sought. But the complaint did call attention to business practices of one of the chief actors in the automobile industry and advanced the case that corporate decisions have climate impacts. As with the World Bank inspection panel, the OECD compliant process offers a window into how non-state actors might find a point of entry for compliance with future climate agreements.

iii. Human Rights Bodies

Human rights institutions offer several mechanisms for non-state actors to initiate and participate in compliance proceedings that may also serve as useful models in the climate context. NGOs can initiate petitions to human rights bodies to consider individual cases or broader human rights policy concerns, they can offer evidence where tribunals and special experts are considering compliance matters, and they can file "shadow reports" to supplement or challenge state self-reporting that is filed periodically with human rights bodies.

One prominent recent example of a climate-based human rights claim is the petition by the Inuit Circumpolar Conference (now the Circumpolar Council)[99] to the Inter-American

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that the Guidelines are well known and understood by the national business community and by other interested parties." (OECD 2010)

[98] OECD "Guidelines for Multinational Enterprises: Specific Instances Considered by National Contact Points" (Oct. 7 2009) at 11, available at http://www.oecd.org/dataoecd/15/43/33914891.pdf

[99] 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= It was represented by the Center for International

Commission on Human Rights[100] in 2005 alleging that the United States has made a "major and disproportionate contribution to [the] transboundary environmental impacts of climate change[101] 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 …."[102] The Commission declined to take the case and issued no formal opinion on the merits. Instead, the Commission sent a letter to counsel for the Circumpolar Conference, in November of 2006, informing them that "it will not be possible to process your petition at present because the information it contains does not satisfy" the Commission's rules "or other applicable instruments." The letter continued, "Specifically, the information provided [in the petition] does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration [of the Rights and Duties of Man]."[103] The Inuit

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Environmental Law (CIEL), see http://www.ciel.org/Climate/Climate_Inuit.html, and Earthjustice, see http://www.earthjustice.org/features/inuit-human-rights-and-climate-change

[100] 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.

[101] 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, at pg. 100.

[102] Id.

[103] Letter from Ariel E. Dulitzky, Assistant Executive Secretary, Inter-American Commission on Human Rights to Paul Crowley, Legal Representative, Inuit Petition, Nov. 16, 2006, *available at* http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf (last visited December 5, 2010) *citing* American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/ser.L./V./II.23, doc. 21 rev. 6 (1948) *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992);

petition thus appears to have been rejected without prejudice. The Circumpolar Conference representatives did not directly appeal this decision or seek to re-file. Instead, they requested a hearing "on the relationship between global warming and human rights,"[104] and the Commission responded by inviting them to attend its "127th ordinary period of sessions" to "address matters relating to Global Warming and Human Rights."[105] The Inuit petitioners and counsel offered statements.[106] To date, no findings or report has been published by the Commission on the basis of that hearing.[107]

Not long after the Inter-American Commission declined to proceed with the Inuit petition, in November 2007, the Republic of the Maldives hosted a meeting of representatives of small island developing states to explore the linkage between human rights and climate. The Maldives has been an active proponent of international action on climate, and was a chief protagonist, along with other members of the Association of Small Island States (AOSIS), in raising concerns over climate change in international forums, and in promoting the adoption of the UNFCCC at the Rio Summit. Participants in the November meeting adopted the "Male' Declaration on the Human Dimension of Global Climate Change," which called for progress on a post-Kyoto agreement at the next Conference of the Parties scheduled for Bali, and also called for "The Office of the United Nations High Commissioner

[104] January 15, 2007 Letter from Sheila Watt-Cloutier to Santiago Cantón "Re: Request for a Hearing on the Relationship Between Global Warming and Human Rights," *available at* http://www.ciel.org/Publications/IACHR_Letter_15Jan07.pdf

[105] 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.

[106] Press Release, Earthjustice, "Nobel Prize Nominee Testifies About Global Warming," (2007), *available at* http://www.earthjustice.org/news/press/2007/nobel-prize-nominee-testifies-about-global-warming.

[107] This is based on a review of the Commission's public records as of the date this chapter was written.

for Human Rights [OHCHR] to conduct a detailed study into the effects of climate change on the full enjoyment of human rights … prior to the tenth session of the Human Rights Council."[108] At the next Council session, in March 2008, the Council adopted a resolution offered by the Maldives requesting that the OHCHR conduct "a detailed analytical study on the relationship between climate change and human rights,"[109] and the OHCHR completed the study and issued a report in January 2009.[110] The OHCHR Report details the potential impact of climate change on specific human rights and describes the unique risks of climate change to vulnerable groups including women,[111] children,[112] and indigenous peoples,[113] as well as the potential impact of displacement caused by climate effects.[114] Although the OHCHR Report declines to determine whether climate effects "[c]an be qualified as human rights violations in a strict legal sense, and stops short of finding that states have any particular responsibility to formulate development, energy, or transportations policies in any way that would be redressable under existing human rights instruments,[115] the fact that the OHCHR would respond to a broad based public petition (NGOs joined by small island states – which were represented in part by NGOs) with a detailed and substantive study and report is telling.

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[108] Male' Declaration on the Human Dimension of Global Climate Change, Nov. 14, 2007, *available at* http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf.

[109] U.N. Human Rights Council Res. 7/23, *in* U.N. Human Rights Council, Report of the Human Rights Council on its Seventh Session, U.N. Doc. A/HRC/7/78 (July 14, 2008) at 65. The resolution had 78 co-sponsors.

[110] OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) [hereinafter OHCHR Report].

[111] Id. at ¶¶ 45-47.

[112] Id. at ¶¶ 48-50.

[113] Id. at ¶¶ 51-54.

[114] Id. at ¶¶ 55-60.

[115] Id. at ¶ 70.

iv. World Heritage Sites

Under the Convention Concerning the Protection of The World Cultural and Natural Heritage non-state actors are able to petition the United Nations Educational, Scientific and Cultural Organization (UNESCO), to consider the state of World Heritage Sites that are threatened.[116] In 2005, a series of NGO petitions to UNESCO sought to have World Heritage Sites included on the List of World Heritage in Danger because of the effects of climate change.[117] The petitions addressed the need to adapt to climate impacts anticipated at these important cultural and natural sites and the need to mitigate GHG emissions as a continuing threat to the sites.

When UNESCO's World Heritage Committee (WHC) met in the summer of 2005, it took note of these petitions and the potential impact of climate change on World Heritage Sites.[118]

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[116] United Nations Educational, Scientific and Cultural Organization (UNESCO), "Convention Concerning the Protection of the World Cultural and Natural Heritage" 27 U.S.T. 37; TIAS No. 8226 (1972), adopted at the Seventeenth Session of the General Conference of the United Nations Educational, Scientific and Cultural Organization, Paris (Oct. 17-Nov. 21, 1972).

[117] Petitions were filed concerning Sagarmatha National Park (Nepal), Huascaran National Park (Peru), the Great Barrier Reef (Australia) and the Belize Barrier Reef Reserve System (Belize). UNESCO World Heritage Committee Twenty-ninth Session, Durban, South Africa, "Decisions of the 29th Session of the World Heritage Committee (Durban, 2005)" (UN Doc. WHC-05/29.COM/22) at 36-37, Decision 29 COM 7B.a "Examination of the State of Conservation of World Heritage Properties: State of Conservation Reports of Properties Inscribed on the World Heritage List" (July 10-17, 2005) [hereinafter UNESCO WHC 2005]. A later petition was filed concerning the Waterton-Glacier International Peace Park (Canada and the United States). UNESCO World Heritage Committee Thirtieth Session, Vilnius, Lithuania, "Decisions Adopted at the 30th Session of the World Heritage Committee (Vilnius, 2006)" (UN Doc WHC-06/30.COM/19) at 7-8, Decision 30 COM 7.1 "Issues Related to the State of Conservation of World Heritage Properties: The Impacts of Climate Change on World Heritage Properties" (July 8-16, 2006) [hereinafter UNESCO WHC 2006].

[118] UNESCO WHC 2005, *supra* note 116, at 36-37.

The Committee also asked the World Heritage Centre to work with interested states 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."[119] The working group was charged with preparing a joint report on "Predicting and managing the effects of climate change on World Heritage" for review by the Committee.[120] The Committee also "encouraged" states parties to "highlight the threats posed by climate change to natural and cultural heritage," and "start identifying the properties under most serious threats," so that management actions could be taken, and it "encourage[ed] UNESCO to do its utmost to ensure that the results about climate change affecting World Heritage properties reach the public at large, in order to mobilize political support for activities against climate change."[121]

These steps may seem limited, but they served, at least, to call climate change to the attention of those concerned with culturally and ecologically important sites. The move also got the attention of the United States administration, which had been active at the time in shutting down, or at least avoiding, climate mitigation and adaptation commitments internationally and domestically. The US joined the World Heritage Committee in late 2005 and began working to oppose a strong response to the petitions.[122] The US issued a position paper questioning climate science, opposing the listing of a site as being "in danger" without the consent of the state in which it is located, and arguing that "There is no compelling argument for the Committee to address the issue of global climate change-- especially at the risk of losing

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[119] Id.

[120] Id.

[121] Id.

[122] Climate Justice Programme, "US Government to oppose World Heritage action on climate change" (Mar. 15, 2006) available at http://www.climatelaw.org/cases/country/intl/unescoglacier/2006Mar15/.

the unified spirit and camaraderie that has become synonymous with World Heritage."[123]

At its next meeting in the summer of 2006, the World Heritage Committee stepped back from strong commitments to work on climate mitigation and did not link state energy and climate policies to effects on World Heritage Sites. Instead, it requested that the World Heritage Centre "prepare a policy document on the impacts of climate change on World Heritage properties" to be discussed at the next meeting of States Parties in 2007.[124] The Committee asked specifically that the document address "legal questions on the role of the World Heritage Convention with regard to suitable responses to Climate Change" and "alternative mechanisms, other than the List of World Heritage in Danger, to address concerns of international implication, such as climatic change."[125]

The policy statement on "legal questions" prepared at the Committee's behest contains no elaboration of states parties' obligations to pursue energy and climate policies and measures in order to protect World Heritage Sites.[126] In a sense, this missed an opportunity to make the link implicit in NGO petitions to the Committee and to clarify to the Convention's original call for parties "to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory."[127] The policy statement asserts only that:

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[123] US Position Paper, Position of the United States of America on Climate Change with Respect to the World Heritage Convention and World Heritage Sites, (2006) available at www.elaw.org/system/files/u.s.climate.US+position+paper.doc.

[124] UNESCO WHC 2006, *supra* note 116, at 7-8

[125] Id.

[126] United Nations Educational, Scientific and Cultural Organization (UNESCO), World Heritage Committee 31st Sess., (May 23, 2007), UN Doc WHC.07/31.COM/7.1, at 6-10 (2007).

[127] United Nations Educational, Scientific and Cultural Organization (UNESCO), "Convention Concerning the Protection of the World Cultural and

> In the context of climate change, this provision will be the basis for States to ensure that they are doing all that they can "to the utmost of their resources, which they may be able to obtain" to address the causes and impacts of climate change, in relation to the potential and identified effects of climate change (and other threats) on World Heritage properties situated on their territories.[128]

The policy statement does clarify that climate effects should be considered "serious and specific dangers" to World Heritage sites under Article 11 (4) of the Convention even though the article "does not specifically refer to climate change."[129]

The World Heritage Committee endorsed the policy statement and authorized work on changes to its Operational Guidelines to reflect the link between climate and threats to World Heritage Sites.[130] Those changes were later adopted by the Committee.[131] 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

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Natural Heritage" 27 U.S.T. 37; TIAS No. 8226 (1972), Art. 4, adopted at the Seventeenth Session of the General Conference of the United Nations Educational, Scientific and Cultural Organization, Paris (Oct. 17-Nov. 21, 1972).

[128] United Nations Educational, Scientific and Cultural Organization (UNESCO), World Heritage Committee 31st Sess., (May 23, 2007), UN Doc WHC.07/31.COM/7.1, at 6-10 (2007a).

[129] Id.

[130] United Nations Educational, Scientific and Cultural Organization (UNESCO), World Heritage Committee 31st Sess., (Jun. 23-Jul. 2, 2007), UN Doc WHC-07/31.COM/24, at 4-5 (2007).

[131] United Nations Educational, Scientific and Cultural Organization (UNESCO), World Heritage Committee, 31st Sess., (Mar. 31, 2009), WHC-08/32.COM/24Rev at 40-41, Decision 32 COM 7A.32, (Jul. 2-10, 2008).

Heritage in Danger.[132] Again, this example of a non-state actor petition process leading to investigation and reform by intergovernmental bodies can serve as a model for institutions designed specifically to deal with climate.

v. Convention on Biological Diversity

In 2009, a Canada-based NGO, the Action Group on Erosion Technology and Concentration (ETC Group), submitted a letter to the Convention on Biological Diversity (CBD) Bureau alleging that Germany had breached CBD decisions on ocean fertilization.[133] The fertilization experiment had apparently been conducted by Germany's Ministry of Science over the objection of the German Minister of Environment and following a "detailed discussion in the German Government as well as in the German Parliament."[134] The experiment was conducted outside of coastal areas in contravention of a CBD Conference of the Parties decision.[135] The Bureau Executive Director reported that it had no procedural jurisdiction to address an "issue of implementation of COP decisions" and the Bureau concluded that "the responsibility to implement COP decision lay with the Parties at the national level."[136] While the Bureau directed the chair to send a letter to Germany expressing its "concerns," it also decided that any direct response to the NGO that had complained of the ocean seeding experiment must come from Germany.[137]

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[132] 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).

[133] Minutes of the Meeting of the Bureau of the Conference of the Parties to the Convention on Biological Diversity Held in Nairobi on 13 February 2009, U.N. Doc. UNEP/CBD/COP/Bur/2009/1/3 (Feb. 19, 2009) at ¶34.

[134] Id. at ¶35.

[135] Id. at ¶¶35-36.

[136] Id. at ¶37.

[137] Id at ¶38.

This case offers an example of an international environmental secretariat responding to an NGO's compliance concern despite the lack of a formal process for non-state access to the compliance process. It resulted in little more than a letter of concern to the party alleged to be out of compliance, but this was because the Bureau determined it was without jurisdiction – not because the complaining NGO was found to be without standing. While this level of response is entirely within the discretion of the international body – discretion unlikely to be exercised where a lack of interest, an over-crowded docket the objection of a state party serve to impede[138] – the case illustrates a relatively benign procedure that can have a positive impact on compliance matters. Absent the NGO letter, the matter may not have reached the CBD Bureau in the first place.

E. Domestic Institutions

Non-state actors have also had success in litigating climate issues in domestic forums under domestic law. These cases, or their corollaries, might have a strong influence on encouraging a state to comply with international norms even where the basis for the claim is grounded in domestic law. In 2006, for example, 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,[139] held that that the procedures sought by FOE should not be seen as an "extraterritorial application of NEPA" because the decisions by the agencies "purportedly significantly affect the domestic environment."[140] The case was later settled by an incoming

[138] It is noteworthy that the German delegate did not object to the Bureau's consideration of this matter, and even left the room while other Bureau members discussed the NGO letter and their response. Id. at ¶36.
[139] Friends of the Earth v. Mosbacher, 488 F. Supp. 2d 889 (2007).
[140] Id., 488 F. Supp. at 908.

Obama administration, which agreed that the agencies would conduct NEPA analysis, before it could proceed further,[141] but the case serves as an example of the utility of domestic institutions in addressing international environmental norms that have been embraced at the national level. Climate commitments that are effected by means of national legislation could be similarly enforced by non-state actors through domestic tribunals.

Given the potential importance of domestic enforcement, a post-Kyoto climate regime might look to mechanisms to encourage access to local tribunals through redress provisions or through cooperative support for citizen suits.

F. Conclusion

Much has been made of the promise of transparency in recent climate commitments, and for good reason. The breakthrough on monitoring, reporting, and verification negotiated in Copenhagen and cemented in Cancun is a critical means to help assure the integrity of any continuing climate commitments and has appropriately been celebrated as strengthening the regime that remains under construction. But transparency is only one step in service of meaningful compliance. Where monitoring and reporting identify performance failures, the ability of interested parties to pursue compliance responses or regime adjustment strengthens regime effectiveness.

Developments in the climate change regime from Rio in 1992 through Cancun in 2010 show that international climate law is being constructed in a manner that engages non-state actors and recognizes the importance of openness to critical constituencies. But it also constrains the non-state role in important respects. Building a legal regime that offers information access but limits or denies access to compliance and enforcement mechanisms relegates important constituencies to the role of relatively passive

[141] *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

recipients of data rather than participants in assuring the success of a climate change framework.

Non-state actors are proven enforcers – sometimes more effective than states. The climate cases brought by non-state actors to non-climate institutions demonstrate this point. Leaving the public without standing to push for compliance within any formal mechanisms misses a critical opportunity to promote compliance. And the mechanisms for non-state access to compliance are already modelled within multilateral environmental agreements ranging from Aarhus to NAFTA.