International Tribunals as Climate Institutions? Strengthening Access to Climate Justice*

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Abstract

This paper explores international redress mechanisms for non-state actors concerned about state failure to embrace policies and measures for climate change mitigation and adaptation. It looks beyond judicial tribunals to survey international institutions whose work is climate relevant (including financial institutions, human rights bodies, and economic cooperation and trade organizations). The paper finds that non-state actors have been creative in bringing climate concerns to these institutions, and the impact of these efforts can be profound. But it concludes that institutional and procedural frameworks constrain access to justice in climate cases and that existing mechanisms do not offer comprehensive opportunities for redress. The paper argues that non-state actors should continue to press existing institutions to expand access to climate justice even as citizen redress mechanisms are pursued within international climate negotiations so that they can be tailored to state climate commitments and coordinated with state-led facilitation and enforcement.

1 Introduction

Public access to mechanisms for redressing environmental harms and for monitoring and enforcing environmental commitments has a strong positive impact on implementation and compliance.¹ These

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“access to justice” mechanisms also fulfill positive and normative obligations of states to engage citizens as stakeholders in matters affecting their lives and well-being. This obligation is particularly acute in democratic states, but even states that do not embrace the institutions or rhetoric of democracy acknowledge the importance of engaging the public in environmental matters (Moorman and Zhang 2007).

Despite instrumental value, positive obligations, and normative responsibilities, international climate institutions offer only limited opportunities for access to justice. The dominant climate regime at present – and the only regime that sets atmospheric Greenhouse Gas (GHG) reduction targets and encourages domestic policies and measure to achieve those targets, the Kyoto Protocol – offers no provision for non-state actors to initiate compliance matters through either the enforcement or facilitative mechanisms. “Competent” NGOs can, after a compliance matter has been initiated, supplement the factual and technical record with “relevant,” and non-state actors can support some of the implementation mechanisms under Kyoto. But there is no means to bring a complaint or even ask the UNFCCC Secretariat or Meetings of the Parties to consider compliance failures under the agreement.

Although non-state actors lack any Kyoto-based standing to bring compliance and enforcement cases, NGOs have turned to alternative, often creative, channels for seeking climate justice. This includes the World Bank’s Inspection Panel, UNESCO’s framework for protecting World Heritage Sites, and the complaint mechanisms of human rights bodies. Unfortunately these alternative forums, while important means of redress within their areas of competence, are of limited utility in addressing the broader problem of global climate change. Relief is always limited, always piecemeal, and often foreclosed.

This paper reviews the cases brought before these alternative international forums and highlights advances and limitations. It finds that their impact can be profound, and it is important that these efforts should continue, but they do not offer comprehensive redress for those concerned about state efforts to mitigate and adapt to climate change. The paper argues that meaningful public access to climate justice is more likely to be secured within the context of a negotiated, comprehensive international climate agreement where citizen redress mechanisms can be tailored to state climate commitments and coordinated with state-led facilitation and enforcement.

Part 2 of the paper notes the growing role of non-state actors in international environmental decision-making and discusses the unique public interest in policies and measures relating to climate. Part 3 examines briefly opportunities for access through the existing compliance mechanism under Kyoto, and Part 4 reviews some of the important alternative international tribunals that NGOs have used to address climate concerns. Part 5 offers some preliminary thoughts about new approaches to climate justice that

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1 This is true both at the domestic level (Tobe and Battle 1995; May 2003), and the international level (Charnovitz 2006; Haas 1989; Hunter 2008; Dannenmaier 2010), although this paper is concerned principally with the latter.
might be considered in continuing negotiations for the next generation of climate commitments beyond Kyoto, and Part 6 offers a few concluding thoughts.

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2 Asserting a Right to Participate

A Rising Non-State Role

The state’s sovereign role in international law emerged as a fundamental organizing principle of international law from a history of territorial power projected onto an international stage. Following the Peace of Westphalia of 1648, and until quite recently, the conception of state preeminence in international affairs seemed unassailable through force of logic and irreversible through force of arms. Sovereignty was contested within state borders – first among small groups of elites and later among larger populations. By the close of the Twentieth Century the idea that sovereignty rested originally with a state’s citizens and that governments found their legitimacy in the consent of the governed had taken hold. The rise of democratic nations in much of the world (Freedom House 2010) seemed to provide evidence that this idea was being put into practice. While no democratic system is a flawless paradigm of popular sovereignty, most rest to some extent on that ideal.

Yet sovereignty projected beyond state borders remains unified, not diffuse; singular, not popular. Decisions about who will lead the state are usually settled through elections, but the head of state retains plenary authority in extraterritorial matters. Individuals may seek to inform or advise their state on international matters, and some states offer mechanisms for their citizens to become informed of, even engaged in, the conduct of international affairs. But historically citizens do not direct or supplant the state.

This role of states as exclusive actors in international law is increasingly contested (Raustiala 1997; Dannenmaier 2010). The challenge comes both from efforts of non-state actors to engage directly in

2 Some would trace this “birth” of modern conceptions of sovereignty to the Peace of Augsburg of 1555, which established the principle cuius regio, eius religio.
3 This is not the case in some parliamentary democracies, such as Britain, where the head of state and head of government are not the same person. But even then the elected head of government represents the state in international negotiations and lawmakers.
formal multilateral lawmaking processes and from the increasing role of non-state actors in shaping, even making, law through less formal means. Some have lamented the rising role of non-state actors in international legal processes (Bolton 2000; Kamminga 2005), and even some who appear comfortable with NGO participation warn “that it is not advisable to entitle [NGOs] to trigger [dispute processes] directly or be involved in the procedure on a formal basis.” (Ehrmann 2002). Others respond that providing for non-state participation in international processes serves instrumental purposes and fulfills underlying ideals of democracy and popular sovereignty (Spiro 1995; Dannenmaier 1997; Charnovitz 2006; Hunter 2008). But against this background of theoretical and policy debate, the role of non-state actors in international law is increasing exponentially (Charnovitz 2006; Dannenmaier 2010).

**The Public Interest in Climate Change**

Whatever the merits of the state prerogative to monopolize lawmaking at the international level – and the countervailing assertion of non-state actor rights – a call for greater public access to climate decision-making assert a uniquely persuasive claim. With climate, we are dealing with a seminal and singularly global issue that defies traditional notions of territorial sovereignty. Unlike decisions about trade, migration, strategic arms, investment policy, and other subjects of international law, the global climate system\(^4\) is a common and shared resource that cannot be fenced, captured, or occupied. It is the ultimate common. It is both beyond the jurisdiction of every state and within the jurisdiction of every state. And unlike Las Vegas, what happens there cannot stay there. Because the climate system is a common concern and a common property, and because changes to the system can have potentially catastrophic effects on populations regardless of state boundaries, the justifications for a non-state role in making and enforcing international law are exceedingly strong.

3 **Kyoto Compliance Mechanism**

Under the Kyoto Protocol, NGOs cannot file complaints, initiate investigations, challenge compliance data they believe to be incomplete or inaccurate, or request compliance documentation beyond *pro forma* submissions (Kyoto Protocol Rules of Procedure 2005; Driesen, 1998). Instead the Protocol provides only 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

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\(^4\) “The climate system is the highly complex system consisting of five major components: the atmosphere, the hydrosphere, the cryosphere, the land surface and the biosphere, and the interactions between them. The climate system evolves in time under the influence of its own internal dynamics and because of external forcings such as volcanic eruptions, solar variations and anthropogenic forcings such as the changing composition of the atmosphere and land use change.” (IPCC FAR, 2006)
state party. (Decision 27/CMP.1 2005, §VIII, ¶4; Kyoto Protocol Rules of Procedure 2005, Rule 20). Non-state actors may also support monitoring and implementation of Emission Trading, Joint Implementation (JI) and the Clean Development Mechanisms (CDM) (Kalas and Herwig 2000, 96-97) because the nature of these mechanisms relies on their partnership and participation. The ability to make submissions on pending questions of implementation is laudable; 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 – even where those procedures are designed to be cooperative in nature. 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, and the ability of citizens to actively police them is foreclosed. Relying solely on states to police those mechanisms misses an opportunity.

4 Alternative Climate Tribunals

NGOs have been creative in pursuing climate justice through a range of international dispute resolution tribunals. The following discussion highlights some of the more prominent examples, but it is not meant to be exhaustive.

*International Financial Institutions (energy financing)*

International financial institutions have a great deal of potential to affect GHG emissions and the creation and preservation of carbon sinks because they finance development projects throughout the world. Financial institutions can leverage their investments even if they are only providing partial financing or seed money for a project. They can encourage investments that reduce carbon footprints, such as renewable energy facilities, conservation practices, energy efficient technology, sustainable urban development, and mass transportation projects, among other things. Banks can also discourage, condition, or even withhold financing for inefficient projects with a large carbon footprint such as timber and fossil fuel extraction. Unfortunately, the record of international financial institutions has been mixed in this regard (Herbertson and Hunter 2007; Richardson 2009). At the World Bank, for example, climate change is now seen as a development concern and climate impact must be considered as part of the Environmental Assessment process (World Bank Operational Policy 4.1 1999), and the bank has increased its renewable energy portfolio (Wang 2007). But this has not resulted in a fundamental change

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5 Kyoto compliance mechanisms emphasize both facilitation and enforcement.
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. (Ferrey 2010; Takacs 2009; Bretton Woods Project 2010; Inter Press Service 2010). As NGOs press for improvements in lending policies on the front end, the ability to of non-state actors to review, challenge, and dispute lending practices and priorities becomes increasingly important.

The World Bank established an institutional mechanism for NGOs to challenge bank lending decisions in 1993 (World Bank Resolution No. 93-10 1993; Bradlow 1994). 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” (World Bank Resolution No. 93-10 1993, ¶12). Inspection Panel 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 (World Bank Resolution No. 93-10 1993, ¶¶ 16-23).

In April of 2010, a request for inspection was filed by 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). The affected parties cited a range of concerns with the Eskom project, including health impacts, water demand and scarcity, cultural impacts, and involuntary resettlement – but they also expressed 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. World Bank support for the project would be in contravention of its own criteria for support to coal plants. (World Bank Inspection Panel Request 2010 at ¶¶ 26-28). The Inspection Panel recently concluded that the request meets eligibility requirements and has recommended an investigation (World Bank Inspection Panel Report and Recommendation 2010). The Panel’s Chair, in a statement to the Bank’s board, explained:

With respect to climate change, the Panel would be guided by OP 4.00 - Piloting the Use of Borrower Systems. This policy calls 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”. There is also a separate provision of OP 4.00 that addresses “mitigation measures” and other actions to prevent or minimize adverse impacts. 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 mitigation actions contained in the Project to address these concerns. The Panel would not, however, 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”

(World Bank Inspection Panel, Statement of Mr. Roberto Lenton, 2010).

The Inspection Panel’s eligibility finding is encouraging in recommending the review of some climate aspects of the project, but discouraging in the limited scope of review. Limiting a review to question of Bank policy is understandable (that is the panel’s job, after all), but the Chair’s statement asserts that the Bank’s “Strategic Framework” for climate change is not an enforceable Bank policy. The Eskom case also highlights an important limitation of the Inspection Panel, whose mandate is limited to hearing complaints from parties “in the territory of the borrower.” Climate change is a global phenomenon, and the impact of Bank projects (especially their cumulative impact) will be felt well beyond the borders of a project country. The projects are also being funded by populations beyond the borders of a project country. Yet the Inspection Panel, charged with investigating whether “rights or interests have been or are likely to be directly affected by an action or omission of the Bank” cannot act on behalf of those who may be paying for and at the same time suffering from the Bank’s acts or omissions.6

International Economic Cooperation Institutions

International Economic Cooperation Organizations are informal intergovernmental institutions that seek to advance economic cooperation, trade, and development on the basis of some geographic, political, or economic commonalities or common interests. Examples include the Economic Cooperation Organization (ECO) a forum for seven members from Central Asia (Treaty of Izmir 1977); Asia-Pacific Economic Cooperation (APEC) a forum for 21 Pacific Rim countries (Canberra Ministerial Joint Statement 1989); Latin American Economic System, (SELA), a forum for 27 Latin American and Caribbean States (Panama Convention 1975); and the Organization for Economic Cooperation and Development (OECD), a forum for 32 members from various regions (Convention on the Organisation

6 It should be noted that some challenges to international financial institution projects play out on a national level, either because states fund and control IFIs (the United States, for example, voted against the Eskom project) or because states control and fund their own international cooperation and finance mechanisms. For example, the United States Overseas Private Investment Corporation and (OPIC) and Ex-Im Bank have been challenged to conduct environmental impact assessment of projects they finance, and this could have implications for climate impact assessment. See, e.g., Friends of the Earth v. Mosbacher, 488 F. Supp. 2d 889; 2007 U.S. Dist. LEXIS 24268 (2007)(denying defendants’ motion for summary judgment arguing lack of standing).

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for Economic Co-operation and Development 1960). These organizations 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” (OECD Guidelines 2008). The Guidelines call for enterprises to focus on issues of environmental management and performance, and to operate with some degree of transparency. The guidelines call for enterprises 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 life cycle” (OECD Guidelines 2008) and more generally to “minimize aspects of their activity that may have negative impacts on the environment” (Environment and the OECD Guidelines 2004).

While goals such as these are often simply aspirational, the OECD backs its Guidelines with a complaint process that non-state actors can use as a means of calling attention to failings and promoting compliance. At least one NGO has used the Guidelines and complaint process in the climate context. In 2007, Germanwatch filed a complaint against Germany-based Volkswagen with the OECD. The complaint alleged that Volkswagen was emblematic of the transport sector “responsible for 20 to 28 percent of worldwide CO₂ emissions” (Germanwatch Complaint 2007, 4) and that the company had pursued technology and a market strategy destined to increase emissions from its products. The group outlined fifteen separate violations of OECD Guidelines (at 7-25), including provisions regarding adequate environmental management (at 7, 14), transparency (at 10-12), and deceptive marketing (13-14), and the responsibility of industry to “contribute to the development of environmentally meaningful and economically efficient public policy” (at 22). Germanwatch asked that the National Contact Point for Germany undertake public mediation 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” (OECD 2009a) 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 it made the case that individual corporate decisions matter. It may also have provided some useful input, even if indirectly, into the OECD’s broader program of study and cooperation on climate change (OECD 2009b)

7 “The National Contact Point (NCP) is a government office responsible for encouraging observance of the Guidelines in a national context and for ensuring that the Guidelines are well known and understood by the national business community and by other interested parties.” (OECD 2010)
International Trade Institutions

International trade agreements may not seem obvious candidates for addressing climate challenges, but trading rules aimed at reducing tariffs and removing non-tariff barriers to trade can potentially constrain national climate policies and measures. Under World Trade Organization (WTO) agreements, the interest in moving goods across borders is primary, and state environmental policies have been found subordinate to the goal of preferential market access. Exceptions to this priority can be made “where restrictions are necessary to protect human, animal or plant life or health” (GATT 1947, Art. XX(b)) and where restrictions “relat[e] to the conservation of exhaustible natural resources” (GATT 1947, Art. XX(g)). But dispute panels have limited the scope of these exceptions. Landmark decisions in the Tuna-Dolphin case (WTO 1993; WTO 1994) and the Shrimp-Turtle case, (WTO 1998; WTO 2001) confirmed that the exceptions of Article XX will be read narrowly by dispute panels that see trade as a priority.

The question of reconciling trade regimes and climate initiatives is beyond the scope of this paper, but a growing literature on the subject makes it clear that accommodations and reform are necessary (Werksman 1999; Green 2005; Frankel 2005; Carlarne 2006; Pauwelyn 2007, Nanda 2008, Eichenberg 2010, Brink 2010). Approaches to climate policy are in many respects multilateral (avoiding the problem of unilateral state action on environmental issues which has been at the heart of much of the trade/environment conflict) and perhaps reform at the WTO can parallel work on global climate commitments. The prospects for reconciliation depend on a shift in priorities within an international market community that has long had a trade-first myopia. Some hope for a shift can be found in a recent joint report by WTO and the United Nations Environment Programme concluding that “the general approach under the WTO rules has been to acknowledge that some degree of trade restrictions may be necessary to achieve certain policy options as long as a number of carefully crafted conditions are respected” (WTO-UNEP 2009, 89).

But even where substantive trade rules are adapted to account for governmental actions on climate, the WTO remains closed to non-state actors as initiators of, and full participants in, dispute resolution (Stilwell and Marceau 2001; Trachtman and Moremen 2003; Fukunaga 2009). There is some openness in the practice of accepting NGO amicus briefs (WTO 1998), and multinational corporations are certainly “de facto complainants before the WTO” (Alvarez 2009, 546). Yet this “indirect, unofficial and largely ad hoc” participation (Dunoff 1998, 434) remains not only lopsided in the interests presented to dispute panels but is also depends entirely on the willingness of a state party to proceed (a willingness necessarily informed by broader political interests unrelated to the issue in dispute).

Fundamental reform in WTO procedures would be needed to allow non-state actors a greater, direct, role in disputes. Procedures might be adapted, for example, to permit a public interest petition challenging a government’s support for domestic GHG-intensive industries, such as coal or oil, as a violation of the
1994 Agreement on Subsidies and Countervailing Measures (WTO 1994). Some might fear that the WTO system could become overwhelmed by public interest petitions of this nature. But the importance of trade to any long-term effort to address climate change warrants some effort to adapt the trade dispute system to hear directly the concerns of non-state actors.

At least one regional trade agreement, the North American Free Trade Agreement (NAFTA 1993), has established a relatively robust system that gives NGOs direct access to policymaking processes and to a petition procedure where there is a concern over a state party’s enforcement of its environmental laws (NAAEC 1993). The NAFTA Commission for Environmental Cooperation, created under a side agreement to NAFTA, supports both collaborative inter-party measures to address trade-environment issues and manages the citizen petition process.

**Human Rights Bodies**

Others have written at length on how climate change might be addressed through human rights bodies (Abate 2007; Aminzadeh 2007; Atapattu 2008; Stephens 2010), including at least one participating in the UNITAR/Yale Conference (Jodoin 2010), so the issue will not be explored in depth here. Nevertheless, it should be noted that human rights institutions have several advantages as potential forums for addressing climate. First, the law itself is sufficiently broad in scope to embrace the range of injuries that are likely to result from changing climate, both in the short and long term. Whether framed within the rubric of “civil and political rights” or “economic, social, and cultural rights,” the kinds of environmental harms, public health impacts, and even threats to life that can be anticipated from climate change can potentially be redressed. Given the complexities of climate impacts, and the relatively significant changes that must be made to national policies to address those impacts, an argument can be made that the economic, social, and cultural rights approach is favorable because it allows for progressive implementation by states and it provides more flexibility in framing liability determinations and remedies.

A second advantage of human rights instruments is that they have already been adopted (at least key instruments) by all major GHG emitters. While all states are not party to all human rights commitments, the basic frameworks contained in the Universal Declaration of Human Rights and even some regional agreements, such as the American Declaration of the Rights and Duties of Man, address fundamental issues that could form the basis for claims of right.

Finally, human rights institutions have the strength of expertise and the advantage of experience in addressing complex legal concerns and recalcitrant states. Unlike the environmental field, where specialized international institutions for adjudicating rights are still on the drawing board, human rights bodies are up and running.
There are, of course, drawbacks to relying on human rights institutions. The most obvious is that they are already overburdened and they lack the specific expertise to address complex climate science and energy policy issues. In addition, many human rights institutions are already struggling to work with state counterparts to fulfill obligations at the core of their missions. What capacity there may be to take on climate issues is an open question.

The most prominent recent example of a climate-based human rights claim is the petition by Circumpolar Inuit Conference to the Inter-American Commission for Human Rights (Inuit Petition 2005).8 The petition sought relief against the United States for failure to pursue a rational domestic energy and climate policy. Unfortunately, the Commission rejected the petition – and it did so with no public record which would explain the decision on the merits. After quietly passing on the petition, the Commission held an informal hearing at OAS headquarters in March 2007 on the more general topic of how climate might be addressed within the Inter-American system. The Inuit petitioners and counsel offered statements (Earthjustice 2007). To date, no findings or report has been published by the Commission on the basis of that hearing.9

World Heritage Sites

States parties to the Convention Concerning the Protection of The World Cultural and Natural Heritage committed to ensure “the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage” and to “do all [they] can to this end, to the utmost of [their] own resources …” (UNESCO 1972). In 2005, a series of NGO petitions to the United Nations Educational, Scientific and Cultural Organization (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 effects of climate change.10 The petitions addressed both the need to adapt to climate impacts anticipated at these important cultural and natural sites and also 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 (UNESCO 2005). The

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8 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.

9 This is based on a review of the Commission’s web site and public records. Further follow-up is planned by the author.

10 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 2005). A later petition was filed concerning the Waterton-Glacier International Peace Park (Canada and the United States) (UNESCO 2006).
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” (UNESCO 2005). 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 (UNESCO 2005). 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” (UNESCO 2005).

These steps may seem limited, but they served, at least, to get climate change onto the radar of those concerned with some of the most culturally and ecologically important sites in the world – sites that often attract the kind of media attention that can help build public interest and political will. 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 (Climate Justice Programme 2006). 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 the unified spirit and camaraderie that has become synonymous with World Heritage” (US Position Paper 2006).

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 (UNESCO 2006). 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” (UNESCO 2006).

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 (UNESCO 2007a). 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” (UNESCO 1972). The policy statement asserts only that:

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.

(UNESCO 2007a). 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” (UNESCO 2007a).

The World Heritage Committee endorsed the policy statement and authorized work on changes to the its Operational Guidelines to reflect the link between climate and threats to World Heritage Sites (UNESCO 2007b). Those changes were later adopted by the Committee (UNESCO 2008). 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 (UNESCO 2007b). 11

**Liability Claims**

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 Agriculture Law Center 2010) – and the trend appears to be growing (Hunter 2007). The question remains whether public interest litigation against states or private parties has a realistic chance to gain a foothold at the international level. 12

5 **New Approaches**

As negotiations continue for further commitments for Annex I Parties under the Kyoto Protocol (or any new climate regime) the parties should embrace a more prominent role for non-state actors in monitoring and enforcing compliance mechanisms. Two possible approaches are outlined below. 13

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11 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).
12 This is an area the author is actively exploring, and is one of the reasons for participating in the UNITAR/Yale Conference.
13 The author plans to expand this section after further research and consultation with participants in the UNITAR/Yale Conference.
Citizen Submissions to the Compliance Committee

The Compliance Committee should be authorized to receive submissions directly from non-state actors concerning compliance matters within the scope of Kyoto and any successor agreement. At a minimum this authority should extend to the informal mechanism available under the Montreal Protocol, under which the Secretariat can initiate a compliance based on information provided by NGOs (Ehrmann 2002, 397). But giving citizens (through NGOs or otherwise) standing to make submissions and trigger a more formal inquiry would be a far stronger mechanism.

Kyoto already embraces (as a successor likely would) a dual approach to compliance which features both facilitation and enforcement tracks that can serve to encourage and support good faith efforts while calling out repeated laggards. This reduces the danger that a non-state triggered mechanism would become a tool for harassment or nuisance complaints and increases the likelihood that citizen-initiated concerns could be addressed through the full range of cooperative mechanisms designed by the parties.

Allowing citizen submissions has proven a successful tool in the context of the North American Free Trade Agreement’s (NAFTA) Commission for Environmental Cooperation (CEC), which provides an opportunity for citizens within any of the trading partners to complain that their government is failing “to effectively enforce” its environmental laws (NAAEC 1992, Art. 14-15). The agreement also provides for investigation and reporting on any other non-enforcement matter within the CEC’s annual work plan and NGOs have used this provision to highlight non-controversial matters calling for regional cooperation (NAAEC 1992, Art. 13; CEC 1995).

A Public Advisory Committee on Compliance

The Compliance Committee should also consider creating a Public Advisory Committee on Compliance that can help promote Kyoto and successor agreement compliance goals, interact with non-state actors on issues of compliance, and help to support any citizen submission mechanism that may be created.

Several good examples of public advisory committees exist, and again, the NAFTA environmental side agreement offers a useful model. The parties created a Joint Public Advisory Committee (JPAC) to advise the CEC Council (comprised of the three senior environmental officials from the three NAFTA parties) as well as the CEC Secretariat (CEC 2005). JPAC is comprised of fifteen members, five from each of the three NAFTA parties, appointed by the head of government from each state. JPAC’s access to decision-makers and its ability to serve as an intermediary for the public has been notable:

Because of its formal and institutionalized role, and the financial and logistical support offered to it by the CEC Secretariat, the JPAC has been in a position not only to present the ideas of its own members to the CEC Council, but also to serve as a ‘sounding board’ of sorts for members of the broader public, who are often invited to attend JPAC meetings (held throughout the region) and engage its members.
6 Conclusion

Two truths emerge from a review of non-state actors’ efforts to address climate change concerns through international tribunals. The first affirms the intuitive idea that climate policy touches and concerns the work of a very wide range of international legal and policy regimes and institutions. A number of institutions in the existing international legal and political system – from trade institutions to human rights institutions – work on issues that are climate relevant. To a large extent, these institutions are recognizing the linkages and beginning to formulate responses, and this development is encouraging.

The second truth is that non-state actors are actively testing the bounds of their access rights across a range of international institutions. The creativity and persistence of international public interest advocates has helped many institutions recognize their responsibilities in the area of climate change, and begin to fulfill those responsibilities. The creative work of public interest advocates has opened doors to climate justice where only walls were apparent in the past.

State negotiators and participants in the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) should take access to climate justice seriously in continuing negotiations for the next generation of climate commitments beyond Kyoto. At present, those negotiations do not reveal a serious commitment to give the public a prominent role in monitoring and enforcing compliance mechanisms. Such a role could be a critical element of the success of any new climate commitment.

Because this is a draft paper intended for discussion, further conclusions regarding mechanisms for access to climate justice and recommendations for future study and action will await the opportunity to learn more about the work of others in this field, to present the preliminary ideas in this paper, and to discuss broader issues of climate institutions with participants in the 2nd Global Conference on Environmental Governance and Democracy.

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