

# Environmental Law

GILBERT M. BANKOBEZA, SUSAN BINIAZ, CLARE BREIDENICH,  
MELANNE ANDROMECCA CIVIC, GABRIEL E. ECKSTEIN, DAVID FAVRE, PAUL E. HAGEN,  
TERESA HOBGOOD, KARISSA TAYLOR KOVNER, GREGORY F. MAGGIO, HOWARD MANN,  
DARLENE A. PEARSON, MARGARET F. SPRING, KATHERINE E. MILLS,  
DAVID W. WAGNER, AND JOHN BARLOW WEINER\*

Noteworthy international activity relating to the environment occurred in a wide variety of fora in 2000. This chapter provides brief updates on some of the most significant developments. Though by no means a comprehensive review, the chapter reflects the wide sweep of issues and large number of entities now involved in the development of international environmental law, at the start of this new century. It also reflects how critical and complex this international work is, and how much remains to be done.

---

\*Any views or opinions expressed in this text are those of the authors in their personal capacity, and do not represent the views of the organizations for which they work. Gilbert Bankobeza is Senior Legal Officer with the Montreal Protocol Secretariat (author of the text on The Montreal Protocol). Susan Biniarz is Assistant Legal Adviser, Oceans, International Environment and Scientific Affairs, U.S. Department of State (co-author of the text on the Kyoto Protocol). Clare Breidenich is Foreign Affairs Officer, Office of Global Change, U.S. Department of State (co-author of the text on the Kyoto Protocol). Melanne Andromecca Civic is Middle East Human Rights Foreign Affairs Officer at the U.S. Department of State and was drafting coordinator for the U.S. negotiating position to the Second World Water Forum (author of the text relating to The Hague Declaration—an advance in the development in international water law and policy and a Program for Action). Gabriel E. Eckstein is Senior Counsel at the American Crop Protection Association, and Director of the International Water Law Project (author of Developments in International Water Law). Professor David Favre is Senior Associate Dean and Professor of Law at Michigan State University in the Detroit College of Law (author of the text on Trade in Endangered Species—Convention on International Trade in Endangered Species (CITES)). Paul E. Hagen is a director of the law firm of Beveridge & Diamond, P.C. (author of the text on the Stockholm Convention on Persistent Organic Pollutants). Teresa Hobgood is Senior Policy Advisor, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State (co-author of the text on the Convention to Combat Desertification). Karissa Taylor Kovner is Director for International Environmental Policy at the Office of the U.S. Trade Representative, Executive Office of the President (author of the text on the World Trade Organization, United States trade policy, Free Trade Area of the Americas, and the Organization for Economic Cooperation Guidelines for Multinational Enterprises). Gregory F. Maggio is an Environmental, Human Rights, and Labor Policy Analyst with the Overseas Private Investment Corporation (author of the text on the World Bank Environmental Guidelines, Regulations and Review Processes). Howard Mann is a practicing attorney in Ottawa, Canada, specializing in international trade, investment, and environmental law (author of the text on Chapter 11 of the North American Free Trade Agreement (NAFTA)). Darlene A. Pearson is Head of Law and Policy Program, Commission for Environmental Cooperation (author of the text on The North American Commission for Environmental Cooperation). Margaret F. Spring is Democratic Counsel for the Oceans and Fisheries Subcommittee for the Senate Committee on Commerce, Science and Transportation (co-author of the Special Focus on International Agreements Concerning Marine

Among the highlights of the year, reflecting the ability of governments to achieve meaningful progress through compromise, were the adoption of the Cartagena Protocol on Biosafety in January in Montreal, Canada, and the conclusion of the negotiations for the pending Stockholm Convention on Persistent Organic Pollutants in December in Johannesburg, South Africa. At the same time, the year saw the suspension of the sixth Conference of the Parties to the Framework Convention on Climate Change, as governments remained unable to find mutually acceptable solutions to the issues hindering entry into force of the Kyoto Protocol.

Meanwhile, governments began making preparatory arrangements for entry into force of the Cartagena Protocol and continued to pursue related efforts in other fora to address biosafety. They also continued to make arrangements for entry into force of the Rotterdam Convention on prior informed consent (PIC) for trade in certain hazardous chemicals and pesticides, and to expand the scope of interim PIC procedures. In meetings of the parties to the Montreal Protocol on Substances that Deplete the Ozone Layer and to the Convention on International Trade in Endangered Species (CITES), governments demonstrated a continued commitment to addressing these two critical areas of environmental cooperation.

A variety of developments occurred concerning marine resource conservation and pollution reduction under the auspices of the United Nations Convention on the Law of the Sea and related regimes and initiatives. Governments addressed illegal, unreported and unregulated fishing, over-fishing of various fish species and threats to whale species due to scientific whaling. They also adopted a protocol to address hazardous and noxious substances (in addition to oil) under the Convention on Oil Pollution Preparedness, Response and Cooperation.

The United States ratified the Convention to Combat Desertification in November demonstrating its support for the Convention's important mission. Governments adopted The Hague Declaration recognizing the critical need to protect and share fresh water resources, and the World Dams Commission released its long-awaited report on dams and development.

At the regional level, the membership of the Organization for Economic Cooperation and Development (OECD) completed negotiations for a revised environmental chapter of the Voluntary OECD Guidelines for Multinational Enterprises, and, in North America, the Commission for Environmental Cooperation continued its efforts to address environmental issues of regional concern.

Of course, significant developments did not occur only in fora primarily concerned with environmental matters. The chapter also reports on: developments in environmental policies and procedures of the World Bank; decisions in investor-state disputes under Chapter 11 of NAFTA, which raise important questions for national environmental regulation; and significant developments relating to the World Trade Organization, the trade policy of the United States and several of its trading partners, and the negotiations for the Free Trade Area of the Americas.

---

Resources and the Marine Environment). Katherine E. Mills is a John A. Knauss Marine Policy Fellow in the Oceans, Atmosphere, and Fisheries Subcommittee for the Senate Committee on Commerce, Science, and Transportation (co-author of the Special Focus on International Agreements Concerning Marine Resources and the Marine Environment). David W. Wagner is an associate with Beveridge & Diamond, P.C. (co-author of the text on the Convention to Combat Desertification). John Barlow Weiner is an associate with Beveridge & Diamond P.C. (chapter editor and author of texts on the Cartagena Protocol on Biosafety and Rotterdam Convention on prior informed consent).

## I. Multilateral Environmental Agreements and Initiatives

### A. BIOSAFETY

#### 1. *The Cartagena Protocol on Biosafety*<sup>1</sup>

As reported in the Environmental Law chapter of the Summer 2000 issue of *The International Lawyer*, in January 2000, the Conference of the Parties (COP) for the Convention on Biological Diversity (CBD) adopted the Cartagena Protocol on Biosafety.<sup>2</sup> The Protocol requires fifty ratifications to enter into force.

##### a. Background

The Protocol addresses safe transfer, handling and use of living modified (i.e., genetically-modified) organisms (LMO). It establishes an Advanced Informed Agreement (AIA) procedure for imports of LMOs intended for release into the environment (e.g., genetically-modified seeds intended for planting). Under the AIA procedures, a Party from which an LMO is exported (Party of export) must provide advance notice to the Party of import. The Party of import may then permit, permit subject to conditions, or deny permission to import the LMO.

In addition, the Protocol imposes obligations for accompanying documentation, which vary depending upon whether the LMO is intended for release into the environment, for use in food or feed, or for contained use such as scientific study. The Protocol also establishes a Biosafety Clearing-House (BCH) to facilitate information exchange regarding regulatory activity. Other obligations addressed by the Protocol are: (1) management of risk associated with use; (2) handling and transboundary movement of LMOs; (3) responding to unintentional transboundary movements of LMOs; (4) protecting confidential information; (5) assistance with capacity building; (6) promoting public awareness; and (7) prevention of illegal transboundary movements of LMOs.<sup>3</sup>

To facilitate implementation of the Protocol after entry into force, the CBD COP established an Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP).

##### b. Activity in 2000

Other than the adoption of the Protocol in January, the most significant event of the year was the first meeting of the ICCP (ICCP-1), which took place from December 11 to 15, 2000, in Montpellier, France. It addressed six issues: (1) the BCH; (2) capacity building; (3) the development of a regionally balanced roster of experts on biosafety issues; (4) decision-making procedures for parties of import; (5) handling, transport, packaging and identification of LMOs; and (6) compliance.

The ICCP meeting concluded with the adoption of decisions, calling for various actions, as summarized below:

1. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027, available at <http://www.biodiv.org> [hereinafter Protocol].

2. Sabrina Safrin, an Attorney-Adviser at the Office of the Legal Adviser for the Department of State, prepared the discussion of the Protocol presented in that issue.

3. For a more detailed discussion and analysis of the Protocol, its negotiation and implications for international trade, see Paul E. Hagen & John Barlow Weiner, *The Cartagena Protocol on Biosafety: New Rules for International Trade in Living Modified Organisms*, 12 GEO. INT'L ENV'T L. REV. 697 (Spring 2000).

- With respect to the BCH, the meeting recommended the initiation of a pilot phase as soon as possible, and addressing related issues such as administration, oversight, and capacity building.
- With respect to capacity building in general, the governments called upon the Global Environment Facility (GEF) to implement its biosafety strategy to provide assistance for developing national biosafety regimes as well as coordination with intergovernmental organizations and participation in the BCF. The Panel also called upon the GEF to support: (1) BCH-related capacity building; (2) development of regional centers for training, (3) risk assessment and management and legal advice; and (4) (with other donors) regional and inter-regional capacity building workshops.
- With respect to handling, transport, packaging and identification, the Panel focused on documentation requirements and invited governments and relevant international organizations to submit by March 2001 information on existing rules, standards and practices. It also called for a meeting of technical experts to consider the need and means for developing measures to satisfy documentation requirements for LMOs intended for release into the environment and for contained use. Significantly, the Panel did not choose to recommend consideration of documentation requirements for bulk commodities, an issue of particular concern to exporting countries of genetically-modified agricultural commodities.
- Regarding the roster of experts, the Panel invited nominations and comment from governments regarding the development of the roster.
- On decision-making procedures, the ICCP invited governments to submit views to be compiled for consideration at the Panel's next meeting (ICCP-2).
- Similarly, the ICCP invited governments to communicate their views on compliance to the Secretariat for synthesis into a report for consideration by an experts meeting to be held immediately prior to ICCP-2.

In addition, the ICCP adopted its agenda for ICCP-2, including: (1) liability and redress; (2) monitoring and reporting; (3) the financial mechanism for the Protocol; (4) rules of procedure for the Protocols Meetings of the Parties (MOP); (5) a draft agenda for MOP-1; and (6) other implementation issues. The ICCP's decision to address liability and redress is of particular interest, as this is another sensitive issue for negotiating governments.

## *2. Additional Activity and Fora*

Additional activity of note with regard to regulation of products derived from biotechnology and trade in them took place in various fora in 2000. Efforts to develop and implement regional, national and sub-national labeling and other regulatory regimes continued in countries around the world, including: the European Community, its Member States, Norway, Switzerland and Russia; Canada, Mexico and the United States; Brazil and Chile in South America, Australia and New Zealand, Indonesia, Malaysia and the Philippines in the Pacific; China and Hong Kong, Japan, South Korea, Singapore, Sri Lanka, Taiwan and Thailand in Asia; and in Saudi Arabia.

At the international level, the activities of the OECD and the Codex Alimentarius Commission continue to be among the most significant. The OECD Task Force on the Safety of Novel Foods and Feeds and Working Group on the Harmonization of Regulatory Oversight for Biotechnology, in particular, continue to work to assess and promote regulatory harmonization for goods derived from biotechnology. Several Codex subsidiary bodies also continue to address significant issues, including the Committee on Food Labeling, Com-

mittee on General Principles (addressing issues relating to the role of precaution in risk analysis), and the Task Force on Food Derived from Biotechnology.

### 3. *Looking Forward*

For now, governments continue to address the issue of biosafety in many different regional and international fora, as well as through individual, domestic initiatives. A "patchwork" of potentially conflicting and inconsistent regulatory approaches may result. Entry into force of the Cartagena Protocol and broad international participation may serve to consolidate some of this activity and facilitate harmonization. However, it is uncertain when entry into force may occur and what countries may decide to become parties. Only two countries have ratified the agreement to date (Bulgaria and Trinidad and Tobago). Further, it remains unclear whether the United States, in particular, the world's largest producer and exporter of genetically-modified agricultural products, would ratify the Protocol even if it enters into force.

The next meeting of the ICCP, ICCP-2, is scheduled for October 1-5, 2001 in Montreal, Canada. In addition, an Expert Meeting on Handling, Transport, Packaging and Identification of LMOs is scheduled for June 13-15, 2001 in Paris, France, and a Workshop on Liability and Redress for June 18-20, also in Paris.

Additional information on the Cartagena Protocol is available on its website at <http://www.biodiv.org/biosafety/>.

## B. CHEMICALS MANAGEMENT

### 1. *Rotterdam Convention on Prior Informed Consent*

The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade<sup>4</sup> (Rotterdam or PIC Convention) was concluded in 1998 and will enter into force upon ratification by fifty countries. The Rotterdam Convention establishes a regime that will provide governments with notice about chemical imports regulated by exporting governments and the information necessary to make decisions about future imports.

#### a. Background

The Convention creates a formal mechanism to provide participating (Party) governments information regarding the risks posed by banned or severely restricted chemicals, and severely hazardous pesticide formulations. The principal mechanism established is a set of procedures to exchange information on the basis for regulating certain chemicals, and to seek the consent of Party governments before import of chemicals listed under the Convention.

The Convention, as written, lists twenty-seven such chemicals, making them subject to these PIC procedures. The Parties to the Convention may decide to list additional substances under the Convention as well. Parties must notify the Convention Secretariat of their decisions on whether to consent, not consent, or conditionally consent to import for each listed substance. Exporting Parties must ensure that exporters within their jurisdictions comply with these decisions.

The Convention also requires Parties to impose labeling requirements for listed chemicals, and to compel provision to importers of safety data sheets for chemicals to be used

4. Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, *opened for signature* Sept. 11, 1998, U.N. Doc. UNEP/FAO/PIC/CONF/2 [hereinafter PIC or Rotterdam Convention].

for occupational purposes, to ensure adequate availability of information regarding risks to human health or the environment. In addition, the Convention calls upon Parties to facilitate exchange of non-confidential information regarding chemicals.

The Rotterdam Convention is based on a voluntary PIC procedure embodied in guidelines developed by the U.N. Environment Programme (UNEP) and the U.N. Food and Agriculture Organization (FAO). The signatories to the Convention agreed to continue the voluntary PIC program, modified to take account of the treaty provisions, as the "interim PIC procedure," pending entry into force of the Convention.

Efforts to plan for the implementation of the PIC Convention when it enters into force are governed by an ongoing Intergovernmental Negotiating Committee (INC). UNEP and FAO jointly provide the PIC Convention Secretariat.

#### b. Developments in 2000

The seventh session of the INC met in Geneva, Switzerland from October 30-November 3, 2000. At its seventh session, the INC approved the listing of two additional chemicals (ethylene oxide and ethylene dichloride) following the recommendation of the Interim Chemical Review Committee (ICRC) of experts established to address whether to make such recommendations to the INC for the inclusion of additional chemicals and pesticides under the interim PIC procedure. The additions bring the number of substances listed under the procedure to thirty-three.

Among other matters addressed, the INC also decided to have the Secretariat prepare, for consideration at the INC's eighth session, a paper on the question of discontinuing the current interim procedure once the Convention enters into force. As noted above, the Convention will enter into force upon the fiftieth ratification, while over 150 countries participate in the voluntary system. The question centers on how to treat national notifications of control actions and import decisions from non-parties to the Convention that are participants in the voluntary system. It is likely that some transitional arrangement will be approved at the first meeting of the Conference of Parties (COP) following entry into force.

Developing countries have continued to urge the INC to focus on the question of "illegal traffic" in hazardous substances. The term "illegal traffic" is apparently used to define a range of possible activities, and there are questions about the nature of the "illegal" activities to be addressed under the PIC Convention. A working group set up under the Intergovernmental Forum for Chemical Safety (IFCS, which met in October, 2000 in Salvador, Brazil) will report to the eighth session of the INC on options for assigning responsibility and liability for illegal chemical shipments.

At the national level in the United States, the president transmitted the Convention to the Senate on February 9, 2000 for advice and consent to U.S. ratification. Implementing legislation is expected to call for amendments to the Toxic Substances Control Act (TSCA) and the Federal Fungicide, Insecticide and Rodenticide Act (FIFRA).

#### c. Looking Forward

The eighth session of the INC is scheduled for October 8-12, 2001 in Rome, Italy. As for ratification in the United States, it is unclear what progress may be made in 2001. Ratification is not expected to occur before 2002, at the earliest, and may be linked to factors including ratification of the pending Stockholm Convention on POPs, discussed below in this chapter.

Additional information on the Convention is available from its Secretariat's website at <http://www.pic.int/>.

## 2. *Stockholm Convention on Persistent Organic Pollutants*

In December 2000, delegates from more than 120 countries concluded negotiations on a new global agreement on Persistent Organic Pollutants (POP). If implemented, the Stockholm Convention on Persistent Organic Pollutants<sup>5</sup> will obligate governments to eliminate the production and use of certain POPs, restrict the uses of certain other POPs, and take measures to reduce or eliminate the release of certain by-product POPs. Negotiations on a legally binding global instrument began under the auspices of the United Nations Environment Programme (UNEP) in June 1998. These negotiations were completed in early December 2000 in Johannesburg, South Africa.

### a. Background

POPs are chemicals that persist in the environment for long periods of time, build up in the food chain, are toxic to humans or wildlife, and can be transported long distances in air or water. POPs are a very small percentage of the chemicals in commerce today. The pesticide and commercial chemical POPs currently targeted under the POPs Convention are no longer produced in the United States. Some, such as polychlorinated biphenyls (PCB) are still in use throughout the world. By-product POPs (such as dioxins and furans) are the unintentional by-products of industrial and other activities.

The global POPs agreement builds on the success of several regional efforts aimed at reducing or eliminating risks posed by POPs. Under the auspices of the U.N. Economic Commission for Europe (UNECE), the United States, Canada and governments in Europe reached an agreement on POPs in 1998. The POPs Protocol to the Long Range Transboundary Air Pollution (LRTAP) Convention<sup>6</sup> served as an important precedent for the recent negotiation of a global agreement. The LRTAP POPs Protocol seeks to "control, reduce or eliminate discharges, emissions and losses of persistent organic pollutants."<sup>7</sup> Under the LRTAP POPs accord, parties are to eliminate the "production and use" of twelve substances: aldrin, chlordane, chlordecone, DDT, dieldrin, endrin, heptachlor, hexabromobiphenyl, hexachlorobenzene, mirex, PCBs, and toxaphene. Parties are to restrict the "uses" of three types of substances: HCH, PCBs, and DDT. Parties are also obligated to reduce emissions of three substances: PCDD/F; HCB; and PAHs.

Recent efforts by the United States, Canada, and Mexico under the North American Commission for Environmental Cooperation (NACEC) to address persistent toxic and bioaccumulative substances also served as important precedent for the negotiation of a global POPs agreement. The Commission for Environmental Cooperation (CEC) was established by the NACEC to address regional environmental concerns among the parties to the North American Free Trade Agreement (NAFTA). In 1995, the governments agreed to a Sound Management of Chemicals Program (SMOC), discussed further in section II below, under which the United States, Mexico, and Canada cooperatively address substances

5. Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, U.N. Doc. No. UNEP/POPS/CONF/2, available at <http://www.unep.org> [hereinafter Stockholm Convention].

6. Protocol to the Convention on Long Range Transboundary Air Pollution Convention, Mar. 31, 1998, 37 I.L.M. 505 [hereinafter LRTAP POPs].

7. *Id.*

of regional concern. To date, the governments have targeted a number of substances for action: Chlordane; DDT; dioxin and furans; hexachlorobenzene (HCB); lindane; lead; and mercury. The governments also reached agreement on criteria and procedures for identifying future substances for regional action that served as an important reference point for the global POPs negotiations.

#### b. Key Features of the Stockholm POPs Convention and Its Negotiation

The objective of the Stockholm Convention is to "protect human health and the environment from persistent organic pollutants."<sup>8</sup> The specific rights and obligations it establishes are designed to promote achievement of this objective.

(i) *Production and Use Prohibitions and Restrictions.* Parties are obligated to "prohibit and/or take the legal and administrative measures necessary to eliminate" the production and use of chemicals listed in Annex A of the Convention.<sup>9</sup> Substances listed in Annex A include: aldrin, chlordane, dichlordane, endrin, hephachlor, hexachlorobenzene, mirex, toxaphene, and PCBs. Parties are also obligated to "restrict" the production and use of chemicals listed in Annex B. DDT is currently listed in Annex B. Restrictions on DDT proved to be the subject of intensive debate. While many governments initially sought to restrict the production and use of DDT, many developing countries sought to preserve the right to use DDT for disease vector control to combat malaria. The Convention includes a number of important general and country-specific exemptions to these obligations.

In addition, Parties to the Convention are obligated to take measures to reduce the releases of unintentional by-products listed in Annex C of the Convention (e.g., dioxins and furans, hexachlorobenzene and PCBs) with the "goal of their continuing minimization and, where feasible, ultimate elimination."<sup>10</sup> Parties are to develop action plans to address releases of these unintentionally produced POPs. Certain new sources of emissions (e.g., new municipal, hospital and hazardous waste incinerators) must be made subject to "best available techniques" (BAT) aimed at reducing emissions. Parties are obligated to promote BAT and "best environmental practices" for other new and existing sources of by-product POPs.

(ii) *Listing of New Substances.* The Convention also includes a process for the addition of new substances to Annexes A, B, and C. This process is governed by numeric screening criteria for persistence and bioaccumulation and requires an evaluation of a chemical's potential for long-range environmental transport and adverse environmental or human impacts. Future listing decisions are to be made by the Conference of the Parties based on a risk profile and the recommendations of an expert review committee.

(iii) *Incorporation of the Concept of Precaution.* The Convention includes important references to precaution in the preamble, objective, and provisions concerning the review and listing of additional chemicals. Negotiations over precaution and the elaboration of Principle 15 of the Rio Declaration<sup>11</sup> were among the most contentious issues addressed in the negotiations. Many European delegates favored expansive and repeated references to precaution and the "precautionary principle" throughout the text, relying in part on precedents established under the Biosafety Protocol to the Convention on Biological Diversity.

8. Stockholm Convention, *supra* note 5.

9. *Id.*

10. *Id.*

11. Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 814, UNCED Doc. No. A/CONF.151/5/Rev.1.



The United States, Australia, and other governments favored a more transparent and science-based approach, particularly with regard to the addition of new substances. In the end, governments agreed to several references to precaution in the text that provide some measure of flexibility in the review process, but that generally reflect U.S. positions for a transparent, science-based process for the evaluation and listing of new chemicals.

(iv) *Management of Wastes.* The Convention also includes a number of obligations aimed at ensuring the proper management of wastes, including products and articles upon becoming wastes, which contain POPs. Standards are to be developed for the destruction and environmentally sound management of wastes containing POPs. This work is to be undertaken with the cooperation of the Basel Convention on Transboundary Movements of Hazardous Wastes.

(v) *Technical and Financial Assistance to Developing Countries.* While POPs pose risks to human health and the environment locally where they are released, as well as globally due to their potential for long-range transport, concern among developed countries drove the negotiation of the Stockholm Convention. On many occasions, delegates from developing countries noted that while POPs posed risks in their countries, these risks paled in comparison to those posed by poverty, AIDS, and other more immediate health and environmental threats. In this context, negotiations over the terms of financial and technical assistance to developing countries figured prominently in the deal struck for a final POPs accord. Under the Convention, developed country parties are obligated to provide new and additional financial resources to enable developed country parties and parties with economies in transition to meet their obligations under the Convention. The Convention provides that the Global Environment Facility (GEF) will, on an interim basis, serve as the primary entity responsible for the operation of the agreement's financial mechanism.

### c. Looking Forward

A Diplomatic Conference is scheduled for May 2001 in Stockholm, Sweden where more than one hundred governments are expected to sign the new POPs Convention.

Additional information on the negotiations, including copies of the draft text, is available at <http://irptc.unep.ch/pops/>.

## C. THE ATMOSPHERE

### 1. *Update on the Kyoto Protocol Negotiations*

#### a. Background

The United Nations Framework Convention on Climate Change<sup>12</sup> (UNFCCC), an outgrowth of the 1992 Earth Summit, entered into force in 1994. In 1995, at the first Conference of Parties to the Convention, Parties recognized that commitments would be insufficient to achieve the Convention's objective to stabilize atmospheric concentrations of greenhouse gas (GHG) concentrations, and agreed to negotiate additional commitments for developed countries. The "Berlin Mandate" called for establishment of "quantified emission limitation and reduction objectives" for industrialized countries listed in Annex I of the Convention.<sup>13</sup>

12. U.N. Framework Convention on Climate Change, Mar. 21, 1994, 31 I.L.M. 849, available at <http://www.unfccc.de/resource/conkp.html>.

13. Decision 1/CP.1 in FCCC/CP/1995/7/Add.1.

These negotiations led to the adoption of the Kyoto Protocol<sup>14</sup> in 1997. Upon entry into force, the Kyoto Protocol would establish legally binding emission targets for Annex I countries covering the “commitment period” 2008–2012. These targets range from 10 percent above 1990 levels for Iceland, to 8 percent below 1990 levels for the European Union. The United States has a target of 7 percent below 1990 levels.<sup>15</sup>

The Kyoto Protocol contains several other important elements, which have been the focus of negotiations since 1997. Most important are several market-based mechanisms to provide Parties with flexibility in how they achieve emission reductions. These include (1) emissions trading, which allows developed countries to trade portions of their emission targets (called assigned amounts in the Protocol’s parlance); (2) joint implementation, which allows a developed country to invest in and take credit for projects to reduce GHG emission in another developed country; and (3) the Clean Development Mechanism (CDM), under which emission reduction projects must occur in a developing country.<sup>16</sup>

In addition, the Protocol provides that carbon sequestration from certain specific land-use change and forestry activities (carbon “sinks”) count toward a Party’s target, and leave open the possibility of including additional sink activities. The Protocol further calls for the establishment of compliance procedures and the development of methodologies and infrastructure for reporting and review of Parties’ implementation.

Following Kyoto, the Fourth Conference of Parties adopted the Buenos Aires Plan of Action (BAPA),<sup>17</sup> calling for the development of rules for the Kyoto Mechanisms, accounting for land-use change and forestry activities, reporting and review, and procedures for compliance. The Parties’ intent was to complete the BAPA by the Sixth Conference of Parties (COP6), which was held in The Hague, Netherlands, in November 2000. COP6 was suspended, however, without fulfilling the BAPA and will resume, most likely, in late June 2001.

#### b. Developments in 2000

(i) *Kyoto Mechanisms.* The issues that plagued discussions of the Kyoto Mechanisms in previous years continued in 2000.

Parties continued to disagree about the desirability of limiting use of the market-based mechanisms (such as emissions trading) on the basis of “supplementarity,” a concept derived from language in Article 17 of the Protocol stating that emissions trading must be supplemental to domestic action. The Umbrella Group<sup>18</sup> vehemently opposed restrictions arguing that the Protocol did not provide for quantification or other elaboration of “supplementarity” and that such limitations would raise implementation costs by undermining the efficiency of the market, without providing any additional environmental benefit. The European Union, supported by the Alliance of Small Island States (AOSIS), just as vigorously supported limitations in order to force Parties to take more domestic action to reduce

---

14. Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, Dec. 10, 1997, 37 I.L.M. 22, U.N. Doc. FCCC/CP/1997/L.7/Add.1, available at <http://www.unfccc.de/fccc/docs/cop3/107a01.pdf> [hereinafter Kyoto Protocol].

15. See *id.* at Annex B.

16. See *id.* arts. 17, 12, and 6 respectively.

17. Decision 1/CP.4 in FCCC/CP/1998/16/Add.1.

18. United States, Australia, Japan, Canada, Norway, New Zealand, Ukraine, and Russia.

emissions. In the late hours of COP6, the EU agreed to, but then re-thought, a compromise in the form of nonbinding qualitative language.<sup>19</sup>

A linked and equally contentious issue was the question of which Party to an emissions trade should be held responsible in the event that the selling Party exceeds its emission target at the end of the commitment period. Environmentalists and some countries initially advocated a “buyer liability” approach, under which, if a Party exceeds its emissions target, any transfers in excess of the amount needed for compliance would be retroactively invalidated and could not be used by the acquiring Party. This approach was opposed by the Umbrella Group, on the grounds that the uncertainty and risk it created would be detrimental to the functioning of the system. An alternative proposal by Switzerland, which would have prevented any trades until a Party demonstrated that it had assigned amounts in excess of its emissions, was also criticized for unduly inhibiting the emissions trading market. Finally, during COP6, it appeared that support was growing around the concept of a “compliance reserve.” Under this model, a Party would be required to hold a specific quantity of assigned amounts at all times to prevent significant overselling.<sup>20</sup> Trading would be permitted above this threshold, and could not be retroactively invalidated. Various levels (from 70 percent to 98 percent of a Party’s target) were proposed, but negotiators did not reach agreement on this issue.

A particular concern of developing countries in 2000 was the issue of “fungibility.” Most Annex I Parties consider units attained under any of the Kyoto Mechanisms to be fundamentally interchangeable and equal for purposes of meeting emissions targets. In contrast, the developing countries, led by India, China, and Brazil, argued that units were not equal and must be treated differently. This alternative position is driven by the concern of many developing countries that the Protocol’s “assigned amounts” for developed countries imply an entitlement to pollution rights, and a view that any additions to assigned amounts (i.e., through gains achieved through Kyoto Mechanisms) should be used as a reason for reducing emissions targets in a subsequent commitment period. Parties debated over the terminology used in accounting for use of the mechanisms, whether Parties could retransfer units acquired through the mechanisms, and whether any unused units could be carried over (“banked”) for use in the next commitment periods.<sup>21</sup> No significant progress toward resolving these issues was made at COP6.

While these issues entangled the mechanisms discussions for much of 2000, progress was nonetheless made on some of the more technical areas. Negotiations neared completion on a system of national “registries” to track transfers of assigned amounts, and significant progress was made on the governance structure of the Clean Development Mechanism. On this latter point, the key obstacle at COP6 was the balance of developed and developing country representation on the Executive Board of the CDM.

(ii) *Land-Use, Land-Use Change, and Forestry.* Negotiations were contentious over the crediting of activities in the land-use, land-use change, and forestry (LULUCF) sectors towards meeting emissions targets. During the first half of the year, negotiations focused on consideration of the many technical and data issues associated with the accounting of land-use and forestry activities. Much of this discussion was stimulated by the release of

---

19. Informal Note by COP6 President, Jan Pronk, <http://www.unfccc.int/resource/docs/cop6/dec1-cp6.pdf>.  
20. FCCC/SB/2000/10/Add.3.

21. *Id.*

the IPCC Special Report on Land Use, Land-Use Change and Forestry,<sup>22</sup> which was considered by the Convention's Subsidiary Body on Scientific and Technical Advice in June. Following consideration, Parties submitted proposals on their preferred definitions and approaches to accounting for land-use change and forestry under the Protocol.<sup>23</sup>

Key issues under consideration included the reliability and verifiability of emissions and sequestration estimates in the LULUCF sector; the types of activities to be included under Article 3.4 (i.e., forestry management, grazing land management, revegetation, etc.), the overall scale or magnitude of credit that a country could take for its carbon stock changes, and whether credit should be allowed for "business as usual" sequestration of carbon. Although there was progress made on some areas, such as the definition of "Afforestation, Deforestation, and Reforestation" under Article 3.3 of the Protocol, some negotiators were loathe to resolve most of the technical details until agreement was reached on the amount or "scale" of credits that could be counted under Article 3.4. Ultimately, most observers pin the breakdown of the negotiations in The Hague on the inability of countries (mainly the Umbrella Group and the European Union) to agree on the scale of credit from land-use, land-use change, and forestry activities under the Protocol.

(iii) *Assistance to Developing Countries.* An area that started out slow and grew in importance in 2000 was assistance to developing countries. The Kyoto Protocol does not include new commitments for developing countries, but calls upon all Parties to advance the implementation of existing commitments.<sup>24</sup> Throughout most of the negotiations under the Buenos Aires Plan of Action, constructive discussions focused on activities to facilitate technology transfer to and capacity building in developing countries. More contentious were discussions regarding developed country efforts to assist developing countries that are vulnerable to the effects of climate change or to developed country efforts to mitigate climate change. On the latter point, Saudi Arabia, supported by its allies in the Organization of Petroleum Exporting Countries (OPEC), continued to demand provisions for financial compensation from developed countries for loss of oil revenues from global efforts to reduce greenhouse gas emissions. In an unusual display of solidarity, this proposal is unanimously opposed by all Annex I countries.

As COP6 neared, developing countries became more far-reaching in their demands, calling for the establishment of multiple new funds for climate change response activities in developing countries. In addition, developing countries—with quiet support from some EU members—proposed extending a CDM fee on transfers to fund adaptation activities. At COP6, all these issues were grouped together for negotiation of a comprehensive assistance package for developing countries. Key questions were the level and vehicle for assistance (e.g., the Global Environment Facility, a new fund, a tax on the mechanisms), the timing of the assistance (i.e., tied to implementation of the Kyoto Protocol or available to Parties under the Convention), and finally, whether such assistance would be conditioned upon additional mitigation activities by developing countries. This latter point was particularly important for the United States and some Umbrella Group Allies, forming an integral part of an Umbrella Group proposal that would have provided roughly one billion dollars over the five-year commitment period for mitigation and adaptation activities in

22. "Land-Use, Land-Use Change and Forestry," Intergovernmental Panel on Climate Change 2000 (Robert T. Watson et al. ed.).

23. FCCC Compilation of August Submissions.

24. See Kyoto Protocol, *supra* note 14, art. 10.

developing countries. Negotiations on this proposal never really occurred in earnest during COP6.

(iv) *Compliance.* The Joint Working Group on Compliance continued work on its portion of the Buenos Aires Plan of Action in 2000, namely development of the procedures and mechanisms relating to compliance under the Kyoto Protocol. Early in the year, there was an emerging convergence of views among Parties in areas such as: coverage of the regime; the need for both facilitative and enforcement elements; functions of the regime's institution(s); and the identification of legal issues concerning procedure and institutions. The more controversial issues included: whether the regime should result in any binding consequences (and, if so, which ones); whether (and, if so, how) the regime should reflect differentiation among Parties; and the precise institutional structure necessary to perform the required functions.

By COP6 in The Hague, the Parties had achieved further convergence of views,<sup>25</sup> including: that there should be one institution with two branches (one for facilitation, one for enforcement) and that the enforcement branch should have a clear, limited mandate (including, at a minimum, determining non-compliance with emissions targets and determining whether a Party is failing to meet eligibility requirements for participation in the Kyoto Mechanisms, such as emissions trading). A large majority of Parties supported binding consequences for exceeding emissions targets. A widely supported consequence for exceeding targets was that the Party must restore its excess emissions and prepare a "compliance action plan" showing how it intends to do so. Major unresolved issues included, for example, the interest rate for restoration of excess emissions and the composition of the facilitative and enforcement branches (i.e., relative representation of developed and developing country-nominated experts).

### c. Looking Ahead

The resumed session of COP6 is likely to occur in late June 2001.<sup>26</sup> Although the COP president had previously proposed a May timeframe, additional time was provided to allow Parties more opportunity to prepare and consult prior to the session. For the United States, the new administration will use this time for a thorough review of its climate policy.<sup>27</sup>

Additional information on the Kyoto Protocol is available on the UNFCCC website at <http://www.unfccc.de>.

## 2. *Montreal Protocol on Substances That Deplete the Ozone Layer*<sup>28</sup>

The Montreal Protocol on Substances That Deplete the Ozone Layer deals with the phase-out of ninety-five listed chemicals whose use destroys the stratospheric ozone, which is essential for protecting human health and the environment against the effects of ultra-violet light.

Since 1987, when the Montreal Protocol was concluded, it has been amended four times, in London in 1990; in Copenhagen in 1992; in Montreal in 1997; and in Beijing in 1999.

25. FCCC/SB/2000/CRP.15/Rev.2.

26. See UNFCCC Press Release, New York, Feb. 12, 2001, <http://www.unfccc.int/press/prel2000/cop6release.pdf>.

27. See Department of State Press Briefing, Jan. 24, 2001, <http://www.state.gov/r/pa/prs/dpb/2001/index.cfm?docid=17>.

28. U.N. Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 29 I.L.M. 1541 [hereinafter Montreal Protocol].

To date, more than 85 percent of the ozone-depleting substances whose worldwide production and consumption was estimated at more than 1.1 million metric tonnes in 1989, has already been phased out mostly by industrialized countries. The remaining 15 percent production and consumption of these substances, used mainly in developing countries, is expected to be phased out in the next ten years. A small amount of these substances, to satisfy essential uses where alternatives are not yet available, will continue to be used in the current decade.

The ratification of the Montreal Protocol is nearly universal,<sup>29</sup> but the Amendments to the Montreal Protocol, each of which has to be formally ratified separately by each contracting Party, is much slower although the actual implementation of the provisions of the Amendments is carried out by some Parties even before formal ratification.<sup>30</sup>

#### a. Developments in 2000

The Parties to the Montreal Protocol held their Twelfth Meeting in Ouagadougou, Burkina Faso on December 11-14, 2000 to consider various issues relating to the implementation of the Montreal Protocol. Among the issues considered by the meeting was a proposal on the need for further adjustments to the phase-out schedule for hydrochlorofluorocarbons (HCFC) for developing countries; measures to facilitate the transition to chlorofluorocarbon-free metered-dose inhalers; assessment of a long-term strategy for the collection, storage, disposal and destruction of ozone-depleting substances and equipment containing such substances; essential use exemption applications for ozone-depleting substances; prevention of illegal trade in ozone-depleting substances and products containing ozone-depleting substances; and information on new ozone-depleting substances.

The Parties did not agree to adjust the existing controls applicable to HCFC consumption in developing countries because of concern that industries that had invested heavily in conversion to HCFCs could not be expected to undertake further conversion until their investments had been paid off. Many Parties were also concerned that any adjustment to the HCFC consumption could jeopardize the ability of some developing countries to meet their phase-out commitments of ozone-depleting substances. It was agreed that the matter be discussed further at their meeting in 2001.

The Parties agreed on measures to facilitate the transition to chlorofluorocarbon-free metered-dose inhalers by deciding that any chlorofluorocarbon metered-dose inhaler product approved after December 31, 2000 for treatment of asthma and/or chronic obstructive pulmonary disease in developing countries is not an essential use, unless the product meets specific criteria agreed to in 1992. They also agreed that developed countries should develop national, or regional, transitional strategies for determining when chlorofluorocarbon metered-dose inhaler products are no longer essential and report to the Secretariat every year on progress made on their transition to chlorofluorocarbon-free metered-dose inhalers. The Parties encouraged developing countries to also develop national or regional strategies based on economically and technically feasible alternatives or substitutes and submit

---

29. As of January 2001, 175 Parties had ratified the Montreal Protocol. Only 19 states are still outside the ozone protection regime—Afghanistan, Andorra, Bhutan, Cambodia, Cape Verde, Equatorial Guinea, Eritrea, Guinea Bissau, Holy Sea, Iraq, Nauru, Niue, Palau, Rwanda, Sao Tome and Principe, San Marino, Sierra Leone, and Somalia.

30. As of January 2001, The London Amendment had been ratified by 144 Parties; the Copenhagen Amendment 115 Parties; the Montreal Amendment 48 Parties; and the Beijing Amendment 2 Parties.

their strategies to the Secretariat in early 2005 and report on any progress made on their transition to chlorofluorocarbon-free metered-dose inhalers.<sup>31</sup>

With respect to the issue of long-term strategy for the collection, storage, disposal and destruction of ozone-depleting substances and equipment containing such substances, the Parties requested the Technology and Economic Assessment Panel to establish a task force on destruction technologies for ozone-depleting substances, which shall evaluate technical and economic feasibility of long-term management of contaminated and surplus ozone-depleting substances including options such as long-term storage, transport, collection, reclassification and disposal of such ozone-depleting substances. The Panel will report on these issues at the Fourteenth Meeting of the Parties in 2002.<sup>32</sup>

The Parties considered and approved about 6,400 tons of CFCs for essential uses in metered-dose inhalers and torpedo maintenance based on applications by some developed countries for 2001 and 2002.<sup>33</sup>

A proposal for putting in place a mechanism to monitor international trade and prevention of illegal trade in ozone-depleting substances generated considerable discussion after which the Parties requested the Ozone Secretariat to examine the options for monitoring international trade and prevention of illegal trade in ozone-depleting substances, mixtures, and products containing ozone-depleting substances. The issues to be examined include current national legislation on labeling of ozone-depleting substances (ODS) and products containing such substances; the need and scope for implementation of universal labeling and/or classification of ODS and products; differences between products containing ODS and mixtures containing ODS; methods of sharing experience between Parties on issues related to classification, labeling, compliance, and incidents of illegal trade.<sup>34</sup> This matter will be further discussed at the Open-ended Working Group meeting of the Parties to the Montreal Protocol this year with possible recommendations for consideration by the Meeting of the Parties in 2001.

The meeting also considered a report on a new ozone-depleting substance, hexachlorobutadiene, which has a small ozone-depletion potential of 0.07 and is being released into the environment in relatively high volumes. It was decided to refer this substance to the Technology and Economic Assessment Panel to be examined from a global perspective.

#### b. Preview for 2001

In 2001, Parties will be examining, among other things, the modalities of reviewing the financial needs of developing countries in anticipation for the 2002 decision on replenishment of the Multilateral Fund for the three-year period 2003-2005. The Parties will also consider the report of the Technology and Economic Assessment Panel<sup>35</sup> and the Scientific Assessment Panel on the criteria to assess the potential ozone-depleting potential (ODP)

31. Decision XII/2 of the Twelfth Meeting of the Parties, document UNEP/OzL.Pro.12/9, at 23, *available at* <http://www.unep.org/ozone>.

32. Decision XII/8 of the Twelfth Meeting of the Parties, document UNEP/OzL.Pro.12/9, at 26, *available at* <http://www.unep.org/ozone>.

33. Decision XII/9 and annex I to the report of the Twelfth Meeting of the Parties to the Montreal Protocol, document UNEP/OzL.Pro.12/9, at 27, *available at* <http://www.unep.org/ozone>.

34. Decision XII/10 of the Twelfth Meeting of the Parties, document UNEP/OzL.Pro.12/9, at 27, *available at* <http://www.unep.org/ozone>.

35. Technology and Economic Assessment Panel Report.

of new chemicals<sup>36</sup> and a guidance paper on mechanisms to facilitate public-private sector cooperation in the evaluation of the potential ODP of new chemicals,<sup>37</sup> in a manner that satisfies the criteria to be set by the Panels.

To be considered also in 2001, will be a review of the implementation of the fixed-exchange-rate mechanism for the replenishment of the Multilateral Fund that assists developing countries in accessing technical and financial assistance to phase-out ozone-depleting substances. In 1999, the Parties introduced a new mechanism for contributions to the Multilateral Fund so that they can pay in their national currencies for the purpose of easing some contributing Parties' administrative difficulties and also to promote timely payment of contributions and to ensure that there is no adverse impact on the level of available resources of the Multilateral Fund. It was decided at the time that the operation of this new mechanism be reviewed in 2001.

The Thirteenth Meeting of the Parties to the Montreal Protocol will be held in Colombo, Sri Lanka, on October 15-19, 2001.

Additional information on the Montreal Protocol is available on its website at <http://www.unep.org/ozone>.

#### D. INTERNATIONAL AGREEMENTS CONCERNING MARINE RESOURCES AND THE MARINE ENVIRONMENT

The year 2000 saw a number of international and regional developments in the areas of living marine resource conservation as well as prevention of marine pollution.

##### 1. *Management of Living Marine Resources*

###### a. U.N. Conference on Straddling Stocks and Highly Migratory Fish Stocks<sup>38</sup>

The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Straddling Stocks Agreement) was adopted on August 4, 1995. As of February 2001, it had twenty-seven of the thirty ratifications or accessions required for entry into force. The United States has ratified this agreement; the most recent ratifications were Barbados and Luxembourg. The Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific<sup>39</sup> (MHLC) is the first regional effort to implement the Straddling Stocks Agreement.

In September 2000, the Chairman of the MHLC formally presented convention text, which included creation of a management commission, the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. The Final Act of the MHLC also included a draft Resolution creating a Preparatory Conference for the establishment of this Commission. The Convention and

---

36. Scientific Assessment Panel on the criteria to assess the potential ozone-depleting potential (ODP) of new chemicals.

37. Guidance Paper on mechanisms to facilitate public-private sector cooperation in the evaluation of the potential ODP of new chemicals.

38. U.N. Conference on Straddling Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, U.N. GAOR, 6th Sess., U.N. Doc. A/CONF.164/37.

39. Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, Sept. 5, 2000, 40 I.L.M. 278.



Resolution were adopted by vote of the Conference on September 4, 2000, and are open for signature and ratification until September 5, 2001.

#### b. FAO Initiatives

The Food and Agriculture Organization (FAO) of the United Nations, formed in 1945, is an autonomous agency based in Rome, Italy charged with raising nutrition levels and standards of living, improving agricultural productivity, and bettering the condition of rural communities. One of FAO's specific priorities is developing a long-term strategy for the conservation and management of natural resources, including fisheries. The Committee on Fisheries (COFI) is a subsidiary body of the FAO and is the only global inter-governmental forum for the examination of major international fisheries issues. COFI has served as a forum for negotiation of global agreements and non-binding instruments.

FAO was mandated by the twenty-third Session of COFI to develop an International Plan of Action (IPOA) to combat Illegal, Unreported, and Unregulated (IUU) Fishing and held technical consultations to this end throughout 2000. The IPOA for IUU fishing will be the fourth such plan to be concluded within the framework of the Code of Conduct for Responsible Fisheries.<sup>40</sup> The final technical consultation, held in Rome on October 2-6, 2000, concluded with the Draft International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.<sup>41</sup> The main objective of the plan is to provide States with effective measures by which to act to prevent IUU fishing activities. COFI approved this plan by consensus at their twenty-fourth Session in early 2001.

#### c. International Tribunal for the Law of the Sea

The United Nations Conference on the Law of the Sea<sup>42</sup> (UNCLOS) incorporates a mechanism for the settlement of disputes, making it obligatory for parties to the Convention to go through the settlement procedure in the case of a dispute with another party. The Tribunal is the central forum for the settlement of disputes arising from the Convention.

In 2000, the International Tribunal for the Law of the Sea considered a conservation case involving Chile and the European Community.<sup>43</sup> The parties requested formation of a Special Chamber to attempt to resolve their dispute concerning the conservation and sustainable exploitation of swordfish stocks in the southeastern Pacific Ocean. The Special Chamber will decide, among other things, whether the European Community has complied with its obligations under UNCLOS to ensure conservation of swordfish in the fishing activities undertaken by vessels flying the flag of any of its Member States in the high seas adjacent to Chile's Exclusive Economic Zone (EEZ), whether the Chilean Decree which purports to apply Chile's conservation measures relating to swordfish on the high seas is in breach of UNCLOS, and whether the Galapagos Agreement of 2000 was negotiated in keeping with the provisions of UNCLOS.

40. FAO Code of Conduct for Responsible Fisheries, at <http://www.un.org/Depts/los/Docs/UNICPO/FAOcodeLink.htm>.

41. Report of the Technical Consultation on Illegal, Unreported and Unregulated Fishing, Appendix D, Oct. 2-6, 2000, available at <http://www.fao.org>.

42. United Nations Conference on the Law of the Sea: Final Act, U.N. Doc. A/CONF.62/121, 21 I.L.M. 1245 (1982), available at <http://www.un.org/depts/los/> (last updated Mar. 2, 2001) [hereinafter UNCLOS].

43. Case Concerning The Conservation And Sustainable Exploitation Of Swordfish Stocks In The South-eastern Pacific Ocean (Chile/European Community), Dec. 20, 2000, 40 I.L.M. 475.

In 1999, the International Tribunal for the Law of the Sea considered and ruled on a fishery conservation and management dispute<sup>44</sup> involving a disagreement among Australia, New Zealand, and Japan, all parties to UNCLOS and the 1993 Convention for the Conservation of southern Bluefin Tuna.<sup>45</sup> After being denied an increase in the total allowable catch (TAC) of southern bluefin tuna, Japan unilaterally began an experimental fishery in 1998, which Australia and New Zealand alleged was undertaken essentially for commercial purposes, and that it constituted a failure to promote and cooperate in the conservation of the southern bluefin tuna stock. The complainants filed a request for provisional measures (an interim injunction against the experimental fishery) from the International Tribunal pursuant to UNCLOS Section 2 Part XV. The International Tribunal found that it had jurisdiction in the matter and imposed some provisional measures that reasserted annual national allocations of bluefin tuna, closed the experimental fishing program, and ordered the parties to resume negotiations to ensure conservation and optimum utilization of southern bluefin stocks. Japan objected to the jurisdiction of the Tribunal and an arbitral tribunal was set up in accordance with Annex VII to rule in the matter. In August 2000, the arbitral tribunal ruled that it lacked jurisdiction over the case due to a dispute settlement provision in the 1993 Convention between the three parties and, accordingly, revoked the provisional measures imposed by the previous decision.

Additional information on the International Tribunal for the Law of the Sea is available on its website at <http://www.un.org/Depts/los/ITLOS/ITLOSHome.htm>.

## 2. *Recent Developments Under Other International or Regional Agreements Concerning Management of Living Marine Resources*

### a. The International Commission for the Conservation of Atlantic Tunas (ICCAT)

ICCAT was established in 1969 at a conference of Plenipotentiaries, which prepared and adopted the International Convention for the Conservation of Atlantic Tunas. ICCAT has management authority over highly migratory fish species including swordfish, tunas, billfishes, and sharks throughout their ranges in the Atlantic Ocean and adjacent seas. There was a special meeting of ICCAT in 2000, but its regular biannual meeting will be held in 2001.

At its 1999 meeting, ICCAT directed the Standing Committee on Research and Statistics (SCRS) to evaluate the fishing capacity of different fleets and gears in the northern albacore tuna fishery. At the 2000 meeting, the Committee reported that a direct comparison of partial fishing mortality between different albacore fleets is possible, but it called attention to the need for a "common currency" (impact in terms of number of fish caught relative to the total number of fish, spawning biomass, reproductive potential, etc.) to interpret meaningfully the results across fleets. The SCRS also recommended decreases in catch limits of bigeye tuna, Mediterranean swordfish, white and blue marlin, East Atlantic bluefin tuna, and sailfish. The Committee expressed concern over the high levels of juvenile catch in many of these fisheries and recognized the need to reduce juvenile mortality through harvest control methods to ensure viable future stocks.

Additional information on ICCAT is available on its website at <http://www.iccat.es/>.

44. Australia and New Zealand v. Japan (Southern Bluefin Tuna Case), Aug. 27, 1999, 38 I.L.M. 1624, available at <http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm>.

45. Convention for the Conservation of Southern Bluefin Tuna, done at Canberra, May 10, 1994, available at <http://www.oceanlaw.net/texts/ccsbt.htm> (last visited May 16, 2001).

### b. Inter-American Tropical Tuna Commission & Panama Declaration (IATTC)

The Inter-American Tropical Tuna Commission (IATTC), established by international convention in 1950, is responsible for the conservation and management of fisheries for tunas and other species taken by tuna-fishing vessels in the Eastern Pacific Ocean. At the 2000 meeting of IATTC, adopted Resolutions addressed the need to reduce catches of bigeye and yellowfin tuna and to encourage States to reduce the capacity of the tuna fleet operating in the Eastern Pacific Ocean. Another Resolution established a program to study measures to reduce bycatch and evaluate the effects of on-board retention of bycatch species.

The IATTC also has significant responsibilities for the implementation of the International Dolphin Conservation Program (IDCP), established in 1990. The IDCP sought to reduce dolphin mortality due to the encirclement method of fishing ("setting on dolphins"). In 1995, the Panama Declaration reaffirmed the commitments and objectives of the IDCP and announced that participating governments should formalize it as a binding legal instrument. On February 15, 1999, the agreement entered into force with ratifications by the United States, Panama, Ecuador, El Salvador, Venezuela, Nicaragua, Costa Rica, Honduras, and Mexico. Under the IDCP implementing regulations (under the International Dolphin Conservation Act), yellowfin tuna caught by encirclement of dolphins can be imported and labeled as "dolphin safe" provided no dolphins were killed or seriously injured during the fishing activities. Prior to this legislation, labeling as "dolphin safe" applied only to tuna that were caught through methods that did not involve encirclement. In April 2000, a ruling in the U.S. District Court in California rejected the Clinton administration's regulations changing the definition of "dolphin safe" and required consideration of scientific research on the stress caused to dolphins from encirclement before the labeling definition of "dolphin safe" is modified.<sup>46</sup>

Additional information on the IATTC is available on its website at <http://www.iattc.org/>.

### c. The International Whaling Commission (IWC)

The International Whaling Commission (IWC) was set up under the International Convention for the Regulation of Whaling,<sup>47</sup> signed in Washington, D.C., on December 2, 1946. The purpose of the Convention is to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry. The main duty of the IWC is to review and revise as necessary the measures laid down in the Schedule to the Convention that govern the conduct of whaling throughout the world.

The IWC met in Australia during July of 2000 and adopted several important resolutions. Scientific whaling permits were discussed at the 2000 meeting; the Commission adopted a Resolution calling on the Government of Japan to refrain from issuing scientific whaling permits and reiterated that, in reviewing scientific permits, the Scientific Committee should examine whether the research is required for management or could be carried out using nonlethal means.

The United States also took interest in Japan's increasing scientific harvest of whales in 2000. The Pelly Amendment, also known as Section 8 of the Fisherman's Protective Act,<sup>48</sup>

46. *Brower v. Daley*, 93 F. Supp. 2d 1071 (N.D. Cal. 2000).

47. International Convention for the Regulation of Whaling, Dec. 12, 1946, available at <http://www.oceanlaw.net/texts/iwc.htm>.

48. Fisherman's Protective Act, 22 U.S.C. 1978.

authorizes the president to prohibit the importation of products from countries that allow fishing operations or engage in trade that diminishes the effectiveness of an international fishery conservation program for endangered or threatened species. The United States certified Japan under the Pelly Amendment on September 13, 2000, finding that its scientific harvest undermined the conservation measures of the IWC. However, President Clinton announced on December 29, 2000, that he would not impose sanctions on Japan. To advance communication and negotiation concerning this issue, the United States and Japan jointly supported a special IWC intersessional meeting to examine lethal and non-lethal methods of collecting scientific data on whales.

The Commission also considered proposals from Norway and Japan to allow commercial whaling. It refused Japan's proposal to provide interim relief from the existing ban on commercial whaling and allow the taking of fifty minke whales but did pass a Resolution reaffirming the Commission's desire to work expeditiously to alleviate the distress to four Japanese communities caused by the cessation of minke whaling. Norway also lodged objections to the ban on the taking of minke whales, and has exercised its right to set national catch limits for this species. The Commission set catch limits for several stocks subject to aboriginal subsistence whaling. The IWC urged governments to prevent takes of highly endangered whales including stocks of bowhead, gray, blue, and right whales; they specifically passed Resolutions calling for the government of Canada not to authorize bowhead takes in the Eastern Canadian Arctic and for the United States and Canada to continue efforts to reduce mortality of right whales due to shipping and fisheries exploitation in the Western North Atlantic. Finally, the IWC urged completion of the Revised Management Scheme (RMS) to guide total catches over time. The Working Group on the RMS was scheduled to meet in February 2001 to revise draft text.

Additional information on the IWC is available on its website at <http://www.ourworld.com/compuserve.com/homepages/iwcoffice/iwc.htm>.

#### d. Inter-American Sea Turtle Convention and Shrimp-Turtle Issues

The Inter-American Convention for the Protection and Conservation of Sea Turtles<sup>49</sup> is the only international treaty dedicated exclusively to setting standards for the conservation of sea turtles and their habitats. At the 20th Sea Turtle Symposium on March 3, 2000, the membership passed a Resolution urging countries to complete their ratification processes. The United States gave its advice and consent to ratify the treaty on September 20, 2000. President Clinton signed the instrument of ratification in October 2000, and it was deposited in early 2001. The required number of ratifications were received, and the Convention entered into force on May 2, 2001.

Since the mid-1990s, there has been much controversy surrounding Section 609 of U.S. Public Law 101-162, which prohibits the importation of shrimp harvested in ways that are harmful to species of sea turtles. At the World Trade Organization (WTO) in 1996, Malaysia, Pakistan, Thailand, and India challenged that U.S. implementation of an embargo on their shrimp products violated U.S. obligations under the WTO Agreement.<sup>50</sup> Ulti-

49. Inter-American Convention for the Protection and Conservation of Sea Turtles, Dec. 1, 1996, S. TREATY Doc. No. 105-48.

50. United States—Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, 38 I.L.M. 118 (1999), available at <http://www.wto.org>.

mately, the WTO Appellate Body ruled on October 12, 1998 that while Section 609 itself was not inconsistent with U.S. obligations under the WTO Agreement, U.S. implementation of Section 609 was inconsistent with the Agreement.

As a result of this decision, the U.S. began taking the following steps: (1) evaluating comparability of sea turtle protection programs with greater flexibility, transparency, and predictability; (2) providing more thorough technical training in the proper use of Turtle Excluder Devices (TEDs); (3) allowing importation of shrimp products from fishermen who use TEDs in nations that remain uncertified; and (4) negotiating a multilateral agreement among shrimp fishing nations in the Indian Ocean. To this end, the United States and countries of the Indian Ocean and Southeast Asia region met in July 2000 in Kuantan, Malaysia, to negotiate the Memorandum of Understanding on Sea Turtle Conservation for the Indian Ocean and Southeast Asia.<sup>51</sup> The MOU addresses the broad range of conservation issues for the threatened and endangered species of sea turtles in the region, including nesting and habitat protection, and mitigation of threats from human activities such as commercial fishing. The countries will meet again in mid-2001 to complete negotiations on a conservation and management plan to become part of the MOU.

#### e. North Atlantic Fisheries Organization (NAFO)

The Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries<sup>52</sup> came into force on January 1, 1979, following ratification by seven signatories. This Convention established the Northwest Atlantic Fisheries Organization (NAFO) to serve as the focus for consultation and cooperation to achieve optimum utilization, rational management, and conservation of the fishery resources of the Convention Area. The Convention has eighteen contracting parties and applies to all fishery resources in the Convention Area, with the exception of salmon, tunas, marlins, cetacean stocks managed by the International Whaling Commission, and sedentary species of the Continental Shelf.

During the annual meeting of NAFO in 2000, the Fisheries Commission considered scientific recommendations and agreed on joint international measures to close direct fisheries for stocks of cod, redfish, American plaice, witch flounder, and capelin in the Regulated Area during 2001. Other efforts focused on the impacts of fishing by Non-Contracting Parties and Illegal, Unregulated, and Unreported Fishing. The president of NAFO signed diplomatic demarches to the Non-Contracting Party flag-States whose vessels have fished in the NAFO Regulatory Area in recent years: Belize, Honduras, Panama, and Sierra Leone.

Additional information on the NAFO is available on its website at <http://www.nafo.ca/>.

#### f. North Atlantic Salmon Conservation Organization (NASCO)

The Convention for the Conservation of Salmon in the North Atlantic Ocean,<sup>53</sup> the basic instrument for NASCO, applies to migratory salmon stocks north of 36 degrees north latitude. NASCO's task is to promote both the collection and dissemination of scientific data on North Atlantic salmon stocks and the conservation, restoration, and sound man-

51. Memorandum of Understanding on Sea Turtle Conservation for the Indian Ocean and Southeast Asia, available at [http://www.wcmc.org.uk/cms/Turtles\\_IndOcean-SEA-MoU.htm](http://www.wcmc.org.uk/cms/Turtles_IndOcean-SEA-MoU.htm).

52. Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (1978), 34 I.L.M. 1452 (1995).

53. Convention for the Conservation of Salmon in the North Atlantic Ocean, Oct. 1, 1983, available at [http://www.nasco.org.uk/html/the\\_convention.html](http://www.nasco.org.uk/html/the_convention.html).

agement of such stocks. At its 2000 meeting, NASCO again expressed concern over low population levels of salmon stocks and established a Working Group to develop a five-year program of research to identify the causes and examine possible means of counteracting salmon mortality. Resolutions reflected the concern over population levels and called for strict harvest limits on fisheries in the French islands of St. Pierre et Miquelon, the Faroe Islands, and West Greenland. The Standing Committee on the Precautionary Approach presented a decision structure for use by the Council and the NASCO Commissions and authorities in the management of single and mixed stock salmon fisheries. This decision structure will be tested and evaluated in selected rivers by 2002. NASCO continued to be concerned over the genetic impact of farm-raised salmon on wild salmon, and the Liaison Group between NASCO and the North Atlantic salmon farming industry reported a closer working relationship between the two groups.

Additional information on NASCO is available on its website at <http://www.nasco.org.uk/>.

g. North Pacific Anadromous Fish Commission (NPAFC)

The North Pacific Anadromous Fish Commission (NPAFC) was established by the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean,<sup>54</sup> which became effective on February 16, 1993. Canada, Japan, the Russian Federation, and the United States are contracting parties to the Convention, which applies to waters north of 33 degrees north latitude in the Pacific Ocean and its adjacent seas. The Convention prohibits directed fishing for salmonids on the high seas and includes provisions to minimize the number of salmonids taken in other fisheries.

At the eighth annual meeting of the NPAFC, the Committee on Enforcement reviewed enforcement efforts and unauthorized salmon fishing activities in the Convention Area in 2000. The cooperative enforcement efforts were highlighted by the apprehension of the Honduran registered fishing vessel, *Arctic Wind*. Due to the continued threat of high seas fishing for salmon in the Convention Area, all Parties agreed to maintain 2001 enforcement activities at high levels as a deterrent to the threat of potential unauthorized fishing.

Additional information on the NPAFC is available on its website at <http://www.npafc.org/>.

h. The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)

CCAMLR is established under the 1982 Convention for the Conservation of Antarctic Marine Living Resources,<sup>55</sup> which aims to ensure the conservation of the Antarctic marine ecosystem. In 2000, the Commission adopted further fishery conservation measures including restrictions on allowable gear types, overall catches, and bycatch and established reporting requirements for catches of certain species of fish, krill, and crabs. They also adopted a measure to minimize incidental mortality of seabirds in longline fishery research activities. The Commission passed a Resolution urging contracting parties to avoid flagging or licensing non-Contracting Party vessels with a history of engagement in illegal, unregu-

54. Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, Feb. 16, 1993, available at <http://www.npafc.org>.

55. Convention for the Conservation of Antarctic Marine Living Resource, May 7, 1980, 19 I.L.M. 837, available at <http://www.ccamlr.org>.

lated, or unreported fishing activities. Other Resolutions addressed catch documentation, landing procedures, and use of Vessel Monitoring Systems in the fishery for threatened toothfish species (Chilean sea bass).

Additional information on the CCAMLR is available on its website at <http://www.ccamlr.org/>.

i. Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region

The 1983 Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region was adopted in Cartagena, Colombia on March 24, 1983, and entered into force on October 11, 1986. The Convention has been supplemented by three Protocols, one of which entered into force in 2000: 1) Protocol Concerning Co-Operation in Combating Oil Spills in the Wider Caribbean Region, which was adopted in 1983 and entered into force on October 11, 1986; 2) Protocol Concerning Specially Protected Areas and Wildlife (SPA), which was adopted in 1990 and entered into force in June 2000; 3) Protocol Concerning the Pollution of the Marine Environment from Land-Based Sources and Activities, adopted in 1999. The Convention and its Protocols constitute a legal commitment by these countries to protect, develop, and manage their common waters, jointly and individually. The SPAW Protocol establishes a framework for regional cooperation to protect and improve the state of ecosystems as well as habitat of threatened or endangered species and other marine life in the Wider Caribbean Region. It contains provisions for the establishment and management of protected areas and buffer zones, national and cooperative measures for the protection of wild flora and fauna, introduction of non-indigenous or genetically altered species, environmental impact assessments, scientific and management research, mutual assistance, and the establishment of common guidelines and criteria.

Additional information on the Convention is available on its website at <http://www.cep.unep.org/pubs/legislation/cartxt.html>.

Additional information and the text of SPAW are available on its website at <http://www.cep.unep.org/pubs/legislation/spaw.html>.

j. U.S.-Russian Maritime Boundary Agreement

On September 16, 1991, the United States ratified the U.S.-Soviet Maritime Boundary Agreement<sup>56</sup> in an attempt to resolve a long-standing controversy over fishing and mineral rights. While the Russian government has implemented many terms of the Agreement, it has never formally ratified it, largely due to concerns surrounding the equitability of its provisions. Since 1999, conflict around the U.S.-Russian maritime boundary escalated during the Bering Sea pollock fishing season. The United States Coast Guard reportedly detected twenty-six illegal foreign fishing vessel incursions into U.S. waters during 2000, down from a high of ninety-two in 1999. The Coast Guard seized six of these vessels, but most cases were not prosecuted due to the brevity of the incursions or the inability to apprehend the criminal vessels.

3. *Marine Pollution*

UNCLOS Article 194 requires States to take measures to address marine pollution from land-based sources, vessels, and other instruments or devices operating in the marine en-

56. Maritime Boundary Agreement, June 1, 1990, U.S.-U.S.S.R., T.I.A.S. No. 11451.

vironment. With respect to land-based sources, States are required to adopt laws and regulations to prevent, reduce, and control such pollution, taking into account internationally agreed rules, standards and recommended practices and procedures. For example, two Protocols to the 1983 Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region specify obligations of party nations towards reducing marine pollution in the Caribbean area (see *supra* section D(2)(i)).

Vessel pollution must be addressed not only by flag States, but also by coastal and port States. Regulations governing vessel pollution must be in accordance with generally accepted international standards, specifically under the International Maritime Organization (IMO) of the United Nations. IMO, established under a 1948 U.N. Convention, has adopted fifty-one conventions and protocols, including six annexes of the Convention on the Prevention of Pollution from Ships (MARPOL),<sup>57</sup> the International Convention on Oil Pollution Preparedness, Response, and Cooperation (OPRC),<sup>58</sup> and the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.<sup>59</sup> The State Department has delegated a large part of IMO responsibility to the Coast Guard.

#### a. MARPOL

Of MARPOL's six annexes (I-VI), only Annexes I and II (dealing respectively with pollution by oil and by noxious liquid substances) are mandatory. All others are optional. Annex IV, in particular, which deals with sewage discharge, has not yet entered into force. Under Annex IV, adopted in 1983, ships would not be permitted to discharge sewage within four miles of the nearest land, unless using an approved treatment plant. Between four and twelve miles from land, sewage would have to be disinfected before discharge. The IMO Secretariat circulated a revised text of Annex IV, and in December 1999, the United States submitted amendments necessary to make the Annex suitable for ratification by the United States and more likely to enter into force. Many of these changes reflect adjustments needed to address changes in technology and policy over the last sixteen years. The proposed text of the amendments was negotiated during 2000, but there is still no international agreement and entry into force remains doubtful.

#### b. OPRC

One of the most important accomplishments last year for IMO was the adoption of a protocol to amend the OPRC to include hazardous and noxious substances (HNS). This protocol will provide a framework similar to that used by OPRC for ships carrying oil to facilitate international cooperation in responding to major incidents or threats of marine pollution involving HNS. Ships carrying HNS will be required to carry a shipboard pollution emergency plan to deal specifically with incidents involving HNS—again extending a requirement similar to that for ships carrying oil under the OPRC.

#### c. Draft Convention on Civil Liability for Bunker Oil Pollution Damage

In 1999, the IMO formally recognized the need to fill an existing gap in the international regime governing liability and compensation for oil pollution, which currently does not

57. Convention on the Prevention of Pollution from Ships, Feb. 17, 1978, available at [http://www.unep.org/gopher/un/unep/elipac/intl\\_leg/treaties/tre-0720.txt](http://www.unep.org/gopher/un/unep/elipac/intl_leg/treaties/tre-0720.txt).

58. International Convention on Oil Pollution Preparedness, Response, and Cooperation, Nov. 30, 1990, 30 I.L.M. 733, available at <http://sedac.ciesin.org/pidb/texts/oil.pollution.preparedness.1990.html>.

59. International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, May 3, 1996, 35 I.L.M. 1406.



cover oil spills from non-tank vessels. Bunker fuel spills from non-tank vessels pose a substantial threat to the marine environment. While U.S. domestic law, the Oil Pollution Act of 1990,<sup>60</sup> addresses these types of spills, there is no such parallel in international law. In October 1999, the IMO Legal Committee voted to submit a Draft Convention on Civil Liability for Bunker Oil Pollution Damage to a diplomatic conference, which is scheduled for March 2001.

#### d. Biennium Work Agenda

IMO has recently taken up other significant marine pollution issues for its biennium work agenda. One of the most prominent is reconsideration of the phase-in dates for double hull tank vessels under MARPOL Regulation 13G. In general, the Oil Pollution Act of 1990 requires a more accelerated double hull phase-in schedule for tank vessels operating in U.S. waters than MARPOL, but the changes being debated in IMO could more closely align the international phase-in schedule with that required by U.S. law. IMO has also scheduled a Diplomatic Conference for October 2001 to consider an international instrument governing the use of shipboard anti-fouling systems and specifically prohibiting the use of hull paints with tributyl tin (TBT) compounds that have proven toxic to the marine environment. Lastly, IMO will continue its work on preventing the spread of aquatic nuisance species by focusing on ballast water management and technologies.

Additional information on the IMO is available on its website at <http://www.imo.org/>.

### E. OTHER INTERNATIONAL EFFORTS TO PROTECT NATURAL RESOURCES

#### 1. *Trade in Endangered Species—Convention on International Trade in Endangered Species (CITES)*<sup>61</sup>

CITES is the largest conservation treaty in the world with 152 Party States. During 2000 four more states became Parties: Kazakhstan, Slovenia, Croatia, and Macedonia. In April of 2000 the Eleventh Conference of CITES was held in Kenya, not in the city of Nairobi, but outside the city at the United Nations Environmental Programme (UNEP) world headquarters in Gigiri. While there were a fair number of species issues considered by the Conference, by the end of the two week Conference little change had occurred in status of species on the two lists: Appendix I (most protected—no commercial trade) and Appendix II (threatened—trade to be monitored). It was perhaps the most status quo outcome of the last five Conferences of the Parties. At the national level, the year 2000 had its share of enforcement issues.

#### a. Eleventh Conference of the Parties

Seven plants and one animal species (brown hyaena) were delisted from Appendix II, two plants and four animals species were added to Appendix II, two plants and two animals (Darwin rhea and the African elephant population of South Africa, see *infra*) were down-listed from Appendix I to Appendix II. One plant and four animal species (Asian pangolin, Dugong, and Horned parakeet) were uplisted from Appendix II to Appendix I. The more extensive list was the number of species for which proposals were either withdrawn or rejected by the Parties; including the gray whale, bottlenosed dolphin, minke whale, musk

60. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484.

61. Trade in Endangered Species—Convention on International Trade in Endangered Species, Mar. 3, 1973, 12 I.L.M. 1085 (1973) (hereinafter CITES).

deer, gyrfalcon, spotted turtles, hawksbill turtles, whale sharks and the tarantula. Mustering the required two-thirds votes to add or change a species' status was very difficult.

As at the prior Conference of the Parties, Japan and Norway sought the downlisting of four whale species to Appendix II, which would allow commercial trade, should quotas by the IWC ever be set. They demanded secret ballots and all four proposals were defeated. Only Norway, on a second try, got a tie vote; all other votes were less than a majority, let alone the two-thirds vote needed. All the whale votes were less about the science of these particular whale stocks and more about the desire to keep key control of the issue before the IWC and to not allow commercial whaling unless the IWC allows commercial whaling first.

Elephants were the most visible subject of CITES debate - signs, posters at the conference, on banners across roadways in the city, and even demonstrations in support of Kenya at the front gate of UNEP all set a pro-elephant tone. A major part of the debate was the degree to which the prior sale of ivory to Japan had triggered an increase in elephant poaching. No agreement was reached about the risk of more poaching should Southern African states commercial sale of ivory increase. Much the world's view was to let Africa decide what to do with these elephants and their ivory, but Africa was split into a number of different camps, and could not reach agreement. Apparently, the European Union and South Africa had been hard at work behind the scenes brokering a deal for the second week of the Conference; all parties would withdraw their proposals. This settlement was announced when the session opened. South Africa was given the same status as the other South African countries relative to the elephant, a downlisting of the elephant with a zero quota on ivory sales. The Parties did agree to implement a poaching monitoring system (MIKE) of elephants, which will hopefully provide more information for the Parties at the next conference of the Parties.

The next big battle was Cuba's proposal to sell the shells of the Hawksbill turtles to Japan. This raised concerns among a wide variety of the Caribbean countries because, while many of them are friendly toward Cuba, the population of Hawksbill turtles that were part of the proposal were populations shared by other countries of the region who did not think that commercial sale was justified at that time. Japan and Norway (and Iceland) were in full support as it promoted a commercial use of an Appendix I species. In another secret vote Cuba lost, getting a slight majority but not the two-thirds needed. Cuba had the issue reconsidered on the last day of the Conference and received an even closer vote but the Hawksbill turtle remained on Appendix I.

The final species battle of the Eleventh COP was an attempt on the last two days of the Conference by the United States, Australia, and the United Kingdom to list three different shark species (the whale shark, the great white, and the basking shark) on Appendix II of the treaty. This would have allowed commercial trade with the issuance of a CITES permit. The granting of permits would help create an information base and bring into play the standard that there be a showing of "no detriment" prior to the granting of a permit of export or import from the sea. The United Kingdoms' basking shark proposal came closest to being adopted, again on a second vote on the last day of the Conference. There was good science supporting the proposal, and the commercial demand for shark fin is of great concern, placing some of the shark species populations in a troublesome position. But Japan and others did not want any further intrusion of CITES into the marine environment. Also, from the tone of the comments made on the floor of the Conference, many Parties were not ready to embrace sharks as a species.

At the meeting, the Parties changed the way that operations that breed Appendix I species for commercial purposes are regulated under CITES (Doc. 11.48 & COM 11.27 and 11.28). Previously, any such operation had to be registered with the CITES Secretariat, a process that required approval by all the Parties. Now, only operations breeding species identified as being critically endangered in the wild and/or difficult to breed or keep in captivity need to go through this process. All operations breeding other species will not, in the future, require such approval; they will only need to be approved by the Management Authority of the exporting Party. The process of developing a list of at-risk species is presently underway.

#### b. Enforcement Issues

Examples of continuing enforcement issues include the following. In the fall of 2000, India's wildlife authorities announced their intention to burn tiger skins and other animal parts worth hundreds of thousands of pounds on the black market to show they are determined to tackle the poaching of endangered species.

In October 2000, two Vietnamese police officers were caught red-handed using their black maria to transport a whole menagerie of protected animals for poachers. Police found two bears and more than 200 kilograms (440 pounds) of other endangered wildlife, including tortoises, when a prison truck was stopped and searched in the central province of Nghe.

Also in October 2000, Japanese animal dealer Mitsuru Ozawa was sentenced to sixteen months in prison and fined \$18,400 for illegal wildlife smuggling. In 1998, he had brought into Japan, by aircraft from Indonesia, boxes containing one baby orangutan, one siamang gibbon, and two Moloch gibbons.

In early November a foreign diplomat was stopped at the Entebbe airport of Uganda when it was found that he was trying to smuggle twenty-two parrots out of the country in a chartered plane.<sup>62</sup>

Additional information about CITES, and supporting documents for the issues discussed above can be found at <http://www.cites.org> (CITES Secretariat) and <http://international.fws.gov/cites/cites.html> (U.S. Fish & Wildlife Service).

#### 2. *Convention to Combat Desertification*<sup>63</sup>

The Convention to Combat Desertification stresses the global dimension of desertification. Its purpose is to mitigate the effects of drought on arid, semi-arid, and dry sub-humid lands. It calls for increased efforts to implement national, subregional, and regional action programs. In particular, the Convention is intended to address the fundamental causes of famine and food insecurity, especially in Africa, by stimulating more effective partnership between governments, local communities, non-governmental organizations, and aid donors, and by empowering grassroots efforts to combat desertification.

The Convention entered into force on December 26, 1996, ninety days after ratification by fifty countries. As of October 11, 2000, 169 countries had ratified the Convention, including nearly all major developed countries. The United States' instrument of ratification was deposited on November 17, 2000, and the Convention enters into force for the United States on February 15, 2001.

62. Next Conference of the Parties is expected to be in Chile in the fall of 2002.

63. U.N. Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, U.N. Doc. A/AC.241/15/Rev.7, available at <http://www.unccd.int/convention/menu.php> [hereinafter Convention to Combat Desertification].

## a. Developments in 2000

The Fourth Conference of the Parties to the Convention was held in December 2000. During the session, delegates had the opportunity to review thirty-two of over 150 reports submitted by the Parties between 1999 and 2000. The review included twenty-four country reports, four sub-regional reports, and four regional reports. Countries affected by desertification emphasized the need for predictable financial support, enhanced South-South cooperation, and the possibility of opening access to Global Environment Facility (GEF) funds to support programs to combat desertification. Though “anti-land degradation” activities are already funded through existing GEF windows, for example, biodiversity, affected countries repeatedly advocated for a new window in the GEF for desertification.

## b. Anticipated Events in 2001

Conference delegates will continue review of the reports at an intersessional meeting in 2001, before the next Conference of the Parties.

Additional information on the Convention is available on its website at <http://www.unccd.int/main.php>.

3. *Fresh Water Initiatives*

Fresh water management and sharing across borders is an important and pressing international environmental issue. Two initiatives of note for 2000, the endorsement of the Hague Declaration and a World Commission on Dams Report, are discussed below.

## a. The Hague Declaration—An Advance in the Development in International Water Law and Policy and a Program for Action

One hundred and thirty countries and twenty-eight international organizations participated in the Second World Water Forum at The Hague in March 2000. The majority of participants endorsed the Declaration of The Hague<sup>64</sup> embracing a set of water use, distribution and development principles and goals.

The Forum highlighted that water stress or insecurity is an immediately pressing and growing problem, and that “business as usual” in water management, usage, and transboundary sharing will almost certainly lead to a critical situation.<sup>65</sup> More than 245 river basins<sup>66</sup> and a large number of underground aquifers are shared by two or more sovereign territories, compounding the difficulty of formulating practical transboundary water legal and management regimes.

The Declaration is a hybrid document of legal principles and action goals, many of which were first introduced in the 1970s and revisited in the early 1990s. It is important for its

64. Ministerial Declaration of The Hague on Water Security in the 21st Century, Mar. 22, 2000, *available at* <http://www.waternunc.com/gb/secwwf12.htm> [hereinafter The Hague Declaration].

65. “Water stress” describes both the profound scarcity of freshwater and the excessive, uncontrolled intrusion or diversion of water. It results from degraded water quality, from pollution or by overextraction, which may lead to degradation in quality from salinization; from decreased water supply due to natural droughts or diverted water resulting from large-scale dam projects; and by competing and uncoordinated needs and demands. Climate change may also contribute to water stress—global warming would cause sea levels to rise which would lead to salt-water intrusion in estuaries and coastal aquifers, and also flood small island States. Water stress also impacts upon the food supply since agricultural and livestock production often require substantial use of freshwater.

66. SALMAN AND BOISSON DE CHAZOURNES, *INTERNATIONAL WATERCOURSES* vii (1998).

high profile and the broad international involvement and support it evoked and may well be influential in the formation of national legislation and bilateral and multilateral agreements on international waters.

(i) *Background.* Presently, international water law is comprised of equitable apportionment and equitable utilization principles modified by the limited territorial sovereignty doctrine integrating the customary law principle of *sic utere tuo ut alienum non laedas*—the obligation of a State to not injure other sovereign's interests in using one's own territory (a.k.a. the rule of no harm), as described in the Helsinki Rules on the Uses of Waters of International Rivers (Helsinki Rules)<sup>67</sup> and the ILC Convention.<sup>68</sup> The classical principles of prior appropriation, absolute sovereignty, and absolute territorial integrity doctrines continue to influence domestic conceptions of exactly what is meant by "reasonable" or "equitable." Equitable apportionment maintains that the resources of a transboundary body of water should be shared among the riparian states and, furthermore, that an authority other than the states themselves may be endowed with the power to decide, based on equitable principles, how and in what proportions the various states may share the resources.<sup>69</sup> Equitable utilization protects beneficial uses, in other words, uses that are "economically or socially valuable."<sup>70</sup> The goals of equitable apportionment and equitable utilization are equitable sharing, so as to "provide the maximum benefit to each basin State from the uses of the waters with the minimum detriment to each,"<sup>71</sup> "with a view to attaining optimal and sustainable utilization."<sup>72</sup>

Transboundary water law for non-navigational use took its modern form in the early 1990s in conjunction with the emergence of the sustainable development paradigm. Nations first came together to discuss international water management and sustainable development at the Dublin Conference on Water and the Environment, held in January 1992. The Dublin Conference produced four guiding principles for action (the "Dublin Statement"):<sup>73</sup>

- Freshwater is a finite and vulnerable resource, essential to sustain life, development and the environment;
- Water development and management should be based on a participatory approach, involving all users, planners and policymakers;

67. See Helsinki Rules on the Uses of Waters of International Rivers, International Law Association (ILA), Report of the Fifty-Second Conference, Aug. 14-20, 1966, at 484 (1967) [hereinafter Helsinki Rules].

68. Convention on the Law of the Non-Navigational Uses of International Watercourses, Report of the Sixth Committee Convening as the Working Group of the Whole, U.N. GAOR, 51st Sess., U.N. Doc. A/51/869 (1997) [hereinafter ILC Convention].

69. See generally *Kansas v. Colorado*, 206 U.S. 46 (1907). In this case, the Supreme Court decided upon the particular equitable apportionment scheme. See also *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Wyoming v. Colorado*, 286 U.S. 494 (1932); *Wisconsin v. Illinois*, 278 U.S. 367 (1929); *Wisconsin v. Illinois*, 281 U.S. 179 (1930); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *New Jersey v. New York*, 283 U.S. 336 (1931).

70. Comment to Art. IV, Helsinki Rules, *supra* note 67. See also ILC Convention: "Watercourse States shall . . . take all appropriate measures to prevent the causing of significant harm to other watercourse States." *Supra* note 68, art. 7, para. 1.

71. Helsinki Rules, *supra* note 67, at General Comment (a) to ch. 2, art. IV. For a discussion of the principles of equity followed by U.S. Courts, see Justice Douglas's opinion in *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

72. ILC Convention, *supra* note 68, art. 5, para. 1.

73. International Conference on Water and the Environment, Dublin Statement on Water and Sustainable Development, Jan. 26-31 1992, available at <http://www.water-2001.de/documents/conferences.asp> [hereinafter Dublin Statement].

- Women play a central part in the provision, management and safeguarding of water; and
- Water has an economic value in all its competing uses and should be recognized as an economic good.

The Agenda 21 Program of Action at the Earth Summit in June 1992 embraced the Dublin Principles and recommended that management of water resources involve full public participation, including that of women, youth, indigenous people, and local communities. In 1998, the Petersberg Principles<sup>74</sup> emphasized the importance of using an integrated approach to water resources management, including a focus on cooperation at the regional level and support for international river basin commissions.

The First World Water Forum was held in Marrakech, Morocco in 1997, coincidental to the completion of the ILC Convention on the Law of the Non-Navigational Uses of International Watercourses, and launched the sustainable and holistic Vision for World Water, Life and Environment in the 21st Century. From 1999 to 2000, regional Water Visions were presented to the World Water Council and integrated into a single World Water Vision document<sup>75</sup> in preparation for The Hague Second World Water Forum.

(ii) *The Hague Declaration.* Like the 1997 ILC Convention,<sup>76</sup> The Hague Declaration is non-legally binding, reflecting national positions and representative of progress toward international consensus. Most notably, the Declaration emphasizes that water is a basic human need, defines the interconnection between water security, social and economic development, and regional stability, and proposes actions for achieving water security goals. The priorities of “water security” are clearly articulated as: “ensuring that freshwater, coastal and related ecosystems are protected and improved; that sustainable development and political stability are promoted, that every person has access to enough safe water at an affordable cost to lead a healthy and productive life and that the vulnerable are protected from the risks of water-related hazards.”<sup>77</sup>

The Hague Declaration succinctly distilled the main challenges for addressing water security concerns thus:

- Meeting basic needs: to recognize that access to safe and sufficient water and sanitation are basic human needs and are essential to health and well-being, and to empower people, especially women, through a participatory process of water management.
- Securing the food supply: to enhance food security, particularly of the poor and vulnerable, through the more efficient mobilization and use, and the more equitable allocation of water for food production.
- Protecting ecosystems: to ensure the integrity of ecosystems through sustainable water resources management.
- Sharing water resources: to promote peaceful co-operation and develop synergies between different uses of water at all levels, whenever possible, within and, in the case of boundary and trans-boundary water resources, between states concerned, through sustainable river basin management or other appropriate approaches.

---

74. International Conference on Water and the Environment, Petersberg Declaration on the Cooperation for Transboundary Water Management, Mar. 3-5, 1998, available at <http://www.water-2001.de/documents/conferences.asp> [hereinafter Petersberg Declaration].

75. World Water Vision Commission Report, Mar. 13, 2000, available at <http://watervision.cdinet.com/commreport.htm>.

76. ILC Convention, *supra* note 68.

77. The Hague Declaration, *supra* note 64, para. 1.

- Managing risks: to provide security from floods, droughts, pollution and other water-related hazards.
- Valuing water: to manage water in a way that reflects its economic, social, environmental and cultural values for all its uses, and to move towards pricing water services to reflect the cost of their provision. This approach should take account of the need for equity and the basic needs of the poor and the vulnerable.
- Governing water wisely: to ensure good governance, so that the involvement of the public and the interests of all stakeholders are included in the management of water resources.<sup>78</sup>

(iii) *Looking Forward.* The Declaration is distinguished from its predecessor agreements in two principal ways. First, it embraces water pricing, qualified by equity and poverty concerns, to correct undervaluing and prevent overuse of water. Second, it explicitly recognizes and emphasizes the “pivotal role” of the individual governments, not only with respect to integrative institutional and technological improvements, but also as regards the importance of governments initiating innovative financial commitments.<sup>79</sup> At the Forum, more than fifty countries, as well as some public international organizations and the private sector committed new financial resources to be devoted to international water security and development. The work of the forum is being followed up by a U.N.-led multi-partner initiative to assess and biennially report on the state of the world’s freshwater in a World Water Development Report.

#### b. World Commission on Dams Report

On November 16, 2000, the World Dams Commission (WCD) released its long-anticipated report—“Dams and Development: A New Framework for Decision-Making.”<sup>80</sup> The WCD was an *ad hoc* commission created in May 1998 by The World Bank and IUCN (World Conservation Union) with a mandate to undertake a rigorous cost-benefit analysis of large dams globally and consider the technical, financial, economic, environmental and social performance of large dams and their alternatives. Moreover, the Commission was to develop appropriate internationally acceptable criteria, guidelines and standards for the planning, design, appraisal, construction, operation, monitoring and decommissioning of large dams.

For more than two years, the WCD conducted the largest review of its kind, including: eight detailed case studies; country reviews for India and China; a briefing paper on Russia and the Newly Independent States; surveys of 125 large dams; seventeen thematic reviews on social, environmental and economic issues, on alternatives to dams, and on governance and institutional processes; and over 900 other submissions and the results of regional public consultations. Significantly, the WCD was composed of a diverse forum of engineers, environmentalists, government officials, indigenous people, financiers, affected people and academics. Despite the broad and divergent backgrounds, the Commission’s members unanimously signed the Report.

The WCD Report concludes that despite the important and significant contribution of large dams to human development, the social and environmental costs have often been unacceptable and frequently unnecessary. The Report acknowledges that dams irrigate

78. *Id.* at para. 3.

79. *Id.* at para. 4.

80. *Dams and Development: A New Framework for Decision-Making, The Report of the World Commission on Dams* (2000). The WCD Report can also be downloaded from the WCD website at: <http://www.dams.org>.

fields that provide up to a sixth of world food production, and that a third of countries depend on hydropower for over half their electricity. Nevertheless, it also concedes that dams have driven up to 80 million people from their homes; one-quarter of dams built to supply water deliver less than half the intended amount; many dams impede the flow of silt downstream, greatly reducing the fertility of flood plains and causing erosion of coastal deltas; in 10 percent of old reservoirs, the build-up of silt has more than halved the storage capacity. In addition, the Report asserts that while today there are over 45,000 large dams worldwide, few have ever been subject to a cost-benefit review.

In response to the findings, the WCD Report recommends far-reaching participatory changes in the way dam proposals are evaluated. It provides for a rights-and-risks approach for identifying all legitimate stakeholders in negotiating development choices and agreements. It also establishes a set of core values, strategic priorities, and practical criteria and guidelines governing future water and energy resources development. These include, among others: environmental flow requirements to sustain aquatic ecosystems; prioritization of existing energy sources and maximizing efficiency of water systems before building new projects; periodic participatory reviews of existing dams to assess dam safety, and possible decommissioning; criteria for international financing of dams involving transboundary rivers; and restoration of damaged ecosystems.

While the WCD Report is candid and highly forthcoming, its impact on the \$42 billion global dam industry is still unclear. The Report was hailed by many environmental and indigenous groups. Industry, governments, and inter-governmental organizations, however, remained conspicuously quiet. To the extent that the Report offers guidelines and standards, it provides an opportunity for clarity and consistency, criteria that businesses and financial institutions often desire more than relaxed regulations. More importantly, because the guidelines and standards are based on a comprehensive study and were adopted unanimously by an inclusive forum of all sectors of society with an interest in large hydro projects, the Report may have a profound impact on how global water and energy resources are developed in the future.

## II. Regional Agreements and Initiatives

### A. THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION

The North American Commission for Environmental Cooperation (CEC), which was created under the North American Agreement on Environmental Cooperation (NAAEC),<sup>81</sup> carries out its work under four program areas: conservation of biodiversity; economics, trade and the environment; pollutants and health; and law and policy. The CEC also administers a citizen submission process whereby persons or non-government groups from Canada, the United States, and Mexico can allege that a country is not effectively enforcing its environmental laws. This report covers selected aspects from each of the four program areas as well as from the petition process.

#### 1. *Conservation of Biodiversity*

CEC initiatives under this program have focused on conservation and sustainable use of North American migratory and transboundary species in shared and critical habitats and

---

81. North American Agreement on Environmental Cooperation (1993), available at [http://www.cec.org/pubs\\_info\\_resources/law\\_treat\\_agree/naaec](http://www.cec.org/pubs_info_resources/law_treat_agree/naaec).



corridors. One project has established a coalition of over 250 government agencies and non-governmental organizations, known as the North American Bird Conservation Initiative, to provide a crucial continental framework for North American cooperation as well as local "on the ground" efforts.

In 2000, the CEC produced a Bird Conservation Regions Map of North America. This map of ecologically based conservation regions having similar natural characteristics and human land uses was created to facilitate efficient conservation planning and implementation as well as partnerships among groups of stakeholders that share landscapes but differ in their conservation and socio-economic values. Starting in 2000, coordinated National Strategies and Action Plans from Canada, Mexico, and the United States are being developed. In addition, the CEC has worked with the wildlife experts of the three countries to develop a portfolio of North American Species of Common Conservation Concern and accompanying report on the species' status, threats and potential areas of collaboration. This list of species has been adopted by the Trilateral Committee on Wildlife and Ecosystem Management and Conservation and is the first step for Canada, Mexico, and the United States to collaborate on protecting these threatened and endangered species.

## *2. Economics, Trade, and Environment*

In 2000, part of the CEC work in this program area focused on assessing the environmental effects of trade liberalization. In October 2000, the CEC hosted the first North American Symposium on Assessing the Linkages between Trade and Environment. At this Symposium fourteen research papers were presented, focusing on the application of the Analytical Framework developed by the CEC in 1999 for assessing the linkages between environment and trade. The papers covered a wide range of economic sectors, environmental media and issues, from the impacts of trade liberalization on industrial pollution emissions and on transboundary movements of hazardous wastes, to trade in services, electricity, water, forest products and fisheries.

The proceedings from the Symposium, held at the World Bank, were covered by the Earth Negotiations Bulletin. An audio version of the fourteen papers and the panel discussions, together with the full texts of each paper, can be found on the homepage of the CEC at <http://www.cec.org>. In 2001, the CEC will publish the papers in English, Spanish and French, together with an overview of key themes, issues and next steps in approaches to assess the environmental effects of free trade.

Article 10(6) of the North American Agreement for Environmental Cooperation (NAAEC) provides that the Council of the CEC shall cooperate with the NAFTA Free Trade Commission (FTC) to achieve the environmental goals and objectives of the NAFTA. The Trade and Environment Officials Group formed pursuant to Article 10(6) met twice in 2000. In addition to procedural matters, it focused its work on two issues: (1) environmental labeling in the context of trade and environment, and (2) the role of precaution in environmental policies and approaches. The 10(6) Group has decided to continue its work on precaution, and instructed the Secretariat in late 2000 to develop a series of background studies including: examples of precaution in statutes and regulations at the federal level in which precaution is included or embodied in laws, as well as examples of jurisprudence in which precaution has been of relevance; an overview of terminology of relevance to precaution; and an economic analysis of risk assessment and risk management approaches applied in the three countries.

### 3. *Pollutants and Health*

#### a. The North American Pollutant Release and Transfer Register Project

The CEC's North American Pollutant Release and Transfer Register (PRTR) project seeks to ensure that citizens have access to accurate information about the release and transfer of toxic chemicals from specific facilities into and through their communities. Since the beginning of its North American PRTR initiative in 1995, the CEC has worked with the national PRTR programs of Canada (National Pollutant Release Inventory), the United States (Toxics Release Inventory), and Mexico (Registro de Emisiones y Transferencia de Contaminantes) to develop a North American profile of pollutant releases and transfers.

On May 30, 2000, the CEC released *Taking Stock: North American Pollutant Releases and Transfers—1997*.<sup>82</sup> The report, which is fourth in the *Taking Stock* series, provides analyses of the matched North American data set for the 1997 reporting year (for Canadian and U.S. data only, Mexican data are not yet available) and looks at trends from 1995-97. The report shows that while there was a reduction of 9 percent in releases from 1995-97, there was a dramatic increase (27 percent) in off-site transfers during the same time period, resulting in an overall increase of 1.2 percent in total releases and transfers. The report also shows that while the facilities with the largest reported amounts are making progress in reducing total releases and transfers, the large block of facilities that report relatively smaller amounts (1000,000 kg) are not part of this reduction trend. These "smaller" facilities showed increases in both releases and transfers from 1995-97.

#### b. Air Quality Program

The CEC's North American Air Quality Program undertakes projects designed to facilitate tri-national coordination in air quality management and to develop technical and strategic tools for improved air quality in North America. In 2000, the CEC sponsored the first meeting of North American air pollution management officials in conjunction with a meeting of the State and Territorial Air Pollution Program Administrators/Association of Local Air Pollution Control Officials (STAPPA/ALAPCO) in Asheville, North Carolina.

Other work by the CEC Air Quality Program targeted specific air contaminants. During 2000, the Air Quality Program supported work by the Mercury Policy Project on mercury waste reduction and handling of mercury-containing products in North America. Through a collaborative effort with CEC's Sound Management of Chemicals (SMOC) Mercury Implementation Task Force, the Air Quality Program initiated an effort to develop a mercury air emissions inventory in Mexico. Also in 2000, the Center for the Biology of Natural Systems, City University of New York, completed a CEC-supported modeling effort of dioxin deposition in the Canadian polar territory of Nunavut. Part of this work under the Program also developed the first-ever dioxin inventory for Mexico.

In addition, the Air Quality Program initiated a project in 2000 to look at potential air quality impacts along trade and transport corridors between the three NAFTA countries. The CEC commissioned an initial analysis of potential impacts and possible mitigation measures along trade corridors, with input from a stakeholders advisory group consisting of representatives from each country as well as NGO participants. The CEC will present this preliminary analysis at a public workshop in Winnipeg, Manitoba in mid-March 2001.

---

82. *Taking Stock: North American Pollutant Releases and Transfers (1997)*, available at [http://www.cec.org/pubs\\_info\\_resources/publications/all\\_pubs](http://www.cec.org/pubs_info_resources/publications/all_pubs).

The public feedback from this analysis and workshop will help the CEC refine its future work in this area.

#### 4. Law and Policy

##### a. Alternative Approaches to Enforcement

Part of the work in the Law and Policy program is carried out through the North American Working Group on Environmental Enforcement and Compliance Cooperation (Enforcement Working Group), a trilateral working group of government enforcement officials from Canada, Mexico, and the United States. This group exists to strengthen cooperation among the environmental enforcement agencies in recognition of shared enforcement and compliance challenges. Among other issues, it has examined alternative approaches to enforcement and compliance in North America. One project of this working group explores the relationship between voluntary environmental management systems (EMS, including the ISO 14,000 series) and government programs to enforce, verify and promote compliance with environmental laws and regulations.

In June 2000, Council Resolution 2000-05<sup>83</sup> endorsed the most recent work of the Enforcement Working Group, a guidance document entitled *Improving Environmental Performance and Compliance: 10 Elements of Effective Environmental Management Systems*.<sup>84</sup> This document represents the first time the three North American governments have jointly expressed their views on how voluntary EMSs designed for internal management purposes can also serve the broader public policy goals of compliance assurance and improved environmental performance in regulated and non-regulated areas. It complements existing EMS models in two ways: (1) by stating government support for properly designed and implemented EMSs helps organizations achieve and maintain compliance and improve their environmental performance in both regulated and non-regulated areas, and (2) by setting out a list of elements that will enhance the ability of users of EMSs to address these goals. The three NAFTA parties prepared this document with the goal of incorporating its elements into their respective voluntary programs in a way that strengthens the Parties' effectiveness at protecting environment. Plans for implementation in each of the three countries are noted in the document.

##### b. Convention on International Trade in Endangered Species of Fauna and Flora (CITES)

All three North American countries are parties signatories to CITES<sup>85</sup> and share similar implementation issues. In carrying out its mandate to encourage cooperation among the Parties to the NAAEC, the CEC partners with the North American Wildlife Enforcement Group (NAWEG) to sponsor tri-national training sessions focused on various aspects of CITES enforcement. The 2000 seminar held in Monterrey, Mexico dealt with enforcement issues related to trophy hunting and game farming and was the fifth in this annual initiative,

83. This resolution, adopted on June 13, 2000, endorsed the use of guidance document by industry, government agencies, and others involved in activities that may have significant environmental impacts and encouraged appropriate governmental agencies to promote its use. Council Resolution 01-05, Promoting Comparability of Air Emissions Inventories, C/01-00/RES/05/Rev.9 (June 29, 2001), available at [http://www.cec.org/who\\_we\\_are/council/resolutions](http://www.cec.org/who_we_are/council/resolutions).

84. Improving Environmental Performance and Compliance: 10 Elements of Effective Environmental Management Systems, June 2000, available at [http://www.cec.org/pubs\\_info\\_resources/publications/all\\_pubs](http://www.cec.org/pubs_info_resources/publications/all_pubs).

85. CITES, *supra* note 61.

which brings together enforcement officials from the three North American countries to learn about their respective laws and regulations, species identification techniques, and investigative methods. To facilitate exchange of information and expertise and to create effective networks for those involved in wildlife enforcement, the CEC hosts the web page for the NAWEG, which contains general information about its collaborative activities and its publications: "DNA Analysis in Wildlife Forensics (March 2000)," "Forensic Analysis of Wildlife Crimes (May 2000)," and the Directory of North American Forensic Laboratories. This web page can be consulted at <http://www.cec.org/naweg>.

### c. Law and Policy Reports

Two issues of the North American Environmental Law Report were published by the CEC in 2000. The spring issue contains two major articles: "Transboundary Environmental Impact Assessment"<sup>86</sup> and "Access to Courts and Administrative Agencies in Transboundary Pollution Matters."<sup>87</sup> These articles address commitments of the Parties under Articles 10(7) and 10(9) of the NAAEC. The fall issue is a compilation of Secretariat Determinations under Articles 14 and 15 of the NAAEC from August 1997 through August 2000. A complete list of CEC publications can be reviewed at <http://www.cec.org>.

### 5. Citizen Submissions under Articles 14 and 15

Articles 14 and 15 of the NAAEC establish a process whereby the CEC Secretariat may consider submissions from a non-government organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Agreement and guidelines establish criteria and procedures for the review of any such submissions. In 2000, six new submissions were filed, two concerning the United States, three concerning Mexico, and one concerning Canada.

Of the twenty-eight submissions that have been filed from the signing of the NAAEC until December 31, 2000, ten are currently being reviewed by the Secretariat: two submissions concerning Canada, (SEM-98-004 and SEM-00-004), one submission concerning the United States (SEM-98-003) and one concerning Mexico (SEM-97-002) are being reviewed in accordance with Article 15(1), in light of the response provided by the Party, to determine whether they warrant the development of a factual record. Regarding submission SEM-00-006 involving Mexico, the Secretariat has notified the submitters that there is a minor error of form and is awaiting receipt of a revised submission in order to proceed with its review under Article 14(1). The Secretariat is awaiting a response from Mexico to submission SEM-00-005, in accordance with Article 14(2), in order to continue its review. In 2000, the Council directed the Secretariat to prepare a factual record with respect to submission SEM-98-007 that alleges a failure by Mexico to effectively enforce its environmental law in connection with an abandoned lead smelter in Tijuana. The Secretariat is awaiting direction from the Council concerning possible development of a factual record for submissions SEM-98-006 (which alleges a failure by Mexico to effectively enforce its environmental laws with respect to the establishment and operation of a shrimp farm in Nayarit, Mexico) and SEM-99-002 (which alleges a failure by the United States to enforce its Mi-

86. *Transboundary Environmental Impact Assessment*, available at <http://www.cec.org>.

87. *Access to Courts and Administrative Agencies in Transboundary Pollution Matters*, available at <http://www.cec.org>.

gratory Bird Treaty Act effectively with respect to logging operations). The Council decided to defer consideration of the Secretariat's recommendation to prepare a factual record with respect to submission SEM-97-006.

Eight files were closed in 2000. Of these, three submissions were dismissed under Article 14(1) (SEM-98-001, SEM-00-003 and SEM-00-001); two under Article 14(3)(a) (SEM-99-001 and SEM-00-002); and two under Article 15(1) (SEM-97-007 and SEM-98-005). One factual record was prepared and made public on June 11, 2000, regarding submission SEM-97-001 alleging that the Canadian Government is failing to enforce the Fisheries Act with respect to hydroelectric operations in the province of British Columbia.

A public registry providing the full text of all submissions, Party responses and factual records as well as the Submissions Guidelines is available online at <http://www.ccc.org>.

## B. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (MNEs)

In May, OECD Members completed the negotiation of the revised environmental chapter of the Voluntary OECD Guidelines for Multinational Enterprises (MNEs). The OECD Guidelines for Multinational Enterprises (MNEs) are non-binding recommendations to enterprises intended to influence corporate behavior with government policies and societal expectations. The recommendations provide guidance on appropriate business conduct across the full range of MNE activities and are supported by implementation procedures in the participating countries, which comprise all thirty OECD Member countries, and three non-Member countries (Argentina, Brazil, and Chile).

Although the original 1970s Guidelines did not contain an environmental chapter, one was added in 1990. That chapter had three recommendations for MNEs: (1) to assess and take into account in decision-making foreseeable environmental consequences of their activities; (2) to cooperate with competent authorities by providing adequate and timely information about their activities; and (3) to take measures to minimize the risk of accidents and damage to the environment.

All OECD countries agreed that the 1990 environmental chapter was in need of substantial revision as it was outdated and too "philosophical" for business to implement in any meaningful way. The renegotiated environmental chapter has eight recommendations, including elements of the original three. The focus is the need for enterprises to incorporate a rigorous, environmental-management systems (EMS) into their corporate planning to provide a process for managing environmental impacts. An EMS is intended to reduce both economic and environmental costs, conserve resources, and move MNEs from a reactive to a preventive mode through a corporate commitment continuously to improve their environmental performance.

The recommendations to MNEs include: (1) establishing and maintaining an environmental management system; (2) consulting regularly with both employees and the local community about the environmental impacts of the enterprise; (3) assessing and taking into account in decision-making foreseeable consequences of the activities and performing an environmental assessment where appropriate; (4) exercising a precautionary approach when the environmental impacts are not fully understood; (5) maintaining contingency plans for unanticipated environmental accidents or damages; (6) encouraging development and adoption of environmentally beneficial technologies, procedures, goods and services; (7) promoting employee education and training in the environmental area; and (8) contributing to partnerships or initiatives that will enhance environmental awareness and protection.

### III. Trade and Investment and the Environment

#### A. THE WORLD TRADE ORGANIZATION

In 2000, activities of the World Trade Organization (WTO) included a number of items of interest from an environmental perspective. The WTO Members launched the Agriculture and Services negotiations mandated by the Uruguay Round Agreements. Focus was given to issues of compliance, enforcement, and implementation. While the Committee on Trade and Environment returned to its normal pace of three meetings during the year, dispute settlement activity increased, and included several environmentally related cases. The WTO, supported by the United States, also continued to pursue efforts to address the issues of internal and external transparency.

##### 1. *WTO Transparency*

As a result of the Seattle Ministerial, the Director-General and the Secretariat made issues of internal and external transparency a priority early in 2000. Transparent and inclusive processes were recognized as necessary for success, both in Ministerial Conferences and in the everyday workings of the institution. On internal transparency, the General Council decided in early February to take measures to ensure both the effective participation of all WTO Members in the workings of the Organization and the transparency of its processes. Members overwhelmingly support the practice of reaching decisions by consensus, and are considering ways to incorporate flexibility and inclusiveness into the Ministerial conferences and the preparatory processes. With respect to external transparency, all Members believe that the responsibility to interact with the public belongs primarily to national governments and that increased dialogue with the public can assist in building public support for the WTO. There is a general consensus that improvements made to the website and WTO-sponsored symposia are useful means of communicating with civil society; however, countries are divided on the extent to which the WTO should engage with civil society. Some countries remain convinced that further interaction between the WTO and civil society is critical, while others believe that further steps could infringe upon the Member-driven nature of the organization. The discussion on external transparency will continue in 2001.

##### 2. *WTO Services Negotiations*

WTO Members reached early agreement on a work program for the mandated services negotiations, including a December 2000 deadline for countries to submit proposals related to the conduct of the negotiations. In March 2001, the Council for Trade in Services is expected to begin the more substantive phase of the negotiations. The United States and the European Community have submitted specific proposals regarding environmental services. Of interest will be how WTO members address the classification of environmental and energy services. For example, will approaches to liberalization include sectors such as construction, engineering, and consulting? These sectors historically have not been classified as environmental services, but some argue should be recognized as environmentally related given the movement by industries and companies away from "end of the pipe" solutions and toward environmentally friendly engineering and design structures. The priority that the environmental services area is given by countries will be a probable sign of how interested and committed countries are to ensuring that reliable and competent environmental services are available when possible.

### 3. *WTO Agriculture Negotiations*

In early 2000, Members agreed to a year-end deadline for submitting initial negotiating proposals and a schedule of meetings to discuss the proposals. To date, there has been no movement to open for renegotiation the Agreement on Sanitary and Phytosanitary Measures,<sup>88</sup> which specifies rights and obligations related to measures taken for health and safety purposes. Environment, health, and safety-related issues of biotechnology and animal welfare have, however, been raised in the negotiations. The United States submitted a proposal addressing biotechnology and the European Union proposed incorporating animal welfare concerns into the negotiations, but neither proposal has gained significant support from other countries. Members will continue to review proposals through the first quarter of 2001, including additions or modifications to proposals already submitted. The next phase of negotiations will focus on developing reform modalities and creating new disciplines on trade-related agricultural policies. As with services, there is no deadline set for completing the negotiations.

### 4. *The WTO Committee on Trade and Environment*

The Committee on Trade and Environment met three times in 2000 and continued its work program using the "cluster approach." The first meeting at the end of February examined the market access cluster. Discussion focused primarily on the fisheries sector because several countries (including Peru, the United States, Iceland, New Zealand, Australia, Chile, and the Philippines) introduced a proposal at the Seattle Ministerial on reducing environmentally harmful subsidies that contribute to over-fishing. The July meeting focused on the environment and trade linkages cluster and included a session where several of the multilateral environmental agreement (MEA) Secretariats updated the delegations on trade-related developments in MEAs. The October CTE meeting included such an MEA session as well as a discussion of the work program and the relationship between the WTO and civil society. As mandated by the Uruguay Round Agreements, the Committee also intends to meet three times in 2001.

### 5. *Trade and Environment-Related Disputes at the WTO*

The WTO Panel issued its report in the "Asbestos" dispute,<sup>89</sup> where Canada challenged France's ban of chrysotile asbestos and products containing chrysotile asbestos. The French instituted the ban based on health concerns. The Panel found that while the French ban was inconsistent with the national treatment provisions provided for by the WTO Agreements, the ban was justified under Article XX, General Exceptions, as being a measure that was necessary to protect human health. The Canadian Government is appealing the decision. The United States, as a third party, supported the WTO-consistency of France's asbestos ban, and is participating as a third participant in the appeal.

The year 2000 also brought renewed attention to the 1996 WTO case brought against the United States by the Governments of Malaysia, India, Pakistan, and Thailand on the importation of shrimp into the United States, the "Shrimp/Turtle" dispute.<sup>90</sup> In 1998,

88. WTO Agreement on Sanitary and Phytosanitary Measures, available at [http://www.wto.org/english/tratop\\_e/sps\\_e/spsagr\\_e.htm](http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm).

89. Dispute Panel Report, European Communities—Measures Affecting Asbestos And Asbestos—Containing Products, WT/DS135/R (Sept. 8, 2000), available at <http://www.wto.org>.

90. Dispute Panel Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R (May 15, 1998); Appellate Body Report, WT/DS58/AB/R (Oct. 12, 1998), available at <http://www.wto.org>.

largely reversing the decision of the Panel, the Appellate Body, while not finding fault with the underlying U.S. law designed to protect endangered sea turtles, found that the United States had discriminated in how it implemented the restrictions on imports of shrimp and shrimp products. In July of 1999 the United States revised its implementation procedures to comply with the findings of the Appellate Body in a manner that it believed did not undermine its commitment to protect the endangered species. This past October, Malaysia requested that the WTO establish a panel to determine whether the changes that the United States made to the implementation of its shrimp/turtle law in order to comply with the findings of the Appellate Body were adequate. The WTO agreed to the request, and a panel has been established.

#### *6. Anticipating 2001 at the World Trade Organization*

The year 2001 is likely to be marked largely by efforts to launch the new Round. The next Ministerial is currently scheduled for November 5-9, 2001 in Qatar. China's entry into the WTO will most likely be completed, bringing additional challenges to the Organization. For environment, health, and safety if a new Round is launched, it remains to be seen whether, and if so, how, those issues are included in the negotiating agenda.

### B. UNITED STATES

In the United States, activity of note also occurred at the national level in 2000, including development of an Executive Order on environmental review of trade agreements and efforts to negotiate several bilateral free trade agreements incorporating provisions to promote environmental protection.

#### *1. Executive Order 13141*

In November of 1999, President Clinton signed Executive Order 13141 (EO 13141)<sup>91</sup> requiring the careful assessment and consideration of the environmental impacts of major trade agreements such as comprehensive multilateral rounds, multilateral or bilateral free trade agreements, or major new agreements in natural resource sectors. The goal of the Executive Order was to institutionalize the integration of environmental considerations into the development of U.S. positions in trade negotiations. The United States Government has conducted several environmental reviews in the past, including for the North American Free Trade Agreement in 1992 and 1993, a study of the economic and environmental effects of the proposed Accelerated Tariff Liberalization initiative with respect to forest products, and a Report to Congress at the end of the Uruguay Round in 1994.

In EO 13141, the president also directed the Office of the U.S. Trade Representative and the White House Council on Environmental Quality to facilitate the development of implementing guidelines to provide more detailed guidance regarding the conduct of reviews. Those guidelines were completed in 2000 and formalized a process for public involvement and a process to analyze environmental issues to ensure that pertinent environmental considerations are identified and explored as trade negotiations move forward. The Guidelines provide for the participation of all interested and relevant Agencies and opportunities for public comment. While the focus of an environmental review is to be on the

---

91. Exec. Order No. 13141, 64 Fed. Reg. 63,169 (Nov. 16, 1999).



effects in the United States, the review can, when appropriate, analyze transboundary and global impacts.

Pursuant to Executive Order 13141, the United States has initiated environmental reviews of the Free Trade Area of the Americas and the bilateral free trade agreements with Jordan, Singapore, and Chile. The U.S.-Jordan draft environmental review was released to the public for comment during the negotiations, and the U.S. Government has requested public comment regarding the scope of both the Singapore and Chile reviews, and is considering a review of the WTO Built-In Agenda negotiations.

## 2. *Bilateral Trade Agreements*

The United States launched bilateral free trade agreements with Jordan, Singapore, and Chile in 2000. The bilateral trade agreement with Jordan was completed in October and included four trade and environment principles.<sup>92</sup> While the genesis of these four principles can be found in past agreements (mostly the NAFTA), the Jordan-U.S. bilateral is notable as the first trade agreement to include a separate set of substantive provisions addressing trade and environment in the text.

The four principles included: (1) an acknowledgment of the objective of sustainable development; (2) a commitment to effective enforcement of national environmental laws; (3) an agreement to strive to provide for high levels of environmental protection; and (4) to continuously improve those laws, and a recognition that it is inappropriate to encourage trade by relaxing domestic environmental laws. The commitment to effective enforcement of national laws is justiciable under the dispute settlement mechanism of the agreement.

The U.S.-Jordan free trade agreement also contained transparency provisions and a Joint Statement on Environmental Technical Cooperation. In the Joint Statement, both governments agreed to the establishment of a Joint Forum on Environmental Cooperation in order to broaden and deepen effective environmental cooperation. The Executive Branch has forwarded the agreement to Congress for approval.

The U.S.-Jordan agreement called attention to several significant trade and environment considerations: how environmental provisions are incorporated into free trade agreements, whether such provisions should be subject to dispute settlement, and, if they are subject to dispute settlement, whether trade sanctions or monetary fines should be implemented when trade and environment obligations are breached. The NAFTA used a supplemental agreement, commonly called "the environmental side agreement," that included a citizen submission process to induce compliance whereas the bilateral agreement with Jordan placed the trade and environment provisions in the text with one justiciable provision.

More fundamentally, the U.S.-Jordan agreement highlights the basic question of whether free trade agreements should address environmental considerations. Like Jordan, Chile has expressed a willingness to address the environment. But not all trading partners may be so interested, as evidenced by the lack of enthusiasm for environmentally related negotiations at the Seattle Ministerial and the current posture of many Latin American countries in the FTAA negotiations.

---

92. Agreement on the Establishment of a Free Trade Area, Oct. 24, 2000, U.S.-Jordan, available at <http://www.ustr.gov/regions/eu-med/middleeast/US-JordanFTA.shtml>.

### C. FREE TRADE AREA OF THE AMERICAS NEGOTIATIONS

At the regional level in the Americas, the thirty-four countries of the Free Trade Area of the Americas (FTAA) spent the year preparing draft text for the nine established negotiating groups (Agriculture, Market Access, Investment, Government Procurement, Services, Dispute Settlement, Intellectual Property, Competition Policy, and Subsidies, Anti-dumping, and Countervailing Duties) to present to the Ministers in April of 2001 in Argentina. Each negotiating group completed a bracketed text incorporating the views and proposals of all countries and/or regional groups.

Environment continued to be a contentious area. The United States, Canada, and Chile appeared to be the only countries actively supporting a discussion of the intersection of trade liberalization and environmental protection, despite agreement at the 1994 Miami Summit of the Americas<sup>93</sup> by all FTAA countries to strive for mutually supportive economic and environmental policies. In fact, several countries opposed an effort by the United States to table language in the investment negotiating group that would, as does Article 1114 of the North American Free Trade Agreement, encourage FTAA countries not to relax their environmental laws for the purposes of attracting investment. Those countries argued such language was outside the scope of the investment chapter because, they contended, investment obligations and environmental provisions are not related topics. Some also expressed concern that developed countries use environmental commitments as a disguised form of protectionism. In November 2000, the investment negotiating group asked the Vice-Ministers for guidance on whether countries could submit bracketed text if the subject matter, in this case environment, was not viewed as relevant by all countries. The issue will surface in other negotiating groups as well.

At both the 1994 Miami Summit and the 1998 Santiago Summit of the Americas, leaders agreed that the negotiations would be concluded no later than 2005. At the end of 2000, Chile came forward with a proposal to conclude the negotiations by the end of 2003. The FTAA countries are currently taking that proposal into consideration.

## IV. Investment and the Environment

### A. THE WORLD BANK

The World Bank is comprised of five associated institutions: the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for the Settlement of Investment Disputes (ICSID). The term "World Bank" or "Bank" as used in this discussion, however, refers only to the IBRD and IDA.

#### 1. *Overview of Activities in Year 2000*

In 2000, the World Bank's environmental activities focused on addressing a broad range of international environmental concerns and on enhancing the Bank's existing performance in promoting environmentally sustainable development. In fiscal year 2000 (July 1999-June

---

93. Free Trade Area of the Americas (FTAA), First Summit of the Americas (1994), available at <http://www.summit-americas.org/eng/miamisummit.htm>.

2000), environmental protection was listed as the primary or one of the major objectives of approximately forty Bank funded projects. This amounted to 10 percent (U.S.\$1.4 billion) of all Bank projects. In addition to direct project loans, the World Bank also provided technical assistance for institutional capacity building for environmental legislation and enforcement in member countries.

In the area of environmental policies, guidelines and regulations, the World Bank continued with its ongoing initiative to update, refine and reformulate the organization's operational instruments, in particular, the re-organization of the standards contained in the Operational Directives (OD) into the normative hierarchy of Operational Policies (OP), Bank Procedures (BP), and Good Practices (GP).<sup>94</sup> Additionally, the World Bank developed and put forth a draft for an Environmental Strategy Consultation,<sup>95</sup> realized the second closing of the Prototype Carbon Fund, and, inter alia, entered into two innovative arrangements, one for promoting sustainable management of forests, and the other for preserving internationally recognized threatened critical ecosystems. The Bank also produced a status report on the implementation of its environmental and social Safeguards Policies. This status report was in part a follow up to the comments expressed by the World Bank's Inspection Panel Investigation Report on the *China Western Poverty Reduction Project*,<sup>96</sup> submitted to the president of the Bank in April 2000.

#### a. Environmental Operational Policies

With regard to the reorganization and review of the environmental operational policies, during the past few years, the Bank has proceeded with an extensive evaluation of its Operational Directives and related instruments, with the goal of clarifying normative content, improving scope of coverage, and effecting greater compliance. In this context, the Bank has paid particular attention to assessing, enhancing and reformulating three of its most well-known operational instruments regarding: Indigenous Peoples, Forestry, and Involuntary Resettlement.<sup>97</sup>

(i) *Safeguard Policies.* The Indigenous Peoples, Forestry, and the Resettlement policies are classified among the Bank's "Safeguard Policies."<sup>98</sup> In 1998, the World Bank Board of Executive Directors identified the ten most significant environmental operational instruments and designated them as Safeguard Policies.<sup>99</sup> As such, the Bank considers these ten policies to have "special operational significance," because of the highly important and sensitive subject matters they address and wide ranging impact on environmental protection in Bank development assistance projects.

94. For a more detailed discussion of the normative distinctions among these texts, see Sabrina Safrin et al., *Environmental Law*, 34 INT'L LAW. 707, 730 (Summer 2000).

95. Toward an Environmental Strategy for the World Bank Group: Progress Report/Discussion Draft (Apr. 2000), available at <http://wbln0018.worldbank.org/essd/essd.nsf>.

96. Inspection Panel Report on The Qinghin Project: A Component of the China Poverty Reduction Project (Apr. 28, 2000), available at <http://wbln0018.worldbank.org/eap/eap.nsf> [hereinafter The Qinghin Project].

97. For additional background on the Bank's ongoing efforts to reformulate these three policies, see Sabrina Safrin et al., *Environmental Law*, 34 INT'L LAW. 730-35 (2000).

98. World Bank Policies are available at <http://www.worldbank.org/whatwedo/policies.htm#featured>.

99. The ten Safeguard Policies, as designated by the World Bank among its operational instruments are: Environmental Assessment (OP 4.01), Natural Habitats (OP 4.04), Forestry (OP 4.36), Pest Management (OP 4.09), Involuntary Resettlement (OD 4.30), Indigenous Peoples (OD 4.20), Cultural Property (OPN 1.03), Dam Safety (OP 4.37), International Waterways (OP 7.50), and Projects in Disputed Areas (OP 7.60).

The Safeguards Policies are internally binding, normative standards among Bank staff and in relation to the execution of Bank supported projects. These policies also have a much wider significance because they can serve as models for the development of environmentally responsible laws, regulations, and related standards by governments and other international actors. The Safeguards Policies, as well as the industry sector recommendations, contained in the *World Bank Group Pollution Prevention and Abatement Handbook, Toward Cleaner Production*,<sup>100</sup> produced in 1998, are increasingly recognized by a number of multilateral and bilateral, as well as private sector organizations, as “best practice” international guidelines for environmental management.<sup>101</sup> The norms articulated in these World Bank instruments also impact the development and execution of domestic laws relating to environmental protection and socio-economic advancement in many developing countries.

Due to the high degree of importance accorded to the execution of the Safeguards Policies in Bank-supported projects, the Bank produced in October 2000, *Environmental and Social Safeguards Policies: Status Report on the Implementation Action Agenda*.<sup>102</sup> This report sought to update Bank Executive Directors on the organization’s progress in implementing and strengthening the safeguards system. The report highlights that the successful implementation and realization of the Safeguards Policies in projects depends both on effective compliance by Bank staff and also upon “ownership” by project country governments through proactive measures to facilitate adherence. The report also identifies the need to control risks associated with inconsistent application of safeguards policies across regions and the necessity for uniform disclosure requirements in this process.

The Bank seeks to increase progressively the development impact of the socio-economic and environmental issues addressed by the Safeguards Policies through host country government incorporation of these norms in national policy frameworks. To augment this process of country “ownership,” the Bank is publicizing successful experiences, assisting in building project country government capacity, and developing skills of regional and national experts to undertake execution of the safeguards.

In 2000, the Bank continued to receive comments from interested stakeholders and other members of the public regarding its proposals for reformulating all three policies. A number of human rights and environmental advocacy NGOs submitted detailed, and sometimes harsh, critiques of the proposed Operational Policy 4.10 on Indigenous Peoples and the conversion of OD 4.30 on Involuntary Resettlement into OP/BP/GP 4.12.

(ii) *Forestry Policy.* Some active developments at the Bank in 2000 and during the early months of 2001, concerned moving forward with modifying operational instruments related to the Forestry Policy. On December 24, 2000, the Bank released on its website for public comment, *Toward a Revised Forest Strategy for the World Bank Group, Draft Discussion*

---

100. WORLD BANK GROUP, POLLUTION PREVENTION AND ABATEMENT HANDBOOK 1998: TOWARD CLEANER PRODUCTION (1999).

101. For example, the Overseas Private Investment Corporation (OPIC), a U.S. Government agency, which supports American private investment through the provision of political risk insurance and direct financing, relies upon the Operational Policies and guidelines in the World Bank Group Pollution Prevention and Abatement Handbook. OPIC utilizes these instruments in every OPIC-supported project for which the standards are applicable. See OPIC, OPIC’s Environmental Handbook, April 1999, available at <http://www.opic.gov/subdocs/environasP/envirohome.htm>.

102. *Environmental and Social Safeguards Policies: Status Report on the Implementation Action Agenda* (Oct. 2000, Status Report).

*Paper*.<sup>103</sup> This document and its associated annexes were presented and discussed at the second meeting of the Forest Policy Implementation Review and Strategy (FPIRS) Technical Advisory Group (TAG) meeting, held in Washington, D.C. in January 2001.<sup>104</sup> The Bank's Operations Evaluations Department (OED) is conducting the FPIRS. In January 2000, the OED produced *A Review of the World Bank's 1991 Forest Strategy and its Implementation*,<sup>105</sup> which contained a detailed and constructively critical overview of the Bank's existing forest-sector policy. The first and second TAG meetings were facilitated by the Bank in conjunction with the World Conservation Union (IUCN). These meetings have included broad participation by forest policy experts and other interested parties.

The participants at the TAG meetings have highlighted the following issues to be addressed in any yet-to-be-finalized World Bank forest-sector policy: the coverage of OP 4.36 "Forestry" as a "Safeguard Policy" should include all forest types, not only tropical moist forests; the Bank must focus more on cross-sectoral impacts on forests; forests must be protected both for their local and global values; the Bank must define its understanding of the proposed forest policy objective of "sustainable forest management"; the Bank needs to define the scope of the term "high conservation value forests" in relation to primary and other types of forests and as this term concerns logging. Using the inputs offered by the participants at the TAG discussions and from comments received from other groups, it is expected that the World Bank Forests Team, tasked with updating the organization's forest policy, will continue to review during 2001 the existing texts of *The Forest Sector: A World Bank Policy Paper*,<sup>106</sup> June 18, 1991 and of OP 4.36 "Forests" of September 1993.

#### b. Inspection Panel

The October 2000 Safeguards report, discussed above, in part responded to concerns raised by the *World Bank Inspection Panel Investigation Report: The Qinghai Project, China Western Poverty Reduction Project*,<sup>107</sup> produced in April 2000. The World Bank Inspection Panel was created in September 1993 by the Bank's Executive Directors to serve as an independent vehicle for ensuring accountability in World Bank operations with respect to the Bank's policies and procedures.<sup>108</sup>

103. *Toward a Revised Forest Strategy for the World Bank Group, Draft Discussion Paper*, available at <http://wbln0018.worldbank.org/ESSD/FORESTPOL-E.NSF/MAINVIEW>.

104. The first TAG Meeting was held in June 2000 in McLean, Virginia. Among the issues that the TAG participants supported for inclusion in a revised World Bank forest policy were: (1) the development of a cross-sectoral approach to forests, to be applied to all Bank activities impacting forests; (2) that the forest policy should focus on poverty alleviation; (3) that the Bank's proposed objectives for the new forest policy—poverty alleviation, sustainable development and protecting global forest values—represented a positive and significant shift from the 1991 forest strategy, which centered on curbing deforestation and enhancing resource creation. See World Bank Forest Policy Implementation Review and Strategy, Report of the First Technical Advisory Group Meeting, McLean Virginia, June 26-28, 2000, available at <http://wbln0018.worldbank.org>.

105. *A Review of the World Bank's 1991 Forest Strategy and its Implementation* (Jan. 2000), available at <http://www.worldbank.org>.

106. *The Forest Sector: A World Bank Policy Paper*, available at <http://www.worldbank.org>.

107. The Qinghai Project, *supra* note 96.

108. See IBRD Resolution No. 93-10, The World Bank Group, *The World Bank Inspection Panel*, IDA Resolution No. 93-6, available at <http://wbln0018.worldbank.org>. The Inspection Panel enables private groups of two or more persons who believe that their interests have been adversely affected due to non-compliance by the Bank with the organization's operational policies, to request a review by the Inspection Panel. The Panel is empowered, subject to World Bank Board approval, to investigate the allegations brought by aggrieved interested parties regarding Bank staff non-compliance. Through the Inspection Panel, the World Bank established an independent forum to facilitate greater transparency and accountability regarding the impact of

The China Western Poverty Reduction Project (the "Project") was submitted by the Chinese government to the World Bank in 1997. The Project's stated objective is to reduce poverty through the relocation of over 50,000 primarily Han Chinese rural poor farmers 450 kilometers to a new irrigation site in an autonomous district inhabited by Mongolian, Tibetan, and other ethnic minorities. The International Campaign for Tibet (ICT), a human rights NGO acting on behalf of the affected people living in the project area, alleged that the inhabitants would suffer irreparable harm from the resettlement project because of the Bank's failure to follow its own operational policies and procedures. Although the World Bank Board in June 1999 agreed to proceed with the financing of the Project, the Board stated that funds could not be disbursed until it had the opportunity to decide on the results of a review by the Inspection Panel.

In September 1999, the Board authorized the Panel to conduct an investigation focusing on whether the Bank had violated eight named internal operational instruments. After an extensive investigation, including site visits and interviews, the Inspection Panel concluded that the Project, as currently proposed, violated six internal policy instruments, five of which are "Safeguards Policies."

Among the Inspection Panel's major findings were that Bank staff's efforts to facilitate and obtain public consultation by affected people were seriously inadequate (BP 17.50, Disclosure of Information); that Bank staff's environmental screening process decisions did not accord with OP 4.01 on Environmental Assessment requiring availability for public comment on large environmentally "sensitive" projects involving dams, irrigation, involuntary resettlement, and indigenous peoples; that given the enormous scale of absolute habitat conversion required for the Project, existing project information lacked sufficient detail regarding biodiversity impacted, thus violating OP 4.04 on critical natural habitats; that Project documents failed to recognize and provide for the specific socio-economic needs of diverse ethnic groups affected by the Project, through the crafting of individual indigenous peoples development plans (IPDP), as required by OD 4.20 (Indigenous Peoples); that Bank staff's definition of the Project's boundaries failed to assess large numbers of persons and communities affected by the Project's resettlement component, thus violating OD 4.30 (Involuntary Resettlement).

In response to a wide divergence of Bank staff opinion regarding the mandatory nature of the bank's operational policies, the Panel unequivocally stated that "[t]here is indeed room for some flexibility and interpretation [within these instruments] but, as provided in the Resolution that established the Panel, the Operational Directives (and updated OPs, BPs, GPs, etc.) are the primary source of Bank policy for purposes of assessing compliance."<sup>109</sup>

---

the organization's environmental policies in relation to affected groups and to the public in general. Upon completion of its investigation, the Panel submits its findings in a Panel Report to the World Bank Board and to Bank management. The Board renders a final decision on how to address the Panel's findings and Bank Management recommendations regarding these findings. After a Board decision is reached concerning the Panel Report and Management response, the Panel Report and management recommendations are available for public review. To date, the Inspection Panel has received more than twenty requests for inspection regarding Bank compliance with operational policies and procedures.

109. See The Inspection Panel Investigation Report, *China: Western Poverty Reduction Project*, INSP/R2000-4; IPN Request RQ99/3 (June 23, 2000), at p. xv.

### c. Other Activity in 2000

Two other recent World Bank environmental initiatives that witnessed major developments in 2000 and in the beginning of 2001 are: the Critical Ecosystem Partnership Fund and the Prototype Carbon Fund.

The Critical Ecosystem Partnership Fund (CEPF or "fund") was launched in August 2000 as a joint initiative of Conservation International, the World Bank, and the Global Environment Facility (GEF). The CEPF has the express aim of safeguarding approximately two-dozen of the most threatened biologically rich ecosystems ("Biodiversity Hotspots") on the planet. These hotspots include the Atlantic rainforest of Brazil, the Madidi-Tambopata of Peru, and the Okavango Delta in Botswana. Ecosystems identified as eligible for funding must be in countries that are parties to the Convention on Biological Diversity.<sup>110</sup>

By the terms of the instrument creating it, this \$150 million CEPF is directed exclusively at assisting local NGOs and other groups whose work is central to protecting biodiversity in the critical hotspots, with administrative flexibility to ensure maximum conservation impact. CI, the World Bank, and the GEF each are expected to commit \$25 million to the fund during the next five years, the initial phase of the program. The remaining \$75 million will be sought from other donor agencies. CI will manage the fund; the World Bank and the GEF shall have an oversight role.

The Prototype Carbon Fund (PCF) is a unique example of a public-private fund regime established under Bank auspices for promoting sustainable development and mitigating a global environmental threat. In July 1999, the Bank Board of Executive Directors approved the PCF. Upon the first closing in April 2000, the PCF became operational. At the second in October 2000, the PCF had a subscription of U.S.\$145 million. The PCF subscription will be capped at U.S.\$180 million. At the time of second closing, the PCF terms state that the PCF shall not be open for new public or private sector entrants. Only participants at the time of the second closing are eligible to contribute additional resources. At the second closing, the PCF had six public-sector participants,<sup>111</sup> all of which are industrialized countries, and seventeen private-sector participants.<sup>112</sup>

The PCF is designed to demonstrate how partnering public and private capital from the industrialized countries can provide both businesses and governments in the North and the South with an equitable share of benefits from projects geared toward reducing greenhouse gas emissions. It also offers the developing and market-transition state parties to the U.N. Framework Convention on Climate Change (UNFCCC),<sup>113</sup> an opportunity to "learn by doing." This practical first-hand experience of developing and implementing Joint Implementation (JI) and Clean Development Mechanism (CDM) projects, provides substantial learning for host countries and project entities and offers active support in host countries

110. See U.N. Environment Programme: Resolution of the Conference for the Adoption of the Agreed Text of the Committee on Biological Diversity, May 22, 1992, 31 I.L.M. 842.

111. These countries were Canada, Finland, Japan (through the Japanese Bank for International Cooperation), the Netherlands, Norway, and Sweden.

112. These private business participants included: RWF (Germany), Gaz de France, Tokyo Electric Power, Deutsche Bank, Chubu Electric, Chugoku Electric, Kyushi Electric, Shikoku Electric, Tohoku Electric, Mitsui, Mitsubishi, Electrabel (Belgium), NorskHydro, Statoil (Norway), BP-Amoco, and Rabobank.

113. See U.N. Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849.

through capacity-building workshops for governments and enterprises on the rules, regulations, and procedures governing greenhouse gas emission reductions projects under the UNFCCC/Kyoto Protocol treaty regime.

To complement the PCF, in 2001, the Bank will also launch the "PCF Plus," which will focus on research and training for enhancing developing country familiarity with the implementation of the "clean development mechanism" of the UNFCCC/Kyoto Protocol regime. Unlike the GEF, under which the World Bank is one of three implementing agencies together with the U.N. Development Programme, and the U.N. Environment Programme, the PCF is solely a World Bank initiative. However, the GEF reviews all PCF projects and has the right of first refusal over them.

## 2. *Looking Forward*

In 2001 and beyond, the Bank can be expected to continue such efforts to enhance its environmental performance and address international environmental concerns, including collaborative efforts with other international institutions, governments, and public interest and private non-governmental organizations.

## B. NAFTA

Chapter 11 of the North American Free Trade Agreement (NAFTA) establishes special international law rights and remedies for foreign investors in the three NAFTA countries. It marked the first time that legally binding rights and remedies against states for private investors was included in a multilateral trade agreement, a fact that will be noted below in the context of the expansive interpretation now being attributed to the rights in Chapter 11.<sup>114</sup>

### 1. *Developments in 2000*

The year 2000 saw the rendering of one jurisdictional decision and three major substantive decisions in Chapter 11 cases with a direct bearing on environmental law and management. No new environmentally significant cases are known to have been initiated over the year, although a waste disposal related case has been initiated by a Spanish company against Mexico under a bilateral investment treaty between the two countries.<sup>115</sup> At the end of the year, the status of the eight major environmental cases initiated to date under Chapter 11 was as follows: one was settled in 1998 (*Ethyl v. Canada*, see last year's review); one remained in abeyance with no action in 2000 (*Sun Belt v. Canada*); two have been dismissed on procedural or jurisdictional grounds (*Waste Management v. Mexico*, discussed below, and *Desona v. Mexico* in 1999); two have now been decided in favor of the investor (discussed below); one (*Pope & Talbot*, below) is still pending following a partial decision this year; and one continues to progress through the litigation process (*Methanex v. United States*, below).

---

114. For a full description of the rights and remedies in Chapter 11, see Howard Mann & Konrad von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impacts of the Investor-State Process on the Environment*, available at <http://iisd1.iisd.ca/trade/chapter11.htm>.

115. See *Technicas Medioambientales Tecmed, S.A. v. United Mexican States*, Case No. ARB(AF)/00/02, International Centre for the Settlement of Investment Disputes (Additional Facility). There is no public indication of the factual or legal basis for this arbitration.



### a. Jurisdictional Decision

In *Waste Management v. Mexico*,<sup>116</sup> this year a Tribunal rejected the case on jurisdictional grounds. It ruled that Waste Management had instituted and maintained domestic proceedings in Mexico arising from the same acts on which its Chapter 11 claim was based, thereby violating the language and intent of the waiver requirement. Consistent with the *Desona* award of 1999,<sup>117</sup> this case confirms the need of foreign investors to choose between Chapter 11 and domestic proceedings when considering litigation over a given underlying act. Under the *Desona* award, if domestic litigation is undertaken first, an investor then turning to Chapter 11 remedies must also show that recourse to the judicial process was inadequate to meet the obligations under Chapter 11 to enable the investor to make its claim. Despite its loss on jurisdictional grounds, Waste Management has now reinstated its claim, following the completion of all domestic litigation in Mexico.<sup>118</sup>

### b. Substantive decisions

(i) *Pope & Talbot v. Canada*. The first substantive decision of 2000 came in the *Pope & Talbot, Inc. v. Canada* case.<sup>119</sup> The case concerned the allocation between companies of the softwood lumber export quotas fixed between Canada and the United States by the Softwood Lumber Agreement. This agreement has, at its roots, issues relating to the rate of harvest and other environmental factors associated with competitiveness between the Canadian and U.S. softwood lumber industry. Without challenging the Agreement per se, Pope & Talbot challenged the allocation of quotas between the provinces as required by the agreement and the allocation between producers within the province of British Columbia, where it harvested wood as a U.S.-owned investment.

The Tribunal ruled expressly that the NAFTA provision on expropriation did cover regulatory actions taken pursuant to the traditional international law concept of the exercise of police powers, including non-discriminatory regulatory action. The only test applied by the Tribunal was the significance of the interference with the investment.<sup>120</sup> On the facts of this case, the Tribunal found that there was no substantial interference with the company's sales. In essence, the case presented a *de minimus* situation on which a breach of Chapter 11 could not be founded.

On the scope of the performance requirements provision (Article 1106 of NAFTA), the Tribunal ruled that a non-discriminatory export prohibition could provide a basis for a claim of breach of the performance requirement prohibitions, which disallowed a host state from requiring an investor to use a given level of domestic inputs in its production process or requiring certain levels of exports of products.<sup>121</sup> Thus, under this decision, foreign investors are indeed able to challenge broader trade measures that impact the sourcing of

116. *Waste Mgmt. v. United Mexican States*, Arbitral Award, Case No. ARB(AF)/98/2, June 2, 2000, International Centre for the Settlement of Investment Disputes (Additional Facility).

117. *See Azinian v. United Mexican States*, Case No. ARB(AF)/97/2, Nov. 1, 1999, International Center for the Settlement of Investment Disputes (Additional Facility).

118. *Waste Mgmt., Inc. v. United Mexican States*, Case No. ARB(AF)00/3, International Centre for the Settlement of Investment Disputes; *see U.S. Waste Control Firm Refiles Case Under NAFTA Investor-State Provisions*, International Environmental Reporter, Oct. 11, 2000, at 791.

119. In *The Matter of an Arbitration Under Chapter Eleven of the North American Free Trade Agreement Between Pope & Talbot Inc. and the Government of Canada*, Interim Award by Arbitral Tribunal, June 26, 2000.

120. *See id.* ¶¶ 96-99, 100-105.

121. *See id.* ¶ 74.

their production inputs or the sales of their product, trade measures previously only challengeable by states under trade rules, not investment rules. The Tribunal left for further argument and a subsequent ruling two additional claims based on the minimum international standards and national treatment provisions.

(ii) *Metalclad v. Mexico*. The second substantive decision of the year was in the *Metalclad v. Mexico* case.<sup>122</sup> This case dealt with a claim by Metalclad that local government actions in Mexico illegally prevented it from operating a hazardous waste facility, ultimately ending in the adoption of a state-level decree setting aside the land as an ecological reserve.

The decision establishes that the minimum international standards provision found in Article 1105 of NAFTA can serve as a basis for a claim concerning the process of adoption of a law and/or the establishment of an investment. The Tribunal ruled that this provision established rights to transparency, adequate participation, and consultation, and extends so far as to create a government obligation to ensure that investors are correctly informed not just about the sources of relevant laws but also their content. This is an extremely broad reading of such a provision, never seen before in international investment law. The expansive reading of the minimum international treatment provision was based in significant part on the incorporation of specific provisions on transparency found elsewhere in NAFTA but not referred to in Chapter 11.<sup>123</sup>

The Tribunal went on to say it need not decide the issue of expropriation given its findings on Article 1105. However, it does make such a ruling. Moreover, it sets out a test for expropriation that, as in the *Pope & Talbot* case, refers to the significance of the impact of a measure on the exercise of property rights or running of the business, even if the impact is occasioned by "incidental interference" due to the measure.

The *Metalclad* decision also contains what may be read as the most express rejection of a police powers carve-out seen in the cases to date. It states simply that "the Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree."<sup>124</sup>

In a new twist on Chapter 11 litigation, the *Metalclad* decision has been made subject both to an application to set aside the award for excess of jurisdiction by the Tribunal and to an appeal of the award under the law of the province of British Columbia, where the arbitration was legally located.<sup>125</sup> Asserted grounds for this action include: the incorporation of NAFTA provisions outside Chapter 11 as sources of law for the award; the Tribunal having arrogated to itself the power to determine the substance of Mexican domestic law; errors in relation to the interpretation of Chapter 11 and of Mexican law; a failure to state fully the reasons on which the award is based as required by the rules of arbitration; and others. This application is to be heard in early 2001.

(iii) *S.D. Myers*. The third substantive decision of 2000 was the *S.D. Myers* case.<sup>126</sup> It concerned Canada's enactment of a temporary ban on exports of PCB wastes, a ban that

122. *Metalclad Corp. v. United Mexican States*, Award, Case No. ARB(AF)/97/1, Aug. 30, 2000, International Centre for Settlement of Investment Disputes (Additional Facility).

123. *See id.* ¶ 74-99.

124. *Id.* ¶ 111.

125. *See, e.g., United Mexican States v. Metalclad Corporation*, (In the Supreme Court of British Columbia: Re Sections 30, 31, and 42 of the Commercial Arbitration Act, R.S.B.C. 1996 C.55 or, in the Alternative section 34 of the International Commercial Arbitration Act, R.S.B.C. 1996 C. 233, and In the Matter of an Arbitration Pursuant to Chapter Eleven of the North American Free Trade Agreement between Metalclad Corporation and The United Mexican States), Supreme Court of British Columbia, No. L002904, Vancouver Registry.

126. In a NAFTA Arbitration Under the UNCITRAL Arbitration Rules, *S.D. Myers, Inc. v. Gov't of Can.*, Partial Award, Nov. 13, 2000.

was essentially applicable during the limited time period in which imports to the United States were allowed following court action by, inter alia, S.D. Myers in the United States. The key aspects of this decision concern the notion and scope of the national treatment provision in Chapter 11, the expropriation provision, and the performance requirements provision. Its ruling on national treatment is again infused with a significant application of least trade restrictive principles from elsewhere in NAFTA, despite the recognized absence of any textual basis within Chapter 11 for such an analysis.<sup>127</sup> The ruling sets out what is likely the broadest interpretation of national treatment and its related requirement of “in like circumstances” ever seen in trade or investment cases.<sup>128</sup>

On expropriation, the Tribunal stated that regulatory action is unlikely to be a legitimate subject of complaint under Article 1110 of NAFTA. However, it goes on to note that a Tribunal must look at the substance of a measure, not just its form, and that a regulation could constitute an expropriation. In indicating that a key difference between expropriation and regulation is that “expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference,”<sup>129</sup> the Tribunal returned at least in part to a test of significance of impact. The Tribunal also stated that the purpose and effect of a measure had to be considered, thus creating at least some degree of alternative approach to that seen in *Metalclad*.<sup>130</sup> Ultimately, the Tribunal ruled that in this case no expropriation claim could be founded as the measure in question was, in any event, only temporary.<sup>131</sup>

In relation to Article 1106 of NAFTA, dealing with performance requirement prohibitions, the Tribunal held that general trade measures could indeed form a basis for a claim by a private company under Chapter 11. However, it held that the export ban imposed no “requirement” to use or purchase domestic services in this case. A minority judgment attached to the main judgment would have ruled there was a breach of this provision.<sup>132</sup>

The decision went beyond the text of Chapter 11 and of NAFTA to rule upon the rights and obligations under other international environmental agreements related to the transboundary movement of hazardous wastes that are referenced in Article 104 of NAFTA. Two rulings are especially relevant here. First, the Tribunal ruled that the Article 104 language that environmentalists had used to argue the primacy of the listed international environmental agreements over NAFTA’s trade rules created a condition that requires the application of, inter alia, the least trade restrictive test and other principles of trade law.<sup>133</sup> The scope of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* and the *Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Wastes*,<sup>134</sup> both covered by Article 104 of NAFTA, the Tribunal read the free trade principles of NAFTA into both agreements.<sup>135</sup> The Tribunal went on to conclude that the Canada-U.S. Agreement does not authorize parties to use their domestic law to bar the import or

127. See, e.g., *id.* ¶ 247 *et seq.*

128. See *id.* ¶¶ 193-95.

129. *Id.* ¶ 282.

130. See *id.* ¶ 285.

131. See *id.* ¶¶ 284, 287.

132. See *id.* ¶¶ 270-78; 294-98.

133. See *id.* ¶ 215.

134. *Basel Convention*, March 22, 1989, 28 I.L.M. 649, 657, Can.-U.S., T.I.A.S. 11099, as amended in 1992.

135. See *id.* ¶¶ 220-21.

export of hazardous waste, although that agreement includes a supremacy clause in favor of national law, which the Tribunal quotes directly.<sup>136</sup>

As the year ended, Canada was considering an action for judicial review and/or appeal of this decision, such as that initiated by Mexico in the *Metalclad* case.

### c. Procedural Decision

The *Methanex v. United States*<sup>137</sup> litigation continued through 2000, with the establishment of the arbitral Tribunal under the UNCITRAL Arbitration Rules. The parties exchanged full statements of claim and defense, reply and rejoinder, and several procedural rulings were made by the Tribunal.<sup>138</sup>

These rulings included the imposition of a confidentiality order (Procedural Order No. 1), which implicitly recognizes the applicability of the Freedom of Information Act process of the United States to these proceedings, and a ruling to hear objections to jurisdiction raised by the United States through a preliminary stage of the proceedings. At the end of the year, however, counsel for Methanex sought to amend the statement of claim in response to the jurisdictional objections. These issues were all pending at the end of 2000.

In another significant ruling, the Tribunal addressed the question of public participation in the Chapter 11 process. In August 2000, the International Institute for Sustainable Development, a Canadian NGO, followed by the American NGO Earth Justice in September, petitioned the Methanex Tribunal for *amicus curiae* status.<sup>139</sup> The underlying basis for this petition was the inherent jurisdiction of the panel to manage its own process.

Methanex filed written submissions opposing the petition, while the United States asked for time to make such submissions. At a procedural meeting on September 7, 2000, the Tribunal asked for further submissions by the two petitioning groups, the litigating parties, and by Mexico and Canada as Parties to the NAFTA (pursuant to Article 1128 of NAFTA). Through this process, Methanex continued to oppose any *amicus* participation, primarily as a breach of the privacy and confidentiality of the arbitration process. Methanex also argued that the Tribunal had no jurisdiction to consider the petition or any actual submissions. Mexico supported the opposition of Methanex to *amicus* participation. However, both the United States, in very extensive submissions, and Canada, in a very brief submission, supported the petitions and the jurisdiction of the Tribunal to accept at least written *amicus* briefs.

The decision of the Tribunal on this issue was handed down on January 15, 2001.<sup>140</sup> The Tribunal ruled unequivocally in favor of having the jurisdiction to accept *amicus* briefs in writing, thereby supporting the NGO petitions on this point. It relied primarily on the absence of any specific provisions in either the UNCITRAL Arbitration Rules or NAFTA's

---

136. See *id.* ¶ 207 (quoting Article 11 of the bilateral Agreement: "The provisions of this Agreement shall be subject to the applicable laws and regulations of the Parties.").

137. *Methanex v. United States*, available at <http://www.naftaclaims.com>.

138. The above-noted documents, as well as the procedural orders noted below, are now available to the public and can be found on the Internet at <http://www.naftalaw.org>.

139. The Petitions and other documents discussed here can be found on the IISD website at [www.iisd.org/trade/investment\\_regime.htm](http://www.iisd.org/trade/investment_regime.htm). The case carries no formal identification numbers under UNCITRAL Rules. By way of full disclosure, this author acted as Counsel to the IISD in the proceedings described here.

140. *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae," Jan. 15, 2001.

Chapter 11 on the possible role of *amici*, to rest its decision on its “broad discretion as to the conduct of this arbitration” under Article 15(1) of the UNCITRAL Arbitration Rules.<sup>141</sup>

While ruling in favor of the petitioners on the legal principle as regards written submissions, the Tribunal rejected the ability to allow oral arguments by *amici* in the absence of the agreement of the litigating parties. This aspect of the ruling was based on an express provision in the Arbitration Rules requiring hearings to be held in camera unless otherwise agreed by the parties.<sup>142</sup>

The Tribunal did not issue an order for the participation of the *amici* in its January decision. Rather, after stating it was “minded” to allow such participation, it stated that a final order was premature in light of (1) ongoing issues related to the jurisdiction of the Tribunal, and (2) a concern to hear the disputing parties on the appropriate procedural modalities for an *amicus* intervention.<sup>143</sup>

## 2. Looking Forward

Decisions to date in Chapter 11 disputes raise significant questions for environmental lawmaking in North America. Elimination of the police-powers carve-out from the scope of expropriation, as seen in *Metalclad* and *Pope & Talbot*, could make all environmental laws effectively subject to Chapter 11 disciplines, and compensation required for any significant interference with the operation of a covered foreign investor. In addition, the extension from governments to all covered investors of the ability to challenge a general trade measure, as in *Pope & Talbot*, would remove significant potential political constraints on the initiation of challenges to environmentally motivated trade measures.<sup>144</sup> Combined with the uncertainty created by the rulings on the minimum international standards provision to date, and the referencing of provisions outside Chapter 11 as essential elements for inclusion within its terms by the Tribunals, it was increasingly unclear as the year ended what scope was left for a government to enact new, non-discriminatory environmental protection law without paying compensation under Chapter 11.

Over much of 1998-99, efforts had been made to initiate international discussions leading to an interpretive statement pursuant to Article 1131(2) of NAFTA. Mexican opposition to such a statement prevented any progress, and it is understood that few efforts were made in this direction over 2000. However, concerns apparently expressed by Canada and the United States in the context of the Free Trade Area of the Americas negotiations may have had a spill-over effect by the end of the year, when indications began to emerge that Mexico was more prepared to review the provisions in Chapter 11. Mexico's filing of an appeal and motion to review the *Metalclad* decision also betrays a growing level of concern with the content and process of Chapter 11.

141. See *id.* ¶ 26.

142. See *id.* ¶¶ 40-42, relying upon Article 25(4) of the UNCITRAL Arbitration Rules.

143. See *id.* ¶¶ 47-53.

144. The importance of this change is discussed in more detail in Howard Mann, *Assessing the Impact of NAFTA on Environmental Law and Management Processes*, First North American Symposium on Understanding the Linkages Between Trade and Environment, North American Commission for Environmental Cooperation, available at <http://www.cec.org>.

