

International Environmental Law

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I. Atmosphere and Climate

A. CLIMATE-INTERGOVERNMENTAL NEGOTIATIONS

1. *UNFCCC/Kyoto Protocol Negotiations*

In December 2007, the parties to the U.N. Framework Convention on Climate Change (UNFCCC) adopted a series of decisions collectively called the Bali Road Map. This Road Map consists of: (1) the Bali Action Plan, which outlines the parameters of negotiation leading to an agreed outcome on climate change in December 2009; (2) a timetable to complete potential revisions to the Kyoto Protocol by the end of 2009; and (3) associated

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decisions on launching an Adaptation Fund, reducing emissions from deforestation, and the development and transfer of climate-friendly technology.¹

The Bali Action Plan is the core decision relating to the upcoming UNFCCC negotiations. It launches a “comprehensive process to enable the full, effective, and sustained implementation” of the UNFCCC.² This process will address, among other things, a “shared vision” for long-term cooperative action, as well as “enhanced action” on mitigation of climate change, adaptation to climate change, technology development and transfer, and the provision of financial resources and investment.³

Unlike the Berlin Mandate, which launched negotiations culminating in the Kyoto Protocol, the Bali Action Plan envisions that both developed and developing countries take measurable, reportable, and verifiable nationally appropriate mitigation actions. For developed countries, the parties agreed to consider “[m]easurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives. . . while ensuring the comparability of efforts among them, taking into account differences in their national circumstances.”⁴ For developing countries, the parties agreed to consider “[n]ationally appropriate mitigation actions. . . in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner”⁵

Since the Bali decisions, the UNFCCC parties have been negotiating on two tracks—one under the UNFCCC, and one under the Kyoto Protocol—but as of November 2008, have reached no consensus on what an “agreed outcome” might look like under the UNFCCC or in likely revisions to the Protocol. Among the many questions the parties will face in the UNFCCC track is how the outcome can be structured to reflect mitigation contributions from all major economies, including that of the United States, which is unlikely to have completed work on climate legislation by the Bali deadline of December 2009.

2. *Major Economies Process*

The seventeen countries participating in the Major Economies Process on Energy Security and Climate Change—a U.S. initiative aimed at contributing to a post-Kyoto framework—continued their discussions throughout early 2008. In July 2008, the leaders of these countries issued a joint statement acknowledging the leadership role of all major economies in combating climate change, highlighting concrete long-term and mid-term actions, and agreeing to work together on a number of climate issues, including promoting an agreed outcome in the UNFCCC process by the end of 2009.⁶

1. See U.N. Framework Convention on Climate Change [UNFCCC], *Report of the Conference of the Parties on Its Thirteenth Session Held in Bali 13 to 15 December*, Decisions 1-4/CP.13 U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008).

2. *Id.*

3. See *id.* at Decision 1/CP.13, para. 1.

4. *Id.* para. 1(b)(i).

5. *Id.* para. 1(b)(ii).

6. See Press Release, The White House, Office of the Press Sec’y, The Major Economies Leaders Meeting (July 9, 2008), http://www.uschamber.com/issues/index/environment/links_of_interest.htm (follow the “Fact Sheet The Major Economies Leaders” hyperlink under “Policy”).

3. ICAO and the IMO

The Kyoto Protocol, which was adopted in 1997 and entered into force in 2005, establishes no limitations on emissions from aviation and marine bunker fuels, instead referring these matters to the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO), respectively.⁷ In response, ICAO established a Group on International Aviation and Climate Change in September 2007.⁸ This group met twice between January 2008 and November 2008 to discuss global aspirational goals, a global emissions trading system, and technology initiatives.⁹ Meanwhile, in 2008 the European Parliament decided to include foreign air carriers in the European greenhouse gas emission allowance trading system,¹⁰ despite opposition from the rest of the world.¹¹

In the IMO, discussions have centered around the possible adoption of global energy efficiency standards for ships and other ship emissions reduction measures. During its October 2008 meeting, the IMO's Marine Environment Protection Committee (MEPC) approved interim guidelines on an energy efficiency design index for new ships, made progress on a plan and code for the energy efficient operation of ships,¹² and discussed the possibility of developing market-based measures.¹³ All of these measures face an uncertain future because certain developing countries have stated that mandatory measures should not apply to vessels flying their flags.¹⁴

B. CLIMATE—OTHER INITIATIVES

Other climate-related initiatives were launched over the last year. The World Bank established the Forest Carbon Partnership Facility to assist developing countries in reducing deforestation and land degradation.¹⁵ The Bank also established two funds, the U.S.-proposed Clean Technology Fund, to help developing countries switch to lower-emissions technologies, and the Strategic Climate Fund, to help developing countries adapt to climate change.¹⁶ Other new initiatives include the U.S.-China Ten-Year Energy and Environment Cooperation Framework—designed to foster U.S.-China bilateral

7. See Kyoto Protocol to the UNFCCC, Conference of the Parties, 3d Sess., pt. 2, U.N. Doc. FCCC/CP/1997/7/Add.1, Art. 2(2) (Dec. 10, 1997).

8. See ICAO Assembly Res. A36-22 (Sept. 2007).

9. See, e.g., Group on International Aviation and Climate Change, *Summary of Discussions, Day 1*, Doc. GIACC/2-SD/1 (Aug. 13, 2008).

10. See Council Directive 2008/101, 2009 O.J. (L 8) 3 (EU).

11. See The Secretary-General, ICAO Assembly Resolutions in Force, at I-72-73, ICAO Doc. 9902 (Sept. 28, 2007) (urging Parties to “refrain from unilateral implementation of greenhouse gas emissions charges”).

12. See Press Release, Int'l Mar. Org. (IMO), Major Progress on Air Pollution, Ship Recycling and Ballast Water Management at IMO Environment Meeting, IMO Newsroom, IMO Briefing 48/2008 (Oct. 13, 2008), http://www.imo.org/Newsroom/mainframe.asp?topic_id=1709&doc_id=10268.

13. See *id.*

14. See *id.*

15. See World Bank Group, About Forest Carbon Partnership Facility (2009), <http://go.worldbank.org/57X9QKTON0>. For further discussion, see *infra* Part V.B.

16. See Lesley Wroughton, *World Bank Approves Climate Funds Before G8 Summit*, REUTERS, July 3, 2008, <http://uk.reuters.com/article/fundsNews/idUKZWE33022320080703>. For further discussion, see *infra* Part V.B.

collaboration¹⁷—and a variety of projects under the Asia-Pacific Partnership on Clean Development and Climate.¹⁸

C. STRATOSPHERIC OZONE

The Parties to the Montreal Protocol held their 28th Open-Ended Working Group in July of 2008. The Working Group discussed proposals to promote destruction of unwanted banks of ozone-depleting substances, encourage the transition to low-global-warming alternatives to hydrochlorofluorocarbons, bring hydrofluorocarbons into the Montreal Protocol framework, and reduce developed country production of ozone depleting substances for their basic domestic needs.¹⁹ The Meeting of the Parties in late 2008 was expected to make progress on at least some of these issues.

II. Marine Environmental Protection and Conservation

The United States deposited its instrument of ratification to Annex VI to the MARPOL Convention,²⁰ with certain understandings,²¹ after Congress passed and the President signed implementing legislation that amended the Act to Prevent Pollution from Ships.²² Annex VI regulates air emissions from ships by, among other things, limiting the emission of nitrogen oxides from marine diesel engines, governing the sulfur content of marine diesel fuel, prohibiting the emission of ozone-depleting substances, regulating the emission of volatile organic compounds, and setting standards for shipboard incinerators. The legislation confers authority on the Environmental Protection Agency and the U.S. Coast Guard to implement the requirements of Annex VI.

Responding to concerns raised by the United States and others that the Annex VI limitations were insufficiently stringent, the parties to the Annex, acting at an October 2008 meeting of the International Maritime Organization's Marine Environment Protection Committee (MEPC), adopted amendments that would reduce allowable sulfur content in marine fuels from 4.5 percent to 0.5 percent by January 2020.²³ Effective January 1, 2015, the amendments would also reduce from 1.5 percent to 0.10 percent the allowable sulfur content of marine fuels that ships may burn in Emission Control Areas (ECAs) designated by the parties. Permissible nitrogen oxide emissions also would be reduced in a phased

17. See Press Release, U.S. Treas. Dep't Office of Pub. Affairs, Joint U.S.-China Fact Sheet (June 18, 2008), <http://www.ustreas.gov/pres/releases/reports/uschinased10yrfactsheet.pdf>.

18. See Asia-Pacific Partnership on Clean Development and Climate, Asia-Pacific Partnership Project Roster, http://www.asiapacificpartnership.org/Project_Roster.aspx (last visited Mar. 21, 2009).

19. See *Report of the 28th meeting of the Open-Ended Working Group of the Parties to the Montreal Protocol*, U.N. Doc. UNEP/OzL.Pro.WG.1/28/5 (July 18, 2008).

20. Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, Sept. 26, 1997, S. TREATY DOC. NO. 108-7, MEPC 78(43); International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 34 U.S.T. 3407, 1340 U.N.T.S. 184.

21. S. EXEC. DOC. 109-13 at 6 (2008). One such understanding is that the Protocol does not, as a matter of international law, prohibit Parties from imposing, as a condition of entry into their ports or internal waters, more stringent emission standards or fuel oil requirements than those identified in the Protocol.

22. Maritime Pollution Prevention Act of 2008, Pub. L. No. 110-280 (amending 33 U.S.C. §§ 1901 et. seq. (2006)).

23. IMO, Prevention of Air Pollution from Ships (2002), http://www.imo.org/environment/mainframe.asp?topic_id=233#review.

implementation system. The amendments will enter into force in August 2010, unless one-third of the parties object.²⁴

The U.S. Senate gave advice and consent to two marine pollution treaties in September: the Protocol Concerning Pollution from Land-Based Sources and Activities (LBS Protocol),²⁵ and the International Convention on the Control of Harmful Anti-Fouling Systems on Ships (AFS Convention).²⁶ The LBS Protocol sets forth measures, including numerical effluent limitations for dischargers of municipal waste, to prevent, reduce, and control pollution from land-based sources in the Wider Caribbean Region.²⁷ The AFS Convention prohibits the use of organotin biocides in anti-fouling paints for ship hulls and provides for the safe treatment, handling, and disposal of wastes resulting from the removal of prohibited anti-fouling systems.²⁸

Several other important international agreements to prevent or control marine pollution remained pending before the Senate for its advice and consent in the 110th Congress (whose term ended January 2008). The Senate Foreign Relations Committee reported favorably the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, 1972,²⁹ which strengthens the regime of the 1972 Convention regulating the deliberate disposal of wastes or other matter at sea. The committee also reported favorably³⁰ on the U.N. Convention on the Law of the Sea (UNCLOS).³¹ The President transmitted the Agreement on the Conservation of Albatrosses and Petrels (ACAP) to the U.S. Senate on September 26, 2008.³² ACAP, which has eleven parties,³³ seeks to end depredation of albatross and petrel populations by reforming long line fishing practices and reducing other environmental stressors.³⁴

24. Press Release, IMO, IMO Environment Meeting Adopts Revised Regulations on Ship Emissions, IMO Newsroom, IMO Briefing 46/2008 (Oct. 10, 2008), http://www.imo.org/About/main-frame.asp?topic_id=1709&doc_id=10262; International Convention on the Prevention of Pollution from Ships, Nov. 2, 1973, 34 U.S.T. 3407, 1340 U.N.T.S. 184, art. 16(2).

25. The 1999 Protocol Concerning Pollution from Land-Based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Oct. 6, 1999, S. TREATY DOC. NO. 110-1, <http://www.cep.unep.org/cartagena-convention/lbs-protocol/lbs-protocol-english>.

26. 154 CONG. REC. S9850 (daily ed. Sep. 26, 2008).

27. Convention for the Protection of the Marine Environment in the Wider Caribbean Region, Mar. 24, 1983, T.I.A.S. No. 11085, 1506 U.N.T.S. 157.

28. International Convention on the Control of Harmful Anti-Fouling Systems on Ships, Oct. 5, 2001, S. TREATY DOC. NO. 110-13, S. EXEC. DOC. NO. 110-19, <http://www.environment.gov.au/coasts/pollution/antifouling/pubs/convention.pdf>.

29. 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, Nov. 7, 1996, S. TREATY DOC. NO. 110-5, 36 I.L.M. 1; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120 [hereinafter Marine Pollution Protocol].

30. U.N. Convention on the Law of the Sea, Dec. 10, 1982, S. TREATY DOC. NO. 103-39, 1833 U.N.T.S. 397.

31. *Id.* UNCLOS often is referred to as the "constitution" for the oceans. Its provisions on protection and preservation of the marine environment seek to strike a balance between environmental protection and assuring freedom of navigation.

32. Agreement on the Conservation of Albatrosses and Petrels [ACAP], June 19, 2001, S. TREATY DOC. NO. 110-22, 2258 U.N.T.S. 257.

33. See ACAP, ACAP Parties (2007), http://www.acap.aq/en/index.php?option=com_content&task=view&id=43&Itemid=47.

34. *Id.*

In October 2008, the MEPC completed work on the text of an international ship recycling convention³⁵ that will be presented for adoption to a Diplomatic Conference in Hong Kong, China, in May of 2009.³⁶ Among other things, this draft Convention would prohibit the use of certain materials in the construction of ships, would require that ships maintain a certified inventory of hazardous materials, and would require that recycling take place pursuant to a ship recycling plan and only at facilities authorized in accordance with the Convention.³⁷

Upon application by the United States, in March 2008 the MEPC designated the Papahānaumokuākea Marine National Monument off Hawaii as a particularly sensitive sea area (PSSA).³⁸ Papahānaumokuākea is the second marine protected area in the United States to receive PSSA designation,³⁹ and the twelfth in the world.⁴⁰ Ships entering the area will be required to follow strict navigation protocols.⁴¹

In November 2008, the parties to the 1972 Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter⁴² and the 1996 Protocol to that Convention⁴³ adopted a nonbinding resolution regarding “ocean fertilization,” defined as “any activity undertaken by humans with the principal intention of stimulating primary productivity in the oceans.”⁴⁴ The primary aim of ocean fertilization is to reduce the level of carbon dioxide in the atmosphere by stimulating the growth of phytoplankton, which absorb carbon dioxide. In light of debate about the effectiveness and risks of this technique, the resolution provided for “legitimate scientific research” into ocean fertilization, but stated that “given the present state of knowledge, ocean fertilization activities other than legitimate scientific research should not be allowed.”⁴⁵ Discussion of climate change issues in the MEPC are reviewed under Part I.A.3.

35. Marine Env't Prot. Comm. [MEPC], *Report of the Marine Environment Protection Committee on Its Fifty-Eighth Session*, MEPC 58/23 at 29 (Oct. 16, 2008).

36. Press Release, IMO, IMO Environment Meeting Finalizes Ships Recycling Convention for Adoption in 2009, IMO Briefing 47/2008 (Oct. 10, 2008), http://www.imo.org/About/mainframe.asp?topic_id=1709&doc_id=10263.

37. MEPC, *Report of the Marine Environment Protection Committee on its Fifty-Eighth Session*, MEPC 58/23 Annex 6 at 44-46 (Oct. 16, 2008) (Draft International Convention for the Safe and Environmentally Sound Recycling of Ships).

38. MEPC, *Report of the Marine Environment Protection Committee on its 57th Session*, MEPC 57/21 Annex 12 at 66 (Apr. 4, 2008).

39. Press Release, U.S. Nat'l Oceanic and Atmospheric Admin., Papahānaumokuākea Marine National Monument Designated a Particularly Sensitive Sea Area, (Apr. 4, 2008), http://www.gc.noaa.gov/gc1_papahanaumokuakea.html (follow the “NOAA Press Release” hyperlink). The Florida Keys National Marine Sanctuary was designated as a PSSA in 2002.

40. See IMO, Particularly Sensitive Sea Areas (2002), http://www.imo.org/environment/mainframe.asp?topic_id=1357#list.

41. MEPC, *Report of the Marine Environment Protection Committee on Its Fifty-Seventh Session*, MEPC 57/21, Annex 12 at 20 (Apr. 4, 2008).

42. 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120.

43. Marine Pollution Protocol, *supra* note 29.

44. Resolution LC-LP.1 on the Regulation of Ocean Fertilization (Oct. 31, 2008), [http://www.imo.org/includes/blastDataOnly.asp/data_id%3D24337/LC-LP1\(30\).pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D24337/LC-LP1(30).pdf).

45. *Id.*

III. International Hazard Management

A. TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTE

The Ninth Conference of the Parties (COP9) of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was held in Bali, Indonesia, in June 2008. The meeting's principal goal was to raise the Convention's profile with international decision-makers, with the hope that waste management issues will be more systematically integrated into health and sustainable development agenda and recognized as a key component of global environmental sustainability.⁴⁶ The Parties adopted the Bali Declaration on Waste Management for Human Health and Livelihood, reaffirming their commitment to the Basel Convention and pledging to promote its principles as part of sustainable development goals.⁴⁷

The Parties also discussed the potential for increasing the efficiency of the Convention's operation by establishing joint services in areas such as reporting and regional "focal centers" for the Basel, Stockholm, and Rotterdam Conventions.⁴⁸ (The latter two conventions concern the production, release, and trade in persistent organic pollutants, and the international trade of hazardous chemicals, respectively.) The Parties recommended that the U.N. Environment Programme (UNEP) establish, on an interim basis, joint services for financial, legal and administrative support, resource mobilization and information technology, with a final decision to be taken at simultaneous "extraordinary meetings" of the three conventions, to be held in 2010.⁴⁹

The Parties also requested the Basel Convention's Open-Ended Working Group to assess preliminarily whether the draft International Convention for the Safe and Environmentally Sound Recycling of Ships, targeted for adoption by the IMO in 2009, establishes control and enforcement levels equivalent to those in the Basel Convention.⁵⁰ Finally, in connection with the Nairobi Declaration on the Environmentally Sound Management of Electrical and Electronic Wastes (adopted at COP8), the Parties adopted a work plan that

46. See Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Bali, Indon., June 23-27, 2008, *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal on Its Ninth Meeting (ADVANCE)*, at 2, 5, U.N. Doc. UNEP/CHW.9/39 [hereinafter Conference Report]; see also *Editorial and The Theme of COP9: Waste Management for Human Health and Livelihood*, BASEL CONVENTION BULLETIN (Basel Convention, Geneva, Switz.), June 2008, at 1-3, available at http://cop9.basel.int/Basel_Bulletin-COP9.pdf.

47. Conference Report, *supra* note 46, at 102.

48. See Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Bali, Indon., June 23-27, 2008, *Information on the Costs and Organizational Implications of Establishing Joint Services of the Basel, Rotterdam and Stockholm Conventions as Reflected in the Recommendation of the Ad Hoc Joint Working Group on Enhancing Cooperation and Coordination Among the Basel, Rotterdam and Stockholm Conventions*, U.N. Doc. UNEP/CHW.9/INF/20.

49. See Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Bali, Indon., June 23-27, 2008, *Cooperation and Coordination Between the Basel, Rotterdam and Stockholm Conventions: Recommendations of the Ad hoc Joint Working Group*, U.N. Doc. UNEP/CHW.9/14.

50. See Conference Report, *supra* note 46, at 56; Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Bali, Indon., June 23-27, 2008, *Environmentally Sound Management of Ship Dismantling and the Joint Working Group of the International Labour Organization, the International Maritime Organization and the Basel Convention on Ship Scrapping*, U.N. Doc. UNEP/CHW.9/34.

included the Mobile Phone Partnership Initiative's (MPPI) guidelines for used and end-of-life mobile phones, the preparation of technical guidelines on transboundary movements of e-waste, a work program for the new Partnership for Action on Computing Equipment (PACE), and regional e-waste initiatives in Africa, the Asia-Pacific Region, and South America.⁵¹

B. CHEMICALS

In 2008, the European Union regulation on Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH)⁵² continued to dominate international chemicals management as companies from almost every region in the world prepared to meet the December 1, 2008, deadline for pre-registration of chemicals.⁵³ Under REACH, all chemicals produced or imported to the European Community in volumes greater than one metric ton per year must be registered.⁵⁴ Failure to register a chemical bars that chemical from entering the European market.⁵⁵ Because the requirements for submission of a full registration package can be substantial,⁵⁶ REACH provides companies with the option to pre-register a chemical by submitting a greatly reduced set of data requirements to remain on the market pending full registration.⁵⁷ The full registration packages for pre-registered chemicals are then due between 2010 and 2018, with chemicals identified as the most hazardous and/or produced in the highest volumes due earlier.⁵⁸ Through November 7, 2008, the European Chemicals Agency (ECHA) had received 874,288 pre-registrations from 18,889 companies covering over 50,000 chemicals.⁵⁹

In October 2008, the Ad-Hoc Working Group on Mercury of the U.N. Environment Programme (UNEP) met in Nairobi, Kenya to develop recommendations on global action to reduce of the risks that mercury poses to human health and the environment,⁶⁰ for consideration by the UNEP Governing Council at its twenty-fifth session scheduled for

51. See Conference Report, *supra* note 46, at 25-26; Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Bali, Indon., June 23-27, 2008, *Nairobi Declaration on the Environmentally Sound Management of Electrical and Electronic Wastes and Decision VIII/2*, U.N. Doc. UNEP/CHW.9/9.

52. Commission Regulation (EC) 1907/2006, Registration, Evaluation, Authorisation and Restriction of Chemicals, 2006 O.J. (L 396) 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=LEX:32006R1907:EN:NOT>.

53. *Id.* at 102, art. 28(2) (requiring pre-registration within a period starting June 1, 2008 and ending December 1, 2008).

54. *Id.* at 62, art. 6(1) ("any manufacturer or importer of a substance, either on its own or in one or more preparation(s), in quantities of 1 tonne or more per year shall submit a registration.").

55. *Id.* at 62, art. 5 ("substances on their own, in preparations or in articles shall not be manufactured in the Community or placed on the market unless they have been registered.").

56. *Id.* at 70, art. 10, *Information to be submitted for general registration purposes*.

57. *Id.* at 101, art. 28(1) (allowing pre-registration "[i]n order to benefit from the transitional regime provided for in Article 23").

58. *Id.* at 94, art. 23, *Specific provisions for phase-in substances*.

59. Press Release, European Chemicals Agency (ECHA), ECHA Publishes an Updated Intermediate List of Pre-Registered Substances ECHA/PR/08/40 (Nov. 7, 2008), http://echa.europa.eu/doc/press/pr_08_40_pre_reg_list_20081107.pdf.

60. United Nations Environmental Program (UNEP), Notice of the Second Meeting of the UNEP Ad Hoc Open-ended Working Group, <http://www.chem.unep.ch/MERCURY/OEWG2/Meeting.htm> (last visited Feb. 16, 2009).

February 2009.⁶¹ The Working Group recognized that mercury was of global concern, but failed to reach consensus on whether to recommend the adoption of more stringent voluntary control measures or the creation of a new binding international agreement.⁶²

Nonetheless, action to control mercury proceeded at the national and supranational levels. In May 2008, the European Parliament approved a ban on exports of mercury (including element mercury, cinnabar ore, mercury chloride, mercury oxide, mixtures, and alloys) from the European Community effective in 2011.⁶³ In October 2008, the United States signed a similar mercury export ban into U.S. law effective in 2013.⁶⁴ The goal of both bans is to prevent the relatively large mercury surpluses available in the EU and United States from re-entering commerce and potentially causing environmental harm.⁶⁵

C. INTERNATIONAL REGULATION OF AGRICULTURAL BIOTECHNOLOGY

Production of genetically engineered crops or their products (biotech crops) was expected to increase worldwide in 2008.⁶⁶ This was consistent with the trend over the past decade, and with several jurisdictions dropping bans on planting of biotech crops in light of high food prices and track records of safe consumption for the main biotech crops now in use.⁶⁷

The EU, which has been among the leading opponents of biotech crops internationally, is reviewing policies in light of high prices for non genetically engineered corn, canola, and soybeans.⁶⁸ With seventy pending approval "biotech events" (corn, rapeseed, and soy) but only seventeen events approved in the EU to date, the pace of innovation will

61. Ad Hoc Open-ended Working Group on Mercury on the Work of its Second Meeting, Nairobi, Kenya, Oct. 6-10, 2008, *Report*, UNEP(DTIE)/Hg/OEWG.2/13 1 (Oct. 16, 2008), http://www.chem.unep.ch/MERCURY/OEWG2/documents/113/English/OEWG_2_13.pdf.

62. *Id.* at 7.

63. Eur. Parl. Ass., *Position for Adopting a Regulation and Banning of Exports and Safe Storage of Metallic Mercury* (May 21, 2008), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0214&language=EN> (last visited Feb. 16, 2009).

64. Mercury Export Ban Act of 2008, Pub. L. No. 110-414, 122 Stat. 4341 (2008), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s906enr.txt.pdf.

65. *Id.* §§ 2(6)-(7).

66. See Press Release, Biotechnology Industry Organization, Agricultural Biotechnology Continues to Increase Crop Yield and Farmer Income Worldwide While Supporting the Environment (Feb. 13, 2008), available at bio.org/news/pressreleases/newsitem.asp?id=2008_0213_01 ("biotech crop acreage is expected to increase in 2008 as two Australian states, New South Wales and Victoria, announced they will lift their bans on biotech crop plantings this year. Additionally, in 2007, Brazil approved, for the first time, seed sales of biotech corn varieties."); Press Trust of India, *Low Acreage Not to Dent Cotton Production Due to Bt Plantation*, BUS. STANDARD, Aug. 21, 2008, <http://www.business-standard.com/india/storypage.php?tp=on&autono=44957> ("While area under cultivation has shrunk, it will not have much impact on the output, as more than 80 per cent of farmers have planted Bt-cotton this year."); Dan Charles, *Honduras Embraces Genetically Modified Crops*, Nat'l Public Radio, Aug. 6, 2008, <http://www.npr.org/templates/story/story.php?storyId=93310225> ("many Third World countries have banned genetically modified crops. But Honduras now is encouraging farmers to plant them.").

67. Int'l Serv for the Acquisition of Agri-biotech Applications (ISAAA), ISAAA Brief, <http://www.isaaa.org/inbrief/pdf/isaaa-in-brief.pdf> (last visited Feb. 15, 2009).

68. G.B.C. BACKUS ET AL., LEI, THE HAGUE, EU POLICY ON GMOs; A QUICK SCAN OF THE ECONOMIC CONSEQUENCES (2008), available at [http://www.lei.wur.nl/UK/publicationsn\[?\]roducts/LEI\[?\]ublications/?id=932](http://www.lei.wur.nl/UK/publicationsn[?]roducts/LEI[?]ublications/?id=932), ("zero tolerance" causing "increasing difficulties with the EU import of (GM) food and feedstuffs from major exporting countries.").

outpace EU approval at current rates with over 100 more events projected in the coming decade.

Meanwhile, the number of Parties to the 2003 Cartagena Protocol on Biosafety (Biosafety Protocol) increased to 149 nations. Laws requiring regulatory approval of biotech crops are proliferating under the Protocol (with Moldova being the latest to pass a biosafety law).

At the Fourth Meeting of the Parties (MOP4) for the Biosafety Protocol held May 2008 in Bonn, Germany, a contact group reported its inability to meet a 2008 deadline for development of liability standards for biotech crops—termed “living modified organisms” (LMOs) under the CPB—moving in international trade among the Parties to the CPB as well as between Biosafety Protocol Parties and non-Parties.⁶⁹ At a May 2008 meeting of the contact group in Cartagena, Colombia, participants applauded a proposal by the six largest biotech seed companies—Monsanto, DuPont, Bayer Agrosiences, BASF, Syngenta, and Dow Agrosiences—to develop a voluntary self-insurance/arbitration “compact” among themselves providing for the award of damages in arbitration upon a showing of actual damage due to biotech crops.⁷⁰

IV. Natural Resources

A. WATER RESOURCES

The most important development in 2008 was the ratification of the new interstate compact on the Great Lakes and St. Lawrence basin.⁷¹ A year ago, Minnesota was the only state to have ratified the new compact.⁷² It has now been ratified by all eight participating states (Vermont, part of which is within the basin, was not invited to join), approved by Congress, and the compact will enter into effect on January 1, 2009.⁷³

The compact aims to preclude, subject to certain exceptions, the export of water from the Great Lakes.⁷⁴ While it creates obligatory standards and a rather elaborate collective structure for supervising their implementation,⁷⁵ that implementation remains largely in the hands of the separate states. This creates some doubt about how effective the new standards will actually be, particularly given the complex and somewhat confusing rela-

69. See Report of the Fourth Meeting of the Conference of the Parties to the Convention on Biological Diversity Serving as the Meeting of the Parties to the Cartagena Protocol on Biosafety, Bonn, F.R.G., May 12, 2008, UNEP/CBD/BS/COP-4/18, ¶ 158 (June 25, 2008). The working group was to conclude its work in 2007 and present its recommendations to the MOP in 2008, under a decision on liability and redress adopted at the first MOP to the Biosafety Protocol in 2004.

70. See Report Of The Open-Ended Ad Hoc Working Group Of Legal And Technical Experts On Liability And Redress In The Context Of The Cartagena Protocol On Biosafety On The Work Of Its Fifth Meeting, Cartagena, Colom., Mar. 25, 2008, UNEP/CBD/BS/WG-L&R/5/3, ¶¶ 36-39.

71. Great Lakes-St. Lawrence Basin Water Resources Compact, Dec. 13, 2005, http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf [Hereinafter Compact].

72. Pawlenty Signs Great Lakes Compact, DULUTH NEWS TRIB., Feb. 21, 2007, at D1, available at 2007 WLNR 14148294.

73. Dan Egan, *President Signs Compact to Protect Great Lakes*, MIL. J. SENTINEL, Oct. 4, 2008, at 2.

74. Compact, *supra* note 71, §§ 1.2, 4.9; Agreement, *infra* note 76, arts. 103, 200-01.

75. Compact, *supra* note 71, §§ 1.2, 2.1, 2.2; Agreement, *infra* note 76, art. 400.

tionship of the accord with a parallel 2005 agreement⁷⁶ between the eight states and the Canadian provinces of Ontario and Québec.⁷⁷ How all of this will impact on the responsibilities and authority of the International Joint Commission remains uncertain,⁷⁸ a particular problem for the Commission because for many years it has largely functioned as a Great Lakes, rather than a boundary-wide, institution.⁷⁹

Litigation continues before the International Court of Justice between Argentina and Uruguay over pollution from proposed paper mills on the Uruguay River—a boundary river between the two nations. The case is still being briefed;⁸⁰ a decision might be forthcoming in 2009. South Africa's highest court has declared a municipality's water policies unconstitutional for violating the "right to water."⁸¹

The International Law Commission completed its second reading of the *Draft Articles on the Law of Transboundary Aquifers*.⁸² The second reading was transmitted to the General Assembly with a recommendation that it endorse the *Draft Articles*⁸³ and convene a global conference to draft a comprehensive treaty on water resources. A number of critics have pointed out serious failings in the *Draft Articles*.⁸⁴ The General Assembly has not yet taken up the Commission's suggestions.

The Mekong basin is experiencing an unprecedented drought, leading the participating states (along with donor nations, led by Denmark) to initiate talks to strengthen the powers of the Commission.⁸⁵ Perhaps because China does not participate, the talks omit important issues such as the impact of rapidly melting glaciers in Tibet (the ultimate source

76. Great Lakes-St. Lawrence River Basin Sustainable Water Agreement, Dec. 13, 2005, http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf [Hereinafter Agreement].

77. See generally Joseph W. Dellapenna, *International Law's Lessons for the Law of the Lakes*, 40 U. MICH. J.L. REFORM 747 (2007).

78. Both the Compact and the Agreement indicate that they are subordinate to the International Joint Commission. Compact, *supra* note 71, § 8.2(3); Agreement, *supra* note 76, art. 701(2). Nonetheless, the Compact and the Agreement undertake to authorize the states and provinces to perform many of the functions heretofore performed by the Commission.

79. David LeMarquand, *Preconditions to Cooperation in Canada-United States Boundary Waters*, 26 NAT. RESOURCES J. 221, 227 (1986).

80. Pulp Mills on the River Uruguay (Arg. v. Urug.), 2007 I.C.J. 135 (Sept. 14) (Order fixing dates for pleadings), available at <http://www.icj-cij.org/docket/files/135/14051.pdf?PHPSESSID=c305e995258054a0b364d913286cb021>.

81. City of Johannesburg and Others v Mazibuko, (489/08) [2009] ZASCA 20 (25 March 2009).

82. General Assembly, Int'l Law Comm'n, *The Law of Transboundary Aquifers*, UN Doc. A/CN.4/L.724 (May 29, 2008).

83. The Commission's choice to recommend mere endorsement of the *Draft Articles* rather than preparation of a groundwater treaty was influenced by the failure of the 1997 *UN Convention on the Law of Non-Navigational Uses of International Watercourses* to reach even half of the necessary ratifications more than ten years after the General Assembly approved it. See Salman M.A. Salman, *The United Nations Watercourses Convention Ten Years Later: Why Has Its Entry into Force Proven Difficult?*, 32 WATER INT'L 1 (2007).

84. The critiques are summarized in Joseph W. Dellapenna, *International Law Applicable to Water Resources Generally* § 49.06, in *WATERS AND WATER RIGHTS* (Robert E. Beck ed., 2005 replacement vol. Supp. 2009).

85. Laos: Int'l Donors Ante up for Mekong River Commission, THAI PRESS REPORTS, July 3, 2007, available at 2007 WLNR 12466463; Apinya Wipatayotin, *Cambodia Eyed as New Source of Water Supply*, BANGKOK POST, Aug. 8, 2007, available at 2007 WLNR 16735462.

of the Mekong).⁸⁶ China's refusal to join these discussions is consistent with its disinclination to consult with other neighbors such as India on shared water issues.⁸⁷

As reported last year, World Bank arbitration appears to have resolved the dispute between India and Pakistan over the Baglihar project,⁸⁸ but conflicts continue over other projects on the countries' shared rivers.⁸⁹ India and Bangladesh have agreed to create a technical committee to consider measures to control flooding on the Ganges, although the committee will not address longer-term questions arising from global climate disruption.⁹⁰ The controversy between Canada and the United States over Devils Lake continues. With water levels rising for over a decade, North Dakota sought to ameliorate flooding of surrounding farmland and towns by opening a drain from the lake into a different watershed—the Red River of the North, which drains into Manitoba and eventually out to James Bay. A 2006 agreement on steps to prevent contamination or invasive species from reaching the Red River did not resolve the dispute, in part because North Dakota repeatedly operated the drain without the filters the Canadians deem necessary.⁹¹

The North Dakota Supreme Court upheld a challenge⁹² to the modification of the permit for the outlet issued by the state Health Department, but the court rejected the challenge to the terms of the original permit.⁹³ The national governments have not become actively involved in these further disagreements over the project.⁹⁴ Meanwhile, Canadians are becoming concerned about another project in North Dakota—a plan to

86. *Go with the Flow*, S. CHINA MORNING POST, Sept. 1, 2008, at 13, available at 2008 WLNR 16478646; *Mekong Floods Put Focus on China Dams*, POWER IN ASIA, Sept. 25, 2008, available at 2008 WLNR 19199080.

87. *China, India and Climate Change: Melting Asia*, ECONOMIST, June 5, 2008, at 30, available at http://www.economist.com/displayStory.cfm?source=HPtextfeature&story_id=11488548; Nirmal Ghosh, *On Thin Ice*, STRAITS TIMES, June 23, 2007, available at 2007 WLNR 11804272; *India and China Likely to Face Food Shortage Due to Melting*, HINDUSTAN TIMES, Mar. 23, 2008, available at 2008 WLNR 5615051.

88. Controversy and litigation continue within Pakistan over the government's acceptance of the decision. See *Baglihar Dam Case: IHC Issues Notices to Ministry*, BUS. RECORDER (PAK.), Oct. 29, 2008, available at 2008 WLNR 20567950; Editorial, *Endless Objections*, BUS. STANDARD (INDIA), Oct. 27, 2008, at 11, available at <http://www.business-standard.com/india/news/editorial-endless-objections/04/57/338507/>.

89. Usman Cheema, *Zadari to Write Letter to Indian PM*, THE NATION (Pak.), Oct. 29, 2008, available at 2008 WLNR 21055589; *Ex-Pak PM Says Water Crisis May Lead to Indo-Pak War*, HINDUSTAN TIMES, Nov. 3, 2008, available at 2008 WLNR 21001236; Mushtaq Ghumman, *Indus Water Treaty Violations: Legal Options to Be Weighted up Today*, BUS. RECORDER, Sept. 16, 2008, available at 2008 WLNR 17533661; *Pakistan to Move World Bank on Chenab Flow*, HINDUSTAN TIMES, Oct. 26, 2008, available at 2008 WLNR 20441179; *Water Crisis May Harm Indo-Pak Ties: Shujaat*, BUS. RECORDER, Nov. 3, 2008, available at 2008 WLNR 20942759.

90. *India and Bangladesh Discuss Water Issue*, THE HINDU (India), July 18, 2008, available at 2008 WLNR 13388451.

91. See Mike Jacobs, *Devils Lake Outlet Issue Becomes More Difficult*, GRAND FORKS HERALD, Aug. 26, 2007, at A2; Yangkyoung Lee, *N.D. Officials Say Pumping Will Continue: State Concedes Performance Isn't Optimal But Has "No Alternative"*, GRAND FORKS HERALD, Aug. 29, 2007, at A1; Blake Nicholson, *Lawsuit Still Possible over Minnows*, GRAND FORKS HERALD, Sept. 4, 2007, at A1; Mia Rabson, *Minister Steamed by News, Lake Outlet Open*, WINNIPEG FREE PRESS, Aug. 9, 2007, at A4, available at 2007 WLNR 15322021.

92. Janell Cole, *Devils Lake Outlet Opponents Argue against Revised Water Permit: Foes Make Case in Front of North Dakota Supreme Court*, GRAND FORKS HERALD, Oct. 11, 2007, at A1.

93. *People to Save the Sheyenne River, Inc. v. N.D. Dep't of Health*, 744 N.W.2d 748, 750 (N.D. 2008).

94. Canada filed a diplomatic complaint when the outlet was opened without proper filters, but it does not seem to have pressed the matter. Mia Rabson, *Manitoba Official Faults Federal Cabinet Minister on Filter Issue*, GRAND FORKS HERALD, Aug. 24, 2007, at B7.

pipe Missouri River water to provide municipal drinking water, with the effluents flowing into rivers that flow into Manitoba.⁹⁵

B. BIOLOGICAL RESOURCES AND WILDLIFE

Pursuant to decisions providing for conditional sales of ivory from the African elephant (*Loxodonta africana*) at past meetings of the Conference of the Parties of the Convention on International Trade in Endangered Species (CITES), the CITES Standing Committee approved China as a designated ivory trading partner in July 2008.⁹⁶ At four CITES-approved ivory one-off sales held in October and November 2008, in Botswana, Namibia, South Africa, and Zimbabwe, traders from Japan and China bid on and purchased around 100 tons of stockpiled ivory.⁹⁷ While these sales raised \$15 million in funds designated for conservation-related purposes under the terms agreed on by the COP,⁹⁸ other African range states and many non-governmental organizations are concerned that this exception from the CITES prohibition on commercial ivory trade will spur poaching from severely threatened elephant populations elsewhere in Africa. According to the COP-14 decisions, no further ivory sales may be proposed for nine years.

The Paris Agreement on the Conservation of Gorillas and their habitats (the Gorilla Agreement) came into effect in June 2008.⁹⁹ The Gorilla Agreement was negotiated as an Article IV Agreement under the Convention on Migratory Species (CMS). Currently, six out of ten range States are parties to the Gorilla Agreement, which aims to protect and rebuild the highly threatened gorilla populations in Central and West Africa through the integration and reinforcement of conservation efforts.¹⁰⁰ Implementation of the Agreement requires parties to coordinate the establishment and maintenance of a network of suitable habitats throughout the gorillas' range and to develop action plans that identify conservation, monitoring, and enforcement objectives.¹⁰¹ In other activities under the CMS, with further indications of plummeting shark populations worldwide¹⁰² and new shark listings on the World Conservation Union's (IUCN) *Red List*, CMS planned its

95. Mary Agnes Welch, *Manitoba to Continue Filtration Demands; Report: N.D. Pipeline Does Not Pose Huge Risk to Province's Environment*, GRAND FORKS HERALD, Jan. 9, 2008, at C2.

96. Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Standing Committee, Control of Trade in Elephant Ivory, July 14, 2008, SC57 Doc. 33.2, available at <http://www.cites.org/eng/com/SC/57/E57-33-2.pdf>; see also CITES, 57th mtg. at 19, SC 57 summary record (July 14, 2008), SC57 Doc. 33.2, available at <http://www.cites.org/eng/com/SC/57/E57-SumRec.pdf>.

97. Press Release, CITES Secretariat, Ivory Actions Raise 15 Million USD for Elephant Conservation (Nov. 7, 2008), available at http://www.cites.org/eng/news/press/2008/081107_ivory.shtml.

98. See CITES Conference of the Parties, CITES, Decision 10.2 ¶ 4, Decision 10.2 (Rev. CoP11), available at <http://www.cites.org/eng/dec/valid13/index.shtml>.

99. See Press Release, Convention on Migratory Species (CMS), Gabon Becomes Sixth Party to CMS Gorilla Agreement (Sept. 4, 2008), available at <http://www.cms.int/news/PRESS/nwPR2008/09-Sep/gabon-joins-gorilla.htm>.

100. See *id.* at 1; see also Agreement on the Conservation of Gorillas and their Habitats ("Gorilla Agreement"), Oct. 6, 2007, http://www.cms.int/bodies/meetings/regional/gorillas/pdf_docs/Gorilla_Agmt_Fin_E.pdf.

101. *Id.* arts. III(2)(c), II(1), & VIII.

102. See e.g., Glenn Sant & Richard Thomas, *Illegal, Unreported, and Unregulated Shark Catch: A Review of Current Knowledge and Action*, TRAFFIC: THE WILDLIFE TRADE MONITORING NETWORK, Apr. 2008, available at <http://www.traffic.org/home/2008/11/3/illegal-shark-fishing-compounds-global-management-shortfall.html>.

second meeting on shark conservation for December 2008 to discuss both a draft Memorandum of Understanding and a draft legally-binding agreement.

In May 2008, the Conference of the Parties (COP) of the Convention on Biological Diversity (CBD) held its ninth meeting in Bonn, Germany. The COP adopted thirty-seven decisions on issues ranging from invasive alien species to access and benefit sharing. In one of the more substantive developments, the Working Group on Marine Biodiversity Beyond National Jurisdiction made headway on international efforts to adopt a framework for the protection of marine biodiversity by adopting scientific criteria to identify marine protected areas.¹⁰³ The COP also urged governments to take a precautionary approach to “ocean fertilization” (the artificial deposit of nutrients in ocean waters to stimulate growth of marine microorganisms in order to increase carbon sequestration) by preventing large-scale fertilization until risks have been scientifically assessed and regulatory controls are in place.¹⁰⁴

The Tenth Meeting of the Conference of the Parties (COP10) of the Ramsar Convention on Wetlands¹⁰⁵ was held in Changwon, Republic of Korea, from October 28 to November 4, 2008.¹⁰⁶ In keeping with the theme “healthy wetlands, healthy people,” COP10 produced the Changwon Declaration, which offers “priority action steps” to promote the conservation and wise use of wetlands to ensure that their ecosystem services contribute to human well-being.¹⁰⁷ The parties adopted a number of other resolutions on a wide range of issues including biofuel production,¹⁰⁸ extractive industries,¹⁰⁹ and highly pathogenic avian influenza.¹¹⁰ A resolution on climate change and wetlands¹¹¹ proved so contentious that the parties came near to holding a vote, contrary to the Ramsar tradition of consensus-based decision-making.¹¹²

The Parties also debated whether to modify the legal status of the Ramsar Secretariat to address administrative difficulties with its current situation (it is administered by and housed in the headquarters of the International Union for Conservation of Nature

103. Convention on Biological Diversity, Marine and Coastal Diversity, May 2008, COP9 Decision IX/20, available at <http://www.cbd.int/decisions/?m=COP-09&id=11663&lg=0>.

104. Convention on Biological Diversity, May 30, 2008, Decision IX/16; *Conference of Biological Diversity, Report of the Ninth COP*, UNEP/CBD/COP/9/29 at 174 (Oct. 9, 2008).

105. Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, T.I.A.S. No. 1084, 996 U.N.T.S. 245, at art. 8 (as amended 1982 & 1987).

106. Ramsar Convention on Wetlands, 10th Meeting of the Conference of the Contracting Parties, available at http://www.ramsar.org/index_cop10_e.htm.

107. Ramsar Convention on Wetlands, Ramsar, Iran, Oct. 28-Nov 4, 2008, *The Changwon Declaration on human well-being and wetlands*, 4, COP10 DR 32: Draft Resolution X.32, available at http://www.ramsar.org/cop10/cop10_dr32_e.doc.

108. Ramsar Convention on Wetlands, Ramsar, Iran, Oct. 28-Nov 4, 2008, *Wetlands and “biofuels”*, COP10 DR 25: Draft Resolution X.25, available at http://www.ramsar.org/cop10/cop10_dr25_e.doc.

109. Ramsar Convention on Wetlands, Ramsar, Iran, Oct. 28-Nov 4, 2008, *Wetlands and extractive industries*, COP10 DR 26: Draft Resolution X.26, available at http://www.ramsar.org/cop10/cop10_dr26_e.doc.

110. Ramsar Convention on Wetlands, Ramsar, Iran, Oct. 28-Nov 4, 2008, *Guidance on Responding to the Continued Spread of Highly Pathogenic Avian Influenza H5N1*, COP10 DR 21: Draft Resolution X.21, available at http://www.ramsar.org/cop10/cop10_dr21_e.doc.

111. Ramsar Convention on Wetlands, Ramsar, Iran, Oct. 28-Nov 4, 2008, *Climate change and wetlands*, COP10 DR 24: Draft Resolution X.24, available at http://www.ramsar.org/cop10/cop10_dr24_e.doc.

112. Royal Gardner & Kim Connolly, *The Ramsar Convention on Wetlands: Assessment of International Designations Within the United States*, 37 ENVTL. L. REP. 10,089, 10,092 (2007) (A party has never opposed consensus in a manner as to require the vote on the merits of any resolution).

(IUCN)).¹¹³ Parties seemed split between an enhanced status quo under IUCN and the option of transferring administration to the U.N. Environment Programme (UNEP) identified in a paper commissioned by the Ramsar Standing Committee.¹¹⁴ Unable to reach agreement, they established an ad hoc working group to develop recommendations.¹¹⁵

In January 2008, the Federal Court of Australia enjoined a Japanese company that owns a number of ships that have engaged in Japanese “scientific whaling” from killing, injuring, taking or interfering with Antarctic minke, fin, and humpback whales in violation of provisions of Australia’s Environment Protection and Biodiversity Conservation Act of 1999 that designate as an Australian Whale Sanctuary the exclusive economic zone that Australia has declared off the coast of Antarctica.¹¹⁶ Japan does not recognize Australia’s claims in Antarctica; the company refused service and did not appear in the case.

V. The International Economy and the Environment

A. TRADE AND ENVIRONMENT

1. *The World Trade Organization (WTO)*

Little progress was made on environmental issues in the WTO Doha negotiations due to a continuing impasse stemming from other issues—in particular agriculture—and dating back to mid-2006.¹¹⁷ In a dispute settlement, Mexico requested consultations with the United States concerning tuna labeling requirements under the Dolphin Protection Consumer Information Act.¹¹⁸ According to Mexico, these requirements prohibit the labeling of Mexican tuna and tuna products as “dolphin-safe” even when the tuna has been harvested in compliance with multilateral standards established by the Inter-American Tropical Tuna Commission.¹¹⁹ Mexico views this as inconsistent with the most-favoured-nation and national treatment obligations of the General Agreement on Tariffs and Trade as well as provisions of the WTO Agreement on Technical Barriers to Trade.¹²⁰

113. Ramsar Convention on Wetlands, Ramsar, Iran, Oct. 28–Nov. 4, 2008, *Report on the Legal Personality of the Ramsar Secretariat*, 10, COP10 DOC.35, available at http://www.ramsar.org/cop10/cop10_doc35_e.doc [hereinafter *Legal Personality Report*]. See also Ramsar Convention on Wetlands, Ramsar, Iran, Oct. 28–Nov. 4, 2008, *Review of Ramsar Secretariat legal status options*, COP10 DOC.20, available at http://www.ramsar.org/cop10/cop10_doc20_e.doc.

114. *Legal Personality Report*, *supra* note 113, at 10–11.

115. Ramsar Convention on Wetlands, Ramsar, Iran, Oct. 28–Nov. 4, 2008, *Facilitating the work of the Ramsar Secretariat at international level*, COP10 DR.05 Draft Resolution X.5, http://www.ramsar.org/cop10/cop10_dr05_e.doc.

116. *Humane Soc’y Int’l Inc. v. Kyodo Senpaku Kaisha Ltd.*, [2008] FCA 3, ¶ 55 (Jan. 15, 2008)(Austl.), available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2008/3.html (unofficial text).

117. See Stephen Castle & Mark Landler, *After 7 Years, Talks Collapse on World Trade*, N.Y. TIMES, July 30, 2008, available at <http://www.nytimes.com/2008/07/30/business/worldbusiness/30trade.html>.

118. Request for Consultations by Mexico, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/1 (Oct. 28, 2008); see also Marrakesh Agreement Establishing the World Trade Organization, opened for signature Apr. 15, 1994, 1867 U.N.T.S. 3, Annex 2, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 4, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) (A Member of the World Trade Organization (WTO) must engage in consultations with the Member complained against before seeking establishment of a dispute settlement panel).

119. See Request for Consultations by Mexico, *supra* note 118.

120. See *id.*

2. *Forest Management and Timber Trade*

Perhaps the most interesting trade and environmental developments in 2008 involved efforts to police illegal logging and trade in timber. These include implementation of innovative provisions on forestry and timber of the 2007 free trade agreement (FTA) between the US and Peru, new legislation prohibiting the import into the United States of timber and other plants or plant products obtained or exported in violation of foreign conservation laws, and the announcement of the first bilateral agreement on a Voluntary Partnership Agreement (VPA) under the EU Action Plan on Forest Law Enforcement Governance and Trade (FLEGT).

The U.S.-Peru Free Trade Agreement¹²¹ contains provisions, unique in international law, that obligate Peru to strengthen its capacity to enforce regulations on forest management and timber trade, and to conduct audits and investigations of Peruvian timber producers and shipments upon the request of the United States.¹²² Peru established a cabinet-level Ministry of Environment,¹²³ reinforced an authority responsible for overseeing the conservation and exploitation of certain forest areas and wildlife, and strengthened criminal penalties and regulations concerning timber and wildlife trafficking as well as implementation of CITES.¹²⁴ Various aspects of this effort received both criticism and appreciation¹²⁵ and Peru's progress toward implementation remained under discussion.¹²⁶

121. U.S.-Peru Trade Promotion Agreement, U.S.-Peru, Dec. 14, 2007, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html (approved by the U.S. Congress in the U.S.-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138 (2007)).

122. See U.S.-Peru Trade Promotion Agreement, *supra* note 121, Annex 18.3.4 on Forest Sector Governance, ¶¶ 3, 5-12.

123. See Decreto Legislativo No 1013, *Aprueba la Ley de Creación, Organización y Funciones del Ministerio del Ambiente* (May 14, 2008); Dan Collyns, *Peru sets up environment ministry*, BBC, May 14 2008, available at <http://news.bbc.co.uk/2/hi/americas/7400588.stm>; see also *Peru President Proposes Creation of Environment Ministry*, PERUVIAN TIMES, Dec. 21, 2007, available at <http://www.peruviantimes.com/peru-president-proposes-creation-of-environment-ministry/>.

124. Decreto Legislativo No. 1085, *Ley Que Crea el Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre* [Law Establishing the Forest and Wildlife Resources Oversight Body], *El Peruano Normas Legales* 375101-03 (June 29, 2008), available at <http://www.osinforperu.net/ADJUNTOS/FILE52.pdf>; see also *El Osinfor pasa del Inreña a la Presidencia del Consejo de Ministros*, EL COMERCIO, June 28, 2008, available at <http://www.elcomercio.com.pe/ediciononline/HTML/2008-06-28/el-osinfor-pasa-inreña-Presidencia-Consejo-Ministros.html>.

125. See, e.g., *Critican leyes peruanas para implementar TLC con EE UU por perjuicio ambiental*, EL NACIONAL, Nov. 26, 2008, available at http://www.el-nacional.com/www/site/p_contenido.php?q=nodo/56682/Internacional/Critican%20leyes%20peruanas%20para%20implementar%20TLC%20con%20EE%20UU%20por%20perjuicio%20ambiental; see also *Alerta Roja Forestal: El Decreto Legislativo que Pone en Jaque la Implementación del TLC*, CARETAS, July 17, 2008, available at <http://www.caretas.com.pe/Main.asp?T=3082&S=&id=12&idE=785&idSTo=0&idA=33984>; Manual Pulgar-Vidal & Milagros Sandoval, *Contenido ambiental de los Decretos Legislativos promulgados al amparo de lo dispuesto por la Ley 29157*, SOCIEDAD PERUANA DE DERECHO AMBIENTAL, July 7, 2008, available at <http://www.spda.org.pe/portal/c.php?s=137&n=3&id=179> (evaluating environmental reforms in Peru to implement the FTA); CITES Standing Committee, 57th Mtg, Summary Record ¶ 36 (commending Peru's "constructive, collective and innovative efforts" to implement CITES requirements relating to trade in mahogany); CITES Standing Committee, 57th Mtg, Species Trade and Conservation: Bingleaf Mahogany ¶ 2 (SCS7 Com. 3) (recognizing "the considerable efforts that Peru has made to improve forest sector governance, management of concessions and other forest management areas, and the effectiveness of oversight mechanisms").

126. See Doug Palmer, *Bush Leaves Peru Without Date for Trade Deal*, REUTERS, Nov. 23, 2008, available at <http://www.reuters.com/article/politicsNews/idUSTRE4AM28G20081123>; Milagros Salazar, *Peru: Free*

In another important development, provisions of the Farm Bill enacted in May 2008 expanded existing prohibitions under the Lacey Act¹²⁷ to encompass the import, export, transport, or sale of wild plants and plant products, including trees and timber, taken or exported in violation of foreign law.¹²⁸ Violations of the Lacey Act may be subject to a civil penalty up to \$10,000 as well as forfeiture of seized shipments.¹²⁹ Substantial criminal penalties, in some cases including imprisonment of up to five years, may be imposed for knowing violations.¹³⁰

The amendments also require importers of plants and plant products to file a declaration stating the species contained in the importation; the monetary value of the import; the quantity, including a unit of measurement, contained in the import; and the country of origin. The U.S. Department of Agriculture is drafting regulations to implement these requirements and anticipates phasing them in beginning in 2009.¹³¹

Improved policing of logging and timber trade was also the subject of negotiation on a Voluntary Partnership Agreement (VPA) on Forest Law Enforcement Governance and Trade between the EU and Ghana, the conclusion of which was announced in September 2008. Under the VPA, Ghana committed to develop a system to license or certify timber exports as legally harvested, while the EU agreed to develop an import screening system to verify documentation of timber imports.¹³² This was the first conclusion of negotiations on a VPA to be announced under the EU's Action Plan on Forest Law Enforcement Governance and Trade (FLEGT); the EU remains in negotiation with several other countries.¹³³ Also relating to timber trade, the European Commission proposed in October 2008 that European Union countries should adopt legislation requiring importers of timber to verify its legality "to their best ability."¹³⁴

Trade Opens Environmental Window, TIERRAMÉRICA, Nov. 1, 2008, available at <http://ipsnews.net/news.asp?idnews=44544>.

127. 16 U.S.C. § 3371 (2008).

128. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 8204 (previously the Lacey Act covered specimens of plants taken in violation of federal, State, and Tribal law but not foreign law); see also 16 U.S.C. § 3372(a) (2007).

129. 16 U.S.C. §§ 3373(a), 3374 (2008).

130. See 16 U.S.C. § 3373(d) (providing for penalties of up to five years); see also 18 U.S.C. 3571 (providing for fines up to \$250,000 for individuals and \$500,000 for organizations); *United States v. Eisenberg*, 496 F. Supp. 2d 578, 582 (E.D. Pa. 2007).

131. See 73 Fed. Reg. 58925 (Oct. 8, 2008), available at http://www.aphis.usda.gov/plant_health/lacey_act/.

132. Press Release, Conclusion Of Negotiations Of The First Voluntary Partnership Agreement Between Ghana And The European Union On A Forest Law Enforcement Governance And Trade, Sept. 3, 2008, available at http://ec.europa.eu/development/icenter/repository/FLEGT_VPA_Ghana_signature.pdf.

133. See *FLEGT Voluntary Partnership Agreements*, EUROPEAN COMMISSION, Jan. 30, 2009, available at http://ec.europa.eu/development/policies/9interventionareas/environment/forest/flegt_vpaa_en.cfm.

134. See Commission Of The European Communities, *Proposal for a Regulation of the European Parliament and of the Council Laying Down the Obligations of Operators who Place Timber and Timber Products on the Market*, at 8, COM(2008) 644/3, available at http://ec.europa.eu/environment/forests/pdf/proposal_illegal_logging.pdf; See Andrew Aziz et al., *EU Tackles Illegal Logging, but Environmentalists Want More*, 8 BRIDGES TRADE BIORES 19 (2008), available at <http://ictsd.net/downloads/biores/biores8-19.pdf>.

3. *Other Bilateral and Regional Developments*

Free trade agreements with Colombia, Panama, and South Korea that were renegotiated in 2007 to incorporate unprecedented new environmental requirements¹³⁵ continued to await Congressional approval.¹³⁶ In May 2008, Canada and Peru signed an FTA accompanied by a side agreement on the environment that included language on biological diversity and corporate environmental responsibility.¹³⁷ In November 2008, Canada concluded an FTA with Colombia, which similarly was accompanied by a side agreement on environment.¹³⁸

In August 2008, the Secretariat, established under an FTA between the United States, Dominican Republic, and five Central American countries¹³⁹ (CAFTA-DR) to receive submissions from citizens of CAFTA countries concerning alleged failures to enforce environmental law, issued its first recommendation as to whether a factual record should be prepared concerning the subject of a submission (this concerned the sole submission received as of October 2008). The Secretariat recommended to the Environmental Affairs Council established under the CAFTA-DR that a factual record be prepared concerning an allegation that the Dominican Republic had failed to enforce certain provisions of its wildlife laws for the protection of endangered sea turtles.¹⁴⁰

4. *Investment Liberalization*

A September 2008 arbitral award rejected a claim under the Energy Charter Treaty by a Cypriot investor against Bulgaria on the grounds that the investor relied on fraudulent misrepresentation in making its investment in an oil refinery. Of particular interest was the tribunal's dictum that a change in environmental law that worked to the investor's disadvantage was not a violation of the Energy Charter Treaty's requirement of fair and equitable treatment where it was not directly aimed at the investor and the government made no commitment to "freeze" its environmental law.¹⁴¹

135. See David Downes et al., *International Environmental Law*, 42 INT'L LAW. 297 (2008).

136. U.S.-Colombia Trade Promotion Agreement, Nov. 22, 2006, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/asset_upload_file708_10150.pdf; U.S.-Panama Trade Promotion Agreement, June 28, 2007, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Final_Text/Section_Index.html; U.S.-Korea Free Trade Agreement, June 30, 2007, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html.

137. See Canada-Peru Free Trade Agreement, May 29, 2008, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/andean-andin/can-peru-perou.aspx?lang=en>.

138. Press Release, Canada Signs Free Trade Agreement with Colombia: Agreements on Improved Environmental and Labour Standards Also Part of Historic Deal (Nov. 21, 2008), <http://www.pm.gc.ca/eng/media.asp?category=1&id=2321>, available at Canada- Colombia Free Trade Agreement, Nov 21, 2008, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/andean-andin/can-colombia-colombie.aspx> (follow "Text of the Agreement" hyperlink).

139. Central American-Dominican Rep.-U.S. Free Trade Agreement art. 17.7, Aug. 5, 2004, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html.

140. Environmental Submissions on Enforcement Matters: Sea Turtles, Submission ID CAALA-07-001, <http://www.misaa.ws/> (follow "Registro de Comunicaciones Ambientales" hyperlink, then "Comunicaciones Activas," then "CAALA-07-001 (Tortugas Marinas)"); available at http://www.saa-caftadr.sieca.org.gt/CAALA_07_01eng.html.

141. *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID (W. Bank) Case No. ARB/03/24 (Cyprus-Bulg. 2008), ¶¶ 218-19, available at http://www.encharter.org/fileadmin/user_upload/document/Plama_Bulgaria_Award.pdf.

B. FINANCE AND THE ENVIRONMENT

Climate change dominated environmental discussions at the major international financial institutions through much of 2008. In October, the World Bank Group,¹⁴² widely seen as the leader in sustainable finance, approved its “strategic framework” for addressing development and climate change.¹⁴³ This framework describes generally the Bank’s anticipated future role in climate change, but avoids setting any measurable goals for reducing the carbon footprint of the World Bank Group’s financial portfolio. A report on implementation will be prepared in 2010.¹⁴⁴

In September 2008, ten industrialized countries pledged \$6.1 billion to two new Climate Investment Funds (CIFs) that were approved by the World Bank Group’s Board of Directors in July 2008.¹⁴⁵ The “Clean Technology Fund” will “invest in projects and programs in developing countries that contribute to the demonstration, deployment, and transfer of low-carbon technologies.”¹⁴⁶ The “Strategic Climate Fund” is set up to test innovative approaches to climate change that have the potential to be scaled up. The first pilot program under the Strategic Climate Fund is aimed at increasing climate resilience in particularly vulnerable developing countries.¹⁴⁷ The CIFs are designed to operate on an interim basis to ensure that climate funding is available if the post-Kyoto climate negotiations falter. Each CIF has a “sunset clause” that will close it once a post-Kyoto climate regime (including a financial mechanism) is negotiated. In response to demands of developing countries for a greater role in decision-making, the CIFs have novel governance structures that include balanced representation of both borrowers and donors on the committees that oversee the funds—although the executive directors of the World Bank or any other multilateral bank involved in a specific project must still approve specific projects. The World Bank Group’s climate-related activities have extended to forest conservation with the launch of the Forest Carbon Partnership Facility (FCPF).¹⁴⁸ The goal of the \$40

142. The World Bank Group is comprised of 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 Center for Settlement of Investment Disputes.

143. THE WORLD BANK, DEVELOPMENT AND CLIMATE CHANGE - A STRATEGIC FRAMEWORK FOR THE WORLD BANK GROUP CONSULTATION DRAFT 11 (2008), <http://siteresources.worldbank.org/EXTCC/Resources/407863-1219339233881/DevelopmentandClimateChange.pdf>.

144. DEVELOPMENT COMMITTEE, DEVELOPMENT AND CLIMATE CHANGE - A STRATEGIC FRAMEWORK FOR THE WORLD BANK GROUP REPORT TO THE DEVELOPMENT COMMITTEE ii (2008), [http://siteresources.worldbank.org/DEVCOMMIT/Documentation/21928837/DC2008-0009\(E\)ClimateChange.pdf](http://siteresources.worldbank.org/DEVCOMMIT/Documentation/21928837/DC2008-0009(E)ClimateChange.pdf).

145. The World Bank, News and Broadcast, Climate Change, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20432982~menuPK:34480~pagePK:64257043~piPK:437376~theSitePK:4607,00.html> (last visited Feb. 17, 2009). [hereinafter Climate Change]

146. Press Release, The World Bank, Climate Investment Funds: Countries Selected for Governing Bodies (Oct 7, 2008), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21944136~menuPK:51062077~pagePK:34370~piPK:34424~theSitePK:4607,00.html>. [hereinafter Climate Investment Funds]

147. Climate Change, *supra* note 145; Climate Investment Funds, *supra* note 146.

148. For more information on the World Bank Forest Carbon Partnership Facility, see The World Bank Carbon Finance Website, <http://carbonfinance.org/Router.cfm?Page=CPF&FID=41756&ItemID=41756> (follow “Carbon Funds and Facilities” hyperlink; then follow “Forest Carbon Partnership Facility” hyperlink) (last visited Feb. 17, 2009).

million FCPF is to demonstrate the feasibility of developing country proposals to receive climate-related financing from “reduced emissions from deforestation and forest degradation” (REDD). Developing countries have proposed REDD as part of a post-Kyoto climate regime that would enable industrialized countries to compensate developing countries for reductions in emissions from deforestation and degradation below a predetermined national baseline. With support from the World Bank, fourteen countries have agreed to begin establishing their current baseline of deforestation, and the FCPF “aims to reduce deforestation and forest degradation by compensating developing countries for greenhouse gas emission reductions.”¹⁴⁹ Many developing countries and climate advocates see this as a major future revenue stream for developing countries. Emissions from unsustainable forestry and land-use practices contribute as much as 18 percent of annual global greenhouse gas emissions, and some suggest that halving current deforestation rates could generate \$15 billion in revenue per year.

Climate change also dominated environmental discussions at other international financial institutions. In March 2008, the InterAmerican Development Bank’s (IDB’s) Board of Directors approved a Sustainable Energy and Climate Change Initiative (SECCI).¹⁵⁰ In April 2008, the African Development Bank’s (AfDB) Board of Directors approved a strategy for supporting recipient country efforts to adapt to climate change.¹⁵¹ The European Bank for Reconstruction and Development (EBRD) joined with the European Investment Bank (EIB) to create the Multilateral Carbon Credit Fund—a public-private, 190 million Euro fund dedicated specifically to climate mitigation projects in Central Europe and Asia.¹⁵²

Beyond climate change, several international financial institutions revised their general environmental and social policies. In May 2008, the EBRD approved a new Environmental and Social Policy and Performance Requirements, closely patterned after the International Finance Corporation’s (IFC’s) environmental and social policy and performance standards.¹⁵³ The new EBRD policy has ten “Performance Requirements” relating to a wide range of environmental and social issues, including, for example, environmental and social management, labor and working conditions, pollution prevention and abatement, involuntary resettlement, biodiversity conservation, indigenous peoples, and information disclosure. The new policy also addresses emerging global environmental issues, including climate change, invasive alien species, and genetically modified organisms.

The Asian Development Bank (AsDB) is nearing the end of a long process to revise its environmental and social safeguard policies. The AsDB’s proposed Safeguard Policy, is-

149. Press Release, The World Bank, First Countries Named to Benefit from Forest Carbon Partnership Facility (July 21, 2008), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,contentMDK:21846447~menuPK:34463~pagePK:34370~piPK:34424~theSitePK:4607,00.html>.

150. See Inter-American Development Bank, SECCI at a Glance, <http://www.iadb.org/secci/secciAtGlance.cfm?lang=en> (last visited Feb. 17, 2009) (describing the SECCI).

151. For a copy of the strategy, see AFRICAN DEVELOPMENT BANK-AFRICAN DEVELOPMENT FUND, REVISED BANK KNOWLEDGE MANAGEMENT AND DEVELOPMENT STRATEGY 2008-2012 (2008), <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/10000001-EN-REVISED-BANK-KNOWLEDGE-MANAGEMENT-AND-DEVELOPMENT-STRATEGY-2008-2012.PDF>.

152. Multilateral Carbon Credit Fund, <http://www.ebrd.com/country/sector/energyef/carbon/mccf/index.htm> (last visited Feb. 17, 2009).

153. Environmental and Social Policy, <http://www.ebrd.com/about/policies/enviro/policy/index.htm> (last visited Feb. 17, 2009).

sued for public comment through December 2008, extends the scope of environmental and social assessments beyond the primary project site to both related and associated facilities, and encompasses both cumulative and indirect impacts. The proposed Policy also requires an assessment of transboundary and global impacts, including climate change and early and ongoing engagement with affected people through free, prior, and informed consultation.¹⁵⁴

This year marked the fifth anniversary of the Equator Principles.¹⁵⁵ The Equator Principles, which closely follow the IFC's environmental policies and standards, set out an overall framework for banks to review and mitigate environmental and social impacts and risks. This year, six more banks, including the first Chinese commercial bank, agreed to comply with the Equator Principles, bringing the total membership to sixty-one financial institutions.

Accountability mechanisms at the international financial institutions were active in 2008. In April 2008, the EBRD began reviewing its Independent Recourse Mechanism (IRM) with a revised draft framework for the IRM expected in December 2008.¹⁵⁶ The IDB is also actively evaluating its Independent Investigation Mechanism in anticipation of establishing a revamped mechanism in 2009. In July 2008, the AfDB's Board of Directors accepted the recommendations from the first compliance review report submitted by the AfDB's new Independent Review Mechanism. The Board ordered AfDB management to prepare an action plan in response to non-compliance found with respect to the proposed Bujagali dam project. In April 2008, the Overseas Private Investment Corporation (OPIC) received its second request for a compliance review, this one involving the Couer d'Alene mines in Bolivia.¹⁵⁷ The OPIC Compliance officer submitted the draft report on October 31, 2008 and management's response is pending. In the spring of 2008, the IFC's Compliance Advisor Ombudsman (CAO) released two advisory reports: *A Guide to Designing and Implementing Grievance Mechanisms for Development Projects*¹⁵⁸ and *Project-Level Development Impact Reporting*.¹⁵⁹ These two reports address issues that remain particularly important for evaluating the development effectiveness of the World Bank Group's private sector lending.

154. Press Release, Asian Development Bank, ADB Issues Second Draft Safeguard Policy Statement for Public Comment (Oct. 3, 2008), <http://www.adb.org/Media/Articles/2008/12650-asian-safeguards-policies/>.

155. Press Release, The Equator Principles, International Financial Institutions Discuss the 5th Anniversary of the *Equator Principles* at an Event in Rio de Janeiro, Brazil (Dec. 10, 2008), <http://www.equator-principles.com/documents/EP%20-%205th%20Anniversary%20-%20Rio%20de%20Janeiro%20-%20English.pdf>.

156. Review of IRM, <http://www.ebrd.com/about/integrity/irm/review> (last visited Feb. 17, 2009).

157. OPIC, Doing Business With Us, Public Registry, http://www.opic.gov/doingbusiness/accountability/registry/bolivia_coeurdalene_mines_compliance.asp (last visited Feb. 17, 2009).

158. Compliance Advisor Ombudsman, About Us, World Bank 2008 Annual Meetings: CAO Sessions, http://www.cao-ombudsman.org/Spring_meetings_08.htm (last visited Feb. 17, 2009).

159. Compliance Advisor Ombudsman, Advisor, Project-level Development Impact Reporting, http://www.cao-ombudsman.org/html-english/dev_impact_reporting.htm (last visited Feb. 17, 2009).

VI. International Environmental Litigation

A. DOMESTIC LITIGATION

1. *Pakootas v. Teck-Cominco Metals*

This year saw two developments in the case of *Pakootas v. Teck-Cominco Metals, Ltd.*¹⁶⁰ In this case, the Ninth Circuit held that the Environmental Protection Agency (EPA) could issue an Administrative Order under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against Teck-Cominco Metals, a Canadian company that conducts a smelting operation located in Trail, British Columbia. Teck-Cominco had dumped slag into the Columbia River, which then flowed downstream into the United States and allegedly polluted Lake Roosevelt in Washington State.¹⁶¹ The Ninth Circuit ruled that applying CERCLA to Teck-Cominco was a domestic, rather than extraterritorial, application of CERCLA because the “release” under CERCLA occurred when toxins leached out of slag that had already flowed into Lake Roosevelt.¹⁶² It then found that Teck-Cominco could be held liable as an “arranger” of the disposal of hazardous substances into Lake Roosevelt.¹⁶³

On January 7, 2008, the Supreme Court denied Teck-Cominco’s petition for certiorari, leaving the Ninth Circuit’s opinion in place.¹⁶⁴ In addition, on September 19, 2008, the district court held that the plaintiffs could not pursue civil penalties against Teck-Cominco because EPA had withdrawn its Administrative Order pursuant to a settlement agreement with Teck-Cominco.¹⁶⁵

The full impact of the Ninth Circuit’s holding has yet to be seen. Some analysts have suggested that the ruling may inspire similar suits in Canada against U.S. companies, such as the recent lawsuit against Detroit Edison by a Canadian environmental group.¹⁶⁶

2. *Reino de Espana v. American Bureau of Shipping*

The case of *Reino de Espana v. American Bureau of Shipping*¹⁶⁷ emerged after a Liberian-owned oil tanker sunk off the coast of Spain, dumping millions of gallons of oil into Spain’s coastal waters. Spain, alleging negligence, brought a suit in U.S. district court against the U.S. company that certified that the tanker was fit to carry fuel. The company defended, in part, on the ground that Spain’s claims were precluded by Spain’s status as a party to the Convention on Civil Liability for Oil Pollution Damage, a treaty that specifies that pollution damage claims “may only be brought in the Courts of any . . . Contracting State.”¹⁶⁸ The court held that it lacked subject matter jurisdiction because: (1)

160. *Pakootas v. Teck-Cominco Metals, Ltd.*, 452 F.3d 1066 (9th Cir. 2006).

161. *See id.* at 1069-70.

162. *Id.* at 1078.

163. *Id.* at 1082.

164. *Teck-Cominco Metals, Ltd. v. Pakootas*, 128 S. Ct. 858 (2008).

165. Order Granting Defendant’s 12(b)(1) Motion to Dismiss, *Teck-Cominco Metals, Ltd. v. Pakootas*, No. 2:04 Civ. 00256-LRS 15 (E.D. Wash. Sept. 19, 2008).

166. *See, e.g.*, Stefan Cornibert, *Environmentalists Turn to Canadian Courts to Address U.S. Pollution*, INSIDE EPA, Jan. 18, 2008, at 1.

167. *Reino de Espana v. American Bureau of Shipping*, 528 F. Supp. 2d 455, 456 (S.D.N.Y. 2008).

168. *Id.* at 458.

the U.S. company was a covered “person” under the terms of the Convention and therefore Spain’s tort claims were subject to the exclusive remedy provided in the Convention;¹⁶⁹ and (2) Spain, as party to the Convention, is bound by the treaty’s forum-selection provisions and therefore cannot pursue its claim in the United States but must bring its claims in Spanish or Bahamian court.¹⁷⁰

This ruling, which is on appeal to the Second Circuit, is somewhat curious because the court did not undertake a choice of law analysis to determine whether or not to apply Spanish law, and because it is not clear how a treaty to which the United States is not a party could deprive a federal court of jurisdiction.

3. *Green Mountain Chrysler v. George Crombie*

In *Green Mountain Chrysler v. Crombie*,¹⁷¹ the district court rejected a challenge by the automotive industry to Vermont’s greenhouse gas emissions standards for new vehicles. One of the arguments rejected by the court was that Vermont’s standards were preempted on foreign policy grounds.¹⁷² The automotive industry had argued that the Vermont standards impermissibly intruded on the President’s authority to conduct foreign affairs because it diminished the ability of the President to negotiate an international climate agreement and “speak with one voice” on climate issues.¹⁷³ The court noted that the federal government “applauded” non-federal efforts to combat climate change, and held that Vermont’s action did not impede the President’s ability to conduct foreign policy.¹⁷⁴ An appeal is pending in the Second Circuit.

B. INTERNATIONAL DISPUTES

On March 31, 2008, Ecuador filed an application with the International Court of Justice (ICJ), requesting relief against Colombia for its anti-coca aerial spraying program near the Ecuador-Colombia border.¹⁷⁵ In its application, Ecuador alleges that Colombia’s spraying has caused damage “to people, to crops, to animals, and to the natural environment”¹⁷⁶ and requests that the ICJ declare Colombia’s program to be contrary to international law. Ecuador also seeks indemnification for, among other things, “environmental damage or the depletion of natural resources.”¹⁷⁷ Ecuador bases its claim on the American Treaty on Pacific Settlement¹⁷⁸ and the U.N. Convention Against Illicit Traffic in

169. *Id.* at 460.

170. *Id.* at 461.

171. *Green Mountain Chrysler v. Crombie*, 508 F. Supp. 2d 295, 300 (D. Vt. 2007).

172. See e.g., *Zschernig v. Miller*, 389 U.S. 432, 440 (1968).

173. *Green Mountain Chrysler*, 508 F. Supp. 2d at 392.

174. *Id.* at 393-95.

175. See Aerial Herbicide Spraying (Ecuador v. Colom.), Application of the Republic of Ecuador, at 4, *available at* <http://www.icj-cij.org/docket/files/138/14474.pdf>. Related suits are pending in the D.C. District Court. See *Arias v. DynCorp*, No. 2001 Civ.01908 (D.D.C. Sept. 11, 2001); *Quinteros v. DynCorp Aerospace Operations, LLC*, No. 2007 Civ. 01042 (D.D.C. June 12, 2007) (actions by Ecuadorian citizens against U.S. government contractors providing support to Colombian spraying operations).

176. Aerial Herbicide Spraying, *supra* note 175, at 4.

177. *Id.* at 26.

178. *Id.* at 6; see American Treaty on Pacific Settlement art. XXXI, Apr. 30, 1948, 30 U.N.T.S. 55, *available at* <http://www.oas.org/juridico/english/treaties/a-42.html>.

Narcotic Drugs and Psychotropic Substances.¹⁷⁹ Ecuador also alleges that Colombia has violated customary law obligations of "prevention and precaution,"¹⁸⁰ raising the possibility that the ICJ may consider, as a matter of first impression, whether such environmental concepts have any status under international law.

179. Aerial Herbicide Spraying, *supra* note 175, at 6-8; see United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 32, Dec. 20, 1988, 28 I.L.M. 493.

180. Aerial Herbicide Spraying, *supra* note 175, at 26.