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# INTERNATIONAL ENVIRONMENTAL LAW 2005 Annual Report<sup>1</sup>

## I. INTRODUCTION

This report reviews some of the major developments in international environmental law during 2005. It discusses developments under relevant bilateral and multilateral international agreements, provides highlights from major conferences and meetings, and surveys significant reports and other publications. Those desiring a more comprehensive or detailed analysis of these subjects are invited to review the sources cited.

## II. GENERAL DEVELOPMENTS

### A. *Sustainable Development*

Established by the United Nations in 1992 to assess and encourage global sustainable development efforts, the Commission on Sustainable Development (CSD) is a functional committee of the United Nations Economic and Social Council (ECOSOC). The CSD organizes its activities in two-year "Implementation Cycles (ICs)," with each cycle focusing on a thematic cluster of issues relating to Agenda 21 (1992) and the Johannesburg Plan of Implementation (2002). The first IC (2004–05) focused on the interrelated issues of water, sanitation and human settlement.<sup>2</sup>

The thirteenth session (CSD-13) held in New York in 2005 formed part of the 2004–05 IC.<sup>3</sup> CSD-13 was the first policy-setting session of the CSD since the World Summit on Sustainable Development in Johannesburg in 2002. The aim of the meeting was to accelerate progress towards achieving the Johannesburg Plan of Implementation targets and commitments on water, sanitation and human settlements. These targets included: halving by 2015 the proportion of people without access to safe drinking water and basic sanitation; developing by 2005 integrated water resources management and water efficiency plans; and significantly improving the lives of at least 100 million slum dwellers by 2020.<sup>4</sup>

The second IC (CSD-14) will meet in 2006–2007 to review progress on a different set of thematic clusters including energy for sustainable development; industrial development; air pollution and the atmosphere; and climate change. This will be

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<sup>1</sup> This report is submitted on behalf of the International Environmental Law Committee by Chair Vail T. Thorne, Senior Environmental, Health & Safety Counsel, The Coca-Cola Company; Vice Chair Lakshman Guruswamy, Nicholas Doman Professor of International Environmental Law, University of Colorado School of Law; with Kevin L. Doran, Senior Research Fellow, Energy & Environmental Security Initiative, University of Colorado School of Law. The Committee is indebted to the following CU Law students for their contributions: Shilpi Banerjee, Lindsey Bates, Ruth Summers, Melissa Boness, Courtney Hopley, James Lyman, Ezekiel Peters, Ann Rhodes and Katie Umekubo. The Committee is also indebted to Jim Rubin, Assistant Chief of the Law & Policy Section, U.S. Department of Justice, Environment and Natural Resource Division, for his contribution of the material for Section VIII of this report.

<sup>2</sup> Press Release, U.N. Department of Public Information, Ministers Call for More Aid, Debt Relief, Domestic Funds to Meet Goals on Water, Sanitation, Slums, as U.N. Commission Concludes (Apr. 25, 2005).

<sup>3</sup> UN Econ. and Soc. Council, *Report of the Commission on Sustainable Development: Thirteenth Session*, Supp. No. 9, U.N. Doc. E/2005/29 (2005).

<sup>4</sup> *Id.*



followed by cycles focusing on: agriculture, rural development, land, drought, desertification, and Africa (2008–09); transport, chemicals, waste management, mining, and a ten-year framework of programs on sustainable consumption and production patterns (2010–11); forests, biodiversity, biotechnology, tourism, and mountains (2012–13); oceans and seas, marine resources, small island developing states, and disaster management and vulnerability (2014–15). The last cycle (2016–17) will involve an overall appraisal of the implementation of Agenda 21, the Programme of Further Implementation of Agenda 21, and the Johannesburg Plan of Implementation.

## B. *Transboundary Waters*

At their fifty-seventh session held in 2005, the International Law Commission (ILC) continued efforts to codify the law on transboundary groundwaters (aquifers and aquifer systems) through the elaboration of draft articles on the law of transboundary aquifers.<sup>5</sup>

The ILC embarked on this effort to codify and progressively develop the law on transboundary groundwaters in response to perceived inadequacies in the legal and regulatory regime governing groundwater resources throughout the world. The scope of the primary treaty on transboundary waters, the Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention), includes only those groundwaters: (1) that are physically part of a system of surface and groundwater; (2) that are part of a unitary whole; (3) that normally flow to a common terminus that is hydraulically linked to surface water; and (4) that are part of a system located in different states.<sup>6</sup> However, this definition excludes significant numbers and types of rechargeable and non-rechargeable transboundary groundwaters that are not linked to surface waters.<sup>7</sup>

The ILC endeavors to address this gap by applying the draft articles to: (1) the utilization of transboundary aquifers and aquifer systems; (2) other activities that have or are likely to have an impact upon those aquifers and aquifer systems; and (3) measures of protection, preservation and management of those aquifers and aquifer systems.<sup>8</sup>

In contrast to the Watercourses Convention, which refers to “groundwaters,” the draft articles adopt an “aquifer” or “aquifer systems” approach to regulating transboundary groundwater. Only transboundary aquifers and aquifer systems are covered; domestic aquifers and aquifer systems are excluded from the scope of the draft articles.<sup>9</sup> Thus, a domestic aquifer or aquifer system that is linked to an international watercourse in the territory of a state where such an aquifer or aquifer system is located would not be covered.<sup>10</sup> However, the draft articles note that domestic aquifers or aquifer

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<sup>5</sup> *Report of the International Law Commission: Fifty-Seventh Session*, U.N. GAOR, 60th Sess., Supp. No. 10, at 34, U.N. Doc. A/60/10 (2005).

<sup>6</sup> Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, art. 2(a), 51 U.N.T.S. 869, available at <http://www.un.org/law/ilc/texts/nonnav.htm>.

<sup>7</sup> See Gabriel E. Eckstein, *Protecting A Hidden Treasure: The U.N. International Law Commission and the International Law of Transboundary Ground Water Resources*, 5 AM. U. SUSTAINABLE DEV. L. & POL'Y, 5 (2005).

<sup>8</sup> Chusei Yamada, Special Rapporteur, *Third Report on Shared Natural Resources: Transboundary Groundwaters*, U.N. GAOR, 57th Sess., at 19, U.N. Doc. A/CN.4/551 (2005) (hereinafter *Third Report*).

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.*

systems linked to international watercourses could be covered by the Watercourses Convention.<sup>11</sup>

The draft articles also specify how the principles of “equitable and reasonable utilization,” and the obligation not to cause harm, apply to transboundary aquifers and aquifer systems. Article 5(1) specifies that “[a]quifer States shall, in their respective territories, utilize a transboundary aquifer or aquifer system in a manner such that the benefits to be derived from such utilization shall accrue equitably to the aquifer States concerned.”<sup>12</sup> The draft articles thus recognize that states have the sovereign right to utilize groundwater resources within their own territories, but this right is somewhat qualified by Article 5(2) which calls on aquifer states to “utilize a transboundary aquifer or aquifer system in a reasonable manner.”<sup>13</sup> The obligation of reasonable utilization differs depending on whether the transboundary aquifer, or aquifer system, is rechargeable or non-rechargeable.

### III. ATMOSPHERE AND CLIMATE

#### A. *Climate Change*

The 1992 United Nations Framework Convention on Climate Change (Convention), is the most widely ratified treaty in the world, boasting 189 ratifications including that of the United States. The more widely publicized Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), to which the United States is not a party, has 157 ratifications and came into force on February 16, 2005.

A unique concurrent meeting of the Conference and the Kyoto Protocol took place in 2005. The first meeting of the parties (MOP-1) to the Kyoto Protocol and the eleventh session of the Conference of the Parties (COP-11) to the Convention were concurrently conducted in Montreal, Canada, from November 28 to December 9, 2005. The combined event drew some 9500 participants, including 2800 government officials, and over 5800 representatives of United Nations bodies and agencies, intergovernmental organizations and non-governmental organizations.<sup>14</sup> Despite the joint venue, the United States, which is a party to the Convention but not the Kyoto Protocol, continued to emphasize the need for a clear separation between Convention issues and Kyoto Protocol-related issues.<sup>15</sup>

#### 1. United Nations Framework Convention on Climate Change (UNFCCC)<sup>16</sup>

COP-11 addressed issues such as capacity building, technology development and transfer, the adverse effects of climate change on developing and least developed countries, and several financial and budget-related issues, including guidelines to the Global Environment Facility (GEF), which serves as the Convention’s financial

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<sup>11</sup> *Id.*

<sup>12</sup> *Third Report, supra* note 6, at 20.

<sup>13</sup> *Id.*

<sup>14</sup> *See Summary of the Eleventh Conference of the Parties to the UN Framework Convention on Climate Change and First Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol: 28 Nov. – 10 Dec. 2005*, 12 EARTH NEGOTIATIONS BULL. (IISD) 291, at 1 (Dec. 12, 2005).

<sup>15</sup> *Id.*

<sup>16</sup> United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (entered into force Mar. 21 1994).



mechanism. After lengthy negotiations the COP also agreed on a process for considering future action beyond 2012 under the UNFCCC. The UNFCCC COP-12 and Kyoto Protocol COP/MOP-2 will take place from November 6 to 17, 2006. These meetings will also coincide with the twenty-five meetings of the UNFCCC's subsidiary bodies.

An additional noteworthy development in 2005 was the UNFCCC's publication of "Key GHG Data"—the first publication to include all greenhouse gas (GHG) data officially submitted by both developed and developing countries under the UNFCCC.<sup>17</sup> The publication includes data on GHG's from forty developed and 121 developing countries. This data indicates that as of 2003, developed countries—taken as a group—have reduced their GHG emissions to 5.9% below 1990 levels.<sup>18</sup> This conclusion with regard to GHG emission reduction by developed countries is contradicted by the finding of the World Resources Institute (WRI),<sup>19</sup> and is probably attributable to self-serving reporting. Moreover, statistics generated both by the International Energy Agency (IEA)<sup>20</sup> and the Organization for Economic Cooperation and Development (OECD)<sup>21</sup> show that CO<sub>2</sub> emissions in developed countries are on the rise.

## 2. Kyoto Protocol

The entry into force of the Kyoto Protocol in 2005 will lead to four major consequences. First, thirty-five industrialized countries, along with the European Community, are now legally bound to reduce their combined emissions of six major GHG's to at least 5% below 1990 levels between the five-year period of 2008 to 2012. Second, the international carbon trading market will become a legal and practical reality. Third, the Clean Development Mechanism (CDM), which encourages investments in projects that promote sustainable development and limit emissions in developing countries, will become operational.<sup>22</sup> In 2005, the Executive Board of the CDM issued the first-ever certified emission reductions (CERs) under the Kyoto Protocol for two hydroelectric projects in Honduras.<sup>23</sup> Since the Protocol's entry into force, the number of registered CDM projects has steadily grown and nearly 300 such projects are currently awaiting validation.<sup>24</sup> Finally, the Kyoto Protocol's entry into force activates the Adaptation Fund, which was established in 2001 to aid developing countries in coping with the adverse effects of climate change.<sup>25</sup>

The Conference of the Parties voted to finalize the "rule book" of the Kyoto Protocol, putting the Protocol into "concrete form."<sup>26</sup> The adopted "rule book" elaborates and solidifies Kyoto's flexible implementation mechanisms by establishing a Joint

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<sup>17</sup> Press Release, UNFCCC Secretariat, New UNFCCC Publication Confirms Decreases in Greenhouse Gas Emissions from Developed Countries, Highlights the Challenges Ahead (Nov. 17, 2005).

<sup>18</sup> *Id.*

<sup>19</sup> See WORLD RESOURCES INSTITUTE, CLIMATE ANALYSIS INDICATORS TOOL (CAIT) (2003), available at <http://cait.wri.org/>.

<sup>20</sup> INTERNATIONAL ENERGY AGENCY, KEY WORLD ENERGY STATISTICS 45 (2005), available at <http://www.iea.org/dbtw-wpd/Textbase/nppdf/free/2005/key2005.pdf>.

<sup>21</sup> OECD, OECD IN FIGURES (2005), available at <http://ocde.p4.siteinternet.com/publications/doifiles/012005061T023.xls> (last visited Jan. 19, 2006).

<sup>22</sup> *Id.*

<sup>23</sup> Press Release, UNFCCC Secretariat, First Emission Credits Issued Under the Kyoto Protocol (Oct. 20, 2005).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Press Release, UNFCCC Secretariat, Montreal Climate Conference Adopts 'Rule Book' of Kyoto Protocol (Nov. 30, 2005).

Implementation Supervisory Board to oversee the emissions trading mechanism and fully establishing the clean development mechanism.<sup>27</sup>

## B. Stratospheric Ozone

The primary objective of the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)<sup>28</sup> is to protect the stratospheric ozone layer by eliminating the use of ozone-depleting substances. In the early 1990s, scientists discovered that methyl bromide, a chemical used mainly as an agricultural pesticide, is sixty times more destructive to ozone than the chlorine in chlorofluorocarbons (CFCs). Parties to the Montreal Protocol responded to this threat in 1997 by agreeing to a global phase-out schedule for methyl bromide. Pursuant to this schedule, non-Article 5(1) countries (developed countries) are to complete the phase-out of methyl bromide by 2005; and Article 5(1) countries (developing countries) are to complete this phase-out by 2015. Importantly, however, “critical uses” of methyl bromide are exempt from these controls.<sup>29</sup>

The seventh Conference of the Parties to the Vienna Convention for the Protection of the Ozone Layer and the seventeenth Meeting of the Parties to the Montreal Protocol (COP-7/MOP-17) took place in Dakar, Senegal, from December 12 to 16, 2005. The joint meeting was attended by over 400 participants representing governments, U.N. agencies, intergovernmental and non-governmental organizations, academia, industry, and the agricultural sector.<sup>30</sup>

COP-7/MOP-17 adopted more than 50 decisions relating, *inter alia*, to the Multilateral Fund for the Implementation of the Montreal Protocol: ratification, compliance, illegal trade, essential- and critical-use exemptions, process agents, and financial and administrative matters.

## IV. ENERGY

Galloping global energy demand, and the challenge of meeting such demand in an environmentally sustainable manner, remains one of the most difficult international environmental problems of the century. 2005 did not see any significant legal developments addressing this issue. A few political developments are worthy of note. The leaders of the G8 nations met at Gleneagles, Scotland, for the annual G8 Summit. The Summit produced a “Gleneagles Plan of Action.”<sup>31</sup> The energy segment of the Plan of Action focused on the following areas: (1) transforming the way energy is used to encourage sustainable practices and improve energy efficiency; (2) powering a cleaner future through renewable energy and cleaner fossil fuels; (3) promoting sustainable energy research and development; (4) financing the transition to cleaner energy

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<sup>27</sup> *Id.*

<sup>28</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541, 1550 (entered into force Jan. 1, 1989).

<sup>29</sup> EPA, OZONE DEPLETION RULES & REGULATIONS, HARMONIZING THE CLEAN AIR ACT & MONTREAL PROTOCOL METHYL BROMIDE PHASEOUTS (1998), available at <http://www.epa.gov/ozone/mbr/harmoniz.html> (last updated June 6, 2002).

<sup>30</sup> See *Summary of the Seventh Conference of the Parties to the Vienna Convention for the Protection of the Ozone Layer and Seventeenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, 19 EARTH NEGOTIATIONS BULL. (IISD) 47, Dec. 19, 2005.

<sup>31</sup> G8, GLENEAGLES PLAN OF ACTION: CLIMATE CHANGE, CLEAN ENERGY AND SUSTAINABLE DEVELOPMENT (2005), available at [http://www.fco.gov.uk/Files/kfile/PostG8\\_Gleneagles\\_CCChangePlanofAction.pdf](http://www.fco.gov.uk/Files/kfile/PostG8_Gleneagles_CCChangePlanofAction.pdf) (last visited Jan. 22, 2006).



technologies; (5) managing the impact of climate change; and (6) tackling illegal logging.<sup>32</sup>

In April of 2005, the International Atomic Energy Agency released a report outlining key indicators for sustainable energy use.<sup>33</sup> The report, entitled *Energy Indicators for Sustainable Development*, was prepared in collaboration with the United Nations Department of Economic and Social Affairs (UNDESA), the International Energy Agency (IEA), Eurostat and the European Environment Agency (EEA). The report presents a set of thirty energy indicators spanning the economic, social, and environmental dimensions of sustainable energy. These indicators are intended to serve as analytical tools enabling countries to ensure their development with respect to energy comports with the ideals and obligations of sustainable development.<sup>34</sup>

## V. INTERNATIONAL HAZARD MANAGEMENT

### A. *Regulation of Chemicals*

#### 1. Rotterdam Convention on Prior Informed Consent<sup>35</sup>

During the 1980s, governments began to address the problems caused by toxic pesticides and other hazardous chemicals by establishing a voluntary Prior Informed Consent Procedure (PIC). Under this procedure, before proceeding to trade in listed hazardous substances, exporters were required to obtain the prior informed consent of importers. In 1998, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade was adopted, making the PIC legally binding.<sup>36</sup> The Convention entered into force on February 24, 2004. As of January 3, 2006, there were 101 Parties and 73 Signatories to the Convention. The United States has signed, but not ratified the Convention.

The second meeting of the Rotterdam Conference of the Parties (COP-2) was held from September 26 to 30, 2005. Among the achievements of COP-2 were the confirmation of experts of the Chemical Review Committee; progress on an agreement vis-à-vis text for a non-compliance mechanism for the Convention; initiation of discussions on the study of possible options for a financial mechanism for the Convention; endorsement of the secretariat's continued work on technical assistance; and adoption of a decision on enhancing synergies between the Basel, Rotterdam, and Stockholm Convention secretariats.<sup>37</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> IAEA, *ENERGY INDICATORS FOR SUSTAINABLE DEVELOPMENT, GUIDELINES AND METHODOLOGIES* (2005), available at [http://www-pub.iaea.org/MTCD/publications/PDF/Pub1222\\_web.pdf](http://www-pub.iaea.org/MTCD/publications/PDF/Pub1222_web.pdf).

<sup>34</sup> *Id.*

<sup>35</sup> Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in Int'l Trade, Sept. 11, 1998, 38 I.L.M. 1 (entered into force Feb. 24, 2004).

<sup>36</sup> *Id.*

<sup>37</sup> For a list and copy of the documents of the Conference of the Parties at its second meeting, see [http://www.pic.int/en/print\\_it.asp?id=386](http://www.pic.int/en/print_it.asp?id=386) (last visited Feb. 25, 2006).



## 2. Stockholm Convention on Persistent Organic Pollutants<sup>38</sup>

The Stockholm Convention on Persistent Organic Pollutants entered into force on May 17, 2004, after the fiftieth instrument of ratification was delivered, initiating the international effort to eliminate the use of dioxins, furans, polychlorinated biphenyls (PCBs), and nine highly dangerous pesticides. The first meeting of the Conference of the Parties (COP-1) was held in Punta del Este, Uruguay, from May 2 to 6, 2005. At COP-1 the Persistent Organic Pollutants Review Committee (POPRC) was established to review additional chemicals proposed for inclusion in the Convention.<sup>39</sup> The first meeting of the POPRC took place in Geneva from November 7 to 11, 2005.

### B. *Transboundary Movement of Hazardous Waste*

The 2004 International Environmental Law Report dealt with key issues and developments pertaining to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.<sup>40</sup> No substantial developments occurred with respect to this treaty in 2005.

## VI. NATURAL RESOURCE MANAGEMENT AND CONSERVATION

### A. *Convention on Biological Diversity*<sup>41</sup>

The Convention on Biological Diversity (CBD) is a framework treaty that aims at protecting global biodiversity. As of January 2006, there were 188 Parties to the CBD. No additional parties joined the CBD in 2005.

A Working Group was convened by the Conference of the Parties to review the implementation of the CBD and the parties' progress to the 2010 target adopted in 2004.<sup>42</sup> The Working Group recommended that the Conference of the Parties adopt a decision advising developed country parties to increase their contributions to the Global Environment Facility. Additionally, it decided that the Conference of the Parties should conduct a thorough review of the financial mechanism of the CBD, to promote the effective implementation of the terms of the treaty. Recognizing that the private sector was in possession of substantial information and technology relevant to the conservation of biodiversity, the Working Group identified a number of methods for facilitating the cooperation of the private sector in implementing the terms of the CBD. Notable among these methods are certification schemes, training workshops involving private businesses, and regulating the conservation commitments of businesses.<sup>43</sup> The Conference of the Parties will consider the recommendations of the Ad Hoc Working Group in 2006.

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<sup>38</sup> United Nations Environment Programme (UNEP): Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532 (entered into force May 17, 2004).

<sup>39</sup> See United Nations Environment Programme, *Report of the Conference of the Parties of the Stockholm Convention on Persistent Organic Pollutants on the Work of Its First Meeting*, U.N. Doc. UNEP/POPS/COP.1/31 (May 2005).

<sup>40</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, March 22, 1989, 28 I.L.M. 657 (entered into force May 5, 1992).

<sup>41</sup> United Nations Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993).

<sup>42</sup> See *Implementation of the Convention and the Strategic Plan and Progress Towards the 2010 Target*, UNEP, CBD Doc. UNEP/CBD/WG RI/1/2 (2005).

<sup>43</sup> *Id.*



## B. *Cartagena Protocol*<sup>44</sup>

The Convention, known as the Cartagena Protocol on Biosafety of January 29, 2000 (Cartagena Protocol), is a supplementary agreement of the CBD. The Cartagena Protocol entered into force on September 11, 2003, ninety days after receipt of the fiftieth instrument of ratification. As of November 14, 2005, there were 127 Parties to the Cartagena Protocol. The Cartagena Protocol seeks to protect biological diversity from the potential risks posed by living modified organisms (LMOs)—also known as genetically modified organisms (GMOs)—resulting from modern biotechnology.<sup>45</sup>

The Conference of the Parties (COP) held their 2005 meeting in Montreal, Canada. At the meeting, the group developed rules and procedures for the Compliance Committee created during the first meeting of the COP.<sup>46</sup> In order to further the mandate identified at the first meeting, the COP defined the activities and operations of the Biosafety Clearing House.<sup>47</sup> The activities will include increasing access to the information lodged in the Biosafety Clearing House and encouraging parties to provide more information.

A potential source of conflict between the Cartagena Protocol and the World Trade Organization agreement on Sanitary and Phytosanitary Measures (SPS) relates to the use of scientific risk assessment. The 2005 COP took cognizance of this putative problem by creating an ad hoc technical expert group to consider the issue of risk assessment and risk management.<sup>48</sup> Among other things, this expert group is requested to evaluate existing methods for risk assessment to determine if they are sufficient. If they determine that there are gaps in existing risk assessment methods, they should consider more effective alternative measures. The ad hoc technical expert group is expected to prepare and submit a report of its findings before the third meeting of the COP in 2006.<sup>49</sup> The COP may defer a decision on the requirements for the transboundary movement of genetically modified organisms to be used for food, feed or processing, until the report of this expert group.

Despite reiteration by the first COP of the need for progress in this area, the 2005 COP did not create a liability regime under the Cartagena Protocol. Instead, they decided that a Working Group will meet and prepare a report before the next meeting of the COP in 2006.

## C. *Convention on International Trade in Endangered Species*<sup>50</sup>

The 1973 Convention on International Trade in Endangered Species of Fauna and Flora (CITES) is an international treaty that attempts to protect endangered plant and animal species through restrictions on international trade. CITES conducted several regular meetings in 2005, including the fifty-third Standing Committee meeting from

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<sup>44</sup> Cartagena Protocol on Biosafety, Jan. 29, 2000, 39 I.L.M. 1027 (entered into force Sept. 11, 2003).

<sup>45</sup> *Id.*

<sup>46</sup> See *Report of the Second 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*, United Nations Environment Programme, 2nd meeting, CBD Doc. UNEP/CBD/BS/COP-MOP/2/15 (June 6, 2005).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Convention on Int'l Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 12 I.L.M. 1085 (entered into force July 1, 1975).

June 27 to July 1, the 21st meeting of the Animals Committee from May 20 to 25, and the fifteenth meeting of the Plants Committee from May 17 to 21.

Significant developments from the fifty-third Standing Committee meeting include: an increased focus on synergy between CITES and the Convention on Biological Diversity; continued cooperation with the Convention on the Conservation of Migratory Species of Wild Animals; approval of the text of a Memorandum of Understanding between CITES and the Food and Agriculture Organization of the United Nations, to be forwarded to the FOA for consideration; and a commitment to reinvigorate and strengthen efforts to halt the illegal trade in big-cats, great apes, rhinoceroses, Tibetan antelope, and ivory.<sup>51</sup>

Other significant CITES developments in 2005 include: development of a program to use economic incentives “to minimize the detrimental effects of wildlife trade and maximize its potential as a conservation tool;”<sup>52</sup> a recommendation that all CITES nations immediately cease trade with Nigeria in any CITES-listed species until Nigeria complies with the convention; withdrawal of a recommendation that all CITES nations suspend trade in any-CITES listed species with India; removal of the Orange-Throated Whiptail from Appendix II; and withdrawal of the Chinese Softshell Turtle from Appendix III.<sup>53</sup>

#### D. *The International Treaty on Plant and Genetic Resources*

The International Treaty on Plant and Genetic Resources entered into force on June 29, 2004, and became the first legally binding treaty on food and agricultural biodiversity.<sup>54</sup> Its aims mirror those of the CBD, but are localized in the context of plant genetic resources used in food and agriculture; that is, the treaty will ensure that such plant genetic resources are conserved, used in a sustainable manner, and equitably distributed among nations.

The Treaty will implement a Multilateral System (MLS) of access and benefit sharing for a list of sixty-four of the most important food and forage crops essential for food security and interdependence for those countries that ratify the treaty. It includes, as one of its funding mechanisms, mandatory sharing of benefits arising from the commercial utilization of plant genetic resources for food and agriculture covered by the MLS.

The Governing Body of the Treaty will meet for the first time in Spain in June of 2006, and will begin finalizing compliance mechanisms, specific goals, and other relevant aspects of the Treaty.<sup>55</sup> As of January 2006, there were eighty-one parties to the treaty.

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<sup>51</sup> See *Summary Record of the Fifty-third Meeting of the Standing Committee*, CITES Standing Comm., 53rd meeting, Doc. SC53 Summary Record (Rev. 1) (June/July 2005) (hereinafter CITES Summary).

<sup>52</sup> See *Notification to the Parties: Economic Incentives*, CITES Doc. 2005/022 (April 20, 2005).

<sup>53</sup> For a list of documents on these developments see CITES, NOTIFICATION TO THE PARTIES 2005, available at <http://www.cites.org/eng/notif/2005.shtml> (last visited Feb. 20, 2006).

<sup>54</sup> International Treaty on Plant Genetic Resources for Food and Agriculture, *opened for signature*, Nov. 3, 2001, (entered into force June 29, 2004).

<sup>55</sup> INT’L INST. FOR SUSTAINABLE DEV., UPCOMING MEETINGS: BIODIVERSITY AND WILDLIFE (2006), available at <http://www.iisd.ca/upcoming/linkages meetings.asp?id=3>.

## E. Fisheries and Marine Mammals

### 1. U.N. Food and Agricultural Organization (FAO)

In 2005, the FAO reported that 3% of the world's marine fish stocks are underexploited, 21% are moderately exploited, 52% are fully exploited, 16% are overexploited, 7% are depleted, and 1% are recovering from depletion.<sup>56</sup>

The 26th Session of the FAO Committee on Fisheries met from March 7 to 11, 2005, and reviewed progress in implementing the ten-year-old Code of Conduct for Responsible Fisheries.<sup>57</sup> The Committee's assessment was limited because only 27% of FAO members responded to an implementation survey.<sup>58</sup> Of those responding, 90% had "national policies and legislation in place that either totally or partially conformed to the Code."<sup>59</sup> However, only 14% of members had created marine fisheries management plans.<sup>60</sup> Given the Committee's difficulties in collecting Code implementation data, the Committee will investigate changing the survey from every two years to every four in hopes of achieving a higher response rate.<sup>61</sup>

### 2. United Nations Convention on the Law of the Sea (UNCLOS)

The UNCLOS is perhaps the most comprehensive international environmental treaty. The UNCLOS focuses, *inter alia*, on the protection of marine living resources as an intrinsic component of the oceanic environment, and contains a number of necessary, general obligations dealing with the protection of different marine resources.<sup>62</sup> As of September 2005, the number of states parties to UNCLOS including the European Community had risen to 149.

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 (Agreement), relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks sets out principles for the conservation and management of those fish stocks and establishes that such management must be based on the precautionary approach and the best available scientific information.<sup>63</sup> The Agreement was adopted on August 4, 1995, by the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, and the Agreement entered into force on December 11, 2001. The Fourth Informal Meeting of States Parties to the Agreement met in 2005 to review and assess the adequacy of the provisions of the Agreement, and, if necessary, to propose means of strengthening the substance and methods of implementation of the Agreement

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<sup>56</sup> FAO, DEPLETED FISH STOCKS REQUIRE RECOVERY EFFORTS (Mar. 7, 2005), available at <http://www.fao.org/newsroom/en/news/2005/100095/index.html>.

<sup>57</sup> FAO, *Progress on the Implementation of the Code of Conduct for Responsible Fisheries and Related International Plans of Action*, Comm. on Fisheries, 26th Sess., FAO Doc. COFI/2005/2 (2005).

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.* at 3.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 13.

<sup>62</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1266 (entered into force Nov. 16, 1994).

<sup>63</sup> *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, U.N. GAOR, 6th Sess., Gen. Assemb., U.N. Doc. A/Conf.164/37 (2005).

in order better to address any continuing problems. The UNCLOS provides for four alternative forums for the settlement of disputes:

[T]he International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII to the UNCLOS or a special arbitral tribunal constituted in accordance with Annex VIII to the UNCLOS. States parties may choose one or more of those forums by written declaration made under article 287 of the UNCLOS and deposited with the U.N. Secretary-General.<sup>64</sup>

Cases still pending before the International Court of Justice, which are of relevance to law of the sea matters are:

Territorial and Maritime Dispute (Nicaragua v. Colombia); Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) and Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine). In the only new oceans-related case since the previous report of the Secretary-General on September 16, 2004, Romania instituted proceedings against Ukraine in a dispute described in its application as “concern[ing] the establishment of a single maritime boundary between the two States in the Black Sea, thereby delimiting the continental shelf and the exclusive economic zones appertaining to them.” In its order of November 19, 2004, the Court fixed August 19, 2005 as the time limit for the filing of Romania’s memorial and May 19, 2006 as the time limit for the filing of Ukraine’s countermemorial.<sup>65</sup>

On December 18, 2004, the International Tribunal for the Law of the Sea entered its judgment in *St. Vincent and the Grenadines v. Guinea-Bissau*, requiring the “prompt release of the St. Vincent vessel Juno Trader and its crew being detained by Guinea-Bissau.”<sup>66</sup>

### 3. International Whaling Commission (IWC)

The 57th Annual Meeting of the IWC was held from June 20 to 24, 2005. The Revised Management Scheme (RMS), an implementation plan for the Revised Management Procedure that will address “scientific and non-scientific” issues, was scheduled to be presented in final form.<sup>67</sup> In 2004, concerned that the failure to reach broad agreement on the RMS in the near future may seriously jeopardize the ability of the IWC to fulfill its responsibilities, the IWC reestablished the Working Group on the RMS and created a detailed “Intersessional Plan of Work.”<sup>68</sup> However, stymied by lack of progress, the Working Group referred its list of outstanding policy and technical issues to

<sup>64</sup> *Oceans and the Law of the Sea: Report of the Secretary-General*, U.N. GAOR, 60th Sess., ¶ 34–35, U.N. Doc. A/60/63 (2005).

<sup>65</sup> *Id.* For a full list of cases pending before the International Court of Justice, and for additional information on the cases referred to above, see <http://www.icj-cij.org/icjwww/idocket.htm> (last visited Feb. 23, 2006).

<sup>66</sup> *Oceans and the Law of the Sea*, *supra* note 68. See *Saint Vincent and the Grenadines v. Guinea-Bissau* (The “Juno Trader” Case), 2004 I.T.L.O.S. 13 (Dec. 18, 2004).

<sup>67</sup> See IWC, REVISED MANAGEMENT SCHEME (2005), available at <http://www.iwcoffice.org/conservation/rms.htm>.

<sup>68</sup> IWC Res. 2004-6, *Resolution on Completion of the Revised Management Scheme (RMS)*, Int’l Whaling Comm’n, 56th meeting (2004).



the Commission.<sup>69</sup> The IWC resolved to hold yet another intercessional meeting of the Working Group to address these issues.<sup>70</sup> This lack of progress should be considered in the context of Iceland's 2002 reservation, which allows Iceland to resume commercial whaling in 2006 if progress is not made on RMS negotiations.<sup>71</sup>

Other elements of the 57th Annual Meeting paralleled the 56th Annual Meeting. Proposed amendments to establish a South Atlantic sanctuary and abolish the Southern Ocean Sanctuary again failed.<sup>72</sup> Japan proposed an amendment, which failed, that would allow 150 whales per year to be taken by community-based whaling until 2009, or until the RMS goes into effect.<sup>73</sup> Finally, the proposed second Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) came under scrutiny with a resolution that "strongly urge[s] the Government of Japan to withdraw its JARPA II proposal or to revise it so that any information needed to meet the stated objectives of the proposal [is] obtained using non-lethal means."<sup>74</sup>

## VII. INTERNATIONAL ECONOMY AND THE ENVIRONMENT

### A. *International Environmental Standards*

Founded in London in 1946, the International Organization for Standardization (ISO) is a non-governmental federation of national standards bodies whose goal is to promote international standards that facilitate global trade.<sup>75</sup> Early standards covered product specifications for ball bearings, gears, and freight containers.<sup>76</sup> From its beginnings in the area of mechanics, the ISO has steadily broadened its coverage developing international norms of corporate conduct with respect to the environment. Three standards received significant attention in 2005.

ISO 14001, as amended in 2004, provides a specification for "a complete and effective Environmental Management System (EMS)."<sup>77</sup> The overall aim of the standard is to "support environmental protection and prevention of pollution in balance with socio-economic needs."<sup>78</sup> A significant development in 2005, related to the United States, was the adoption of a final rule by the United States Forest Service which requires every administrative unit to develop and implement an environmental management system

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<sup>69</sup> *Chair's Summary Report for the 57th Annual Meeting (Revised)*, Ulsan, Republic of Korea, June 2005, Int'l Whaling Comm'n, 57th Annual Mtg., at 3 (Jul. 28, 2005) [hereinafter *Chair's Summary*].

<sup>70</sup> *Id.*

<sup>71</sup> IWC, 2002 SPECIAL MEETING: FINAL PRESS RELEASE FROM THE INTERNATIONAL WHALING COMMISSION'S SPECIAL MEETING IN CAMBRIDGE, UK 2002, ICELAND'S RESERVATION, available at <http://www.iwcoffice.org/meetings/specmeeting2002.htm#iceland2> (last updated May 5, 2004).

<sup>72</sup> *Chair's Summary*, *supra* note 68, at 3.

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.*

<sup>75</sup> Naomi Roht-Arriaza, *The International Organization for Standardization: Drafting of the ISO 14000 Series*, in *THE GREENING OF TRADE LAW: INT'L TRADE ORGANIZATION AND ENVIRONMENTAL ISSUES* 251, 252 (Richard H. Steinberg ed., 2002).

<sup>76</sup> Vincent Grey, *Setting Standards*, in *FRIENDSHIP AMONG EQUALS* 35 (1997).

<sup>77</sup> Susan Jackson, *ISO 14000 Frequently Asked Questions THE ISO 14001 IMPLEMENTATION GUIDE* (2001), available at <http://www.iso14001.homestead.com/ISO14000FAQS.html> [ISO FAQ].

<sup>78</sup> EAGLE GROUP, ISO 14001 (2006), available at <http://www.eaglegroupusa.com/ISO%2014001.htm>.

(EMS) that complies with ISO 14001.<sup>79</sup> This directive represents the first time that a federal agency in the United States has adopted this international standard throughout the organization. By adopting ISO 14001, the Forest Service hopes to create “a systematic approach to identify and manage environmental conditions and obligations to achieve improved performance and environmental protection.”<sup>80</sup>

In 2005, the ISO responded to criticisms of small businesses by commissioning and publishing a report on the use of ISO 14000 by small and medium enterprises.<sup>81</sup> The report recommended that the ISO better publicize the advantages of ISO 14001 to small enterprises, provide additional guidance targeted to small and medium enterprises, and consider alternatives to the expensive independent certification process.<sup>82</sup>

Also in 2005, the ISO began development of ISO 14064 to enable governments and businesses to measure and manage GHG emissions and reduction activities. Use of the standard is intended to support the development of GHG reduction programs and emissions trading markets by providing an auditable, standardized process for GHG measurement and verification. Although the standard is scheduled for completion in 2006, the draft standard is already being used in governmental activities in Canada and Australia.<sup>83</sup>

Recognizing a worldwide concern that organizations operate ethically and with respect for the social, economic, and environmental dimensions of sustainable development, the ISO created a Working Group in 2004 to develop ISO 26000, an international standard providing guidance on social responsibility.<sup>84</sup> The standard is to be consistent with existing treaties, conventions, and other international standards and is to be completed in 2008. The first two meetings of the Working Group were held in 2005 in Brazil and Thailand.<sup>85</sup> Meetings were attended by a broad array of stakeholder representatives.

## B. *International Trade and the Environment*

### 1. World Trade Organization (WTO)

The sixth WTO Ministerial Conference was held in Hong Kong from December 13 to December 18, 2005.<sup>86</sup> Progress at the conference was considered essential if the four-year-old Doha Development Agenda negotiations were to move forward sufficiently to conclude the round in 2006. At the conference countries agreed to phase out all their agricultural export subsidies by the end of 2013 and to terminate any cotton export

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<sup>79</sup> National Forest System Land Management Planning, 70 Fed. Reg. 1023, 1030 (Jan. 5, 2005).

<sup>80</sup> *Id.*

<sup>81</sup> ISO/TC207/SCI/ STRATEGIC SME GROUP, THE GLOBAL USE OF ENVIRONMENTAL MANAGEMENT SYSTEM BY SMALL AND MEDIUM ENTERPRISES (May 2005), available at [http://www.iso.org/iso/en/iso9000-14000/pdf/iso14001survey\\_2.pdf](http://www.iso.org/iso/en/iso9000-14000/pdf/iso14001survey_2.pdf).

<sup>82</sup> *Id.*

<sup>83</sup> See Press Release, Int'l Org. for Standardization, ISO 14064 Standard on Greenhouse Gases in Wings of UN's Climate Change Conference (Nov. 29, 2005).

<sup>84</sup> See *Long and Winding Road*, SOCIAL RESPONSIBILITY NEWSL. (ISO, Geneva, Switzerland) Apr. 2005.

<sup>85</sup> See *The Outcome of the First Plenary Meeting in Brazil*, SOCIAL RESPONSIBILITY NEWSL. (ISO, Geneva, Switzerland), May, 2005; *One Great Step Toward 2008 – ISO/SR 2nd meeting in Bangkok*, SOCIAL RESPONSIBILITY NEWSL. (ISO, Geneva, Switzerland), Oct., 2005.

<sup>86</sup> See *Doha Work Programme: Ministerial Declaration*, WTO Ministerial Conference, Sixth Sess., WTO Doc. WT/MIN(05)/W/3/Rev.2 (2005).



subsidies by the end of 2006. Further concessions to developing countries included an agreement to introduce duty free, tariff free access for goods from the Least Developed Countries, following the Everything But Arms initiative of the European Union—but with up to 3% of tariff lines exempted. Other major issues were left for further negotiation to be completed by the end of 2006.

The WTO dispute panel adjudicating the case brought by the United States, Canada, and Argentina against the EU's alleged de facto moratorium on the approval of new genetically modified organisms (GMOs) scheduled for October 10 was pushed back to January 2006. Consequently, the much-awaited ruling was not released before the Hong Kong Ministerial Conference in December.

## 2. Bilateral and Regional Trade Initiatives

### a. North American Free Trade Agreement (NAFTA)<sup>87</sup>

The Commission for Environmental Cooperation (CEC) held its Twelfth Regular Session of the Council of the CEC from June 21 to 23, 2005, in Quebec City, Canada. During this session the Council—which is composed of the environment ministers of Canada, Mexico and the United States—considered a program of action to address environmental issues facing North America. The program of action focused on the following priority-areas: (1) the development of information for decision making; (2) support for capacity building; and (3) ongoing work to address trade and environment issues more effectively in order to promote environmental protection and sustainability.<sup>88</sup>

The citizen submissions mechanism of the CEC enables the public to play a whistle-blower role on matters of environmental law enforcement. Under Article 14 of the North American Agreement on Environmental Cooperation (NAAEC), any person or nongovernmental organization may submit a claim alleging that a NAFTA partner has failed to effectively enforce its environmental law.<sup>89</sup> Following a review of the submission, the CEC may investigate the matter and pursue a factual record of its findings. On January 18, 2005, the CEC received a revised citizen submission asserting that the United States is failing to effectively enforce the federal Clean Water Act against coal-fired power plants for mercury emissions. Following a determination by the Secretariat that the submission conformed to the requisite criteria of Article 14(1) of the NAAEC, on December 5, 2005, the Secretariat informed the Council—the CEC's governing body—of its conclusion that the submission warrants development of a factual record.<sup>90</sup>

### b. Other Bilateral and Regional Trade Agreements

This past year has seen few developments relating specifically to environmental issues within the free trade arena. Neither the Southern Common Market (MERCOSUR),

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<sup>87</sup> For a discussion of *Methanex Corp. v. United States of America*, a recent arbitral award issued under the investment chapter of the NAFTA, see *infra* Section VIII(B).

<sup>88</sup> See CEC, *LOOKING TO THE FUTURE, STRATEGIC PLAN OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION 2005–2010* 9 (2005).

<sup>89</sup> For a copy of the agreement, see *COMM'N FOR ENVTL. COOPERATION, NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION BETWEEN THE GOVERNMENT OF CANADA, THE GOVERNMENT OF THE UNITED MEXICAN STATES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICAN* (1993) available at [http://www.cec.org/pubs\\_info\\_resources/law\\_treat\\_agree/naaec/index.cfm?varlan=english](http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english).

<sup>90</sup> See *Article 15(1) Notification to Council that Development of a Factual Record is Warranted*, Secretariat of the CEC, CEC Doc. A14/SEM/04-005/48/ADV (Dec. 5, 2005).



the Central American Free Trade Agreement (CAFTA), the Asian Free Trade Agreement (AFTA), nor the African Economic Community (AEC) witnessed significant developments regarding environmental conflicts within their regional trade agreements. However, following the general trend towards open-market access on a regional and global scale, efforts to stimulate negotiations for free trade agreements between regional free trade associations abounded. For example, the MERCOSUR has continued extensive discussions with the EU, which if successful would create the largest regional trading bloc in the world.<sup>91</sup> The EU is also conducting specialized dialogues in the Latin America region, as one of its largest trading partners, with Central America Common Market (CACM) and the Andean Community.<sup>92</sup> This is just one example of the various communications between trade regions that are being conducted, evidencing a huge push towards globalization.

The CAFTA, which was signed in May of 2004, will enter into force on January 2006. With the exception of the Dominican Republic, which still awaits domestic ratification, the agreement was successfully ratified by domestic governments of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the United States.

Another important occurrence was the failing of talks regarding the Free Trade Area of the Americas (FTAA), which would include all countries of the Americas and was supposed to conclude negotiations and go into force by the end of 2005. The alleged failing of the talks rested primarily on the MERCOSUR countries refusal to accept the United States agricultural subsidies. Talks may begin again in 2006; however, the countries could not agree to schedule further negotiations.

## VIII. SELECT ENVIRONMENTAL CASES PRESENTING INTERNATIONAL ISSUES<sup>93</sup>

### A. *Extraterritorial Application of Laws*

In 2005 the issue of whether U.S. domestic laws apply to actions or impacts beyond U.S. borders arose both directly and indirectly in a number of contexts, including under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the National Environmental Policy Act (NEPA) and other statutes, with no clearly consistent resolution. In the hazardous waste context, the Ninth Circuit in *Arc Ecology v. United States Department of the Air Force*<sup>94</sup> affirmed a lower court dismissal of a CERCLA claim by plaintiffs concerning alleged U.S. contamination at Clark Air Force Base and Subic Naval Base in the Philippines. Applying the general statutory presumption against extraterritorial application of U.S. law, the court found nothing in the CERCLA or its legislative history that suggested Congress intended for the CERCLA

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<sup>91</sup> See EU & MERCOSUR, JOINT COMMUNIQUE: MERCOSUR-EU NEGOTIATORS MEETING AT MINISTERIAL LEVEL (2005).

<sup>92</sup> See, EU & MERCOSUR, SPECIALISED DIALOGUES: MERCOSUR, THE ANDEAN COMMUNITY AND CENTRAL AMERICA AND DIALOGUES WITH SPECIFIC COUNTRIES, MEXICO AND CHILE, available at [http://europa.eu.int/comm/external\\_relations/la/index.htm#2](http://europa.eu.int/comm/external_relations/la/index.htm#2) (last visited January 6, 2006).

<sup>93</sup> The Committee is indebted to Jim Rubin, Assistant Chief of the Law & Policy Section, U.S. Department of Justice, Environment and Natural Resource Division, for the contribution of this section. The contributed material is written in his personal capacity and does not represent the official views of the Department of Justice or the United States. This section provides an overview of selected cases relevant to international environmental law. It is not intended to be an exhaustive or comprehensive overview of all relevant case law developments.

<sup>94</sup> 411 F.3d 1092 (9th Cir. 2005).



to apply to contaminated sites located in a foreign country. The court saw no conflict between its ruling and international law.<sup>95</sup>

The application of the CERCLA to transboundary pollution has been raised in another case, *Pakootas, et al. v. Teck Cominco Metals, Ltd.*,<sup>96</sup> where a district court held that the CERCLA could be applied to contamination of the Upper Columbia River and Lake Roosevelt in the United States arising from certain mining activities taking place in Canada.<sup>97</sup> The court held that the presumption against extraterritoriality did not apply when conduct in a foreign country produces adverse effects in the United States. The matter was certified for interlocutory appeal, and an appeal was allowed on February 14, 2005.<sup>98</sup>

In 2005, the issue of the extraterritorial application of the NEPA arose in several cases, although only directly in one. In *Basel Action Network v. MARAD*,<sup>99</sup> plaintiffs challenged on NEPA and other grounds the Maritime Administration's (MARAD) decision to tow decommissioned military vessels (the so called "ghost fleet") to the United Kingdom for dismantling. In dismissing the plaintiffs' complaint, the court found that MARAD had complied with its domestic NEPA obligations, explicitly rejecting the application of the NEPA to the high seas.

In *Province of Manitoba v. Norton*,<sup>100</sup> the issue of extraterritoriality did not specifically factor into the decision of the court to enjoin some construction of a water supply project that would move water from the Missouri Basin to the Hudson Bay Basin. The court granted Manitoba partial summary judgment on its NEPA claims, which alleged the failure to adequately consider the impacts of the project in the United States; however, the court did not address the question of potential impacts in Canada.<sup>101</sup> On a related issue, the court rejected the United States claim that the case raised a political question due to the existence of a treaty governing the allocation of water between the United States and Canada.

Extraterritoriality was raised outside the CERCLA/NEPA context in *Okinawa Dugong v. Rumsfeld*.<sup>102</sup> In that case, the court allowed a claim to proceed alleging that the Defense Department failed to comply with the requirements of the National Historic Preservation Act (NHPA) in planning to replace a Marine Corps Air Station in Japan by taking action which allegedly would harm the native dugong. The plaintiff's alleged that the dugong was "property" under the NHPA, protected for cultural and historical reasons by Japan. The court expressly found that the NHPA could apply in Japan, distinguishing the issue from the foreign application of the NEPA, which it noted remained an open question in the courts.<sup>103</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> No. CV-04-256-AAM, 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004).

<sup>97</sup> This same facility gave rise to the seminal Trail Smelter cases. Trail Smelter Arbitral Tribunal Decisions (Can. v. U.S.), 3 R.I.A.A. 1911 (1938); 3 R.I.A.A. 1938 (1941).

<sup>98</sup> *Pakootas*, 2004 WL 2578982, at \*17.

<sup>99</sup> 370 F. Supp. 2d 57 (D.D.C. 2005).

<sup>100</sup> 398 F. Supp. 2d 41 (D.D.C. 2005).

<sup>101</sup> It should be noted that a case was filed in 2005 that more directly presents the question of the applicability of NEPA to impacts in other countries. In *Consejo de Desarrollo Economico de Mexicali v. US*, No. CV-S-05-0870-KJD-(GWF) (D.Nev., filed July 19, 2005), U.S. and Mexican plaintiffs filed a class action to prevent the lining of the All American Canal, which they claim, among other things, would diminish seepage of water from the Canal into Mexico and harm endangered species in both countries. Motions to dismiss are pending.

<sup>102</sup> No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005).

<sup>103</sup> *Id.*

## B. Treaty Issues

Several cases litigated in 2005 related to the implementation of international environmental treaties. In addition, there was a decision on an international arbitration under the NAFTA that directly related to environmental regulation.

In *Natural Resources Defense Councils (NRDC) v. EPA*,<sup>104</sup> petitioners challenged the EPA's decision to grant critical use exemptions for methyl bromide, a chemical regulated by the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) and implemented domestically through the Clean Air Act. Methyl bromide production and importation were prohibited after 2004 except to the extent that the parties decided to permit production and importation to satisfy critical uses. Also, the EPA issued a final rule in 2004 establishing a list of critical uses for 2005 and the amount of chemical that could be supplied from existing stockpiles and new production to meet those critical uses. Petitioners argued that the regulations allowed for existing stocks to be used for non-critical purposes and for the production and importation of nearly seventeen million pounds of new chemical in 2005. The United States argued the EPA rule was reasonable, lawful and fully complied with the Montreal Protocol. The case was argued in October 2005 and is now awaiting decision. The court did deny petitioners' emergency motion to stay the new rule.

Treaty implementation and foreign policy matters were also at issue in an appeal by the United States in the longstanding tuna-dolphin litigation. In *Earth Island v. Evans*<sup>105</sup> the United States appealed a lower court ruling which struck down a finding by the Department of Commerce that the encirclement of dolphins with purse seine nets is not having a significant adverse impact on depleted dolphin stocks in the Eastern Tropical Pacific. A finding on the impact of this tuna fishing technique was required by the International Dolphin Consumer Protection Act which was passed in large part to allow the United States to meet obligations under a multinational fisheries agreement, and the matter has raised great interest among the countries participating in the agreement.<sup>106</sup> In striking down the Commerce Department finding, the lower court had held, among other things, that the finding had been improperly influenced by the alleged consideration of international policy and trade concerns.<sup>107</sup> The United States is now appealing that and other findings by the district court.

Finally, though not a domestic action, a recent arbitral award was issued under the investment chapter of the NAFTA in 2005, ending a matter that had raised great controversy among environmental groups and others concerned with the impact of free trade agreements upon domestic regulatory authority. In *Methanex Corp. v. United States of America*,<sup>108</sup> the Methanex Corporation, a Canadian maker of methanol, filed a claim under NAFTA's Chapter 11 against the United States. Plaintiff alleged that California's ban on methyl tertiary-butyl (MTBE) either violated NAFTA or international law and sought approximately \$970 million in damages. The arbitral panel rejected Methanex's claims both as outside the jurisdiction conferred by NAFTA and on the merits, and it ordered Methanex to pay the United States nearly \$4 million in fees and

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<sup>104</sup> No. 04-1438, 2005 WL 1666942 (D.C. Cir. filed July 1, 2005).

<sup>105</sup> No. 04-17018 (9th Cir. filed Oct. 13, 2004). See *Earth Island v. Evans*, 256 F. Supp. 2d 1064 (N.D. Cal. 2003).

<sup>106</sup> The Mexican and Venezuelan tuna fishing associations sought, but were denied, intervention as defendants in the district court action, and unsuccessfully appealed the denial of intervention to the Ninth Circuit. *Earth Island*, 136 Fed. App'x. 34.

<sup>107</sup> *Earth Island*, 256 F. Supp. 2d 1064.

<sup>108</sup> For a copy of the Final Award of the Tribunal on Jurisdiction and Merits see US DEPARTMENT OF THE STATE, METHANEX CORP. V. UNITED STATES OF AMERICA, available at <http://www.state.gov/s/l/c/5818.htm> (last visited Feb. 23, 2006).



costs. Among other things, the panel rejected Methanex's claims that the California regulation violated international law standards, discriminated against it and effected an expropriation of its investment.<sup>109</sup>

### C. Cases Related to Climate Change

In *Connecticut v. American Electric Power*,<sup>110</sup> the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin, as well as the City of New York, filed suit against six utilities (American Electric Power Company, American Electric Power Service Corp., the Southern Company, TVA, XCEL Energy Inc., and Cinergy Corp.). Plaintiffs alleged that the defendants' emissions of CO<sub>2</sub> have exacerbated global warming, injuring the plaintiff states and their citizens. Plaintiffs seek an injunction requiring the defendants to first cap, and then reduce, their emissions of CO<sub>2</sub> "by a specified percentage each year for at least a decade."<sup>111</sup> The court dismissed the lawsuit on September 15, 2005 as presenting a political question.

In *Friends of the Earth v. Watson*,<sup>112</sup> the court allowed a NEPA challenge to proceed alleging the failure of the Overseas Private Investment Corporation (OPIC) and the Export-Import Bank of the United States (Ex-Im Bank) to consider effects of climate change upon the United States and the global commons resulting from "fossil fuel projects" involving investment or exports supported by OPIC or Ex-Im Bank, respectively. The court found, among other things, that plaintiffs had established standing through the alleged nexus between the agencies' financial transactions and the actual emissions by fossil fuel end-users; that plaintiffs challenged a final agency action; that OPIC organic statute did not preclude judicial review; and that OPIC's environmental procedures did not displace the NEPA.<sup>113</sup>

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<sup>109</sup> A number of other NAFTA claims are pending against the United States, including another action related to environment and natural resources where the Canadian owner of unpatented mining claims in California has alleged that the U.S. Department of Interior and California violated NAFTA's investment provisions through a series of regulatory actions directed against its proposed gold mine. See *Glamis Gold Ltd., v. United States*, (U.S. v. Can. 2003), available at <http://www.state.gov/s/l/c10986.htm> (last visited January 6, 2006).

<sup>110</sup> 406 F. Supp. 2d 265 (S.D.N.Y. 2005).

<sup>111</sup> *Id.* at 270.

<sup>112</sup> No. C 02-4106 JSW, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005).

<sup>113</sup> *Id.*