

International Environmental Law

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I. Atmosphere and Climate

A. CLIMATE

Intensive negotiations under the United Nations Framework Convention on Climate Change (“UNFCCC”) continued in 2010, following the 15th Conference of the Parties (“COP”) to the UNFCCC (“COP-15”) held in Copenhagen in December 2009. The presence of record numbers of participants, including 120 heads of state,¹ had raised hopes that the UNFCCC Parties might agree on clear next steps for the period after commitments under the UNFCCC’s Kyoto Protocol end in 2012. Yet the COP-15 produced no

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1. *The United Nations Climate Change Conference in Copenhagen, 7-19 December 2009*, UNFCCC, http://unfccc.int/meetings/cop_15/items/5257.php (last visited Dec. 2, 2010).

binding outcomes. The Copenhagen Accord,² a non-binding agreement negotiated personally by a number of heads of state, was not adopted by the COP.³ Rather, the COP “took note of” the agreement, leaving its status within the UNFCCC negotiations in limbo.

In a marked contrast to COP-15, COP-16 (and CMP-6) in Cancun in December 2010 resulted in the adoption of the Cancun Agreements.⁴ While a complete review of the elements of the Cancun Agreements is beyond the scope of this brief update, the Cancun Agreements: bring the Copenhagen Accord mitigation pledges more formally into the UNFCCC system; enhance reporting and review requirements for both developed and developing countries; establish the Green Climate Fund, the Technology Mechanism, and the Cancun Adaptation Framework; and provide important momentum to reducing emissions from deforestation and forest degradation (“REDD”) in developing countries. The Cancun Agreements also set a goal of keeping the global temperature increase below 2°C and call for periodic review of the adequacy of the goal and progress towards achieving it—the first such review to be completed by 2015.

While the Cancun Agreements collectively appear to have restored confidence in the multilateral process and represent significant progress, this set of decisions fails to resolve a number of key issues. On the fundamental issue of mitigation, the Agreements do not go beyond the voluntary pledges of the Copenhagen Accord which appear highly unlikely to keep warming below the 2°C goal.⁵ The ultimate legal architecture of the climate regime remains unclear. Do the Cancun Agreements represent a transition to a more structured long-term climate regime or an indefinite period of collective but ultimately voluntary efforts? Will the Kyoto Protocol continue with a second commitment period after 2012? Will the parallel negotiations under the Convention result in a protocol or less formal outcome? While the Agreements recognize the goal of mobilizing US\$100 billion per year by 2020 for developing countries, the sources of those funds remain uncertain. Finally, the Parties face the daunting task of fleshing out the details of the Cancun Agreements—and confronting the devils that are certain to reside there.

B. STRATOSPHERIC OZONE

The Parties to the Montreal Protocol held the 22nd Meeting of the Parties (“MOP-22”) in November of 2010. Two significant issues left unresolved by MOP-21 in 2009 were on the agenda for MOP-22 as well: a possible amendment to the Protocol to regu-

2. Framework Convention on Climate Change, Copenhagen, Den., Dec. 7-19, 2009, *Report of the Conference of the Parties on Its Fifteenth Session, FCCC/CP/2009/11/Add.1*, 5 (Mar. 30, 2010), available at <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>.

3. *Copenhagen Accord*, UNFCCC, <http://unfccc.int/home/items/5262.php> (last visited Nov. 29, 2010).

4. See UNFCCC, Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention, Draft Decision 1/CP.16, available at http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf (last visited Jan. 6, 2011); see also Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session, Draft Decision 1/CMP.6, available at http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_kp.pdf (last visited Jan. 6, 2011).

5. UNEP, *The Emissions Gap Report: Are the Copenhagen Pledges Sufficient to Limit Global Warming to 2°C or 1.5°C?*, Nov. 2010, available at www.unep.org/publications/ebooks/emissionsgapreport/ (last visited Jan. 6, 2011).

late hydrofluorocarbons (“HFCs”) and a decision on environmentally sound destruction of accumulated stocks of ozone depleting substances (“ODS”).⁶ HFCs are gases with high global warming potential. They are subject to limitations under the Kyoto Protocol, but are an alternative to ozone-depleting hydrochlorofluorocarbons (“HCFCs”), which are subject to accelerated phase-out under the Montreal Protocol. The MOP-22 resolved neither the HFC nor the ODS stocks issue, although ninety-one countries did sign a declaration indicating their intent to pursue action under the Montreal Protocol to transition to environmentally sound alternatives to HCFCs.⁷

II. Marine Environment and Conservation

A. MARINE ENVIRONMENTAL PROTECTION

Annex VI to the International Convention for the Prevention of Pollution from Ships (“MARPOL”)⁸ regulates air pollution from ships.⁹ Following ratification,¹⁰ the Annex entered into force for the United States on January 9, 2009. A set of amendments to the Annex entered into force internationally on July 1, 2010. These Amendments reduce allowable emissions of NOx and reduce allowable sulfur concentrations in marine fuel, especially from ships operating in “emission control areas” (“ECAs”) to be designated under the Annex.¹¹

At its March 2010 meeting, the International Maritime Organization’s Marine Environment Protection Committee (“MEPC”) adopted the North American ECA proposed by the United States, Canada, and France.¹² This ECA, which includes most Atlantic and Pacific coastal waters seaward to 200 nautical miles, is expected to enter into force on August 1, 2011, although the fuel sulfur limitations would not take effect until one year later. The EPA has promulgated a rule to implement Annex VI, including the proposed ECA.¹³ The rule also extends ECA standards to U.S. internal waters. A U.S. proposal to establish another ECA in ocean waters proximate to Puerto Rico and the U.S. Virgin

6. *Summary of the Twenty-Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer: 8-12 November 2010*, EARTH NEGOTIATIONS BULL. 11, 13 (Nov. 15, 2010), <http://www.iisd.ca/download/pdf/enb1979e.pdf>.

7. *See id.* at 13.

8. International Convention on the Prevention of Pollution from Ships as modified by the 1978 Protocol, Nov. 2, 1973, 34 U.S.T. 3407, 1340 U.N.T.S. 184.

9. As of February 28, 2011, 62 countries, representing 84.93% of the world’s tonnage were Parties to MARPOL Annex VI. Int’l Mar. Org., Status of Conventions (Feb. 28, 2011), <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

10. S. EXEC. DOC. NO. 109-13, at 6 (2008).

11. *Amendments to the Annex of the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating Thereto*, Res. 176 (58), Ch. 1, Reg. 2, ¶ 8, MEPC Doc. 58/23/Add.1/Annex 13 (Oct. 10, 2008), available at http://www5.imo.org/SharePoint/blastDataHelper.asp/data_id%3D23760/176%2858%29.pdf.

12. *Marine Environment Protection Committee (MEPC)-60th Session: 22-26 March, 2010*, INT’L MARITIME ORG., <http://www.imo.org/MediaCentre/MeetingSummaries/MEPC/Pages/MEPC-60th-Session.aspx> (last visited Feb. 9, 2011) [hereinafter Meeting Summary 60].

13. 75 Fed. Reg. 22,896 (Apr. 30, 2010).

Islands was approved by the MEPC at its October 2010 meeting, and will be considered for adoption as an amendment to Annex VI in July 2011.¹⁴

B. MARINE CONSERVATION

In February 2010, a Memorandum of Understanding (“MOU”) on the Conservation of Migratory Sharks was concluded under the framework of the Convention on the Conservation of Migratory Species of Wild Animals (“CMS”).¹⁵ The MOU entered into effect on March 1, 2010.¹⁶ Its objective is to achieve and maintain a favorable conservation status for migratory sharks based on the best available scientific information, taking into account the socio-economic and other values of these species for the people of the signatories.¹⁷ The MOU currently covers seven species of sharks: basking, great white, whale, porbeagle, northern hemisphere populations of spiny dogfish, long-fin mako, and short-fin mako.¹⁸ Negotiations of a conservation plan that elaborates on the MOU will continue at the first Meeting of the Signatories in 2011 or 2012.¹⁹

On August 27, 2010, the Convention for the Strengthening of the Inter-American Tropical Tuna Commission (“IATTC”), established by the 1949 convention between the United States and the Republic of Costa Rica, entered into force.²⁰ The IATTC is the oldest regional fisheries management organization (“RFMO”) with responsibility for management of international fisheries, having been established in 1949, more than thirty years prior to the 1982 UN Convention on the Law of the Sea and forty-five years before the 1995 UN Fish Stocks Agreement.²¹ The new agreement, known as the “Antigua Convention,” establishes a clear mandate to implement many of the modern concepts of fisheries management embodied in the 1995 Agreement, including the ecosystem and precautionary approaches.

14. *Marine Environment Protection Committee (MEPC) 61st Session: 27 September to 1 October 2010*, INT’L MARITIME ORG., <http://www.imo.org/MediaCentre/MeetingSummaries/MEPC/Pages/MEPC-61st-Session.aspx> (last visited Feb. 9, 2011) [hereinafter Meeting Summary 61].

15. Summary Sheet, Memorandum of Understanding on the Conservation of Migratory Sharks (Feb. 4, 2011), http://www.cms.int/pdf/en/summary_sheets/sharks.pdf; *Memorandum of Understanding on the Conservation of Migratory Sharks, opened for signature*, Feb. 12, 2010, http://www.cms.int/species/sharks/sharks_MoU.htm [hereinafter *Shark MOU*].

16. Summary Sheet, *supra* note 15.

17. *Shark MOU*, *supra* note 15, § 2(5); Press Release, Secretariat of CMS, UN Wildlife Conference Enhances Intergovernmental Cooperation to Safeguard Sharks (Feb. 12, 2010), available at http://www.cms.int/news/PRESS/nwPR2010/02_feb/CMS_press_release_global_agreement_sharks.pdf.

18. *Convention on Migratory Species, Shark Specialist Group*, <http://www.iucnssg.org/index.php/convention-on-migratory-species> (last visited Nov. 18, 2010).

19. *See id.*

20. *Entry Into Force of the Antigua Convention*, Inter-American Tropical Tuna Comm’n, (June 8, 2009), <http://www.iattc.org/PDFFiles2/IATTC-80-04-Entry-into-force-of-Antigua-Convention.pdf>.

21. *See* U.N. Convention for the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm; *see* U.N. Convention for the Implementation of the Provisions of the U.N. 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, opened for signature Dec. 4, 1995, S. TREATY DOC. No. 104-24, 34 I.L.M. 1542 (1995) (entered into force Dec. 11, 2001), available at http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm.

Late 2009 and the year 2010 also saw progress towards the establishment of two new RFMOs to provide for international cooperation in the management of high seas fisheries resources of the Pacific Ocean not managed by other Pacific RFMOs.²² These developments occurred in response to calls from the international community for States to take measures to address the impact of fishing on vulnerable marine ecosystems on the high seas.²³ On November 14, 2009, after more than three years of negotiations, participants in the International Consultations on the proposed South Pacific Regional Fisheries Management Organisation adopted the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (“SPRFMO Convention”), which was opened for signature on February 1, 2010.²⁴

Like the Antigua Convention and the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, the SPRFMO Convention embodies many of the modern fisheries management principles reflected in the UN Fish Stocks Agreement, and goes further than these RFMOs in certain respects; specifically, it incorporates more explicitly the precautionary and ecosystem approaches to fisheries management.²⁵ Negotiations of a North Pacific RFMO convention also advanced in 2010, and will continue in February 2011 in Vancouver, British Columbia.²⁶

The substantial decline of the Eastern Atlantic and Mediterranean bluefin tuna stock was a topic of debate at the annual meeting in November 2010 of the International Commission for the Conservation of Atlantic Tunas (“ICCAT”), which adopted more stringent monitoring, control, and surveillance requirements, and reduced the total allowable catch (“TAC”) for 2011 to 12,900 metric tons,²⁷ down from 13,500 for 2010 and 29,500 for 2007.²⁸ Nevertheless, ICCAT has been widely criticized for not going far enough to en-

22. Other RFMOs in the Pacific include the Western and Central Pacific Fisheries Commission, the Inter-American Tropical Tuna Commission, and the Commission for the Conservation of Southern Bluefin Tuna, all of which focus on highly migratory species such as tuna and tuna-like species.

23. See G.A. Res. 59/25, ¶ 69, 59th Sess., Supp. No. 49(b), U.N. Doc. A/RES/59/25 (Jan. 17, 2005), available at http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm; see also United Nations Food and Agric. Org., *Int'l Guidelines for the Mgmt. of Deep-Sea Fisheries in the High Seas*, <http://www.fao.org/docrep/011/i0816t/i0816t00.htm> (last visited Mar. 3, 2011).

24. Final Act of the International Consultations on the Establishment of the Proposed South Pacific Regional Fisheries Management Organization, Nov. 14, 2009, <http://www.southpacificrfo.org/assets/Convention-and-Final-Act/2272942-v1-SPRFMOSignedFinalAct.pdf>; Convention on the Conservation and Management of High Seas Fishery Resources of the South Pacific, Art. 36(b), Feb. 1, 2010, <http://www.southpacificrfo.org/assets/Convention-and-Final-Act/2353205-v2-SPRFMOConvention-textascorrectedApril2010aftersignatureinFebruary2010forcertificationApril2010.pdf>.

25. Convention on the Conservation and Management of High Seas Fishery Resources of the South Pacific, *supra* note 24, arts. 2, 3(2) (the Convention's objective includes application of precautionary and ecosystem approaches).

26. *Northwest Pacific Bottom Trawling*, NAT'L MARINE FISHERIES SERV. PAC. ISLANDS REG'L OFFICE, http://www.fpir.noaa.gov/IFD/ifd_nwpbottomtrawl.html (last visited Nov. 15, 2010).

27. Press Release, Secretariat of the Int'l Comm'n for the Conservation of Atl. Tunas (ICCAT), 17th Extraordinary Meeting of ICCAT, ¶¶ 4-6 (Nov. 27, 2010), available at http://iccat.int/Documents/Meetings/COMM2010/COMM2010_PressRelease.pdf.

28. J.M. Fromentin, An Attempt to Evaluate the Recent Management Regulations of the East Atlantic and Mediterranean Bluefin Tuna Stock Through a Simple Simulation Model, 62 *Collective Volume Sci. Papers* 1271, 1272 (2008), available at http://www.iccat.int/documents/cvsp/cv062_2008/no_4/CV062041271.pdf.

sure recovery of the stock.²⁹ ICCAT also adopted certain legally binding measures to protect species not specifically addressed in pre-existing ICCAT requirements, including marine turtles, oceanic whitetip, and hammerhead sharks.³⁰

III. International Hazard Management

A. TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTE

In what has become known as the “synergies process,” efforts to enhance coordination and cooperation among the Basel,³¹ Stockholm,³² and Rotterdam³³ Conventions, to better address the environmentally sound management of hazardous substances at different stages of their life cycle, continued in 2010. Toward that end, in February 2010, simultaneous extraordinary Conferences of the Parties (“COP”) to the three Conventions were convened in Bali, Indonesia. Each COP adopted a similar “omnibus decision,” with specific emphasis on joint activities, joint managerial functions, joint services, and the synchronization of budget cycles, joint audits, and review arrangements.³⁴

The seventh session of the Open-Ended Working Group (“OEWG7”) of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was held in Geneva, Switzerland in May. During the OEWG7, among other actions, the parties revised technical guidelines on environmentally sound management of used tires, wastes containing or contaminated with mercury, and hazardous waste in cement kilns.³⁵ The Parties also developed criteria for a “preliminary assessment of whether the Hong Kong International Convention for the Safe and Environmentally Sound Re-

29. See, e.g., David Jolly, *Group Votes to Keep Fishing Levels of Bluefin Tuna Stable*, N.Y. TIMES, Nov. 27, 2010, http://www.nytimes.com/2010/11/28/world/europe/28tuna.html?_r=1&partner=rss&emc=rss; see Angela Doland, *Sharks Protected; Status Quo for Bluefin Tuna*, BLOOMBERG BUSINESSWEEK, Nov. 27, 2010, <http://www.businessweek.com/ap/financialnews/D9JOKFB80.htm>; Press Release, Nat’l Oceanic and Atmospheric Admin., United States Leads Push for Strong Measures to Protect Sharks and Sea Turtles, ¶ 3 (Nov. 27, 2010), available at http://www.noaa.gov/stories/2010/20101127_jccat.html.

30. Press Release, Secretariat of ICCAT, *supra* note 27; Juliet Eilperin, *Atlantic Ocean Sharks Get New Protections*, WASH. POST, Nov. 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/27/AR2010112703755.html>.

31. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126, 28 I.L.M. 657, available at <http://www.basel.int/text/con-e-rev.pdf>.

32. Conference of Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants, Stockholm, Swed., May 22-23, 2001, *Final Act*, U.N. Doc. UNEP/POPS/CONF/4 (June 4, 2001), available at http://www.pops.int/documents/meetings/dipcon/25june2001/conf4_finalact/en/FINALACT-English.pdf.

33. Conference of Plenipotentiaries on the Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, Neth., Sept. 10-11, 1998, *Final Act*, U.N. Doc. UNEP/FAO/PIC/CONF/5 (Sept. 17, 1998), available at <http://www.pic.int/incs/dipcon/eb/English/FINALE.pdf>.

34. Basel Convention, *Report on Simultaneous Implementation of the Conferences of the Parties to the Basel, Rotterdam and Stockholm Conventions*, U.N. Doc. UNEP/CHW/OEWG/7/INF/1 (Apr. 8, 2010).

35. Basel Convention, *Report of the Open-Ended Working Group of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal on the Work of Its Seventh Session*, U.N. Doc. UNEP/CHW/OEWG/7/21 (May 14, 2010) at 26-27 [hereinafter *OEWG Report*].

cycling of Ships³⁶ establishes an equivalent level of control and enforcement as that established by the Basel Convention.”³⁷

B. CHEMICALS

In June 2010, 118 countries participated in the first meeting of the Intergovernmental Negotiating Committee to Prepare a Global Legally Binding Instrument on Mercury (“INC-1”) in Stockholm.³⁸ It was the first of a number of meetings scheduled between 2010 and 2013 designed to develop a new treaty on mercury. As stated by the United Nations Environment Programme, “[m]ercury is recognized as a chemical of global concern due to its long-range transport in the atmosphere, its persistence in the environment, its ability to bioaccumulate in ecosystems, and its significant negative effect on human health and the environment.”³⁹ Mercury can cause permanent damage to the nervous system; infants, children, and women of child bearing age are particularly vulnerable.⁴⁰ At INC-1, delegates exchanged of view on the key elements of a convention, and requested to the Secretariat to prepare a document on the elements of a legally binding instrument as the basis of for negotiations at INC-2 in early 2011.⁴¹

C. INTERNATIONAL REGULATION OF AGRICULTURAL BIOTECHNOLOGY

The most notable international development relating to crops using recombinant DNA (“rDNA”) breeding (“biotech crops”) was the October opening for signature of the Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to Cartagena Protocol on Biosafety (“NKL Protocol”).⁴² This is the first international law on liability for “living modified organisms” (e.g., plants, microbes or animals produced using rDNA biotechnology). “Damage” for which liability may lie, is defined as an “adverse effect” that is “significant” and “measurable or otherwise observable” using “scientifically-established baselines recognized by a competent authority.”⁴³

An industry “compact” whereby the six largest biotech seed companies agreed to compensate scientifically documented harm caused to biodiversity played a role in reaching compromises on the NKL protocol. The NKL Protocol will enter into force upon ratifi-

36. See generally Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships, 2009, IMO Doc. SR/CONF/45 (May 19, 2009), available at <http://ec.europa.eu/environment/waste/ships/pdf/Convention.pdf>.

37. OEWG Report, *supra* note 35, at 29-36.

38. Report of the Intergovernmental Negotiating Committee to Prepare a Global Legally Binding Instrument on Mercury on the Work of its First Session, U.N. ENVTL. PROGRAM, ¶ 2 (July 15, 2010), http://www.unep.org/hazardoussubstances/Portals/9/Mercury/Documents/INC1/INC1_21_final.pdf.

39. Reducing Risks from Mercury, U.N. ENVTL. PROGRAM, <http://www.unep.org/hazardoussubstances/Mercury/tabid/434/language/en-US/Default.aspx> (last visited December 2, 2010).

40. *Id.*

41. See First Meeting of the Intergovernmental Negotiating Committee to Prepare a Global Legally Binding Instrument on Mercury: 7-11 June 2010, EARTH NEGOTIATIONS BULL., (June 14, 2010), www.iisd.ca/download/pdf/enb2806e.pdf.

42. The Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, Oct. 16, 2010, available at http://bch.cbd.int/protocol/NKL_text.shtml.

43. See, e.g., Gunther Handl, *Trail Smelter in Contemporary International Environmental Law: It's Relevance in the Nuclear Energy Context*, in TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 130 (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

cation by 40 Parties to the 2003 Cartagena Protocol on Biosafety (“Biosafety Protocol”), which has 160 Parties.⁴⁴

IV. Natural Resources

A. WATER RESOURCES

The General Assembly took a potentially important step on July 28, 2010, adopting a resolution recognizing a human right to water, by a vote of 122-0, but with an interesting group of forty-one states abstaining from voting.⁴⁵ The abstainers include most industrialized countries for which recognition of a human right to water would make little practical difference. There is considerable indirect support in existing international legal instruments for such a right.⁴⁶

Meanwhile, the crisis caused by Chinese dams on the upper Mekong continues unabated and mostly unaddressed.⁴⁷ Another dispute is emerging between India and China over proposed Chinese dams on the upper Brahmaputra River.⁴⁸ India and Pakistan, on the other hand, have agreed to arbitrate their dispute over the Kishanganga dam.⁴⁹ The controversy between Canada and the United States over the Devils Lake outlet also continues.⁵⁰ On April 20, 2010, the International Court of Justice rendered its decision in the litigation between Argentina and Uruguay concerning transboundary river pollution.⁵¹ This ruling is discussed further in Part VI.B below.

B. BIOLOGICAL RESOURCES AND WILDLIFE

The United Nations designated 2010 as the Year of Biodiversity, the year by which the international community would significantly reduce the rate of biodiversity loss according

44. Somalia ratified in October 2010 to become the 160th party. *See Parties to the Protocol, CONVENTION ON BIOLOGICAL DIVERSITY*, <http://bch.cbd.int/protocol/parties/> (last visited Nov. 5, 2010).

45. *The Human Right to Water and Sanitation*, ¶ 1, U.N. Doc. A/64/L.64/Rev.1 (July 26, 2010), available at http://www.unesco.org/water/wwap/news/archives/UNDecWaterHR_EN.pdf.

46. *See* U.N. Econ. & Soc. Council (ECOSOC), Sub-Comm’n on Econ., Soc. & Cultural Rights, *General Comment* No.15, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); *see generally* Edgar Chen & Sarah A. Altschuller, *Corporate Accountability and Human Rights in the Age of Water Scarcity*, 24 NAT. RESOURCES & ENV’T. 3, 9 (2010); Stephen C. McCraffey & Kate J. Neville, *Small Capacity and Big Responsibilities: Financial and Legal Implications of a Human Right to Water for Developing Countries*, 21 GEO. INT’L ENVTL. L. REV. 679 (2009); Vrinda Narain, *Water as Fundamental Right: A Prospective from India*, 34 VT. L. REV. 917 (2010).

47. *Downstream Fears as China Powers Ahead with New Dams*, CANBERRA TIMES (Austl.), Sept. 29, 2010, available at 2010 WLNR 19275283; Nirnal Ghosh, *Delay Building Dams: Official Study Advises Pushing Back Plans by 10 Years, Citing Ecological Damage*, STRAITS TIMES (Sing.), Oct. 20, 2010, available at 2010 WLNR 20923766.

48. Shi Jiangtao, *India Fears Beijing’s Dams Will Harm Brahmaputra*, S. CHINA MORNING POST, Nov. 17, 2010, at 6, 2010 WLNR 22894077.

49. Gargi Pasai, *Kishanganga Arbitration Court to be Headed by Justice Stephen Schwebel*, THE HINDU (INDIA), Oct. 31, 2010, 2010 WLNR 21733525.

50. Kevin Bonham, *U.S.-Canadian Officials Agree to Work Together to Address Devils Lake Outlet, Water Quality*, GRAND FORKS HERALD, Oct. 8, 2010, https://secure.forumcomm.com/?publisher_ID=40&article_id=178604&CFID=296331647&CFTOKEN=42839414.

51. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 135 (Apr. 20, 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>.

to the United Nations' Millennium Development Goals as well as a strategic plan⁵² previously adopted by the Convention on Biological Diversity ("CBD").⁵³ This goal was not, however, achieved.

The 10th Meeting of the Conference of the Parties to the CBD, held in Nagoya, Japan, in October 2010, was notable for adopting the Nagoya Protocol,⁵⁴ which was the second of two protocols adopted under the CBD, the first having concerned biosafety.⁵⁵ The Nagoya Protocol's objective focuses on the fair and equitable sharing of the benefits arising from the utilization of genetic resources.⁵⁶ It provides that access to genetic resources and associated traditional knowledge should be with prior informed consent of the relevant Party and indigenous and local communities but leaves great discretion to national governments as to how the principle will be implemented.⁵⁷ The Protocol also contains provisions to encourage implementation and compliance, including a requirement in Article 13 that parties designate a national focal point and at least one competent national authority.⁵⁸ Also, Article 17 requires that Parties designate checkpoints to collect information from users of genetic resources.⁵⁹ Article 14 establishes an international clearinghouse for information related to the utilization of genetic resources.⁶⁰ While the Protocol has been heralded as a success after years of difficult negotiations, some commentators have expressed disappointment that the Protocol provides relatively little guidance on the execution and implementation of its broad principles, leaving considerable discretion to national governments.⁶¹

Also in Nagoya, the Parties to the Cartagena Protocol on Biosafety adopted a new agreement on liability and redress for damage to biodiversity due to modified living organisms, concluding six years of negotiations.⁶²

The 15th meeting of the Conference of the Parties ("COP15") to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")⁶³ held in March 2010 in Qatar, was most notable for the failure to approve proposed listings of

52. *Global Biodiversity Outlook*, CONVENTION ON BIOLOGICAL DIVERSITY, 3, 9 (2010), <http://www.cbd.int/doc/publications/gbo/gbo3-final-en.pdf>.

53. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993).

54. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biological Diversity, (advanced unedited version) (Nov. 2, 2010), available at <http://www.cbd.int/meetings/icbcd/documents/> [hereinafter Nagoya Protocol].

55. Press Release, Convention on Biological Diversity, A New Era of Living in Harmony with Nature is Born at the Nagoya Biodiversity Summit (Oct. 29, 2010), available at <http://www.cbd.int/doc/press/2010/pr-2010-10-29-cop-10-en.pdf>.

56. See Nagoya Protocol, *supra* note 54, art. 1.

57. See *id.* art. 5 ¶ 1.

58. See *id.* art. 13.

59. See *id.* art. 17 (indicating that "checkpoints" may collect and receive information related to prior informed consent at various stages of the access process).

60. *Id.* art. 14.

61. *CBD Clinches ABS Protocol in Nagoya*, INT'L CTR. FOR TRADE AND SUSTAINABLE DEV., Nov. 8, 2010, <http://ictsd.org/i/news/biores/94075>.

62. Press Release, Convention on Biological Diversity, The Nagoya-Kuala Lumpur Protocol on Liability and Redress for Damage Resulting from Living Modified Organisms Born in Nagoya (Oct. 2010), available at <http://www.cbd.int/doc/press/2010/pr-2010-10-12-nklp-en.pdf>.

63. Convention on International Trade in Endangered Species of Flora and Fauna (CITES), Mar. 3, 1973, 27 U.N.T.S. 243 (entered into force July 1, 1975).

threatened marine species, including pink and red corals (*Coralliidae*), a number of shark species, the polar bear (*Ursus maritimus*), and Atlantic bluefin tuna (*Thunnus thynnus*).⁶⁴

The most contentious issue was the proposal by Monaco to list the Atlantic bluefin tuna on Appendix I of CITES, which would prohibit commercial trade in this highly valuable fish, prized for sushi and sashimi around the world.⁶⁵ Despite clear evidence that population levels had fallen to critically endangered levels due to overfishing,⁶⁶ Monaco, supported by the United States, could not rally a two-thirds vote of the 175 CITES Parties.⁶⁷ Japan led the fight against the listing, arguing that CITES is not the appropriate forum for marine species conservation efforts. Japan further urged that the issue be handled by the ICCAT.⁶⁸ For discussion of ICCAT's later handling of the issue at its November 2010 meeting, see *supra* Part II.B.

The CITES Parties also considered proposals to list eight shark species in Appendix II, which would require the issuance of export permits or "introduction from the sea" certificates prior to trade in the species.⁶⁹ Spearheaded by the United States, the European Union, and Palau, the shark listings were strongly opposed by China and Japan.⁷⁰ Proposals to list the dusky shark (*Carcharhinus obscurus*) and the sandbar shark (*Carcharhinus plumbeus*) were withdrawn before a vote. Proposals to list the spiny dogfish shark; the scalloped hammerhead shark (*Sphyrna lewini*) and two look-alike species, the great hammerhead (*Sphyrna mokarran*) and the smooth hammerhead (*Sphyrna zygaena*); the oceanic whitetip shark (*Carcharhinus longimanus*); and the porbeagle shark (*Lamna nasus*) were rejected.⁷¹

With the rejection also of proposals to list red and pink coral and the polar bear in Appendix II, it is clear that the Parties have significant differences to overcome before

64. CITES Governments Depart Doha Leaving Marine Species Unprotected, ENV'T NEWS SERVICE, Mar. 25, 2010, <http://www.ens-newswire.com/ens/mar2010/2010-03-25-01.html>.

65. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Doha, Qatar, Mar. 13-25, 2010, *Proposal to Include Atlantic Bluefin Tuna (Thunnus thynnus (Linnaeus, 1758)) on Appendix I of CITES in Accordance With Article II of the Convention*, CoP15 Prop. 19, available at <http://www.cites.org/eng/cop/15/prop/E-15-Prop-19.pdf>.

66. *Id.* ¶ 8.

67. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Doha, Qatar, Mar. 13-25, 2010, *Summary Record of the Eight Session of Committee I*, CoP15 Com. I Rec. 8 (Rev. 1), available at <http://www.cites.org/eng/cop/15/sum/E15-Com-I-Rec08.pdf>.

68. *Id.* at 2.

69. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Doha, Qatar, Mar. 13-25, 2010, *Consideration of Proposals for Amendment of Appendices I and II*, CoP15 Prop. 15, available at <http://www.cites.org/eng/cop/15/prop/E-15-Prop-15.pdf>; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Doha, Qatar, Mar. 13-25, 2010, *Consideration of Proposals for Amendment of Appendices I and II*, CoP15 Prop. 16, available at <http://www.cites.org/eng/cop/15/prop/E-15-Prop-16.pdf>; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Doha, Qatar, Mar. 13-25, 2010, *Consideration of Proposals for Amendment of Appendices I and II*, CoP15 Prop. 17, available at <http://www.cites.org/eng/cop/15/prop/E-15-Prop-17.pdf>; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Doha, Qatar, Mar. 13-25, 2010, *Consideration of Proposals for Amendment of Appendices I and II*, CoP15 Prop. 18, available at <http://www.cites.org/eng/cop/15/prop/E-15-Prop-18.pdf>.

70. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Doha, Qatar, Mar. 13-25, 2010, *Summary Record of the Thirteenth Session of Committee I*, CoP15 Com. I Rec. 13 (Rev. 2), 2, available at <http://www.cites.org/eng/cop/15/sum/E15-Com-I-Rec13.pdf>.

71. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Doha, Qatar, Mar. 13-25, 2010, *Summary Record of the Sixth Session of Committee I*, CoP15 Plen. 6 (Rev. 1), 2-3, available at <http://www.cites.org/eng/cop/15/sum/E-15-Plen-06.pdf>.

CITES can play a meaningful role in the conservation and management of many commercially-valuable marine species.

At the 62nd meeting of the International Whaling Commission (“IWC”), the eighty-eight Parties to the International Convention on the Regulation of Whaling (“ICRW”) once again hit an impasse. The compromise brokered by the Chair of the IWC would have lifted the commercial whaling moratorium, allowing Japan to take 120 minke whales (*Balaenoptera acutorostrata*) in its coastal waters, and 400 minke whales in the Southern Ocean for the next five years with a reduction for the following five years to 200.⁷² While the proposal would reduce the number of whales hunted annually, Australia, the Latin American countries, and a number of environmental groups strongly opposed the proposed compromise, and after several days of discussion, it was clear that the IWC would not be in a position to achieve consensus on the document.⁷³ Prior to the meeting, Australia instituted proceedings against Japan in the International Court of Justice for alleged breaches of the ICRW in the Southern Ocean Sanctuary recognized by the IWC.

V. The International Economy and the Environment

A. TRADE AND ENVIRONMENT

With the WTO negotiations on environmental issues largely stalled along with the rest of the Doha Development Agenda, most activity on trade and environment took place at the national or regional levels or in dispute settlement.

In July 2010, the European Parliament overwhelmingly approved legislation prohibiting the sale of timber logged illegally under the rules of the country of origin.⁷⁴ The legislation also would require companies to use a system of due diligence to ascertain that the timber they sell in the European Union was harvested legally.⁷⁵ In October 2010, legislation (“Illegal Timber Law”) was formally adopted by the European Council, with a 27-month preparatory period before the law becomes effective at the beginning of 2013.⁷⁶ The legislation places a “traceability obligation” on “traders throughout the supply chain” to identify “the operators or the traders who have supplied the timber and timber products; and where applicable, the traders to whom they have supplied timber and timber products.”⁷⁷ Meanwhile, the United States completed the phase-in of enforcement product coverage and established definitions under the 2008 Amendments of the Lacey Act,⁷⁸

72. *Proposed Consensus Decision to Improve the Conservation of Whales From the Chair and Vice-Chair of the Commission*, INT’L WHALING COMM’N, (Apr. 4, 2010), http://iwcoffice.org/_documents/commission/IWC62docs/62-7rev.pdf.

73. *Chair’s Summary Report of the 62nd Annual Meeting, Agadir, Morocco, June 2010*, INT’L WHALING COMM’N, 1 (June 2010), http://iwcoffice.org/_documents/commission/TWC62docs/IWC62_Chair's_Summary_Report%20FINAL.pdf.

74. James Murray, *European Parliament Approves Illegal Timber Ban*, BUS. GREEN, July 7, 2010, <http://www.businessgreen.com/bg/news/1801862/european-parliament-approves-illegal-timber-ban>.

75. *Id.*

76. *See European Council Votes to Implement Illegal Timber Law*, ILLEGAL-LOGGING.INFO, Oct. 20, 2010, http://www.illegal-logging.info/item_single.php?it_id=4882&it=news.

77. *Id.*

78. 16 U.S.C. §§ 3371-78 (2011).

which prohibit the import of timber and wood products obtained in violation of foreign conservation and natural resource laws.⁷⁹

Dispute settlement proceedings at the WTO continued concerning Mexico's complaint about United States' "dolphin safe" labeling requirements regarding the importation, marketing, and sale of tuna and tuna products. A final panel report is expected by February 2011.⁸⁰ In the meantime, the United States insists that the North American Free Trade Agreement ("NAFTA") is the sole forum for this dispute, and in September 2010, formally requested that the NAFTA Free Trade Commission establish a dispute settlement panel regarding Mexico's refusal to transfer its "dolphin safe" labeling dispute from the World Trade Organization ("WTO") to the NAFTA, as requested by the United States pursuant to Article 2005 of the NAFTA.⁸¹

Consultations continued at the WTO⁸² concerning Canada's objection that the European Union's prohibition on imports of seal products, motivated by concern that seal hunting is inhumane, violates WTO obligations.⁸³ Meanwhile, the General Court of the Court of Justice of the European Union on August 19, 2010, ordered the suspension of the EU import ban on seal products that was set to begin the next day.⁸⁴ But, the Court lifted this interim relief on October 25, 2010, finding inadequate evidence that the ban would damage seal hunting communities.⁸⁵

B. FINANCE AND THE ENVIRONMENT

Climate change continues to dominate environmental discussions at the major international financial institutions ("IFIs"). The United Nations Framework Convention on Climate Change's ("UNFCCC") Fifteenth Conference of the Parties ("COP-15") concluded with the COP taking notice of the Copenhagen Accord, which calls for "scaled up, new and additional, predictable and adequate funding" to help developing countries take meaningful mitigation actions and to adapt to changes. This includes a call for both fast-

79. Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 45,415 (Sept. 2, 2009) (outlining plan for continuing phase-in of enforcement for various categories of wood and wood products, with some products still to be phased in as of Aug. 31, 2010); Lacey Act Implementation Plan, 75 Fed. Reg. 46,859 (Aug. 4, 2010) (to be codified at 7 C.F.R. pt. 357).

80. *United States—Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm (last visited Sept. 21, 2010).

81. Press Release, Office of the U.S. Trade Representative, United States Requests Dispute Settlement Panel in Tuna Dolphin NAFTA Choice of Forum Dispute (Sept. 2010), available at <http://www.ustr.gov/about-us/press-releases/2010/september/united-states-requests-dispute-settlement-panel>.

82. *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm (last visited Nov. 8, 2011).

83. Council Regulation 1007/2009, 2009 O.J. (L 286) 36 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:286:0036:01:EN:HTML>; Commission Regulation 737/2010, 2010 O.J. (L 216) 1 (EU), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:216:0001:01:EN:HTML>.

84. See Mike de Souza, *Canada Seeks Special WTO Panel on EU Seal Ban*, CANADA.COM, Aug. 19, 2010, <http://www.canada.com/business/Canada+seeks+special+panel+seal/3418322/story.html>.

85. Case T-18/10 RII, *Inuit Tapiriit Kanatami v. Parliament*, (2010), http://curia.europa.eu/jurisp/cgi-bin/gettext.pl?&lang=fr&num=79898974T1910%20RII0018_2&doc=T&ouvert=Tseance=ORD.

start financing “approaching \$30 billion” for the period 2010 to 2012, and for long-term financing equal to \$100 billion a year by 2020.⁸⁶

The World Bank Group⁸⁷ administers the Clean Technology Fund (“CTF”) and the Strategic Climate Fund as part of its Climate Investment Fund (“CIF”).⁸⁸ As of March 2010, the value of pledges to the CIFs was \$6.1 billion.⁸⁹ The CTF promotes financing for low carbon technologies aimed at long-term reductions in greenhouse gas emissions.⁹⁰ As of January 2009, \$4.3 billion had been pledged to the CTF.⁹¹ As of October 2010, the CTF has endorsed thirteen country investment plans.

The Strategic Climate Fund consists of the Pilot Program on Climate Resilience (“PPCR”), the Forest Investment Program (“FIP”), and the Scaling Up for Renewable Energy Program (“SREP”). The PPCR’s goal is to help countries adapt to climate risk and become more resilient.⁹² As of November 2010, the PPCR had accepted the Strategic Programs for Climate Resilience for Bangladesh, Niger, and Tajikistan, from the nine countries and two regions invited to apply.⁹³

The Forest Investment Program (“FIP”) was made operational in July 2009 to support developing countries’ efforts to implement forest projects aimed at reducing GHG emissions from deforestation or degradation (“REDD”).⁹⁴ As of October 2010, the FIP had received \$558 million in pledges and \$102 million had been deposited.⁹⁵ As of July 2010, no funds had been disbursed, but the FIP sub-committee had chosen Brazil, Burkina Faso, Democratic Republic of Congo, Ghana, Indonesia, Mexico, Laos, and Peru as pilot countries.⁹⁶ SREP, which is designed to show the viability of low carbon development in low-income countries, was operationalized in December 2009 with initial pledges exceeding \$250 million.⁹⁷

86. See *supra* Part I.A.

87. 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 (ICSID). *About Us*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (last updated Oct. 4, 2010).

88. See CLIMATE INV. FUNDS, <http://www.climateinvestmentfunds.org/cif> (last visited Feb. 3, 2011).

89. *Funding*, CLIMATE INV. FUNDS, <http://www.climateinvestmentfunds.org/cif/funding-basics> (last visited Feb. 3, 2011).

90. *Clean Technology Fund*, CLIMATE INV. FUNDS, <http://www.climateinvestmentfunds.org/cif/node/2> (last visited Feb. 3, 2011).

91. *Financial Status as of January 26, 2009*, CLIMATE INV. FUNDS, (2009), http://www.climateinvestmentfunds.org/cif/sites/climateinvestmentfunds.org/files/CIF_Financial_Status_Jan_26_2009.pdf.

92. See *Pilot Program for Climate Resilience*, CLIMATE INV. FUNDS, <http://www.climateinvestmentfunds.org/cif/ppcr> (last visited Feb. 3, 2011).

93. *PPCR Pilot Programs*, CLIMATE INV. FUNDS, http://www.climateinvestmentfunds.org/cif/Pilot_Programs (last visited Feb. 3, 2011).

94. *Forest Investment Program*, CLIMATE INV. FUNDS, <http://www.climateinvestmentfunds.org/cif/node/5> (last visited Feb. 3, 2011) [hereinafter CLIMATE INV. FUNDS].

95. *Forest Investment Program*, CLIMATE FUNDS UPDATE, <http://www.climatefundsupdate.org/listing/forest-investment-program> (last visited Feb. 3, 2011).

96. CLIMATE INV. FUNDS, *supra* note 94.

97. See *Scaling Up for Renewable Energy Program in Low Income Countries*, CLIMATE INV. FUNDS, <http://www.climateinvestmentfunds.org/cif/srep> (last visited Feb. 3, 2011).

The World Bank Group's Forest Carbon Partnership Facility ("FCPF")⁹⁸ also expanded over the past year. The goal of the FCPF is to demonstrate the feasibility of proposals under the UNFCCC to receive climate-related financing for "reduced emissions from deforestation and forest degradation" ("REDD"). As part of the FCPF's "readiness" mechanism, the World Bank is providing technical assistance to thirty-seven developing countries in establishing forest-related baselines and priorities for future carbon financing in the forestry sector. The FCPF is also planning to compensate a limited number of these countries for reducing emissions from deforestation below the business-as-usual baseline, if the countries have a credible method for measuring and monitoring the climate-related benefits. In this way, the Bank hopes to learn lessons that will allow it to develop a larger global program of incentives for REDD over the next five to ten years. At the end of fiscal year 2010, the FCPF's readiness fund had received \$86.2 million of the \$123.5 million pledged.⁹⁹

Beginning in January 2010, the U.S. Overseas Private Investment Corporation ("OPIC") conducted consultation on its *Environmental and Social Policy Statement*.¹⁰⁰ OPIC released its new policy in August 2010.¹⁰¹ With this policy, OPIC became the first export credit or insurance agency to commit to quantitative reductions in the GHG emissions, agreeing to curb direct carbon emissions from its active portfolio thirty percent by 2018 and fifty percent by 2023.

VI. Selected Litigation

A. DOMESTIC LITIGATION

Litigation in multiple fora relating to pollution associated with Chevron's operations in Ecuador generated a significant decision this year. The litigation involves claims by indigenous groups that Chevron's activities in Ecuador have caused severe environmental harm. A suit in United States court under the Alien Tort Statute was previously dismissed on *forum non conveniens* grounds. The indigenous groups accordingly brought suit in Ecuadorian courts, seeking damages exceeding \$100 billion. Chevron responded by filing an arbitral claim pursuant to the bilateral investment treaty between the Ecuador and the United States, alleging that the manner in which Ecuador's courts have handled the case is a breach of Chevron's rights. In March 2010, a federal district court denied Ecuador's request to stay the arbitration, finding that Chevron's claims were arbitrable.¹⁰²

The United States District Court for the District of Columbia issued a significant opinion relating to the extraterritorial application of the National Environmental Policy Act

98. See FOREST CARBON PARTNERSHIP FACILITY, <http://www.forestcarbonpartnership.org/fcp> (last visited Feb. 3, 2011).

99. *FY2010 Annual Report: Forest Carbon Partnership Facility*, WORLD BANK (2010), <http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Nov2010/2010FCPF-annual%2007.pdf>.

100. Elizabeth Littlefield, *Letter from the President*, OPIC, http://www.opic.gov/doing-business/investment/environment/policy_revision (last visited Feb. 3, 2011).

101. *Environmental and Social Policy Statement*, OPIC, http://www.opic.gov/sites/default/files/docs/final_environmental_social_policy_statement.pdf (last visited Feb. 3, 2011).

102. *Ecuador v. Chevron Corp.*, No. 09Civ.9958 & 10Civ.316, at 2 (S.D.N.Y. Mar. 16, 2010).

("NEPA") in *Manitoba v. Salazar*.¹⁰³ The Canadian province of Manitoba sued to challenge a proposed water transfer pipeline being planned by the United States Department of the Interior and the State of North Dakota. Manitoba asserted that the pipeline, which linked the Missouri River Basin and the Hudson Bay Basin, risked transferring biota between the two watersheds and that the environmental impacts of the project had not been sufficiently analyzed. In reviewing the potential impacts of the project, the Bureau of Reclamation had concluded that it was not required to include extraterritorial effects under NEPA. The district court disagreed, ruling that agencies must analyze reasonably foreseeable transboundary impacts from a project occurring within the United States.

B. INTERNATIONAL DISPUTES

In August 2010, an arbitral tribunal convened under NAFTA's Chapter 11 issued a significant decision limiting the definition of expropriation. *Chemtura v. Canada*¹⁰⁴ involved a ban imposed on the pesticide lindane by the Canadian government. Lindane has been banned by many countries in light of its toxic effects, and Canada imposed a similar ban in 2001. One alleged reason for the ban was that Canadian canola producers were concerned that canola treated with lindane might not be marketable in the United States, in light of that country's lindane ban. Chemtura, a firm that produced lindane in Canada, filed a NAFTA claim, asserting violations of the minimum standard of treatment, most-favored nation, and expropriation provisions of the treaty.

The tribunal rejected all of these claims. The tribunal found that Canada's regulatory actions were not arbitrary and did not violate the minimum standard of treatment under the investment provisions of Chapter 11 of NAFTA. The tribunal specifically noted that "in assessing whether the treatment afforded to the Claimant's investment was in accordance with the international minimum standard, the Tribunal must take into account all the circumstances, including the fact that certain agencies manage highly specialized domains involving scientific and policy determinations."¹⁰⁵ In reviewing the circumstances of Canada's decision, the tribunal also placed weight on the fact that a review of lindane uses was contemplated by the Aarhus Protocol to the LRTAP Convention—in other words, that Canada was complying with its obligations under international law.

As to Chemtura's expropriation claim, the tribunal found that lindane sales were a "relatively small" part of Chemtura's overall business, so that there had not been a "substantial deprivation" of the investment.¹⁰⁶ In the alternative, the tribunal found that non-discriminatory measures taken to protect human health and the environment are "a valid exercise of the Respondent's police powers" and hence cannot constitute an expropriation.¹⁰⁷

The International Court of Justice ("ICJ") ruled this year in a claim by Argentina that Uruguay violated a 1975 treaty between the two nations on governance of the Uruguay

103. *Manitoba v. Salazar*, 691 F. Supp. 2d 37, 39 (D.D.C. 2010).

104. *Chemtura v. Canada*, Ad Hoc NAFTA Arbitration under UNCITRAL Rules, available at http://www.pca-cpa.org/showfile.asp?fil_id=1459.

105. *Id.* ¶ 123.

106. *Id.* ¶ 253.

107. *Id.* ¶ 254. The tribunal also disposed of Chemtura's most-favored-nation claim, citing its detailed analysis of Canada's regulatory process and Chemtura's failure to point to evidence of discriminatory treatment.

River as a result of Uruguayan pulp mills polluting the boundary river.¹⁰⁸ In April 2010, the ICJ issued its decision, finding that Uruguay had violated procedural obligations under the treaty relating to notice and cooperation,¹⁰⁹ but that there was no showing of harm to the river that would amount to a violation of substantive provisions of the treaty.¹¹⁰ The ICJ found that the treaty obligation to protect the aquatic environment entailed an obligation to conduct environmental assessments. The ICJ also observed that general international law requires undertaking of a prior “environmental impact assessment where there is a risk that a proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource,” but does not specify the assessment’s scope or content.¹¹¹

108. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. 135 (Mar. 26, 2010).

109. *Id.* ¶ 158.

110. *Id.* ¶ 265.

111. *Id.* ¶¶ 204-05.