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Environmental Law

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Significant developments relating to the environment took place in numerous international venues in 2001. While by no means comprehensive, this chapter briefly reports on some of the most significant of these developments. Noteworthy activity occurred not only in fora dedicated primarily to environmental matters but also in some focused principally on other areas of international policy.

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Among the most significant developments of the year, the United States rejected the Kyoto Protocol process under the Framework Convention on Climate Change, as remaining governments made important progress to address hurdles to the Protocol's entry into force. Meanwhile, the Members of the World Trade Organization initiated a new round of negotiations, agreeing to address several environmentally related issues and to review the environmental impacts of the negotiations themselves.

As reported in this chapter, a variety of additional developments occurred with respect to biosafety, chemicals management, protection of the ozone layer, desertification, endangered species, fisheries and marine resources, trade and the environment, investment and the environment, and regional issues in North America.

In addition, though not reported upon in this chapter, governments and stakeholders began preparations in greater earnest for the World Summit on Sustainable Development (WSSD or Rio + 10), scheduled to take place from August 26 to September 4, 2002 in Johannesburg, South Africa. This Summit of heads of state will mark the ten-year anniversary of the 1992 United Nations Conference on Environment and Development (UNCED) (often referred to as the "Earth Summit" or "Rio Summit") held in Rio de Janeiro, Brazil.

The WSSD is expected to address a wide range of issues concerning environmental conservation and social and economic development. The outcome of the Summit may largely set the tenor for international environmental law and policy in the coming decade.¹ As of this writing, the agenda and likely outcome of the Summit remain matters of some conjecture. A full report on the WSSD will be provided in our chapter for 2002.

I. The Atmosphere

A. KYOTO PROTOCOL

The Kyoto Protocol,² adopted in 1997 by the Third Conference of the Parties (COP-3) to the United Nations Framework Convention on Climate Change (UNFCCC),³ will establish upon its entry into force legally binding multi-year caps on emissions of six greenhouse gases for the years 2008–2012 for certain developed country Parties.⁴ The Protocol

1. The 1992 Rio Summit was historic in its scope, bringing together 172 governments, 2400 NGOs, and thousands of individual participants. That Summit gave rise to the Commission on Sustainable Development (CSD) as well as a number of groundbreaking international environmental instruments including: the Rio Declaration on Environment and Development; Agenda 21 (the agenda for sustainable development into the 21st century); the United Nations Framework Convention on Climate Change (UNFCCC); the Convention on Biological Diversity (CBD); the United Nations Convention to Combat Desertification (CCD); and the Statement of Forest Principles.

Agenda 21 is a plan of action for implementing sustainable development. It addresses numerous objectives and identifies specific steps for governments, international organizations, and non-state actors to take in furtherance of sustainable development. Using Agenda 21, in particular, as the benchmark, the WSSD will try to gauge how far the world has come in the ten years since Rio, and to identify obstacles that hindered progress. In addition to this assessment of progress since 1992, the Summit is to develop recommendations for future action.

2. United Nations, *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Conference of the Parties, 3rd Sess., addendum pt. 2, Annex to Decision 1/CP.3 at 7, U.N. Doc. FCCC/CP/1997/7/Add. 1 (1998), available at <http://unfccc.int/resource/doc/convkp/kpeng.html> [hereinafter Kyoto Protocol].

3. United Nations, *United Nations Framework Convention on Climate Change*, 31 I.L.M. 849 (1994), available at <http://www.unfccc.int/resource/conv/conv.html> [hereinafter UNFCCC].

4. See Kyoto Protocol, *supra* note 2, art. 3.

provides for other, developing country, Parties to limit emissions among other responsibilities. The gases covered by the Kyoto Protocol are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), sulfur hexafluoride (SF₆), perfluorocarbons (PFCs), and hydrofluorocarbons (HFCs).⁵ The Protocol allocates to each of these nations a legally binding target allowable amount of greenhouse gas emissions ("assigned amount units" or "AAUs"), which, on average, constitute a 5 percent reduction from 1990 emissions, and which are measured in common units according to the global warming potential (GWP) of each of the gases.⁶ The Protocol effectively issues emissions allowances to each of these nations and requires each nation to limit emissions to allowable levels. Allowances are tradable: Nations that reduce emissions below allowable levels can transfer them to nations that need more.

The Protocol's "flexibility mechanisms" allow any Party with emissions caps to transfer a portion of its AAUs to any other such nation, using three different routes: emissions trading; reallocation of assigned amount units among a group of nations that ratify the Protocol together; and "joint implementation" (JI) projects that reduce emissions in one nation below what would have occurred in the absence of the project.⁷ The Protocol also establishes a Clean Development Mechanism through which Parties with caps on emissions may obtain certified emissions reductions (CERs) arising from projects in Parties without emissions caps, provided those projects satisfy a rigorous set of requirements demonstrating that they have successfully reduced emissions below what would have occurred in the absence of the projects.⁸ To ensure the integrity of emissions reductions the Protocol requires each Party with caps on emissions to measure, monitor, and report its total emissions of all the greenhouse gases as well as uptake of carbon dioxide by forest and agriculture (so-called carbon "sinks"); those reports are to be reviewed by independent experts.⁹

1. *Developments in 2001*

In November 2001, representatives of 180 nations meeting in Marrakech, Morocco reached a landmark agreement on rules to implement the Kyoto Protocol on Climate Change. The Marrakech Accords pave the way for nations to ratify the Protocol and bring it into force.

a. *Events Leading to the Marrakech Accords*

Several Articles of the Kyoto Protocol require the adoption of rules for their implementation.¹⁰ Accordingly, following the Protocol's 1997 adoption, the Conference of the Parties (COP) to the UNFCCC set for itself the task of agreeing on such rules.¹¹ Difficult and protracted negotiations at the Fourth, Fifth, and Sixth COP meetings from 1998–2000

5. *Id.* art. 3 & Annex A.

6. *Id.* art. 3.

7. *Id.* arts. 4, 6 & 17. While the terms "flexibility mechanisms" and "joint implementation" do not appear in the text of the Protocol itself, they have become part of the technical parlance.

8. *Id.* art. 12.

9. *Id.* arts. 5, 7 & 8. For an additional summary of the Accords, see Donald Goldberg and Katherine Silverthorne, *The Marrakech Accords*, Climate Change and Sustainable Development Committee Newsletter (ABA Section of Environment, Energy and Resources), Jan. 2002, available at <http://www.abanet.org/enviro/committees/climatechange/newsletter/jan02/goldberg.html>.

10. See, e.g., Kyoto Protocol, *supra* note 2, arts. 6, 12 & 17.

11. See, e.g., United Nations, *Buenos Aires Plan of Action*, U.N. Doc. FCCC/CP/1998/16 (1998), available at <http://copy.unfccc.int> (a set of decisions taken at the Fourth Conference of the Parties, establishing a work plan for the development of rules to implement the Kyoto Protocol).

failed to produce agreement on the package of rules, and COP-6 collapsed when the European Union walked away from the negotiating table in a dispute over crediting for forest carbon sinks.¹² In early 2001, however, a chain of events began that ultimately led to the adoption of the rules in Marrakech.

First, in January 2001, the Intergovernmental Panel on Climate Change (IPCC), convened under the joint auspices of the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO), published its Third Assessment Report, which provided a stern warning to the nations of the world.¹³ The IPCC warned that global climate change had already begun to occur; that warming of more than 1–2° C would be dangerous for many human societies and fragile ecosystems; and that if action did not begin in the current decade to limit and reduce greenhouse gas emissions, it might not be possible to prevent this dangerous interference in the climate system.¹⁴

Second, shortly following the IPCC's Report, newly inaugurated United States President George W. Bush announced a dramatic change in policy position. The United States rejected the Kyoto Protocol and the entire concept of caps on carbon dioxide emissions, although the latter had been a campaign pledge of then-candidate Bush prior to the November 2000 elections.¹⁵ This dramatic policy shift by the United States was greeted with opprobrium around the world.

These events seemed to galvanize nations to reach agreement on rules to enable entry into force of the Protocol. They reached agreement on key outstanding issues, in broad outline, in Bonn at a follow-on meeting (COP-6bis) in July 2001, subsequently agreeing on a detailed package of rules at Marrakech.¹⁶

b. The Bonn Agreement and the Marrakech Accords

To bring the Protocol into force requires ratification by fifty-five nations representing 55 percent of the 1990 CO₂ emissions of the thirty-eight nations listed in Annex I of the 1992 U.N. Climate Treaty.¹⁷ Key unresolved issues going into Bonn included: measurement

12. See, e.g., Odile Blanchard et al., *After The Hague, Bonn and Marrakech: the Future International Market for Emissions Permits and the Issue of Hot Air*, Institute of Energy Policy and Economics, Jan. 2002, available at <http://www.upmf-grenoble.fr/iepe/textes/cashier27Angl.pdf>.

13. Intergovernmental Panel on Climate Change (IPCC), *Third Assessment Report: Climate Change 2001*, available at <http://www.ipcc.ch> (last visited July 9, 2002).

14. See IPCC Working Group II, *Third Assessment Report, Technical Summary, Climate Change: Impacts, Adaptation, and Vulnerability*, at Fig. TS-12 (Feb. 2001).

15. See Letter from President George W. Bush to Senators Chuck Hagel et al. (Mar. 13, 2001) (on file with the author); see also John J. Fialka & Jeanne Cummings, *Politics & Policy: How the President Changed His Mind on Carbon Dioxide*, WALL ST. J., Mar. 15, 2001, at A20. Following his change in policy, President Bush asked the National Academy of Sciences to conduct a thorough review of climate science, including the IPCC's conclusions. In June 2001, the National Academy issued its report. See Committee on the Science of Climate Change, Division of Life and Earth Studies, National Research Council, *Climate Change Science: An Analysis of Some Key Questions* (June 2001) [hereinafter NAS Report]. The NAS Report found that "temperatures are in fact rising. The changes observed over the last several decades are likely mostly due to human activities." The NAS Report called the IPCC's findings "robust" and its work "admirable." See *id.* Immediately after the publication of this report, President Bush issued a policy statement declaring that the scientific uncertainty was too great to justify the Kyoto Protocol's targets. See President George W. Bush, Transcript of Remarks By The President On Global Climate Change (June 11, 2001), available at <http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html>.

16. For the full text of the Bonn Agreement, see <http://www.unfccc.int>.

17. Kyoto Protocol, *supra* note 2, art. 25.

of emissions, transparency of reporting, and compliance, the pillars of accountability; emissions trading and restrictions upon its operation; accounting for carbon emitted from and sequestered by forests and agriculture; financial assistance to developing nations; and rules for participation of new countries.

c. Measurement, Reporting, Transparency, and Compliance: The Pillars of Accountability

Recognizing that market infrastructure plays an important role in determining cost, nations were under pressure at Bonn and Marrakech to adopt transparent systems for measuring and reporting emissions, recording emissions trades, and holding nations accountable for meeting their emissions budgets. Moreover, prior to the Bonn meeting, some had advocated a system that would allow nations, if the price of traded emissions reductions topped a pre-specified level, to break their emissions caps and "buy" their way out of non-compliance by paying fines, fees, or taxes to pollute. Others had urged nations to resist this temptation, arguing that such a system would discourage investment in emissions reductions by allowing nations and firms simply to pay and go on emitting.

At Bonn and Marrakech, nations adopted rules requiring the establishment of transparent national registries providing full information on each nation's emissions, allowances, and transactions. The Accords establish a global double-entry bookkeeping system within which all emissions and transactions must be recorded. With the exception of emissions allowances re-allocated among multiple Parties under Article 4 of the Protocol, as the Members of the European Union have announced they will do, each emissions unit in trade will be labeled with a unique serial number indicating the Party of origin, type (AAU, CER), and in the case of emissions reductions achieved through joint projects, labeled with a project identifier. Each Party must use best practice standards established by the IPCC for recording its emissions. The Accords provide that independent expert review teams will review each Party's emissions inventory. The Accords establish a time-limited process for adjusting a Party's emissions inventory where lack of information indicates that emissions may have been under-estimated, and they provide that failure to deliver adequate information and maintain transparency in reporting can affect a Party's eligibility to undertake emissions trading.

With regard to compliance the Kyoto Protocol provides, "Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol."¹⁸ In Bonn in July 2001, negotiators agreed to establish a Compliance Committee, with Facilitation and Enforcement Branches. In Marrakech, they finalized a detailed appendix of compliance rules. Importantly, negotiators in Bonn agreed that any country that exceeded its assigned amount would be required to "pay back" the excess emissions to the atmosphere with a penalty. The penalty was set at 1.3 tons of emission reductions for every 1 ton of excess emissions. A Party in non-compliance also will have its eligibility to participate in the emissions market suspended. At Marrakech, the COP agreed upon these procedures and mechanisms on compliance and recommended that the first Meeting of the Parties (MOP) to the Kyoto Protocol adopt those rules, as it must for them to enter into force.

18. *Id.* art. 18.

d. Emissions Trading and Restrictions Upon its Use

In the run-up to Bonn and Marrakech, some advocated restrictions on the amount of emissions trading and banking, limits on the exchangeability of allowances earned from different activities and in different nations, and caps on the extent to which nations and firms could earn emissions credit for protecting and planting forests that take up carbon dioxide, the principal greenhouse gas. Those seeking restrictions on trading had argued that countries have moral responsibilities to undertake most of their emissions reductions at home, and that any overcompliance ought to be tendered, at the end of the commitment period, for the immediate benefit of the atmosphere. Others pointed out that such restrictions could drive up the costs of compliance while reducing the ambit for investment in cleaner development in developing nations, and that experience in emissions trading markets indicates that the availability of banking provides a powerful compliance incentive, since the prospect of saving allowances for the future gives emitters incentives to invest in compliance and over-compliance. For the most part, the Marrakech Accords rejected artificial constraints on trading.¹⁹

e. Carbon emitted from and sequestered in farms and forests

At COP-6 in The Hague in 2000, controversies over limitations on sequestered carbon proved the most contentious. Some had urged full carbon accounting; however, while future negotiations may reach agreement on that subject, the structure of the Kyoto Protocol made it all but impossible to achieve for the 2008–2012 period. Some sought rules that would not place limits on forest and agricultural sequestering. Others argued that the real problem of climate change is fossil fuel consumption, and that allowing crediting for so-called “sinks” activities would undermine incentives for shifting to less carbon-intensive fuels. Still others pointed out that forest and agriculture crediting could serve as an important “bridge” to a less fossil-intensive global economy while providing incentives to conserve the world’s few remaining tropical forests.

The Accords reached at Marrakech place no limit on the abilities of farmers and ranchers in industrialized and developing countries to earn emissions credits by improving agricultural practices. But they do place quantitative restrictions on the amount of credits countries can achieve through improved management of existing forests, which could inhibit efforts to change existing forest management practices to improve carbon sequestration. In nations without caps on emissions, the rules allow limited crediting for projects that plant trees, but they bar credit for projects that save forests, and they do not require reporting of emissions from forest destruction. Consequently, care will need to be taken in the development of further rules to ensure that the Marrakech Accords do not simply encourage unrecorded destruction of high biodiversity forests and for-credit planting of large monocrop plantations in nations without caps on emissions.²⁰

19. At Marrakech, the Parties did place numeric 2.5% limits on the bankability of emissions reduction units derived from joint projects in countries with caps on emissions, as well as emissions reductions derived from the Clean Development Mechanism. These types of units are known, in Protocol parlance, as ERUs and CERs, respectively. However, since these units remain fully fungible with assigned amount units (AAUs), whose bankability was not limited, the effect of the banking restrictions is simply that Parties will use project tons for compliance immediately, during the first commitment period, in order to retain some value for them, and will bank AAUs that they would have otherwise used for compliance purposes. So the effect of the restrictions will simply be a slight increase in transactions costs.

20. The Marrakech Accords create a new emissions unit, an RMU (removal unit) that pertains to all emis-

f. Financial Assistance

At Bonn, the Parties agreed to launch major programs to provide financial assistance to nations to quantify emissions and to help adapt to the impacts of climate change. Several nations that are highly economically dependent on fossil fuel exports sought mandatory payments to compensate them for the loss of oil revenues that might result as nations undertake activities to reduce greenhouse gas emissions. At Bonn and Marrakech their proposal for mandatory payments was rejected.

g. Participation of new countries

Issues pertaining to the participation of new nations in the cap-and-trade framework of the Kyoto Protocol had proven contentious at each COP. Some industrialized nations, concerned about the competitive distortions that might arise if their industries were subject to emissions caps and their competitors in uncapped nations were not, sought to create mechanisms for bringing new nations into the framework. Many nations without caps on emissions strenuously opposed such mechanisms. Other nations, particularly economies in transition that had not adopted emissions caps, were interested in seeing whether participation in such systems might provide greater inward investment opportunities than the project-by-project approach otherwise available to nations without caps. The Marrakech Accords do not specify any rules for participation of new nations.

In the run-up to the Bonn meeting, several nations sought agreement on a commitment that nations would complete the negotiation of the next emissions commitment period target, including agreement on which nations would adopt such targets, prior to 2008. This recommendation was not adopted at Bonn and did not resurface at Marrakech.

2. Looking to 2002

Meetings are slated to occur throughout 2002–2003 on rules for crediting forest and agriculture carbon sequestration and the future development of full carbon accounting systems. The CDM Executive Board will also continue to meet regarding operation of the Clean Development Mechanism.

The interface between national emissions trading systems and the Kyoto Protocol system, and the extent to which non-Parties to the Protocol are permitted to participate in national and regional emissions trading system, will also be considered in upcoming negotiations under the auspices of the World Trade Organization.²¹

B. THE MONTREAL PROTOCOL

The Montreal Protocol on Substances that Deplete the Ozone Layer is an environmental treaty,²² supplemental to the Vienna Convention for the Protection of the Ozone Layer,²³

sions reductions earned through terrestrial carbon sequestration. RMUs cannot be banked, and thus they have zero value in the second commitment period. Accordingly, Parties will use these tons for compliance immediately, during the first commitment period, in order to retain some value for them, and will bank the AAs that they would have otherwise used for compliance purposes. So the restriction on bankability of RMUs simply creates transaction costs as countries have additional elements of emissions transactions to track.

21. See WTO, *Doha WTO Ministerial 2001: Ministerial Declaration*, WT/MIN(01)/DEC/1, Nov. 20, 2001, para. 31, available at <http://www.wto.org/english/thewto-e/minist-e/minist-e/minded-e.htm>. Additional information is available on the UNFCCC Web site at <http://www.unfccc.de>.

22. United Nations Environmental Programme, *Montreal Protocol on Substances That Deplete the Ozone Layer*, 29 I.L.M. 1541 (1987).

whose purpose is to phase out ozone-depleting substances. Since 1987 when the Montreal Protocol was concluded, the global production and consumption of ozone-depleting substances has been reduced significantly from about 1.2 million tons in 1986 to the current level of about 250,000 tons covering a list of ninety-six substances. The bulk of the remaining production of these substances is by developing countries or by developed countries for consumption by developing countries.

Industrialized countries that were the major producers and consumers of the controlled substances have virtually completed the phase-out of production and consumption of the majority of listed substances, except for essential uses in applications that have no viable substitutes as yet, which account for about 8,000 tons of annual production. These countries are scheduled to phase out methyl bromide by 2005 and hydrochlorofluorocarbons, the last of the controlled substances, by 2030.

Developing countries on the other hand enjoy a ten-year grace period to phase out controlled substances. They have to phase out the first group of ozone-depleting substances by 2010, the second by 2015, and the last group by 2040. However, the rapid change in technology, coupled with sustained technical and financial assistance under the Multilateral Fund, might accelerate the phase out of ozone-depleting substances by developing countries, allowing them to complete the process much earlier than is provided for under the current Montreal Protocol schedule.

1. *Developments in 2001*

The number of parties to the Montreal Protocol has continued to grow and reached 183 by January 1, 2002, making the Protocol one of the most widely ratified agreements (environmental or non-environmental) to date. Only eleven states²⁴ are yet to join this global environmental protection effort, but it is expected that more countries will join the Protocol before September 16, 2002—the International Ozone Day—in an effort to achieve universal ratification and implementation of the Protocol.

In 2001, the Parties to the Protocol considered a number of important issues aimed at improving and strengthening the implementation of the Protocol. Their annual Meeting of the Parties (MOP) was held in Colombo, Sri Lanka, from October 15–19, 2001. One of the important issues at the meeting was consideration of the terms of reference for the study on the replenishment of the Multilateral Fund for the triennium 2003–2005. The Parties established a Multilateral Fund in 1991 to provide both technical and financial assistance to developing countries for the implementation of the Montreal Protocol. In Colombo, they agreed to request the Technology and Economic Assessment Panel to prepare a report for submission to the 14th MOP in 2002, to enable the Parties to take a decision on the appropriate level of the 2003–2005 replenishment of the Fund.²⁵

The Parties also considered a proposal for a more general evaluation of the financial mechanism established by Article 10 of the Montreal Protocol, with a view to ensuring its consistent, effective functioning in meeting the needs of developing and developed coun-

23. United Nations Environmental Programme, *Vienna Convention for the Protection of the Ozone Layer*, 26 I.L.M. 1529 (1987).

24. Afghanistan, Andorra, Bhutan, Cook Islands, Equatorial Guinea, Eritrea, Guinea Bissau, Holy Sea, Iraq, Niue, San Marino.

25. United Nations Environmental Programme, Decision XIII/1 of the Thirteenth Meeting of the Parties to the Montreal Protocol, U.N. Doc. UNEP/OzL. Pro.13/10, at 35 (2001).

tries. The Parties decided to launch a process for an external, independent study for the 16th MOP in 2004.²⁶

Other important issues considered by the Parties included:

- *Expedited procedures for adding new controlled ozone-depleting substances under the Protocol.* The Parties decided to request the Secretariat to compile precedents in other conventions regarding the procedures for adding new substances and to provide a report to the Parties in 2002.²⁷
- *Criteria to assess the ozone-depleting potential (ODP) of new substances.* The Parties decided to request the Secretariat to keep up to date at its Web site the list of new substances notified by the Parties and distribute the list to the Parties six weeks in advance of meetings of the Open-Ended Working Group of the Parties; asked the Secretariat to call upon Parties having enterprises producing a listed new substance to request that such enterprises carry out preliminary assessments of the substance's ozone-depletion potential and toxicological effects and report through the Party concerned the outcome to the Secretariat.²⁸
- *Essential use nominations for developed countries for controlled substances for the year 2002 and beyond.* The Parties authorized essential use allowances for ozone-depleting substances of 4,038 metric tons for 2002, and 6,362 metric tons for 2003.²⁹ The authorized quantities are to be used mainly in metered-dose inhalers for asthma and chronic obstructive pulmonary disease, space shuttle and torpedo maintenance by the requesting Parties.
- *Study on issues relating to monitoring of international trade and prevention of illegal trade in ozone-depleting substances, mixtures and products containing ozone-depleting substances.* The Parties decided to request the Secretariat, in consultation with appropriate bodies of the Montreal Protocol, to undertake a study on these issues and present a report with practical suggestions for consideration by the Parties in 2002.
- *Compliance with the Protocol.* The Parties, with the assistance of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol, reviewed the compliance of all Parties with the obligations under the Protocol for 2000, based on the information reported by each Party. The MOP made specific decisions for some Parties whose implementation of the Protocol, especially with respect to compliance with the phase-out schedule of ozone-depleting substances, was not in conformity with the provisions of the Protocol. These decisions called for: monitoring and review of performance by the Implementation Committee until the Party returns to compliance; submission to the Implementation Committee of action plans, including compliance benchmarks for the Committee's review; and issuance of cautions that in the event the concerned Parties do not return to compliance within a specified time-frame, the MOP may consider taking further measures to address the non-compliance.³⁰

26. United Nations Environmental Programme, Decision XIII/3 of the Thirteenth Meeting of the Parties to the Montreal Protocol, U.N. Doc. UNEP/Ozl. Pro 13/3, at 36 (2001).

27. United Nations Environmental Programme, Decision XIII/6 of the Thirteenth Meeting of the Parties to the Montreal Protocol, U.N. Doc. UNEP/Ozl. Pro 13/6, at 38 (2001).

28. United Nations Environmental Programme, Decision XIII/5 of the Thirteenth Meeting of the Parties to the Montreal Protocol, U.N. Doc. UNEP/Ozl. Pro 13/5, at 37 (2001).

29. United Nations Environmental Programme, Decision XIII/8 of the Thirteenth Meeting of the Parties to the Montreal Protocol, U.N. Doc. UNEP/Ozl. Pro 13/8 at 38 (2001).

30. The Parties affected by these decisions include Argentina, Armenia, Bangladesh, Belize, Cameroon, Chad, Comoros, Dominican Republic, Ethiopia, Honduras, Kazakhstan, Kenya, Mongolia, Morocco, Niger, Nigeria, Oman, Papua New Guinea, Paraguay, Peru, Samoa, Solomon Islands, Russian Federation, and Tajikistan. See United Nations Environmental Programme, Decisions XIII/16-XIII/25 of the Thirteenth Meeting of the Parties to the Montreal Protocol, U.N. Doc. UNEP/Ozl Pro. 13/16 and 13/25, at 41-47 (2001).

2. *Looking to 2002*

In 2002, the Parties will hold MOP-14, scheduled for Rome, Italy, from November 25–29, and will focus on negotiations for the replenishment of the Multilateral Fund for the triennium 2003–2005 based on the report to be submitted by the Technology and Assessment Panel in July 2002. Based on past precedents,³¹ the negotiations will be protracted before the final amount of replenishment is reached. Another important issue for the meeting will be consideration of the Secretariat's report on monitoring of international trade and prevention of illegal trade in ozone-depleting substances, mixtures, and products containing ozone-depleting substances. The Parties will also carry out the annual review of compliance with the Montreal Protocol by each Party, considering especially the phase out schedule of ozone-depleting substances, and make appropriate decisions.³²

II. Biosafety

A. THE CARTAGENA PROTOCOL ON BIOSAFETY

The Cartagena Protocol on Biosafety³³ to the Convention on Biological Diversity (CBD) addresses the safe transfer, handling, and use of living modified organisms (LMO) that may have an adverse effect on biodiversity, taking into account human health, with a specific focus on transboundary movements. The Protocol establishes an advance informed agreement (AIA) procedure for imports of LMOs for intentional introduction into the environment. It also incorporates mechanisms for risk assessment and risk management. The Protocol further establishes a Biosafety Clearing-House (BCH) to facilitate information exchange, and contains provisions on capacity building and financial resources with special attention to developing countries and those without domestic regulatory systems. Currently, the Protocol has 107 signatories with eleven States having ratified or acceded to it. These include: Bulgaria, Czech Republic, Lesotho, Nauru, Fiji, Norway, St. Kitts & Nevis, Spain, The Netherlands, Trinidad & Tobago, and Uganda. To enter into force, the Protocol requires fifty countries to ratify or otherwise agree to become parties to it.³⁴

The Parties to the CBD established the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP) to facilitate implementation of the Protocol. At the first meeting of the ICCP (ICCP-1) (December 11–15, 2000; Montpellier, France), governments discussed: information sharing and the BCH; capacity building; development of a roster of experts on capacity development; decision-making procedures; LMO handling, transport, packaging and identification; and compliance. The meeting highlighted significant issues relating to the capacity of developing countries to implement the Protocol and means to make the BCH operational and accessible. ICCP-1 concluded with recommen-

31. This year's negotiations will mark the fifth replenishment negotiation for the Fund. Prior decisions occurred in 1990 (Decision II/8A for U.S.\$160 million, but see also Decision III/22 of 1991, which increased the amount to U.S.\$200 million); 1993 (Decision V/9 for U.S.\$510 million); 1996 (Decision VIII/4 for U.S.\$540 million); and 1999 (Decision XI/9 for U.S.\$475.7 million).

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

33. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 28, 2000, 39 I.L.M. 1027, available at <http://www.biodiv.org>.

34. See *id.* art. 37.

dations for intersessional activities and synthesis reports for each substantive item to be further considered by ICCP-2.³⁵

1. *Developments in 2001*

a. Intersessional Activities (prior to ICCP-2)

A Meeting of Technical Experts on Handling, Packaging, Transport & Identification was held in Paris, France (June 13–15, 2001). The Experts considered the need and means for developing measures to address documentation to accompany LMOs, including those destined for contained use and for intentional introduction into the environment.³⁶ In addition, an Open-Ended Meeting of Experts on Capacity Building was held in Havana, Cuba (July 11–13, 2001). This experts' meeting developed a draft Action Plan for Building Capacities for the Effective Implementation of the Protocol, which was forwarded for consideration by ICCP-2.³⁷ Also, an Open-Ended Meeting of Experts on Compliance was held in Nairobi, Kenya (September 26–28, 2001). This meeting addressed potential elements, options, draft procedures, and mechanisms for compliance regimes under the Protocol.³⁸ Lastly, a Liaison Group of Technical Experts on the Biosafety Clearing-House met twice to continue its work on providing expertise to facilitate the implementation of the BCH's pilot phase in Montreal, Canada (March 19–20, 2001) and Nairobi, Kenya (September 27–28, 2001).

b. ICCP-2

ICCP-2 was held in Nairobi, Kenya from October 1–5, 2001. Approximately 350 participants from 117 countries and forty-seven intergovernmental, non-governmental and industry organizations attended.³⁹ ICCP-2 briefly addressed agenda items forwarded from ICCP-1 (information sharing; capacity building; handling, transport, packaging and identification; and compliance) and new items: liability and redress; monitoring and reporting; the Secretariat; guidance to the financial mechanism; rules of procedure; and consideration of other issues necessary for the Protocol's implementation, including rules of procedure, the agenda of the first Conference of the Parties (COP) serving as the Meeting of the Parties (MOP-1), cooperation with the International Plant Protection Convention (IPPC), and other preparatory work for MOP-1. The salient recommendations adopted by ICCP-2⁴⁰ are summarized below:

- On Information Sharing, ICCP-2 called for governments to nominate a national focal point responsible for approving information registered on the Biosafety Clearing-House (BCH),

35. United Nations Environmental Programme, *Report of the Intergovernmental Committee for the Cartagena Protocol on Biosafety on the Work of its First Meeting (ICCP-1)*, UNEP/CBD/1/9 (Apr. 3, 2001), available at <http://www.biodiv.org/doc/meetings/iccp/iccp-01/official/iccp-01-09-en.pdf>.

36. United Nations Environmental Programme, *Report of the Meeting of Technical Experts on Handling, Transport, Packaging and Identification of Living Modified Organisms*, U.N. Doc. UNEP/CBD/ICCP/1/9 (July 3, 2001), available at <http://www.biodiv.org/doc/meetings/bs/bsteht-01/official/bsteht-01-03-en.pdf>.

37. United Nations Environmental Programme, *Report of the Open-Ended Expert Meeting on Capacity Building for the Cartagena Protocol on Biosafety*, U.N. Doc. UNEP/CBD/BS/EM-CB/1/3 (July 3, 2001), available at <http://www.biodiv.org/doc/meetings/bs/bsemcb-01/official/bsemcb-01-03-en.pdf>.

38. United Nations Environmental Programme, *Elements and Options for a Compliance Regime Under the Cartagena Protocol on Biosafety*, U.N. Doc. UNEP/CBD/BS/EM-Comp/1/2 (2001), available at <http://www.biodiv.org/biosafety/mtg-te-cmpl.asp>.

39. United Nations Environmental Programme, *Report of the Intergovernmental Committee for the Cartagena Protocol on Biosafety on the Work of its Second Meeting (ICCP-2)*, U.N. Doc. UNEP/CBD/ICCP/2/15 (Oct. 10, 2001), available at <http://www.biodiv.org/doc/meetings/iccp/iccp-02/official/iccp-02-15-en.pdf>.

40. *Id.*

made recommendations regarding national assessments of capacity-building needs and further urged the provision of financial assistance to developing countries and countries that are centers of origin or diversity to enable them to access and use the BCH.

- Under the item on Handling, Transport, Packaging and Identification, the meeting requested the CBD Secretariat convene a meeting of technical experts to consider how to address labeling requirements for LMOs intended for use in food or feed or for processing (LMO-FFPs), as provided for in Article 18.2(a).
- On Monitoring and Reporting, ICCP-2 recommended that MOP-1 establish guidelines for national reports and that Parties submit their reports to the Secretariat every four years. It further recommended that reports be submitted twelve months prior to the MOP and that the intervals and formats be kept under review.
- Regarding Capacity Building, ICCP-2 recommended an Action Plan for Building Capacities for the Effective Implementation of the Protocol and a possible Sequence of Actions, which highlighted current capacity-building initiatives, including by (UNEP) and the Global Environment Facility (GEF), and invited all relevant entities to begin implementation of the endorsed Action Plan. The meeting also called on the MOP to request the GEF to take into account the endorsed Action Plan in providing assistance.
- On the Roster of Experts, the recommendation includes Interim Guidelines, a nomination form, and an indicative list of areas for advice and support.
- Discussions on guidance to the financial mechanism, as related to the Protocol Articles 22 (Capacity Building) and 28 (Financial Mechanism and Resources), produced recommendations that MOP-1 consider, among other issues, eligibility criteria for Parties to the Protocol and also for CBD Parties that have provided clear political commitments to become Parties to the Protocol.
- On Decision-Making Procedures, the recommendation invites the MOP to adopt procedures and mechanisms to facilitate decision-making by Parties of import; continue to identify and build upon mechanisms that will further facilitate capacity building; and establish review procedures and mechanisms in line with Article 35 of the Protocol (Assessment and Review).
- With regard to Liability and Redress, ICCP-2 recommended a draft decision for MOP-1 to adopt, emphasizing that the process with respect to liability and redress is distinct from that of the CBD, and recognizing that it is also distinct and different from the compliance procedures and mechanisms under the Protocol. It recommends that MOP-1 establish an open-ended experts' group to address the issue, pursuant to Article 27.
- On Compliance, ICCP-2 recommended the draft procedures and mechanisms contained in the report of the Open-Ended Meeting of Experts on Compliance, for full consideration at MOP-1.

The draft procedures and mechanisms on compliance include bracketed text (i.e., text that is still under negotiation) on several substantial issues. Disagreement remains on the question of "common but differentiated responsibilities" between developed and developing countries. The procedures recommend the establishment of a regionally balanced Compliance Committee consisting of fifteen legal and technical experts in the field of biodiversity. However, disagreement remains on issues including the balance between LMO importers and exporters in the Committee. Text is also bracketed regarding who can submit information to the Committee.

- ICCP-2 also recommended a Draft Provisional Agenda for MOP-1, which includes ten substantive items for discussion at MOP-1: decision procedures; information sharing and the BCH; capacity building; handling, transport, packaging and identification; compliance; liability and redress; monitoring and reporting; the Secretariat; guidance to the financial mechanism; and consideration of other issues necessary for the Protocol's effective implementation. It also calls for adoption of the MOP's Rules of Procedure and a medium-term programme of work.

- In considering issues necessary for the Protocol's effective implementation, the ICCP-2 recommended that three months prior to MOP-1 a medium-term programme of work be established to address, *inter alia*: issues stipulated by the Protocol for consideration by MOP-1; and issues that need to be addressed by specific times after the Protocol's entry into force, including documentation requirements for LMO-FFPs, rules and procedures for liability and redress, and evaluation of the Protocol's effectiveness.

c. Other Developments in 2001

In addition to these Protocol-specific efforts, UNEP has launched a new multi-million dollar project to help up to 100 developing countries assess the potential health and environmental risks and benefits from genetically modified crops. Financed by the GEF, the three-year, \$38.4 million project was launched at the three-day African Meeting on Capacity Building for the Biosafety Clearing-House, which was held back-to-back with the UNEP-GEF African Regional Workshop on Biosafety in Nairobi (January 19, 2002). The project is intended to help developing countries attain the scientific and legal skills necessary to evaluate the issues surrounding the import of genetically modified organisms.

This effort could be important to facilitate ratification and implementation of the Protocol. Implementation of the Protocol will require a minimum level of capacity. There is a clear need for legal, technical, and scientific expertise, infrastructure, human resources and training, and communication structures. In fact, some developing countries have expressed reluctance to ratify the Protocol, lest they lack the capacity to comply with the Protocol's obligations.

2. Looking to 2002

Due to the slow ratification of the Protocol, instead of MOP-1, a Third Meeting of the Intergovernmental Committee for the Cartagena Protocol on Biosafety (ICCP-3) will be held in The Hague, The Netherlands (April 22–26, 2002).⁴¹

III. Chemicals Management⁴²

A. ROTTERDAM CONVENTION ON PRIOR INFORMED CONSENT⁴³

The Rotterdam Convention on the Prior Informed Consent (PIC) Procedure marks another step in the development of an international body of "right-to-know" law. The

41. Additional information on the Protocol is available on the CBD Web site at <http://www.biodiv.org/biosafety/>.

42. On the related issues of hazardous wastes, the Basel Convention on transboundary movement of such wastes saw little activity in 2001, with only one set of technical and legal meetings, and no major decisions. Looking ahead, the 6th Meeting of the Conference of Parties (COP-6) will take place in December 2002, where several key issues will be addressed including: (1) adopting an implementation and compliance mechanism; (2) determining whether ships destined for scrapping are hazardous waste; (3) approving the elaboration/definition of several hazard characteristics; and (4) finalizing technical guidelines for environmentally sound management of plastic wastes, lead-acid battery waste, and ship scrapping. The COP will also adopt amendments to Annex VIII (the list of hazardous wastes generally within the scope of the Convention) and Annex IX (the list of non-hazardous wastes generally outside the scope of the Convention). In cooperation with the Stockholm Convention on Persistent Organic Pollutants (as discussed below in this chapter), the Basel Technical Working Group (TWG) has begun developing technical guidelines for environmentally sound management of POPs wastes, and updating its 1994 technical guidelines on PCBs, PBBs, and PCTs. We will report on these developments in the next Year in Review.

43. United Nations Environmental Programme, *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, U.N. Doc. UNEP/CHEMICALS/98/17

Convention provides governments notice about chemical imports regulated by exporting governments and the information necessary to make decisions about future imports. The Convention will enter into force following ratification by fifty countries. Of the seventy-three countries that have signed the Convention, eighteen have now ratified.⁴⁴ The United States has signed the Convention, but progress toward U.S. ratification may well be delayed beyond the year 2002.⁴⁵ It is possible that the Bush administration will seek advice and consent to ratification of the Rotterdam Convention in conjunction with congressional consideration of the Stockholm Convention on Persistent Organic Pollutants.

The PIC Convention builds on a voluntary PIC procedure embodied in guidelines developed by the U.N. Environment Programme (UNEP) and the U.N. Food and Agriculture Organization (FAO).⁴⁶ Pending the entry into force of the PIC Convention, the signatories decided to continue the voluntary PIC program, modified to take account of the treaty provisions. The program is now known as the "interim PIC procedure." Over 155 countries participate in the interim PIC procedure. Notably, only half of the countries participating in the voluntary PIC program have elected to sign the Convention. The slow pace of signature and ratification of the PIC Convention may well be due to governments' in effect meeting their obligations without additional national implementing measures.⁴⁷ For example, the chemical nominations, notifications of national regulatory actions, and information exchange systems continue to operate much as they had under the voluntary program. The future of the PIC Convention as a viable instrument of international law may well depend on the extent to which the signatories believe the Convention offers significant advantages over the voluntary program.

The Intergovernmental Committee that negotiated the PIC Convention was appointed to manage the operation of the interim PIC procedure, and the Committee will meet annually to make decisions on including additional chemicals in the procedure.⁴⁸ The Committee has established the Interim Chemical Review Committee (ICRC) to review nominations of chemicals for the PIC list. The ICRC's third meeting will be held February 17–21, 2002, in Geneva. No new chemicals are slated for addition to the PIC list, although

(1998), available at <http://www.lexmercatoria.org> [hereinafter PIC Convention]; see also UNEP's PIC Convention Web site at <http://www.pic.int/> (last visited July 3, 2002).

44. The most recent ratification was Switzerland in January 2002.

45. The Clinton administration submitted the Rotterdam Convention for advice and consent to ratification. However, the Bush administration has not submitted proposed legislation to implement the treaty requirements into U.S. law. At a minimum, implementation of the PIC Convention in the United States will require changes to the import and export provisions of the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).

46. United Nations Environmental Programme, *UNEP Guidelines for the Exchange of Information on Chemicals in International Trade* (1989), available at <http://www.lexmercatoria.org>; Food & Agricultural Organization of the United Nations, *International Code of Conduct on the Distribution and Use of Pesticides* (1985), available at <http://www.fao.org/waicent/FAOinfor/agricult/AGP/AGPP/pesticide/code/annex.htm>.

47. Strictly speaking, the Parties have obligated themselves to take appropriate national implementing measures under the Convention. See PIC Convention, *supra* note 43, art. 15. The obligation will only become effective, of course, upon entry into force.

48. The next meeting of the PIC Intergovernmental Negotiating Committee is tentatively scheduled for September 2000, in Geneva, Switzerland.

the ICRC is reviewing the status of "old" notifications under the voluntary PIC system. The ICRC will be converted to the Chemical Review Committee upon entry into forces of the Convention.⁴⁹

B. STOCKHOLM CONVENTION ON PERSISTENT ORGANIC POLLUTANTS⁵⁰

In May 2001, 114 governments agreed on a final text for this global treaty to control the production, use and emissions of persistent organic pollutants (POPs). The Stockholm Convention will be open for signature until May 22, 2002. As of this writing five countries have ratified the treaty,⁵¹ of the fifty required for entry into force. The United States has signed the treaty, and President Bush has indicated his support for the agreement.⁵² However, as of February 10, 2002, the treaty and proposed implementing legislation had not yet been submitted for congressional action.

The POPs treaty is focused on controlling the production, use and/or emission of twelve POPs of "historical concern."⁵³ The treaty contemplates additions to the list of POPs after the agreement enters into force.⁵⁴

In general, the POPs treaty obligates governments to reduce and eliminate releases of POPs (Article 4). Governments are required to eliminate the production and restrict the use of pesticide and industrial chemical POPs, including a requirement to address imports and exports, including exports to non-States Parties.⁵⁵ A number of exemptions are recognized in the agreement, including country-specific exemptions, for research and development, unintentional trace contaminants, and closed-system, site-limited intermediates. Generally speaking, the country and use specific exemptions will require notification to national governments, subsequent notification under the treaty, and periodic review.

The process for the review of nominated chemicals and for making decisions on including those chemicals in the Convention and what to do to manage them is grounded in science. The treaty establishes a criteria-based process for the nomination of new chemicals as POPs, and requires risk evaluation and socio-economic analysis to support the nomination and consideration of listings.

49. Additional information on the Rotterdam Convention is available on the UNEP Web site at <http://www.unep.org>.

50. United Nations Environmental Programme, *Stockholm Convention on Persistent Organic Pollutants*, U.N. Doc. UNEP/POPS/CONF/2 (2001) [hereinafter POPs Convention]. Additional information on the Stockholm Convention is on UNEP's new Web site, at <http://www.chem.unep.ch/sc/> (last visited July 3, 2002).

51. Canada, Fiji, Lesotho, the Netherlands, and Samoa.

52. In a White House briefing held April 19, 2001, President Bush announced the U.S. government's intention to sign the then draft Stockholm Convention.

53. The twelve substances are aldrin, chlordane, dieldrin, DDT, endrin, heptachlor, hexachlorobenzene, mirex, toxaphene, polychlorinated biphenyls (PCBs), dioxins and furans.

54. It is widely anticipated that the United States would also make a declaration, similar to that made by Canada upon its ratification of the treaty, to the effect that any amendment to the list of chemicals covered by the treaty would only be effective upon specific ratification or assent. See Canadian Declaration, available at <http://www.chem.unep.ch/sc/documents/signature/signstatus.htm> (last visited July 3, 2002).

55. The trade provisions also impose a prior consent requirement for shipments of POPs, although it is not certain if mere compliance with the Rotterdam Convention on Prior Informed Consent will satisfy this requirement.

Provisions regarding the treatment of wastes containing POPs and the disposal of POPs stockpiles were among the most contentious during the negotiations, because of the potential impact on the Basel Convention on Transboundary Movements of Hazardous and Other Wastes. The treaty encourages governments to adopt strategies for identifying POPs in products and articles that, upon becoming wastes, may need to be controlled, generally through the application of best available techniques and best environmental practices.⁵⁶

IV. Desertification

A. UNITED NATIONS CONVENTION TO COMBAT DESERTIFICATION

The United Nations Convention to Combat Desertification⁵⁷ (UNCCD) stresses the global dimension of desertification. Its purpose is to mitigate the effects of drought on arid, semi-arid, and dry sub-humid lands. It calls for increased efforts to implement national, subregional, and regional action programs. In particular, the Convention is intended to address this fundamental cause of famine and food insecurity, especially in Africa, by stimulating more effective partnerships between governments, local communities, non-governmental organizations, and aid donors, and by empowering grassroots efforts to combat desertification.

The Convention entered into force on December 26, 1996, ninety days after ratification by the first fifty countries. As of January 7, 2002, 178 countries have ratified the Convention, including nearly all developed countries. The United States' instrument of ratification was deposited on November 17, 2000, and the Convention entered into force for the United States on February 15, 2001.

1. *Developments in 2001*

The Fifth Conference of the Parties to the Convention (COP-5) was held from October 1-13, 2001, in Geneva, Switzerland, with approximately 150 countries represented. The theme of a special high-level segment was Poverty and the Environment. A summary of the discussions will be transmitted to the World Summit on Sustainable Development to be held in Johannesburg, South Africa, in August-September 2002. A major issue for the COP was to define the scope and nature of work to be undertaken in the interim two years until the next session (COP-6), to be held in Bonn, October 18-31, 2003. The Committee of the Whole (COW) recommended the adoption of eleven decisions, which included: a program of work; reviews of implementation; a review of financing by multilateral institutions, and of activities for inter-organizational relationship building; a World Day to Combat Desertification; and additional procedures for regular review of implementation by the Committee for the Review of Implementation of the Convention (CRIC).

2. *Looking to 2002*

Preparatory meetings will begin in June 2002 for the First Session of the CRIC (CRIC-1), to be held November 18-29, 2002. The Parties shall reconsider the terms of reference

56. Additional information on the Stockholm Convention is available on the UNEP Web site at <http://www.unep.org> (last visited July 3, 2002).

57. U.N. Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, U.N. Doc A/AC.241/15/REV.7 (1994), available at <http://www.unccd.int>.

of the CRIC and the need for its continued existence no later than COP-7. The mandate for CRIC-1 is the review of new and updated National Action Plans.⁵⁸

V. Endangered Species

A. TRADE IN ENDANGERED SPECIES

The year 2001 was not a Conference year for CITES (Convention on International Trade in Endangered Species).⁵⁹ During 2001, three more states became Parties: Republic of Moldova, Qatar, and Saotome and Principe. The State of Lithuania will be a member effective in early 2002, and will be the 156th Party to CITES.

1. *Developments in 2001*

The most significant policy issue that has been considered since the last Conference of the Parties (COP) in 2000, COP-11, deals with the redrafting of Conference Resolution 9.24. This resolution is a detailed policy statement setting out the criteria that the Party States should use when deciding about the listing, delisting or downlisting of species on Appendix I (threatened with extinction; trade generally prohibited) and Appendix II (not necessarily threatened with extinction as yet but could be without trade controls; and "look-alike" species).⁶⁰ At COP-11, the Parties adopted Decision 11.2, calling for the listing criteria to be revised. A committee was appointed and a report submitted to the Secretariat. This draft was then considered at a joint meeting of the Animal and Plants Committee. The Chairs of those committees have submitted a final draft for the Parties' consideration.⁶¹ However, there has been criticism of the draft for focusing more on shifting the criteria to make it harder to list on Appendix I and easier to downlist species.

From a legal institutional development perspective, the most interesting activity of 2001 dealt with the issues of enforcement. As typical for a treaty drafted in the early 1970s, in the text of CITES there is almost no provision for enforcement against a state that does not meet its responsibilities under the treaty. The Parties have previously shown a willingness to use trade sanction, however, as a method to deal with states that had not adopted adequate domestic legislation to implement CITES.

This year there were two developments relating to the use of trade sanctions. First, the Standing Committee had questions regarding the status of the United Arab Emirates (UAE) enforcement efforts under CITES but wanted it to have a chance to show compliance with the treaty. The Secretary-General was instructed to contact the Party, request a visit and determine whether the state was "adequately implementing" the obligations of CITES. The Secretariat did make a trip and decided that UAE's efforts were inadequate. Notice 2001-079 was issued, which requests all Party States to impose trade sanctions as to CITES products and specimens. This action raised two issues. First, there had not been any resolution adopted by the Party States setting out a common understanding of "adequately

58. Additional information on the Convention is available on its Web site at <http://www.unccd.int/cop/cric1/menu.php>.

59. Trade in Endangered Species—Convention on International Trade in Endangered Species, 12 I.L.M. 1085 (1973).

60. See 5 Yearbook of International Environmental Law (Oxford Press) 258 (1994).

61. See CITES Notification 2001-037, available at <http://www.cites.org> (last visited July 3, 2002), to which the report is attached [hereinafter CITES Notification].

implementing" and, therefore, the standard used to find a violation of treaty obligation is unclear. Second, the power delegated to the Secretariat to make such a significant substantive decision on behalf of the Party States was substantial. It will be interesting to see if such delegation will occur in the future.

A second development in the enforcement area concerned selected species boycotts. Under resolution Conf. 8.9(Rev.), a lesser sanction than a full boycott of CITES specimens has been authorized. Under the resolution, when it is apparent that a particular country is having difficulty in monitoring and controlling trade of a specific species, a sanction can be imposed requesting that all CITES Parties not accept export permits from that country for trade in items for those specific species. The Standing Committee was specifically authorized to make this judgment. Several countries were given the opportunity to clarify and address the situation. Some countries changed or modified their conduct but others did not, and the Standing Committee, in June 2001, added nineteen species to the list, which now includes forty-four species from twenty-five states.⁶²

2. *Looking to 2002*

The next meeting of the Conference of the Parties (COP-12) will be held in November 2002, in Chile.⁶³

B. THE INTERNATIONAL WHALING COMMISSION

The International Whaling Commission (IWC) was established by the International Convention for the Regulation of Whaling (ICRW), which was signed in Washington, D.C., on December 2, 1946. The stated purpose of the Convention is to provide for the proper conservation of whale stocks and the orderly development of the whaling industry.

The main responsibilities of the IWC are to keep under review, and revise as necessary, the measures included in the Schedule to the Convention, which governs the conduct of whaling throughout the world. These measures, among other things, provide for the complete protection of certain species; designate specified areas as whale sanctuaries; set limits on the number and size of whales that may be taken; prescribe open and closed seasons and areas for whaling; require certain humane-killing measures; and require the consideration of environmental factors on whale populations.

Membership in the IWC is open to any country that formally adheres to the Convention. Currently there are forty-two recognized IWC member countries. Each year there is an annual Commission meeting, held in May, June, or July. The last meeting was held in July 2001 in London.

Other than when and what meetings to hold, almost all other issues of the IWC are in dispute. Not all countries agree on the purpose of the Convention, its jurisdiction, objection and reservation procedures, or on transparency issues. When the ICRW came into force the Parties were all whaling nations. Every country was more interested in exploiting whales than protecting them. However, now most IWC members feel that there should never be a resumption of commercial whaling and that it is the function of the IWC to protect and conserve whales for future generations. Only a few countries now believe that whales, like any other natural resource, should be exploited.

62. See CITES Notification 2001-084, available at <http://www.cites.org/eng/notifs/2001/08y.shtml> (last visited July 3, 2002).

63. Additional information on CITES is available on its Web site at <http://www.cites.org>.

For several decades the IWC issued unsustainable whaling quotas. By the 1970s, more than two million whales had been killed. Several species of whales were hunted to the brink of extinction. As a result, a ban on commercial whaling was enacted in 1986 by a three-quarters vote of the member countries. This ban is still in effect. Initially, all IWC countries agreed to abide by the ban except Norway, Russia, and Peru. Eventually all countries stopped commercial killing except Norway, which, while acting on its objection, resumed whaling in 1993. Japan stopped commercial whaling in 1986; however, it resumed killing a year later under an exemption in the Convention that allows whales to be killed for scientific purposes.⁶⁴

IWC resolutions are regularly passed criticizing Japan and Norway for killing whales. Norway is criticized for resuming commercial whaling in opposition to the moratorium, while Japan is criticized for engaging in lethal scientific whaling, when non-lethal methods are available.

1. *Developments in 2001*

At the London meeting in 2001, five major, controversial issues dominated the agenda. First, in an effort of some interest as a matter of general international treaty law, Iceland attempted to rejoin the IWC with a reservation to the moratorium. Iceland left the IWC in 1992, ten years after the moratorium was voted upon, and six years after it was implemented. Iceland had never availed itself of the right to object to the moratorium. Iceland decided to rejoin in 2001, but made its membership conditional upon taking a reservation to the moratorium. There was a difference of legal views as to whether the Commission should accept Iceland's reservation, and indeed whether the Commission had the competence to decide. On the latter point, the Commission voted by nineteen to eighteen (one country was absent) that it had the competence to determine the legal status of Iceland's reservation. The Commission then moved to vote on whether to accept Iceland's reservation, sixteen members refused to participate in the vote because they claimed that such a vote was illegal. The motion to deny Iceland's reservation was then carried with nineteen votes in favor, zero votes against, and three abstentions. After consultations with member nations, the Chairman ruled that Iceland should participate in the meeting as an observer and not be given the privilege of voting. This ruling was challenged but upheld by a simple majority. Some countries relied upon the Vienna Convention on Treaties to argue that the reservation was contrary to the object and purpose of the ICRW; others felt that the Vienna Convention on Treaties did not apply, while still others considered Iceland's action an untimely objection rather than a reservation. Further, some members felt that the Convention did not allow for reservations. Since this meeting each country has secured legal opinions on this issue. Iceland has stated that it intends to try to re-join with its reservation at the next meeting.

The second major issue addressed at the meeting was the Revised Management Scheme (RMS), an observation and inspection system intended to oversee commercial whaling when

64. Though the ability to engage in lethal scientific whaling is available to all Member countries, no other country kills whales as part of their scientific program. Over the past three decades, various U.S. Administrations have certified Japan under the Pelly Amendment to the Fisherman's Protective Act, for undermining the IWC by killing whales in contravention of the moratorium. A Pelly certification by the U.S. Commerce Department enables the President to impose trade sanctions against a country for undermining a fishery conservation treaty. However, the United States has yet to impose such sanctions upon Japan.

—or if— the moratorium is lifted. The RMS is extremely controversial. Japan, Norway, and the Caribbean countries argue for minimal oversight. These countries contend that international observers, penalties, reporting, tracking, etc. are not warranted. Other countries such as the United States, New Zealand, the United Kingdom, Mexico, and Germany believe that strong measures must be in place to ensure compliance and to protect the whale stocks. The RMS negotiations have been ongoing for many years with little movement or compromise. Two additional RMS meetings have been scheduled to take place prior to the next annual meeting. It is believed that these additional meetings, which are closed to non-governmental organizations, will make it more likely that the RMS will be voted upon and in place by the next meeting.

The third major topic of discussion was vote buying. There have been allegations for several years that Japan engages in vote buying. Japan has been accused of providing financial incentives to developing countries in exchange for favorable votes at IWC meetings. For the most part, such allegations have been left outside the meeting rooms. However, this year New Zealand formally raised the issue. It openly condemned Japanese practices and called on Japan to stop undermining the IWC. New Zealand sponsored a resolution at the meeting to require member countries to be transparent in their activities involving aid. The resolution was dramatically amended on the floor and, as a result, New Zealand withdrew its resolution. In the last two years, according to New Zealand, Japan has brought in three pro-whaling member countries into the Commission. It is thought that by the next annual meeting Japan will bring in at least five additional countries sympathetic to their position.

The fourth issue was the South Pacific Whale Sanctuary proposed by Australia and New Zealand. To implement a sanctuary under the Convention, a three-quarters majority is needed. A majority of countries voted for the sanctuary, however, not the super majority necessary. The vast majority of countries in the South Pacific supported the sanctuary. These countries argued that their whale watching businesses were booming and that they wanted to continue such eco-tourism without the threat of a resumption of commercial whaling.

The last controversial issue covered at the meeting was the Japanese theory of “whales eating fish.” Japan has for the past two years argued that whales are competing directly with humans for fish. Japan killed 600 whales in 2001 in support of this scientific theory. The Food and Agriculture Organization (FAO), an international body that tracks fishery information, among other things, stated that 75 percent of the world’s fish stocks are over-fished by humans. However, Japan continues to kill whales in furtherance of its theory even though fifteen countries sent Demarches calling on them to stop killing whales. At the 2001 meeting, the Commission adopted resolutions calling on Japan to refrain from issuing two additional permits allowing whales to be killed in furtherance of their “whales eating fish” theory.

2. *Looking to 2002*

The next IWC meeting will be held in May 2002 in Shimonoseki, Japan. At this meeting it is believed that the RMS will be completed. It could be an historic meeting. If several more pro-whaling countries join the IWC, there may be sufficient votes to tip the balance in favor of the resumption of commercial whaling.⁶⁵

65. Additional information on the IWC is available on its Web site at <http://www.iwcoffice.org/>.

VI. Fisheries and Marine Resources

The year 2001 saw a number of international and regional developments in the areas of living marine resource conservation and marine pollution prevention.

A. MANAGEMENT OF LIVING MARINE RESOURCES

1. *U.N. Treaty on Straddling Stocks and Highly Migratory Fish Stocks*

The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea (UNCLOS) of December 10, 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Straddling Stocks Agreement), which had been adopted on August 4, 1995, entered into force on December 11, 2001. The United States is a party to this agreement. The Multilateral High Level Conference (MHLC) on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and the Convention on the Conservation and Management of the Fishery Resources in the South East Atlantic Ocean (the SEAFO Convention) are the first concluded agreements to regionally implement the provisions of the Straddling Stocks Agreement, since it was adopted in 1995.

In September 2000, the Chairman of the MHLC formally presented convention text, which included creation of a management commission, the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean. The Final Act of the MHLC also included a draft resolution creating a Preparatory Conference for the establishment of this Commission. The Convention and Resolution, adopted by vote of the Conference on September 4, 2000, were open for signature and ratification until September 5, 2001. Since its adoption, sixteen states (including the United States) have signed the Convention and four states have ratified the Convention. Taiwan has signed an Arrangement for the Participation of Fishing Entities.⁶⁶

The SEAFO Convention was formally signed and adopted by nine Parties, including the United States, in April 2001. It mandates the creation of the South East Atlantic Fisheries Organization to oversee fishery resources, other than highly migratory species or sedentary stocks of the continental shelf, found in the high seas portion of the South East Atlantic Ocean. Only Namibia has ratified the Convention, but two other signatories are within months of doing so. Although U.S. interests have fished in the Convention Area in the past, no U.S. fishers are currently active in that region.⁶⁷

2. *FAO Initiatives*

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

66. Additional information on the MHLC Convention is available at <http://www.ocean-affairs.com>.

67. Additional information on the SEAFO Convention is available on its Web site at http://www.fao.org/fi/body/rfb/SEAFO/seafo_home.htm.

governmental forum for the examination of major international fisheries issues. COFI has served as a forum for negotiation of global agreements and non-binding instruments.

The twenty-fourth session of COFI endorsed an International Plan of Action (IPOA) to combat Illegal, Unreported, and Unregulated (IUU) Fishing, and the FAO and the United States have since begun implementation efforts. The IPOA for IUU fishing is the fourth such plan to be concluded within the framework of the Code of Conduct for Responsible Fisheries. The main objective of the plan is to provide States with effective measures to prevent IUU fishing activities. COFI-24 also took a number of steps related to commercial fisheries and CITES. First, it called for a technical consultation on the applicability of CITES listing criteria, held in Namibia in October 2001. Second, COFI advised the Sub-Committee on Fish Trade to develop a work plan for the FAO to explore CITES issues with respect to international fish trade, the results of which would inform CITES deliberations on marine fish species. If successful, this work plan will provide an important example of two inter-governmental bodies complementing one another's work.

3. *Recent Developments Under Other Agreements*

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

ICCAT was established in 1969 at a Conference of Plenipotentiaries, which prepared and adopted the International Convention for the Conservation of Atlantic Tunas. ICCAT, now composed of thirty-one Contracting Parties, has management authority over highly migratory fish species including swordfish, billfishes, and sharks, in addition to tunas, throughout their ranges in the Atlantic Ocean and adjacent seas. The most recent meeting of the Commission was held in November 2001.

ICCAT's 2001 meeting ended in a stalemate after the United States and other members refused to agree to new management measures for East Atlantic bluefin tuna that would have set catch levels at about 135 percent of the scientifically-recommended level. As of early 2002, the Commission was working to try to formalize a number of other proposals discussed and provisionally agreed to at that meeting, including: (1) new allocation criteria; (2) measures to address non-compliance by ICCAT members and problem fishing by non-members; (3) fishery management regulations for bigeye and albacore tunas and swordfish; (4) programs to monitor the trade of swordfish and bigeye tuna and to improve fishery monitoring; (5) a decision to postpone the scientific assessment of blue marlin; and (6) a measure calling for assessments for two species of pelagic sharks in 2004, and encouraging improved data collection, the release of live sharks taken incidentally, minimization of waste and discards, and voluntary limits on fishing effort. Other proposals not provisionally agreed to at the 2001 meeting will be held over to the next session in 2002; however, in the interim, ICCAT members will likely consider new proposals for East Atlantic bluefin tuna.⁶⁸

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

The Inter-American Tropical Tuna Commission (IATTC), established in 1950, is responsible for the conservation and management of fisheries for tunas and other species taken by tuna-fishing vessels in the eastern Pacific Ocean. At the 2001 meeting, IATTC adopted resolutions concerning the conservation and management of bigeye and yellowfin tuna fisheries. The Commission agreed to extend for one more year a program to study

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

measures to reduce bycatch and evaluate the effects of on-board retention of bycatch species.

The International Dolphin Conservation Program (IDCP), established in 1990 to reduce dolphin mortality due to the encirclement method of fishing ("setting on dolphins"), formalized as a binding agreement in accordance with the Panama Declaration of 1995, entered into force on February 15, 1999, with ratifications by the United States, Panama, Ecuador, El Salvador, Venezuela, Nicaragua, Costa Rica, Honduras, and Mexico. Under U.S. IDCP implementing regulations, under the International Dolphin Conservation Act, yellowfin tuna caught by encirclement of dolphins can be imported and labeled as "dolphin safe" provided no dolphins are killed or seriously injured during the fishing activities. Prior to this legislation, labeling as "dolphin safe" applied only to tuna that were caught through methods that did not involve encirclement.

In April 2000, a ruling in the U. S. District Court in California rejected the Commerce Department's regulations changing the definition of "dolphin safe" and required consideration of scientific research on the stress caused to dolphins from encirclement before the labeling definition of "dolphin safe" is modified. In July 2001, the U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's ruling. In a related case, however, the U.S. Court of International Trade ruled in December 2001 that Commerce regulations implementing the 1999 international dolphin conservation agreement were consistent with U.S. law and that the United States had satisfied related NEPA requirements.⁶⁹

c. Inter-American Sea Turtle Convention and Shrimp-Turtle Issues

The Inter-American Convention for the Protection and Conservation of Sea Turtles is the only international treaty dedicated exclusively to setting standards for the conservation of sea turtles and their habitats. The United States ratified the Convention in early 2001, which entered into force on May 2, 2001. The first Conference of Parties will be held in Costa Rica in August 2002.⁷⁰

d. North Atlantic Salmon Conservation Organization (NASCO)

The Convention for the Conservation of Salmon in the North Atlantic Ocean, the basic instrument for NASCO, applies to migratory salmon stocks north of 36 degrees latitude. NASCO's task is to promote both the collection and dissemination of scientific data on North Atlantic salmon stocks and the conservation, restoration, and sound management of such stocks. At its 2001 meeting, NASCO again expressed concern over low population levels of salmon stocks. A Working Group has been established to develop a five-year program of research to identify the causes and examine possible means of counteracting salmon mortality. Resolutions reflected the concern over population levels and called for strict harvest limits on fisheries in the French islands of St. Pierre et Miquelon, the Faroe Islands, and West Greenland. The Standing Committee on the Precautionary Approach presented a decision structure for use by the Council and the NASCO Commissions and authorities in the management of single and mixed stock salmon fisheries. This decision structure will be tested and evaluated in a selection of rivers by 2002. NASCO continued to be concerned over the genetic impact of farm-raised salmon on wild salmon, and the

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

70. Additional information on the Convention is available at <http://www.nwf.org/trade/treaty.html>.

Liaison Group between NASCO and the North Atlantic salmon farming industry reported a closer working relationship between the two groups.⁷¹

e. North Pacific Anadromous Fish Commission (NPAFC)

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

At the ninth annual meeting of the NPAFC held in Victoria, Canada, the Committee on Enforcement reviewed enforcement efforts and unauthorized salmon fishing activities in the Convention Area in 2001. Due to the continued threat of high seas fishing for salmon in the Convention Area, all Parties agreed to maintain in 2002 enforcement activities at high levels as a deterrent to the threat of potential unauthorized fishing.⁷²

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

CCAMLR is established under the 1982 Convention for the Conservation of Antarctic Marine Living Resources, which aims to ensure the conservation of the Antarctic marine ecosystem. In 2001, the Commission continued to address the problem of illegal, unregulated, or unreported (IUU) fishing, especially with regard to Patagonian and Antarctic toothfish (Chilean sea bass). Specifically, the Commission passed a resolution urging Contracting Parties to avoid flagging or licensing non-Contracting Party vessels with a history of engagement in IUU fishing activities. Other resolutions addressed catch documentation, landing procedures, and use of vessel monitoring systems in the fishery for threatened toothfish species. The Commission also adopted further fishery conservation measures including restrictions on allowable gear types, overall catches, and bycatch and established reporting requirements for catches of certain species of fish, krill, and crabs. In addition, it adopted a measure to minimize incidental mortality of seabirds in longline fishery research activities.⁷³ Dr. Denzil Miller of South Africa was appointed the new Executive Secretary, replacing Dr. De Salas, who had served in the post for the past ten years.

g. U.S.-Russian Maritime Boundary Agreement

On September 16, 1991, the United States ratified the U.S.-Soviet Maritime Boundary Agreement in an attempt to resolve long-standing controversy over fishing and mineral rights. While both governments agreed in 1992 provisionally to apply the terms of the Agreement, Russia has never formally ratified it, largely due to concerns surrounding the equitability of its provisions. Since 1999, conflict around this U.S.-Russian maritime boundary has escalated during the Bering Sea pollock fishing season. The United States Coast Guard reportedly detected fifteen illegal foreign fishing vessel incursions into U.S. waters during 2001, down from a high of eighty-three in 1999. The Coast Guard seized and

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

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

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

prosecuted two of these vessels, and obtained settlements totaling \$570,000. The other vessels were not prosecuted, mostly because they could not be apprehended.

h. Yukon Salmon Agreement

After sixteen years of intermittent negotiations, the United States and Canada reached agreement on March 29, 2001, on a management regime for salmon fisheries on the Yukon River in Alaska and the Yukon Territory. The basic elements of the agreement include: a formula for sharing returning runs of Canadian-origin salmon; commitments to conserve and restore salmon habitat; cooperative scientific research and coordination of fishery management efforts; and re-establishment of the Yukon River Panel and a \$1.2 million Yukon River Salmon Restoration and Enhancement (R&E) Fund. The agreement represents a significant achievement in balancing the interests of diverse indigenous and other communities along the Yukon River in both countries.

B. MARINE POLLUTION

UNCLOS Article 194 requires nations to take measures to address marine pollution from land-based sources, vessels, and other instruments or devices operating in the marine environment. With respect to land-based sources, nations are required to adopt laws and regulations to prevent, reduce, and control such pollution, taking into account internationally agreed rules, standards, and recommended practices and procedures. Vessel pollution must be addressed not only by flag States, but also by coastal and port States. Regulations governing vessel pollution must be in accordance with generally accepted international standards, specifically those established under the International Maritime Organization (IMO) of the United Nations. The IMO has adopted fifty-three conventions and protocols. Several significant developments occurred under the IMO system in 2001.

1. *Phase-out of Single-Hull Tankers*

One of the most important accomplishments last year for the IMO was the approval of revisions to Regulation 13G of MARPOL 73/78 Annex I, which sets a new global timetable for accelerating the phase-out of single-hull oil tankers. The agreed timetable provides for the elimination of most single-hull oil tankers by 2015. As double-hull tankers offer greater protection to the environment from pollution in certain types of accidents, and the proposed phase-out dates are more in line with the Oil Pollution Act of 1990, the United States supported these amendments in principle.

2. *International Convention on the Control of Harmful Anti-fouling Systems on Ships*

Another accomplishment for 2001 was the successful adoption of the International Convention on the Control of Harmful Anti-fouling Systems on Ships (AFS Convention). This treaty will prohibit the use of harmful organotins in ships' anti-fouling paints and establishes a mechanism to prevent the potential future use of other harmful substances in anti-fouling systems. The AFS Convention will enter into force twelve months after the date on which not less than twenty-five States representing at least 25 percent of the gross tonnage of the world's merchant shipping have ratified the instrument. An interagency working group is preparing the ratification package for submission to the Senate for its advice and consent.

3. *International Convention on Civil Liability for Bunker Oil Pollution Damage*

The International Convention on Civil Liability for Bunker Oil Pollution Damage was adopted in March 2001, and establishes a liability and compensation regime for bunker fuel

spills. Bunker fuel spills from non-tank vessels pose a substantial threat to the marine environment. While U.S. domestic law (Oil Pollution Act of 1990) addressed these types of spills, there was no such parallel in international law, until now. The Convention will enter into force one year after the date that eighteen States, including five States each with ships whose combined gross tonnage is not less than one million gross tons, have ratified it.

4. *Biennium Work Agenda*

The IMO continues work on other significant marine pollution issues in its biennium work agenda. One of the most prominent is the ongoing effort to prevent the introduction and spread of harmful aquatic organisms by ships' ballast systems. A diplomatic conference has been provisionally scheduled for late 2003 to adopt the new instrument. Meeting this date hinges on the development of an acceptable ballast water treatment standard, a task that is proving to be very difficult. The IMO's biennium work agenda also includes discussions on recycling of ships, prevention of air pollution from ships, and identification and protection of Special Areas and Particularly Sensitive Sea Areas.⁷⁴

C. UNCLOS DISPUTE SETTLEMENT

UNCLOS also establishes a dispute settlement system to promote compliance with its provisions and ensure that disputes are settled by peaceful means. As a part of that system, UNCLOS provided for the constitution of the International Tribunal for the Law of the Sea (ITLOS).

In 2001, ITLOS considered a request for provisional measures in a case involving Ireland and the United Kingdom (U.K.). The case concerns U.K. authorization of operations at a British nuclear facility near the coast of the Irish Sea, and transport through the Sea of fuel produced at the plant. Ireland contends that U.K. actions violated UNCLOS marine environment protection obligations, in addition to, *inter alia*, cooperation and impact assessment obligations. Pending constitution of an arbitral tribunal to hear the case on the merits, Ireland requested ITLOS to grant provisional relief based on the urgency of the situation. Specifically, Ireland requested ITLOS to order the U.K. immediately to suspend operation of the plant and to take certain other steps to ensure that no action would be taken that might prejudice the rights of Ireland. On December 3, 2001, ITLOS denied Ireland's request. ITLOS did, however, prescribe consultations between the Parties on several matters related to the dispute. Arbitration on the merits will follow.⁷⁵

VII. Trade and Environment

The year 2001 was a very busy year for trade and environment developments. While WTO-related activities captured a lot of the attention, the United States also pursued its trade and environment agenda in other fora, including in bilateral free trade agreements, at the OECD and in the Free Trade Area of the Americas negotiations.

A. WORLD TRADE ORGANIZATION (WTO)

At the World Trade Organization, Members both prepared for and launched new global trade talks on a broad range of issues, including the environment, at the fourth Ministerial

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

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

Conference in Doha, Qatar. Significant developments took place in sector-specific negotiations, under the WTO dispute settlement procedures, and in the Committee on Trade and Environment.

1. *Agriculture Negotiations*

In 2001, Members submitted numerous informal discussion papers, which built upon the forty-five proposals submitted in 2000, with regard to the agricultural negotiations. As in 2000, Members submitted no specific proposals to open for renegotiation the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), which specifies rights and obligations related to measures taken for health and safety purposes. However, the EU proposed using the negotiations to clarify the use of precautionary measures in the context of existing SPS rules. Environment, health, and safety-related issues of biotechnology and animal welfare have been raised in the negotiations by the United States and the European Union respectively, but there has been little support, if any, for addressing either issue in the negotiations. Other potential areas where environmental issues could be raised include the reduction of both export subsidies and trade distorting domestic supports, which reductions are considered to be two of the main objectives of the negotiations. Both of these areas offer opportunities for improved environmental protection to the extent that they, for example, result in more sustainable land use patterns or decrease pesticide use. The United States has identified these objectives as being "win-wins," meaning that both trade and environmental benefits could be realized.

2. *Committee on Trade and Environment and Environmental Aspects of the Doha Mandate*

The Committee on Trade and Environment (CTE) was created in 1995, following the Marrakesh Ministerial. The CTE met three times last year and continued its work program. The mandate of the CTE has been to make recommendations on rule changes necessary to the trading system to promote a mutually supportive relationship between trade and environment. However, that mandate was expanded at the Doha Ministerial, when Ministers instructed the CTE to act as a forum to identify and debate the environmental aspects of the negotiations to help achieve the objective of having sustainable development appropriately reflected.

During the CTE 2001 market access discussion, the focus remained primarily on the fisheries sector as Peru, the United States, Iceland, New Zealand, Australia, Chile, and the Philippines continued to press their proposal from the Seattle Ministerial to reduce environmentally harmful subsidies that contribute to over-fishing. This discussion resulted in a victory for those countries and their supporters at the Doha Ministerial where a commitment was made to launch negotiations on disciplining the use of harmful subsidies in the fisheries area. Such a negotiation had been a long time objective of members of the U.S. environmental community, an objective that the United States shared and worked for several years to achieve. The Doha Declaration also called for negotiations on reducing and/or eliminating tariff and non-tariff barriers to environmental goods and services, another long-time objective of the United States and an issue that has been under consideration by the CTE for many years.

Several of the multilateral environmental agreement (MEA) secretariats updated delegations on trade-related developments in MEAs, and in June the CTE held a session where UNEP and the WTO prepared papers for a discussion on the compliance and dispute settlement provisions in MEAs and at the WTO. The CTE also continued discussion of its work program and the relationship between the WTO and civil society. These discus-

sions paved the way for Doha, where Ministers agreed to a limited negotiating mandate on MEAs, specifically regarding the relationship between specific trade measures set forth in MEAs and existing WTO rules, for governments that are Parties to both agreements, and regarding procedures for enhancing regular information sharing between the WTO and MEA secretariats and the criteria for granting observer status. The Doha Declaration also instructs the CTE, by mid-2003, to focus discussion on three particular issues within its mandate (the effect of environmental measures on market access, the relevant provisions of the Agreement on Trade-related Aspects of Intellectual Property, and labeling requirements for environmental purposes) and to make recommendations on the desirability of negotiations on these issues.

The United States has traditionally used the CTE as a forum to create further momentum for its trade and environment agenda, and is expected to continue to do so in 2002. The United States will also continue to encourage other countries to conduct environmental reviews to consider and take fully into account the environmental implications of WTO negotiations. The Doha Declaration also reflected this idea, although the Declaration language is an acknowledgment of the efforts some Members are making, as opposed to a commitment for all countries to perform reviews. The Declaration does, however, provide for technical assistance and capacity building programs to be requested by WTO Members. The United States is also expected to identify and pursue further "win-win" opportunities where opening markets and reducing or removing subsidies can directly benefit both trade and environment, such as environmental goods and services and harmful fishery subsidies. Improving internal and external transparency is also expected to be pushed at the CTE to further the openness of the organization and involve NGOs in the workings of the organization.

The environment negotiations at Doha proved to be as difficult as anticipated, with environment proving to be one of the last issues resolved at the negotiating table. This occurred for several reasons, including that several EU Member States were unwilling to accept until the final moments the lack of consensus to pursue work on issue areas where countries feared that the EU had protectionist motivations, such as the use of precaution in international trade. In addition, several developing countries, like India, have historically opposed agreeing to pursue work on issues like environment until they are satisfied that their needs in areas such as implementation and technical assistance are met and their own market access interests would not be harmed.

3. Trade and Environment-Related Disputes

a. Shrimp-Turtle

In 1996, the Governments of Malaysia, India, Pakistan, and Thailand brought a WTO case against the United States on the importation of shrimp into the United States. In 1998, largely reversing the decision of the Panel, the Appellate Body, while not finding fault with the underlying U.S. law designed to protect endangered sea turtles (Section 609 of Public Law 101-162), found that the United States had discriminated in how it implemented the restrictions on imports of shrimp and shrimp products. In July of 1999, the United States revised its implementation procedures to comply with the findings of the Appellate Body in a manner that it believed did not undermine its commitment to protect the endangered species. In October of 2000, Malaysia requested that the WTO establish a panel to determine whether the implementation revisions made by the United States complied with the findings of the Appellate Body.

The United States was handed a victory in June of 2001, when its revisions to those implementing procedures were indeed determined to be in compliance. That victory was further reinforced in December of 2001, when the WTO Appellate Body upheld that June panel decision in an appeal by Malaysia. In its report the Appellate Body recognized both the additional revisions made by the United States to the shrimp-turtle guidelines to provide more due process to exporting nations and the efforts of the United States to negotiate MEAs with countries affected by the shrimp-turtle law.

b. Chrysotile Asbestos

In 2000, a WTO Panel found against Canada's claim that a French ban of chrysotile asbestos and products containing chrysotile asbestos was WTO-illegal, finding that the measure was justified under Article XX (General Exceptions) as a measure necessary to protect human health. The United States, as a third party, supported the WTO-consistency of France's asbestos ban, but not based on Article XX. In the U.S. view, banning asbestos, but not banning asbestos substitutes, did not amount to discrimination among "like products," so that there was no need for recourse to an Article XX exception. Canada appealed the panel decision to the WTO Appellate Body to no avail. The Appellate Body did, however, agree with the United States that asbestos was not "like" its substitutes—based in significant part on the health hazards created by asbestos—and so found that a measure targeting asbestos did not discriminate among "like products." Therefore, the Appellate Body did not rely on Article XX for its decision. Some commentators view the Appellate Body's discussion of "like products" and "less favorable treatment" as a suggestion of increased flexibility in assessing environmental measures. Others see it as a simple reassertion of past WTO jurisprudence.

c. Anticipating 2002 at the World Trade Organization

In 2002, the WTO Trade Negotiating Committee will establish the calendar for the negotiations agreed to at the fourth Ministerial Conference in Doha. WTO Members have agreed that negotiating proposals must be tabled by the next Ministerial meeting, planned for mid-2003 in Mexico City. For the environment, it is likely that the discussions will be difficult, as there is little consensus on the exact nature of the relationship between the trading system and environmental protection. While the historical division between developed and developing countries will likely continue, there will be additional pressure on countries like the United States and the European Union Member States to find consensus in areas such as fishing subsidies and the relationship between multilateral agreements and international trade obligations. WTO Members committed to January 1, 2005, as the deadline to complete the negotiations launched at Doha.⁷⁶

B. PLURILATERAL, REGIONAL, AND BILATERAL FORA

1. *Free Trade Area of the Americas Negotiations*

The thirty-four countries of the Free Trade Area of the Americas (FTAA) continued in 2001 to prepare draft text for the nine established negotiating groups (Agriculture, Market Access, Investment, Government Procurement, Services, Dispute Settlement, Intellectual

76. Additional information on the WTO is available on its Web site at <http://www.wto.org>.

Property, Competition Policy, Subsidies, Anti-dumping, and Countervailing Duties) to present to the Ministers at the April Ministerial, held in Argentina. Several of the negotiating groups also began to prepare for the launch of market access negotiations.

Environment continued to be a contentious area in 2001. The United States is still one of but a few countries supporting a discussion of the intersection of trade liberalization and environmental protection, despite agreement at the 1994 Miami Summit of the Americas by all FTAA countries to strive for mutually supportive economic and environmental policies. In April, the opposition to addressing environment in the FTAA culminated in a multi-hour discussion amongst the Ministers at the Buenos Aires Ministerial when the United States insisted on its right to table language in the investment negotiating group that would, as does Article 1114 of the North American Free Trade Agreement, encourage FTAA countries not to relax their environmental laws for the purposes of attracting investment. While most Ministers argued that investment obligations and environmental protection are not related topics, suggesting that the U.S. language was outside the scope of the investment chapter, the United States was able to get an agreement that any country could table text on any issue it deemed related to the negotiations. However, other countries emphasized their right to bracket such text for further discussion.

One of the most important outcomes from the Buenos Aires Ministerial was the agreement to release the draft consolidated negotiating text to the public. While the United States released detailed summaries of its negotiating positions in January of 2001, the release of the draft consolidated text in July of 2001 marked the first time a draft of a trade agreement of such magnitude had been released collectively by governments. The FTAA consolidated text was translated and posted on the FTAA Web site in the four official FTAA languages.

The FTAA Civil Society Committee continued to operate alongside the established negotiating groups. In November of 2001, the Committee issued a third open invitation, inviting citizens or organizations in the Hemisphere to provide their views on the FTAA. Since the FTAA does not have an environmental negotiating group, the United States successfully argued that all submissions that addressed environmental issues needed to be circulated to all of the nine established negotiating groups for review by the committee's negotiators. The United States also sought to establish discussion of civil society comments as a standard agenda item for each meeting of each of the negotiating committees. Most committees have agreed to do so. At the April meeting of the Trade Negotiating Committee, Ministers agreed to foster a process of increasing and sustained communication with civil society, to ensure that civil society has a clear perception of the development of the FTAA negotiating process.⁷⁷

2. Organization for Economic Cooperation and Development

In 2001, the Organization for Economic Cooperation and Development placed particular focus on issues related to sustainable development. In May of 2001, at the annual Ministerial, Ministers received recommendations on how the OECD could better address horizontal issues, such as sustainable development. Currently, several committees across the organization address environmental issues, including their relationship to trade and investment.

77. Additional information on the FTAA is available on its Web site at http://www.ftaa-alca.org/alca_e.asp.

Most relevant for trade and environment is the OECD Joint Working Party on Trade and Environment, which met twice in 2001, per its usual schedule. The Working Group has traditionally been a forum for discussing the environmental implications of trade policy, as well as the trade effects of environmental policy. In most cases, delegations are represented at the discussion table by both trade and environment experts. Over the years, this particular Working Group at the OECD has developed a significant focus on environmental assessments. In 2001, the Working Group successfully completed work on methodologies for assessing the environmental effects of trade liberalization in the services sector. Given the on-going services negotiations mandated by the Uruguay Round and the Bush administration's commitment to conduct an environmental review of the services negotiations in accordance with the Executive Order 13141, the product of the Working Group should make a significant contribution. The Working Group also compiled a synthesis of case studies examining national application of transparency and consultation procedures.

Building upon the emphasis placed on the development aspect of trade in the Doha Ministerial Declaration, the Working party at its November meeting agreed to explore the development dimension of trade and environment by analyzing how environmental measures may affect developing country exports. A workshop with developing countries is to be held in 2002.

The OECD Export Credit Group also touched on some important sustainable development issues. In 2001, the OECD Export Credit Group worked to develop common approaches for export credit agencies to follow when addressing the environmental factors associated with the projects that they may finance. (The current OECD Arrangement on Guidelines for Officially Supported Export Credits places limitations on the terms and conditions of government supported export credit financing so that competition among exporters is based on the price and quality of the goods and services being exported, rather than on the terms of the government-supported financing.) The United States has not yet supported the current proposal for common approaches, as it believes it to be inadequate in its present form. Pending a final agreement on common approaches, most Member governments are voluntarily implementing a draft proposal that includes monitoring and review of export credits for their environmental component.

The Trade Committee and its Working Party are also pursuing environmental issues in the course of their work on regional trade agreements and through the conduct of scheduled reviews of the regulatory structures of Member governments.⁷⁸

3. *Bilateral Agreements with Chile and Singapore*

In 2001, the United States continued to negotiate the bilateral free trade agreements launched in 2000 with Singapore and Chile.

With respect to the U.S.-Chile FTA negotiation, the environmental negotiators met regularly in 2001. Although the Bush administration was awaiting guidance from the U.S. Congress on how best to address the environment in the context of free trade agreements, U.S. and Chilean negotiators used their negotiating sessions to discuss their respective environmental commitments in other trade agreements, exchange information related to the conduct of environmental reviews, and begin to consider how the U.S.-Chile FTA could initiate or further cooperative efforts in the environmental area. With the passage of

78. Additional information on OECD activities is available on its Web site at <http://www.oecd.org>.

H.R. 3005 on Trade Promotion Authority in the House in early December, the United States and Chile are expected to engage on environmental text early in 2002.

The United States also released its draft environmental review of the U.S.-Chile FTA in November of 2001. The review was conducted in accordance with Executive Order 13141. The review discussed the U.S.-Chile bilateral relationship (including its economic relationship) and focused on particular sectors and transboundary issues related to the environment, which were considered relevant for an FTA between the United States and Chile. The regulatory review section provided the public with a summary of the negotiating issues and a review of the potential environmental effects, both positive and negative, of the draft FTA text. The review also contained several annexes, including an annex identifying major Chilean environmental laws and regulations. The draft review was made available for public comment at www.ustr.gov through a Federal Register Notice.

The United States launched its environmental review of the U.S.-Singapore FTA in late 2000. However, as with the Chile FTA, the Administration was awaiting negotiating guidance from the Congress, so the U.S.-Singapore FTA negotiations did not focus on environmental issues in 2001. The environmental negotiations, along with the other negotiating areas underway with Singapore, are expected to continue in 2002.

The Executive Branch also forwarded the U.S.-Jordan agreement to Congress for approval. The Jordan agreement, signed by President Clinton and King Abdullah in October of 2000, had highlighted the relationship between trade and environment by including four environmental provisions in the body of the trade agreement. The four provisions included an acknowledgment of the objective of sustainable development, a commitment to effective enforcement of national environmental laws, an agreement to strive to provide for high levels of environmental protection and to continuously improve those laws, and recognition that it is inappropriate to encourage trade by relaxing domestic environmental laws. The commitment to effective enforcement of national laws is justiciable under the dispute settlement mechanism of the agreement. On December 10, 2001, President Bush signed a proclamation that brought the U.S.-Jordan FTA into force on December 17, 2001.⁷⁹

VIII. Investment and the Environment

A. THE WORLD BANK

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

1. *Overview of Activities in 2001*

During 2001, environmental law and policy developments at the World Bank continued to focus on the ongoing review and reformulation of the "safeguard policies"⁸⁰ concerning

79. Additional information is available on the Web site for the Office of the United States Trade Representative at <http://www.ustr.gov>.

80. According to the Bank, the Safeguard Policies are those that "help ensure that Bank operations do no harm to people and the environment." In 1998, the World Bank Board of Executive Directors identified the

forestry, indigenous peoples,⁸¹ and involuntary resettlement. The Bank also undertook the conversion of the safeguard policy on cultural property through transforming Operational Policy Note (OPN) 11.03 into the framework of a formal operational policy (OP), and approved revisions to the existing policy on disclosure of information with a view to facilitating greater transparency and accountability in Bank support for development activities.⁸² In addition, following the release of the Report of the World Commission on Dams in November 2000, the Bank issued its position statement on the relevance of that report for the Bank's activities in the context of hydropower projects. The Bank also released a statement affirming the viability of the clean development and joint implementation mechanisms under the Kyoto Protocol.

a. Involuntary Resettlement

In December 2001, the Bank formally released OP 4.12 and BP 4.12 on Involuntary Resettlement, to replace Operational Directive (OD) 4.30, which had been the Bank's policy on involuntary resettlement since 1990. The Bank's review and reformulation of the involuntary resettlement policy arose out of recommendations made by the Bank's Operations Evaluations Department (OED) based on its study of resettlement in eight Bank-supported dam projects between 1984 and 1991.⁸³ Textual ambiguities in OD 4.30 regarding the purpose of resettlement and the means for effectively executing resettlement in Bank-supported projects was a source of particular concern among human rights and environmental groups. For this reason, the release of OP/BP 4.12 was anticipated by members of the international development community as a clarification of certain aspects of the previous instrument.

Between 1999 and 2001, the Bank circulated several drafts of what was to become OP/BP 4.12. The Bank held consultations in fourteen countries, solicited and received comments from non-governmental organizations (NGOs), national governments and other interested stakeholders around the world, and posted the final draft instrument on its Web site. Advocates of indigenous and other vulnerable groups have contended, however, that this process was inadequate because it did not effectively encompass the views of communities that had been the actual subjects of previous involuntary resettlement efforts.

ten most significant environmental operational instruments and designated them as Safeguard Policies. The safeguard policies are: Environmental Assessment, Cultural Property, Disputed Areas, Forestry, Indigenous Peoples (currently under revision), International Waterways, Involuntary Resettlement, Natural Habitats, Pest Management, and Dam Safety.

81. In 2001, the Bank solicited comments on the draft Operational Policy/Bank Procedure (OP/BP) 4.10 from external stakeholders through electronic consultations carried out in Spanish, English, and French via the Bank's Web site and through meetings with multilateral and bilateral institutions and in-country discussions with borrower governments, indigenous organizations, NGOs, and academic experts. These consultations began in July 2001 to continue to February 2002. The Bank plans to take into consideration all of these inputs in the final revision of the draft OP/BP 4.10 on Indigenous Peoples. OP/BP 4.10 will replace Operational Directive (OD) 4.20, which has codified the World Bank's Indigenous Peoples Policy since 1991. For a more detailed discussion on the draft OP/BP 4.10, see Gregory F. Maggio, *Environmental Law: World Bank*, 34 INT'L. LAW. 707, 730 (2000).

82. Time and space limitations do not permit further discussion of this important development in this note. The reader is directed to World Bank News Release No. 2002/070/S, *available at* <http://www.worldbank.org/kz/word/disclosure-eng.doc> (last visited July 3, 2002).

83. See World Bank Group, *Operations Evaluation Study: 17538* (July 2, 1998).

OP 4.12 affirms that involuntary resettlement should be avoided where feasible; that groups experiencing involuntary resettlement as a result of Bank-supported projects must be informed and consulted about their options and rights pertaining to resettlement and receives prompt and effective compensation. Preference should be given to land-based resettlement strategies for displaced groups with land-based livelihoods; in the context of involuntary resettlement, particular attention is to be focused on the needs of vulnerable groups among those displaced, identified as "especially those below the poverty line, the landless, the elderly, women and children, indigenous peoples, ethnic minorities or other displaced persons who may not be protected through national land compensation legislation." This articulation of "vulnerable groups" for special consideration reflects insights gained from the volume of research and experience since the 1992 United Nations Conference on Environment and Development, on the special developmental circumstances of women, indigenous peoples, children, and other groups traditionally marginalized in mainstream development decision-making.

Certain ambiguities from OD 4.30 remain with respect to objectives to pursue as part of involuntary settlement policy. Critics of the World Bank's resettlement policy assert that the objective articulated in paragraph 2(c) of OP 4.12, to restore living standard and livelihoods of displaced persons to pre-displacement or pre-project implementation levels, conflicts with the policy's objective that resettlement activities should be conceived and executed as sustainable development programs and that displaced persons should share in project benefits.

In addition, although paragraph 8 of OP 4.12 states that "achieving the policy's objectives entails paying particular attention to the needs of vulnerable groups 'including women,' indigenous peoples and other displaced persons who may not be protected through national land compensation legislation," the eligibility for benefits provisions in paragraphs 15 and 16 expressly differentiate between persons having formal legal title and those "having no recognizable legal right or claim to the land they are occupying." Paragraph 16 specifically provides that those groups having legal title are to be provided with compensation for the land they lose and other assistance. However, persons having no recognizable legal title are provided only with "compensation for loss of assets other than land."

b. Forestry

At the end of 2001, the Bank was finalizing the review of its forest sector policy, as encompassed in the Forest Policy Implementation Review and Strategy, with a focus on the role of that instrument in promoting the sustainable use of forest resources. The Bank had posted the forest sector strategy paper on its Web site in July 2001 for public comment. In December 2001, the Bank was preparing a final draft revision of the policy, OP 4.36, and anticipated posting that document on the World Bank Web site for public review in early 2002. After the public review period, the Bank will incorporate comments received and then forward the revised text to its Executive Board Committee on Development Effectiveness (CODE).

The Bank has indicated that the draft will concentrate on the following three overriding objectives: harnessing the potential of forests for sustainable reduction of poverty; the integration of forests into sustainable economic development initiatives; and protecting vital local and global environmental services and values contributed by forests. These objectives reflect the input provided by forest policy experts and other stakeholders at the Bank-IUCN

sponsored 2001 Technical Advisory Group (TAG) meetings.⁸⁴ Based on an important observation made in the January 2000 Bank OED report entitled, "A Review of the World Bank's 1991 Forest Sector Strategy and its Implementation,"⁸⁵ NGOs argued that any new Bank forest policy should encompass all World Bank activities that impact upon forests and not only those involving logging and other forest harvesting operations.⁸⁶ NGOs have continued to press for the realization of this OED recommendation, including in structural adjustment/program lending loans.⁸⁷ In response to this, the Bank has indicated that a broad, underlining principle in the proposed draft for the forest policy will be that the Bank proactively addresses impacts on forests from activities in other sectors and in economy-wide reform measures.

With the stated purpose of ensuring that Bank financial support to projects contributes to mitigating further forest loss and degradation, the draft OP/BP 4.36 will seek to replace the current World Bank Group blanket prohibition on support for commercial logging in primary moist tropical forest with a prohibition on financing support for timber harvesting in any type of environmentally or culturally critical forest. This proposed modification could set a precedent for management policies and practices among other development institutions as well as project country governments that have relied upon the Bank's technical resources and expertise in developing their own environmental standards.

c. Cultural Property

As part of the ongoing review of its operational instruments, the World Bank is currently reformulating its policy on protecting cultural property through the conversion of Operational Policy Note (OPN) 11.03 to OP 4.11. OPN 11.03 entitled "Management of Cultural Property in Bank-Financed Projects," was issued in 1986 to articulate the Bank's general policy on cultural property, to assist in such property's preservation and to avoid its destruction through Bank-financed projects.⁸⁸ In reconstituting OPN 11.03 as OP 4.11, the Bank has undertaken to affirm this general policy and to strengthen its effectiveness by integrating protection of cultural resources into the Bank's Environmental Assessment procedures.⁸⁹ Under OP 4.11, the Bank's policy on protecting and avoiding the elimination of cultural property will be a required part of the Environmental Assessment process.

Some notable features of OP 4.11 that affirm the content of OPN 11.03 are: that the material covered under the policy as "cultural property" is very broad, including man-made structures, sites and objects as well as natural features and landscapes having archaeological, historical, architectural, religious, aesthetic or other cultural significance; and that the host

84. For further discussion, see Gregory F. Maggio, *Environmental Law: The World Bank*, 35 INT'L LAW. 659, 700 (2001).

85. Operations Evaluations Department, World Bank, *A Review of the World Bank's Forestry Strategy and its Implementation* (Jan. 13, 2000).

86. "[I]n general, intersectoral linkages, crucial to the forest sector have not received much attention. The ESW (economic and sector work) in areas with the potential to affect forests—agriculture, transportation, industry, mining, poverty—do not adequately reflect the treatment of key forest issues." *Id.* at 6.

87. See Letter from Ian Johnson, Vice President and Head, Environmentally and Socially Sustainable Development Network, The World Bank, to GLOBE USA (Nov. 21, 2001), available at <http://www.globeusa.org/globeusa/wbforestresponse.html>.

88. World Bank, *Operational Policy Note No. 11.03 Management of Cultural Property in Bank Financed Projects*, para. 2 (1986).

89. See OP 4.01 Environmental Assessment.

country government need not register the cultural resources for the resource to be considered cultural property for purposes of the Bank policy's protections.⁹⁰

As noted above, OP 4.11 also contains elements that expand upon the text of OPN 11.03 by requiring borrowers to address impacts on cultural resources in proposed projects as an integral component of the EA process. In this context, the policy places various responsibilities directly upon the borrower, including: to inform the Bank of relevant requirements of host country laws relating to managing physical cultural assets; to identify physical cultural assets that are likely to be affected by the project; to identify appropriate mitigation measures where the project will likely have adverse impacts; and to consult with competent authorities, project-affected groups and relevant experts to document the presence and significance of physical cultural resources, and to assess potential impacts and explore mitigation options with these parties. Under draft OP 4.11, the details of the cultural resources findings must be disclosed along with other aspects of the EA. Dissemination of information regarding the locations of ancient burials and other archeological sites has at times contributed to the despoliation of such sites and their artifacts. Consequently, OP 4.11 includes the qualification that where the borrower in consultation with the Bank determines that "such disclosure would jeopardize the safety or integrity of the cultural resources involved," information about these resource can be left out of the EA made accessible for public comment.

Operational Policy 4.11 narrows the categories of material that are encompassed under the protection of the cultural property policy. The Bank clearly states in the introduction to OP 4.11 that cultural resources under the policy refer "exclusively to physical cultural resources" (emphasis in original), a distinction that was not made in OPN 11.03. This restriction could exclude from the policy's purview intangible cultural assets such as languages, oral traditions and histories, knowledge of the utilization of floral and faunal material for medicinal or other purposes, and ways of living.

The Bank has been conducting the revision of OPN 11.03 to OP/BP 4.11 in consultation with cultural resource and environmental assessment experts within the Bank and externally. The draft OP/BP 4.11 was posted for public information and comment on the Bank Web site in eight languages until the end of November 2001.⁹¹ Additionally, the Bank held in-country consultations on the draft OP 4.11 during 2001 in several borrower nations and presented the draft policy at a UNESCO convened meeting of culture field experts in the East Asia region, in China in October 2001.⁹² It is anticipated that the draft OP 4.11 will be submitted to the Bank's Executive Board in 2002 for final approval.

d. The World Commission on Dams Report

In November 2000, the World Commission on Dams (WCD) released its findings and recommendations on the impact of the financing of large dams in the report entitled "Dams and Development: A New Framework for Decision-Making" (Report).⁹³ At the time of the

90. Subject to the proviso in OP 4.11, and noted above that these cultural resources include only "physical cultural resources."

91. Arabic, Mandarin Chinese, English, French, Portuguese, Russian, Spanish, and Turkish.

92. These nations included Ethiopia, Ghana, Yemen, Tunisia, Turkey, Georgia, India, Mexico, Brazil, and Cambodia. The Bank also presented the draft OP 4.11 at a regional meeting that it convened in Kimberley, South Africa, in November 2001. That meeting was attended by government ministry representatives responsible for cultural issues from fourteen African countries.

93. World Commission on Dams, *Dams and Development: A New Framework for Decision-Making. The Report of the World Commission on Dams* (Nov. 16, 2000), available at <http://www.dams.org/report>.

Report's presentation on November 16, 2000, World Bank President James Wolfensohn welcomed the document and stated that he would take the Report back to Washington "so that its conclusions and recommendations could be fully studied by Bank staff and by the 182 governments that are the Bank's shareholders."⁹⁴

In July 2001, the World Bank issued a formal position statement on the WCD's study.⁹⁵ A number of NGOs, including some groups that had contributed to the WCD's findings, wanted the Bank to implement fully the Report's recommendations, and to forego all further support for dam projects until it did so.⁹⁶ The Bank's position statement stated that it considers the Report to be "a major contribution in defining the issues associated with large infrastructure projects in developing countries, and in engaging a wide variety of stakeholders in the debate," and pointed out differences between the WCD's recommendations and the World Bank's policies concerning these recommendations.⁹⁷

The Bank's position statement highlighted particular differences concerning project preparation and consultation, and indigenous peoples.⁹⁸ Whereas the WCD had recommended a multistage preparation and consultation process that entails participation and obtaining agreement among all stakeholders, the Bank stated that "in both developing and developed countries the State has the right to make decisions that it regards as being in the best interest of the community as a whole, and to determine the use of natural resources based on national priorities."⁹⁹ On the status of indigenous peoples whose lands and way of life could be impacted by a dam, the WCD proposed that indigenous and tribal populations should give their free, prior, and informed consent in order for the project to go forward. The Bank's response is that World Bank policies require "free and meaningful consultations with directly affected indigenous groups . . . prior to the initiation of detailed project planning"¹⁰⁰ but also that consideration of these views does not "infring[e] . . . on the right of the State to make decision which it judges to be the best solution for the community as a whole."¹⁰¹

e. Consultative Review of the Oil, Gas, and Mining Sectors

At a conference with NGOs and other members of civil society during the World Bank's annual meeting in Prague in September 2000, President James Wolfensohn indicated that the Bank would begin a comprehensive consultative review of the oil, gas, and mining sectors. This review would involve the participation of a wide range of stakeholders, including NGOs and other civil society representatives, governments, industry and academia, in a manner similar to the process undertaken by the WCD for dam projects.¹⁰² To follow

94. See World Bank News Release No. 2001/119/S (Nov. 16, 2002), available at http://www.unep-dams.org/documents.php?doc_id=125 (last visited July 3, 2002).

95. See ESSD Unit, World Bank, *The World Bank Position on the Report of the World Commission on Dams* (July 2001).

96. For example, see Press Release, International Rivers Network, Critics Demand Dam-Building Moratorium, Reparations for Past Damage (Nov. 16, 2000), available at <http://www.irn.org/wcd/1100.shtml>.

97. *Id.* at 4.

98. The Bank's position statement also discussed differences between Bank policy and the WCD on the issue of projects in international waterways. *Id.* at 4.

99. *Id.* at 3.

100. *Id.*

101. *Id.* at 4.

102. The first Latin America regional consultation workshop for the EIR is targeted for April 2002, to be held in Brazil. The EIR will invite 15 government, 25 civil society (including 5 from organized labor), 15 industry, 10 World Bank, and 5 academia and other interest representatives to attend this workshop.

up on this commitment, in July 2001, Mr. Wolfensohn appointed Dr. Emil Salim, former Indonesian Minister for Population and Environment to head this Extractive Industries Review (EIR).¹⁰³ Like the WCD, which also originated out of a World Bank initiative, the EIR is an independent organ with its own secretariat based in Jakarta, Indonesia. The EIR will be conducted until June 2003 and will culminate in a final report to be communicated to the World Bank and the public.

f. Prototype Carbon Fund

The Bank released a statement on the occasion of the seventh conference (Marrakech conference) of the parties to the United Nations Framework Convention on Climate Change (UNFCCC) that the Bank initiated "Prototype Carbon Fund (PCF)" affirmed the viability of the clean development mechanism and joint implementation tools established under the Kyoto Protocol regime.¹⁰⁴ At the time of the Marrakech conference, the Bank launched its first annual PCF report and announced that it had negotiated projects in Latvia, Chile, and Uganda. The Uganda West Nile Electrification Project is the first clean development mechanism transaction in an African country.

2. *Looking Forward to 2002*

As noted above, the Bank expects to complete revisions to its forest and cultural property policies in 2002. In addition, the Bank will continue to pursue its Extractive Industries Review, among other efforts.¹⁰⁵

IX. NAFTA and the Environment

The North American Free Trade Agreement (NAFTA) regime generated several significant environmental developments in 2001.¹⁰⁶ The following discussion highlights activities under the Commission for Environmental Cooperation (CEC) and with regard to investor-state disputes under Chapter 11 of the NAFTA.

A. THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION

The CEC was established in 1994 under the auspices of the North American Agreement on Environmental Cooperation (NAAEC), commonly known as the environmental-side agreement to the NAFTA. The CEC is composed of three parts: the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC).

The Council consists of the three cabinet level equivalent environment officials from the three countries, and meets every June. The Secretariat, located in Montreal, carries out the priorities and program set out by the Council. In addition, the NAAEC states that each country may have a National Advisory Committee (NAC) and/or a Governmental Advisory Committee (GAC). The function of these committees is to advise their respective country's

103. See World Bank News Release No. 2002/029/S, World Bank Group Appoints Dr. Emil Salim to Head Extractive Industries Review Consultative Process (July 23, 2001).

104. For further information, see World Bank News Release No. 2002/118/S, Prototype Carbon Fund (PCF) shows that Kyoto Protocol Works (Nov. 2, 2001).

105. Additional information on Bank policy and activities is available at <http://www.worldbank.org> (last visited July 3, 2002).

106. North American Free Trade Agreement, 32 I.L.M. 605 (1993).

Council Representative. Not unlike the JPAC, NACs consists of representatives of academia, private industry, and non-governmental organizations. The United States is currently the only Party to have both a NAC and a GAC. The U.S. GAC consists of representatives of state, local, and tribal governments from across the country. The U.S. NAC and GAC meet three to four times annually. The U.S. EPA Administrator appoints their members.

The JPAC is comprised of fifteen members, five from each of the three Parties to the Agreement. Members come from academia, private industry, and non-governmental organizations. They meet four times annually to provide advice to the Council and to consult with the public on CEC matters. The President appoints the JPAC members that represent the United States.

The current Program Plan of the CEC encompasses four areas: Environment, Economy and Trade; Conservation of Biodiversity; Pollutants and Health; and Law and Policy. In addition, the Secretariat works in areas such as public participation, public submissions on enforcement matters, preparing reports under the agreement, and administrating the North American Fund for Environmental Cooperation (NAFEC). The current funding for the Secretariat is U.S. nine million dollars, three million from each country.

1. *Developments in 2001*

At the 2001 Council Session hosted by Mexico in Guadalajara, the Council set directions for the work of the CEC over the next few years, building upon the current Program Plan, adding new initiatives, such as water and hazardous waste, and developing a framework for the CEC based on the following principles: gathering, compiling, and sharing high-quality environmental information; promoting the use of market-based approaches; cooperating regionally in the implementation of global commitments; building capacity for stronger environmental partnerships; strengthening strategic linkages to improve sustainability; and promoting public participation in the CEC's work. Some of the main achievements of the CEC during 2001 are as follows.

a. Biodiversity Conservation Program

This year, the Council formed a Biodiversity Conservation Working Group to provide guidance and direction to the CEC efforts to promote biodiversity conservation in North America. In addition, the Secretariat published an interactive map of the most ecologically important and threatened regions in North America.

b. Pollutants and Health Program

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

On July 20, 2001, the CEC released *Taking Stock: North American Pollutant Releases and Transfers—1998*. For the first time, the report has a special summary and a Web site to search for information related to the report.

In addition to the PRTR, the CEC's North American Air Quality Program undertakes projects designed to facilitate tri-national coordination in air quality management and to

develop technical and strategic tools for improved air quality in North America. In 2001, the Council committed to develop air emission inventories for North America.

At the 2001 Session, the Council also reaffirmed its commitment to work on Children's Environmental Health, and approved the Terms of Reference for an Expert Advisory Board. In June 2001, the CEC co-sponsored the first national workshop regarding Children's Environmental Health in Mexico. A follow-up tri-lateral workshop occurred in November 2001, to develop a cooperative agenda on Children's Environmental Health in North America.

c. Law and Policy Program

The North American Working Group on Enforcement and Compliance Cooperation, composed of senior-level environmental enforcement officials from the three countries, prepared a special Report on Enforcement Activities, which focuses on three enforcement issues: compliance promotion; compliance verification (inspection); and measurement of program results. The report also looks at cooperative initiatives carried out through the CEC.

d. Article 13 Initiatives

NAAEC's Article 13 allows the Secretariat to prepare a report to Council on any matter within the scope of the annual work program. Currently, the Secretariat is working on a report on "Electricity and the Environment." The objective of the report is to determine what policies are needed to ensure that the transformation of the electricity market promotes sustainable development; and that it generates both environmental and economic benefits.

In November 2001, the CEC organized a symposium where the links between electricity and the environment were discussed. At the symposium, the Secretariat listed four areas of cooperation to ensure environmental and economic benefits as the electricity sector evolves in North America: cooperation on renewable energy; market-based approaches; coordination in environmental impact assessments; and comparable air emission inventories.

e. Citizen Submissions under Articles 14 and 15

Articles 14 and 15 of the NAAEC establish a process whereby the CEC Secretariat may consider submissions from an individual or a non-government organization that a Party to the Agreement is failing to enforce effectively its environmental law. The Agreement and guidelines establish criteria and procedures for the review of any such submissions.

At the 2001 Session, the Council considered JPAC's "lessons learned" report regarding the review of Articles 14 and 15 submission processes, and agreed to take action on many of JPAC's recommendations, including that a notification and the Secretariat's reasoning regarding a recommendation to develop a factual record will be posted in the registry five working days after the Secretariat has notified the Council. Also, the Council committed to provide a public statement of its reasons whenever it votes not to instruct the Secretariat to prepare a factual record, and make best efforts to ensure that submissions are processed in a timely manner with the goal that the process will be completed in no more than two years following the Secretariat's receipt of a submission.

In 2001, three new submissions were filed, two concerning Mexico, and one concerning Canada. Three files were closed: two submissions were dismissed under Article 14(1) (SEM-01-002, SEM-01-003); one was terminated under Article 15(1) (SEM-98-003). In addition,

the Council unanimously instructed the Secretariat to prepare five factual records with respect to the following submission:

- SEM 97-006: The Submitter alleges that the Government of Canada is failing to apply, comply with and enforce the habitat protection sections of the Fisheries Act and CEEA (Canadian Environmental Assessment Act).
- SEM-98-004: The Submission identifies the systemic failure of the Government of Canada to enforce Section 36(3) of the Fisheries Act to protect fish and fish habitat from the destructive environmental impacts of the mining industry in British Columbia. Sections 36(3) and 40(2) of the Fisheries Act make it an offence to deposit a toxic substance in water that is frequented by fish.
- SEM-98-006: The Submission alleges that the United Mexican States is failing to enforce effectively its environmental laws with respect to the establishment and operation of a shrimp farm located in Isla del Conde, Municipality of San Blas, Nayarit, Mexico.
- SEM-99-002: The Submitters allege that the United States Government is failing to enforce effectively Section 703 of the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 703–712, which prohibits the killing of migratory birds without a permit.
- SEM 00-004: The Submitters allege that the Government of Canada is in breach of its commitments under NAAEC to effectively enforce its environmental laws and to provide high levels of environmental protection. They allege that the Fisheries Act is routinely and systematically violated by logging activities undertaken by British Columbia.

Also in 2001, the Secretariat reviewed two submissions in accordance with Article 15(1), in light of the response provided by Mexico (SEM 97-002 and SEM 01-001), and requested a response from Mexico regarding submission SEM 00-006, in accordance with Article 14(2). The Secretariat recommended to the Council to make public the factual record concerning submission SEM 98-007, regarding an abandoned lead smelter in Tijuana, Baja California, Mexico (*Metales y Derivados*). The Secretariat also recommended the development of a factual record for submission SEM 00-005, in which the submitters allege that Mexico has failed to enforce effectively the General Law of Ecological Equilibrium and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente—LGEEPA*) in relation to the operation of the company Molymex, S.A. de C.V. (*Molymex*) in the town of Cumpas, Sonora, Mexico.¹⁰⁷

2. *Looking Toward 2002*

The ninth regular session of the Council of the CEC and parallel events will take place on 17–19 June 2002, in Ottawa, Canada. During its session, the Council will examine opportunities and challenges for enhancing North American Environmental Cooperation and identify priorities for 2003 and beyond. In parallel to the regular session of the Council, the JPAC will hold a regular session, including roundtable discussions on education and capacity-building opportunities for the Sound Management of Chemicals, as well as a session on NAFTA Chapter 11.¹⁰⁸

107. A public registry providing the full text of all submissions, Party responses, and factual records as well as the Submissions Guidelines is available at <http://www.cec.org> (last visited July 3, 2002).

108. Additional information is available at <http://www.cec.org> (last visited July 3, 2002).

B. INVESTOR STATE ARBITRATION

1. *Introduction*

Chapter 11 of NAFTA requires that Canada, the United States, and Mexico each meet certain standards in relation to foreign investment, including granting national treatment to foreign investors and only expropriating foreign investments for a public purpose and with adequate compensation. If a State fails to meet its obligations under Chapter 11, a foreign investor protected under the Agreement may seek compensation from the State in binding arbitration for any injury suffered. To date, twenty-two arbitrations have been initiated.

Several recent cases have involved environmental measures, and concerns have been expressed regarding the impact of Chapter 11 on the ability of the NAFTA States to regulate in the interests of environmental protection.¹⁰⁹ Lack of transparency in the dispute settlement process has also raised concerns.

C. DEVELOPMENTS IN 2001

1. *Transparency*

The basic model for Chapter 11 is private arbitration. The entire process can operate in secrecy and most of the arbitrations do. The prospect of issues involving complex political tradeoffs regarding important public policies being resolved through a process immune to public scrutiny has been a primary concern of critics of Chapter 11.¹¹⁰ Chapter 11 provides little in the way of guidance on transparency issues. In July 2001, the Free Trade Commission, composed of the trade ministers of the three NAFTA States, adopted an Interpretative Note addressing transparency, which provides, in part, as follows:

Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

- I. Confidential business information;
- II. Information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
- III. Information that the Party must withhold pursuant to the relevant arbitral rules, as applied.¹¹¹

The commitment to improved transparency expressed by the Free Trade Commission in the Interpretive Note represents progress toward a more open, regular, and accountable process. Many issues, however, remain unresolved. It is unclear to what degree disclosure of written submissions and interim orders without the consent of the investor promised in

109. E.g., Howard Mann & Katherine von Moltke, *NAFTA's Chapter 11 and the Environment: Addressing the Impact of the Investor-State Process on the Environment* (1999), available at <http://www.iisd.org/trade/chapter11.htm> [hereinafter Mann & von Moltke]; and International Institute for Sustainable Development, *Private Rights, Public Problems: A Guide to NAFTA's Chapter on Investor Rights* (2001), available at http://www.iisd.org/trade/private_rights.htm.

110. E.g., Mann & von Moltke, *supra* note 109, at 50–61.

111. *NAFTA Free Trade Commission: Notes of Interpretation of Certain NAFTA Provisions* (July 31, 2001), available at (last visited July 3, 2002) [hereinafter FTC Interpretive Note]. Where the Free Trade Commission established under NAFTA has interpreted a provision of NAFTA, the interpretation is binding on arbitral tribunals (NAFTA Article 1131). The FTC Interpretive Note also provided an interpretation of the minimum standard of treatment to be given investors under Article 1105.

the Note is consistent with the Chapter. Even giving full effect to the Interpretive Note, hearings may not be open, nor full transcripts available. Also, no commitment is undertaken by the NAFTA States with respect to disclosure of information regarding proceedings prior to the formal commencement of arbitration.

The arbitral rules under Chapter 11 do not expressly create a right for third parties to participate in arbitrations and such participation is not addressed in the Interpretive Note. However, in January 2001, a Chapter 11 tribunal recognized its power to permit participation by third parties as *amicus curiae*. In *Methanex*,¹¹² the Methanex Corporation, a Canadian corporation that produces the gasoline additive methyl-tert-butyl-ether (MTBE), is challenging an Executive Order by the Governor of the State of California requiring the removal of MTBE from gasoline by no later than the end of 2002 in the interests of protecting health and the environment. Methanex is claiming that the order is tantamount to expropriation of its business and that the manner in which it was enacted and implemented violated the minimum standard of treatment guaranteed by Chapter 11.

The International Institute for Sustainable Development (IISD), Communities for a Better Environment, the Blue Water Network of Earth Island Institute, and the Center for International Environmental Law have sought to intervene in the arbitration arguing that the case could have significant implications for the NAFTA States' ability to enact environmental protection legislation. They argue that they can bring an important and distinctive perspective to the proceedings; and their participation would be important to the public acceptance of the Chapter 11 process. In deciding that it had power to allow *amicus curiae* participation, the tribunal recognized the importance of the public interest in relation to the issues before them.¹¹³ The tribunal has not yet decided if it will exercise its discretion to permit *amicus curiae* to participate.

2. Substantive Obligations

In August 2000, a Chapter 11 tribunal found expropriation had occurred in the *Metalclad* case. Metalclad Corporation, a U.S. investor, had sought to build and operate a hazardous waste disposal facility in Mexico. Ultimately, the local municipal authorities issued an order prohibiting the substantially completed facility from being opened, in part, because a municipal building permit had not been issued. Subsequently, the state government issued an Ecological Decree under which an ecological preserve was to be established that included the investor's site. The Decree would have had the effect of permanently foreclosing the operation of the facility on the proposed site. The Chapter 11 tribunal found that the municipal order was based on inappropriate grounds and made without due process in breach of the requirement to provide fair and equitable treatment in accordance with international law. It held that both the order and the Ecological Decree constituted expropriation of the investor's investment.

112. *Methanex Corp. v. United States* (Notice of a Submission to Arbitration filed Dec. 3, 1999) [hereinafter *Methanex*], Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amicus Curiae" (Jan. 15, 2001) [hereinafter *Methanex Amicus Decision*]. The same conclusion was reached in *United Parcel Service of America Inc. v. Canada*. *United Parcel Service of America Inc. v. Canada* (Notice of Intent to Arbitrate filed Jan. 19, 2000), Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae (Oct. 17, 2001).

113. *Methanex Amicus Decision*, *supra* note 112, at para. 49; *UPS Amicus Decision*, *id.* at para. 70. This position was taken by the United States with the support of Canada in *Methanex*.

In awarding damages, the tribunal declined to order an amount for future profits to be paid. Because the facility had never been in operation, future profits were too speculative. It limited its award to U.S.\$16.685 million, which was the amount necessary to compensate for the amount spent by Metalclad directly on the facility.¹¹⁴

In 2001, the British Columbia Supreme Court overturned the tribunal's finding of expropriation based on the municipality's denial of the right to operate the facility and its finding that the investor had not received the minimum standard of fair and equitable treatment. The court found no basis to set aside the tribunal's alternative finding that there was expropriation based on the Ecological Decree.¹¹⁵

D. LOOKING TO 2002

The approach taken by tribunals so far sets a threshold requirement for a compensable expropriation under Article 1110, to screen out many potential complaints regarding economic regulation by the state.¹¹⁶ Tribunals have consistently held that "tantamount to nationalization or expropriation" means only "equivalent" consistent with the customary international law standard.¹¹⁷ No case to date has been a true test of how Article 1110 would apply to a legitimate, non-discriminatory environmental protection measure having a substantial impact on the operations of a foreign investor short of eliminating the operations altogether, as in *Metalclad*.

In the coming year, this issue may be addressed in the decision on the merits in *Methanex*. Prior to that, likely early in the year, the tribunal in *Methanex* will make a decision as to whether the IISD and others will be permitted to participate as *amicus curiae* and on what terms. Without the consent of the investor, which to date has not been provided, any *amicus curiae* will not be able to attend hearings and their access to information will be limited. Nevertheless, the decision on this issue may have significant implications for the openness and accountability of the NAFTA Chapter 11 process. Finally, the Federal Court of Canada will hand down its decision in its review of the *S. D. Myers* award,¹¹⁸

114. *Metalclad Corp. v. The United Mexican States*, Award of Aug. 30, 2000 (Case No. ARB (AF)/97/1) reproduced in ICSID Review—FOREIGN INVESTMENT LAW J. [hereinafter *Metalclad*] (this was subject to a judicial review which varied the arbitral tribunal's award in some respects; see *Mexico v. Metalclad Corp.* (2001) B.C.J. No. 950 (QL), supplementary reasons (2001) B.C.J. No. 2268 (S.C.) (notices of abandonment of appeal filed by both parties Oct. 30, 2001 [hereafter *Metalclad Review*] at paras. 113–129).

115. *Metalclad Review*, *supra* note 114, at para. 105.

116. *S. D. Myers, Inc. v. Canada*, Partial Award, at para. 282.

117. *Id.* at para. 181. Though the scope of the traditional customary international law exception for state action in the exercise of its "police powers" is unclear given the decision of the tribunal in *Pope & Talbot Inc. v. Canada*, Interim Award (June 26, 2000), at paras. 96, 99.

118. In *S. D. Myers*, the tribunal considered a complaint by a U.S. investor regarding a temporary Canadian ban on the export of PCBs, which precluded the investor from offering its PCB remediation services in Canada. The investor argued that the ban was contrary to Canada's national treatment obligation in Chapter 11. The tribunal determined that Canadian businesses providing PCB remediation services in Canada and the investor providing the same services in the United States competed for the same customers and that the ban on PCB exports to the United States treated the investor and its Canadian competitors differently in fact.

In determining whether the PCB export ban could be justified, the tribunal took note of the recognition in NAFTA, the NAAEC and the principles that it affirms (including the Rio Declaration) of the principles that: States have the right to establish high levels of environmental protection; states should avoid creating distortions to trade; and environmental protection and economic development can and should be mutually

which may shed some further light on the ability of the NAFTA States to discriminate against foreign investors in the interests of environmental protection.¹¹⁹

supportive. *S. D. Myers Inc. v. Canada*, Partial Award (Nov. 13, 2000), at para 247. Notice of application to set aside the award was filed with Federal Court of Canada on February 8, 2001 (Court file T-225-01) and is currently pending.

In light of these considerations, the *S. D. Myers* tribunal found that Canada had acted to impose the ban on PCB exports with a view to ensuring the long-term viability of the Canadian industry, in part, to sustain its ability to process PCBs within Canada and that this was a legitimate goal consistent with the environmental protection objectives of the Basel Convention to which Canada, but not the United States, is a party. The tribunal nevertheless determined that the ban was not an appropriate way to accomplish this goal. It found that the ban could not be justified on environmental grounds and that its real purpose was to protect the investor's Canadian competitors from competition. Other methods could have been used that would have been consistent with Canada's national treatment obligation and the Basel Convention. Consequently, it held that the export ban was in violation of Canada's obligation to provide national treatment.

119. Additional information is available at <http://www.iisd.org/default.asp>.

