

International Environmental Law

JOHN BARLOW WEINER, GILBERT BANKOBEZA, KITTY BLOCK, AMY FRAENKEL,
TERESA HOBGOOD, ALICE MATTICE, DAVID W. WAGNER*

There were numerous developments for international environmental law and policy in 2002. This article briefly discusses some of the more noteworthy. This year, in keeping with the effort to streamline the year-in-review overall, the International Environmental Law Committee has taken this more focused approach, rather than attempt a more comprehensive reporting effort. In light of this new approach, a list of web links is provided at the end of the article to facilitate efforts to find out more about developments with respect both to the instruments and fora discussed in this article and those not addressed this year.

I. World Summit on Sustainable Development

The World Summit on Sustainable Development (WSSD) occurred in the late summer of 2002 in Johannesburg, South Africa.¹ The WSSD marked the 10th anniversary of the United Nations Conference on Environment and Development (UNCED or Earth Summit) held in Rio de Janeiro, Brazil in 1992. By resolution in December 2000, the United Nations General Assembly authorized the WSSD, as a ten-year review of UNCED at the summit level, to reinvigorate the global commitment to sustainable development.² In accordance with the resolution, the WSSD addressed areas requiring further efforts to

*Any views or opinions expressed in this text are those of the authors in their personal capacities, and do not necessarily represent the views of the organizations for which they work. John Barlow Weiner (chapter editor and discussions of WSSD and Basel Convention) is an attorney with Ropes & Gray. Gilbert Bankobeza (Montreal Protocol discussion) is Senior Legal Officer with the Montreal Protocol Secretariat. Kitty Block (International Whaling Commission discussion) is Special Counsel to the United Nations and Treaties Department of the Humane Society of the United States. Amy Fraenkel (Dolphin Protection Consumer Information Act discussion) is Democratic Counsel for the Oceans, Atmosphere and Fisheries Subcommittee of the U.S. Senate Committee on Commerce, Science and Transportation. Teresa Hobgood (CITES discussion) is Senior Policy Advisor, Bureau of Oceans and International Scientific Affairs, U.S. Department of State. Alice Mattice (trade and environment discussion) is Director for Trade and Environment Policy Planning, Office of the U.S. Trade Representative. David W. Wagner (climate change discussion) is an attorney with Beveridge & Diamond, P.C.

1. See generally United Nations, *Johannesburg Summit 2002*, available at <http://www.johannesburgsummit.org> (last visited May 18, 2003).

2. See G.A. Res. 55/199, U.N. GAOR, 55th Sess., U.N. Doc. A/55/582/Add.1 (2000).

implement Agenda 21: the agenda for sustainable development into the 21st century,³ which is a broad blueprint for government actions, including investment in education, natural resource conservation, and economic development, intended to achieve the goal of sustainable development in the 21st century, and other outcomes of UNCED. The WSSD agenda focused both on particular environmental sectors, such as forests, oceans, global climate, energy, and fresh water, and on cross-sectoral issues, such as economic conditions, new technologies, and globalization. The WSSD produced two negotiated documents: a Plan of Implementation (Plan) and a four-page political statement called the “Johannesburg Declaration on Sustainable Development (Declaration),” which endorsed the Plan.⁴

While the Declaration calls upon the international community to address “poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base for economic and social development” as the “overarching objectives of, and essential requirements for sustainable development,” the Plan establishes more specific commitments, including “targets, timetables and partnerships” to achieve certain results, generally by 2015.⁵

Some of these commitments reaffirm prior commitments made in the U.N. General Assembly’s Millennium Declaration in 2000 to make substantial strides to address such basic needs as access to food and water, reduction of maternal mortality, providing primary schooling for children, and reversing the spread of HIV/AIDS. The Plan also establishes some new targets to address additional issues, including access to basic sanitation, fish stock management, and development of alternatives to ozone depleting substances. It also calls on governments to make substantial progress by 2005 on development and implementation of national sustainable development strategies. With respect to topics for which governments could not agree upon targets and timetables, the Plan includes more broadly stated goals, including with respect to increased renewable energy sources: accelerated movement toward sustainable consumption and production: production and use of chemicals to minimize significant adverse effects on human health and the environment: phase out of sources of human exposure to lead: and corporate environmental and social responsibility. The Plan also identifies education as a critical means to promote sustainable development and proposes establishment of a decade of education for sustainable development beginning in 2005.

The Plan recognizes the need for significant new financial resources to implement these commitments. Though it does not establish any such new financial commitments, it refers to prior commitments (such as those made at the March 2002 Monterrey Conference on Financing for Development), encourages countries to increase existing commitments, and calls on countries to reduce unsustainable debt burden through actions including debt relief.

3. United Nations, Division for Sustainable Development, *Agenda 21*, available at <http://www.un.org/esa/sustdev/documents/docs.htm> (last visited May 25, 2003).

4. See Johannesburg Declaration on Sustainable Development, adopted Sept. 4, 2002, in REPORT OF THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT at 1, U.N. Doc. A/CONF.199/20, U.N. Sales No. E.03.II.A.1 (2002), available at http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf (last visited May 24, 2003) [hereinafter Johannesburg Declaration]; see Plan of Implementation of the World Summit on Sustainable Development, adopted Sept. 4, 1992, in *id.* at 7. Numerous discussions and analyses of the Summit have been released, including the Report of the ABA Delegation to the Summit. United Nations, *Report of the ABA Delegation to the Summit*, at http://www.abanet.org/inlaw/divisions/public/wssd_delegation.doc.

5. Johannesburg Declaration, *supra* note 4, at 2–3.

In addition to these instruments, non-negotiated partnerships for sustainable development (Type II initiatives) among and between commercial, non-profit, and governmental entities were a major focus of the WSSD. Aimed at implementing Agenda 21 and intended to supplement the commitments agreed to by governments, approximately 250 such partnerships have been announced.⁶ They address a wide range of sustainable development issues in regions throughout the world.

While governments reaffirmed their commitment to the Commission on Sustainable Development (CSD) in its role as the focal point for international review of progress toward sustainable development, the Plan also calls for the CSD to contribute more to the process, especially by addressing proactive mechanisms to enable sustainable development and ways to overcome obstacles to it. Discussions regarding the future role of the CSD will be among the topics of interest in 2003. The first meeting of the CSD following the WSSD is scheduled for April 28 to May 9, 2003 in New York City. In addition, efforts to implement and develop Type II initiatives to promote sustainable development will continue in 2003 and may be a particular focal point of activity for the United States and interested domestic stakeholders.

II. Climate Change: The Kyoto Protocol

In December 1997, representatives from all the parties to the United Nations Framework Convention on Climate Change (UNFCCC) completed negotiations for the Kyoto Protocol,⁷ an agreement establishing legally binding emission reduction commitments for six greenhouse gases.⁸

The Kyoto Protocol will enter into force when ratified by at least fifty-five parties, including enough Annex I (developed country) parties to account for at least 55 percent of total 1990 carbon dioxide emissions of these parties. At the end of 2002, 100 parties had ratified the Kyoto Protocol and ratification by developed country parties accounted for 43.9 percent of 1990 carbon dioxide emissions.⁹ Of remaining countries, only two, the United States and Russia represent a significant enough share of 1990 emissions to reach the 55 percent threshold for entry into force.¹⁰ The Bush administration stated in 2001 that the United States would not ratify the Kyoto Protocol.¹¹

6. See United Nations, Division for Sustainable Development, *Partnerships for Sustainable Development*, available at <http://www.un.org/esa/sustdev/partnerships/partnerships.htm> (last visited May 18, 2003).

7. United Nations, *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Conference of the Parties, 3rd Sess., U.N. Doc. FCCC/CP/1997/L.7/Add.1 (1997), available at <http://unfccc.int/cop3/> (last visited May 25, 2003) [hereinafter *Kyoto Protocol*].

8. The gases covered by the Kyoto Protocol are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), sulfur hexafluoride (SF₆), perfluorocarbons (PFCs), and hydrofluorocarbons (HFCs). See *id.* at Annex A.

9. See United Nations, Framework Convention on Climate Change, *Kyoto Protocol, Status of Ratification*, at <http://unfccc.int/resource/kpstats.pdf> (last modified Mar. 20, 2003). This site lists the countries that have ratified the Kyoto Protocol. "Ratification" of the Protocol could also include acceptance, approval or accession.

10. The United States is responsible for 36.1 percent of 1990 emissions and the Russian Federation is responsible for 17.4 percent. Ratification is also pending in several, mostly smaller, countries; all of these countries together, however, are not sufficient for reaching the 55 percent mark. *Id.*

11. In February 2002, President Bush announced a new domestic initiative for addressing greenhouse gas (GHG) emissions, which is to be issued in final form early in 2004. Press Release, Office of the Press Secretary, President Announces Clear Skies & Global Climate Change Initiatives (Feb. 14, 2002), available at <http://www.whitehouse.gov/news/releases/2002/02/print/20020214-5.html> (last visited May 18, 2003). The centerpiece of the initiative is a focus on reducing emissions through improvements in efficiency. To achieve this,

In November 2002, the eighth Conference of the Parties (COP-8) to the UNFCCC and the seventeenth sessions of the COP's Subsidiary Body for Implementation (SBI) and Subsidiary Body for Scientific and Technological Advice (SBSTA) were held in New Delhi, India. This meeting marked the first Conference of the parties since November 2001, when delegates completed three years of negotiations on the operational details of the Kyoto Protocol and adopted the Marrakesh Accords to the Bonn Agreements. Representatives from 167 parties at COP-8 began a new phase of negotiations focused on implementation of the Marrakesh Accords and UNFCCC issues.¹²

At COP-8, most issues were deferred for future consideration and were relatively minor compared to those in the Bonn Agreement and Marrakech Accords. Nonetheless, COP-8 made some advancement. Notably, the parties adopted the Delhi Ministerial Declaration on Climate Change and Sustainable Development (Delhi Declaration).¹³ The Delhi Declaration largely underscores principles established in the UNFCCC and the theme adopted at the WSSD earlier in the year.¹⁴

While it does not call for a dialogue on broadening commitments, the Delhi Declaration strongly urges the parties that have ratified the Protocol to push others to ratify. It calls for policies and measures specific to each country's conditions; integration of climate change objectives into national sustainable development strategies; and implementation of UNFCCC commitments according to parties' common but differentiated responsibilities, development priorities and circumstances. The Delhi Declaration stresses adaptation, the exchange of information, and consideration of developing country concerns arising from the adverse effects of climate change and implementation of response measures. It further calls for development, dissemination, and investment in innovative technologies; the strengthening of technology transfer, as well as improved energy access; diversification of energy supplies; and an increase in the use of renewable energy. It also stresses the need for Annex I parties to take the lead and further implement their commitments under the

the proposal has adopted a voluntary "greenhouse gas intensity" reduction target of 18 percent for the United States over the next ten years. The initiative's strategy to limit or reduce emissions is a departure from Kyoto Protocol's approach of an "absolute" target requiring emissions reduction by a specified amount below an agreed upon 1990 baseline. The Administration's strategy establishes a target for reducing GHG intensity, defined as the ratio of GHG emissions to economic output expressed in gross domestic product. To achieve this, the Administration's initiative also calls for a dramatic expansion of an existing voluntary reporting program. Under the current program, organizations voluntarily submit information on their GHG emissions reduction efforts and the information is entered into a public registry.

12. See generally United Nations, Framework Convention on Climate Change, *Eighth Session of the Conference of the Parties*, available at <http://unfccc.int/cop8/> (last visited May 18, 2003) [hereinafter COP8].

13. United Nations, *Delhi Ministerial Declaration on Climate Change and Sustainable Development*, Conference of the Parties, 8th Sess., U.N. Doc. FCCC/CP/2002/L.6 Rev.1 (2002), available at http://unfccc.int/cop8/latest/l_cpl6rev1.pdf (last visited Apr. 8, 2003) [hereinafter Delhi Declaration].

14. Prior to COP-8, the World Summit on Sustainable Development (WSSD) was held in Johannesburg, South Africa. The WSSD adopted text identifying the UNFCCC as the "key" instrument for addressing climate change; reaffirmed the UNFCCC's ultimate objective of stabilizing greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system; and emphasized the importance of developing cleaner technologies in sectors such as energy. See United Nations, *World Summit on Sustainable Development Plan of Implementation*, para. 36, available at http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm (last visited Apr. 8, 2003). It also contains the following reference to Kyoto ratification: "States that have ratified the Kyoto Protocol strongly urge States that have not already done so to ratify the Kyoto Protocol in a timely manner." *Id.*

UNFCCC, including with regard to the provision of financial resources, technology transfer, and capacity building.

In addition to the Delhi Declaration, COP-8 adopted rules of procedure for the Executive Board of the clean development mechanism; adopted guidance to the Global Environment Facility for managing two new funds established at COP-7 to assist developing countries; completed work on the reporting required of developed countries to assess their compliance under the Kyoto Protocol; and requested the Intergovernmental Panel on Climate Change and the Montreal Protocol's Technological and Economic Assessment Panel to conduct a special report on the question of HFCs/PFCs—compounds that have replaced ozone-depleting substances but contribute to climate change.¹⁵

Of greatest interest in 2003 will be Russia's potential ratification of the Kyoto Protocol. If Russia ratifies the Kyoto Protocol, then it will enter into force. Though there are expectations that the Russian Federation will take action on the Kyoto Protocol this year, Russia has not yet stated its intent.

In addition, rules for including afforestation and reforestation activities in the clean development mechanism for the first commitment period are expected to be finalized for adoption at COP-9, and a review of emission reduction commitments is scheduled for this COP. This discussion could frame the future of developing country efforts.

III. Hazardous Waste: The Basel Convention

The Sixth Meeting of the Conference of Parties (COP VI) to the Basel Convention on Transboundary Movements of Hazardous Wastes in December 2002 made a number of decisions that will guide the Convention in coming years. The main accomplishments of COP VI included adoption of an implementation and compliance mechanism and a compliance committee to oversee it; a partnership with industry on environmentally sound management of end-of-life mobile phones; several new non-hazardous waste listings; several technical guidelines on environmentally sound management; a legal framework agreement for the establishment of the Basel Convention Regional Centers for Training and Technology Transfer; and a strategic plan for the next ten years.¹⁶

The new implementation and compliance mechanism is designed to assist the parties in complying with their obligations under the Convention and to facilitate and promote full and timely implementation. A Compliance Committee consisting of fifteen individuals nominated by the parties are to serve terms of varying lengths as objectively and fairly as possible and in the best interest of the Convention. The members were elected at the first meeting of the newly formed Open Ended Working Group (OEWG), an all-encompassing subsidiary body replacing the former Technical, Legal, and, Implementation Working Groups.

The Partnership with Industry on the Environmentally Sound Management of End-of-Life Mobile Phones is intended to bring together the major mobile phone manufacturers to figure out the best way to handle the significant volume of waste caused by old cell

15. See generally COP8, *supra* note 12.

16. *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, U.N. Environment Program, 6th Meeting, U.N. Doc. UNEP/CHW.6/40 (2003), available at <http://www.basel.int/meetings/cop/cop6/english/Report40e.pdf> (last visited May 25, 2003).

phones and to find ways to encourage environmentally sound recycling and recovery of valuable materials. Eventually, network providers and recyclers will be invited to join the partnership. A group of industry and governments experts will meet periodically to develop recommendations for COP VII, which will take place in October 2004.

The Strategic Plan for the next ten years of the Basel Convention moves the Convention away from the traditional command and control approach to regulation of transboundary movements and toward a greater emphasis on capacity building and environmentally sound management. Developing countries and countries with economies in transition (EITs) will develop project proposals and will seek funding from donor countries. In addition, COP VI set aside approximately \$350,000 in 2003 and \$700,000 in 2004 for implementation of the plan.

The Bush administration continues to explore ratification of the Basel Convention. The Convention was signed by the United States in 1990 and the Senate gave its advice and consent to ratification in 1992. The President cannot ratify the Convention; however, until Congress passes legislation containing the legal authorities necessary to fully implement the Convention, in particular, adjustments to the Resource Conservation and Recovery Act (RCRA).

IV. Ozone Layer Protection: The Montreal Protocol

The main highlight of activities in 2002 by the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer¹⁷ was the replenishment of the Multilateral Fund to assist developing countries to phase out ozone-depleting substances (ODS). The Multilateral Fund, established in 1991 under Article 10 of the Protocol and which has to date collected and disbursed more than \$1.5 billion, meets incremental costs of phasing out ODS by developing countries.¹⁸

The negotiations for the replenishment of the Multilateral Fund for the triennium 2003–2005 were based on a report of the Ad Hoc Working Group on Replenishment set up by the parties to the Montreal Protocol in 2001 to consider the approximate level of funding needed to replenish the Multilateral Fund for the triennium 2003–2005. The Working Group, in its report to the parties, had proposed that the funding requirement for developing countries would range between \$530 million and \$568 million to enable them to meet the 2005 deadline for reduction by 50 percent for chlorofluorocarbon consumption, 20 percent for methyl bromide consumption, 85 percent for carbon tetrachloride consumption, and 50 percent for consumption of halons, and to meet the 2003 deadline to freeze methyl chloroform consumption at 1998–2002 average levels.¹⁹

During the negotiations, developed countries were open to the overall increase in the replenishment of the Fund at the higher range of what had been proposed by the Ad Hoc Working Group as sufficient to enable the compliance of all developing countries with their

17. United Nations Environment Program, *The Montreal Protocol on Substances That Deplete the Ozone Layer* (Jan. 1, 1989), available at <http://www.unep.org/ozone/montreal.shtml> (last visited Apr. 8, 2003).

18. The World Bank Group, Montreal Protocol, *Multilateral Fund*, available at <http://www.worldbank.org> (last visited May 18, 2003).

19. Supplement by the Technology and Economic Assessment Panel to the April 2002 TEAP Replenishment Report "Assessment of the Funding Requirement for the Replenishment of the Multilateral Fund for the Period 2003–2005," Sept. 2002, at 19.

Montreal Protocol obligations. On the other hand, developing countries were of the opinion that the appropriate level of funding should be around \$924 million taking into account other pertinent factors, which the report of the Ad Hoc Working Group did not address. In the end, the parties approved a budget of \$573 million with the understanding that \$76 million of that sum would be provided from the funds not allocated during the triennium 2000–2002.²⁰ It is expected that the approved funding will enable all developing countries to meet their mid-term obligations to phase out ozone-depleting substances.

In addition to the replenishment of the Multilateral Fund, the parties also took a number of decisions regarding parties found to be in non-compliance with their Montreal Protocol obligations, and undertook to review their status through the Implementation Committee on a continuous basis.

The expected highlight of 2003 will be the consideration by the parties of the four-year periodic assessment of the scientific and environmental effects, and technology and economic assessment reports by the Assessment Panels established under Article Six of the Montreal Protocol. In the past, such periodic assessments have triggered recommendations for further adjustment and amendment to the Montreal Protocol in order to tighten the existing control measures for phasing out ozone-depleting substances. To date, the Montreal Protocol has been amended four times and adjusted five times through this process.²¹

V. Trade and Environment

Pursuant to the Bipartisan Trade Promotion Authority Act of 2002 (TPA Act),²² Congress established a number of negotiating objectives related to the environment, and the United States is implementing the TPA guidance in a number of fora. In 2002, the United States pursued a strong environmental agenda in the World Trade Organization (WTO) negotiations, held at the WTO Fourth Ministerial Conference in 2001 at Doha, Qatar. On the bilateral and regional fronts, the United States completed negotiations for free trade agreements (FTAs) with Chile and Singapore, each of which includes an environment chapter in the body of the agreement.²³ The United States also initiated negotiations for FTAs with five Central American countries and Morocco, and announced its intention to negotiate FTAs with Australia and the South African Customs Union (SACU).

The United States' environment agenda in the WTO negotiations includes contributing to a mutually supportive relationship between multilateral environmental agreements (MEAs) and the WTO, particularly through enhanced forms of cooperation and information-sharing;²⁴ and new market access commitments for environmental goods and

20. Report of the Fourteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N. Environment Program, U.N. Doc. UNEP/OzL.Pro/14/9 (2002), available at <http://www.unep.ch/ozone/mop/mop14-docs.shtml>.

21. London Adjustments and Amendment to the Montreal Protocol (1990); Copenhagen Adjustments and Amendment (1992); Vienna Adjustments (1995); Montreal Adjustment and Amendment (1997); Beijing Adjustments and Amendment (1999). The World Bank Group, Montreal Protocol, *Ozone Treaties*, available at <http://www.worldbank.org> (last visited May 18, 2003).

22. Bipartisan Trade Promotion Authority Act of 2002, 19 U.S.C.A. §§ 3801–3813 (2002).

23. See United States Trade Representative, *Singapore Free Trade Agreement*, available at <http://www.ustr.gov/new/fta/singapore.htm> (last visited May 18, 2003); United States Trade Representative, *Chile Free Trade Agreement*, available at <http://www.ustr.gov/new/fta/chile.htm> (last visited May 18, 2003).

24. World Trade Organization, Ministerial Declaration, WT/MIN(01)/DEC/1 (Nov. 14, 2001), available at <http://www.wto.org> (last visited May 16, 2003).

services, a key means of spreading environmental technologies worldwide.²⁵ While negotiations on the relationship between specific trade obligations in MEAs and WTO rules²⁶ were not part of the United States' affirmative agenda going into Doha, the United States is using the negotiations as an opportunity to reaffirm the mutually supportive relationship between the two systems and to relieve the anxiety some have expressed about the relationship.

The United States is also a strong supporter of the negotiations to clarify and improve WTO disciplines on fisheries subsidies.²⁷ The mandate reflects WTO Members' concerns about the negative trade, environment, and developmental effects of fisheries subsidies that contribute to over-fishing and overcapacity. The negotiations on subsidies represent a considerable milestone for the WTO. For the first time, concerns for environmental conservation and sustainable development—not only traditional trade concerns—played a major role in the launch of a trade negotiation.

In the negotiation of FTAs with Chile and Singapore, the United States successfully negotiated environment provisions that implement TPA guidance.²⁸ The environment chapters in both agreements include core commitments by each party concerning effectively enforcing its environmental laws, providing for high levels of environmental protection, and not weakening environmental laws to encourage trade or attract investment. The agreements also provide robust consultative mechanisms for implementing the environmental agreements, including transparency provisions and opportunities for public involvement and a commitment to pursue environmental cooperative activities. If either party fails to implement the obligation to effectively enforce its environmental laws, the other party can promote compliance through innovative dispute settlement procedures, including the use of either fines or trade remedies.

In the WTO, the United States will be seeking to suggest concrete ways to move forward in the environment-related areas of its negotiating agenda by the time of the WTO Ministerial meeting in Cancun, Mexico in September 2003. (The WTO negotiations will conclude in January 2005.) The United States also expects to seek Congressional approval for the Chile and Singapore FTAs and to press forward with environmental chapters in the FTA negotiations with the Central American countries, Australia, Morocco, and SACU.

VI. Wildlife Preservation

A. THE INTERNATIONAL WHALING COMMISSION

The International Whaling Commission (IWC) was established under the International Convention for the Regulation of Whaling (ICRW), which was signed in Washington, D.C., on December 2, 1946.²⁹ The Convention was intended to provide for the proper conservation of whale stocks and the regulation of commercial and aboriginal whaling. A majority of IWC member countries, along with animal protection and environmental or-

25. *Id.*

26. *Id.*

27. *Id.* at para. 28.

28. See United States Trade Representative, *Singapore Free Trade Agreement*, *supra* note 23; see United States Trade Representative, *Chile Free Trade Agreement*, *supra* note 23.

29. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849.

ganizations, believe that the treaty has evolved into a conservation agreement that allows for greater protection for whales from environmental, commercial, and other types of threats. Japan, Norway, and other whaling nations, however, maintain that the purpose of the IWC is to promote the orderly development of the whaling industry.

The 54th annual International Whaling Commission meeting took place in Shimonoseki, Japan in May 2002.³⁰ At the meeting, commissioners rejected Japan's bid to re-instate pro-whaling Iceland with a reservation to the whaling moratorium, its proposal was to give a quota of fifty minke whales to four coastal communities and a Revised Management Scheme (RMS).

The whaling moratorium was voted on in 1982 and implemented in 1986. At the time it was voted upon, under the Convention, countries had ninety days to object to the moratorium. Iceland did not object and therefore, after the ninety-day period, it became bound by the moratorium. In 1992 however, Iceland withdrew from the IWC because it was frustrated over the Commission's anti-whaling position. By rejoining as a new member with a reservation to the moratorium, Iceland would be able to void a key environmental obligation it undertook decades earlier. IWC members voted 25–20 on May 20, 2002, against Iceland rejoining the commission as a full member.³¹ Iceland was denied re-entry in 2001, and by this vote, the members upheld the chairman's ruling and kept Iceland as an observer nation. As discussed below, however, this vote was subsequently reversed, and the issue remains a topic of debate among member governments.

In an apparent reprisal over losing its bid for commercial coastal whaling, Japan and its allies blocked a five-year extension of a subsistence bowhead quota for Russian and Alaskan aboriginal communities.³² Critics accused Japan of playing politics with the lives of aboriginal people, while Japan accused the United States of hypocrisy for allowing the Alaskan Inuit to hunt the endangered bowhead while rejecting Japan's coastal minke proposal. The United States contends, however, that the two quotas are not comparable: The Inuit catch is for subsistence, since it is estimated that whale meat comprises 80 percent of the community's diet, while the Japanese quota is for commercial purposes.

IWC Governments were stunned when Japan and its allies blocked the subsistence bowhead-whaling quota for Russian and Alaskan aboriginal communities after Japan lost its request for a coastal whaling quota. In response to the international concern, Japan agreed to reverse its stance, and the United States called for another vote at a special IWC intercessional meeting on October 14 in Cambridge, U.K.

While the special meeting was called to address the subsistence bowhead quota, two additional items were added to the agenda and reconsidered: Iceland's readmission to the IWC with a reservation to the commercial whaling moratorium and Japan's coastal whaling proposal.

With respect to Iceland, it became apparent that there were sufficient votes in support of readmission, and, after a series of confused and procedurally flawed votes (where Iceland was able to vote in the very vote deciding if it had the right to vote, which was decided by a single vote), Iceland was tacitly admitted to the IWC. A number of countries stated that they had made voting mistakes. Sweden for instance, stated in the press, and sent a letter

30. Press Release, International Whaling Commission, Final Press Release: 54th Annual Meeting, at <http://iwcoffice.org/2002PressRelease.htm>.

31. *Id.*

32. *Id.*

to the United States as the depository government stating, that they voted in error. In addition, a number of anti-whaling nations stated at the meeting that they believed Iceland's rejoining with a reservation violates international law and would set a dangerous legal precedent—namely, that if a country changes its mind after initially agreeing with a legally binding decision of an international treaty or convention, that country may simply quit and rejoin the convention with a formal objection exempting it from the rules by which it does not wish to abide. After the meeting, several countries (fourteen as of April 2003) filed formal objections with the United States, unilaterally objecting to Iceland rejoining with a reservation.³³

With respect to the bowhead subsistence whaling quotas, the governments of the United States and the Russian Federation were able to overturn the previous vote and pass the quota for aboriginal communities near the Bering-Chukchi-Beaufort seas. The quota was approved by consensus with Japan still formally objecting but not blocking the consensus.

Following the subsistence bowhead quota vote, Japan proposed a resolution promoting its coastal whaling quota, which failed to pass. The United States, however, voted in favor of the quota. The United States was the only conservation minded country to vote with Japan. Many delegates and NGOs attending the meeting felt that the United States did so in return for Japan's not blocking the subsistence quota.

The 55th IWC meeting will take place in Berlin, Germany in June 2003. It is rumored that the Icelandic vote will be revisited because of the confusion surrounding the votes at the special meeting. It is also believed that Japan will reintroduce its coastal minke whaling proposal. The outcomes of the meeting will depend upon which countries join this year and whether conservation minded countries are able to maintain a simple majority. At this point, it is a political guess as to which faction will have the majority-voting block.

B. OTHER NOTEWORTHY DEVELOPMENTS

1. CITES

The twelfth meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) held in Santiago, Chile in November, 2002 charted new territory in listing marine and tropical timber species.³⁴ In particular, whale sharks, basking sharks, and seahorses were added to the short list of marine species under CITES Appendix II. Similarly, the parties agreed for the first time to list a high-volume, high-value commercially traded tropical timber species—bigleaf mahogany—on Appendix II. (Appendix II lists species that may be threatened with extinction if trade is not closely controlled.) Japan's proposals to reopen commercial whaling for minke and Bryde's whales were rejected, and a conditional agreement was reached to allow three southern African states to conduct limited, one-time ivory sales no sooner than 2004.

2. 1990 Dolphin Protection Consumer Information Act

The "dolphin safe" label is a voluntary consumer label that companies can use in marketing their canned tuna. The label was initiated in 1990 by the U.S. tuna industry after

33. These countries are Argentina, Australia, Brazil, France, Germany, Italy, Mexico, Monaco, Netherlands, Sweden, the United Kingdom, Peru, Spain, and San Marino. In addition, Italy and Mexico do not recognize Iceland as a Contracting Government to the ICRW.

34. Convention on International Trade in Endangered Species of Wild Fauna and Flora (Mar. 3, 1973), 27 U.S.T. 1087, T.I.A.S. No. 8249.

broad public concern arose about dolphin mortality in the eastern tropical Pacific ocean (ETP), caused by a tuna fishing method used in the region (known as “encirclement” or “setting on dolphin”). The label, used to signal to consumers that tuna was not caught using this method, was adopted under the 1990 Dolphin Protection Consumer Information Act (DPCIA).³⁵ Since that time, the U.S. fishing fleet has not used the encirclement method and has stopped fishing in the ETP entirely. Foreign purse seine fleets in the ETP, primarily from Mexico and Venezuela, which had increased significantly by the late 1980s, however, remained.

The DPCIA was amended in 1997 to require the Department of Commerce to consider use of the dolphin safe label on tuna caught by a less deadly form of encirclement in compliance with an international dolphin treaty, the Agreement on the International Dolphin Conservation Program (AIDCP). Use of the dolphin safe label for tuna caught in compliance with the treaty could only be allowed if the Secretary of Commerce determines, based on a scientific study by the National Oceanic and Atmospheric Administration, that there would be no significant adverse impact on dolphins.

On December 31, 2002, the Secretary of Commerce issued a decision to allow use of the dolphin safe label on tuna caught using the encirclement method under the AIDCP.³⁶ The decision has generated substantial controversy, particularly because the scientific study conducted by National Marines Fisheries Service identified potential dolphin population impacts caused by continued use of this method. Senator Boxer has introduced a bill to nullify this decision by reverting to the previous standard. In addition, a lawsuit challenging this decision was filed in federal district court in San Francisco.

On April 10, 2003, the federal district court judge issued a preliminary injunction blocking the Administration’s decision from taking effect.³⁷ The court found that the Administration did not meet the statutory requirement showing no significant adverse impact on dolphins from the encirclement fishing practice, particularly in light of the Administration’s scientific report that indicated a likely reason for non-recovery of dolphin populations in the ETP to be the continued practice of setting on dolphins. The Court also found that the administrative decision—meant to be based only on scientific findings by the Department of Commerce—was improperly influenced by political considerations propounded by the Department of State. According to the court, there was “a serious question as to the integrity of the Secretary [of Commerce’s] decision-making process,” noting that Secretary of State Powell had sent a letter urging Secretary of Commerce Evans to make the decision of no significant adverse impact.³⁸

VII. Web Links

Following are links to web pages addressing a number of international environmental instruments and regimes, including those discussed in this chapter.

35. Dolphin Protection Consumer Information Act, 16 U.S.C. 1385 (1990).

36. Taking and Importing of Marine Mammals; Decision Regarding the Impact of Purse Seine Fishing on Depleted Dolphin Stocks, 68 Fed. Reg. 2010 (Dep’t Commerce Jan. 15, 2003).

37. Earth Island Inst. v. Evans, No. C 03-0007 TEH, 2003 WL 1870323 (N.D. Cal. Apr. 10, 2003).

38. *Id.* at 4.

A. THE ATMOSPHERE

- Kyoto Protocol: <http://www.unfccc.de>
- Montreal Protocol: <http://www.unep.org/ozone>

B. BIODIVERSITY AND BIOSAFETY

- Convention on Biological Diversity: <http://www.biodiv.org/>
- The Cartagena Protocol on Biosafety: <http://www.biodiv.org/biosafety/>

C. CHEMICAL MANAGEMENT

- Rotterdam Convention on Prior Informed Consent: <http://www.unep.org>
- Stockholm Convention on Persistent Organic Pollutants: <http://www.unep.org>

D. DESERTIFICATION

- United Nations Convention to Combat Desertification: <http://www.unccd.int/cop/cric1/menu.php>

E. THREATENED AND ENDANGERED SPECIES

- Convention on International Trade in Endangered Species: <http://www.cites.org>
- International Whaling Commission: <http://www.iwcoffice.org>

F. FISHERIES

- Agreement on the International Dolphin Conservation Program: <http://www.iattc.org/>
- Commission for the Conservation of Antarctic Marine Living Resources: <http://www.ccamlr.org/>
- International Commission for the Conservation of Atlantic Tunas: <http://www.iccat.es/>
- Inter-American Sea Turtle Convention: <http://www.nwf.org/trade/treat.html>
- Inter-American Tropical Tuna Commission & Panama Declaration: <http://www.iattc.org/>
- Multilateral High Level Conference (MHLC) on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean: <http://www.ocean-affairs.com>
- North Atlantic Salmon Conservation Organization: <http://www.nasco.org.uk/>
- North Pacific Anadromous Fish Commission: <http://www.npafc.org/>
- Convention on the Conservation and Management of the Fishery Resources in the South East Atlantic Ocean: http://www.fao.org/fi/body/rfb/SEAFO/seafo_home.htm

G. MARINE POLLUTION

- International Maritime Organization: <http://www.imo.org/>
- Law of the Sea Convention: <http://www.un.org/Depts/los/>

H. HAZARDOUS WASTE

- Basel Convention: <http://www.basel.int/>

I. SUSTAINABLE DEVELOPMENT

- Commission on Sustainable Development: <http://www.un.org/esa/sustdev/csd/csd.htm>
- United Nations Environment Programme: <http://www.unep.org/>; <http://www.unep.ch/>
- World Summit on Sustainable Development: <http://www.un.org/esa/sustdev/index.html>

J. TRADE AND INVESTMENT AND THE ENVIRONMENT

- Free Trade Area of the Americas: http://www.ftaa-alca.org/alca_e.asp
- North American Commission for Environmental Cooperation: www.cec.org
- Office of the United States Trade Representative: <http://www.ustr.gov/>
- World Bank: <http://worldbank.org>
- World Trade Organization: <http://www.wto.org>.

