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INTERNATIONAL ENVIRONMENTAL LAW¹

2004 Annual Report

I. INTRODUCTION

This report reviews some of the major developments in international environmental law during 2004. It discusses developments under relevant bilateral and multilateral international agreements, provides highlights from major conferences and meetings, and surveys significant reports and other publications. Those desiring a more comprehensive or detailed analysis of these subjects are invited to review the sources cited.

II. GENERAL DEVELOPMENTS

A. *Sustainable Development*

The Commission on Sustainable Development (CSD) is a functional committee of the United Nations Economic and Social Council (ECOSOC) established in 1992 to track and encourage sustainable development. CSD organizes its activities in two-year "Implementation Cycles," with each cycle focusing on a thematic cluster of issues.

The twelfth session (CSD-12) was held in New York from April 14–30, 2004. CSD-12 and CSD-13, scheduled to take place in New York from April 11–22, 2005, form part of the 2004–2005 implementation cycle. In this cycle, the CSD will focus on the interrelated issues of water, sanitation, and human settlement. This will be followed by cycles focusing on: energy, industrial development, air pollution and the atmosphere, and climate (2006–2007); agriculture, rural development, land, drought, desertification, and Africa (2008–2009); transport, chemicals, waste management, mining, and a ten-year framework of programs on sustainable consumption and production patterns (2010–2011); forests, biodiversity, biotechnology, tourism, and mountains (2012–2013); and oceans and seas, marine resources, small island developing states, and disaster management and vulnerability (2014–2015). The last cycle (2016–2017) will involve an overall appraisal of the implementation of Agenda 21, the Programme of Further Implementation of Agenda 21, and the Johannesburg Plan of Implementation.

B. *Water Resources and Transboundary Waters*

In 2004, the International Law Association (ILA) adopted the Berlin Rules on Water Resources. The ILA claims that the Berlin Rules, which replaced the earlier Helsinki Rules,² express the entire body of customary international law applicable to the management of water, and govern the management of waters within a state as well as

¹ This report is submitted on behalf of the International Environmental Law Committee by Chair Vail T. Thorne, Senior Environmental, Health & Safety Counsel, The Coca-Cola Company; Vice Chair Lakshman Guruswamy, Nicholas Doman Professor of International Environmental Law, University of Colorado School of Law; with Kevin L. Doran, Senior Research Fellow to the Energy and Environmental Security Initiative at the University of Colorado. The Committee is indebted to the following CU Law students for their contributions: Joshua Graae, Christopher Gray, Rob Keating, Ryan McGee, Tanya Sobol, Kate Stone, and Anne Zoltani.

² *The Helsinki Rules on the Uses of the Waters of Int'l Rivers*, Int'l Law Ass'n (1967), available at http://www.internationalwaterlaw.org/IntlDocs/Helsinki_Rules.htm.



transboundary waters.³ The ILA re-phrased the now famous rule of equitable and reasonable utilization of international water resources to clarify that states must “manage the waters . . . in an equitable and reasonable manner having due regard for the obligation not to cause significant harm to other basin States . . . [, and to] develop and use the waters of the basin in order to attain the optimal and sustainable use thereof and benefits therefrom.”⁴

III. ATMOSPHERE AND CLIMATE

A. *Climate Change*⁵

1. United Nations Framework Convention on Climate Change (UNFCCC)⁶

The UNFCCC created a number of subsidiary bodies such as the Subsidiary Body for Implementation (SBI-20), and the Subsidiary Body for Scientific and Technological Advice (SBSTA-20). The Twentieth Session of the Subsidiary Bodies to the UNFCCC (SB-20) was held in Bonn, Germany from June 16–24, 2004. The parties discussed a variety of issues including “non-Annex I national communications, . . . implementation of UNFCCC Article 4.8 (adverse effects) and [Article] 4.9 (least developed countries); the UNFCCC’s financial mechanism”; “small-scale afforestation and reforestation project activities under the Clean Development Mechanism (CDM)”; good practice guidance on land use, land-use change and forestry (LULUCF); greenhouse gas inventories; and “emissions resulting from fuel used in international aviation and maritime transport.”⁸ Also discussed were issues relating to the Kyoto Protocol such as Article 7 (dealing with communication of information) and Article 8 (reviewing information).⁹

The Tenth Conference of Parties (COP-10) to the UNFCCC and the Twenty-First sessions of the COP’s Subsidiary Body for Scientific and Technological Advice (SBSTA-21) and Subsidiary Body for Implementation (SBI-21) were held from December 6–17, 2004, in Buenos Aires, Argentina.¹⁰ In response to mounting evidence that climate change impacts can already be detected, the Parties to COP-10 adopted the Buenos Aires Programme of Work on Adaptation and Response Measures.¹¹ The Programme includes support for the National Action Plans on Adaptation of least developed countries, calls for workshops and technical papers on aspects of climate

³ *Water Resources Committee, 4th Report, Berlin Conference: Water Resources Law*, Int’l Law Ass’n (2004), available at <http://www.asil.org/ilib/WaterReport2004.pdf>.

⁴ *Id.* at 20.

⁵ See *infra* Section VIII.

⁶ United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (entered into force Mar. 21, 1994).

⁷ See *Summary of the Twentieth Session of the Subsidiary Bodies of the UN Framework Convention on Climate Change: 16-25 June 2004*, 12 EARTH NEGOTIATIONS BULL. (IISD) 242, June 28, 2004, at 1, available at <http://www.iisd.ca/vol12/enb12242e.html>.

⁸ *Id.* at 3.

⁹ *Id.*

¹⁰ See UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, TENTH SESSION OF THE CONFERENCE OF PARTIES (COP-10), DEC. 6–17, 2004, BUENOS AIRES, ARGENTINA, available at http://unfccc.int/meetings/cop_10/items/2944.php.

¹¹ See Decision 1/CP.10, Buenos Aires Programme of Work on Adaptation and Response, Dec. 6–17, 2004, available at http://unfccc.int/files/meetings/cop_10/adopted_decisions/application/pdf/01_cp_1_16.pdf.

change and adaptation measures, and provides for further scientific assessments of vulnerabilities and options for adaptation.¹²

During COP-10 the Parties also adopted a number of other decisions on various issues, including issues relating to: land use; land-use change and forestry; technology transfer; the UNFCCC's financial mechanism; capacity building; Annex I national communications; adverse effects and adaptation; and UNFCCC Article 6 (education, training, and public awareness).¹³

2. Kyoto Protocol

The momentous decision of the Russian Federation to ratify the Kyoto Protocol was the most important climate change event of 2004. As a result of the Russian Federation's ratification, the Protocol will become legally binding on its 128 Parties on February 16, 2005.¹⁴

To enter into force, the Kyoto Protocol required ratification by at least fifty-five Parties to the UNFCCC, including Annex I countries (industrialized countries and those in transition to a market economy) that account for at least 55% of the total carbon dioxide emissions in 1990 for Annex I countries.¹⁵ The United States, which is a party to the UNFCCC and represents 36% of the 1990 carbon dioxide emissions from Annex I countries, has refused to ratify the Protocol. Thus, prior to ratification by the Russian Federation, which represents 17% of the 1990 Annex I emissions total, there was considerable doubt as to whether the Protocol would ever enter into force.¹⁶

The Protocol's entry into force will lead, *inter alia*, to the following consequences: (1) thirty industrialized countries will be legally bound to reduce their respective greenhouse gas emissions by at least 5% below their 1990 levels during the commitment period of 2008–2012; (2) the international carbon trading market will become a legal and practical reality; (3) the Clean Development Mechanism (CDM) will move from an early implementation phase to full operations; and (4) the Protocol's Adaptation Fund, established in 2001, will start preparing itself for assisting developing countries to cope with the negative effects of climate change.

Implementation of the Kyoto Protocol took another significant step forward on November 18, 2004, when the first CDM project was registered.¹⁷ The project will reduce methane emissions by an expected 31,000 tons from a landfill in Rio de Janeiro, Brazil, by capturing greenhouse gases and using them to generate electricity.¹⁸

¹² *Id.*

¹³ See *Summary of the Tenth Conference of the Parties to the U.N. Framework Convention on Climate Change*, 12 EARTH NEGOTIATIONS BULL. (IISD) 260, Dec. 20, 2004, at 1, available at <http://www.iisd.ca/download/pdf/enb12260e.pdf>.

¹⁴ In addition to the Russian Federation, eight other countries signed and ratified the Kyoto Protocol in 2004: Rwanda, Niger, Togo, Isr., the Yugoslav Republic of Maced., Yemen, and Sudan. *Kyoto Protocol Status of Ratification*, at <http://www.mct.gov.br/clima/quioto/pdf/kpstats.pdf> (last modified Feb. 2, 2005).

¹⁵ Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, *opened for signature* Mar. 16, 1998, art. 25, 37 I.L.M. 22, 35 (1998).

¹⁶ Press Release, UNFCCC Secretariat, Russian Decision on Ratification—Major Step Towards Entry Into Force of Kyoto Protocol (Oct. 7, 2004), available at <http://unfccc.int/files/press/releases/application/pdf/pr040930.pdf>.

¹⁷ Press Release, UNFCCC Secretariat, The Kyoto Protocol's Clean Development Mechanism Takes Off: First CDM Project Registered (Nov. 18, 2004), available at http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/pr05041118_cdm.pdf.

¹⁸ *Id.*

B. *Stratospheric Ozone*

The primary objective of the Montreal Protocol on Substances that Deplete the Ozone Layer¹⁹ is to protect the stratospheric ozone layer by eliminating the use of ozone-depleting substances. In the early 1990s, scientists discovered that methyl bromide, a chemical used mainly as an agricultural pesticide, is sixty times more destructive to ozone than the chlorine in chlorofluorocarbons (CFCs). Parties to the Montreal Protocol responded to this threat in 1997 by agreeing to a global phase-out schedule for methyl bromide. Pursuant to this schedule, non-Article 5(1) countries (developed countries) are to complete the phase-out of methyl bromide by 2005, and Article 5(1) countries (developing countries) are to complete this phase-out by 2015. Importantly, however, “critical uses” of methyl bromide are exempt from these controls.²⁰

The phase-out of methyl bromide was one of the primary issues discussed at the Fifteenth Meeting of the Parties (15-MOP) in Nairobi, Kenya from November 10–14, 2003.²¹ Due to a lack of technically and economically feasible substitutes, a small group of developed countries requested “critical use exemptions” which would allow them to continue using methyl bromide in limited quantities past the 2005 phase-out date.²² Negotiations stalled at the 15-MOP and the Parties agreed to convene for an Extraordinary MOP (ExMOP) in March 2004.²³ In the Interim, an ad hoc group, the Methyl Bromide Technical Options Committee (MBTOC), was given the task of reviewing nominations for critical use exemptions. For each nomination, the MBTOC would make a determination of “‘recommended’, ‘not recommended,’ or ‘unable to assess.’”²⁴

The ExMOP met in Montreal, Canada from March 24–26, 2004. After discussion and debate, the Parties granted critical use exemptions to eleven countries for 2005. The United States was granted a use exemption of 9446 metric tons of methyl bromide—approximately two-thirds of the total exemption allocation for all eleven countries.²⁵

The Sixteenth MOP met in Prague, Czech Republic from November 22–26, 2004.²⁶ Over 500 participants attended the meeting representing Parties, non-governmental organizations, U.N. agencies, and other interested groups. The primary areas of controversy concerned the critical use exemptions for methyl bromide and the essential use exemptions for CFCs in metered dose inhalers. Some Parties continued to

¹⁹ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (1987) (entered into force Jan. 1, 1989), available at <http://www.unep.org/ozone/pdfs/Montreal-Protocol2000.pdf> [hereinafter Montreal Protocol].

²⁰ *Id.* at art. 2H.

²¹ See *Report of the Fifteenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N. Env't Programme, 15th Meeting*, U.N. Doc. UNEP/OzL.Pro.15/9 (2003), available at http://www.unep.org/ozone/Meeting_Documents/mop/15mop/15mop-9.e.doc.

²² See Pamela Najor, *Parties Seeking Methyl Bromide Exemption Must Show Lack of Affordable Substitutes*, 27 INT'L ENV'T REP. (BNA) 398 (May 19, 2004).

²³ See *Report of the First Extraordinary Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, U.N. Env't Programme, U.N. Doc. UNEP/OzL.Pro.ExMP/1/3* (2004), available at http://www.unep.org/ozone/Meeting_Documents/mop/Ex_mop/1ex_mop-3.e.doc.

²⁴ *Id.* ¶ 23.

²⁵ *Id.* at App. I.

²⁶ See *Summary of the Sixteenth Meeting of the Parties to the Montreal Protocol*, 19 EARTH NEGOTIATIONS BULL. (IISD) 40, Nov. 29, 2004, available at <http://www.iisd.ca/download/pdf/enb1940e.pdf>.

disfavor the granting of methyl bromide exemptions, giving rise to what they referred to as a “phase-in” of methyl bromide by the countries requesting exemptions.²⁷ Still, the United States and other countries were granted some of the requested critical use exemptions for 2005 and 2006.²⁸ On the issue of CFCs in metered dose inhalers, the European Community (EC) continued to voice disapproval of the United States’ essential-use exemptions.²⁹ While the EC alleged a lack of medical justification for failing to switch from CFC to non-CFC salbutamol, the United States maintained its concern over resulting higher health care costs that would be imposed upon uninsured individuals under its system of private health care. Ultimately, a compromise was reached such that the proposed 2006 phase-out was not adopted, but the issue of further review for 2006 exemptions remained on the agenda.

IV. ENERGY



From June 1–4, 2004, the International Conference for Renewable Energies was held in Bonn, Germany. The conference drew some 3600 participants and included official governmental delegations, representatives from the U.N., other international organizations, civil society, and the private sector. The following were among the primary outcomes of the conference: (1) a Political Declaration³⁰ containing shared political goals for an increased role of renewable energies and reflecting a joint vision of a sustainable energy future which provides better and more equitable access to energy as well as increased energy efficiency; (2) an International Action Programme,³¹ including actions and commitments by governments, international organizations, and stakeholders; and (3) Policy Recommendations for Renewable Energies³² that can be of benefit to governments, international organizations, and stakeholders as they develop new approaches and political strategies and address the roles and responsibilities of key actors.

Representatives from fourteen countries, including the United States, signed an agreement on November 16, 2004, to create an international partnership to reduce methane releases from gas pipelines and to encourage the capture and use of methane from coal mines, oil wells, and solid waste landfills.³³ According to the U.S. Environment Protection Agency (EPA), the voluntary partnership has the potential to eliminate methane emissions with a greenhouse gas potential equivalent to fifty million metric tons of carbon dioxide by 2015. Additional signatories to the agreement include Argentina, Australia, Brazil, China, Colombia, India, Italy, Japan, Mexico, Nigeria, Russia, Ukraine, and the United Kingdom.³⁴

On November 20, 2003, the ministerial representatives from fifteen countries and the European Commission signed the International Partnership for the Hydrogen

²⁷ *Id.* at 12.

²⁸ *Id.* at 8.

²⁹ *Id.* at 13.

³⁰ *Political Declaration*, Int’l Conference for Renewable Energies (June 4, 2004), available at http://www.renewables2004.de/pdf/Political_declaration_final.pdf.

³¹ *Int’l Action Programme*, Int’l Conference for Renewable Energies (Aug. 30, 2004), available at http://www.renewables2004.de/pdf/International_Action_Programme.pdf.

³² *Policy Recommendations for Renewable Energies*, Int’l Conference for Renewable Energies (June 4, 2004), available at http://www.renewables2004.de/pdf/policy_recommendations_final.pdf.

³³ See Linda Roeder & Steve Cook, *Fourteen Countries Sign Pact to Reduce Methane Leaks, Increase Landfill Gas Use*, 27 INT’L ENV’T REP. (BNA) 979 (Dec. 1, 2004).

³⁴ *Id.* at 980.

Economy (IPHE) Terms of Reference (TOR),³⁵ thus establishing the IPHE as an international institution designed to facilitate coordinated research on emerging hydrogen technologies. Current IPHE partner members include: Australia, Brazil, Canada, China, European Commission, France, Germany, Iceland, India, Italy, Japan, Republic of Korea, Norway, Russian Federation, United Kingdom, and the United States.³⁶

V. INTERNATIONAL HAZARD MANAGEMENT

A. *Regulation of Chemicals*

1. Rotterdam Convention on Prior Informed Consent

During the 1980s, governments began to address the problems caused by toxic pesticides and other hazardous chemicals by establishing a voluntary Prior Informed Consent Procedure (PIC). Under this procedure, before proceeding to trade in listed hazardous substances, exporters were required to obtain the prior informed consent of importers. In 1998 the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade³⁷ was adopted, making PIC legally binding. The Convention entered into force on February 24, 2004. As of November 10, 2004, there were seventy-eight Parties and seventy-three Signatories to the Convention. The United States has signed, but not ratified the Convention. The first meeting of the Conference of the Parties of the Rotterdam Convention was held in Geneva, Switzerland from September 20–24, 2004.

The eleventh session of the Intergovernmental Negotiating Committee for an International Legally Binding Instrument for the Application of the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (INC-11) was held in Geneva, Switzerland on September 18, 2004.³⁸

2. Stockholm Convention on Persistent Organic Pollutants (POPs)³⁹

The 2001 Stockholm Convention on Persistent Organic Pollutants (POPs) entered into force on May 17, 2004, marking the start of an international effort to eliminate the use of dioxins, furans, PCBs, and nine highly dangerous pesticides.⁴⁰ The Global

³⁵ *Terms of Reference for the Int'l P'ship for the Hydrogen Econ.* (Nov. 20, 2003), International Partnership for the Hydrogen Economy, at <http://www.iphe.net/TermsofReference.pdf>.

³⁶ *Id.* at App. A.

³⁷ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in Int'l Trade, Sept. 11, 1998, 38 I.L.M. 1 (entered into force Feb. 24, 2004).

³⁸ See generally, *Report of the Intergovernmental Negotiating Committee for an Int'l Legally Binding Instrument for the Application of the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in Int'l Trade on the Work of its eleventh session*, U.N. Doc. UNEP/FAO/PIC/INC.11/7 (2004), available at [http://www.pic.int/incs/inc11/g\)8/English/K0430735%20INC-11%20%20REPORT%20-%20FINAL.doc](http://www.pic.int/incs/inc11/g)8/English/K0430735%20INC-11%20%20REPORT%20-%20FINAL.doc).

³⁹ United Nations Environment Programme (UNEP): Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532 (entered into force May 17, 2004).

⁴⁰ See Press Release, U.N. Environment Programme, Stockholm Convention on POPs to become Int'l Law, Launching a Global Campaign to Eliminate Twelve Hazardous

Environment Facility will serve as the Convention's financial mechanism on an interim basis. The first meeting of the Conference of the Parties (COP-1) will be held from May 2–6, 2005 in Punta del Este, Uruguay.

B. *Transboundary Movement of Hazardous Waste*

The primary objectives of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal⁴¹ are to (1) minimize the generation of hazardous wastes in terms of quantity and their hazardous characteristics; (2) to dispose of them as close to the source of generation as possible; and (3) to reduce the movement of hazardous wastes.

The Seventh Meeting of the Conference of the Parties to the Basel Convention (COP-7) took place in Geneva, Switzerland from October 25–29, 2004.⁴² COP-7 considered a number of decisions prepared by the Open-Ended Working Group (OEWG) during the intersessional period. These decisions encompassed a range of issues relating to the Basel Protocol on Liability and Compensation, the Basel Convention Regional Centers (BCRCs), the Ban Amendment, the Basel Convention Partnership Programme, and institutional arrangements.

Delegates to COP-7 also adopted decisions on guidance elements for bilateral, multilateral or regional agreements, definitions of hazardous wastes, hazardous waste characteristics, and a number of technical guidelines. COP-7 achieved considerable progress on the issues of waste minimization and ship dismantling; however, lack of adequate financial support to meet the Convention's goals continues to be a pressing concern.⁴³

VI. NATURAL RESOURCE MANAGEMENT AND CONSERVATION

A. *Convention on Biological Diversity*

The Convention on Biological Diversity (CBD) is a framework treaty that aims at protecting global biodiversity.⁴⁴ The CBD secured a single ratification (Thailand) in 2004 bringing the total number of parties to the Convention to 188.⁴⁵ The Seventh Meeting of the Conference of the Parties (COP-7) took place from February 9–20, 2004 in Kuala Lumpur, Malaysia.⁴⁶ The Parties agreed to construct a regime that would help

Chemicals (May 14, 2004), available at <http://www.pops.int/documents/press/EIF/pr5-04POPsEIF-E.pdf>.

⁴¹ Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 28 I.L.M. 657 (entered into force May 5, 1992), available at <http://www.basel.int/text/con-e-rev.doc>.

⁴² See *Summary of the Seventh Conference of the Parties to the Basel Convention*, 20 EARTH NEGOTIATIONS BULL. (IISD) 18, Nov. 1, 2004, available at <http://www.iisd.ca/download/pdf/enb2018c.pdf>.

⁴³ *Id.*

⁴⁴ United Nations Conference on Environment and Development: Convention on Biological Diversity, July, 1992, arts. 22(1), 23(4)(h), 31 I.L.M. 818 (entered into force Dec. 29, 1993).

⁴⁵ See Convention on Biological Diversity, Parties to the Convention on Biological Diversity, available at <http://www.biodiv.org/world/parties.asp> (last visited Feb. 8, 2005).

⁴⁶ See *Report of the seventh meeting of the Conference of the Parties to the Convention on Biological Diversity*, U.N. Environment Programme, Convention on Biological

provide developing countries with better access to the benefits of their genetic resources. Furthermore, the Parties reaffirmed certain aims discussed at the World Summit on Sustainable Development in Johannesburg, including reducing the current rate of biodiversity loss by 2010 and conserving at least 10% of each type of ecosystem worldwide.

B. *Cartagena Protocol*

Acting pursuant to art. 19(3) of the CBD, the Conference of the Parties to the CBD adopted a supplementary agreement to the Convention known as the Cartagena Protocol on Biosafety on January 29, 2000.⁴⁷ The Cartagena Protocol seeks to protect biological diversity from the potential risks posed by living modified organisms (LMOs), also known as genetically modified organisms (GMOs), resulting from modern biotechnology. This protocol or procedure “entered into force on September 11, 2003, ninety days after receipt of the 50th instrument of ratification. As of . . . January 13, 2005, 111 instruments of ratification or accession to the Cartagena Protocol have been deposited with the U.N. Secretary-General.”⁴⁸

The Cartagena Protocol’s first meeting of the Conference of the Parties of the Convention was held with the Parties to the Protocol (COP-MOP-1) from February 23–27, 2004 in Kuala Lumpur.⁴⁹ A key outcome of this joint meeting was the adoption of documentation requirements and other procedures for promoting the safety of international trade in LMOs (or GMOs) by the Protocol’s eighty-seven member states.⁵⁰ Under the newly adopted system, all bulk shipments of genetically engineered crops intended for food, feed, or processing are to be identified as “may contain LMOs.”⁵¹ Agreement was reached on more detailed documentation requirements for GMOs that are meant to be introduced directly into the environment. Other decisions adopted at the meeting focused on making the Biosafety Clearing House fully functional, implementing a comprehensive action plan to promote capacity building, providing guidance to the Protocol’s financial mechanism on priorities, and establishing a medium-term work program for the Protocol.

C. *Convention on International Trade in Endangered Species*

The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁵² is an early international treaty that attempts to protect endangered plant and animal species through restrictions on international trade. The

Diversity, U.N. Doc. UNEP/CBD/COP/7/21/PART1 (Apr. 13, 2004), available at <http://www.biodiv.org/doc/meetings/cop/cop-07/official/cop-07-21-part1-en.pdf>.

⁴⁷ Cartagena Protocol on Biosafety, Sept. 2000, 39 I.L.M. 1027 (entered into force Sept. 11, 2003).

⁴⁸ CBD Secretariat, *Cartagena Protocol on Biosafety: Status of Ratification and Entry into Force* (Jan. 29, 2000), available at <http://www.biodiv.org/biosafety/signinglist.asp>.

⁴⁹ See *Report of the First Meeting of the Conference of the Parties Serving as the Meeting of the Parties to the Protocol on Biosafety*, U.N. Env’t Programme, U.N. Doc. UNEP/CBD/BS/COP-MOP/1/15 (April 14, 2004), available at <http://www.biodiv.org/doc/meetings/bs/mop-01/official/mop-01-15-en.pdf>.

⁵⁰ See Press Release, CBD Secretariat, *Biosafety Protocol Now Operational as Governments Agree on Documentation Rules for GMO trade* (Feb. 27, 2004), available at <http://www.biodiv.org/doc/press/2004/pr-2004-02-27-bs-en.doc>.

⁵¹ *Id.* at 1.

⁵² *Convention on Int’l Trade in Endangered Species of Wild Fauna and Flora*, Mar. 3, 1973, 12 I.L.M. 1085 (entered into force July 1, 1975).

Thirteenth Meeting of the Conference of the Parties (COP-13) for CITES took place in Bangkok, Thailand from October 2–14, 2004. The 166 countries present at the talks focused on encouraging countries to form new regional alliances, increasing funding for enforcement, and changing the protected status with regard to certain species.⁵³

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

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

E. *Fisheries and Marine Mammals*⁵⁵

1. United Nations Food and Agricultural Organization (FAO)

In 2004, the FAO reported that 47% of major marine fish stocks were fully exploited, and another 18% were overexploited.⁵⁶ “[O]ver-capacity and illegal, unreported and unregulated (IUU) fishing” is the primary contributor to over-exploitation undermining efforts to manage fisheries in a sustainable manner.⁵⁷

IUU fishing was the topic at the FAO’s technical meeting in June 2004. Eighty-four FAO members convened to discuss ways of strengthening “international cooperation on managing fishing capacity and combating” IUU fishing.⁵⁸ At the close of the technical meeting, the members recommended that governments cooperate more to suppress trade in illegally caught fish and increase the severity of penalties for IUU fishing.⁵⁹ At the meeting, members reviewed the status of National Plans of Action (NPOAs) to combat IUU fishing. Although “FAO Members [were] urged to formulate . . . NPOAs to combat IUU fishing” by June 2004,⁶⁰ current figures indicate that twenty FAO members (32%) have not yet started formulating NPOAs, twenty-two members (31%) are actively planning on formulating NPOAs, and only fifteen members (24%) are currently formulating NPOAs.⁶¹ Only six members (9%) had finalized their respective

⁵³ See Jonathan Hopfner, *Biodiversity: Parties to U.N. Biodiversity Treaty Pledge to Reduce Rate of Species Loss, Set Targets*, 27 INT’L ENV’T REP. (BNA) 165 (2004).

⁵⁴ See Eric J. Lyman, *Biodiversity: Plant Genetic Resources Treaty Ratified By 12 EU States, Takes Effect in Late June*, 27 INT’L ENV’T REP. (BNA) 287 (2004).

⁵⁵ See *infra* section VIII.

⁵⁶ Press Release, Food and Agric. Org. of the U.N., *Excess Capacity and Illegal Fishing: Challenges to Sustainable Fisheries* (July 1, 2004), available at <http://www.fao.org/newsroom/en/focus/2004/47127/index.html>.

⁵⁷ *Id.*

⁵⁸ Press Release, Food and Agric. Org. of the U.N., *Countries Debate Strategies for Managing Fleet Capacity and Combating Illegal Fishing* (July 1, 2004), available at <http://www.fao.org/newsroom/en/news/2004/47649/index.html>.

⁵⁹ *Id.*

⁶⁰ See *Action Taken by FAO Members to Implement the Int’l Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (IPOA-IUU), ¶ 5, FAO Doc. TC IUU-CAP/2004/Inf.3 (2004), available at <ftp://ftp.fao.org/fi/DOCUMENT/tc-iuu-cap/2004/inf3e.pdf>.

⁶¹ *Id.* ¶ 68.

NPOAs by the June 2004 deadline, with the “other [m]embers putting estimated completion dates for their NPOAs back to 2005 and 2006.”⁶²

2. United Nations Convention on the Law of the Sea (UNCLOS)⁶³

UNCLOS is perhaps the most comprehensive international environmental treaty. UNCLOS focuses, *inter alia*, on the protection of marine living resources as an intrinsic component of the oceanic environment, and contains a number of necessary, general obligations dealing with the protection of different marine resources.

As of February 2004, there were 145 parties to the UNCLOS, which included roughly 83% of all coastal states (127 of 152).⁶⁴ Generally, the twenty-five non-party coastal states have accepted the Convention as reflecting customary international law.⁶⁵ One hundred and ten coastal states claim an exclusive economic zone (EEZ)—this means 72% of coastal states have laid claim to an area for which they now have an international legal obligation to conserve and manage.⁶⁶

In March 2004, the U.N. General Assembly released a December 2003 resolution that reiterated its “*deep concern* at the situation of many of the world’s fisheries, caused principally by overcapacity, overfishing and illegal, unregulated and unreported fishing, as well as, in many areas, pollution.”⁶⁷ The resolution reaffirmed that the UNCLOS “sets out the legal framework within which all activities in the oceans and seas must be carried out.”⁶⁸ A United States case, *American Pelagic Fishing Co. v. U.S.* invoking UNCLOS, is referred to in Section VIII (A).

3. International Whaling Commission

The International Whaling Commission’s (IWC) 56th annual meeting took place from July 19–22, 2004 in Sorrento, Italy. Although the Revised Management Procedure (RMP) for commercial whaling has been endorsed, the Revised Management Scheme (RMS), an inspection and observation system, must be completed before the Commission will consider establishing catch limits above zero.

At the 56th annual meeting, the IWC rejected proposals to create sanctuaries in the South Pacific and South Atlantic, to delete the provision for the Southern Ocean Sanctuary, and a proposal to include a catch limit of 2914 Antarctic minke whales was also rejected. Additionally, the Commission rejected Japan’s proposals to establish catch limits of 100 minke whales and 150 Bryde’s whales to be taken by coastal community-based whaling, but passed a resolution to work to resolve this issue.⁶⁹

⁶² *Id.*

⁶³ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1266 (entered into force Nov. 16, 1994).

⁶⁴ *Oceans and the Law of the Sea: Report of the Secretary-General*, U.N. GAOR 59th Sess., Agenda Item 51(a), ¶ 5, U.N. Doc. A/59/62 (2004).

⁶⁵ *Id.* ¶ 20.

⁶⁶ *Id.*

⁶⁷ *Oceans and the Law of the Sea*, U.N. GAOR 58th Sess., Agenda Item 52(a), U.N. Doc. A/58/L.19 (2003).

⁶⁸ *Id.*

⁶⁹ *Int’l Whaling Comm’n, 2004 Resolutions: The Resolutions Made at the IWC Annual Meeting in Sorrento, Italy 2004* (July 19–22, 2004), available at <http://www.iwcoffice.org/meetings/resolutions/resolution2004.htm>.

4. International Maritime Organization

On February 13, 2004, the International Maritime Organization (IMO) adopted the International Convention for the Control and Management of Ships Ballast Water and Sediments.⁷⁰ The goal of the Convention is to prevent the spread of harmful aquatic organisms carried by ships' ballast water.

VII. INTERNATIONAL ECONOMY AND THE ENVIRONMENT

A. International Environmental Standards

During 2004 the International Organization for Standardization (ISO) continued its work on developing environmental standards and published improvements to ISO 14001 and ISO 14004. These two standards provide specifications and guidelines for the implementation of environmental management systems. The improvements include better compatibility between the standards, clarification of the standards' requirements, and increased user-friendliness.⁷¹

The ISO held its 27th General Assembly in Geneva, Switzerland from September 14–16, 2004. In his address to the Assembly, U.N. Secretary-General Kofi Annan praised the work contributions of the ISO to "health, safety, security, the environment, transport, and information technology," and added that the standards were "crucial to sustainable development."⁷²

B. International Trade and the Environment

1. World Trade Organization (WTO)

The character of trade and environmental conflicts has been illustrated by past decisions of the Dispute Settlement Body (DSB) of the WTO. The inter-jurisdictional nature of such conflicts is accentuated by the case of *Chile v. European Union*.⁷³

In April 2004, the WTO Secretariat attempted to address these potential conflicts in a background document section entitled *Trade and Environment at the WTO*.⁷⁴ While the document goes into great depth on the trade and environment debate, the overarching themes boil down to four "Parameters of Discussion": (1) the WTO is not an environmental protection agency; (2) GATT/WTO rules provide significant scope for environmental protection; (3) trade policies should strive for increased market access for

⁷⁰ *Int'l Convention for the Control and Mgmt. of Ships' Ballast Water and Sediments*, (adopted Feb. 13, 2004), at <http://www.imo.org/Index.htm> (stating the convention will enter into force twelve months after ratification by thirty States, representing 35% of world merchant shipping tonnage; currently, no States have ratified or signed the Convention).

⁷¹ See Press Release, Int'l Org. for Standardization, ISO Publishes Improved Versions of ISO 14000 Environmental Management System Standards (Nov. 15, 2004), available at <http://www.iso.org/iso/en/commcentre/pressreleases/2004/Ref940.html>.

⁷² Press Release, Int'l Org. for Standardization, ISO Standards 'Crucial' to Sustainable Development, Says UN Secretary-General (Sept. 15, 2004), available at <http://www.iso.org/iso/en/commcentre/pressreleases/2004/Ref930.html>.

⁷³ This case involves Swordfish Stocks in the South-Eastern Pacific Ocean. For a discussion of this case see *infra* Part VIII(B)(1).

⁷⁴ *Background Document to Assist Public Understanding of the Trade and Environment Debate in the WTO* (Apr. 2004), 4–6, at http://www.wto.org/English/tratop_e/envir_e/envir_backgrnd_e/trade_env_e.pdf.

developing countries; and (4) trade and environment coordination should be enhanced.⁷⁵

On June 21, 2004, the United States submitted observations to the WTO in accordance with paragraph 31(I) of the Doha Declaration.⁷⁶ According to paragraph 31(I), the parties agreed to negotiations concerning “the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements.”⁷⁷ The United States’ report submitted observations concerning WTO rules and Multilateral Environmental Agreements (MEAs) with Party-to-Party specific trade obligations (STOs).⁷⁸ The report indicates “the United States believes that the MEA/WTO relationship is working quite well,”⁷⁹ making it unsurprising that “no formal disputes, on trade or other matters, have arisen concerning the STOs discussed.”⁸⁰ The report also noted various features of STOs that have aided conflict avoidance, including restrictions designed to target environmental problems with specificity, restrictions which can be adjusted according to changing science, flexible procedures for amending the scope of restrictions, and restriction transparency.⁸¹

WTO members met in July 2004 with the hope of working through disagreements over the Doha negotiations that ended in deadlock during the 2003 Ministerial Conference in Cancun, Mexico.⁸² Following intense negotiations, the delegates approved a package of framework and other agreements that will form the foundation for future negotiations.

On November 8, 2004, the EC requested consultations with the governments of the United States and Canada concerning the continued suspension of obligations in the EC.⁸³ In 1998, the WTO’s dispute settlement body (DSB) adopted the reports of the panel and Appellate Body finding a violation of WTO rules by the EC.⁸⁴ When the EC did not modify its laws within a “reasonable period of time,” both the United States and Canada were authorized to suspend obligations to the EC and impose import duties at set bound rates.⁸⁵ The EC enacted new legislation, which entered into force on October 14, 2003, and claimed the new laws conformed to WTO rules.⁸⁶ The United States and Canada disagreed and consequently continued the suspension of obligations to the EC.⁸⁷

⁷⁵ *Id.* at 6–7.

⁷⁶ See WTO: Committee on Trade and Environment: Sub-paragraph 31(I) of the DOHA Declaration, TN/TE/W/40 (June 21, 2004), available at http://www.ustr.gov/assets/Trade_Sectors/Environment/Environmental_Submissions_to_WTO/asset_upload_file574_5975.pdf [hereinafter *DOHA 31(I)*].

⁷⁷ WTO: Ministerial Conference, Nov. 20, 2001, WT/MIN(01)/DEC/1 (2001), at ¶ 31(i), available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#tradeenvironment.

⁷⁸ *DOHA 31(I)*, *supra* note 76, ¶ 3.

⁷⁹ *Id.* ¶ 29.

⁸⁰ *Id.* ¶ 31.

⁸¹ *Id.* ¶ 30.

⁸² See Press Release, WTO, Round-the-Clock Meetings Produce “Historic” Breakthrough (July 31, 2004), available at http://www.wto.org/english/news_e/news04_e/dda_package_sum_31july04_e.htm.

⁸³ Request for Consultations by the European Communities, United States: Continued Suspension of Obligations in the EC–Hormone Dispute, WT/DS320/1, G/L/713, WTO Doc. 04–4762 (Nov. 10, 2004), available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2004.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

2. Bilateral and Regional Trade Initiatives

a. North American Free Trade Agreement (NAFTA)

On March 11, 2004, the North American Commission for Environmental Cooperation (CEC) held a symposium in Oaxaca, Mexico, on the issue of transgenic corn.⁸⁸ Established to address regional environmental concerns, help prevent potential trade and environmental conflicts, and to promote the effective enforcement of environmental law, the CEC is an international organization created under the North American Agreement on Environmental Cooperation (NAAEC)—a subsidiary to NAFTA.⁸⁹

Following the symposium the Joint Public Advisory Committee (JPAC) drafted a letter of advice to the CEC for consideration in drafting a report later in the year.⁹⁰ Pursuant to Article 13 of the NAAEC, the Secretariat issued a report on behalf of the CEC on November 8, 2004, entitled “Maize and Biodiversity: The Effects of Transgenic Maize in Mexico.”⁹¹ The report acknowledged the controversial spreading of genetically modified corn amongst native crops in areas around Oaxaca and made a number of recommendations.⁹² The recommendations called for additional research, a continuation of the moratorium on planting genetically modified corn in Mexico unless carefully planned and contained in an experimental setting, preservation of the genetic diversity of Mexican corn, and application of an “as low as is reasonably achievable” standard in adopting risk-reducing policies.⁹³

On June 15, 2004, the Ten-year Review and Assessment Committee released a report to the CEC entitled *Ten Years of North American Environmental Cooperation*.⁹⁴ The Report assessed the accomplishments and future objectives of the NAAEC in light of the ten year anniversary of NAFTA and the Side Agreement.⁹⁵ The Review noted that Mexico’s environmental legislation benefited significantly from the NAAEC while benefits in Canada and the United States were more subtle.⁹⁶ The Review also issued fourteen recommendations based on conclusions that the Committee had made during its assessment. The recommendations essentially outline ways to strengthen the CEC in the future.⁹⁷

⁸⁸ See Press Release, North American Commission for Environmental Cooperation, As Per the NAAEC Agreement, the JPAC Provides Its Initial Recommendations to the NAFTA Ministers on Transgenic Maize in Mexico (Apr. 13, 2004), available at <http://www.cec.org/news/details/index.cfm?varlan=english&ID=2604>.

⁸⁹ See *infra* section VIII.

⁹⁰ Letter from Donna Tingley, Chairperson for the the Joint Public Advisory Committee, to Council Members to the Commission for Environmental Cooperation (Apr. 13, 2004), available at http://www.cec.org/files/PDF/JPAC/JPAC-Letter-Maize-13-Apr-04_en.pdf.

⁹¹ *Secretariat for the Commission for Environmental Cooperation, Maize and Biodiversity: The Effects of Transgenic Maize in Mexico—Key Findings and Recommendations* (2004), available at http://www.cec.org/files/PDF/Maize-and-Biodiversity_en.pdf.

⁹² *Id.* at 32–34.

⁹³ *Id.* at 31.

⁹⁴ *Ten-Year Review and Assessment Committee, The Commission for Environmental Cooperation, Ten Years of North American Environmental Cooperation* (2004), available at http://www.cec.org/files/PDF/TRAC-Report2004_en.pdf.

⁹⁵ *Id.*

⁹⁶ *Id.* at 5.

⁹⁷ *Id.* at 48–56.



b. Other Bilateral and Regional Trade Agreements

In 2004 the United States established new bilateral free trade agreements (FTAs) with Australia, Morocco, and Bahrain.⁹⁸ The United States also signed a bilateral investment treaty with Uruguay in an effort to “deepen [the United States’] economic relationship with Uruguay, thus encouraging two-way trade.”⁹⁹ In efforts to strengthen regional ties, the United States negotiated with Peru, Ecuador, and Colombia concerning a proposed Andean FTA, which the United States hopes will also include Bolivia during later negotiation stages.¹⁰⁰ Additionally, the Dominican Republic joined the United States and other Central American countries in the previously established Central American Free Trade Agreement (CAFTA).¹⁰¹ Controversy over CAFTA continues as some fear that the perceived harmful environmental impacts of NAFTA will merely be extended to the region further south.¹⁰²

The Office of the United States Trade Representative (USTR) concluded a number of FTA environmental reviews in 2004. The USTR released Final Environmental Reviews for the Australia and Morocco FTAs.¹⁰³ In both cases, “the Administration has concluded that changes in the pattern and magnitude of trade flows attributable to the FTA will not have any significant environmental impacts in the United States.”¹⁰⁴ The USTR also released for comment Interim Environmental Reviews of the FTAs with Bahrain and Panama.¹⁰⁵ In both cases, “the FTA is not expected to have

⁹⁸ Free Trade Agreement, May 18, 2004, U.S.-Austl., available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file148_5168.pdf; Free Trade Agreement, June 15, 2004, U.S.-Morocco, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html; Free Trade Agreement, Sept. 14, 2004, U.S.-Bahr., available at http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html.

⁹⁹ Treaty Between the United States of America and the Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, Oct. 25, 2004, U.S.-Uru., available at <http://www.state.gov/documents/organization/38051.pdf>; Press Release, Office of the U.S. Trade Representative, United States, Uruguay Sign Bilateral Investment Treaty (Oct. 25, 2004), available at http://www.ustr.gov/Document_Library/Press_Releases/2004/October/United_States_Uruguay_Sign_Bilateral_Investment_Treaty.html.

¹⁰⁰ See The Office of the U.S. Trade Representative, *Andean Free Trade Agreement*, at http://www.ustr.gov/Trade_Agreements/Bilateral/Andean_FTA/Section_Index.html.

¹⁰¹ Press Release, Office of the U.S. Trade Representative, Dominican Republic Joins Five Central American Countries in Historic FTA with U.S. (Aug. 5, 2004), available at http://www.ustr.gov/Document_Library/Press_Releases/2004/August/Dominican_Republic_Joins_Five_Central_American_Countries_in_Historic_FTA_with_U.S.html.

¹⁰² See Mark Engler, *The Trouble with CAFTA*, THE NATION (Jan. 16, 2004), available at <http://www.thenation.com/doc.mhtml?i=20040202&s=engler>.

¹⁰³ Final Environmental Review of the U.S.-Australia FTA, July 2004, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/asset_upload_file_550_5830.pdf [hereinafter U.S.-Australia FTA Review]; Final Environmental Review of the U.S.-Morocco Free Trade Agreement, July 2004, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/asset_upload_file_569_5831.pdf [hereinafter U.S.-Morocco FTA Review].

¹⁰⁴ U.S.-Australia FTA Review, *supra* note 103, at 1; U.S.-Morocco FTA Review, *supra* note 103, at 1.

¹⁰⁵ Executive Office of the President of the U.S., Interim Env'tl. Review of the U.S.-Bahr. Free Trade Agreement (2004), available at <http://www.ustr.gov/assets>

significant direct effects on the U.S. environment.”¹⁰⁶ It should be noted, however, that these environmental reviews primarily assess the environmental impact of FTAs on the United States environment and not on the trading partner’s environment. Consequently, the assessment may be misleading in terms of the overall impact of the FTA, especially where the trading partner is a developing country primarily engaged in harvesting natural resources.

VIII. RECENT IEL LITIGATION¹⁰⁷

A. U.S. Cases

1. Sosa v. Alvarez-Machain

On June 29, 2004, the U.S. Supreme Court unanimously decided *Sosa v. Alvarez-Machain*,¹⁰⁸ a case that may have significant impacts on the fate of pending and future international environmental litigation. *Sosa* involved claims under the Federal Tort Claims Act (FTCA) and the Alien Tort Statute (also known as the Alien Tort Claims Act (ATCA)). In deciding whether a Mexican national who was abducted in Mexico and brought to the United States to stand trial could recover on the basis of an international tort, the Supreme Court concluded that (1) “the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country”¹⁰⁹ and (2) the courts must use the utmost caution and restraint in considering claims and crafting remedies under the ATCA.¹¹⁰ Based on these conclusions, the Court found the plaintiff was not entitled to recover. Currently, there are about ten pending ATCA cases, including those alleging violations of rules and norms of international environmental law that may be affected by this decision.¹¹¹

2. American Pelagic Fishing Co. v. United States

The Federal Circuit Court of Appeals in *American Pelagic Fishing Co. v. U.S.*¹¹² acknowledged the relevance of international legal obligations to conserve and protect living marine resources under UNCLOS. American Pelagic invested \$40 million in a

/Trade_Agreements/Bilateral/Bahrain_FTA/asset_upload_file720_3078.pdf [hereinafter U.S.-Bahrain FTA Review]; Office of the U.S. Trade Rep., Interim Environmental Review U.S.-Panama FTA (2004), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Panama_FTA/asset_upload_file503_5123.pdf [hereinafter U.S.-Panama FTA Review].

¹⁰⁶ U.S.-Bahrain FTA Review, *supra* note 105, at i; U.S.-Panama FTA Review, *supra* note 105, at 1.

¹⁰⁷ This section provides an impressionistic view of selected cases relevant to international environmental law. It is not intended to be an exhaustive or comprehensive overview of all relevant case law developments.

¹⁰⁸ 124 S. Ct. 2739 (2004).

¹⁰⁹ *Id.* at 2754.

¹¹⁰ *Id.* at 2762–64.

¹¹¹ *Recent ATCA Cases Against Corporate Defendants*, at <http://www.earthrights.org/litigation/recentatcacases.shtml> (last updated July 21, 2004); see, e.g., *Arias v. DynCorp*, No. 1:01CV01908 (RWR) (D.D.C. filed Sept. 11, 2001) (filed by a group of Ecuadorian farmers against DynCorp asserting the company illegally sprayed a toxic fumigant over the Colombian border into Ecuador, causing serious health effects, crop and property damage, and death).

¹¹² 379 F.3d 1363 (Fed. Cir. 2004).

fishing vessel to harvest mackerel and herring within the United States exclusive economic zone (EEZ). Congress, concerned American Pelagic would over-harvest the fish, added a rider to an appropriations bill that effectively revoked the company's fishing permits. The company sued the government for a Fifth Amendment taking, and the trial court awarded them \$37 million.¹¹³ The government appealed and won. The Federal Circuit held that fishing permits did not constitute a property interest for purposes of the Fifth Amendment, the government was within its rights under UNCLOS and the Magnuson Act to restrict fishing for the purposes of conservation and management, and the right to fish was not a "stick in the bundle of rights" owning a fishing vessel entailed.¹¹⁴

3. Pending IEL Litigation—U.S. Cases

On July 21, 2004, three non-governmental organizations and eight attorneys general filed complaints alleging that greenhouse gases from American Electric Power Co., American Electric Power Service Corp., The Southern Co., the Tennessee Valley Authority, XCEL Energy Inc., and Cinergy Corp. contribute to global warming and climate change, causing damage to the public infrastructure, private property, and residents of those states.¹¹⁵ The plaintiffs in these cases seek injunctive relief under public nuisance theories found in federal and state common law.

4. Pending IEL Litigation—Non-U.S.

The Inuit is a group of seal-hunting indigenous peoples scattered throughout the Arctic. The Inuit Circumpolar Conference (ICC) announced that it will seek a ruling from the Inter-American Commission on Human Rights that the United States is threatening the Inuit's existence by substantially contributing to global warming.¹¹⁶ The Commission is an investigative arm of the Organization of American States and has no enforcement powers. However, a declaration that the United States has violated the Inuit's rights could arguably establish the foundation for a future lawsuit against either American companies in federal court or the United States in an international court.

B. *International Tribunal for the Law of the Sea (ITLOS)*

1. Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. E.U.)

The potential for conflict between international trade and international environmental law is expressed in pending international litigation between the European Union (EU) and Chile. In 2000 the EU filed a WTO claim against Chile challenging Chile's prohibition on the unloading of swordfish by EU fishing vessels in Chilean ports.¹¹⁷ Chile subsequently filed an ITLOS claim against the EU in 2000 alleging

¹¹³ *Id.* at 1366.

¹¹⁴ *Id.* at 1382–83.

¹¹⁵ *Conn. v. Am. Elec. Power Co.*, No. 04-5669 (S.D.N.Y. filed July 21, 2004); *Open Space Inst. v. Am. Elec. Power Co.*, No. 04-5670 (S.D.N.Y. filed July 21, 2004) (proceeding under the same judge as related cases).

¹¹⁶ Andrew C. Revkin, *Eskimos Seek to Recast Global Warming as a Rights Issue*, N.Y. TIMES, Dec. 15, 2004, at A3.

¹¹⁷ WTO Dispute Panel Report, Request for Consultations by the European Communities, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/1 (Apr. 26, 2000), available at <http://docsonline.wto.org>; WTO Dispute Panel Report, Request for the Establishment of a Panel by the European Communities,

violations of the UNCLOS.¹¹⁸ Both the WTO and ITLOS disputes are currently suspended at the request of the Parties.¹¹⁹ Since both the DSB and ITLOS are legally binding dispute settlement mechanisms with compulsory jurisdiction, the possibility of contrary judgments between the two bodies poses an especially interesting development to the conflict between MEAs and the WTO.

Pursuant to an order issued by ITLOS, the January 1, 2004 deadline for making preliminary objections in the Case on the *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Union)* was further extended until January 1, 2006.¹²⁰

C. United Nations Compensation Commission (UNCC)

The scorched-earth tactics of Iraqi troops during the 1991 invasion of Kuwait resulted in “one of the worst man-made environmental disasters of all time.”¹²¹ In December 2003, the UNCC reviewed the third installment of “F4” claims by Kuwait and Saudi Arabia against Iraq for environmental damage caused by the invasion of 1990-1991.¹²² While the claims were \$10 billion, the award was only \$1.5 billion.

In reviewing the claims, the UNCC stressed the claimants’ duty to act reasonably in mitigating damages,¹²³ and that in restorations efforts, “emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or [the] restoration of the environment to a particular physical condition.”¹²⁴ The UNCC also advised the claimants that any remediation measures they took should take account of potential adverse impacts, and that claimants were obligated under international law to avoid creating transboundary damages in the process of restoring their own environment.¹²⁵



Chile—Measures Affecting the Transit and Importation of Swordfish, WT/DS193/2 (Nov. 7, 2000), available at <http://docsonline.wto.org>.

¹¹⁸ Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Cmty.), Dec. 20, 2000, 40 I.L.M. 475.

¹¹⁹ WTO Dispute Panel Report, Communication from the European Communities, *Chile—Measures Affecting the Transit and Importation of Swordfish—Arrangement Between the European Communities and Chile*, WT/DS193/3 (Apr. 6, 2001), available at <http://docsonline.wto.org>.

¹²⁰ Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Cmty.), (Dec. 16, 2003), available at http://www.itlos.org/case_documents/2004/document_en_240.pdf (last visited Jan. 25, 2005); see also Press Release, ITLOS, Case on Conservation of Swordfish Stocks Between Chile and the European Community in the South-Eastern Pacific Ocean; Time-Limits Extended at the Request of the Parties (Jan. 7, 2004), available at http://www.itlos.org/news/press_release/2004/press_release_87_en.pdf.

¹²¹ THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL ECONOMIC AND SCIENTIFIC PERSPECTIVES 317 (Jay E. Austin & Carl E. Bruch eds., Cambridge University Press 2000).

¹²² See United Nations Compensation Commission Governing Council Report and Recommendations made by the Panel of Commissioners Concerning the Third Installment of “F4” Claims, Dec. 18, 2003, 43 I.L.M. 704, 705–6.

¹²³ See *Id.* at 712.

¹²⁴ *Id.* at 714.

¹²⁵ *Id.*

D. *European Court of Human Rights*

The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)¹²⁶ does not explicitly link or assert that the degradation of the environment may violate human rights. Nonetheless, that link is being forged by the European Court of Human Rights (ECHR). In the case of *Moreno Gómez v. Spain*,¹²⁷ rendered on November 16, 2004, the court found the city of Valencia, Spain violated art. 8 of the European Convention by issuing permits to bars and nightclubs that greatly contributed to noise pollution and vandalism in the area surrounding the plaintiff's home.¹²⁸ Article 8 of the European Convention reads, "[e]veryone has the right to respect for his private and family life, his home and his correspondence."¹²⁹ The court specifically referred to their opinion in *Lopez-Ostra v. Spain*,¹³⁰ where they held that environmental degradation may affect an individual's well-being in a manner that may deprive the individual of enjoyment of private and family life.¹³¹ *Moreno Gómez* and *Lopez-Ostra* are significant because they recognize a legal nexus between human and environmental rights. Furthermore, the decisions of the European Court, which are non-binding on other tribunals, may be of persuasive value in a broader international context.

E. *North American Commission for Environmental Cooperation Cases (CEC)*¹³²

Currently there are ten active CEC investigations open, with four originating in Mexico, five in Canada, and one in the United States.¹³³ These cases concern a diverse range of environmental issues, including: vehicle emissions; pulp mill and polychlorinated biphenyls (PCB) pollution in violation of the Canadian Fisheries Act; logging in Canada; hazardous waste management; water management; air pollution; environmental violations of indigenous peoples in Mexico; and violations of the Clean Water Act by the emission of mercury from coal-fired power plants in the United States.

¹²⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) (amended 1970, 1971 and 1990) [hereinafter European Convention].

¹²⁷ App. No. 4143/02, at <http://www.echr.coe.int/Eng/>.

¹²⁸ *Id.*

¹²⁹ European Convention, *supra* note 126, art. 8.

¹³⁰ App. No. 16798/90, 20 Eur. H.R. Rep. 277 (1994).

¹³¹ *Id.*

¹³² The North American Agreement on Environmental Cooperation (NAAEC) is a Side Agreement to NAFTA. Its members include Can., the United States, and Mex., and its purpose is to promote environmental enforcement, provide a framework for environmental protection, and to reconcile issues between trade and the environment. To this end, the NAAEC created the North American Commission for Environmental Cooperation (CEC). The CEC plays a quasi-judicial role under the NAAEC, through its Citizen Submissions on Enforcement Matters (CSEM) program. Under the CSEM, any citizen of the NAFTA partner states may act as a "whistle-blower," and inform the CEC of a partner government's failure to effectively enforce environmental laws. The CEC may then investigate the matter and publish a factual record of its findings.

The CEC has no enforcement power and its findings are not legally binding. However, the CEC provides a convenient and useful mechanism for individuals to bring official attention to environmental concerns. The fact finding and reporting roles that the CEC plays receive international attention, which in turn focuses the environmental issues and puts pressure on the governments that are failing to enforce their environmental regulations.

¹³³ See the CEC's official website at <http://www.cec.org> for more details on these cases.