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ARTICLE

CONSENSUS AMONG MANY VOICES: ARTICULATING THE EUROPEAN UNION'S POSITION ON CLIMATE CHANGE

NUNO S. LACASTA, SURAJE DESSAI & EVA POWROSLO*

I. INTRODUCTION

"We all recognize that climate change is one of the most threatening issues that we are facing today... We cannot negotiate with the Climate! We need to take action, now." – Margot Wallström, European Commissioner for Environment¹

"Europe is resolved to act and has mobilized to fight the greenhouse effect." – Jacques Chirac, French President

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¹ Speech by European Environment Commissioner, Margot Wallström, Environment European Climate Change Program: A Successful Approach to Combating Climate Change, ECCP Conference Brussels, 2 July 2001. Available at: http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/322|0|RAPID&lg=EN (visited Dec. 6, 2001).

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"... [C]limate change is already upon us. But it can get much worse if we fail to act." – John Prescott, UK Deputy Prime Minister

"The fight against the greenhouse [effect] cannot be delayed."
– Jürgen Trittin, German Environment Minister

As the above statements² from European leaders attest, the issue of climate change ranks high on the continent's political agenda. In fact, the European Union (EU)³ and its Member States have for over a decade claimed domestic and international leadership with regard to the challenge of global warming.⁴ The EU has historically supported both the 1992 United Nations Framework Convention on Climate Change (UNFCCC),⁵ as well as its 1997 Kyoto Protocol.⁶ After the United States withdrawal from the latter in mid 2001,⁷ the EU

² The last three statements presented were made in 2000 at Sixth Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC), which took place in The Hague from November 13-25, 2000. See list of statements, in U.N. Doc. FCCC/CP/2000/5/Add.1, at 25-26. Available at: <http://unfccc.int/resource/cop6.html> (visited January 10, 2001).

³ The European Union (EU), established by the 1992 Treaty on European Union (also known as Maastricht Treaty), available at http://www.europa.eu.int/eurlex/en/treaties/dat/eu_cons_treaty_en.pdf (visited Dec. 11, 2001), consists of three pillars: the European Communities (European Community [EC], European Coal and Steel Community and European Atomic Energy Community); the Common Foreign and Security Policy; and co-operation in home affairs and justice policy. Although the use of terms may sometimes be incorrect as a strict legal matter (see for a detailed explanation of this terminology Nigel Haigh, *Climate Change Policies and Politics in the European Community*, in *POLITICS OF CLIMATE CHANGE: A EUROPEAN PERSPECTIVE* (Tim O'Riordan & Jill Jäger eds., 1996 [hereinafter O'RIORDAN & JÄGER] 155-156 [hereinafter Haigh]), following common practice in the context of climate negotiations, the term "EU" will be used consistently, without distinction as to which entity, the EU or the EC, acts in the specific circumstances (cf. SEBASTIAN OBERTHÜR & HERMANN E. OTT, *THE KYOTO PROTOCOL: INTERNATIONAL CLIMATE POLICY FOR THE 21ST CENTURY* 14 (1999)[hereinafter OBERTHÜR & OTT]).

⁴ For an in-depth analysis of European leadership on climate change, see JOYETA GUPTA AND MICHAEL GRUBB (EDS.) *CLIMATE CHANGE AND EUROPEAN LEADERSHIP* (2000) [hereinafter GUPTA & GRUBB].

⁵ United Nations Framework Convention on Climate Change, 9 May 1992, reprinted in 31 I.L.M. 849 (1992), available at <http://www.unfccc.int/resource/conv/index.html> (visited Dec. 10, 2001) [hereinafter UNFCCC or Convention].

⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Conference of the Parties, 3rd Sess., Agenda Item 5, U.N. Doc. FCCC/CP/1997/L.7/Add.1, adopted Dec. 10, 1997, opened for signature Mar. 16, 1998 available at <http://www.unfccc.int/resource/docs/convkp/kpeng.pdf> (visited Dec. 10, 2001) [hereinafter Kyoto Protocol or Protocol].

⁷ See e.g. "Oh no, Kyoto," *The Economist* (Apr. 7, 2001). For a summary of initial reactions to the U.S. withdrawal from Kyoto, see Gonçalo Cavalheiro & Nuno Lacasta,

has continued to actively pursue the Protocol's ratification and entry into force by the time of the World Summit on Sustainable Development in 2002.⁸ In fact, the EU and its Member States have recently ratified the Protocol.⁹ Following is a brief overview of the international climate regime¹⁰ since 1992 (see table 1, below).¹¹

Table 1: Phases of EU Climate Policy¹²

Phases	Milestone
1988-1990	Emergence of scientific concern
1990-1992	Negotiation of UNFCCC
1992-1995	Entry into force and First Conference of the Parties (COP-1)
1995-1997	Negotiation of Kyoto Protocol
1997-Present	Preparations for Protocol entry into force and implementation

"I Oppose the Kyoto Protocol": *Ou Como se Deita um Acordo Internacional no Lixo!* Euronatura Working Paper 1/2001, April 2001, available at: www.euronatura.pt (visited Dec. 12, 2001).

⁸ See e.g. 2399th European Council of Environmental Ministers, Brussels, December 12-13, 2001, available at http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=PRES/01/459|0|RAPID&lg=EN&display= (visited June 1, 2002).

⁹ See e.g. "EU Ratifies Global Warming Treaty: Kyoto Accord En Route to Becoming Law Despite U.S. Rejection," *The Washington Post*, (June 1, 2002), at A15 [hereinafter EU ratification].

¹⁰ We use in our analysis Krasner's definition of "regimes" as "Sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations." See INTERNATIONAL REGIMES (Stephen D. Krasner, ed.), 1982, at 186. For an application of the main theories of international relations to the issue of climate change, see I. H. Rowlands, *Major theoretical approaches*, in INTERNATIONAL RELATIONS AND GLOBAL CLIMATE CHANGE (D. Sprinz D. and U. Luterbacher, eds.), 1996 [hereinafter SPRINZ & LUTERBACHER], at 32-39.

¹¹ See for reviews and analyses of the UNFCCC negotiation, IRVING M. MINTZER AND J. AMBER LEONARD (EDS.), NEGOTIATING CLIMATE CHANGE: THE INSIDE STORY OF THE RIO CONVENTION (1994); and Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J INTL L 451-558 (1993). For review and analyses of the Kyoto Protocol, see OBERTHÜR & OTT, *supra* note 3; MICHAEL GRUBB, CHRISTIAAN VROLIJK AND DUNCAN BRACK, THE KYOTO PROTOCOL: A GUIDE AND ASSESSMENT (1999) [hereinafter GRUBB ET AL]; Clare Breidenich et al., *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 AM J INTL L 315-326 (1998); and Nuno S. Lacasta and Pedro Martins Barata, *Análise do Protocolo de Quioto sobre Alterações Climáticas*, 4-5 Rev. de D. Ambiente e Ordenamento do Território, 105-131 (Dec. 1999) [hereinafter Lacasta & Barata].

¹² From Farhana Yamin, *The Role of the EU in Climate Negotiations*, in GUPTA & GRUBB, *supra* note 4, at 48. [hereinafter Yamin]. For a detailed account of the first three phases of EU climate policy, see Haigh, *supra* note 3, at 161-185.

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The Convention's ultimate objective is to "achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."¹³ In the face of mounting climate science¹⁴ and in recognizing that the UNFCCC was only a first step in addressing the challenge of global warming, the international community decided to take on more stringent commitments and adopted the Kyoto Protocol in 1997. This landmark international agreement obliges developed countries and economies in transition (Annex B Parties) to reduce their overall emissions of six greenhouse gases (GHGs)¹⁵ to "at least" five percent¹⁶ below 1990 levels during the 2008–2012 "commitment period."¹⁷ In order to meet their commitments in an economically efficient manner, Parties can make use of market-based instruments known as the Kyoto mechanisms (International Emissions Trading, Joint Implementation and the Clean Development Mechanism).¹⁸ Parties can also choose to use toward their emission reduction commitments activities enhancing the ability of forests to store carbon (also known as land use change and forest activities or "sinks").¹⁹ Such activities are currently limited to afforestation, reforestation, and deforestation, although Article 3.4 leaves a door open for the inclusion of other activities.²⁰

¹³ Article 2 UNFCCC, *supra* note 5.

¹⁴ See CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE (J.T. Houghton et al. Eds., 1996). This Second Assessment Report from the Intergovernmental Panel on Climate Change (IPCC) (established in 1988), which has been elaborated with the contribution from over 2000 scientists from all over the world, provided the scientific foundation for the strengthening of the international response to climate change that culminated in the adoption of the Kyoto Protocol. The IPCC has recently updated that report after a third assessment. See also CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS (J.T. Houghton et al. Eds., 2001).

¹⁵ The six GHGs are carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulphur hexafluoride (SF₆).

¹⁶ Emissions limitation or reduction are differentiated for each party: e.g. the EU reduces by 8%, the U.S. by 7%, Japan by 6%, Russia and Ukraine stabilise, whereas Australia increases by 8% and Iceland by 10%. See Kyoto Protocol, *supra* note 6, Annex B.

¹⁷ *Id.* Article 3

¹⁸ *Id.* Article 6, 12 and 17.

¹⁹ *Id.* Article 3.3 and 3.4.

²⁰ Indeed, at the resumed Sixth Conference of the Parties to the UNFCCC (COP-6.5), in mid 2001, Parties have agreed to also include as "sinks" activities those of cropland management, grazing land management and re-vegetation. In addition, and most importantly, each Annex B Party was allocated a quantity of tons of carbon uptake it

The Kyoto Conference raised the issue of climate change into the arena of "high politics" with the involvement of *inter alia* U.S. President Clinton, United Kingdom (UK) and Japan's Prime Ministers Blair and Hashimoto and Germany's Chancellor Kohl.²¹ The adoption of the Kyoto Protocol was seen as a major success for international environmental cooperation, even though it left myriad matters unfinished and nearly broke down at some critical stages.²² In November 1998, the Fourth Conference of Parties (COP-4)²³ to the FCCC adopted the Buenos Aires Plan of Action (BAPA), an ambitious work program on some of the key issues to be finalized by COP-6.²⁴ This work program was, however, only finished at COP-7 in 2001, after a collapse of the negotiations at COP-6 in late 2000.²⁵ As

can account towards its emissions target from forest management activities. *See Report of the Conference of the Parties on its Sixth Session, United Nations Framework Convention on Climate Change, Conference of the Parties, 6th Sess., U. N. Doc. FCCC/CP/2001/5 (with two addenda) [hereinafter COP-6.5 Report].* At the Seventh Conference of the Parties to the UNFCCC (COP-7), in November 2001, Parties further specified the operational rules with regard to the treatment of "sinks" under the Protocol. *See Report of the Conference of the Parties on its Seventh Session, United Nations Framework Convention on Climate Change, Conference of the Parties, 7th Sess., U.N. Doc. UNFCCC/CP/2001/13 (with four addenda) [hereinafter COP-7 Report].* Documents also available at: www.fccc.int (visited Oct. 11, 2001). For an overview of COP-7, including the provisions on "sinks," see Donald Goldberg & Katherine Silverthorne, *The Marrakech Accords*, American Bar Association's Climate Change and Sustainable Development Committee Newsletter, Vol.5, No.2, January 2002, at 1-6 [hereinafter "Goldberg & Silverthorne"].

²¹ See OBERTHÜR & OTT, *supra* note 3.

²² *Id.*

²³ COP refers to "Conference of the Parties." Hereinafter, a numeral following the acronym refers to the specific meeting, which have taken place annually since the Convention entered into force in March 21, 1994 (U.N. Doc. FCCC/1995/Inf.3, at 1). The convention's Parties have met for seven times since its adoption in 1992. COP-1 met in Berlin in 1995 (*see Report of COP-1, U.N. Doc. FCCC/CP/1995/7 (with one addendum) [hereinafter COP-1 Report];* COP-2 in Geneva in 1996 (*see Report of COP-2 U.N. Doc. FCCC/CP/1996/15 (with one addendum and one corrigendum) [hereinafter COP-2 Report];* COP-3 in Kyoto in 1997 (*see Report of COP-3, U.N. Doc. FCCC/CP/1997/7 (with one addendum and two corrigenda) [hereinafter COP-3 Report];* COP-4 in Buenos Aires in 1998 (*see COP-4 Report U.N. Doc. FCCC/CP/1998/16 (with one addendum) [hereinafter COP-4 Report];* COP-5 in Bonn in 1999 (FCCC/CP/1999/6 (with one addendum) [hereinafter COP-5 Report], COP-6 (which had two sessions in the Hague in 2000 and in Bonn in 2001 (COP-6.5) (*see COP-6 Report, U.N. Doc. FCCC/CP/2000/5 (with four addenda, including 5 volumes to Add.3) and COP-6.5 Report, supra* note 20.; and COP-7 in Marrakech in 2001 (*see COP-7 report, supra* note 20). All documents listed available at <<http://www.unfccc.int>> (visited Oct. 11, 2001).

²⁴ Those issues included the financial mechanism, technology transfer, adverse effects, activities implemented jointly (AIJ) under the pilot phase, the Kyoto mechanisms, the monitoring, reporting and verification rules and a compliance regime for the Protocol. *See Cop-4 Report, supra* note 23.

²⁵ See Suraje Dessai, *Why did the Hague Climate Conference Fail?*, 10 Environ-

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a result, Parties met at the resumed COP-6 (COP-6.5), already without the U.S. as an active negotiating Party, and reached agreement on a political package—the Bonn Agreement—on the Protocol’s operational rules.²⁶ This political agreement was later complemented with legal texts—the Marrakech Accords—at COP-7 in late 2001.²⁷ These agreements have paved the way for the ratification and entry into force of the Protocol, which is expected in 2003.

This article attempts to provide an overview of key policy elements of the European Union’s climate policy since the adoption of the UNFCCC in 1992 (see table 1 above). Section II discusses the main features of the EU as an actor vis-à-vis its Member States and the international community at large. Section III identifies the key actors at play in the EU context; Section IV analyzes the EU’s track record on domestic policies and measures. Section V, in turn, debates selected key topics in the international climate change negotiations from a EU perspective. Finally, section VI debates the prospects of continued international EU leadership on climate change, especially now that the U.S. has withdrawn from the Kyoto Protocol.

II. THE EU AS AN INTERNATIONAL ACTOR

The EU is a *sui generis* international organization, which has been referred to as a “supranational” organization.²⁸ Its characteristics are new to international law in that it performs certain functions that are traditionally within the realm of the sovereign state.²⁹ Notably, it has the power to adopt law which has “direct effect” in the Member States, an act of implementation by the states’ authorities not being necessary.³⁰

mental Politics 139-144 (2001).

²⁶ See COP-6.5 Report; and Goldberg & Silverthorne, *supra* note 20.

²⁷ See COP-7 Report, *supra* note 20.

²⁸ HANS SMIT & PETER E. HERZOG, *THE LAW OF THE EUROPEAN COMMUNITY*, Vol. 1, § 1.02 (Publication 623, Release 40, July 2001).

²⁹ Richard Macrory & Martin Hession, *The European Community and Climate Change*, in O’RIORDAN & JÄGER, *supra* note 3, at 106 [hereinafter Macrory & Hession].

³⁰ PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW* 163-167 (1998) [hereinafter CRAIG & DE BÚRCA]. EC Treaty art. 249 (ex Article 189) (*see infra* note 31) lists the different legal instruments that the EU has at its disposal: Regulations are binding in their entirety and apply directly in all Member States. Directives are binding, as to the result achieved, upon each Member State to which they are addressed. They leave the

A. THE BASIS FOR COMMUNITY ACTION

The Treaty of the European Community (EC Treaty)³¹ does not contain a single legal basis for Community action in the area of climate change. Depending on the nature of the individual measures, they have been based on a variety of provisions, including, *inter alia*, Articles 71 (ex Article 75, Transport), 95 (ex Article 100a, Approximation of laws), 133 (ex Article 113, Common commercial policy), as well as on the Community's environmental competence³² as set out in Title XIX of the EC Treaty, especially Article 174 (ex Article 130r). Its paragraph 1 provides that community policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilization of natural resources;
- promoting measures at international level to deal with regional or worldwide environmental problems.

Paragraph 4 explicitly provides for international cooperation, *inter alia* through the conclusion of treaties with third countries. Its first subparagraph reads:

Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organizations.

choice of form and methods to the national authorities. Decisions are binding in their entirety upon the addressees. Recommendations and opinions are not binding.

³¹ Treaty establishing the European Community (hereinafter EC Treaty) as amended by the 1997 Treaty of Amsterdam, available at <http://www.europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf> (visited Dec. 11, 2001). As the Treaty of Amsterdam renumbered the articles of the EC Treaty, we will cite the old article in parentheses. In late 2000, the Treaty of Nice amended the Amsterdam Treaty, but the former has not yet entered into force. The Nice treaty has not nonetheless clarified the questions addressed in this paper. We will therefore not take it into account in our analysis. See, for an analysis of EU environmental policy after Nice, Andrew Jordan & Jenny Fairbrass, *European Union Environmental Policy after the Nice Summit*, 10 ENV'TL POLITICS 109-114.

³² The word "competence" is used often by europeans in describing the mandate and/or relationships between eu states and the commission, etc. However, the word is not typically used that way in the U.S.

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The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.

Article 175 (ex Article 130s) determines the general procedure for the adoption of measures under Article 174, while Article 300 (ex Article 228) contains special rules for the conclusion of agreements according to Article 174 paragraph 4.

B. EXCLUSIVE VERSUS SHARED COMPETENCE

One of the features of the EU that most clearly distinguishes it from a state is the fact that the EU does not have comprehensive competence. On the contrary, it has competency to the extent that Member States have granted it.³³

In a few areas, the Member States have decided that the EU should be solely responsible for dealing with all issues that may arise pertaining to that particular subject matter ("exclusive" competence). This is arguably the case, for example, of the common commercial, agricultural and fisheries policies,³⁴ but not for the field of environmental policy. According to the first paragraph of Article 174 (ex Article 130r), which determines the scope of the Community's environmental competence, the EU environmental policy only "contributes" to the conservation and improvement of the environment. In addition, Article 176 EC Treaty (ex Article 130t) explicitly reserves the Member States' right to adopt more stringent measures than those adopted by the Community.³⁵ This is a case of "shared" or mixed competence between the Community and its Member States. Both entities have the power to take action, legislative and non-legislative, in the field of environmental protection. The Member States can act insofar as the EU has not done so.³⁶

³³ EC Treaty art. 5, ¶ 1 (ex Article 3b); CRAIG & DE BÚRCA, *supra* note 30, at 124. Further, the Community has legal personality insofar as the Member States have conferred competence on it. See EC Treaty art. 281 (ex Article 210), *supra* note 31; P.J.G. KAPTEYN & P. VERLOREN VAN THEMMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 97-101 (1998) [hereinafter KAPTEYN & VAN THEMMAAT].

³⁴ CRAIG & DE BÚRCA, *supra* note 30, at 124-126.

³⁵ Macrory & Hession, *supra* note 29, at 106, 123.

³⁶ Agnethe Dahl, *Competence and Subsidiarity*, in GUPTA & GRUBB, *supra* note 4, at

It is important to note that for areas of shared competence, the EC Treaty contains a presumption that the Member States rather than the Community should take necessary action.³⁷ According to the “subsidiarity” principle, the EU takes measures “only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore [. . .] be better achieved by the Community.”³⁸ This principle was introduced in 1987 for environmental regulation³⁹ and, since the adoption of the 1992 Maastricht Treaty, is applicable as a general rule to all areas of shared competence. Subsidiarity restricts the Community’s scope of action in the environmental field. The debate around subsidiarity has been highly politicized, and as a result decisions on attribution of competence have primarily been made for political and economic rather than environmental reasons.⁴⁰ In particular, the subsidiarity principle has been used to impede the surrender of further powers to the Community in the field of climate change.⁴¹

EU competence is particularly limited in the crucial energy sector. In fact, the Treaties do not contain any formal Community competence in this field. Energy legislation has therefore been based on the – exclusive – EU competence on internal market issues,⁴² and attempts have been made to take energy-related measures on the basis of EU environmental powers. However, by invoking the subsidiarity principle, Member States have frequently managed to retain their sovereignty in all important areas.⁴³ As will be shown in detail below (Section IV), EU policy proposals in this field have frequently failed or have been considerably weakened. For instance, some Member States have, to date, successfully prevented the adoption of a

203, 205 [hereinafter Dahl].

³⁷ *Id.* at 203, 213.

³⁸ EC Treaty art. 5 ¶ 2 (ex Article 3b), *supra* note 31.

³⁹ Former Article 130r (for explanation, *see supra* note 31).

⁴⁰ Ute Collier, *The EU and Climate Change Policy: the Struggle over Policy Competences*, in CASES IN CLIMATE CHANGE POLICY 43, 48 (Ute Collier & Ragnar Löfstedt eds., 1997 [hereinafter COLLIER & LÖFSTEDT]) [hereinafter Collier].

⁴¹ *See* Collier, *id.* at 43, 53-55; Dahl, *supra* note 36, at 203, 217; Haigh, *supra* note 3, at 165, 179; and IAN MANNERS, SUBSTANCE AND SYMBOLISM: AN ANATOMY OF COOPERATION IN THE NEW EUROPE 74 (2000) [hereinafter MANNERS].

⁴² *For an overview see* Dahl, *supra* note 36, at 203, 208, and Collier, *supra* note 40, at 43, 49, 50.

⁴³ *Id.* at 43, 49; also Dahl, *supra* note 36, at 203, 209.

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Community-wide CO₂/energy tax, which the Commission first suggested in 1991. Similarly, the European energy efficiency program (SAVE)⁴⁴ was considerably weakened as a direct result of Member States bringing the subsidiarity principle into play.⁴⁵ Agnethe Dahl, in analyzing the interplay between EC competence and subsidiarity in the climate change arena, was led to conclude that the subsidiarity principle has dominated the evolution of EU climate policy.⁴⁶

C. INTERNAL VERSUS EXTERNAL COMPETENCE

The internal competences of the EU are paralleled by external powers. Insofar as it is competent to promulgate regulation within the Community, the EU can also enter into negotiations and conclude treaties with other states and international organizations. Because Community law preempts Member State law, only the EU has the power to accept and implement international obligations in areas of EU competence. Where the Treaty does not provide explicitly for such external competences, they are therefore considered to be “implied powers.”⁴⁷ As stated above, Article 174, paragraph 4 (ex Article 130r) explicitly provides for an external Community competence in the field of environmental policy.

As the external competence corresponds to the internal powers, the split of competences described in the previous section also occurs in the external sphere. Article 174, paragraph 4 expresses this by referring to “[the EC and its Member States] respective spheres of competence.” This is the reason why both the EU and its Member States are Parties to the UNFCCC and the Kyoto Protocol and they both need to ratify these agreements.

The UNFCCC and the Kyoto Protocol as well as other environmental treaties are what can be termed “mixed” agreements. They cover a variety of subject matters – including e.g.

⁴⁴ See Section IV.X below.

⁴⁵ See Collier, *supra* note 40, at 43, 55; Dahl, *supra* note 36, at 203, 216; and Haigh, *supra* note 3, at 155, 166, 175, 179.

⁴⁶ Dahl, *supra* note 36, at 203, 204.

⁴⁷ CRAIG & DE BÚRCA, *supra* note 30, at 115-119; Macrory & Hession, *supra* note 29, at 106, 123-125.

environmental protection and trade, so that neither the EU nor its members have the exclusive power to execute these accords.⁴⁸ In theory, only the EU is entitled to participate in negotiations concerning matters of exclusive Community competence, while the Member States are entitled to participate in negotiations in areas of exclusive Member State competence. Both are entitled to participate in fields of shared competence.⁴⁹ These areas cannot, however, be easily be delineated from one another. This has at times caused the EU members and institutions to enter into internal negotiations within the context of external negotiations in order to decide who is competent regarding the issue under discussion.⁵⁰ On occasion, it has even barred the EU from participating altogether.⁵¹ This has sometimes placed the EU at a disadvantage compared with other actors.⁵²

Because the clear determination of respective competences is virtually impossible, the Presidency of the Council speaks on behalf of the Community and its Member States in climate negotiations, conveying agreed upon common positions.⁵³ Since such common positions affect in part areas of Member State competence, they must be approved by consensus. As a result, the process of reaching agreement among all EU members and the European Commission can be cumbersome, and can delay necessary action and inhibit the EU's capability to demonstrate leadership in international negotiations. In situations where swift moves are indispensable, especially during the last hours of decisive negotiations, the EU's negotiating ability can sometimes be paralyzed.⁵⁴ In addition, the outcome of these internal negotiations is likely to reflect lowest common denominator

⁴⁸ Joseph Jupille & James A. Caporaso, *States, Agency, and Rules: The European Union in Global Environmental Politics*, in *THE EUROPEAN UNION IN THE WORLD COMMUNITY* (Carolyn Rhodes ed., 1998 [hereinafter RHODES]) 213, 218 [hereinafter Jupille & Caporaso].

⁴⁹ Macrory & Hession, *supra* note 29, at 106, 113, 136.

⁵⁰ *Id.* at 213, 218. See also Jupille & Caporaso, *supra* note 48, at 222, further note on the UNFCCC negotiations that with the exception of areas of exclusive competence, "the EC's authority was rarely clear to anyone, including the EC participants themselves."

⁵¹ *Id.* at 213, 222.

⁵² *Id.* at 213, 225.

⁵³ Macrory & Hession, *supra* note 29, at 106, 136. See also Section III.D.1 below.

⁵⁴ OBERTHÜR & OTT, *supra* note 3, at 268; Hermann E. Ott, *Climate change: an important foreign policy issue*, 77 INT'L AFF. 277, 285 (2001) [hereinafter Ott].

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positions even before the EU enters into bargaining with outside governments (see section VII, below).⁵⁵

D. NEGOTIATING CLIMATE CHANGE: INTERNAL AND EXTERNAL ORGANIZATION

1. *Reaching a Common Position: The Council*

Although the European Parliament's role has to some extent been strengthened by recent treaty reforms, the Council of the European Union is still the most powerful EU body.⁵⁶ The Council is the EU's primary decision-making, legislative, and coordinating authority. It consists of a representative at ministerial level of each Member State.⁵⁷ In the case of climate policy, the Council usually consists of the environment ministers.⁵⁸ The members of the Council are bound by instructions from their respective governments, but they are also obligated – as parts of a Community institution – to act for the EU's common good.⁵⁹

Decision-making procedures and Council voting rules vary in different areas of EU competence. Most matters are now decided by qualified majority voting.⁶⁰ In the field of environmental regulation, the procedure of co-decision between the Council and the European Parliament, which provides for qualified majority voting within the Council,⁶¹ is to be generally applied.⁶² Article 175 (ex Article 130s), paragraph 2, however, contains important exceptions that apply when the Council

⁵⁵ Joyeeta Gupta & Lasse Ringius, *The EU's Climate Leadership: Reconciling Ambition and Reality*, 1 INT'L ENVTL. AGREEMENTS 281-286 (2001) [hereinafter Gupta & Ringius]; MANNERS, *supra* note 41, at 57-58; Bert Metz et al., *How Can the European Union Contribute to a COP-6 Agreement?*, 1 INT'L ENVTL. AGREEMENTS 167, 169 (2001) [hereinafter Metz et al.]; Accord Jupille & Caporaso, *supra* note 48, at 213, 219, 226.

⁵⁶ Mikael Skou Anderson & Lise Nordvig Rasmussen, *The Making of Environmental Policy in the European Council*, 36 J. OF COMMON MKT. STUDIES 585-97.

⁵⁷ EC Treaty art. 202-210 (ex Articles 145-154), *supra* note 31; CRAIG & DE BÚRCA, *supra* note 30, at 57-58.

⁵⁸ Henry D. Jacoby & David M. Reiner, *Getting climate policy on track after The Hague*, 77 INT'L AFF. 297, 300 (2001) [hereinafter Jacoby & Reiner].

⁵⁹ KAPTEYN & VAN THEMAAT, *supra* note 33, at 187-188.

⁶⁰ CRAIG & DE BÚRCA, *supra* note 30, at 130 (1998). EC Treaty art. 205 ¶ 2 (ex Article 148), *supra* note 31, defines the qualified majority.

⁶¹ EC Treaty art. 251 (ex Article 189b), *id.*

⁶² EC Treaty art. 175, ¶ 1 (ex Article 130s), *id.*

must act unanimously on matters primarily of a fiscal nature and “measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply.”

In the context of climate negotiations, the Council plays a key role both in the run-up to negotiations and in signing and ratifying the relevant agreements. Before a negotiating session, the EU and its members meet in Council formation to discuss and agree on a common position. The fact that the Council was able at various stages of the climate negotiations to reach agreement on specific internal climate policies, e.g. burden sharing among Member States, has both ensured a common EU line and strengthened the EU’s leadership role during those negotiations.⁶³ However, this leadership is sometimes much less effective in the “heat” of complex international negotiations, in which a Party is expected to think and act quickly (see section VII, below). The EU has often shown a lack of flexibility and expedition; it clearly has an effectiveness gap in international negotiations on areas of mixed competence like climate change.⁶⁴

The process of reaching a common position within the Council is characterized by bargaining and uncertainty until the last moment. Success depends considerably on the leadership exerted by the country holding the Presidency⁶⁵ at a given moment, which in effect has to broker the deal among the other Member States and the Commission.⁶⁶ After COP-1 (1995), an Ad Hoc Group on Climate Change was established at Council level. This EU coordinating group has enhanced the EU’s effectiveness in reaching a common position.⁶⁷ The group is further divided into working groups (as many as half a dozen at times) that analyze different negotiation proposals at a technical level with third Parties and prepare policy packages for adoption by the Ad Hoc Group and the Council of ministers.

⁶³ MANNERS, *supra* note 41, at 64.

⁶⁴ Yamin, *supra* note 12; and GUPTA & GRUBB, *supra* note 4.

⁶⁵ See *infra* Section II.D.2.

⁶⁶ Historically, smaller Member States have been more prone to reaching consensus—and to a certain extent foregoing their strict national position in favor of an overall EU position. Thus has been clearly the case for Sweden and Belgium in recent years. Bigger Member States, in contrast, tend to try to impose their own priorities, or to broker agreement with other bigger states or influential smaller states.

⁶⁷ OBERTHÜR & OTT, *supra* note 3, at 65.

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Once an international agreement is reached, the Council is responsible for signing and concluding the treaty or agreement.⁶⁸ Similar to the rules for internal decision-making, the Council decides by a qualified majority. However, it must act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules.⁶⁹ There have been arguments over the question of whether the second paragraph of Article 175 EC Treaty (ex Article 130s), which requires unanimity, applies to the conclusion of climate agreements. When the UNFCCC was adopted, the UK argued that it did—in that climate policy affected significantly energy policies. The Council legal service, on the other hand, held that Article 175, paragraph 1 governed and thus the qualified majority voting procedure applied. The problem was resolved politically when the UK abstained from voting.⁷⁰ The approval process regarding the Kyoto Protocol,⁷¹ once again, addressed this question. The Council faced intense discussions in reaching an agreement on ratification, because several Member States, including the UK (and to a lesser extent France), argued for the necessity of unanimity. In order to settle the dispute, the Council adopted a declaration according to which further national obligations to reduce emissions should be decided upon by consensus. It managed, however, to ratify the Kyoto Protocol by under Article 175, paragraph 1 of the EC Treaty.⁷²

2. *Negotiating Internationally: The Role of Presidency*

The Council is headed by the Presidency, which is held alternately by each Member State for six months.⁷³ The Presidency is assisted by the Commission and the Member States

⁶⁸ EC Treaty art. 300 ¶ 2 (ex Article 228), *supra* note 31.

⁶⁹ EC Treaty art. 300 ¶ 1, subparagraph 2, and ¶ 2, subparagraph 1 (ex Article 228), *supra* note 31.

⁷⁰ Haigh, *supra* note 3, at 155, 178.

⁷¹ Commission Proposal for a Council Decision, COM(2001) 579, *available at* <http://europa.eu.int/comm/environment/climat/com/01579_en.pdf> (visited Dec. 11, 2001).

⁷² See 2413th European Council of Environmental Ministers, Brussels, Mar. 4, 2002 (provisional version). Available at: <http://ue.eu.int/en/summ.htm> (visited Mar. 5, 2002) [hereinafter March 2002 Council].

⁷³ EC Treaty art. 203 ¶ 2 (ex Article 146), *supra* note 31.

holding the preceding and the upcoming Presidency, these three forming the traditional so-called "Troika."⁷⁴

The Presidency coordinates the formation of the EU's common position and presents it at international negotiations.⁷⁵ Its management of the process is vital for the effectiveness of the EU negotiating stance. The Presidency determines the agenda of the Council, chairs its sessions and coordinates the Member States at negotiations.⁷⁶ Thus, the effectiveness of the EU in international negotiations is influenced by the Presidency's internal management and external negotiating skills and tactics. For example, in the run-up to Kyoto, EU climate policy did not progress much during the Italian and Irish Presidencies in 1996. While in the first half of 1997, the Dutch Presidency drove the process forward significantly, which resulted in the approval by the Council of the EU Burden Sharing Agreement, as well as a negotiating 15% reduction target by 2010, and an intermediate 7.5% reduction target by 2005 (see *infra*, Section V.B.).⁷⁷ Similarly, German leadership—and insistence—on the matter of using the Kyoto market mechanisms as "supplemental to domestic actions,"⁷⁸ ensured that during its Presidency, in the first half of 1999, the EU concluded and presented a negotiating proposal on this matter.⁷⁹

In terms of negotiating with third parties, the Presidency's leadership is also conditioned by practical and political considerations. For instance, two of the three Presidencies immedi-

⁷⁴ After the Treaty of European Union and The Treaty of Amsterdam, *supra* note 3, the Troika currently consists of the Presidency in office, the Secretary-General of the Council, in his capacity as High Representative for the common foreign and security policy, and the Member State which is next in line for the Presidency. In the climate context, however, the practice has been to use the *traditional* rather than the *current* Troika i.e. the Presidency in office, the Member State to hold the next Presidency and the Commission. See Glossary, available at: <http://www.europa.eu.int/scadplus/leg/en/cig/g4000t.htm#t6> (visited Dec. 10, 2001).

⁷⁵ OBERTHÜR & OTT, *supra* note 3, at 14.

⁷⁶ CRAIG & DE BÚRCA, *supra* note 30, at 58-59; OBERTHÜR & OTT, *supra* note 3, at 66.

⁷⁷ OBERTHÜR & OTT, *supra* note 3, at 67.

⁷⁸ Article 17 states that Parties' use of international emissions trading "shall be *supplemental* to domestic actions for the purpose of meeting [the emissions targets]." (Emphasis added.) This language was included upon the insistence of the EU. See Joanna Depledge, Tracing the Origins of the Kyoto Protocol: an Article-by-Article Textual History U.N. Doc. FCCC/TP/2000/2 (2000) [hereinafter Depledge], at 83-85; OBERTHÜR & OTT, *supra* note 3, at 188-205. See also Section X, below.

⁷⁹ See 2178th Council of Agriculture Ministers, Brussels May 17, 1999. Available at: <http://ue.eu.int/newsroom/newmain.asp?lang=1> (visited Dec. 12, 2001).

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ately before COP-7 (2001)—France and Belgium— adopted considerably different coordination and negotiation practices, perhaps reflecting the differences in capacities and posture between a large and a medium Member State. France, which held the Presidency during the second semester of 2000, at times⁸⁰ clearly pushed for what seemed like its own domestic agenda in the internal EU coordination and watched the UK unilaterally enter into tentative negotiations with the U.S. aimed at securing agreement between the EU and the U.S.⁸¹ On the other hand, Belgium, which held the Presidency during the second semester of 2001, took a more consensus-based approach internally and relied considerably on the assistance of the European Commission (discussed below in Section IIIB) as well as on a division of labor between Member States, especially at the technical level.⁸²

The rotation of the Presidency every six months in itself presents a problem, because it has not allowed the EU's climate policy to develop in a coherent and stable way,⁸³ and has not provided negotiating partners with a steady arrangement.⁸⁴ This is unlikely to change in the foreseeable future.

III. KEY ACTORS WITHIN THE EU

A. MEMBER STATUS

The EU currently consists of 15 Member States,⁸⁵ the greenhouse gas emissions patterns and energy mix and con-

⁸⁰ Especially during COP-6.

⁸¹ See Michael Grubb and Farhana Yamin, *Climatic collapse at The Hague: What happened, why, and where do we go from here?*, INTERNATIONAL AFFAIRS 77, 2 (2001), at 263-264, available at: www.field.org.uk/papers/pdf/cop6.pdf (visited Apr. 12, 2002) [hereinafter Grubb & Yamin]; and Ott, *supra* note 54, at 277.

⁸² Such a technical legal division of labor has, as a matter of fact, been commonplace for quite some time, at least since 1995. It derives mainly from the extreme complexity of the issues under negotiation (which include the setting of an elaborated set of rules on an international monitoring, reporting and verification regime for GHGs emissions, as well as an international emissions trading system), a growing sense of team work at the technical level, and also the fact that virtually every Presidency lacks the capacity to tackle comprehensively and effectively such issues.

⁸³ OBERTHÜR & OTT, *supra* note 3, at 268; Ott, *supra* note 54, at 277, 285.

⁸⁴ Ott, *id.*, at 277, 285; cf. also Sebastian Oberthür, *The EU as an International Actor: The Protection of the Ozone Layer*, 37 J. OF COMMON MKT. STUDIES 641, 646 (1999) [hereinafter Oberthür 1999].

⁸⁵ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy,

sumption of which vary widely.⁸⁶ The disparity in emission characteristics, abatement costs, possible impacts of climate change, and relative level of economic development in the different Member States presents a significant obstacle to agreement on a common climate policy,⁸⁷ and to a certain extent provides an illustration of the climate change discussions at the global level.⁸⁸ Thus the resulting variations in Member states' willingness and capability to reduce emissions (see section V.B below). In addition, Member States' readiness to endow the EU with further competences varies widely, with the UK in particular being traditionally euro-skeptical in this regard.⁸⁹

Ian Manners, discussing the UNFCCC negotiations in the early 1990s, divides the Member States into "lead states" (mainly Germany, the Netherlands and Denmark—after 1995 joined by the new Member States Sweden and Finland),⁹⁰ "support states" (primarily Italy and Belgium), "swing states" (chiefly Spain, Ireland, Portugal and Greece), a "veto state," the UK (which tended to position itself closer to the U.S. than to the EU, although less so in recent years), and France shifting from an initial status as a support state to one of a swing state.⁹¹ It is beyond the scope of this paper to illustrate comprehensively the positions of the fifteen Member States with regard to the EU positioning on the climate negotiations. Suffice it to say, however, that countries strongly pursue their national interests at the EU level through Council meetings, and at the international level through constant, tacit pressure on the country holding the Presidency to uphold the collective EU

Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

⁸⁶ For instance, with the exception of the UK, the EU as a whole and every EU Member State are net importers of energy. GRUBB ET AL, *supra* note 11, at 30. For a comprehensive review of Member States and Community's greenhouse gas emissions and trends, see Commission of the European Communities, Report under Council [on the] monitoring mechanism of Community greenhouse gas emissions, Nov. 30, 2001, COM(2001) 708 Final.

⁸⁷ Ute Collier, *The EU and Climate Change Policy: the Struggle over Policy Competences*, in CASES IN CLIMATE CHANGE POLICY 43, 44 (Ute Collier & Ragnar Löfstedt eds., 1997).

⁸⁸ GRUBB ET AL, *supra*, note 11, at 30.

⁸⁹ CLIVE H. CHURCH & DAVID PHINNEMORE, EUROPEAN UNION AND EUROPEAN COMMUNITY 49, 508 (1994).

⁹⁰ These countries are those usually more sensitive to environmental issues in general.

⁹¹ MANNERS, *supra* note 41, at 60-62. More recently, the UK has adopted positions closer to the EU majority, *id.*, at 76.

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position.⁹² However, without the EU's collective "weight" individual Member States' interests might simply not be able to prevail on the negotiating arena in the face of such sizable negotiating partners as the U.S., Japan, China or Brazil. In a recent statement German Environment Minister Jürgen Trittin has illustrated this point quite effectively:

In such negotiations, Germany does not act as a nation state and can only play an active role within the EU... I don't see this as a loss of power of the nation state. On the contrary, as far as environmental policy is concerned, it has been extraordinarily useful that the EU speaks with one voice and acts, at global environmental conferences like Bonn or Marrakech, as a strong nation state. This way, we have been able to continue the Kyoto Process despite the blockage by the United States.⁹³

B. EUROPEAN COMMISSION

The European Commission (Commission) has been referred to as the motor of the Community⁹⁴ and the guardian of the treaties.⁹⁵ It performs a broad range of important functions, from elaborating legislative proposals to ensuring the implementation of European law. It generally enjoys the exclusive right to initiate legislative procedures.⁹⁶ Unlike the Council, the Commission does not consist of Member State officials, but of 20 independent individuals, one or two nationals of

⁹² EU negotiators often feel exasperated by the lack of leeway they are awarded in negotiating the EU position. That is because they are essentially tied to the wording of the most current Council conclusions, which are by definition starting positions. However, the internal EU dynamics at international climate meetings is less than prone to rapid changes. That is essentially due to the fact that the EU has typically not fully discussed bottom line positions before the start of the negotiations. It thus spends most of the precious negotiation time discussing internally rather than trying to convince other Parties of its own positions and trying to reach agreement. It comes therefore as no surprise to repeatedly observe Member States' representatives bickering in the media, as was the case after COP-6 in 2000 (Grubb&Yamin, *supra* note 81, at 263-4; and Ott, *supra* note 54, at. 277).

⁹³ http://www.bmu.de/reden/rede_trittin011208.php (visited Dec.17, 2001).

⁹⁴ RUDOLF GEIGER, EG-VERTRAG Article 155/2 (1995).

⁹⁵ For the role of the European Commission, see http://www.europa.eu.int/comm/role_en.htm#3 (visited Dec. 10, 2001).

⁹⁶ EC Treaty art. 211, 249-252 (ex Articles 155, 189-189c), *supra* note 31. In the field of environmental policy, this power flows from Articles 175, 251 EC Treaty (ex Articles 130s, 189b), *id.*

each Member State.⁹⁷ It takes decisions by a the majority of its members.⁹⁸

The Commission is organized in Directorates-General (DGs),⁹⁹ several of which play a significant role in climate policy (e.g. the DGs for environment, energy, taxation). Because of their different functions and clientele—some DGs being closer to business representatives and others to environmental groups¹⁰⁰—, agreement amongst them on climate policies has not always been easy to reach, especially during the run up to the UNFCCC negotiations.¹⁰¹ More recently, in the context of the Commission's intra-service negotiation on a proposal for an emissions trading directive, DGs Environment, Energy & Transport and Enterprise were particularly active in brokering an internal Commission deal.

In other environmental regimes, e.g. the ozone regime, the Council has mandated the Commission to conduct the negotiations on behalf of the EU.¹⁰² Within the climate regime, however, Member States could not agree to follow the same procedure. The Council did not grant the Commission's request to endow it with negotiating authority¹⁰³ for the Kyoto Protocol negotiations, because many members opposed transferring more competences to the EU level.¹⁰⁴ As described above,¹⁰⁵ the Presidency rather than the Commission fulfills the task of coordinating and presenting the EU position in climate negotiations. As a result, the Commission plays a limited role.¹⁰⁶ It participates as equal partner in establishing the EU common position, on which it and all Member States must agree.¹⁰⁷

⁹⁷ EC Treaty art. 213 paras 1, 2 (ex Article 157), *id*; KAPTEYN & VAN THEMAAT, *supra* note 33, at 195-196.

⁹⁸ EC Treaty art. 219 ¶ 2 (ex Article 163), and Article 213, paragraphs 1 and 2 (ex Article 157), *supra* note 31.

⁹⁹ For an overview of Commission's Directorates-General and Services, see generally <http://www.europa.eu.int/comm/dgs_en.htm> (visited Dec. 10, 2001).

¹⁰⁰ MANNERS, *supra* note 41, at 69-70, 73.

¹⁰¹ *Id.* at 63-4 (2000).

¹⁰² Macrory & Hession, *supra* note 29, at 106, 112; for a detailed description of its role in ozone negotiations see Oberthür 1999, *supra* note 84, at 641, 645-646.

¹⁰³ Such authorization of the Commission by a Council decision is provided for in EC Treaty art. 300 ¶ 1 (ex Article 228), *supra* note 31.

¹⁰⁴ OBERTHÜR & OTT, *supra* note 3, at 66.

¹⁰⁵ See Section II.D.2.

¹⁰⁶ OBERTHÜR & OTT, *supra* note 3, at 269.

¹⁰⁷ Ott, *supra* note 54, at 277, 285.

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The refusal to grant the Commission a negotiating mandate has considerably weakened EU negotiating capacities.¹⁰⁸ While in the ozone negotiations the Commission has facilitated agreement among the Member States, the guidance of the EU by the rotating Presidency does not provide a stable foundation for the process and prevents the development of a medium or long term negotiating strategy (see section VII, below).¹⁰⁹

C. BUSINESS

The business community has taken an increasing interest in the climate negotiations.¹¹⁰ Early in the process, business focused on fighting any restriction of fossil fuel use. The U.S.-based Global Climate Coalition, a group of multinationals that invested much money and efforts primarily in discrediting climate science, is a prominent example of early business activity in the climate regime.¹¹¹

In Europe, the Commission's proposal for an energy tax faced "some of the most ferocious lobbying"¹¹² the EU had ever experienced when it became clear that it would not be a "no regrets" measure, as the EU had previously asserted. The well organized business lobby, led by the Union of Industrial and Employer's Confederations of Europe (UNICE), played a major part in the inclusion of a "conditionality clause" in the energy tax proposal, which ensured that the measure would not be applied unless the major OECD competitors introduced similar measures.¹¹³

¹⁰⁸ OBERTHÜR & OTT, *supra* note 3, at 66.

¹⁰⁹ *Id.* at 286-269; Oberthür 1999, *supra* note 84, at 641, 645-646; Ott, *supra* note 54, at 277, 285.

¹¹⁰ Chad Carpenter, *Business, green groups and the media: the role of non-governmental organizations in the climate change debate*, 77 INT'L AFF., 313 314 (2001) [hereinafter Carpenter].

¹¹¹ *Id.* at 313 314; Clair Gough & Simon Shackley, *The respectable politics of climate change: the epistemic communities and NGOs*, 77 INT'L AFF. 329, 334 (2001) [hereinafter Gough & Shackley].

¹¹² The Economist, May 9, 1992, at 19.

¹¹³ Commission of the EC, Proposal for a Council Directive Introducing a Tax on Carbon Dioxide Emissions and Energy, 30 June 1992, COM(92) 226 Final, at 4; (for a general description of the evolution of EU policy from "no regrets" to conditionality in this early phase see IAN MANNERS, *supra* note 41, at 42-9, 59-60, 63-4, 70; and Jorge Wettestad, *The complicated development of EU climate policy: lessons learnt*, in GUBTA & GRUBB, , *supra* note 4, 25-45 [hereinafter Wettestad]. For current UNICE policy see

Over time and with ever-increasing certainty in climate science, the picture has become much more diverse. Many businesses have now accepted the need for action. Some have begun developing renewable energy and energy efficiency programs, set voluntary emission reduction targets and undertaken emission trades.¹¹⁴ After British Petroleum withdrew from the Global Climate Coalition,¹¹⁵ other companies followed suit, and the Business Environmental Leadership Council was founded in the run-up to Kyoto. This council accepts the scientific evidence of climate change and believes businesses should play a major role in finding a solution.¹¹⁶

More recent developments in Europe include the creation of the European Business Council for a Sustainable Energy Future (e5) in 1996, which is dedicated to sustainable development achieved primarily through energy efficiency, renewable energy and sustainable housing and transport policies,¹¹⁷ and the launch of e-mission 55 in the run-up to COP-6.5, in July 2001. E-mission 55 called for the adoption of meaningful political decisions by the COP and entry into force of the Kyoto Protocol by 2002.¹¹⁸ Both groups have a substantial number of European members.¹¹⁹

D. ENVIRONMENTAL NON-GOVERNMENTAL ORGANIZATIONS

Environmental non-governmental organizations (NGOs), most of them organized in the global Climate Action Network

<<http://www.unice.org>> (visited Dec. 11, 2001).

¹¹⁴ For a detailed account see Carpenter, *supra* note 110, at 313-314-319. See also Gough & Shackley, *supra* note 111, at 329, 334; Gupta & Ringius, *supra* note 55, at 281-286; WWF Climate Savers, available at <<http://www.panda.org/climate/savers.cfm>> (visited Dec. 6, 2001).

¹¹⁵ The Global Climate Coalition closed down recently, possibly attesting to the fact that it was rapidly losing membership. See Nature, Feb. 7, 2002, at 567.

¹¹⁶ Business Environmental Leadership Council, available at <<http://www.pewclimate.org/belc/index.cfm>> (visited Dec. 6, 2001); Gough & Shackley, *supra* note 111, at 329, 334.

¹¹⁷ e5: History, available at <<http://www.e5.org/pages/energy.htm>> (visited Dec. 6, 2001); The Sustainable Energy Charter, available at <<http://www.e5.org/pages/sec.htm>> (visited Dec. 6, 2001).

¹¹⁸ e-mission 55, available at <http://www.solarworld.de/E-Mission-55/frame_index/e_index.htm> (visited Dec. 10, 2001).

¹¹⁹ e5 Members 2001, available at <<http://www.e5.org/pages/comp.htm>> (visited Dec. 6, 2001); e-mission 55 Solution Site, available at <http://www.solarworld.de/E-Mission-55/solutions/e_home.htm> (visited Dec. 6, 2001).

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(CAN),¹²⁰ have played an important role in climate negotiations from the outset. Their number has increased from 191 accredited observers at COP-1 in 1995 to over 530 at COP-6 in 2000.¹²¹ They have been participating in a number of ways, including raising public awareness, e.g. through the media or demonstrations; making presentations on specific topics in side-events at the COPs;¹²² providing analyses, research papers and comments;¹²³ publishing ECO, CAN's newsletter on the negotiating process;¹²⁴ lobbying and discussing the issues with negotiators; making formal interventions during negotiating sessions; and assisting parties in drafting legal texts for UNFCCC documents.¹²⁵

The role of NGOs in the climate arena differs from that in many other fields, in that they have participated as partners in developing the regime rather than simply playing the part of outside critics.¹²⁶ NGOs are part of what has been described as an "epistemic community," a network of communities that share knowledge about a certain phenomenon and a common set of normative beliefs concerning what actions will benefit human welfare in this domain.¹²⁷ As in other fields, climate NGOs reflect a heterogeneous universe of stakeholders, such as generalist versus specialized/expert NGOs, membership versus non-membership NGOs, etc.

¹²⁰ See <<http://www.climatenetwork.org>> (visited Dec. 12, 2001). CAN has a global membership of 20 Million people, PETER NEWELL, CLIMATE FOR CHANGE 128 (2000) [hereinafter NEWELL].

¹²¹ Carpenter, *supra* note 110, at 313-319.

¹²² For reports on some COP-7 side events see Earth Negotiations Bulletin - On the Side, available at <<http://www.iisd.ca/linkages/climate/cop7/enbots>> (visited Dec. 12, 2001).

¹²³ See e.g. Independent NGO Evaluation of National Plan for Climate Change Mitigation: Second Review, August 1994, Climate Action Network.

¹²⁴ See Climate Network, available at <<http://www.climatenetwork.org>> (visited Dec. 12, 2001).

¹²⁵ Carpenter, *supra* note 110, at 313-319-321; for an extensive overview over different NGOs see Gough & Shackley, *supra* note 111, at 329, 336-339, 341-345. For a portrayal of CAN see Matthias Duwe, *The Climate Action Network: global civil society at work?*, 10 RECIEL 177-189 (2001) [hereinafter Duwe].

¹²⁶ Gough & Shackley, *supra* note 111, at 329, 329; similar MANNERS, *supra* note 41, at 69.

¹²⁷ Peter M. Haas, *Epistemic Communities and the Dynamics of International Environmental Co-Operation*, in REGIME THEORY AND INTERNATIONAL RELATIONS 168, 179 (Volker Rittberger ed. with assistance of Peter Mayer 1993).

In Europe, cooperation between governments and the Commission and NGOs has been particularly close. Some government delegations even include experts originating from NGOs, especially from expert/specialized NGOs.¹²⁸ In addition, Member States as well as the Commission have made frequent use of the competence of NGO experts, e.g. by funding climate-related research projects carried out by NGOs¹²⁹ and by discussing relevant issues with them outside and also during negotiations.¹³⁰ For instance, in preparing a proposal for an emissions trading directive, the Commission relied on the expert advice of several European (and American) based NGOs. In many areas, NGOs clearly possess advanced technical knowledge which several EU delegations lack.

NGO presence varies in different EU countries. The number of NGOs listed in the 2000 CAN Directory ranges from two (Spain) to nineteen (UK) in large Member States and from one in Luxembourg to five in the Netherlands and seven in Belgium, the seat of many important EU institutions.¹³¹ NGO influence has been heightened by the sensitivity to their demands from the part of certain Member States.¹³² For instance, it has been suggested that NGO opposition to the UK-U.S. deal at COP-6, which among other elements included the possibility of accounting "generous" amounts of carbon storage activities for the U.S. and other countries, might have contributed to the decision of some EU countries to reject that deal, notably Denmark and Germany.¹³³

CAN Europe differs in certain respects from other CAN regional offices. While most CAN coordinators are employees of regional NGOs and carry out their CAN functions alongside

¹²⁸ See List of Participants, FCCC/CP/2000/INF.2, available at <<http://cop6.unfccc.int/pdf/lopcop6.pdf>> (visited Dec. 11, 2001).

¹²⁹ E.g. Oberthür 1999, *supra* note 84, at 641; see n. at 641; Jürgen Lefevere & Farhana Yamin, *The EC as a Party to the FCCC/KP: An examination of EC competence* (1999), available at <<http://www.field.org.uk/papers/pdf/2%20ECcompetence.pdf>> (visited Dec. 7, 2001).

¹³⁰ On environmental NGO consultation by the Commission in general see John McCormick, *Environmental Policy and the European Union*, in INTERNATIONAL ORGANIZATIONS AND ENVIRONMENTAL POLICY 37 (Robert v. Bartlett et al. eds. 1995 [hereinafter BARTLETT ET AL]) at 46-47. On the relationship between NGOs and some European governments, see NEWELL, *supra* note 120, at 134.

¹³¹ CLIMATE ACTION NETWORK INTERNATIONAL NGO DIRECTORY 2000.

¹³² MANNERS, *supra* note 41, at 68.

¹³³ Grubb & Yamin, *supra* note 81, at 263; and Ott, *supra* note 54, at 283-284.

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their regular work,¹³⁴ and U.S.-CAN currently has one half-time staff member,¹³⁵ CAN Europe currently has a permanent staff of 7 people.¹³⁶ This is partly due to the fact that CAN Europe receives government funding¹³⁷ - while U.S.-CAN relies on foundation support -, as well as a practical reflection of the fact that, in contrast to the heavy representation of NGOs in Washington, D.C., the European NGO community had been seriously underrepresented at the seat of EU power in Brussels. The greater number of staff members has enabled CAN Europe to engage in substantive work much more than other CAN offices, which cannot easily perform such tasks in addition to coordinating regional NGOs.¹³⁸

Other than CAN Europe and a handful of staffers from the big international NGOs located in Brussels or nearby, European NGOs are primarily located in the different European countries. The local versus regional interaction in Europe constitutes the backbone of NGO activity there. In that sense, a strong local presence—in addition to a limited but targeted coordinating presence in Brussels—has over the years contributed to a high level of NGO pressure in Europe and, arguably, higher overall effectiveness¹³⁹ when compared to other regional CAN activities.¹⁴⁰

¹³⁴ Duwe, *supra* note 125, at 177.

¹³⁵ Personal interview with Joanna Krinn, U.S.-CAN (Dec. 11, 2001).

¹³⁶ Staff, *available at* <<http://www.climnet.org>> (visited Mar. 5, 2002).

¹³⁷ It is not uncommon in Europe for NGOs to receive partial financial support from public authorities including the State. This is partly due to the fact that, unlike in the U.S., private foundations are less predominant in Europe, and the State has traditionally a bigger role—including a financial role—in society in general.

¹³⁸ Personal interview with Joanna Krinn, U.S.-CAN (Dec. 11, 2001). CNE staff includes energy specialists and a climate policy researcher, CNE Staff, *available at* <<http://www.climnet.org>> (visited Dec. 11, 2001).

¹³⁹ See also Axel Michaelowa, *Impact of Interest Groups on EU Climate Policy*, 8 *European Environment* 152-160 (1998). A recent poll confirmed a trend that "Europeans continue to trust NGOs twice as much as government and substantially more than corporations or the media." See Edelman PR Worldwide, *Second annual survey of U.S. and European Opinion Leaders* (on file with authors).

¹⁴⁰ Comparing briefly CAN Europe with U.S.-CAN, the latter has focused primarily on coordinating those NGOs with offices in Washington, D.C. As a result, there is a high level of coordination—and arguably effectiveness—of NGO activity in the U.S. capital (Personal interview with Joanna Krinn, U.S.-CAN (Dec. 11, 2001), which is primarily aimed at the Federal Government.

E. MEDIA AND PUBLIC

Public attention plays a central role in determining the EU's political agenda. High levels of public concern about environmental problems have repeatedly prompted governments to address them, while in the absence of popular interest, they are considerably less likely to take action. Arguably, both the conclusion of the UNFCCC in time for the Rio Summit in 1992 and of the Kyoto Protocol were to a large degree the result of substantial public pressure.¹⁴¹

However, the attitude of the public towards environmental policies varies in different EU Member States. It is an important element that has influenced the positions individual states have adopted in environmental matters in general and climate policies in particular.¹⁴² The strength of the Green movement, which in the 1990s, for example, was strong in Germany and rather weak in France, can serve to some extent as an indicator of public opinion, and success of a Green Party in elections has at times caused a government to change its position.¹⁴³

Public opinion is largely influenced by the media. Media coverage directs the public's attention to certain issues and consequently has a bearing on the government agenda. Since the media is the primary source of information on climate change for most people, it also shapes the way they perceive the problem and possible solutions.¹⁴⁴

In recent years, major media sources have reported on various aspects of climate change on a very regular basis.¹⁴⁵ Large numbers of journalists attend the COPs; almost 1,000 were accredited at COP-6 (2000) in The Hague in comparison to little more than 2,000 members of Party delegations.¹⁴⁶

¹⁴¹ NEWELL, *supra* note 120, at 70-1, 76, 85-6.

¹⁴² MANNERS, *supra* note 41, at 70-1.

¹⁴³ See NEWELL, *supra* note 120, at 70 for acid rain; and Oberthür 1999, *supra* note 84, at 641, 648-650 for ozone politics, both referring to Germany.

¹⁴⁴ NEWELL, *supra* note 120, at 71-72; Priya A. Kurian, *The U.S. Congress and the World Banks*, in BARTLETT ET AL, *supra* note 130, at 103, 106-107

¹⁴⁵ Carpenter, *supra* note 110, at 313, 321-5. Lists of recent reports are available e.g. in the IISD's bi-weekly news summary "Climate News", available at <http://www.cckn.net/climate_news.asp> (visited Dec. 12, 2001), and – with a more European focus – on the CNE website, available at <<http://www.climnet.org/news/news.htm>> (visited Dec. 12, 2001).

¹⁴⁶ List of Participants, FCCC/CP/2000/INF.2, www.unfccc.int (visited Dec. 11, 2001).

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Since COP-3 (1997), newspaper articles have been posted and distributed at the conference center and handed to government officials,¹⁴⁷ providing negotiators with an immediate public feedback. On the other hand, media interest fades in the time periods between major conferences,¹⁴⁸ and the way reporters have presented the subject has in certain respects added to confusion and lack of knowledge concerning important aspects of climate change. Factual errors, an overemphasis of the findings of skeptical climate scientists, exaggeration of abatement costs and a focus on singular extreme events rather than structural problems have resulted in widespread misunderstandings about the science, the causes of climate change and possible responses.¹⁴⁹ This applies to European as well as U.S. media.¹⁵⁰

IV. DOES THE EU HAVE A DOMESTIC CLIMATE CHANGE POLICY?

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A. POLICIES AND MEASURES AT THE EU LEVEL

The EU has demonstrated itself as a leader on the issue of climate change (Section V, below), but how is its domestic record of accomplishment? This chapter briefly reviews the track record of the European Union's climate policy in the last decade and its likely course in the next one. We will not focus on Member States' climate strategies and policies as this would fall beyond the scope of this paper.¹⁵² First, the regulatory

¹⁴⁷ Carpenter, *supra* note 110, at, 313, 319.

¹⁴⁸ See for an analysis of media coverage in Portugal Suraje Dessai, Kevin Branco, Miguel de França Doria, *Climate Change and Media in Portugal: Preliminary Results*, poster presented at the International Conference on Climate Change: Science, Economics and Politics, Lisbon: November 3-4, 2000 (on file with authors).

¹⁴⁹ NEWELL, *supra* note 120, at 79-86 with many examples.

¹⁵⁰ *Id.* at 69 and references in 68-95.

¹⁵¹ This section is partly based on Suraje Dessai and Nuno Lacasta, What has the European Union Been Doing on Climate Change? (2001) (unpublished manuscript on file with authors) [hereinafter Dessai & Lacasta 2001].

¹⁵² For several analyses of different Member States plans and policies, see e.g. JOHN GUMMER AND ROBERT MORELAND, THE EUROPEAN UNION & GLOBAL CLIMATE CHANGE, A REVIEW OF FIVE NATIONAL PROGRAMS, PEW CENTER ON GLOBAL CLIMATE CHANGE, 2000 [hereinafter GUMMER & MORELAND]; Heather Broadbent, *Study of the Dutch, French and British Climate Change Programmes*, Euronatura Working Paper 1/201 (January 2001), available at: <www.euronatura.pt> (visited Oct. 10, 2001) [hereinafter Broadbent]; Suraje Dessai and Axel Michaelowa, *Burden sharing and cohesion coun-*

framework is described, followed by the more recent initiatives, including the European Climate Change Program (ECCP) and a framework directive for greenhouse gas emissions trading within the European Community.

As explained throughout this paper, EU policy is the result of the complicated interaction between various interest groups compounded by intra and inter-Member States politics.¹⁵³ Climate policies in Europe have traditionally been divided into environmental policies and energy policies.¹⁵⁴ By 1998, the EU had some of the most progressive environmental policies in the world.¹⁵⁵ Yet, just as one may consider EU environmental policy as a success in general, one may call EU energy policy a failure.¹⁵⁶

As explained in Section II, in the absence of a clearly defined area of exclusive EU competence on climate change, it is extremely difficult to isolate EU and Member States' obligations. Furthermore, comprehensive international environmental agreements (such as the UNFCCC or the Kyoto Protocol) are not easily related to the system of segregated legal bases prescribed by the EU treaties.

"Initial steps to get climate policy in the EU agenda include a 1986 Resolution from the Parliament and Communications from the Commission in 1988 and 1989."¹⁵⁷ The Fourth Action Program on the Environment adopted in late 1987 and covering the years 1987 to 1992,¹⁵⁸ made no mention of climate change except as a subject for further research.¹⁵⁹ Momentum

tries in European climate policy: the Portuguese example, 3/1 *Climate Policy* 327-341 (2001) [hereinafter Dessai & Michaelowa]; Nick Eyre, *Carbon Reduction in the Real World: How the UK will Surpass its Kyoto Obligations*, 1/3 *Climate Policy* 309-326 [hereinafter "Eyre"]; and Joachim Schleich et al., *Greenhouse Gas Reductions in Germany – lucky strike or hard work?*, *id.* at 363-380 [hereinafter Schleich et al].

¹⁵³ See section IV, above.

¹⁵⁴ See Wettestad, *supra* note 113, at 27-35.

¹⁵⁵ At its founding in 1957, the EU had no environmental policy, no environmental bureaucracy, and no environmental laws. When, in 1973, the EU began systematically to address environmental concerns there was little expectation that the environment would develop into one of the largest areas of common activity. See Andrew Jordan, *The implementation of EU environmental policy: a policy problem without a political solution?*, 17 *ENVIRONMENT AND PLANNING C: GOVERNMENT AND POLICY*, 69-90 (1999) [hereinafter Jordan].

¹⁵⁶ Dahl, *supra* note 36, at 203-220.

¹⁵⁷ See Wettestad, *supra* note 113, at 27.

¹⁵⁸ See EEC Fourth Environmental Action Programme (1987-1992), O.J. (C328) 7.12.1987.

¹⁵⁹ See Haigh, *supra* note 3, at 161.

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emerged, however, when the Council of Energy and Environment ministers in 1990 adopted a political agreement to stabilize CO₂ emissions in the EU as a whole at 1990 levels by the year 2000.¹⁶⁰ Closer to the final stages of the negotiations of the Convention in 1992, the Commission proposed to the Council the following climate package of measures to be implemented within the EU in the coming years:¹⁶¹

- A framework directive on energy efficiency within the Special Action Program for Vigorous Energy Efficiency (SAVE) program;
- A decision on renewable energies – ALTENER program;
- A directive on a combined carbon and energy tax; and
- A decision concerning a monitoring mechanism for CO₂ emissions.

We will look at each such measure in more detail in the next section.

B. REGULATORY COMPONENTS: WATERED DOWN?

The SAVE program was designed to improve energy efficiency within the EU in order to reduce CO₂ emissions and improve security of supply. The program was actually launched in 1987, but only in October 1991 did the Council of Energy Ministers manage to approve it.¹⁶² At that stage, the program emphasized the adoption and implementation of several existing Directive proposals on energy efficiency standards across a range of sectors from power generation to buildings, vehicles and household appliances.¹⁶³ But by the time it had been

¹⁶⁰ See European Community Conclusions on climate change. Council of Environment Ministers, European Community, October 1990.

¹⁶¹ See Community strategy to limit carbon dioxide emissions and to improve energy efficiency, COM(92) 246. Given the Commission's traditional desire to expand its competence, it chose the path of trying to develop a complete and ambitious package of measures to be agreed together (See Haigh, *supra* note 3, at 164.

¹⁶² Decision 91/565/EC [7] established a program to promote energy efficiency in the Community (the SAVE program); O.J. (L 307) 08.11.1991, at 34.

¹⁶³ It was estimated that the program could lead to emission reductions of about 3% in the year 2000 (Wettestad, *supra* note 113, at 31-32).

adopted in 1993, all the legislative proposals had either been watered down or removed entirely. SAVE was turned into a framework directive merely laying out general principles for action to guide Member States' own programs and measures, short on targets, deadlines and content.¹⁶⁴ Most commentators argue that the program failed due to insufficient funding and a new interpretation of the subsidiarity principle,¹⁶⁵ which led much of its regulatory content to be abandoned or severely diluted. SAVE is considered to have had little impact on energy efficiency in the Member States.¹⁶⁶ The few gains achieved by the first SAVE program were based on the legislative component of the program, which is missing from the SAVE II framework.¹⁶⁷ Instead SAVE II, which was adopted in December 1996,¹⁶⁸ intends to rely on voluntary agreements with equipment manufacturers on labeling and energy standards. The SAVE II proposal includes only a modest target to improve the overall efficiency on energy use in the EU by one per cent over the next five years, and has been subject to significant budgets cuts that undermine its ability to meet its self-declared goals.¹⁶⁹

The two technology-oriented programs, the THERMIE¹⁷⁰ and the JOULE¹⁷¹ programs, are intended to bring about a 10-20 per cent reduction in CO₂ emissions between 2010 and 2020. A recent evaluation of THERMIE indicated that it had made an impact on market shares for energy efficiency technology, but clean coal funding under the program has been criticized by environmental groups for displacing focus on renewables, and for making only a small contribution to lowering CO₂ emissions.¹⁷² JOULE and THERMIE have been merged into

¹⁶⁴ See WYN GRANT, DUNCAN MATTHEWS & PETER NEWELL, *THE EFFECTIVENESS OF EUROPEAN UNION ENVIRONMENTAL POLICY*, MACMILLAN PRESS, LONDON (2000), Section III [hereinafter GRANT ET AL].

¹⁶⁵ *Id.* Section III and note 5.

¹⁶⁶ Collier as quoted by Wettstad, *supra* note 113, at 32.

¹⁶⁷ Decision 96/737/EC established the new multi-annual SAVE II program to continue and strengthen the action of the original SAVE program. See Council Decision 96/737/EC, O.J. (L335) 24.12.96.

¹⁶⁸ The originally proposed 150 million ECU budget of SAVE II was cut to 45 million by the Energy Council in May 1996. See Wettstad, *supra* note 113, at 32).

¹⁶⁹ See GRANT ET AL, *supra* note 164, Section III.

¹⁷⁰ For the strengthening of existing measures to promote the dissemination of better energy conversion and use technologies.

¹⁷¹ Focusing on energy research and development.

¹⁷² See GRANT ET AL, *supra* note 164, Section III.

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ENERGIE, a subprogram on energy of the thematic program "Energy, Environment and Sustainable Development" within the EU Fifth Framework Program for Research, Technological Development and Demonstration (1999-2002). The ENERGIE Program is organized principally around two key actions: Cleaner Energy Systems, including Renewable Energies, and Economic and Efficient Energy for a Competitive Europe supplemented by coordination and cooperative activities of a sectoral and cross-sectoral nature. With targets guided by the Kyoto protocol and associated policies, ENERGIE's integrated activities are focused on creating and applying new solutions which achieve balanced improvements to Europe's energy, environmental and economic performance and thereby contribute towards a sustainable future for Europe's citizens.¹⁷³

Established in March 1993, the ALTENER¹⁷⁴ Directive on "the promotion of renewable energy sources in the EU" followed a similar fate to SAVE. Its scope and content were considerably reduced and its budget deemed insufficient.¹⁷⁵ It contained specific targets but no substantial tools for implementation. ALTENER II was funded with a budget of merely twenty-two million ECU (the Parliament and Commission had proposed more than thirty million¹⁷⁶) for 1998-1999.¹⁷⁷ A Commission Paper published in December 1997 called for a doubling of the proportion of EU energy needs supplied by renewables to twelve percent by 2010.¹⁷⁸ Opposed by the UK, France and Germany, the Council accepted the Commission's target only by way of guidance making it a voluntary target for Member States.¹⁷⁹ Some progress was achieved in September 2001,

¹⁷³ See <http://europa.eu.int/comm/energy/en/prog5.htm>, (visited Mar. 4, 2002).

¹⁷⁴ Council Decision 93/500/EEC on the adoption of a Program for the Promotion of Renewable Energy Sources, O.J. (L 235) 18.9.1993, at 41).

¹⁷⁵ See Wettstad, *supra* note 113, at 32.

¹⁷⁶ *Id.* at 32.

¹⁷⁷ Council Decision concerning a multi-annual program for the promotion of renewable energy sources in the Community (Altener II), 98/352/EC, O.J. (L159) 03/06/1998, at 53.

¹⁷⁸ Communication from the Commission: Energy for the future: Renewable Energy Sources - White Paper for a Community Strategy and Action Plan, COM(97)599 final. According to the White Paper, renewables currently supply just 5.3 per cent of EU energy consumption.

¹⁷⁹ See GRANT ET AL, *supra* note 164. Efforts to promote renewables are also undermined by the continued use of subsidies to fossil fuels. A Greenpeace report on 'Energy subsidies in Europe' showed that more than 90 per cent of direct subsidies from Euro-

when the Energy Council adopted the Directive on the promotion of electricity produced from renewable energy sources in the internal electricity market.¹⁸⁰ After more than a year under discussion, the Directive was weakened in a number of areas compared to the draft Directive released by the Commission.¹⁸¹

Nonetheless, the adopted Directive requires that the EU double the use of renewables in the energy supply.¹⁸² The Directive includes indicative targets for individual members' states, which will be required to draft and adopt legislation to achieve these targets.¹⁸³ The renewables Directive was clearly a positive step, but it is still uncertain how the Member States will implement it, since the Directive leaves much scope for interpretation. Progress will monitor the Directive's progress and may, as a result, make further proposals, including for mandatory targets.

As this brief review has shown, regulatory measures have been consistently bogged down either through the principle of subsidiarity or lack of funding, both demonstrating overall lack of political will to act at the EC level. Furthermore, poor implementation and regulatory failure remain a problem within the EU.¹⁸⁴ This gap may partly be attributed to the fact that it is the Environment Council that makes climate policy announcements and other Council formations, e.g. Energy, (as well as the Member States) that undertake the implementation of relevant legislation. Some of the measures that have been proposed to close the implementation gap include making use of non-regulatory instruments such as taxes, tradable permits, and voluntary agreements. We now turn to those policy instruments and analyze the EU's attempt to introduce them.

pean governments to the energy industry go to fossil fuels. Kirsty Hamilton, *The Oil Industry and Climate Change* 14 (Greenpeace International 1998).

¹⁸⁰ Directive on the promotion of electricity produced from renewable energy sources in the internal electricity market, 2001/77/EC, O.J. (L.283) 27.10.2001, at 33.

¹⁸¹ Energy for the future: renewable sources of energy, COM(97)599 final; also known as White Paper for a Community Strategy and Action Plan.

¹⁸² Article 3 of *supra* note 180.

¹⁸³ *Id.*

¹⁸⁴ See Jordan, *supra* note 155, at 69.

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C. THE ENERGY/CARBON TAX AND FISCAL MEASURES: TOTAL FIASCO?

In 1992, the European Commission proposed a Directive for the introduction of a tax on all energy products, excluding renewables, based 50% on energy content and 50% on the carbon content of fuels.¹⁸⁵ The objective was to improve energy efficiency and favor fuel substitution towards products emitting less or no CO₂. It was proposed to introduce the tax in steps. After seven years the rates would have reached 0.7 ECU/GJ and 9.4 ECU/CO₂, equivalent to \$10 per barrel. Graduated reductions and conditional exemptions from the tax were to be applied for energy intensive firms.¹⁸⁶ The tax proposal was estimated to lead to a reduction in CO₂ emissions of around 10% ten years after implementation, compared to a business-as-usual scenario. Depending on the business-as-usual scenario, this would imply no growth or a slight reduction in CO₂ emissions compared to 1990 levels. The tax was intended to be levied in addition to existing excise duties.

No agreement was ever reached in the Council, where this proposal encountered strong opposition from some countries and transnational industry. The "cohesion countries" (i.e., Spain, Greece, Portugal and Ireland)¹⁸⁷ could only accept the proposal in return for additional structural funding, and France argued for a pure carbon tax in order to protect its nuclear industry.¹⁸⁸ Using the subsidiarity principle, the UK argued that it would be more appropriate to develop such a tax at the national level.¹⁸⁹ The tax proposal has been halted ever since. The 1994 decision of the Council in Essen does no more

¹⁸⁵ Proposal for a Council Directive introducing a tax on carbon dioxide emissions and energy, COM(92)226 final.

¹⁸⁶ *Id.*

¹⁸⁷ The Treaty of Maastricht created the so-called "Cohesion Fund" aimed at financing infrastructure and environmental projects in those Member States where the gross national domestic is less than 90% of the EU average. Greece, Ireland, Portugal and Spain are currently within that threshold, and are thus known as "cohesion" Member States. See Maastricht Treaty, *supra* note 3.

¹⁸⁸ See Skjærseth as quoted by Wettstad, *supra* note 113, at 29.

¹⁸⁹ Hence, the UK's objection to a CO₂ tax did not concern the idea of fiscal measures in the climate change package as such but rather tax harmonization at the EU level. Taxation for the UK is the responsibility of the Member States (Haigh, *supra* note 3, at 165; Dahl, *supra* note 36, at 217).

than enable Member States to apply a carbon/energy tax “if [they] so desire.”¹⁹⁰

The idea of a CO₂ tax has not been abandoned, but proposals for other, more indirect avenues have been discussed as well.¹⁹¹ Former environment Commissioner, Ritt Bjerregaard, stated publicly that the EU could not avoid a carbon/energy tax if it intends to reduce CO₂ emissions after the year 2000 because energy prices are currently too low to stimulate improvements in efficiency.¹⁹² The EU-wide carbon/energy tax has the potential to reduce greenhouse gas emissions considerably, but will probably remain on the “shelf” because of the requirement for consensus in EU fiscal environmental policies. In the meantime, Member States should address the issue, as the UK has done, with the introduction of the climate change levy on April 2001. Furthermore the development of a EU-wide emissions trading scheme might relieve the pressure from the development of taxation initiatives, especially if trading leads to significant emission reductions within the EU.

D. MONITORING MECHANISM FOR GREENHOUSE GASES: SOME HOPE?

The only substantive piece of EU legislation to have been adopted by the Council so far was the establishment of a monitoring mechanism for greenhouse gases. On June 24, 1993 the Council of Environment Ministers adopted Decision 93/389/EEC¹⁹³ establishing a monitoring mechanism in the Community for anthropogenic CO₂ and other greenhouse gas emissions not controlled by the Montreal Protocol. The monitoring mechanism serves a double purpose of monitoring progress towards the stabilization of CO₂ emissions at 1990 levels by the year 2000, and towards the fulfillment of the Community's joint commitments under the 1992 Climate Convention. The Decision requires each Member State “to devise, publish, implement and periodically update national programs for limit-

¹⁹⁰ Haigh, *id.*, at 165-166.

¹⁹¹ Wettstad, *supra* note 113, at 29.

¹⁹² See Dessai & Lacasta 2001, *supra* note 151, at 9.

¹⁹³ Council Decision 93/389/EEC for a monitoring mechanism of Community CO₂ and other greenhouse gas emissions, O.J. (L 167) 9.7.1993, at 31.

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ing their anthropogenic emissions of CO₂.”¹⁹⁴ The Commission annually evaluates the national programs in order to assess whether progress in the Community as a whole is sufficient to attain the stabilization objective. For the performed evaluations¹⁹⁵ under this Decision, the Commission concluded that the information provided was still not sufficient to evaluate progress towards the Community stabilization target in a satisfactory way.¹⁹⁶ Compliance with Decision 93/389 has not been impressive because the annual assessments, a key part of the Decision, seem to have been virtually ignored.¹⁹⁷

Decision 93/389/EEC was revised in April 1999,¹⁹⁸ to allow for the updating of the monitoring process in line with the inventory requirements incorporated into the Kyoto Protocol. The amendment strengthened national program requirements on policies and measures, which should include (a) information on actual progress and (b) information on projected progress. Member States are required to submit by December 31 inventory data for the two previous years, any updates of previous years (including the base year 1990) and their most recent projected emissions for the years 2005, 2010, 2015 and 2020. As many commentators have argued,¹⁹⁹ the term “monitoring mechanism” does not convey its full potential importance, which has taken on a particular relevance with the burden-sharing agreement under the EU “bubble” (See section V below). This mechanism could play a critical role in ensuring

¹⁹⁴ *Id.* Article 2.1. See also Joy Hyvarinen, *The European Community's Monitoring Mechanism for CO₂ and other Greenhouse Gases; the Kyoto Protocol and other Recent Development*, 8 RECIEL, 191, 197 n.2 (2000) [hereinafter Hyvarinen].

¹⁹⁵ The first evaluation report, which was issued on 10.03.1994, covers the period 1990-1993. See Report from the Commission under Council Decision 93/389/EEC, *First Evaluation of Existing National Programs under the Monitoring Mechanism of Community CO₂ and Other Greenhouse Gas Emissions* COM(94)67 final, 10.03.1994 at 6. The second evaluation report was issued on 14 March 1996. See Report from the Commission under Council Decision 93/389/EEC, *Second Evaluation of Existing National Programmes under the Monitoring Mechanism of Community CO₂ and Other Greenhouse Gas Emissions* COM(96)91 final, 14.03.1996, at 1.

¹⁹⁶ *Id.*

¹⁹⁷ See Hyvarinen *supra* note 194, at 193.

¹⁹⁸ Council Decision 99/296/EC amending Decision 93/389/EEC for a monitoring mechanism of Community CO₂ and other greenhouse gas emissions, O.J. (L 117) 05.05.1999, at 35.

¹⁹⁹ See e.g. Haigh, *supra* note 3; and Hyvarinen, *supra* note 194.

that the EU and Member States stay on track towards their targets under the Convention and the Kyoto Protocol.

The first progress report under Decision 99/296/EC was released in November 2000.²⁰⁰ The Commission saw good progress in Member State's reporting on emission inventories and some progress with regard to national policies/measures and projections. However, much remains to be done with regard to the completeness, accuracy and comparability of the data, especially those on projections. The report concluded that:

- The EU's greenhouse gas emissions fell by 2.5% between 1990 and 1998;
- The majority of Member States are far away from their target paths towards Kyoto; the transport sector being the fastest-growing emission sector;
- "Business-as-usual" projections suggest that existing policies and measures would at best reduce overall EU emissions in 2010 by 57 Mt CO₂, taking emissions to 1.4%, or at worst 0% below the 1990 level;
- Additional policies and measures identified by Member States are projected to yield further reductions close to 7% below 1990 levels;
- Projections have considerable uncertainty because of the lack of quantified data on additional measures, lack of comparability of methodologies used and uncertainty over implementation of the policies and measures.²⁰¹

This means the EU as a whole is expected to have met its commitment under the Convention, i.e. to stabilize emissions at 1990 levels by the year 2000. However, this positive evolution is more a "fortuitous" result of the economic collapse and modernization in eastern Germany and the unintended consequence of "dash for gas" resulting from the privatization in the UK's energy sector.²⁰² The 1999 Landfill directive²⁰³ is also

²⁰⁰ Report under Council Decision 1999/296/EC for a monitoring mechanism of Community greenhouse gas emissions, COM(2000)749, final 22.11.2000.

²⁰¹ *Id.*

²⁰² Natural gas particular emits less CO₂ than coal or oil. See GRUBB ET AL, *supra* note 11, at 81.

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expected to have a considerable impact on the reduction of overall emissions.²⁰⁴ However, compliance with the ambitious Kyoto target of -8% will prove much harder for the EU and its Member States. The Monitoring Mechanism report concludes by arguing that in view of the difficulties that the Member States face in meeting their Kyoto commitments under the Burden Sharing Agreement, common and coordinated policies and measures at EU level will become an increasingly important element to supplement and reinforce national climate strategies. The Commission has proposed policies and measures, e.g. on energy taxation, renewables, energy efficiency, vehicle emissions and landfills, and intends to intensify such ongoing work through the European Climate Change Program (ECCP), which is further discussed below. Results from the ECCP will form the basis for concrete policy proposals in the areas of energy, transport, industry and agriculture and for an internal EU emissions trading scheme.

E. VOLUNTARY AGREEMENTS: IS EUROPE GETTING THEM RIGHT?

Environmental voluntary agreements have been emphasized in the EU Sixth Environment Action Program.²⁰⁵ During the 1990s, they received increased attention as an alternative or supplement to traditional policy instruments, particularly in the field of energy efficiency. Voluntary Agreements can more specifically be defined as “commitments between authorities and target groups setting forth environmental objectives based on voluntary participation or absence of sanctions as part of the commitments themselves.”²⁰⁶ In the EU context, the promotion of agreements with industry can be seen as part of the effort to broaden participation and the range of policy instruments, and thus implement the concept of “shared responsibility” empha-

²⁰³ 1999/31/EC Council Directive 1999/31/EC of Apr. 26, 1999 on the landfill of waste, O.J. (L 182) 16.07.1999, at .1

²⁰⁴ See Christoph Bail, Simon Marr and Sebastian Oberthür, *Klimaschutz und Recht* (2002) (manuscript on file with authors).

²⁰⁵ See Wettstad *supra* note 113, at 37.

²⁰⁶ See Skjærseth as quoted by Wettstad, *id.* at 37-38.

sized in the 1992 Fifth Action Program and the 'wider constituency' proposed in the Sixth Environment Action Program.

Voluntary Agreements are widely applied in EU Member States, but few at EU level.²⁰⁷ Recently, the European Commission and the European Automobile Manufacturers Association²⁰⁸ signed a Voluntary Agreement to reach a 25% reduction of CO₂ emissions from passenger cars by 2008.²⁰⁹ Agreements have been reached with the Japan Automobile Manufacturers Association (JAMA) and the Korean Automobile Manufacturers Association (KAMA).²¹⁰ Voluntary Agreements, however, are not free of problems. Besides the difficulty of separating their specific effects from more general societal factors and processes, Voluntary Agreements are also likely to work best in "benign" conditions; with energy efficiency as a relevant climate policy example.²¹¹ As an April 2000 Commission Recommendation noted, "The agreement with the auto industry is an interesting development, but it is too early to judge whether this was a regulatory breakthrough or a regulatory cop out."²¹²

F. THE EUROPEAN CLIMATE CHANGE PROGRAM

The Environment Council of October 1999 urged the Commission to put forward a list of priority action on climate change as early as possible in 2000 and to prepare appropriate proposals in due course.²¹³ In response, the European Climate Change Program (ECCP) was created.²¹⁴ The driving force behind the ECCP is the uncertainty and difficulties Members

²⁰⁷ For a review of voluntary agreements in Member States, See OECD, *Voluntary Approaches for Environmental Protection in the European Union* (Dec.10, 1998), ENV/EPOC/GEEI(98)29/FINAL.

²⁰⁸ See ACEA and European Commission, CO₂ emissions from cars, The EU Implementing the Kyoto Protocol (1998).

²⁰⁹ See Wettestad, *supra* note 113, at 39.

²¹⁰ Commission Recommendation of Apr. 13, 2000 on the reduction of CO₂ emissions from passenger cars (KAMA), O.J. (L 100) 20.04.2000, at 55. Commission Recommendation of Apr. 13, 2000 on the reduction of CO₂ emissions from passenger cars (JAMA), O.J. (L 100) 20.04.2000, at 57.

²¹¹ *Id.*, at 38.

²¹² *Id.*

²¹³ Council Conclusions on a Community strategy on Climate Change, Doc. 11654/99, Luxembourg Oct. 12, 1999.

²¹⁴ Communication from the Commission on EU policies and measures to reduce greenhouse gas emissions: Towards a European Climate Change Programme (ECCP), COM(2000)88 Final 8.3.2000 [hereinafter ECCP Communication].

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States will face in fulfilling their commitments.²¹⁵ Under current policies and measures the overall EU emission reduction in 2010 will lie somewhere between -1.4% and 0%. The ECCP emerged as a means of reinforcing common and coordinated policies and measures at the Community level, in the face of consistent weakening or altogether dropout of Commission proposals. These measures are supplemental to actions taken by Member States in the fulfillment of their Kyoto targets. The ECCP has taken a multi-stakeholder approach²¹⁶ in the preparation of the proposals to reduce greenhouse gas emissions. The scope of the program is limited to achieving the Kyoto target of -8%, but in the mid and long-term perspective, the ECCP will address issues such as adaptation; international cooperation through capacity-building and technology transfer; research/observation; demonstration of efficient; and clean technologies and training and education.²¹⁷

The ECCP established a Steering Committee²¹⁸ to coordinate six Working Groups:

1. Flexible mechanisms
2. Energy supply
3. Energy consumption
4. Transport
5. Industry
6. Research

Some Working Groups have sub-groups. The Commission's role is to coordinate and facilitate the different Working Groups in this innovative integration exercise. The results of the "Economic Evaluation of Sectoral Emission Reductions Ob-

²¹⁵ For a review of some Member State's climate programs, *See* Eyre; Scleich et al.; GUMMER & MORELAND; Broadbent; and Dessai & Michaelowa, all *supra* note 152.

²¹⁶ Which has brought together relevant stakeholders such as representatives of the Commission, the Member States, industry and the NGO community. *See* ECCP Communication, *supra* note 214.

²¹⁷ *Id.*

²¹⁸ Composed of all Commission services that take part in the ECCP.

jectives for Climate Change”²¹⁹ study were used as inputs for each Working Group, so they have to be briefly mentioned. This EU-commissioned report which identifies a least-cost allocation of objectives for different sectors and greenhouse gases, would allow the EU to reach its Kyoto target.²²⁰ With caveats and limitations, the study combines a “top-down” and a “bottom-up” methodology to understand different cost-effective greenhouse gas mitigation options. The study results show that instead of having each sector reduce its emissions by 8%, some sectors need to reduce their emissions by more than 8%: energy supply (11%), fossil fuel extraction (46%), industry (26%), agriculture (8%) and waste (28%). According to this sectoral least-cost allocation approach compliance costs are predicted to be 0.06% of EU gross domestic product.²²¹ A number of other studies provide estimates in a similar range of up to 0.3%.²²² According to this study the six most cost-effective ways for the EU to reach its Kyoto target are:

1. Decarbonization of energy supply:
 - a. Further switching from coal to gas;
 - b. More efficient generation of power (e.g. increasing the share of Combined Heat and Power);
 - c. Increase in the use of renewable energy (notably biomass and wind energy).
2. Improvement of energy efficiency, particularly in industry, households (retrofitting) and services sector.
3. Further reduction of nitrous oxide from the adipic acid industry and implementation of reduction options in the nitric acid industry.
4. Reductions of methane emissions in coal mining, oil and natural gas, and waste and agriculture sectors.

²¹⁹ Kornelis Blok, David de Jager and Chris Hendriks. *Economic Evaluation of Sectoral Emission Reduction Objectives for Climate Change – Summary Report for Policy Makers*, ECOFYS Energy and Environment, March 2001 [hereinafter Blok et al].

²²⁰ *Id.* at 1. The intention was to identify a least-cost allocation so that the cost of production of energy and other goods would increase as little as possible.

²²¹ Had the allocation been done at a Member State level instead of EU-wide, the compliance costs would more than double (*Id.* at iv).

²²² European Commission Proposal for ratification of the Kyoto Protocol by the European Community COM(2001)579 final;

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5. Reduction of fluorinated gases in specific applications, e.g. industrial processes, mobile air conditioning and commercial refrigeration.
6. Energy efficiency improvement measures in the transport system.²²³

The results from this study served as the basis for discussion of the ECCP Working Groups, which came up with measures based on criteria of cost efficiency, emission reduction potential, time horizon and political acceptability. Each Working Group met several times in 2000 and 2001. The Commission was then urged to develop concrete policy proposals that have been presented as a package of measures in four areas: cross-cutting, energy, transport and industry (see table 2, below).²²⁴

Table 2: ECCP Policy Proposals

Cross Cutting Issues

- Promoting effective implementation of the Integrated Pollution Prevention and Control Directive
- Proposal for a Directive on linking project-based mechanisms including Joint Implementation and Clean Development Mechanism to EC emissions trading scheme
- Proposal for a review of the monitoring mechanism

Energy Issues

- Proposal for a Framework Directive for minimum efficiency requirements for end-use equipment
- Proposal for a Directive on energy demand management
- Proposal for a Directive for the promotion of Combined Heat and Power
- Non-legislative proposals: Initiatives on increased energy-efficient public procurement; Public awareness campaign and campaign take-off

²²³ Blok et al, *supra* note 219, at iv-v.

²²⁴ See European Commission Communication on the implementation of the first phase of the ECCP COM(2001)580 final.

Table 2 Continued: ECCP Policy Proposals***Transport***

- Proposal for shifting the balance between modes of transport
- Proposal for improvement in infrastructure use and charging
- Promotion of the use of biofuels for transport

Industry

- Proposal for a Framework Directive on fluorinated gases

Without scrutinizing each item individually, the climate package is ambitious and worthy of the “leader” of the climate regime. Nonetheless, according to the Commission, the emissions reduction effects of these measures are unlikely to meet the Kyoto targets, thus the need to examine additional measures from the on-going ECCP process. After a decade of weakened proposals, but at the same time building on them, European climate policy is finally starting to shape up. However, all these efforts will be in vain if the Council does not quickly adopt and implement these proposals. Only then, will the EU be able to show directional leadership, i.e., leadership by example.²²⁵

G. THE COMMISSION PROPOSAL FOR AN EMISSIONS TRADING DIRECTIVE

In 1999 the European Commission suggested that the best way for the Community and its Member States to get acquainted with the Kyoto mechanisms would be to develop their own emissions trading scheme.²²⁶ A paper²²⁷ on greenhouse gas emissions trading within the EU was released in 2000 for wider consultation with stakeholders. Ninety comments – overwhelmingly supporting emissions trading – were received from governmental organizations, businesses and NGOs throughout Europe.²²⁸ The proposal for a framework directive

²²⁵ GUPTA & GRUBB, *supra* note 4, at 21

²²⁶ Communication from the Commission to the Council and the European Parliament - Preparing for Implementation of the Kyoto Protocol COM(1999)230, final.

²²⁷ Green Paper on greenhouse gas emissions trading within the European Union, COM(2000)87, final [hereinafter Emissions Trading Greenpaper].

²²⁸ See <http://europa.eu.int/comm/environment/docum/0087_en.htm seen in 23 Jan.

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was released just before COP-7 (2001) as part of the EU climate package. While neither industry nor NGOs seemed fully content with the proposal, the Commission appears to have taken a middle-ground position, which we briefly describe next.

Beside providing experience in a scheme that will later be used internationally,²²⁹ an internal emissions trading system will enhance the cost-effectiveness of emission reductions by making emission reductions as cheap as possible wherever they may occur in the Community. The Commission proposed a cap-and-trade approach covering heavy industry sectors across the EU. This proposal revolves around two key concepts: greenhouse gas "permit" and greenhouse gas "allowance." All installations under the scheme will be required to have permits that will lay down monitoring, reporting and verification requirements in respect of direct emissions of greenhouse gases specified in relation to those activities. Member States will allocate allowances to all installations holding permits that can then be transferred to other companies. "Each year, companies must submit for cancellation a number of allowances that corresponds to their actual emissions. If they do not have enough allowances, sanctions will be imposed on them."²³⁰ The scheme will run between 2005 and 2007, before the Kyoto Protocol's first commitment period starts. The rationale of using emissions trading is based on the fact that it provides certainty about the environmental outcomes.²³¹ However, under this proposal, the Member States rather than the EU will decide on initial allocations. The Monitoring Mechanism in conjunction with national transaction registries will perform the tracking of traded allowances. Only carbon dioxide emissions will be covered in the beginning of the scheme because they represent 80% of the Community's greenhouse gas emissions. Penalties for non-compliance have also been envisaged: set at \square 100 per excess tone or twice the average market price during that period.

02> (visited Dec. 9, 2001).

²²⁹ The difficulties that might result from inconsistent systems within the EU offer a microcosm of the larger challenge. See Jacoby & Reiner, *supra* note 58, at 310.

²³⁰ Proposal for a framework Directive for greenhouse gas emissions trading within the European Community, COM(2001)581, final.

²³¹ See Emissions Trading Green paper, *supra* note 227, at 7-9.

Designing an emissions trading scheme is not a trivial task, least of all if one is to consider all stakeholder interests from a variety of Member States. Member States and particular interest groups remain divided in the details of this emissions trading directive.²³²

In the previous sections we overviewed some key aspects of EU policymaking on climate change from an institutional and actors-based perspective, as well as the key developments of a “domestic” EU climate policy. We now turn to an analysis of selected elements in the Kyoto Protocol negotiations between 1992 and the present day i.e. between the signing of the UNFCCC at the Rio Earth Summit (UNCED) and COP-7 in late 2001.

V. THE EU ON SELECTED ISSUES OF THE CLIMATE CHANGE REGIME

Almost ten years have passed since the adoption of the United Nations Framework Convention on Climate Change. A full fledged analysis of the climate change regime, even if specifically focused on the EU track record, is beyond the scope of this paper. We will instead focus on key selected areas of the last ten years of the negotiations by providing illustrations of how the EU positioned itself with regard to such areas. We will draw upon the available literature and official documents, as well as on our own experience—including multiple interactions with many different participants—in taking part in different capacities in the climate negotiations since the mid 1990s. Finally, the select issue-oriented approach to this analysis will be played in the context of the different chronological milestones, which the climate change regime has gone through. These milestones are summarized immediately below.

As mentioned in the introduction,²³³ the UNFCCC went through essentially three phases after it was signed. The first phase was between the Convention’s signature in 1992 until

²³² See for example ENDS daily: “EU states divided over climate emission trading”, 13/12/2001, available at: www.environmentdaily.com/articles/index.cfm?action=article&ref=11232&searchtext=Euistatesdivided&seerchtype=phrase (visited Apr. 12, 2002).

²³³ See *supra* table 1.

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COP-1 in Berlin, Germany, when Parties decided to strengthen the regime. The next phase corresponded to the Kyoto Protocol negotiations that began in 1995 (COP-1) and culminated with the adoption of the Protocol at COP-3 in Japan in 1997. The third and present phase of over 4 years corresponds to the period in which Parties negotiated the key operational rules and guidelines under the Protocol, which were essential for its ratification and entry into force—which depends on a majority of 55 Parties, including Annex I Parties that account for 55% of this Annex's CO₂ emissions.²³⁴

Throughout this past decade the EU has remained committed to push for what has generally been perceived as stringent climate change standards,²³⁵ somewhat in contrast with its own domestic track record, as explained in the previous section. If one can summarize the following subsections, the EU positioning was predicated on the ability of the Member States and the Community to jointly fulfill their target obligations under the Protocol. This fact has consistently conditioned the EU position, leading it often to renege or soften other positions in order to secure its primary objective. The following analysis will focus on three issues: policies and measures, emission targets, and developing countries.

A. POLICIES AND MEASURES: EXPORTING DOMESTIC APPROACHES OR INTERNATIONAL PRETEXT FOR DOMESTIC COORDINATION?

A key element in the EU negotiation strategy leading up to Kyoto consisted of a package of so-called “common and coordinated policies and measures,” such as a carbon/energy tax or energy efficiency standards, to be adopted by Parties.²³⁶ The EU spent much of its internal discussions and negotiating capital devising and presenting this package to other Parties. The

²³⁴ Article 25.1 of the Protocol, *supra* note 6.

²³⁵ See e.g. Dessai & Lacasta 2001, *supra* note 151; Yamin, *supra* note 12; and OBERTHÜR & OTT, *supra* note 3.

²³⁶ GRUBB ET AL, *supra* note 11, at 65, define “policies and measures” as “any action which Parties can adopt, either nationally or internationally, to reduce emissions or enhance sinks.”

policies and measures text that was eventually agreed upon is much too weak to be claimed as a EU negotiating success.

The discussion on policies and measures effectively began at COP-1 in Berlin (1995). Due to statements from progressive Member States and NGO pressure, the EU managed to forge an alliance, the so-called "green group," with developing countries (minus OPEC²³⁷) against the JUSSCANNZ countries.²³⁸ This coalition paved the way for the adoption of the Berlin Mandate, which included the EU proposal to call on developed country Parties "to elaborate on policies and measures."²³⁹

To that effect and throughout 1996 and part of 1997 the EU went through an intense internal process to prepare several lists of policies and measures. This proposal was submitted in mid 1997, and at its core consisted of three annexes containing three sets of policies and measures. Annex I included "[mandatory] Policies and measures common to all [OECD] Parties;" Annex II "Policies and measures to be given high priority by [OECD] Parties and for coordination with other Parties;" and Annex III "National policies and measures to be given priority for inclusion in national programmes of [OECD] Parties ... as appropriate to national circumstances."²⁴⁰

This proposal was not, however, further elaborated, thus provoking considerable criticism and "irritation" from other negotiating Parties.²⁴¹ In fact, those Parties never showed much interest in following the EU approach of binding policies and measures.²⁴² The U.S., although initially signaling some

²³⁷ Organization of Petroleum Exporting Countries.

²³⁸ JUSSCANNZ was an informal grouping of the following like-minded countries: Japan, United States, Switzerland, Canada, Australia, Norway and New Zealand. After the adoption of the Protocol, with Switzerland dropping out, the remaining members plus Iceland, Russia and Ukraine became to be known as "Umbrella Group." This more recent formation is especially focused on a coordinated position around the Protocol's flexible mechanisms of joint implementation (Article 6), clean development mechanism (Article 12) and international emissions trading (Article 17). See Kyoto Protocol, *supra* note 6.

²³⁹ See COP-1 Report, Decision 1/CP.1, *supra* note 23;. This process was called the Ad Hoc Group on the Berlin Mandate or "AGBM." *Id.*

²⁴⁰ See U.N. Doc. FCCC/AGBM/1997/3/Add.1, at 103-123.

²⁴¹ Yamin, *supra* note 12, at 53.

²⁴² Japan (which nonetheless presented its own proposal), the Alliance of Small Island States (AOSIS) and some Central and Eastern European countries in the line up for EU membership conveyed some mild, however unsubstantiated, support. In fact, the EU's first attempt in 1995 to discuss policies and measures had been "met with little enthusiasm." See e.g. GRUBB ET AL, *supra* note 11, at 63.

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interest in discussing policies and measures in general,²⁴³ came out in favor of targets and timetables at COP-2 (1996). (See next subsection.) It further stated that it “firmly opposed mandatory, harmonized policies and measures that would be imposed upon us in order to reach our target.”²⁴⁴ As a result, the U.S. did not submit any proposal on policies and measures. In the face of such widespread opposition, why did the EU keep insisting on its proposals on policies and measures? Commentators have essentially given two reasons for that fact: the first reason is based on internal EU politics, and the second views the EU position as a default position in the face of U.S. early opposition to targets.

The first reason is that some internal political issues, despite considerable discussion, remained fundamentally unresolved among the Member States and the Commission. As a result, some Member States transferred such considerations to the international level, in the hopes of attracting some support for their views.²⁴⁵ The EU certainly had a long history of policy coordination in such areas as trade, agriculture and environment. However, as explained in section IV above, by 1997 it had failed to implement meaningful policies and measures on climate change—most notably an energy/carbon tax. As a result, the European Commission in particular might have had an interest in exploring the policies and measures avenue as a way to extend its competences on climate change.²⁴⁶ An energy/carbon tax, which the Commission had kept under discussion,²⁴⁷ required harmonization at EU level and was conditional on comparable efforts by the EU’s competitors—e.g. the U.S. and Japan.²⁴⁸ This measure, it was argued, would suggest

²⁴³ Which led some EU Member States to believe the U.S. was more for policies and measures rather than targets. See OBERTHÜR & OTT, *supra* note 3, at 105.

²⁴⁴ Statement of Stuart Eizenstat before the U.S. House International Relations Committee, Washington, DC, 13 May 1998, as quoted in OBERTHÜR & OTT, *supra* note 3, *id.*

²⁴⁵ OBERTHÜR & OTT, *supra* note 3, at 104; and Yamin, *supra* note 12, at 53.

²⁴⁶ See *supra*, section II, and the discussion therein on climate change as an area of “shared” or “mixed” competence between the EC and its Member States.

²⁴⁷ As explained *supra* in Section II, Under the EC treaty the Commission retains the exclusive competence to propose EC regulatory measures.

²⁴⁸ See for a discussion on the principle of conditionality of the EU proposal of a energy/carbon tax, Wettstad, *supra* note 113; and Manners, *supra* note 41.

international coordination.²⁴⁹ In addition to the Commission, smaller Member States also favored the policies and measures approach as a way to ensure that their particularly open economies would not be comparatively disadvantaged should they take domestic action on climate change.²⁵⁰ However, as Farhana Yamin sharply observes, analyzing the EU international climate change negotiating strategy “the fact that these same countries could not get other EU Member States to agree internally to mandatory [policies and measures] should have alerted them to the difficulty of trying to persuade a more heterogeneous and larger number of states . . .” Rather than seeing itself as a microcosm of the larger group, the EU appeared to have thought of the [Ad Hoc Group on the Berlin Mandate (AGBM)]²⁵¹ process as having the ability to solve the EU own internal problems.²⁵²

The second reason advanced by commentators for the EU's insistence on policies and measures is of a tactical nature vis-à-vis the U.S. in particular. At the beginning of the AGBM process the U.S. had not yet signaled a preference for targets and timetables. Some in the EU therefore viewed the proposal on binding policies and measures as a way to put pressure on the JUSSCANNZ in general and on the U.S. in particular to either approach.²⁵³ However, the EU's continued insistence on policies and measures even after the United States' announcement on targets suggests that the strategy did little more than irritate other negotiating partners while proving ultimately to be unsuccessful.

The Protocol text does not contain any reference to binding policies and measures. Article 2 of the Protocol merely lists examples of policies and measures to be taken by each Party “in accordance with its national circumstances.”²⁵⁴ Article 2.4

²⁴⁹ The notion of an internationally coordinated carbon tax had been opposed by most OECD members and OPEC, even in the run-up to the UNFCCC. GRUBB ET AL, *supra* note 11, at 67, even suggest that the EU proposal on policies with its taxation component was “thinly veiled criticism of cheap U.S. gasoline (a topic of transatlantic dispute ever since the first oil shock in 1973) and a red rag to OPEC which viewed such proposals as a conspiracy to grab its oil rent revenues.”

²⁵⁰ OBERTHÜR & OTT, *supra* note 3, at 103-104 and Yamin, *supra* note 12, at 53.

²⁵¹ See *supra* note 239.

²⁵² Yamin, *supra* note 12, at 53. See also GRUBB ET AL, *supra* note 11, at 68.

²⁵³ OBERTHÜR & OTT, *supra* note 3, at 105; and Yamin, *id.*, at 52.

²⁵⁴ See Kyoto Protocol, *supra* note 6, Article 2.1.

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further opens the door for the future consideration of policies and measures “coordination.”²⁵⁵

Since the adoption of the Protocol in 1997, policies and measures have barely been in the negotiators’ attention span. This is mainly because Parties were busy crafting the Protocol’s key operational rules on, e.g., the flexible mechanisms and monitoring, reporting and verification of Parties’ emissions.²⁵⁶ As a result, Parties have limited their activity on policies and measures to the organization of two information-sharing workshops on “best practices.”²⁵⁷ COP-7’s decision on this issue called for further information exchange activities.²⁵⁸

B. TARGETS AND TIMETABLES: LEADING . . . BUT AS A “BUBBLE”

After the adoption of the Convention and in the run up to the first Conference of the Parties scheduled for Berlin in 1995, it was up to the Alliance of Small Island States (AOSIS) to push for additional reduction commitments. It based such a proposal on the argument that the Convention’s stabilization aim would not be sufficient to tackle the challenge of climate change and that the first review of the adequacy of commitments under the Convention’s Article 4.2(d) should take place at COP-1.²⁵⁹ AOSIS thus proposed a draft protocol six months prior to COP-1, which called for a 20% reduction of industrialized countries CO₂ emissions by 2005.²⁶⁰ At that stage the EU had no clear common position with regard to the strengthening of targets.²⁶¹ Germany, however, proposed language that called for further reductions,²⁶² thereby setting the stage within the

²⁵⁵ *Id.*

²⁵⁶ See COP-7 Report, *supra* note 20.

²⁵⁷ The first workshop took place in Denmark in April 2000, and the second workshop in Norway in October 2001. See, respectively, U.N. Doc. FCCC/SBSTA/2000/2; and FCCC/CP/SBSTA/2001/INF.5.

²⁵⁸ See COP-7 Report, Add. 1, *supra* note 20.

²⁵⁹ See UNFCCC, *supra* note 5.

²⁶⁰ See OBERTHÜR & OTT, *supra* note 3, at 45.

²⁶¹ The EU Council of Environmental Ministers of 26.05.1992 had merely indicated a willingness to “confirm their readiness to contribute actively to preparatory work . . . on the review of developed country Parties commitments, and to the early preparation of Protocols under the Convention covering specific issues, in particular the limitation of CO₂ emissions.” Available at: http://www.environment.fgov.be/Root/tasks/atmosphere/klim/pub/eu/main_en.htm (visited 12.12.01).

²⁶² *Id.*

EU. At COP-1 Parties concluded that the Convention's aim was not adequate. They decided to set up the AGBM to strengthen developed countries' (Annex I) commitments, including by means of "quantified limitation and reduction commitments within specified time-frames, such as 2005, 2010 and 2020. . ."²⁶³

Although the EU submitted a "proposal on the structure of a protocol or another legal instrument,"²⁶⁴ in late 1995, it was caught in "stymied"²⁶⁵ internal discussions on the relationship between policies and measures (see previous section) and targets for most of the AGBM. It took a German proposal in October 1995, with the support of a few other Member States, for a 10% reduction of CO₂ emissions by 2005 and a 15-20% reduction by 2010,²⁶⁶ as well as the U.S. coming forward with its position on targets at COP-2 (1996),²⁶⁷ for the EU to come to an agreement on a collective proposal in March 1997. This proposal called for developed country's targets and timetables based on a basket of three gases (carbon dioxide, methane and nitrous oxide)²⁶⁸ and on a flat rate reduction of 15% by 2010 in relation to the 1990 base year.²⁶⁹

As stated above, the EU has, during the negotiations of targets, insisted on being permitted to fulfill its obligations jointly – or as a "bubble." This means that the EU and its Member States have a common target (Parties in the end agreed upon a reduction of 8%), but that they can redistribute the burden of emissions reductions among themselves by

²⁶³ See Report of COP-1, Decision 1/CP.1, *supra* note 23.

²⁶⁴ See U.N. Doc. FCCC/AGBM/1996/MISC.2, at 18-25.

²⁶⁵ See OBERTHÜR & OTT, *supra* note 3, at 51.

²⁶⁶ The timetables in this proposal had been previously agreed with the EU. *Id.* at 116. See also U.N. Doc. FCCC/AGBM/1996/MISC.2, at 13-18.

²⁶⁷ At COP-2 the U.S. conceded on taking "binding" targets. See Speech by Timothy Wirth, Under Secretary of Global Affairs, as quoted by OBERTHÜR & OTT, *supra* note 3, at 52.

²⁶⁸ Whereas other Parties like the U.S. were pushing for comprehensive coverage i.e. one that included six rather than three GHGs, the EU was patently divided on this issue. Countries like Germany, France and Austria had favored a partial basket of gases. The UK and the Netherlands, on the other hand, were in favor of a comprehensive approach. See OBERTHÜR & OTT, *supra* note 3, at 120-126.

²⁶⁹ See 1990th European Council of Environmental Ministers, Brussels, Mar. 3, 1997 [hereinafter March 1997 Council]. The June 1997 Council further proposed a 7.5% reduction for 2005 for the same basket of gases. See 2017th European Council of Environmental Ministers Luxembourg, 19/20 June 1997. Both docs are also available at: www.environment.fgov.be/Root/tasks/atmosphere/klim/pub/eu/main_en.htm (visited Dec. 10, 2001).

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means of an internal agreement (the “Burden Sharing Agreement;” see below).

Although developing countries supported the EU proposal on targets,²⁷⁰ this approach drew considerable criticism from JUSSCANNZ Parties, in particular Japan and Australia, which considered it “unfair” because it was rooted on the possibility of internal differentiation (thus flexibility)²⁷¹ while at the same time calling for a single target at the international level.²⁷² Nonetheless, Farhana Yamin considers that, despite individual proposals from Member States, “it was the collective voice of the EU that forced [JUSSCANNZ] countries to take this target position seriously” and that it “represented the pinnacle of the EU leadership” in the Kyoto negotiations.²⁷³

Whereas the EU secured its main objectives of having binding targets for developed countries alongside with the possibility of it being able to combine its aggregate targets into a “bubble,” on nearly every other issue regarding targets the EU’s preferred proposal was effectively rejected. Except with regard to the fact that the targets were ultimately differentiated among developed countries²⁷⁴ (an approach favored e.g. by Australia),²⁷⁵ and that Parties chose 1990 as the year upon which reduction should be based²⁷⁶ (a EU preference),²⁷⁷ the

²⁷⁰ OBERTHÜR & OTT, *supra* note 3, at 118.

²⁷¹ France for one favored differentiated targets due to its reliance on nuclear energy and, consequently, low per capita emissions. See U.N. Doc. FCCC/AGBM/1997/MISC.1, at 22.

²⁷² See Yamin, *supra* note 12, at 55; OBERTHÜR & OTT, *supra* note 3, at 116; and GRUBB ET AL, *supra* note 11, at 84-86.

²⁷³ Yamin, *id.*; and GRUBB ET AL, *id.* at 87.

²⁷⁴ See Kyoto Protocol, *supra* note 6, Annex B.

²⁷⁵ The EU spent most of its negotiating time either discussing among itself or talking to the U.S. and Japan. Consequently, it paid less attention to the concerns of countries with Economies in Transition (EITs), in particular those which were deemed to join the EU in the mid-term. According to OBERTHÜR & OTT, *supra* note 3, at 129-130 “...there can be little doubt that the Polish and Hungarian commitments [-4%] would look different if the EU had been more proactive in its diplomatic efforts towards [those] countries....”

²⁷⁶ Kyoto Protocol, *supra* note 6, Article 3.1.

²⁷⁷ The EU’s insistence on 1990 as the base year (although somewhat against the stated opinion of France), constituted a strategic objective for the EU. A later base year would have put the EU in disadvantage by rewarding those countries that had not limited their emissions since the adoption of the UNFCCC in 1992. See GRUBB ET AL, *supra* note 11, at 72. However, not all gases covered by the Protocol are subject to the 1990 base year. In fact, Parties “may use” 1995 as the base year for the so-called “industrial gases” (hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride). See

bulk of the target's design features were instead U.S. proposals—such as a comprehensive coverage of six gases rather than three.²⁷⁸ In addition, there is no interim target for 2005.²⁷⁹ Furthermore, rather than being based on a single year assessment, the targets are assessed on the basis of a five year²⁸⁰ “budget” or “commitment” period commencing in 2008.²⁸¹

1. The Burden Sharing Agreement and Article 4 of the Kyoto Protocol

The issue of “burden sharing” has been historically at the center of the EU position on climate change.²⁸² Already during the UNFCCC negotiations, the EU had announced it would implement its commitments jointly.²⁸³ However, after the entry into force of the Convention and perhaps because of the non-binding nature of its stabilization goal, EU climate policy moved slowly. It was only in the run up to Kyoto, in March 1997, that the EU managed to come to an internal agreement on burden sharing.²⁸⁴ Negotiated under the Dutch Presidency,²⁸⁵ this internal agreement contrasted with the EU's own

Kyoto Protocol, *supra* note 6, Article 3.8. This was mainly to accommodate industrial bases' concerns in Europe and Japan. See GRUBB ET AL, *id.*, at 75-76.

²⁷⁸ See Kyoto Protocol, *supra* note 6, Annex A. The wider the coverage of gases the greater the flexibility in reaching one's target. That is why the U.S. favored a six gas coverage rather than a 3 gas coverage. By COP-3 the U.S. had also decided to accept differentiated. See OBERTHÜR & OTT, *supra* note 3, at 119 and 128; and GRUBB ET AL, *id.* at 69, 72-76.

²⁷⁹ See Kyoto Protocol, *supra* note 6, Article 3.2, which merely calls for each Party to have made by 2005 “. . . demonstrable progress in achieving its commitments under th[e] Protocol.” (emphasis added.)

²⁸⁰ The EU then tried to have it commence in 2003-2007 but it failed. See OBERTHÜR & OTT, *supra* note 3, at 126.

²⁸¹ Kyoto Protocol, *supra* note 6, Article 3.1.

²⁸² MANNERS, *supra* note 41.

²⁸³ It had thus interpreted the language in article UNFCCC 4.2(b), *supra* note, 5, allowing Parties to meet their commitments “individually or jointly.” For an illustration of the EU position on joint fulfilment in the context of the UNFCCC negotiations, See Daniel Bodansky, *The History of the Climate Change Regime*, in SPRINZ & LUTERBACHER, *supra* note 10, at 33.

²⁸⁴ March 1997 Council, *supra* note 269.

²⁸⁵ The Burden Sharing Agreement of 1997 was based on a proposal prepared by a team of researchers from Utrecht University in the Netherlands. See K. Blok, G.J.M. Phylipsen, and J.W. Bode, *The triptique approach: burden differentiation of CO2 emission reduction among European Union Member States*, Utrecht University, Utrecht, 1997. For a detailed account of the burden sharing negotiations, see Lasse Ringius, *Differentiation, leaders and fairness: negotiating climate commitments in the European Community*, 4 International Negotiation 133-166 (1999).

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proposal of a 15% reduction described above. In fact, the 1997 Burden Sharing Agreement would only accomplish a 9% reduction, with Member States' limitations or reductions ranging from -25% to +40% (see table 3, below).

It hence came as no surprise that this agreement had to be renegotiated after the Protocol's adoption, which mandates an 8% reduction for the EC and the Member States. This time under a British Presidency in 1998, the EU renegotiated the Burden Sharing Agreement to meet the Kyoto targets, "but ultimately the decision was political."²⁸⁶ With the prospect of locking in specific individual targets, the collective ambition at COP-3 (1997) gave way to the positions of the more conservative Member States. Indeed, as Oberthür and Ott summarize in a characteristic illustration of the relationship between the Member States in the climate arena:

...[A] number of governments used the new situation to achieve a general relaxation of their targets. Denmark and Germany demanded adjustments and the former "green" countries Austria and the Netherlands admitted that they would not be able to meet their ambitious targets of the first agreement. These announcements triggered distinctive resistance from Greece, Ireland, Portugal and Spain, who were now expected to limit their emission growth to a larger extent than formerly agreed. Of the main emitters of the [EU], only the UK declared that it would take a stronger commitment than before.²⁸⁷

Table 3: EU 1997 and 1998 Burden Sharing Agreements

Member State	1997 ²⁸⁸	1998 ²⁸⁹
Austria	-25%	-13%
Belgium	-10%	-7.5%
Denmark	-25%	- 21%
Finland	0%	0%

²⁸⁶ See Dessai & Michaelowa, *supra* note 152.

²⁸⁷ See OBERTHÜR & OTT, *supra* note 3, at 147.

²⁸⁸ March 1997 Council, *supra* note 269.

²⁸⁹ 2106th European Council of Environmental Ministers, Luxembourg, 16 June 1998. Available at: http://www.environment.fgov.be/Root/tasks/atmosphere/klim/pub/eu/main_en.htm (visited October, 1, 2002).

Table 3 Continued: EU 1997 and 1998 Burden Sharing Agreements

Member State	1997	1998
France	0%	0%
Germany	-25%	-21%
Greece	+30%	+25%
Ireland	+15%	+13%
Italy	-7%	-6.5%
Luxembourg	-30%	-28%
Netherlands	-10%	-6.0%
Portugal	+40%	+27%
Spain	+17%	+15%
Sweden	+5%	+4.0%
United Kingdom	-10%	-12.5%
EU TOTAL	-9.2%	-8%

The 1998 burden sharing thus settled the scores after Kyoto and allowed the EC and the Member States to focus on the development of their own implementation plans, which have indeed been under way ever since.²⁹⁰

The issue of burden sharing is intrinsically linked with a key provision in the Protocol: Article 4, also known as the “joint fulfillment” provision. This article was established essentially to accommodate the possibility that the EU and its Member States would implement their targets jointly or as a “bubble” and, as said, constituted a cornerstone of the EU negotiating position. Some commentators have argued that the Article 4 negotiations undercut somewhat the EU’s negotiating positions on other matters, where the EU had to give in so as to secure agreement on joint fulfillment.²⁹¹ Another price to pay

²⁹⁰ At the date of this writing virtually every Member State had either adopted its climate plan, or had developed a first draft of such a plan. See Sebastian Oberthür & Dennis Tänzler, *International Regimes as a Trigger of Policy Diffusion: The Development of Climate Policies in the European Union*, Annex 1 (Feb. 2002) (manuscript on file with Authors). For analyses of several plans, see GUMMER & MORELAND; Broadbent; Dessai & Michaelowa; Eyre; Schleich et al, all *supra* note 152. See also links to Member States’ climate web sites at: <http://www.europa.eu.int/comm/environement/climat/links.htm> (visited Dec. 10, 2002).

²⁹¹ See Yamin, *supra* note 12, at 56-57.

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for this article was that it contains several features that were not EU proposals.²⁹² First, it allows for the possibility that Parties other than the EU (a so-called regional economic and integration organization-REIO, like the North American Free Trade Agreement²⁹³) may also enter into a bubble agreement.²⁹⁴ Secondly, the bubble agreement must remain unchanged from the time of ratification of the Protocol until the end of the commitment period.²⁹⁵ Thirdly, and most importantly, the bubble that will be applicable to the EU contains a provision on individual and joint responsibility between the REIO and its members. According to Article 4.6 of the Protocol, “in the event of failure to achieve the *total combined level* of emissions reductions,”²⁹⁶ both each non-complying bubble member and the bubble itself are responsible for such “combined” target.

C. DEVELOPING COUNTRIES

Traditionally, the EU has taken a different approach to developing country participation in the climate regime, when compared to other OECD developed countries. Notably, the U.S. and Australia have argued that the larger developing countries should take on targets or limitations during the Kyoto Protocol’s first commitment period. This was clearly expressed in the 1997 Byrd-Hagel Resolution by the U.S. Senate, which required that any agreement signed by the U.S. should have meaningful participation by key developing countries in

²⁹² For an analysis of the Article 4 negotiations, see Depledge, *supra* note 78, at 57-59.

²⁹³ North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Dec. 17, 1992, U.S.-Can-Mex., 32 I.L.M. 605 (1993).

²⁹⁴ See Article 4.1, 2, 3 and 5 of the Kyoto Protocol, *supra* note 6. However, Parties new that the EU would be the only REIO using this article in the foreseeable future. In fact, the EU is the only REIO with at a developed enough stage of integration (far beyond “economic” in fact) to be able to effectively enforce—via e.g. the European Court of Justice—the joint responsibility obligation under Article 4 of the Kyoto Protocol.

²⁹⁵ *Id.* Article 4.2 and 4.3. The EU had proposed that the Burden Sharing Agreement be changed up until “five years before the expiration of the [commitment] period.” This would have allowed the EU to change the agreement right before the start of the first commitment period, in 2008, so as to take on board the expected new Member States of Central and Eastern Europe. See OBERTHÜR & OTT, *supra* note 3, at 144. See also Depledge, *supra* note 78, at 57-59.

²⁹⁶ Emphasis added.

the same commitment period, while not harming the U.S. economy.²⁹⁷

The EU, on the other hand, has taken a much more conciliatory position with respect to developing countries commitments. In the run-up to Kyoto, the EU supported the G-77/China's opposition to new commitments for developing countries, in line with the Berlin Mandate in fact.²⁹⁸ Instead, the EU argued for a "graduation" – which would include in the countries taking on commitments those developing countries that had joined the OECD, like South Korea and Mexico – and "evolution" – because regulation of developing countries emissions in the long term is an environmental necessity.²⁹⁹ According to Farhana Yamin, the EU was unable to explain their proposals (which were somewhere between the U.S. and its allies and the G77/China) to developing countries, who rejected them as soon as they heard mention of new commitments.³⁰⁰ The EU proposal for developing countries is fairly consistent with its own "bubble" concept, where more capable states take on higher emissions cuts (e.g. Germany) while the less developed (e.g. Spain, Portugal, Greece, and Ireland) are allowed to increase their emissions. In their view, similar principles can be applied to the climate regime as a whole in the future. Indeed, the EU bubble will surely bring a good deal of insight into global burden sharing for future commitment periods.

After Kyoto, the EU's relationship with developing countries has been mixed. Sometimes it has supported Umbrella Group positions, other times G77/China positions, and probably most of the time somewhere in between. However, after the U.S. Bush administration rejected further negotiations over the Kyoto Protocol, the EU speedily arranged support from G77/China. The EU/G77 coalition was crucial for the success of

²⁹⁷ See Byrd-Hagel Resolution, Expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change, 105th Congress 1st Session S. RES. 98. (July 25, 1997), available at: <http://www.nationalcenter.org/KyotoSenate.html> (visited Dec.10, 2001).

²⁹⁸ See Yamin, *supra* note 12, at 62-64; and Lacasta & Barata, *supra* note 11, at 124-125.

²⁹⁹ See GRUBB ET AL, *supra* note 11, at 108-111.

³⁰⁰ Yamin, *supra* note 12, at 124-125. Developing Countries fear that the developed countries might convert the climate change regime into a vehicle that will prevent them from growing economically.

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the Bonn meeting in the summer of 2001 at COP-5.³⁰¹ According to some commentators, Europe has bred a polity that is far less dominated by the fossil-fuel cartel and far more open to the logic of a new North/South deal, when compared to the U.S. This was noticeably apparent when the EU and a few other developed nations pledged to contribute □450 million annually by 2005 (with this level to be reviewed in 2008) for developing countries climate change activities, while the U.S., Australia and Japan remained silent.³⁰²

It is important to consider whether this coalition will hold, strengthen or collapse altogether in the near future. The Marrakech conference already saw some weakening of the coalition, with the EU caving in to many Umbrella demands, much to the dislike of G77/China. However, with the discussion on second commitment period targets nearing, the EU will surely have to take a leadership and mediating role in order to “keep the family together.” This will be one of the biggest challenges the EU faces in the years to come (see section VII, below).

VI. THE EU AS A LEADER ON CLIMATE CHANGE: ASPIRATION OR REALISM?

A. OVERVIEW OF EUROPEAN LEADERSHIP PROPOSALS

The sections above have given a mixed picture of the EU's ability to pursue a leadership role in climate change policy. In Sections II and III we saw that, despite favorable conditions in the EU in terms of public and business support, the EU institutional machinery in areas of shared or mixed competence has constrained the Union's ability to both implement meaningful domestic policies (section IV) and prepare and present an effective external negotiating position. In Section V we reviewed the EU's performance on selected issues of the international climate negotiations. Although by no means exhaustive, such

³⁰¹ See Tom Athanasiou and Paul Baer, *Bonn and Genoa: a tale of two cities and two movements*, Foreign Policy in Focus (Aug. 2001), available at: <http://www.foreignpolicy-infocus.org/> (visited 17.11.01). The EU/G77 coalition was unable to break the Umbrella group though, even with a silent U.S.

³⁰² See Suraje Dessai and Nuno S. Lacasta, *The Marrakech Accords: Saving or Sinking the Kyoto Protocol?*, Euronatura Working paper 1/2002 (unpublished manuscript on file with authors)[hereinafter Dessai and Lacasta 2002].

exercises allowed us to realize that the EU can be a powerful force in the negotiations and that many key elements in the Kyoto Protocol were either EU proposals or, as a result of EU positions, were not considerably watered down by others. We also identified the existence of a paradox according to which the EU—and several of its Member States—consistently pushed for progressive elements in the agenda, whereas the U.S. drove the thinking on the specific elements of the negotiations. As a result, the key architectural elements in the Kyoto Protocol are all U.S. ideas. In this concluding section we will review key ways that Europe may continue leading on climate change, with a view to discerning from recent trends the way forward.

Among the climate policy literature, two proposals have emerged on the issue of European leadership. The first proposal was presented in 1999 by two German researchers, Sebastian Oberthür and Herman Ott.³⁰³ The second proposal was headed by Joyeeta Gupta and Michael Grubb in 2000, and was part of a comprehensive research project on this very subject.³⁰⁴ Both proposals are complementary and we shall therefore focus on their common elements and apply them to the practice of the EU for the past year.

These proposals call for a decisive stance from Europe, in particular but not exclusively the EU,³⁰⁵ on climate change. They are predicated on the central notion that the U.S. (or others like Japan or the G77) will not exercise leadership, and that the EU is the only major player with both the will and the capacity to muster the resources to move the process forward. The key common elements of these proposals are thus:

- Ensuring ratification and entry into force of the Kyoto Protocol, even without the U.S. initially. The core elements of this strategy include forging a common understanding with Japan and Russia in particular, but also with other Parties, so as to ensure the majority needed for the entry into force of the Protocol without the U.S.,³⁰⁶

³⁰³ For a review of this proposal, see OBERTHÜR & OTT, *supra* note 3.

³⁰⁴ See GUPTA & GRUBB, *supra* note 4.

³⁰⁵ OBERTHÜR & OTT, *supra* note 3, at 301, termed it a “leadership initiative.”

³⁰⁶ GUPTA & GRUBB, *supra* note 4, at 309; and OBERTHÜR & OTT, *supra* note 3, at 303-305.

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- Implementing domestic policies and measures (at EU and Member States' levels), so as to lead "by example." In addition to demonstrating that the EU was "putting its money where its mouth was," this element would arguably pave the way to international coordination of policies and measures, but this time from a bottom-up process;³⁰⁷ and
- Strengthen relations and common strategies with developing countries. This approach would rely on increased capacity building support, as well as on ways to "bridge the gap between [the developing countries] and the U.S."³⁰⁸

Gupta and Grubb further add the following elements:

- First, the EU needs to develop a "better diplomatic *modus operandi* to ensure that its total influence is united, flexible, effective and wide in its outreach."³⁰⁹ To that end, the authors argue, the EU should focus its energies on devising common implementation and negotiating strategies, whereas their implementation should be left primarily to the Member States. With regard to international negotiations in particular, the authors recommend that the EU and the Member States effectively use their impressive combined diplomatic resources. In particular, Member States should have clearly stated roles, including greater authority to speak. This fact alone would enhance the projection of the EU's arguments.
- Second, the EU and the Member States need to deploy comprehensive public education and outreach campaigns. This is especially relevant in the context of the specific

³⁰⁷ OBERTHÜR & OTT, *id.* at 305-308; and GUPTA & GRUBB, *id.* Oberthur and Ott suggest that in the process of building a coalition for entry into force with like-minded countries, the EU should also coordinate a "limited set of [policies and] measures," such as in the fields of fiscal policy; research and development on renewables and energy efficiency; dismantling of perverse subsidies; energy efficiency standards; and public procurement. *Id.*

³⁰⁸ GUPTA & GRUBB, *id.* at 310; and OBERTHÜR & OTT, *id.*, at 309-31. See also the discussion in section V *supra* on developing countries.

³⁰⁹ GUPTA & GRUBB, *id.*

"sacrifices" that will be required in order to implement domestic policies and measures.³¹⁰

Are these proposals, both dating back two or three years, already outdated by the pace of events? Quite the contrary. The U.S. pull out of Kyoto only reinforced all the elements in the leadership proposals reviewed, and during the last year several—although by no means all—elements of those strategies were clearly visible on the part of the European Union. The next section presents some examples.

B. RECENT DEVELOPMENTS IN LIGHT OF THE LEADERSHIP ELEMENTS: FROM THE HAGUE TO MARRAKECH

Shortly after the U.S. withdrawal from the Protocol, the EU sent a letter to the White House emphasizing that a global strategy to tackle climate change is an integral part of its relations with the United States. European Commission President Romano Prodi and Swedish Prime Minister Goran Persson, whose country held the EU presidency at the time, signed the joint letter that challenged the United States to find the "political courage" to come to an agreement on the Protocol's operational rules, at talks due to take place in Bonn in July 2001.³¹¹ A series of transatlantic letters and diplomatic endeavors followed to try to keep the U.S. engaged.³¹² This shuttling of officials confirmed the rise of climate change as yet another controversial area of transatlantic foreign policy.

As European leaders realized that the U.S. had decisively disengaged from the international climate talks, EU environment ministers pledged to pursue ratification of the Protocol with or without the U.S.³¹³ In addition, demonstrating flexibility it had lacked at COP-6,³¹⁴ the EU signaled its willingness to renegotiate parts of the Protocol in order to accommodate U.S.

³¹⁰ *Id.* at 310.

³¹¹ "EU Tells Bush Climate Is Key to Europe/U.S. Ties," Reuters (Mar. 23, 2001).

³¹² "Bush Urges U.S. Partnership with EU in Fighting Problem of Global Warming," BNA-Intl. Env. Reporter, vol. 24, No.13, at 500 (June 20, 2001).

³¹³ "Kyoto accord may be ratified without U.S. – Germany," Reuters News Service (Mar. 15, 2001). "Maybe it will be necessary to ratify the Protocol without the U.S. and to instead pave the way for them to join later," Rainer Hinrichs-Rahlwes, director general at the environment ministry told Reuters at a conference in Leipzig."

³¹⁴ See Grubb & Yamin, *supra* note 81; and Ott, *supra* note 54, at 283-84.

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concerns,³¹⁵ but the administration had simply dug itself too deeply to contemplate any adjustment to its withdrawal. The EU hence started gathering support for the Kyoto Protocol around the world. A European delegation visited Moscow, Tehran (Iran led the G77 at the time), Beijing and Tokyo.³¹⁶

At COP-6.5, in Bonn, the EU showed extensive negotiating flexibility. As a result, a political agreement (the Bonn Agreement) was brokered among the Parties.³¹⁷ According to the EU the Kyoto Protocol was saved. A bitter sweet feeling was nonetheless evident in some EU quarters as they were reminded that the terms of the Bonn Agreement are really not so much different—perhaps even less stringent in some areas—than the agreement almost reached at COP-6, at the end of 2000.³¹⁸ However, the stakes in 2001 were considerably different than those of 2000, in that now it was the Protocol's own survival that was at issue due to the U.S. withdrawal. In that respect, the EU managed to pull together a coalition of like-minded countries to secure agreement conducive to the Protocol's entry into force. That coalition—although at times bitter—persisted at COP-7, in November 2001. At COP-6.5 and COP-7 the EU appeared somewhat less under a reclusion mode, having engaged in multiple discussions with third Parties. This may have resulted in part from the fact that by COP-6.5 and 7 the EU had well established negotiation positions, or at least the key principles underlying such positions, therefore allowing it to reach out to other Parties. It remains to be seen whether that was more the result of a particular Presidency (Belgium at the time) or the beginning of a change of practice.

VII. CONCLUSION AND OUTLOOK: CAN THE EU LEAD THE WAY BEYOND THE KYOTO PROTOCOL?

Legge and Egenhofer have labeled this next phase as “the regionalization of the Kyoto Protocol.”³¹⁹ Just before COP-7,

³¹⁵ “EU ready to renegotiate Kyoto,” BBC News (Apr. 7, 2001).

³¹⁶ “EU to send Delegations to Pacific, Canada on Climate Change; Japan Plans similar Trip,” BNA-Intl. Env. Reporter, *supra* note 313, at 499.

³¹⁷ See Decision 5/CP.6, in U.N. Doc. FCCC/CP/2001/L.7.

³¹⁸ Concluding in a similar vein, Ott, *supra* note 54.

³¹⁹ T. Legge and C. Egenhofer, After Marrakech: the regionalisation of the Kyoto Protocol. CEPS Commentary (2001). Available at: <http://www.ceps.be> (visited Dec.12,

the European Commission adopted a major package of decisions on the ratification of the Kyoto Protocol, the implementation of the European Climate Change Program, and a framework Directive for greenhouse gas emissions trading within the European Community (see section IV, above). Although this effort represents considerable progress towards ratification and implementation, coupled with Member States' own implementation plans, the EU should not be complacent and should learn from past lessons on domestic policies and measures. The ratification and implementation processes need to be understood as on-going tasks. With regard to the former, the EU and its Member States are demonstrating leadership by having ratified Protocol on time for its entry into force the World Summit on Sustainable Development in the latter half of 2002.³²⁰ EU ratification alone, however, will not ensure that the Protocol enters into force. As a result, the EU needs to continue pressuring other key Parties to ratify.³²¹

Furthermore, it is essential to bring the U.S. back into the Kyoto game and the EU must play a key role here. U.S. "free-riding" on climate change raises deeper issues of equity for the international community as a whole,³²² and may increase the reluctance of developing countries to take mitigation commitments of their own. Climate change is a challenge that is here to stay—it is a century-scale global commons problem. Having the world's largest emitter of greenhouse gases outside a global climate change regime cannot be sustained for a long period of time. It is therefore essential to re-engage the U.S. on serious climate talks, using if necessary avenues other than the UNFCCC. The establishment of a high-level working group at the EU-U.S. summit in Gothenburg in 2001 may constitute an initial basis for continued contacts between the two blocs.³²³

2001).

³²⁰ See March 2002 Environment Council, *supra* note 72. See also "EU Ministers Agree to Kyoto Ratification: Some Nations Differ over Emissions Targets," BNA-Intl. Env. Reporter, vol. 25, No.6, at 257 (Mar. 13, 2002). See also on the EU having ratified the Kyoto Protocol, EU ratification, *supra* note 9.

³²¹ A good example came from John Prescott, who urged the world's biggest per capita emitter, Australia, not to hide behind the U.S. and use this as an excuse not to do anything. "Australia warned on Kyoto" AAP (Dec. 2001).

³²² M.S. Soroos, Global climate change and the futility of the Kyoto process, 1(2) Global Environmental Politics, 1-9.

³²³ On Mar. 4 2002, the Environment Council "...confirmed its willingness to pursue a dialogue with the United States in the framework of the EU/United States High

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However, the recent U.S. administration proposal on climate change represents a set back in terms of its international engagement, as under that plan U.S. emissions are estimated to grow at business-as-usual levels.³²⁴ Initial European reactions indicate clear skepticism from their part.³²⁵

The EU seems to be the only Party willing and capable to bridge the divide between the Umbrella Group and the developing countries. Assuming the Protocol enters into force, as Parties prepare for the negotiations of second commitment period targets, the strategy of bringing the U.S. on board must be played in tandem with the negotiation of developing countries' targets. Some developing countries may be more willing than others to take on commitments.

Rather ironically, the U.S. withdrawal from the Kyoto Protocol might have contributed significantly to Europe taking the role of leading the climate change regime into full being. As the EU continues to assert itself internationally, its responsibility increases accordingly. To seize this opportunity of lead-

Level Group . . ." See March 2002 Council (Authors' translation from the original French version), *supra* note 72.

³²⁴ See e.g. "Blowing smoke", *The Economist* (Feb. 16, 2001), at 27-28; and Special Report: Climate Change," BNA-Intl. Env. Reporter, vol. 25, No.5, at 244-250 (Feb. 27, 2002).

³²⁵ Jaume MATAS, Minister for Environment, Spanish Presidency of the EU and Margot WALLSTRÖM, Commissioner for Environment, European Commission, Reaction by the European Union to the Speech by President Bush on Climate Change of Feb. 14, 2002, available at < [\(visited Feb. 22, 2001\).](http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/02/33|0|RAPID&lg=EN&display=.)

It is clear that the proposals for U.S. action on climate change are purely domestic. But the EU is concerned that they will not even be sufficient to reduce U.S. emissions. The "intensity target" proposed allows for further increases in absolute emissions and is not sufficient to fight climate change effectively. In contrast, the Kyoto Protocol requires most industrialised countries to achieve absolute emission reductions, while they still expect economic growth.

The March 2002 Council, *supra* note 72, after approving the ratification of the Kyoto Protocol by the EC, commented on President Bush's plan as follows (Authors' translation from the original French version)

... The Council...

- is concerned that the [U.S. President's] proposed measures, which allow for an increase in greenhouse gases at a rate close to the present rate, are insufficient to effectively combat climate change;
- expects all parties to the UNFCCC, including the USA, the leading emitter of greenhouse gases, to assume their responsibilities under the convention, which demands industrialised countries to reduce their greenhouse gas emissions to 1990 levels....

ership, the EU needs to change internal procedures and practices, and engage more widely with third Parties.

It has already been pointed out that the EU needs to lay more emphasis on timely coalition building, especially with the group of developing countries. In addition, in order to fulfill the important leadership functions the EU is called to perform in the years to come, it will have to improve the internal decision-making process, which has proven inefficient and too cumbersome for the needs of climate negotiating sessions (see Sections II, III). Some of the internal issues addressed throughout this paper include:

- The EU cannot afford paralyzing itself by regular haggling over competences. The EU needs to at least agree on a common mid and long-term strategy on climate change, and on a *modus operandi* for international negotiations, which assigns clear negotiating and decision-making powers to the Commission and/or to the Member States according to their perceived “comparative advantage.” These negotiators need to be authorized to act with flexibility, i.e. to enter into bargaining with third Parties without being forced to assure consensus among all EU Member States in the case of each modification to original agreed EU negotiating positions. Member States must hence give up some (paralyzing) control in order to ensure higher overall effectiveness of the EU negotiating practice, which in turn would improve its relationship to negotiating partners.
- Like in other environmental regimes, the Commission rather than the Presidency should take the lead on climate negotiations. This would not be incompatible with a clearer division of labor among the Commission and the Member States described in the preceding bullet, in that the Commission would work closely with the Member States in both preparing and negotiating a common position. In fact, such a division of labor would require that someone ensure the medium and long-term continuity, stability and consistency of EU negotiating positions. The Commission seems to be better equipped for that task in that it is by definition and practice the “guardian of the Treaties” i.e. of EU policies and regulations.

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- In addition, the EU needs to enter into negotiating sessions with more elaborate positions in order to ensure a greater impact on the overall design of the regime. It also and very importantly needs to develop potential fall-back positions ahead of time to allow for more flexibility and quick moves in the decisive phases of international bargaining process. As a result, the internal process for reaching a common position needs to be streamlined by, for instance, having a system of “lead countries” to prepare, in close coordination with the Commission, draft common negotiating positions to be decided by Council. In fact, some Member States have historically provided most of the intellectual capital to selected issues, and at times such a system of lead countries has been adopted during negotiating sessions. The EU would nonetheless benefit from having such a practice made more permanent and effective between negotiating sessions.
- Finally, in terms of the specific institutional arrangements within the EU to further this leadership strategy, the Gupta and Grubb suggestion that climate change should become part of the EU’s Common Foreign and Security Policy, thereby greatly enhancing its profile.³²⁶

In conclusion, the EU’s main priorities in the mid-long-term relate to its ability to (a) implement effective domestic climate policies—leading by example; (b) reform internal processes so as to ensure it is more capable to lead the international negotiations (e.g. the role of the Commission); and (c) prepare itself adequately for the second commitment period negotiations under the Kyoto Protocol (by in particular “bridging the gap” between the U.S. and the developing countries). If the EU manages to develop more efficient ways to coordinate its many voices—maybe sometimes even without reaching consensus—it will be better able to lead the international climate change process. The analysis of the history of EU climate change policy, now ten years old, has revealed a mixed record that, in spite of all its shortcomings, gives rise to guarded optimism for continued international coordination and cooperation on the management of the global commons.

³²⁶ GUPTA & GRUBB, *supra* note 4, at 305.