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## Ratification Resisted: Understanding America's Response to the Convention on Biological Diversity, 1989-2002

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ARTICLE

RATIFICATION RESISTED:  
UNDERSTANDING AMERICA'S  
RESPONSE TO THE  
CONVENTION ON BIOLOGICAL  
DIVERSITY, 1989-2002

ROBERT F. BLOMQUIST\*

[T]here is more information of a higher order of sophistication and complexity stored in a few square yards of forest than there is in all the libraries of mankind. Obviously, that is a different order of information. It is the information of the universe we live in. It is the information that has been flowing for millions of years. In this total information context [humans] may not be necessarily the highest or the most interesting product.<sup>1</sup>

It is a well-known assumption among international legal observers that the American government has refused to embrace the 1992 Convention on Biological Diversity (the "Convention" or the "CBD"), through initial executive refusal to sign the CBD by President George H. W. Bush in 1992, and ongoing refusal by the American Senate to ratify the Convention after President William J. Clinton signed the treaty in 1993.<sup>2</sup>

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<sup>1</sup> GARY SNYDER, *TURTLE ISLAND* 108 (1974).

<sup>2</sup> *See generally*, DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 957-58 (1998) [hereinafter

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Therefore, according to this presupposition, America constitutes “[t]he major hold-out” among the nations of the world in validating and supporting the goals of the Convention.<sup>3</sup> Yet, this is the same American national government that nearly three decades ago led the world in biodiversity protection by passing and implementing the Endangered Species Act of 1973.<sup>4</sup> And this is the same nation containing state and local governments that have engaged in innovative biodiversity policymaking during the last several years.<sup>5</sup> How can this be? What accounts for this apparent legal and policy inconsistency? While it is tempting to explain such anomalous behavior in base political terms (that the United States Senate has been in conservative, supposedly “environmentally-unfriendly” Republican hands for most of the last decade compared to control by the liberal, supposedly “environment-friendly” Democrats dur-

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INTERNATIONAL ENVIRONMENTAL LAW AND POLICY] (discussing chronology of events from 1992 through the end of the decade regarding the reticence of the United States to become a party to the CBD); Chris Wold, *The Futility, Utility and Future of the Biodiversity Convention*, 9 COLO. J. INT’L ENVTL. L. & POL’Y 1(1998).

<sup>3</sup> INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, *supra* note 2, at 957. The treatise authors observe:

Even though the United States had registered no complaints with the text as reported out of the May 1992 [preparatory draft] meeting, EPA Administrator Reilly announced on arrival at [the United Nations Conference on the Environment and Development] that the United States would not sign the agreement. Initially Reilly identified on-going disagreement over the financial mechanism as the reason for U.S. opposition, but later the United States also objected to the Convention’s treatment of intellectual property rights, the requirements to share benefits and technology gained from biological resources, and even the Convention’s limited requirements for domestic conservation.

The failure to sign the Convention proved to be a public relations nightmare for the United States and then-President George Bush. To make matters worse, a memorandum written by Administrator Reilly was leaked to the press by someone close to the President in what was viewed as a deliberate move to undermine the EPA Administrator’s negotiating position in Rio. The Reilly memorandum recommended that the United States agree to sign the Convention in return for some modest changes that could be negotiated at UNCED. The President publicly rejected the EPA recommendations, and from that point forward the United States was essentially isolated at the Rio Conference. The United States would be the only industrialized country not to sign the Biodiversity Convention at Rio. President Clinton signed the Convention soon after entering office, but the [US] Senate has refused to give its advice and consent to ratification, in spite of the support of most pharmaceutical and biotechnology companies as well as environmental organizations.

*Id.*

<sup>4</sup> See *infra* notes 31-32 and accompanying text.

<sup>5</sup> See *infra* note 162 and accompanying text. See also, 23 States Represented at National Biodiversity Symposium, 18 ENVTL. F. 62 (Mar./April 2001) (discussing state and local biodiversity conservation efforts).

ing the 1970's "Decade of the Environment")<sup>6</sup>, such a line of reasoning would grossly oversimplify and fail to reflect the nuances of the American response to the CBD since its creation at Rio.

This Article undertakes a broad, synoptic evaluation of America's complex response to the Convention. It paints an intricate picture of American legal and policy initiatives, on multiple levels, for enhanced domestic and international protection of biodiversity juxtaposed with concomitant legal and policy footdragging. Part I limns, in bold lines, the basic structure of the matter: initially it provides a brief overview of the genesis and contents of the CBD; then, it sketches a chronological synopsis of America's formal and informal response to the CBD.<sup>7</sup> Part II adds some detailed brushwork: it attempts to deepen understanding of the various tensions, concerns, interests and legal-policy dimensions of America's multi-faceted response to the Convention.<sup>8</sup> This discussion will demonstrate that there has not been a monolithic negative American reaction to the CBD but, rather, a variety of American responses that includes several positive aspects. Part III devotes a corner of the epistemological canvas to open up a frame on the future: it discusses such topics as the importance of American leadership and engagement in formal international environmental diplomacy and lawmaking; the wildcard implications of the September 11, 2001 terrorist attacks on America's willingness and need to exercise leadership in implementing the CBD. Finally, it offers some pragmatic suggestions for reconfiguring America's response to the Convention.<sup>9</sup>

## I. INTRODUCTION

### A. OVERVIEW OF THE CBD

As I explained in detail in an earlier article<sup>10</sup>, the immediate intellectual and symbolic antecedent to the 1992 CBD was

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<sup>6</sup> See generally, MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* — 2000 42-47 (1999) (discussing political composition of Congress).

<sup>7</sup> See *infra* notes 10-240 and accompanying text.

<sup>8</sup> See *infra* notes 241-325 and accompanying text.

<sup>9</sup> See *infra* notes 326-426 and accompanying text.

<sup>10</sup> Robert F. Blomquist, *Protecting Nature "Down Under": An American Law Professor's View of Australia's Implementation of the Convention on Biological Diversity* —

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the 1982 passage, by the United Nations General Assembly, of the World Charter on Nature,<sup>11</sup> which, in turn, was enacted partly in honor of the tenth anniversary of the seminal 1972 Stockholm Conference on the International Environment.<sup>12</sup> Commencing in 1987, the United Nations Environmental Program (UNEP) convened a working group to determine the desirability and feasibility of an umbrella convention to rationalize current activities in the field of international wildlife habitat conventions and to address other areas which might fall under such a convention.<sup>13</sup> Formal negotiations between nations for a comprehensive and integrated global biodiversity convention commenced in 1991, one year in advance of the scheduled Rio de Janeiro United Nations Conference on Environment and Development (UNCED).<sup>14</sup> One authoritative treatise, while praising the diplomatic compromises that ensued during the relatively short year of formal negotiations, also criticizes the final text of what became the CBD in June of 1992 as being sometimes contradictory and often unclear, because of the haste which characterized its drafting.<sup>15</sup> On June

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*Laws, Policies, Programs, Institutions and Plans, 1992-2000*, 9 DICK. J. ENVTL. L. & POL'Y. 227 (2000).

<sup>11</sup> *Id.* at 236 (footnote omitted). See also *The World Charter on Nature*, UNGARES 37/7; 22 I.L.M. 455 (1983):

[The Charter on Nature] remains one of the most progressive and innovative statements of humanity's obligation to the natural world. Despite its mandatory language, however, the World Charter is a soft law instrument with no independent binding force. Although the World Charter did help to shape future negotiations, much of its vision, has not carried through to more recent [international legal] instruments.

<sup>12</sup> INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, *supra* note 2, at 956.

<sup>13</sup> Blomquist, *supra* note 10, at 237 (internal quotation marks and bracketed language omitted; citing UNEP GC Res. 14/2 (1987)). See also MOSTAFA K. TOLBA, GLOBAL ENVIRONMENTAL DIPLOMACY: NEGOTIATING ENVIRONMENTAL AGREEMENTS FOR THE WORLD, 1973-1992 136-46 (The MIT Press 1998) [hereinafter TOLBA]; MICHAEL GRUBB ET AL. THE EARTH SUMMIT AGREEMENTS: A GUIDE AND ASSESSMENT 76-84 (Royal Institute of International Affairs 1993) [hereinafter GRUBB].

<sup>14</sup> Blomquist, *supra* note 10, at 237 (footnote omitted); TOLBA, *supra* note 13, at 146-60. For further background on the historic Rio conference, see generally RANEE L. PANJABI & ARTHUR C. CAMPEAU, THE EARTH SUMMIT AT RIO: POLITICS, ECONOMICS, AND THE ENVIRONMENT (Northwestern University Press 1997); Marc Pallemarts, *International Environmental Law from Stockholm to Rio: Back to the Future*, in GREENING INTERNATIONAL LAW 1 (Phillipe Sands ed., The New Press 1994); Thomas L. Adams Jr. & Jose Martinez-Aragon, *Setting the Stage for the Earth Summit: Brazil 1992*, 22 ENVTL. L. REP. (ENVTL. L. INST. 10190) (March 1992); EARTH SUMMIT (Stanley Johnson ed., Kluwer Academic 1992).

<sup>15</sup> INTERNATIONAL ENVIRONMENTAL LAW AND POLICY, *supra* note 2, at 957. Some observers have been far more critical. See GRUBB, *supra* note 13, at 82 (referencing various opinions, including that of, Jacques Delors, who characterized the Convention

2, 1992 the Convention was signed in Rio by diplomatic representatives from around the planet, entering into force on December 29, 1993.<sup>16</sup>

The text of the CBD consists of 42 articles and two annexes.<sup>17</sup> The Preamble, among other assertions, affirms that the conservation of biological diversity is a common concern of humankind and that nations are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner.<sup>18</sup> Article I of the CBD expresses the overarching-egalitarian and redistributive objectives of the Convention as follows:

The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies and by appropriate funding.<sup>19</sup>

The key substantive provisions of the CBD are Article 6 (General Measures for Conservation and Sustainable Use), Article 7 (Identification and Monitoring), Article 8 (In-situ Conservation), Article 9 (Ex-situ Conservation), Article 10 (Sustainable Use of Components of Biological Diversity), Article 11 (Incentive Measures), Article 12 (Research and Training), Article 13 (Public Education and Awareness), Article 14 (Impact Assessment and Minimizing Adverse Impacts), Article 15 (Access to Genetic Resources), Article 16 (Access to and Transfer of Technology), Article 17 (Exchange of Information), Article 18 (Technical and Scientific Cooperation), Article 19 (Handling of Biotechnology and Distribution of Benefits), and Article 20 (Financial Resources).<sup>20</sup> Articles 1-5 and 21-42 contain the definitional, jurisdictional, procedural and organizational provisions of the Convention.<sup>21</sup> Annex I of the Convention, termed "Iden-

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as "being too timid").

<sup>16</sup> *Id.*

<sup>17</sup> Blomquist, *supra* note 10, at 238.

<sup>18</sup> *Id.* at 231-32, n. 3 (quoting CBD Preamble).

<sup>19</sup> *Id.* (quoting CBD, Article 1).

<sup>20</sup> *Id.* at 238-44, n. 27 (providing full text of CBD provisions).

<sup>21</sup> *Id.* at 238, n. 27. Among the most important of the procedural requirements of

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tification and Monitoring,” requires systematic monitoring by contracting nations of the following components of biological diversity within their borders: ecosystems, habitats, species, communities, genomes, and genes.<sup>22</sup> Annex II of the CBD sets forth detailed procedures for arbitration and conciliation of disputes arising under the Convention.<sup>23</sup>

The most recent international legal development stemming from the CBD was the adoption in February 2000 of the Cartagena Protocol on Biosafety (“Biosafety Protocol”).<sup>24</sup> The Biosafety Protocol regulates trade in genetically modified organisms (GMOs) intended to be released into the environment,<sup>25</sup> while imposing information-sharing requirements for GMOs shipped in bulk as commodities for use as human food or animal feed, or in processed goods.<sup>26</sup> The Biosafety Protocol is a type of international hazardous management law that stems from the CBD’s Article 19(3) earlier call<sup>27</sup> on the Parties to craft a protocol to address the safe use and transfer of living modified organisms (LMOs) derived from GMOs which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity,

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the CBD is Article 26, which calls for periodic preparation and filing of National Reports by contracting parties regarding their implementation of the Convention. *Id.* at 245-46, n. 29.

<sup>22</sup> *Id.* at 244-45, n. 28 (providing full text of Annex I, CBD).

<sup>23</sup> *Id.* at 245, n. 28.

<sup>24</sup> *Cartagena Protocol on Biodiversity to the Convention on Biological Diversity* (Feb. 23, 2000), available at <http://www.biodiv.org/biosafe/Protocol/html/Biosafe-Prot.html> [hereinafter *Biosafety Protocol*]. See also *Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, 15-26 May 2000; EARTH NEGOTIATIONS BULL. (IISD), Vol. 9, No. 10 (May 29, 2000), at 1, available at <http://www.iisd.ca/vol09/enb09160e.html> [hereinafter *Fifth Meeting*]. See generally, Gareth W. Schweizer, *The Negotiations of the Cartagena Protocol on Biosafety*, ENVTL. L. 577 (2000); Jonathan H. Adler, *More Sorry Than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol*, 35 TEX. INT’L. L. J. 173, 191 (2000) (discussing CBD’s GMO provisions, including the relationship between biodiversity and regulation of GMOs).

<sup>25</sup> ABA International Environmental Law Committee, *International Environmental Law — 2000 Annual Report*, ENV’T, ENERGY, AND RESOURCES L.: THE YEAR IN REVIEW 2000, at 269 (2001) [hereinafter 2000 YEAR IN REVIEW] (footnote omitted).

<sup>26</sup> *Id.* (footnote omitted).

<sup>27</sup> The CBD was adopted on May 22, 1992 in Rio de Janeiro, and entered into force on December 29, 1993. 2000 YEAR IN REVIEW, *supra* note 25, at 269. “The [Biosafety] Protocol became open for signing in May 2000, and entered into force when fifty nations promptly ratified it.” *Biosafety Protocol*, *supra* note 24, at art. 37. As of November 23, 2000 some eighty states and regional economic organizations had signed the Protocol and two of these had ratified it. 2000 YEAR IN REVIEW, *supra* note 25, at 269, n. 44 (citing Protocol website).

taking into account the risks to human health.<sup>28</sup> Interestingly, in spite of being a non-voting party to the CBD, America actively influenced the Biosafety Protocol negotiations, successfully excluding pharmaceuticals altogether and excluding commodities from preliminary drafts of what became the Biosafety Protocol.<sup>29</sup> America was able to have this influence on the Protocol negotiation by virtue of its membership in an Open-Ended Ad Hoc Group of Experts known as the Biosafety Working Group (BSWG).<sup>30</sup>

## B. A CHRONOLOGICAL SYNOPSIS OF AMERICA'S RESPONSE TO THE CBD, 1989-2002

### 1. *Expressing Concern, 1989-1990*

Building on the American environmental policy foundation of the Endangered Species Act of 1973,<sup>31</sup> and its subsequent

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<sup>28</sup> United Nations Convention on Biological Diversity, (June 5, 1992), at art. 19(3) available at [http://www.biodiv.org/chm/conv/cbd\\_text\\_e.htm](http://www.biodiv.org/chm/conv/cbd_text_e.htm). (visited Oct. 4, 2001). The Protocol focuses on LMOs, a subset of GMOs capable of transferring or replicating their genetic material. See generally Biosafety Protocol, *supra* note 23, at art. 3. In 1999, a total of 40 million hectares of GMO crops were being grown around the world. Of this global total, the United States accounted for 72%, with the remaining acreage chiefly among Argentina, Australia, Canada, China and South Africa. The most prevalent GMO crops are corn, cotton and canola. Paul E. Hagen & John B. Weiner, *The Cartagena Protocol on Biodiversity: New Rules for International Trade in Living Modified Organisms*, 12 GEO. INT'L. ENVTL. L. REV. 697, 698-99 (2000).

<sup>29</sup> 2000 YEAR IN REVIEW, *supra* note 25, at 271 (footnote omitted). See generally *id.* at 270-71 for a detailed negotiations history of the Biosafety Protocol during the 1990s leading to the passage of the Protocol in 2000. The Protocol "covers both GMOs intended for release into the environment, such as seeds for cultivation and animals for breeding, and those intended for use in food or feed, or in processing, such as bulk commodities like corn, cotton and soy." *Id.* at 270 (footnote omitted).

<sup>30</sup> *Id.* "The BSWG met six times between 1996 and 1999, and with the help of over 100 governments, including the United States, drafted a protocol that it sent for approval to an extraordinary meeting of the [CBD Conference of the Parties] (Ex-Cop) in February 1999." *Id.* Nevertheless, the dispute settlement procedures of the Biosafety Protocol are problematic for American biotechnology businesses because of "ambiguous and conflicting language" that opens the prospect that dispute resolution mechanisms in the Biosafety Protocol will "trump" World Trade Organization dispute mechanisms. See Paul E. Hagen, *The Green Diplomacy Gap*, 17 ENVTL. F. 28, 31 (2000).

<sup>31</sup> 16 U.S.C. § 153 et seq. "While not alone among U.S. wildlife and habitat protection laws, the U.S. ESA is the flagship enactment on wildlife protection, and it has served as a worthy domestic forum for debating the relationship between humans and the other creatures of the planet." WILLIAM H. RODGERS, JR. ENVIRONMENTAL LAW 996 (2d ed. 1994). See Mollie Beatty, *Biodiversity Policy and Ecosystem Management*, in BIODIVERSITY AND THE L. 11 (William J. Snape, ed., Island Press 1996) [hereinafter Snape]; Jason Patlis, *Biodiversity, Ecosystems, and Endangered Species*, in Snape,



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expansive judicial interpretation in *TVA v. Hill* — the 1978 Snaildarter Case<sup>32</sup> — in 1989 William K. Reilly, the new Administrator of the U.S. Environmental Protection Agency (EPA) under President George H. W. Bush, asked EPA's Science Advisory Board (SAB) "to examine strategies for reducing major risks and to recommend improved methodologies for assessing and comparing risks and risk reduction options in the future."<sup>33</sup> In response to this charge, the SAB issued a report that, among other things, emphasized ecological risks.<sup>34</sup> Significantly, the SAB 1990 report concluded that ecological problems, not direct human health concerns, were the most serious environmental risks facing humankind.<sup>35</sup> According to the SAB, these high-risk problems are fourfold: habitat alteration and destruction; species extinction and overall loss of biological diversity; stratospheric ozone depletion; and global climate change.<sup>36</sup>

During 1990, a number of individual United State Senators from both major political parties made significant expressions of concern and policy proposals on the issue of global biodiversity protection. For example, in a January speech entitled

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*supra*, at 43.

<sup>32</sup> 437 U.S. 153 (1978).

<sup>33</sup> Robert F. Blomquist, *The EPA Science Advisory Board's Report on "Reducing Risk": Some Overarching Observations Regarding the Public Interest*, 22 ENVTL. L. 149, 149 (1991) (quoting SCIENCE ADVISORY BOARD, USEPA, REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION, at ii (1990)).

<sup>34</sup> See *id.* at 160-64.

<sup>35</sup> *Id.* at 164. Several key themes support the SAB's assessment. First, natural ecosystems are extraordinarily valuable, not only because of their immediate utility to humans, but also because of the intrinsic, moral value that must be measured in its own terms and protected for its own sake. *Id.* at 160-61 (footnote omitted; internal quotation marks omitted). Second, human beings are part of an interconnected and interdependent global ecosystem and past experience has shown that change in one part of the system often affects other parts in unexpected ways, while past EPA efforts at understanding environmental risk were incomplete or inappropriate, because the principles of welfare economics were defined too narrowly. *Id.* at 161 (footnotes omitted; internal quotation marks omitted). Third, temporal causation arising out of long-range environmental problems is a significant concern with a variety of dimensions including intergenerational equity wherein future generations of human beings are unable to vote on the wisdom of present industrial and developmental policies presenting ecological risk, while the irrevocable and non-sustainable nature of ecological resources is always a preeminent concern in long-term environmental planning. *Id.* at 162 (footnote omitted; internal quotation marks omitted). Fourth, traditional forms of economic analysis, as applied to the costs and benefits of economic development and environmental protection, have systematically undervalued natural resources. *Id.* at 162 (footnote omitted; internal quotation marks omitted).

<sup>36</sup> *Id.* at 164.

*An Environmental Dividend: Capitalizing on New Opportunities for International Action*, Senator Claiborne Pell (D-RI) then Chairman of the Senate Foreign Relations Committee, made some poignant observations about biodiversity protection and the importance of international environmental law including the following:

- On several [past] occasions I have persuaded my Senate colleagues to endorse resolutions containing draft treaty language. I am pleased to say that two of these efforts were, in fact, converted from Senate resolution to an actual treaty now in force. These are a treaty banning the emplacement of weapons of mass destruction on the seabed floor and a treaty banning the use of environmental modification techniques in warfare<sup>37</sup>;
- In 1977 I put forward draft language for a third treaty. . . mandating the preparation of an environmental impact statement for all projects, public and private, that would impact on the territory of another state or on the global commons” [and] “[t]his idea was endorsed unanimously by the U.S. Senate in 1978<sup>38</sup>;
- I would urge we move forward quickly with proposals to draft and enact an international convention to protect biological diversity. This, too, is an issue of personal concern and I am proud to be the author of a provision of U.S. law establishing a program, under the auspices of our Agency for International Development, to assist countries in the protection of biological diversity. With the rate of extinctions rapidly accelerating there can be no doubt of the seriousness of the problem. Here in the presence of so many spiritual leaders I can only wonder how the divine must view the destruction of so many of His creations. And I wonder what He must think of the cavalier manner in which these extinctions are being carried out — elephants and rhinos destroyed for ivory trinkets and aphrodisiac powder, or perhaps worse, entire species obliterated without man even knowing what was once there;<sup>39</sup>

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<sup>37</sup> Claiborne Pell, *An Environmental Dividend: Capitalizing on New Opportunities for International Action*, Address Before Global Forum on Environment and Development (Jan. 17, 1990) *reprinted in* 136 CONG. REC. S3 (daily ed. Jan. 23, 1990) (speech by Sen. Pell), *available at* <http://thomas.loc.gov>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

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- A Treaty to conserve biological diversity should include provisions under which countries would register species-rich habitats, and in particular, the habitats of endangered species. Registration of the habitat would include an obligation to protect the habitat, and the species contained therein. In my view, a treaty should spell out minimum standards for habitat and species protection. In return for protecting these habitats, the registering countries should receive technical assistance for their protective activities and perhaps a priority for other kinds of assistance intended to encourage local peoples to value the preserved life resources;<sup>40</sup>
- I would note that the last fifteen years [1975-89] has seen an enormous explosion in the number and scope of international legal agreements relating to the environment. The development of international environmental law is a low cost and highly beneficial way of protecting [the] global environment and of enhancing global environmental cooperation. This is a trend we must encourage. I would hope that UNEP's environmental law unit might become the nucleus of a new international environmental institute. Such an institute should draw on the resources of UNEP members, and in particular those with more developed domestic environmental law.<sup>41</sup>

In March of 1990, Senator Patrick Moynahan (D-NY) introduced a bill to initiate a research program on biological diversity.<sup>42</sup> He noted that The National Science Board estimates that the rate of extinction over the next few decades is likely to rise to at least 1,000 times the normal background rate of extinction<sup>43</sup> and many scientists estimate that from one-quarter to one-half of the Earth's species will become extinct in the next 30 years.<sup>44</sup> Senator Moynahan informed his Senate colleagues that:

The Bill which I am introducing today will help us understand the magnitude and impact of the laws of biological diversity. It establishes conservation of biological diversity as a national goal. The Bill also establishes a National Center for

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 136 CONG. REC. S3544 (daily ed. Mar. 29, 1990) (statement of Sen. Moynahan).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

Biological Diversity and Environmental Research. This Center will be the focal point for research, data compilation, and dissemination of information on biological diversity. Since biological diversity is, by its scope, a multi-disciplinary, multi-agency issue, the Bill also creates an interagency working committee to develop a coordinated Federal strategy for conservation of biological diversity. A National Scientific Advisory Committee is established to oversee the implementation of the national strategy.<sup>45</sup>

On July 31, 1990 Senator Al Gore (D-TN), in conjunction with a bipartisan group of six other senators, (Senator John Chafee (R-RI), Senator John Heinz (R-PA), Senator Rudy Boschwitz (R-MN), Senator John Kerry (D-MA), Senator Tim Wirth (D-CO), and Senator Max Baucus (D-MT). provided a formal report to the Senate on the results of the interparliamentary conference on the Global Environment, the first U.S.-sponsored conference of international legislators to focus on the global environment.<sup>46</sup> Senator Gore told his colleagues that during several sessions of the Conference, held in Washington D.C. the previous spring, legislators from 42 nations produced agreements in seven areas<sup>47</sup>:

First of all, the area of global climate change; second, the area of stratospheric ozone depletion; third, the problem of explosive population growth; fourth, the problems of deforestation and desertification, closely related; fifth, the problem of sustainable development, which is the key to solving the other problems; sixth, the challenges facing oceans and water resources; and seventh, the loss of biodiversity, or the disappearance of living species on Earth.<sup>48</sup>

Senator Gore acknowledged in the report that one of the most difficult divisions at the Conference was between the developed world and the developing world whereby:

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<sup>45</sup> *Id.*

<sup>46</sup> 136 CONG. REC. S11139 (daily ed. July 31, 1990) (statement by Sen. Gore). The Conference employed each of the seven U.S. Senators who participated with each Senator being a chair of one of the seven working groups and each committee co-chaired by a delegate from one of the parliamentary groups visiting the Conference. *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

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Those nations which entered the industrial revolution early on and achieved a higher standard of living and better way of life for their peoples have a particular point of view which stands, frequently, in contrast to the point of view shared by peoples in those nations throughout the world that are still in abject poverty, have not undergone the process of industrialization, and really have a standard of living for their peoples far different from what we enjoy.<sup>49</sup>

The findings of the Interparliamentary Conference, which specifically dealt with the issue of loss of biodiversity, were numerous. In the first instance, the biodiversity findings set forth general facts, figures, and concepts:

The 10 to 30 million species that inhabit earth are threatened by human activity. Estimates are that one hundred species become extinct every day and, because the pace is expected to increase, by the year 2000, one million species could become extinct. At this rate, more than half of the world's species could disappear within one generation.

In the complex interaction of ecological systems that support life, loss of even small links in the biological chain can doom an entire system. Because many have symbiotic relationships, continuation of the system depends on the presence of most of the organisms in the systems. In addition, medicines and pharmaceuticals depend heavily on specialized chemistry found in living organisms. Loss of these wild organisms could mean the loss forever of discoveries of new drugs that could cure human diseases or form the basis of ecologically benign chemicals.

The domesticated plants that form the basis for the world's agriculture must be replaced, from time to time, by infusions of stock from wild plants. Some of the 'raw material' of biotechnology is found in the genetic riches of living organisms that are being destroyed on the current wave of extinctions, the most rapid loss of species since the mass extinctions of eras before human life on earth.<sup>50</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at S11147 (inserted material). Moreover, the findings of the Interparliamentary Conference, brought to the attention of the U.S. Senate, also pointed out that: Earth's various plants, animals, and micro-organisms provide the rice and fish we eat, the penicillin doctors use to save lives, the bamboo poles villagers use to

Second, the biodiversity findings of the Interparliamentary Conference, introduced into the *Congressional Record*, offered a disturbing set of trends:

If current trends continue, extinctions in [sic.] the coming decades may represent the most massive loss of species since the end of the Cretaceous era some 65 million years ago. Since 1600, 1 percent of birds and 2 percent of mammals are known to have become extinct; the unrecorded extinctions probably far exceed these figures. Already, the rate of extinction of birds and mammals may be as much as 100 to 1,000 times the background extinction rate. The single greatest cause of species extinction in the next half-century will be tropical deforestation. Scientists predict that roughly five to 10 percent of closed tropical forest species will become extinct per decade at current rates of tropical forest loss and disturbance. With more than 50 percent of species occurring in closed tropical forests and a total of roughly 10 million species on earth, this amounts to the phenomenal extinction rate of more than 100 species per day. Globally, roughly 5 percent of the world's species will be lost per decade if current trends continue.

The extinction crisis is not restricted to tropical forests. Freshwater habitats are being dramatically altered as rivers are impounded and exotic species introduced. In the southeastern United States, for example, 40 to 50 percent of freshwater snails have been driven to or near extinction as water impoundments were built and rivers straightened, widened, and deepened. Oceanic islands, where most extinctions have occurred in past centuries, also remain among the most threatened with extinction on earth. Some 60 percent of the plant species endemic to the Galapagos Islands are threatened with extinction, as are 40 percent of Hawaii's endemic species and 75 percent of the endemic plant species of the Canary Islands. Mediterranean climate zones, with their high

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build their homes, and other natural products. They also provide options for addressing future human needs, and invaluable aesthetic, spiritual, and educational benefits. Just as important, species provide more subtle benefits in the form of wide-ranging ecological services. Coast wetland ecosystems formed from various plant and animal species remove pollutants from the water and provide the spawning and rearing habitat for commercially important fish and crustaceans. Similarly, forest ecosystems help regulate water discharge into rivers, which affects the frequency of floods [sic.] and the availability of water during dry seasons.

*Id.*

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plant species richness and distinctive floras, face continuing threats of species loss through habitat conversion and species introductions.<sup>51</sup>

Third, the Interparliamentary Conference biodiversity findings, incorporated into the *Congressional Record*, focused on the question of responsibility:

Where does the blame for the loss of biodiversity and the degradation of biological resources lie? On the surface, the answer seems clear. The proximate causes include large-scale clearing and burning of forests, overharvesting of plants and animals, indiscriminate use of pesticides, draining and filling of wetlands, destructive fishing practices, air pollution, and the conversion of wildlands to agriculture and urban areas. The maintenance of large, relatively intact ecosystems also have implications for regional and global environmental conditions. If the forest cover of Amazonia were lost, computer models predict that rainfall would decrease significantly in the region and the loss of the forest carbon sink would significantly increase the rate of global climate change.<sup>52</sup>

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<sup>51</sup> *Id.* The findings of the Interparliamentary Conference continue in this regard: Habitat loss and degradation are the most important causes of the extinction crisis, but overharvesting, species introductions, pollution, and other causes also take a significant toll. Global warming will exacerbate the loss and degradation of biodiversity by increasing the rate of species extinction, changing population sizes and species distributions, modifying the composition of habitats and ecosystems, and altering their geographical extent. *Even if all human impacts on the biosphere were to cease immediately, species extinctions due to the impacts that have already taken place would continue for decades.*

*Id.*

<sup>52</sup> *Id.* An article entitled *The Globetrotters* by Robert Cahn describing the April 1990 Interparliamentary Conference, published in the summer 1990 edition of AMICUS, was inserted into the Congressional Record by Senator Gore. See 136 CONG. REC. S12604 (daily ed. Aug. 15, 1990) (inserted by Sen. Gore). This article made it clear that Senator Gore was “the leading global environmentalist in Congress”; that “Gore introduced legislation authorizing the conference, and won approval for \$500,000 in Senate funding.” *Id.* Moreover, the article pointed out that Senator Gore was “the author of several bills [then] before Congress, including the World Environment Policy Act which addresses virtually all areas of the global environment; a package of legislation addressing protection of the stratospheric ozone layers; a resolution that would protect Antarctica from mining and minerals development and preserve the continent as a global ecological commons; and a bill for a Strategic Environment Initiative focusing on developing, marketing, and exporting technologies that will allow economic growth to continue in an environmentally sustainable manner.” *Id.*

Along with the filing of their report on the 1990 Interparliamentary Conference,<sup>53</sup> Senators Gore, Chafee, Baucus, Heinz, Kerry, Boschwitz, and Wirth introduced *Senate Resolution 316 — Relative to the International Conference on the Global Environment* which called for the United States to urgently seek international cooperation, including negotiations on the necessary treaties and conventions on the pressing issues identified at the Interparliamentary Conference on the Global Environment.<sup>54</sup> Specifically, *Senate Resolution 316* urged that the United States should take the lead in negotiations to establish an international convention on protection of biological diversity, noting that such a convention is currently under development and deserves strong support by the United States.<sup>55</sup> Moreover, in January of 1989 Senator Rudy Boschwitz (R-MN) and Senator Al Gore (D-TN) introduced a bill to establish the Office of Global Warming within the Department of State.<sup>56</sup> The bill had a separate Title V entitled “Biological Diversity,” which included the following: (1) the Earth’s biological diversity is being rapidly reduced; (2) reduced biological diversity may endanger the functioning of ecosystems and critical ecosystem processes that moderate climate change, and may endanger support of tropical forests; (3) most losses of biological diversity are unintended and largely avoidable consequences of human activity; (4) a comprehensive and coordinated Federal strategy is needed to arrest the loss of biological diversity and also, where possible, to restore biological diversity both through natural recovery and active management; and (5) because it cannot be predicted which biological resources will be most important for future needs, maintaining

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<sup>53</sup> See *supra* notes 46-52 and accompanying text.

<sup>54</sup> S. Res. 316, 101st Cong., 135 CONG. REC. S11431 (daily ed. July 31, 1990), available at <http://thomas.loc.gov>. The resolution was referred to the Senate Foreign Relations Committee. *Id.*

<sup>55</sup> *Id.* Interestingly, in 1989 the U.S. House of Representatives and the U.S. Senate both received executive communications pursuant to 22 U.S.C. § 2151g from the Assistant Secretary, Legislative Affairs, Department of State, transmitting on behalf of the President, a Report on Progress Toward Negotiating the International Convention to Protect Biological Diversity. See 135 CONG. REC. H7982 (daily ed. Nov. 2, 1989) (executive communication); 135 CONG. REC. S15153 (daily ed. Nov. 7, 1989), available at <http://thomas.loc.gov>.

<sup>56</sup> S. 603, 101st Cong. (1989), available at <http://thomas.loc.gov>.



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the diversity of living organisms in their natural habitats is prudent policy.<sup>57</sup>

## 2. *Expressing Disagreement, 1991-92*

With the start of the 102nd Congress in early 1991, several key American policymakers and opinion leaders started to express basic disagreement over the advisability of the United States committing to sign a multilateral biodiversity convention. This difference of opinion also carried over to disagreement about American commitment to other global environmental undertakings. No doubt driving this rise in the volume of rhetoric were two scheduled, politically charged events in 1992: (1) the June 1992 Rio Earth Summit and (2) the November 1992 American Presidential election.

On February 6, 1991, Senator Malcolm Wallop (R-MT) threw fat into the fire by noting, on the floor on the Senate, "yesterday several of my colleagues launched a big green attack against President Bush"<sup>58</sup> and opining that "[a]s usual, their obsolete missiles were off target,"<sup>59</sup> while "[t]he only damage was to the credibility of extremists in the environmental movement"<sup>60</sup> and "[t]heir barrage was precipitated by the White House proposals on global warming to the U.N. Intergovernmental Negotiating Committee on a framework convention on climate change."<sup>61</sup> Senator Wallop continued his oration, focusing on the issue of global warming but, by implication and by reference to newspaper articles by Warren Brookes of the conservative newspaper *The Washington Times*,<sup>62</sup> on the wider issue of global biodiversity endangerment. Senator Wallop said:

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<sup>57</sup> *Id.* at § 501.

<sup>58</sup> 137 CONG. REC. S1683 (daily ed. Feb. 6, 1991) (statement of Sen. Wallop) available at <http://thomas.loc.gov>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* The following newspaper articles by Warren Brookes were appended to Senator Wallop's oral remarks: *Debate Hotter Than the Earth?*, WASH. TIMES, Feb. 5, 1991; *Warmer, Greener, Better?*, WASH. TIMES, Feb. 5, 1991 (noting Tennessee Democratic Sen. Albert Gore's hopes for his presidential bid got a boost from last week's announcement that 1990 was the warmest year in the global temperature record) reprinted in 137 CONG. REC. S1683-84 (daily ed. Feb. 6, 1991) (appended to statement of Sen. Wallop), available at <http://thomas.loc.gov>.

This rather formidable sounding [United Nations] committee is negotiating a treaty to limit emissions of the so-called greenhouse gases. As my colleagues will recall, back in the late 1970's, the climate issue was whether the Earth was entering a new ice age. We were experiencing cold winter temperatures.

One thing Members of Congress have simply not been able to come to grips with is that God has something to do with life and that changes in climate are not necessarily somebody's fault. The image at that time was one of glaciers rolling down the Appalachian Mountains, engulfing Washington in ice. The closest we came to an ice age was when the Potomac River froze, allowing us to walk over to Virginia.

Having been discredited about the ice age, the environmentalists decided we were really experiencing global warming. Several years ago, the Senate Energy Committee held hearings with NASA (the National Aeronautics and Space Administration), NOAA (the National Oceanic and Atmospheric Administration), and university scholars describing their elaborate computer models which demonstrated that the Earth was turning into a greenhouse because of carbon dioxide and CFC emissions. As work progressed, questions arose about flaws in the models and in measuring techniques. For instance, we rely on temperature data over a 100-year period taken in such locations as Rosslyn, VA, which was transformed from pastures to concrete canyons. A more appropriate measure is average ocean temperatures which have not been affected by the pouring of concrete. Analysis of such records has called into question the argument about global warming.

The advocates of global warming have ignored these recent twists in the science, and pretend that their original arguments are valid. President Bush, on the other hand, has acknowledged the scientific uncertainty. He has taken a reasoned approach which seeks to limit greenhouse gasses without destroying our economy. At the U.N. conference, he has proposed an action plan to reduce emissions of gases affecting the climate. *We are exercising prudence, but not becoming hysterical about this problem.* I ask unanimous consent that

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[some] recent articles by Warren Brookes on the lack of warming data be printed in the *Record*.<sup>63</sup>

Senator Wallop also raised the issue of access to public lands, taking swipes at so-called elitists (including President Bush's EPA Administrator, William Reilly) by noting that:

Yesterday, while the President was being attacked for not being green enough, I introduced a bill which will promote environmental security by reducing greenhouse gases. This bill is the National Energy Security Act. Ironically, some of the environmental groups which are most concerned about greenhouse warming attacked [my] bill without having even read it. One has to wonder about their agenda [but] we can receive the full flavor of their agenda by reading the recent seven-part series by Warren Brookes on how various green groups are seeking to deny access to public lands. *This is a growing threat to private property and public access*.<sup>64</sup>

Apparently, President Bush did not heed the political flak from the right-wing of his party, exemplified by Senator Wallop<sup>65</sup>, when the President sent the Congress on April 18, 1991 an environmental report card of his first two years in office, appending the annual report of the Council on Environmental

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<sup>63</sup> 137 CONG. REC. S1683 (daily ed. Feb. 6, 1991) (emphasis added) (statement of Sen. Wallop), available at <http://thomas.loc.gov>.

<sup>64</sup> *Id.* at S1684 (daily ed. Feb. 6, 1991) (statement by Sen. Wallop) (emphasis added), available at <http://thomas.loc.gov>. The following newspaper articles by Warren Brookes were appended to Senator Wallop's oral remarks: *Greenlining: Backdoor to Limiting Our Use of Land?*, WASH. TIMES, Jan. 17, 1991 (noting "Not only are government land-taking budgets . . . on the rise, but government is extending its control over our property through two laws, wetlands preservation and endangered species, with a third method called 'Greenline Parks', well under way with more than 50 million private acres now being targeted"); *Big Park Coming At You?*, WASH. TIMES, Jan. 21, 1991; *Hijacking Development?*, WASH. TIMES, Jan. 23, 1991; *Land Trusts or Government Advance Men?*, WASH. TIMES, Jan. 25, 1991; *Development for a Favored Few?*, WASH. TIMES, Jan. 25, 1991; *Great Green Scam?*, WASH. TIMES, Jan. 28, 1991; *Exclusive Club of R&R?*, WASH. TIMES, Jan. 29, 1991 (characterizing Bush EPA Administrator William Reilly as part of a network of conservation elite, including Laurance Rockefeller, noting that "Mr. Reilly's main interest is not in 'big environment' issues like acid rain or global warming, but with national land use planning. In 1972 Mr. Rockefeller named him executive director of the Task Force on Land Use and Urban Growth, where he helped write *The Use of Land: A Citizens Policy Guide*. This laid out many of the premises for using 'biological diversity' as a rationale for limiting the two bête noires of environmentalism[:] single family housing expansion (urban sprawl) and commercial agriculture").

<sup>65</sup> See *supra* notes 58-64 and accompanying text.

Quality.<sup>66</sup> The President started his Message with a philosophical flourish, emphasizing the importance of environmental stewardship, observing that:

Of all the great social and technological changes of the 20<sup>th</sup> century, none may be more crucial to our well-being and that of future generations than the change that has occurred in the way we view our environment. Ours was the first generation to see the many colors of Earth from the vastness of space, and to recognize that our decisions will determine whether the next generation lives in a polluted world of lowered expectations or *a world that sustains humanity and a wondrous diversity of life*.<sup>67</sup>

Next, President Bush's message focused on 1990 and characterized that year as a landmark year in the Nation's efforts to enhance environmental quality,<sup>68</sup> proudly observing:

- We enacted the Clean Air Act Amendments of 1990, providing the United States with the world's most advanced, comprehensive, and market-oriented laws to address air pollution, including acid precipitation, urban air quality, toxic air pollutants, and global ozone layer depletion.
- We adopted an international agreement and enacted laws to phase out chlorofluorocarbons (CFCs) and other substances that deplete the Earth's ozone layer, which protect us from the harmful effects of solar radiation.
- We enacted the Oil Pollution Act of 1990 and adopted a major international agreement to strengthen laws related to oil pollution prevention, liability, and response.
- We enacted the most environmentally progressive farm bill ever. It will help farmers protect water quality and wildlife habitat and it launches a part of our America the Beautiful initiative to begin a long-term national tree planting and improvement campaign aimed at both rural and urban areas.
- In partnership with the Nation's Governors, we developed ambitious national educational goals, while the Congress and

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<sup>66</sup> *Annual Report of the Council on Environmental Quality — Message From the President*, PM 41, reprinted in 137 CONG. REC. S4731 (daily ed. April 18, 1991) (laid before the Senate by the Presiding Officer), available at <http://thomas.loc.gov>.

<sup>67</sup> *Id.* (emphasis added).

<sup>68</sup> *Id.*

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the executive branch strengthened environmental education programs. These actions are an essential part of our efforts to revitalize American education and to improve the environment.

- We made other commitments to environmental stewardship, including the expansion of national parks, wildlife refuges, marine sanctuaries, and recreation areas; accelerated cleanup of Federal facilities; enhanced protection of marine mammals, the African elephant, the Florida panther, and other threatened species; and the suspension of up to 10 years of oil and gas leasing in many areas of our coastlines pending further environmental and resource analysis.<sup>69</sup>

In the remainder of his 1991 Environmental Message to Congress, President Bush stressed themes and concepts that indicate that he — at least on the rhetorical level — was aware of the importance of the United States taking national and international actions to preserve and protect biodiversity. For example, he exhorted Congress to the following challenge: “Our efforts to enhance the quality of the domestic environment must be accompanied by comparable efforts toward global environmental quality. In these times, Americans are aware that our political and economic security is affected by actions occurring abroad.”<sup>70</sup> In a similar vein, Bush articulated an internationalist environmental vision for the United States, contending that “Americans are aware that our political and economic security is affected by actions occurring abroad”<sup>71</sup> and that “[i]n the months and years ahead, we need to broaden our dialog with other nations and international institutions and to-

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<sup>69</sup> *Id.* President Bush continued by noting: “Our achievements in 1990 add to a growing national record of environmental action that has improved the quality of American life. Compared to the conditions facing Americans earlier in my lifetime, our skies and streams are cleaner, and our major technologies are less wasteful.” *Id.* Looking to the future, Bush stated: “Our work, however, is incomplete. Americans are sobered by the scope of the stewardship challenge and recognize that it requires ongoing vigilance and action. We know, for example, that increased trade and economic development is needed to reduce poverty and improve the quality of life for all of the world’s people. However, if we fail to make wise economic and environmental choices, those needed increases in economic activity are likely to result in new burdens on the Earth’s ability to sustain life.” *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

gether address environmental issues that know no boundaries.”<sup>72</sup>

On January 31, 1992, a mere nine months after President Bush’s expansive Message to Congress on the environment,<sup>73</sup> a narrowly bipartisan group of eleven U.S. Senators, with Senator William Cohen of Maine as the sole Republican co-sponsor, proposed *Senate Concurrent Resolution 80 — Relative to the U.N. Conference on Environment and Development*.<sup>74</sup> The need for the United States, in conjunction with the international community, to take a leadership stance at the upcoming Rio Conference was articulated in seven predicative clauses, which spoke both expressly and implicitly of the importance of international action on biodiversity protection:

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<sup>72</sup> *Id.* President Bush, looking ahead to the 1992 Rio Conference, voiced his firm support for a global warming convention, and a convention on forests; however, in his 1991 Message he omitted reference to support for a separate convention on biodiversity. As indicated in the following quotation from his Message, however, Bush specifically mentioned the biological diversity benefits of a convention on forests:

Looking abroad, the United States will continue to seek to conclude an international convention on global climate change in time for its signing at the 1992 United Nations Conference on Environment and Development in Brazil. In our view, such a convention must be comprehensive in scope, addressing all sources and sinks of greenhouse gases, adoption as well as mitigation measures, and continued scientific and economic research policy responses. The United States is committed to a series of domestic actions that have many benefits such as curbing air pollution, conserving energy, and restoring forest lands and that also help to curb greenhouse gas levels. These actions — recently established in law were proposed by my Administration, will hold U.S. net emissions of greenhouse gases at or below the 1987 level through the foreseeable future. An effective response to potential climate change also requires that all nations participate and meet obligations that are appropriate to their circumstances.

I have also proposed that a worldwide convention on forests be developed and ready for signing by world leaders at the U.N. conference in 1992. *Forests provide diverse benefits*, helping to clean our air and water, *foster biological diversity*, and sequester greenhouse gases. We should take steps now to protect and enhance them. In the coming year, I also hope we can move forward on U.S. proposals for integrated economic and environmental assistance in such regions as Latin America and the Caribbean, Eastern and Central Europe, and the Middle East.

*Id.* (emphasis added).

<sup>73</sup> See *supra* notes 66 to 72 and accompanying text.

<sup>74</sup> S. Con. Res. 89, 102nd Cong. (1992), available at <http://thomas.loc.gov>. The bipartisan sponsors of the concurrent resolution were Senator John Kerry (D-MA), Senator Carl Levin (D-MI), Senator Al Gore (D-TN), Senator William Cohen (R-ME), Senator Patrick Leahy (D-VT), Senator Paul Wellstone (D-MN), Senator Joseph Lieberman (D-CT), Senator Quentin Burdick (D-ND), Senator Daniel Akaka (D-HI), Senator Tom Harkin (D-IA), and Senator Claiborne Pell (D-RI). The proposed resolution was referred to the Senate Committee on Foreign Relations.

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Whereas the health and stability of the environment of the Earth are threatened by global climate change, depletion of the ozone layer, deforestation, *the loss of biological diversity*, increasing population, disposal of hazardous chemicals, marine pollution, the depletion and contamination of fresh water supplies, and other international environmental problems;

Whereas it is in the interest of the citizens of all nations to encourage environmentally sustainable development policies that allow for the preservation and renewal of natural resources;

Whereas the maintenance of global environmental health requires increased cooperation among nations, including new agreements and policies designed for the achievement of such maintenance;

Whereas the United Nations Conference on Environment and Development (hereinafter referred to the U.N.C.E.D.) will convene in June of 1992 in Rio de Janeiro, Brazil;

Whereas the U.N.C.E.D. will provide a rare and important opportunity to make progress towards global environmental protection and sustainable development;

Whereas this Nation has sufficient power and influence to play a major role in determining the success or failure of U.N.C.E.D.; and

Whereas the well-being of present and future generations of this Nation depends on the preservation of a healthy and stable world environment[.]<sup>75</sup>

On March 18, 1992, Congressman Dante B. Fascell (D-FL), Chairman of the House Committee on Foreign Affairs, extended remarks to his colleagues noting that “[i]t is ironic that the United States shrinks from a leadership role [in the upcom-

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<sup>75</sup> *Id.* (emphasis added). On March 19, 1992 the U.S. House of Representatives approved H. Con. Res. 292, 102nd Cong. (1992), available at <http://thomas.loc.gov>. This resolution referenced global environmental and development issues such as climate change, depletion of the ozone layer, the disposal of hazardous chemicals, deforestation, the loss of biological diversity, marine pollution, threats to the world’s supply of fresh-water, and rapid population growth as constituting “high priority concerns of the United States, affecting the security and well-being of present and future generations.” *Id.* The House proposal focused on the United Nations Conference on Environment and Development and the need for “the personal participation of the President of the United States.” *Id.*

ing Rio Earth Summit] at the same time our Department of Defense is calling for other nations to cede to the United States an unchallenged position as the world's only superpower."<sup>76</sup> He inserted into the record a newspaper article.<sup>77</sup> The inserted newspaper article observed, among other things, that: "Virtually alone among the developed nations, the United States is unwilling to make any specific commitments to reduce its share of carbon dioxide emissions to deal with climate change, but favors commitments by developing nations to protect forests and conserve species. Seen from the developing world, this is an invitation to bear an inordinate burden for the sake of the global environment while granting affluent nations further license to pollute."<sup>78</sup>

Among the sixteen specific resolutions in proposed *Senate Concurrent Resolution 89* was "a sense of the Congress that the President should . . . support the development of a global strategy and action plan to conserve the biological diversity of plant and animal species."<sup>79</sup> Importantly, Democrat Senator John Kerry of Massachusetts, the chief sponsor of *Senate Concurrent Resolution 89*, leveled criticism at President Bush in the Senator's remarks, inserted in the *Congressional Record*, introducing the proposal. Senator Kerry's introductory barbs thrown at the Republican President, stated that "[t]he record of U.S. participation in the conference thus far raises doubts that we have taken full advantage of our position in achieving environmentally sustainable worldwide policies."<sup>80</sup> Kerry elaborated on his "doubts" by the following general set of criticisms of the Bush Administration's actions in preparing for the upcoming Rio Conference:

I am concerned that the administration has not appeared to see the Conference as an opportunity to make major strides toward global environmental and developmental objectives. Rather it has appeared to be more concerned with limiting the cost to the United States of the Conference's actions and rec-

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<sup>76</sup> 138 CONG. REC. E715 (daily ed. Mar. 18, 1992) (statement by Cong. Fascell).

<sup>77</sup> Jay D. Hair, *MIAMI HER.*, Mar. 4, 1992, reprinted at 138 CONG. REC. E716 (daily ed. Mar. 18, 1992), available at <http://thomas.loc.gov>.

<sup>78</sup> *Id.*

<sup>79</sup> S. Con. Res. 89, 102nd Cong. (1992), available at <http://thomas.loc.gov>.

<sup>80</sup> 138 CONG. REC. S 807 (daily ed. Jan. 31, 1992) (statement of Sen. Kerry), available at <http://thomas.loc.gov>.



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ommendations. Earlier, the U.S. delegation was directed by the White House to avoid presenting initiatives to the UNCED Preparatory Committee meetings that would incur potential future budgetary costs. Instead, the administration is advocating the reprogramming of budgetary resources from existing developmental programs. Such an injunction puts the United States in an unnecessarily negative posture toward this vitally important conference.

Furthermore, despite the fact that every other member of the Group of Seven industrialized countries has committed to sending its head of state to the Earth Summit, we still do not have a commitment from the President to attend the Conference. It is anticipated that between 60 and 80 heads of governments worldwide plan to be in Rio. Failure of President Bush to participate actively in this Conference would sadly squander the great opportunity the Conference offers the United States to try and regain some of our standing as an international leader on environmental issues.<sup>81</sup>

Senator Kerry specifically challenged what he referred to as “disturbing reports that the White House views the Conference as a potential embarrassment . . . particularly because of the isolated U.S. position on climate change.”<sup>82</sup> Moreover, linking the Bush White House’s reluctance to lead in pre-Rio international negotiations addressing forest preservation — and concomitant biodiversity protection — to the then-raging domestic political spotted owl controversy in the Northwest,<sup>83</sup> Kerry stressed the importance of American leadership on these interconnected issues by opining:

With respect to forestry . . . the world has become increasingly aware in recent years of the threat to its primary forest[s], and especially its tropical forests. It is estimated that forests are disappearing at the rate of 1½ acres every second. The rapid loss of forests result in dozens of species becoming extinct every day. Forests cover less than 10 percent of the Earth’s surface, and are believed to contain to over 50 percent

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* Senator Kerry added: “Those who participated and observed the most recent preparatory committee meeting of the Earth Summit have reported that the United States’ role in the negotiations overall was more negative than positive, because of the restricted negotiating brief given the delegation.” *Id.*

<sup>83</sup> *Id.*

of the world's species and a majority of the endangered species. Among those threatened species are many which are needed to treat diseases.

The best known example is the rosy periwinkle, which is the source of alkaloids used to treat childhood leukemia and Hodgkin's disease with a significant success rate. The National Cancer Institute has awarded over \$2.5 million in contracts for research institutions to collect tropical plant species to be tested for anticancer activity. The United States has a vital interest in preserving the untapped wealth of biological resources that is being lost with forests.

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The discussion about the world's forests at UNCED will focus on principles that could serve as the basis for an international agreement on those forests. Unfortunately, the negotiating text on forest principles that was produced at the last Preparatory Committee meeting is weak in a number of areas. It is critical that the United States fight for a stronger document and support forestry principles that would slow the rate of global deforestation, increase worldwide forest cover, and provide for international protection, growth, and sustainable use of mature forests.<sup>84</sup>

On April 7, 1992, the United States Senate, having received *Senate Concurrent Resolution 89* favorably reported from the Committee on Foreign Relations with amendments, proceeded to debate and vote on the proposal.<sup>85</sup> The Foreign Relations Committee version of *Senate Concurrent Resolution 89* retained the same language as the original proposal regarding American involvement in an international biodiversity convention, to wit: "That it is the sense of the Congress that . . . the President should . . . support the development of a global strategy and action plan to conserve the biological diversity of plant and animal species."<sup>86</sup> However, the Foreign Relations

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<sup>84</sup> *Id.*

<sup>85</sup> S. Cong. Res. 89, as amended, 102nd Cong. (1992), available at <http://thomas.loc.gov>. The debate is reported at 138 CONG. REC. S4689-897 (daily ed. April 7, 1992) available at <http://thomas.loc.gov>.

<sup>86</sup> S. Cong. Res. 90, as amended, proposed resolution (4), 102nd Cong. (1992), available at <http://thomas.loc.gov>, discussed at 138 CONG. REC. S 4869 (daily ed. April 7, 1992), available at <http://thomas.loc.gov>. Compare *supra* note 79 and accompanying text.

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Committee version added a new subsection b. to *Senate Concurrent Resolution 89*, to wit: “The President should not support any action or undertake any commitment” regarding international environmental conventions, strategies or action plans at the Rio Earth Summit “which he believes would have an adverse effect on the competitiveness of American industry or that would result in a net long-term loss of American jobs.”<sup>87</sup>

In the general debate on adoption of *Senate Concurrent Resolution 89*, as amended, Senator Malcolm Wallop (R-MT) characterized the negotiations leading up the June Rio Conference as “in a state of chaos” because of “disagreements between the so-called Third World nations . . . , the emerging economic nations, and the economic nations.”<sup>88</sup> Senator Wallop also expressed general concern that “[s]ound science, not science driven by a political agenda” should provide a “cornerstone for a sound response to the potential for climate change,” and presumably other international environmental issues like biodiversity protection.<sup>89</sup>

In the general debate on the adoption of *Senate Concurrent Resolution 89*, as amended, Senator John Kerry (D-MA) stated that “[a] number of years ago, the President of the United States suggested that he wanted to be known as the environment President,”<sup>90</sup> and that the Rio Earth Summit “is an extraordinary opportunity to be exactly that, to define himself and to help define leadership for the world.”<sup>91</sup> Yet, in Senator Kerry’s view, while one could “point easily to cosmetic motions that are made,”<sup>92</sup> the representative of the United States at Rio would be “hampered by . . . lack of leadership, by a President who simply is not present on this issue and does not recognize the enormity of the choices we face with respect to environmental issues internationally.”<sup>93</sup> Kerry continued his attack on

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<sup>87</sup> S. Cong. Res. 89, as amended, proposed resolution (b), 102nd Cong. (1992), available at <http://thomas.loc.gov>, discussed at 138 CONG. REC. S 4869 (daily ed. April 7, 1992), available at <http://thomas.loc.gov>.

<sup>88</sup> 138 CONG. REC. S 4870 (daily ed. April 7, 1992) (statement of Sen. Wallop), available at <http://thomas.loc.gov>.

<sup>89</sup> *Id.*

<sup>90</sup> 138 CONG. REC. S 4871 (daily ed. April 7, 1992) (statement of Sen. Kerry), available at <http://thomas.loc.gov>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

President Bush by observing: "Like many others, I am frankly, puzzled and disappointed by the administration's failure to exercise the kind of strong leadership for which this resolution calls."<sup>94</sup> In Senator Kerry's view, "[i]nstead of approaching the [Rio] conference as an opportunity to make great progress, the [Bush] administration has literally been treating it like an ordeal that has to be endured,"<sup>95</sup> while "instead of taking the lead, we are . . . following, and I would say distantly following, the lead of others."<sup>96</sup> Then, Senator Kerry uncovered a raw political nerve that might have potentially explained, in the midst of the Republican Presidential primary season, why President Bush was hesitant to lead the American delegation at the upcoming Rio Conference:

Dozens of world leaders are expected to gather in Rio, but the President of the United States has not yet committed to go. He said this past week [in April of 1992] that running for the Presidency may keep him home.

Mr. President, it is really hard to understand how the somewhat tattered campaign of Pat Buchanan could really take precedence over the concerns of the planet . . . It seems to me that if you have a true commitment to the environment and you understand the enormity of the choices that we face right now, a week in Rio, a few days in Rio, would be worth months on the campaign trail. It would, in fact, be one of the first substantive things that we have seen in the context of an environmental Presidency and would do more to add substance to a Presidency lacking in substance . . . than anything I could think of.

I believe the real reason the President is reluctant to go is that the administration really has not had anything seriously to say about the environment either domestically or internationally in three and one-half years. The symbols have been there, some tree plantings, the Department of Environment proposals, and some photo opportunities at the Grand Canyon and elsewhere. But the reality is when we [the Democrats] had to negotiate the details of the Clean Air Act, when we had to press for water treatment facilities and other things, the administration has been absent without leave.

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

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. . . I think it is important when contemplating the administration's policies to remember that this is not a penny-ante political debate. It is a rare and real historic opportunity. We are talking about the long-term ability of the atmosphere of this planet to sustain human life. We are talking about stopping the destruction of habitat that is now causing species to become extinct faster than any time since the Ice Age. We are talking about the preservation and sound management of forest resources that are today disappearing at the rate of 54 acres a minute around the world.<sup>97</sup>

Moreover, to add insult to injury from President Bush's perspective, the leader of the U.S. Senate delegation to Rio was to be a Democrat potential opponent in the upcoming November Presidential Elections: Senator Al Gore (D-TN). Gore took up the verbal attack on President Bush where his colleague, Senator John Kerry had left off,<sup>98</sup> in urging Senate passage of *Senate Concurrent Resolution 89*, as amended. Gore opined that President Bush would confront "political catastrophe if he is the only leader of a major nation in the entire world who refuses to go to the Earth summit,"<sup>99</sup> even though Gore was "not worried about the political damage to . . . President [Bush]"<sup>100</sup> since he preferred "to see somebody else elected [in the] fall."<sup>101</sup> Yet, according to Senator Gore:

[I]f [President Bush] is isolated and becomes the only world leader who refuses to go to the Earth summit, that hurts our country. That embarrasses not just him as President, not just him as an individual; it would embarrass our country, and it would hurt our national interest severely because a new political consensus in the world is emerging.<sup>102</sup>

Senator Gore blamed President Bush's lack of leadership for the "uproar" in the status of all substantive negotiations

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<sup>97</sup> *Id.*

<sup>98</sup> See *supra* notes 90-97 and accompanying text.

<sup>99</sup> 138 CONG. REC. S 4872 (daily ed. April 7, 1992) (statement of Sen. Gore), available at <http://thomas.loc.gov>.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

leading up to Rio.<sup>103</sup> Gore specifically mentioned that “[t]he biodiversity talks have broken down.”<sup>104</sup>

In a statement close to the end of debate on *Senate Concurrent Resolution 89*, as amended, Senate Minority Leader Bob Dole (R-KS) attempted to respond to the Democrats attack on President Bush’s negotiating stance leading up to Rio. The Dole statement is worthy of extensive quotation since it probably represents an accurate assessment of many Republican Senators’ general concerns about the wisdom of extensive international environmental diplomacy efforts by the United States, in general, and the advisability, in particular, of ratifying the Biological Diversity Convention. Senator Dole remarked:

Environmental laws and regulations governing nearly every aspect of life in America are stronger in the United States than they are in any other country in the world. We have laws on air emissions, water discharges, filling and dredging wetlands and waterways, disposal of every type of waste from common household garbage to toxic chemicals to radioactive waste. We regulate almost to the absurd, demanding asbestos which has been safely sealed in place instead be disrupted and removed at enormous cost. We demand toxic waste be removed from leaking dump sites and transferred to exotic space age dumps which also leak, a move that generates huge profits to lawyers and little, if any, benefit to the environment.

Unfortunately, those who have criticized the President of the United States . . . fail to tell us the basic position of the two sides in the UNCED negotiations. The United States wants to have a cooperative agreement whereby all nations of the world commit themselves to undertake the same type of aggressive environmental controls that the United States has taken. Conversely, the Third World has viewed these negotiations as a cash cow. For a price, they have said, we might be able to interest them in being concerned about the environment.

So . . . let us ask the American people. Let us ask American taxpayer which we failed to do around here almost every day.

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

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Ask the American taxpayer the real question: Do you favor spending hundreds of millions, if not billions, of your tax dollars to foreign countries to try to interest them in the environment? Or, do you favor taking a tough stand, demand that all nations follow the lead of the United States in cleaning the air, the water, protecting forests and species, and eliminating chemicals . . . ?

I am quite certain when the American people understand the facts — not the speeches, not the rhetoric, not the criticism of President Bush — when they are told the truth, they will reject the sleight of hand to take money out of the hands of the needy in this country and use it as bribes to foreign governments.

I am also quite certain the American people would instead agree that President Bush, that all nations should voluntarily protect the fragile environment of this globe which is, as best as I can determine, the only choice we have in choosing a place for mankind to live.

In closing, I would like to praise President Bush for his courage in taking the sensible position he has. He could have chosen the politically expedient route that many of my colleagues talked about . . . of hiding behind the skirt of environmental protection and allow this Nation to be blackmailed.<sup>105</sup>

The Senate, in a procedural maneuver, unanimously consented to the use of the previously-passed, although substantively different, *House Concurrent Resolution 292*<sup>106</sup> on the Rio Conference, as the Senate's legislative moniker and to substitute the entire text of *Senate Concurrent Resolution 89*, as amended, for the pending *House Concurrent Resolution*.<sup>107</sup> Thereafter, the Senate passed *House Concurrent Resolution 292*, with the substituted Senate text, by a vote of 87 to 11, with many Republican Senators joining Democrat Senators voting "yea."<sup>108</sup> All eleven "nay" votes were cast by Republican Senators.<sup>109</sup>

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<sup>105</sup> 138 CONG. REC. S 4896 (daily ed. April 7, 1992) (statement of Sen. Dole), available at <http://thomas.loc.gov>.

<sup>106</sup> See 138 CONG. REC. S 4897 (daily ed. April 7, 1992), available at <http://thomas.loc.gov>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* Among this group, key Republican Senators who voted "nay" were Senators

During the runup to the Earth Summit in June of 1992, and its immediate aftermath, several members of Congress took to the floor of their respective chambers, or inserted remarks in the *Congressional Record*, to express to their colleagues information and arguments about the appropriate approach of the United States in responding to the Biological Diversity Convention. Senator Tim Wirth (D-CO) inserted remarks entitled *Chemical Prospecting Earth's Biological Diversity* into the Senate Record on March 26th.<sup>110</sup> Senator Wirth's remarks began by asserting "in recent years we have heard much from our scientists and other experts about the dire need to protect biodiversity, and about the chilling rate of species extinction now underway — 1,000 times the normal rate."<sup>111</sup> While noting that "[t]here are, of course, several valid reasons to protect the diversity of God's creation" including ethical and aesthetic arguments,<sup>112</sup> Senator Wirth focused his comments on what he called "the economic potential inherent in the protection of biodiversity,"<sup>113</sup> that, in his words, "there is money to be made in the chemical prospecting of Mother Nature's rich diversity of plant and animal life."<sup>114</sup> Wirth sketched the outline of his economic biodiversity rationale in the following words:

Simply put, chemical prospecting is the search for new chemical compounds that can become life-saving drugs and other products that benefit humankind. Animal and plant life is a rich storehouse of such chemicals. The happy marriage between recent advances in biotechnology, which allow efficient testing of thousands of natural substances, and the tremendous biodiversity found but imperiled [species] on this planet has already added tens of billions of dollars to our economy. Sophisticated drugs whose origin is found in the great biologic library are already relieving human suffering around the world. It took millions of years of evolution to create this genetic encyclopedia and it is just beginning to be explored. It is also threatened as never before.

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Bob Dole (R-KS), Phil Gramm (R-TX), Jesse Helms (R-NC), Trent Lott (R-MS), Alan Simpson (R-WY), and Malcolm Wallop (R-MT).

<sup>110</sup> 138 CONG. REC. S 4401 (daily ed. Mar. 26, 1992) (extension of remarks by Sen. Wirth), available at <http://thomas.loc.gov>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*



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This situation presents both urgency and opportunity. Many of the world's most endangered species and ecosystems are found in the poorest nations, whose thrust for economic advancement drives unsustainable development practices. Huge areas of rainforest containing the highest species concentrations found anywhere are slashed and burned in pursuit of income. In these areas, economic development and environmental protection clash in a mutually destructive cycle of resource exploitation. In the end, both local economies and nature's bounty are impoverished.

What is needed then, is a harmonization of development and environmental stewardship. Chemical prospecting offers an exciting link between conservation and economic advancement by vesting the caretakers of the world's genetic resources with an interest in its sustainable development. Chemical prospecting provides a path toward the peaceful co-existence between the needs of humankind and the ecological balance on which we depend.<sup>115</sup>

On June 10, 1992, a few days after the conclusion of the Rio Conference, Senator Daniel Akaka (D-HI) criticized President Bush's performance on "watering down the global climate treaty binding governments to control emissions of greenhouse gases"<sup>116</sup> and in "refus[ing] to sign the compact to protect

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<sup>115</sup> *Id.* Senator Wirth inserted several articles into the record to substantiate his argument: Andrew Pollack, *Drug Industry Going Back to Nature*, N.Y. TIMES, Mar. 5, 1992; Thomas E. Lovejoy, *Earth's Living Library: Check It Out*; Thomas Eisner, *Chemical Prospecting*, 138 CONG. REC. S 4400-403 (daily ed. Mar. 26, 1992) (insertion in record by Sen. Wirth), available at <http://thomas.loc.gov>.

<sup>116</sup> 138 CONG. REC. S 7783 (daily ed. June 10, 1992) (statement by Sen. Akaka), available at <http://thomas.loc.gov>. Senator Akaka quipped, in this regard: "Among the world's industrialized nations, only the United States refused to commit itself to stabilizing emissions of carbon dioxide at 1990 levels by the year 2000. Brandishing the threat that President Bush might boycott the summit, administration negotiators strong-armed other nations in limiting the climate treaty to voluntary emission reduction goals. Our country is the source of nearly one-quarter of the world's carbon dioxide emissions, and if the United States will not agree to anything other than voluntary goals, no one should expect anything more than voluntary results." *Id.* For a totally different perspective on the Bush negotiating strategy on the global warming treaty at Rio, see Rose Gutfeld, *Earth Summitry: How Bush Achieved Global Warming Pact With Modest Goals*, WALL ST. J., May 27, 1992, reproduced in 138 CONG. REC. S 7457-58 (daily ed. June 3, 1992) (insertion by Sen. Wirth), available at <http://thomas.loc.gov>. "How did the White House manage to set the global-warming agenda for the [Rio] conference on its own terms? The key, according to people familiar with the talks, was a clever bargaining ploy devised by an influential but little-known State Department official [Robert Zoellick, an Undersecretary of State in conjunction with Clayton Yeuter, the Bush White House's domestic policy czar]. The heart of his strategy: to use the

plants, animals and natural resources — known as the biodiversity treaty — because of [President Bush's] desire to shield the U.S. biotechnology industry from competition."<sup>117</sup> Senator Akaka claimed that "[w]hen you examine his record at Rio de Janeiro, President Bush looks more like [former Secretary of Interior under Ronald Reagan] James Watt than the environment President he claims to be"<sup>118</sup> since Bush's "message is clear: 'Do as I say, not as I do.'"<sup>119</sup> Akaka went on to provide a Hawaiian perspective on the failure of President Bush to sign the Biological Diversity Convention by remarking:

The United States failure to sign the biodiversity convention is an especially disturbing development. In rejecting this treaty, the Bush administration professed a desire to preserve economic development opportunities for U.S. industry. What the administration fails to recognize is that there can be no economic development without biological diversity.

Experts on biodiversity estimate that as much as 20 percent of the Earth's plant and animal species may disappear in the decades ahead. Given that natural organisms are the source of nearly three-quarters of all medicines, the loss of biological diversity has grave implications for the quality of life on Earth. When these species disappear so do the cures for the ills that plague us. As my colleague Senator [George] Mitchell [D-ME] warned in his book "World on Fire", "When we let species become extinct, we foreordain our own extinction."

Nowhere is the significance of the biological diversity convention more apparent than in Hawaii. Hawaii is famed for its unique natural heritage. No other place on Earth has a higher percentage of unique plant and animal species. Nearly 100 percent of Hawaii's invertebrate species, and 90 percent of its birds and flowering plants are endemic, making Hawaii home to over 10,000 life forms found nowhere else on the globe.

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threat that Mr. Bush would boycott the summit to wrangle an agreement that wouldn't lock the U.S. into costly requirements that could threaten economic growth." *Id.*

<sup>117</sup> 138 CONG. REC. S 7783 (daily ed. June 10, 1992) (statement by Sen. Akaka), available at <http://thomas.loc.gov>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

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The availability of . . . science to contribute to human welfare rests in large part on the knowledge waiting to be discovered in the tropical forests. Yet Hawaii has already lost most of its original tropical forests, half of its original bird species, and an untold number of other wildlife and plants.<sup>120</sup>

On June 17, 1992 Senator Don Nickles (R-OK) rose on the Senate floor to offer support for President Bush's "decision that it is in the best interests of the United States that the United States not be a signatory to the Biological Diversity Convention."<sup>121</sup> First, Senator Nickles attempted to refute those who criticized the decision by President Bush not to sign the Biological Diversity Convention as evidence of a lack of leadership in world environmental issues<sup>122</sup> by noting that the administration had signed "the Framework Convention on Climate Change, the other multilateral treaty open for signature at the Rio Conference . . ."<sup>123</sup> Second, Nickles contended that "[t]he truth is, the United States strongly supports the principle of maintaining biological diversity, both domestically and internationally."<sup>124</sup> Third, Senator Nickles identified the treatment of intellectual property rights<sup>125</sup> under the Biodiversity Convention, as the chief reason the United States chose not to sign that treaty. His commentary on this point is instructive:

These problematic [intellectual property] provisions are almost side issues to the protection of endangered species and habitat. However, these problematic provisions are the heart of the agenda of the developing nations at Rio. They want our money with only vague accountability and they want our technology for free, without any understanding of the effectiveness of private sector investment to assist in meeting biodiversity goals. These same two issues, wanting to have funding without strings and technology without royalties, have also been major stumbling blocks in the Agenda 21 provisions.

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<sup>120</sup> *Id.*

<sup>121</sup> 138 CONG. REC. S 8375 (daily ed. June 17, 1992) (statement of Sen. Nickles), available at <http://thomas.loc.gov>.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* Senator Nickles noted that: "In fact, the United States was an early proponent of an international convention to protect biodiversity in developing countries — yet another environmental area in which the United States has been a world leader in terms of domestic action." *Id.*

<sup>125</sup> *Id.*

Agenda 21 is nonbinding environmental action plan. The Biological Diversity Convention, however, is an enforceable treaty.

The Biological Diversity Treaty would essentially coerce the transfer of technology by the United States and other developed countries to the developing countries. Article 16(2) of the treaty would obligate the United States to transfer not only the commercially available products of technology, but also the technology itself to developing countries, without regard to intellectual property rights.

I remind my colleagues that the United States has been pressing for appropriate international recognition of intellectual property rights for the past 5 years in the Uruguay round of the GATT negotiations. This very issue — treatment of intellectual property rights — has been one of the two biggest hurdles for agreement during the GATT negotiations. Why should we throw away our basic position of 5 years on this critical issue just to say we will sign this particular environmental treaty?<sup>126</sup>

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<sup>126</sup> *Id.* The United States signed Agenda 21 — the “non-binding action plan” referred to in Senate Nickles remarks in June of 1992. See Agenda 21: The U.N. Program of Action from Rio, U.N. Sales No. E.93.1-11 (1993). Some of the chapters of Agenda 21 that deal with aspirational biological diversity protection include Chapters 15 (“conservation of biological diversity”), and 16 (“environmentally sound management of biotechnology”). For a discussion of some specific biodiversity protection provisions, at the habitat level, see Robert F. Blomquist, *Virtual Borders? Some Legal-Geographical Musings on Three Globally Significant Fragile Ecosystems Under United Nations’ Agenda 21*, 45 CLEV. ST. L. REV. 23 (1997). On the debate over intellectual property protection and biodiversity, see generally Jim Chen, *Diversity and Deadlock: Transcending the Conventional Wisdom on the Relationship Between Biological Diversity and Intellectual Property*, 31 ENVTL. L. REP. (ENVTL. L. INST.) 10625 (June 2001); GRAHAM DUTFIELD, *INTELLECTUAL PROPERTY RIGHTS, TRADE AND BIODIVERSITY* (Earthscan 2000); Timothy Swanson & Timo Göschl, *Property Rights Issues Involving Plant Genetic Resources: Implications of Ownership for Economic Efficiency*, 32 ECOLOGICAL ECON. 75 (2000); KERRY TEN KATE & SARAH A. LAIRD, *THE COMMERCIAL USE OF BIODIVERSITY* (Island Press 1999); Mahadev G. Bhat, *On Biodiversity Access, Intellectual Property Rights, and Conservation*, 29 ECOLOGICAL ECON. 391 (1999); G. Utkarsh et al., *Intellectual Property Rights on Biological Resources: Benefiting from Biodiversity and People’s Knowledge*, 77 CURRENT SCI. 1418 (1999); Charles R. McManus, *The Interface Between International Intellectual Property and Environmental Protection: Biodiversity and Biotechnology*, 76 WASH. U. L. W. 255 (1998); Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conversation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59 (1998); Antonio G.M. LaVina, *Intellectual Property Rights and Indigenous Knowledge of Biodiversity in Asia*, 2 ASIA PAC. J. ENV’T. L. 227 (1997).

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Fourth, Senator Nickles identified adverse impacts on international trading opportunities of the U.S. biotechnology industry as another justification for President Bush's decision not to sign the CBD, observing that "[u]nder the Biological Diversity Convention, the U.S. biotechnology industry would be harmed in the same way as any U.S. industry trying to provide products to the developing countries" in that "the proprietary process information would have to be given free to the developing country along with the product."<sup>127</sup> Moreover, Senator Nickles perceived another trade-related problem with the Biological Diversity Convention: "the biotechnology industry has been singled out for special regulation"<sup>128</sup> in that "[u]nder the guise of concern for the safety of biotechnology products, the convention would authorize preimport approval of products produced by the United States using its biotechnology capabilities."<sup>129</sup> Therefore, according to Senator Nickles, "[s]igning this treaty would be handing the rest of the world a new trade barrier for U.S. high-technology products"<sup>130</sup> and "[f]or those who have been frustrated by the European farm subsidy issue, this convention's open invitation to reject United States agricultural products should be of real concern."<sup>131</sup> At this point in his remarks, Senator Nickles received permission to insert two letters that had been sent to President Bush in opposition to the United States signing the CBD: one letter was from the Pharmaceutical Manufacturers Association;<sup>132</sup> the other letter

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<sup>127</sup> 138 CONG. REC. S 8375 (daily ed. June 17, 1992) (statement of Sen. Nickles), available at <http://thomas.loc.gov>. Nickles opined: "That is not right. That is wrong." *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* According to this June 9, 1992 letter to President Bush:

Patent protection is the foundation of the research-based pharmaceutical industry. Without such protection, there simply would be no pharmaceutical industry — and no new drugs to cure disease, ease suffering and prolong life. Unlike many U.S. industries, the U.S. pharmaceutical industry continues to increase its investment in research and development. This year [1992], the industry will spend almost \$11 billion on R&D, thirteen and one-half percent more than [1991].

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Our industry, according to the March 9, 1992 issue of Fortune Magazine is America's most internationally competitive industry. None of this would be conceivable without the assurance of strong patent protection. As it is, our companies

was from the Industrial Biotechnology Association.<sup>133</sup> Fifth, Senator Nickles pointed to the financing provisions<sup>134</sup> of the Convention as being problematic, describing these provisions to his colleagues as “yet another attempt by the developing world to obligate the developed world, especially the United States, to pay them to meet environmental goals without any strings attached,”<sup>135</sup> largely, in Nickles’ view, through the power the treaty gave developing nations in managing the Global Environment Facility (GEF),<sup>136</sup> and Article 20’s impact on the biodiversity protection responsibilities of developed nations vis-à-vis developing nations.<sup>137</sup> In concluding his remarks in opposition to the CBD, Senator Nickles stated:

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continue to lose billions of dollars a year in sales to patent pirates who operate in countries that lack adequate patent protection.

The proposed Convention on Biological Diversity would undermine the great progress that your Administration has made in encouraging other countries — most recently and notably Mexico and China — to strengthen their patent laws. The unclear language relating to “technology transfer” and equitable sharing appear to be code words for compulsory licensing and other forms of property acquisition. Your sensitivity to these matters is most gratifying.

Our industry considers your continuing strong support for protection of both the environment and intellectual property rights as an indication of your commitment to ensuring American competitiveness in the international arena.

*Id.*

<sup>133</sup> *Id.* at 8376. According to this June 8, 1992 letter to President Bush:

The biotechnology industry would support the treaty if its provisions were limited to conservation of biological diversity. Unfortunately, the treaty also contains provisions permitting developing countries to disregard the patent rights of biotechnology companies and mandates that companies transfer their inventions to developing countries on concessional, preferential, and most favorable terms. It would then allow both government institutions and the private sector of developing countries to market U.S.-developed biotechnology products in competition with companies that developed them.

\* \* \*

IBA represents 136 companies engaged in biotechnology research and development. Collectively our members represent more than 80% of all private biotechnology research investment in the U.S. Thank you for acting to protect the technology and the jobs thereby affected. Your stand is one of political courage and foresight.

*Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* According to Nickles, “[u]nder the Biological Diversity Convention, the signatory nations would manage the funds, presumably by majority vote” and “[t]he majority consists of developing countries, not developed countries like the United States.” *Id.*

<sup>137</sup> *Id.* According to Senator Nickles, “the language of article 20 of the convention conditions any responsibilities of the developing world to implement their commitments under the convention only after the industrialized nations first effectively [meet] their financial resource commitments.” *Id.* “In other words”, Nickles noted, “under the convention, the developing world does not have to act at all to protect biological diver-

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In my view, the Biological Diversity Convention is not an acceptable treaty, and would not withstand Senate scrutiny if it were signed by the President. One of the burdens of leadership is standing alone, of keeping your wits about you when all those around you are losing theirs.

Looking behind the simple descriptions of this convention, compels this Senator to conclude that the President is exactly correct in refusing to sign it.<sup>138</sup>

At the conclusion of his remarks, Senator Nickles cited, and entered into the record, two contemporaneous newspaper editorials which supported President Bush's decision not to sign the Convention on Biological Diversity: one editorial, from the *New York Times* was entitled "Not-So-Bad Boy of Biodiversity;"<sup>139</sup> the other editorial, from *USA Today* was entitled "Bush is Right Not to Sign Environmental Treaty."<sup>140</sup>

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sity until the industrialized countries have given them funds without oversight and technology without royalties." *Id.* Senator Nickles argued, in this regard, that "[t]he goal of the United States is, and should be, to encourage economic self-sufficiency and sustainable growth rather than prolong[ing] the tragic financial dependency of the developing countries embodied in this convention." *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (citing Editorial, *Not-So-Bad Boy of Biodiversity*, N.Y. TIMES, June 5, 1992). According to the editorial:

Critics are quick to cast the United States again as an environmental bad boy for refusing to sign the biodiversity treaty today at the world environmental summit meeting in Rio de Janeiro. But the Bush Administration should not be judged too harshly. The treaty will start a valuable conservation effort but it contains subsidiary clauses that could erode important American interests going far beyond saving endangered species.

The best course now for the U.S. is to warmly embrace the goals and most provisions of the treaty — and find ways to work around the nettlesome clauses. There will always be time to sign the treaty later if U.S. concerns prove exaggerated.

The need for a treaty is clear. The world's enormous store of life — some 10 million or more species of insects, microbes, plants, birds, animals and marine life — is shrinking. Species are disappearing at an unknown but apparently very high rate, largely because their habitats are being obliterated for development. Some people estimate that a quarter of the existing species may be wiped out over the next half-century. This would mean losing genetic stocks that might someday serve as the basis for better crops, medicines or other products.

The treaty that has emerged after arduous negotiations will at least begin to mitigate the mindless destruction. True, it sets no firm requirements for saving species and guarantees no level of funds. But it commits the signatories to develop national programs to conserve diversity, monitor species and establish protected areas.

What stuck in the craw of the Bush Administration were subsidiary clauses, especially those on financing. The treaty has been read by a few to give poor countries the right to determine how much money the rich countries must contribute.

More worrisome is that the money will be allocated to conservation projects through a financing mechanism controlled by the parties to the treaty, mostly the poor countries. Donor countries would have little control over how the money was spent, a sharp break with usual practice.

There are also clauses that the Administration believes threaten the protection of patents and intellectual property rights, others imply that organisms modified by biotechnology need special regulation to insure safety, the very opposite of the Administration's approach.

All these obstacles can be surmounted. The Administration could submit memorandums setting forth its understanding of somewhat ambiguous language on patents and biotechnology. And it could wait until the financing mechanism is chosen before concluding that the treaty is inadequate. President Bush badly needs to make his commitment to environmental issues more credible. Even if he says 'no' now in Rio, he can also keep the door open to affirming this important conservation effort.

Editorial, *Not-So-Bad Boy of Biodiversity*, N.Y. TIMES, June 5, 1992

<sup>140</sup> *Id.* at 8377 (citing Editorial, *Bush is Right Not to Sign Environmental Treaty*, USA TODAY, June 9, 1992). According to the editorial:

Biodiversity treaty may sound good, but it demands too much of the USA and too little of others.

President Bush may be all alone this week in refusing to sign an Earth Summit treaty aimed at protecting endangered wildlife species.

He also happens to be right.

The so-called biodiversity treaty is long on good intentions. It offers underdeveloped countries economic aid in exchange for limiting the environmental damage they cause. It would protect dying species that might someday provide new medicines and foods.

But the price demanded of the USA is too high, and the promise of meaningful results is too low. The treaty would:

Deny the USA and other industrial nations control of the dollars they donate to conservation.

If the USA is going to spend money on conservation, it should be able to assure that the money is spent effectively.

Unwisely and unnecessarily force the emerging U.S. biotechnology industry — the undisputed world leader — to share confidential information and property rights with other countries.

Lead to international regulation of the genetic-engineering industry, impeding progress and endangering U.S. leadership in the field.

The treaty does all this without setting firm requirements for saving species.

Too much sacrifice; too few results. Bush should resist pressure from home and abroad to sign the treaty and work for changes.

Other developed countries pressing Bush to sign have less at stake. In fact, some could gain by opening up U.S. biotech efforts.

They also make weak arguments. Britain and Japan, for instance, say they share some of the same concerns but plan to sign anyway. If they have doubts, they should work for change.

President Bush should take the lead in advancing programs to prevent species from dying out. He should be willing to spend U.S. money and expertise to help avert environmental devastation.

But he should keep his name off this document until rightful U.S. concerns are addressed.

Editorial, *Bush is Right Not to Sign Environmental Treaty*, USA TODAY, June 9, 1992



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On June 24, 1992 Congressman Lee Hamilton (D-IN) inserted a report of his attendance at the Rio Earth Summit into the *Congressional Record*.<sup>141</sup> While implicitly supporting President Bush's decision not to sign the CBD by observing that "[t]he President is correct when he says that the U.S. has done much to clean up its air and water and protect endangered species"<sup>142</sup> and that "[a]t the summit the U.S. . . . made the legitimate argument that environmental treaties should not give the poor countries the right to determine how much money industrialized nations should contribute to environmental protection and how assistance should be distributed,"<sup>143</sup> Congressman Hamilton provided an overall negative assessment of the Bush Administration's lack of international leadership at Rio by claiming:

Yet, the Bush Administration's foot-dragging in Rio allowed other major industrial countries to take the lead and to upstage it with stronger environmental commitments. The U.S. found itself isolated and forfeited its leadership role. Europe and Japan view protecting the environment as a challenge that will over time strengthen their economies, create jobs and sustain valuable resources. The U.S. tends to view the environmental protection measures as a threat to jobs.

The Rio conference showed that no other country is willing to take aggressive steps without top-level U.S. participation. It showed that international action on the environment is likely to succeed when the U.S. strongly backs it but founder when we oppose it or sit on the sidelines. Yet, the consequences of abdicating leadership on an international issue is that one loses influence over decision-making. If we fail to exercise vigorous leadership, others will make decisions for us, on the environment and on other issues of vital interest to us.<sup>144</sup>

On July 31, 1992, Senator Tim Wirth (D-CO) participated in Presidential politics by coming to the aid of the Democrat Vice Presidential nominee, Al Gore.<sup>145</sup> Senator Wirth con-

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<sup>141</sup> 138 CONG. REC. E 1966 (daily ed. June 24, 1992) (statement of Rep. Hamilton), available at <http://thomas.loc.gov>.

<sup>142</sup> *Id.* at E 1967.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> 138 CONG. REC. S 11048 (daily ed. July 30, 1992) (statement by Sen. Wirth), available at <http://thomas.loc.gov>.

trusted what he viewed as the positive role of Senator Gore at the Rio Summit, with the counterproductive role of the Bush Administration. In making this comparison, Senator Wirth relied on a July 15, 1992 Memorandum to EPA Employees by the Environmental Protection Agency's Administrator, William Reilly,<sup>146</sup> which he incorporated into the *Congressional Record*.<sup>147</sup> The Reilly Memorandum described his participation at Rio as "a bungee jump" where his line was cut by a political operative in the Bush White House.<sup>148</sup> Reilly's analysis of America's involvement in the CBD was as follows:

The United States decision not to sign [the Convention] was the subject of intense controversy and criticism. In public relations terms we never recovered from it. The decision was not based on opposition to the conservation elements of the agreement, which we support, but our financial and legal concerns related to a proposed regime to single out as especially unsafe biotechnology, and language suggesting that intellectual property rights are subordinate to other rights recognized in the Treaty. The financing provisions, leaving authority with the donee, are also unsound. The U.S. early on supported the need for a biodiversity convention so it was a perverse twist that we alone rejected it. In his speech to the Rio Conference, President Bush announced that the U.S. would exceed the conservation goals of the Convention on Biological Diversity . . . Incidentally, I have begun to hear . . . some claims that the biotechnology industry did not have fundamental objections to the Convention. Certainly elements of that industry convinced the State Department, Vice-President's office and White House that the Convention did threaten them; no companies communicated any contrary message, even privately.<sup>149</sup>

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<sup>146</sup> *Id.* at 11050 (citing *Memorandum from William Reilly to all EPA Employees Re: Reflections on the Earth Summit*).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* Reilly mentioned that his views on developing countries' responsibilities were impacted by the U.S. position on biodiversity. Specifically, Reilly noted: One key question that remains . . . is why so little [was] asked of the developing countries? The lessons of Eastern Europe — the importance of democracy and free markets — are clear. The lessons of Mexico's experience are also clear. In Mexico, a liberalized economy open to trade and investment has resulted in more than \$25 billion in new inflows of capital over the past few years, an amount that dwarfs any conceivable aid to which they might have aspired. And now Mexico is spending one percent of their GNP on the environment. We are in a new era where trade, not aid, will provide needed

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Moreover, Administrator Reilly posed another key question in his memorandum: “[W]hy did the United States play such a low-key defensive game in preparing for Rio? We assigned a low priority to the negotiations of the biodiversity treaty, were slow to engage the climate issue, were last to commit our President to attend Rio. We put our delegation together late and we committed few resources. No doubt this contributed to the negative feelings toward the United States.”

On October 8, 1992, — a month before the November Presidential Election — Senator Al Gore (D-TN) inserted a statement in the *Congressional Record* that was critical of the Bush Administration’s actions in Rio; particular criticism was targeted at the failure of President Bush to sign the CBD.<sup>150</sup> That same day, Senator Claiborne Pell (D-RI), as Chairman of the Senate Foreign Relations Committee, gave a report to his colleagues on the record of the Committee during the 102nd Congress;<sup>151</sup> Pell observed that “[p]rotecting the global environment is certain to be a major priority of the new administration and the new Congress”<sup>152</sup> and that he “hoped that we can strengthen international environmental law by signing and ratifying a biological diversity agreement,”<sup>153</sup> among other objectives.

### 3. *Debating Ratification, 1993-94*

With the election of William Jefferson Clinton as President and Al Gore as Vice President in November 1992, a new Democrat administration moved into the White House for the first time in twelve years.<sup>154</sup> President Clinton, reversing the course of his predecessor, signed the CBD on June 4, 1993.<sup>155</sup> Antici-

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resources. I was virtually alone in pointing to these realities but because of the U.S. position on biodiversity I simply was not heard.

<sup>150</sup> 138 CONG. REC. S 18236 (daily ed. Oct. 8, 1992) (statement of Sen. Gore), available at <http://thomas.loc.gov>.

<sup>151</sup> 138 CONG. REC. S17724 (daily ed. Oct. 8, 1992) (statement of Sen. Pell), available at <http://thomas.loc.gov>.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> BARONE & UJIFUSA, *supra* note 6, at 47-51 (discussing Clinton elections of 1992 and 1996).

<sup>155</sup> S. REP. NO. 104-21 (1995), available at <http://thomas.loc.gov>.

pating Clinton's signature, a flurry of bills were introduced at the outset of the 103rd Congress to bring the United States into compliance with the Convention.<sup>156</sup> On November 19, 1993 President Clinton transmitted the CBD to the Senate,<sup>157</sup> with an accompanying message<sup>158</sup> which stressed the negotiating history of the treaty,<sup>159</sup> the purposes and objectives of the CBD,<sup>160</sup> the role of economic incentives under the treaty,<sup>161</sup> and

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<sup>156</sup> See, e.g., HR 200, 103rd Cong. (1993), available at <http://thomas.loc.gov>; HR 869, 103rd Cong. (1993), available at <http://thomas.loc.gov>. In remarks inserted into the record by the sponsor of HR 869, Rep. Robert G. Torricelli (D-NJ), said that he "hope[d] this legislation will help pave the way for the signing of the Convention on Biological Diversity by the U.S. Government." 139 CONG. REC. E 286 (daily ed. Feb. 4, 1993) (statement by Rep. Torricelli), available at <http://thomas.loc.gov>.

<sup>157</sup> Convention on Biological Diversity, June 4, 1993, S. TREATY DOC. NO. 103-20 (1993).

<sup>158</sup> 139 CONG. REC. S 16572 (daily ed. Nov. 19, 1993), available at <http://thomas.loc.gov>.

<sup>159</sup> *Id.* According to President Clinton's Message: "The final text of the Convention was adopted in Nairobi by the Intergovernmental Negotiating Committee for a Convention on Biological Diversity (INC) on May 22, 1992. The INC was preceded by three technical meetings of an Ad Hoc Working Group of Experts on Biological Diversity and two meetings of an Ad Hoc Working Group of Legal and Technical Experts. Five sessions of the INC were held, from June 1991 to May 1992. The Convention was opened for signature at the United Nations Conference on Environment and Development in Rio de Janeiro on June 5, 1992." *Id.*

<sup>160</sup> *Id.* According to President Clinton's Message:

The Convention is a comprehensive agreement, addressing the many facets of biological diversity. It will play a major role in stemming the loss of the earth's species, their habitats, and ecosystems through the Convention's obligations to conserve biodiversity and sustainably use its components as well as its components as well as its provisions that facilitate access to genetic resources and access to and transfer of technology so crucial to long-term sustainable development of the earth's biological resources. The Convention will also create a much needed forum for focusing international activities and setting global priorities on biological diversity.

The objectives of the Convention as set forth therein are the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of benefits arising out of the utilization of genetic resources. These objectives are implemented through specific provisions that address, *inter alia*, identification and monitoring, *in situ* and *ex situ* conservation, sustainable use, research and training, public education and awareness, impact assessment, access to genetic resources, access to and transfer of technology, technical and scientific cooperation, handling of biotechnology and distribution of its benefits, and financing.

*Id.*

<sup>161</sup> According to President Clinton's Message:

Economic incentives will help all Parties achieve the environmental benefits of conservation and sustainable use of biological diversity. The Administration thus supports the concepts that benefits stemming from the use of genetic resources should flow back to those nations that act to conserve biological diversity and provide access to their genetic resources. We will strive to realize this objec-

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the role of the Convention in expanding and strengthening the “tightly woven partnership of Federal, State, and private sector” biodiversity protection measures in the United States.<sup>162</sup>

On April 12, 1994, the Senate Foreign Relations Committee reported that it had concluded hearings on the CBD.<sup>163</sup> On June 29, 1994 the Committee recommended to the Senate that it ratify the CBD<sup>164</sup> and on July 11, 1992, the Committee reported proposed *Senate Resolution 239* which expressed the sense of the Senate regarding conditions for continued United States participation and ratification of the CBD.<sup>165</sup>

Proposed *Senate Resolution 239* stated that it would be “the understanding of the Government of the United States of America with respect to provisions addressing access to and transfer of technology”<sup>166</sup> that “(a) ‘fair and most favorable terms’ in Article 16(2) means terms that are voluntarily agreed

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tive of the Convention. As recognized in the Convention, the adequate and effective production of intellectual property rights is another important economic incentive that encourages the development of innovative technologies, improving all Parties’ ability to conserve and sustainably use biological resources. The Administration will therefore strongly resist any actions taken by Parties to the Convention that lead to inadequate levels of protection of intellectual property rights, and will continue to pursue a vigorous policy with respect to the adequate and effective protection of intellectual property rights in negotiation on bilateral and multilateral trade agreements. In this regard, the report of the Department of State provides a detailed statement of the Administration’s position on those provisions of the Convention that relate to intellectual property rights.

*Id.*

<sup>162</sup> *Id.* According to President Clinton’s Message:

Biological diversity conservation in the United States is addressed through a tightly woven partnership of Federal, State, and private sector programs in management of our lands and waters and their resident and migratory species. There are hundreds of State and Federal laws and programs and an extensive system of Federal and State wildlife refuges, marine sanctuaries, wildlife management areas, recreation areas, parks, and forests. These existing programs and authorities are considered sufficient to enable any activities necessary to effectively implement our responsibilities under the Convention. The Administration does not intend to disrupt the existing balance of Federal and State authorities through this Convention. Indeed, the Administration is committed to expanding and strengthening these relationships. We look forward to continued cooperation in conserving biological diversity and in promoting the sustainable use of its components.

*Id.*

<sup>163</sup> 140 CONG. REC. D 355 (daily ed. April 12, 1994), available at <http://thomas.loc.gov>.

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<sup>164</sup> 140 CONG. REC. D 759 (digest ed. June 29, 1994), available at <http://thomas.loc.gov>.

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<sup>165</sup> 140 CONG. REC. S 8484 (daily ed. July 11, 1994), available at <http://thomas.loc.gov>.

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<sup>166</sup> *Id.*

to by all parties to the transaction”<sup>167</sup> and “(b) with respect to technology subject to patents and other intellectual property rights”<sup>168</sup> technology access and transfer under the CBD must be “consistent with the adequate and effective protection of intellectual property rights, and that Article 16(5) does not alter this obligation.”<sup>169</sup> Proposed *Senate Resolution 239* would also have conditioned ratification of the CBD on the following understanding of the “provisions addressing the conduct and location of research based on genetic resources”<sup>170</sup>: that “(a) Article 15(6) applies only to scientific research conducted by a Party, while Article 19(1) addresses measures taken by Parties regarding scientific research conducted by either by public or private entities,”<sup>171</sup> and that “(b) Article 19(1) cannot serve as a basis for any Party to unilaterally change the terms of existing agreements involving public or private U.S. entities.”<sup>172</sup> Moreover, to provide more control of financial aid by the United States to developing countries under the CBD, *Senate Resolution 239* proposed the understanding “that, with respect to Article 20(2), the financial resources provided by developed country Parties to meet the full incremental costs to them of implementing measures”<sup>173</sup> that meet developing country Convention obligations and “that are agreed between a developing country Party and the institutional structure [the Global Environmental Facility] referred to in Article 21.”<sup>174</sup> In addition, to circumscribe the financial powers of the Conference of the Parties to the CBD, which would meet periodically to review the implementation of the Convention, *Senate Resolution 239* proposed the understandings that “with respect to Article 21(1) the ‘authority’ of the Conference of the Parties with respect to the financial mechanism relates to determining . . . the policy, strategy, program priorities and eligibility criteria relating to the access and utilization of such resources,”<sup>175</sup> and “that the decision to be taken by the Conference of the Parties under Ar-

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

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ticle 21 . . . concerns 'the amount of resources needed' by the financial mechanism,"<sup>176</sup> while "nothing in Article 20 or 21 authorizes the Conference of the Parties to take [sic] decisions concerning the amount, nature, frequency or size of the contributions of the Parties to the institutional structure."<sup>177</sup> Proposed *Senate Resolution 239* also included the following set of conditions:

It is the sense of the Senate that, in formulating United States participation under the Convention on Biological Diversity, the President should ensure that:

- (1) any proposal for funding of United States participation under the Convention includes specific offsets within the United States budget to ensure the United States budgetary deficit is not increased;
- (2) a restructured Global Environmental Facility is the financing mechanism referred to in the Convention;
- (3) further decisions under the Convention provide adequate and effective protections for intellectual property and are not weaker than those provided under the General Agreement on Tariffs and Trade, under United States laws, or under the laws of other developed countries;
- (4) the United States has received a vote in all institutions, organizations, and mechanisms created under the Convention that is commensurate with the level of United States assessed contributions under the Convention;
- (5) the biological safety protocol is submitted to the Senate for its advice and consent to ratification; and
- (6) United States contributions under the Convention are solely dependent upon appropriations by the United States Congress is not bound by assessments of organizations created under the Convention.<sup>178</sup>

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* Senate Resolution 239 also conditioned ratification of the CBD on a technical understanding dealing with reasonable compliance of military warships, and military aircraft with the Convention and on another technical legal understanding focused on Article 3 of the CBD. *Id.*

<sup>178</sup> 140 CONG. REC. S 8485 (daily ed. July 11, 1994), available at <http://thomas.loc.gov>.

Finally, proposed *Senate Resolution 239* conditioned ratification of the CBD on the President of the United States providing the following periodic report:

It is the sense of the Senate that the President should provide a report one year after the date of entry into force of the Convention, and every year thereafter, to the Speaker of the House of Representatives and to the Chairman of the Committee on Foreign Relations of the Senate outlining the status of United States participation under the Convention and specifically explaining the status of the following:

- (1) The costs of United States participation under the Convention during the preceding one year period, and the total amount of projected expenditures under the Convention for the subsequent five year period.
- (2) The financing mechanism and whether it includes a restructured Global Environment Facility.
- (3) Whether decisions under the Convention provide adequate and effective protections for intellectual property and, specifically, whether those protections provided under the Convention are weaker than those protections —
  - (A) provided under United States laws,
  - (B) provided in other developed countries, or
  - (C) provided under the Uruguay Round of the General Agreement on Tariffs and Trade.
- (4) Whether the United States has received a vote in all aspects of the furtherance of goals under the Convention that is commensurate with the level of United States assessed contributions under the Convention.
- (5) The biological safety protocol and whether it was adopted in consultation with the United States Senate and the United States biotechnology industry.<sup>179</sup>

While the United States Senate did not get around to debating and voting on proposed *Senate Resolution 239*<sup>180</sup> during

<sup>179</sup> *Id.*

<sup>180</sup> See *supra* notes 165-178 and accompanying text.



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the summer of 1994, various discussions about international biodiversity protection policy transpired in July during Senate debate on the *Foreign Operations, Export Financing, and Related Agencies Appropriation Act of 1995*.<sup>181</sup> By way of illustration, a colloquy occurred between Senator Patrick Leahy (D-VT) and Senator Carl Levin (D-MN) on the need to promote environmental quality and biological diversity in American financial aid to the New Independent States (NIS) of the former Soviet Union.<sup>182</sup> In this regard, Senator Leahy observed that:

All Senators should be aware that the nations of the former Soviet Union have access to vast natural resources and unique environmental assets. As the United States and other nations of the world continue our efforts to help these countries develop sound market economies and stable democratic societies, we have an opportunity to do so in a way that protects and conserves the most vulnerable of these assets and promotes sustainable development of natural resources. Without a careful and comprehensive approach, the United States Government would be helping these nations to squander some of the most valuable assets they possess.

Russia, for example, contains thousands of unique species found nowhere else in the world, many of which are highly endangered. The Russian far East alone contains highly endangered Siberian tigers, Amur leopards, several eagle and crane species, sable, lynx, wild boar, Siberian musk deer, wild ginseng and much more. Economic deregulation and rapid development projects seriously jeopardize this biodiversity.<sup>183</sup>

Senator Levin responded to Senator Leahy with a plug for broader goals of biodiversity protection and sustainable development, stating:

I thank the Chairman. His Subcommittee [on appropriations] and other Members of Congress have urged the Administration to provide more timely and targeted assistance to the

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<sup>181</sup> HR 4426, 103rd Cong. (1994) (enacted).

<sup>182</sup> 140 CONG. REC. S 9021 (daily ed. July 14, 1994) (statement by Sen. Leahy), available at <http://thomas.loc.gov>.

<sup>183</sup> *Id.* Senator Leahy concluded this thought by noting: "Protection of the environment and conservation of biological diversity are essential to long-term sustainable development in the NIS, just as they are throughout the world. Protecting the environment and biological diversity is necessary for long-term economic stability and public health, as well as for recreation, cultural and aesthetic values." *Id.*

NIS. I hope he will also agree we should assure that even rapidly designed projects meet the longer term goals of protecting biodiversity and promoting environmental conservation, which are priorities of both the U.S. Government and governments of these new states.

The United States Government has recently underscored the importance of preserving the Earth's diverse plant and animal species in coordination with other nations by signing the Convention on Biological Diversity. The Senate Foreign Relations Committee voted overwhelmingly on June 29, 1994 to recommend ratification of this treaty.

The Clinton Administration has also reaffirmed its policy to make biodiversity conservation a high priority for all U.S. Government agencies and programs to promote sustainable development most recently in a Presidential Decision Directive last May [in 1993], and in the "Statement of the White House Office on Environmental Policy", of May 27, 1994.<sup>184</sup>

In debating the *Foreign Operations, Export Financing and Related Agencies Act of 1995*, however, Senator Don Nickles (R-OK) expressed concern about American financial assistance to the World Bank and the associated Global Environment Facility<sup>185</sup> until the GEF completed Congressionally mandated restructuring and reforms enacted in appropriations legislation during 1992-93.<sup>186</sup> This view was vigorously contested by Senator Patrick Leahy (D-VT), who inserted into the *Congressional Record* various letters of support for full funding of the GEF.<sup>187</sup> Moreover, a Republican, Senator Nancy Kassebaum (R-KS) also opposed cutting American funding to the GEF.

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<sup>184</sup> *Id.* (statement by Sen. Levin). Senator Levin continued his colloquy with Senator Leahy by contending: "Foreign assistance projects that may significantly affect biodiversity or the environment should proceed only after a rapid environmental assessment, to be prepared jointly with local specialists in the region. Assessments should address wildlife and plant diversity, as well as the project's effects on soil, water quality and carbon sequestration." *Id.* at S 9022. Moreover, Senator Levin urged that: "AID [the U.S. Agency for International Development] should also assess the economic value of non-timber products, such as medicinal and edible plants, animals for fur and meat, local consumption needs and non-timber industries such as ecotourism. Where alternative forms of energy are available or feasible, U.S. assistance projects should seek to use or develop them." *Id.*

<sup>186</sup> 140 CONG. REC. S 9058 (daily ed. July 15, 1994) (statement by Sen. Nickles), available at <http://thomas.loc.gov>.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at S 9058-60 (statement by Sen. Leahy).

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Senator Kassebaum justified her opposition to Senator Nickles' proposal by arguing in pertinent part:

Many, including myself, have had serious reservations about the original mandate, size, and focus of [the GEF]. Due to these concerns expressed by many, the United States did not fund the pilot program for the facility for 3 years. I now believe that many of these issues have been addressed, and addressed very effectively. After tough negotiations by both the Bush and Clinton negotiators, we now have the type of institution that we want — a transparent, accountable, cost-effective mechanism to address international environmental issues. Under intense American pressure:

The scope and costs of the GEF have been reduced from \$4 billion to the current size of \$2 billion;

The U.S. share is only \$430 million over 4 years, less than the per capita contributions of other countries;

The United States retains a great amount of control over the GEF's policies and projects; and

The focus of the GEF has been limited to projects with global environmental benefits, such as biodiversity.

I now believe that the GEF can become an important part of U.S. efforts to promote international cooperation on the environment. The United States won some major concessions in forming the GEF. If we want to keep this institution on the right track, it is important that our participation be comprehensive and aggressive to help shape the agenda and make GEF a constructive, focused, effective and coordinated institution addressing global environmental problems.<sup>188</sup>

During September and October of 1994, the United States Senate engaged in extensive informal debates on the merits of ratifying the CBD, yet, because of opposition to a unanimous consent order to bring up the Convention for formal consideration and a Senate ratification vote, the CBD languished, unratified, at the close of the 103rd Congress. This informal period of debate opened on September 13, 1994 when Senator Paul Simon (D-IL) inserted into the *Congressional Record* an

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<sup>188</sup> *Id.* at 9060-61 (statement by Sen. Kassebaum).

editorial from the *St. Louis Post-Dispatch* entitled "Senate Inaction Threatens Biodiversity Treaty."<sup>189</sup>

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<sup>189</sup> 140 CONG. REC. S 12825 (daily ed. Sep. 13, 1994) (statement by Sen. Simon) (inserting Howard G. Buffet, *Senate Inaction Threatens Biodiversity Treaty*, ST. LOUIS POST-DISP., Aug. 31, 1994), available at <http://thomas.loc.gov>. The editorial insert argued as follows:

A powerful, far-reaching agricultural issue was overlooked by the U.S. Senate, an issue that affects all humankind — the conservation and sustainable use of the world's animals, plants and ecosystems. The world is getting smaller and needs a global effort to preserve its biological diversity; unfortunately, due to inaction, the United States will not participate fully in this effort.

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Decisions affecting the rules of procedure and biosafety protocol will be made without our input or influence. The Senate may have left Washington without acting on this important issue, but make no mistake about it — the rest of the world will not stand still because we failed to act. This conference will move forward, and our decision not to be at the table reflects poorly on our commitment to future generations.

Every year, the U.S. government spends billions of dollars to idle fertile cropland in an effort to support prices. At the same time, countless developing nations subsidize intensive production on fragile soils. The resources necessary to produce food for the world's nearly 6 billion people are literally eroding daily, even in countries with strong conservation traditions.

We live in a world where fewer than 20 plant species produce 90 percent of the food supply, and we live in a country where more than 99 percent of commercial crop acres are planted with plant species introduced from foreign countries. We are dependent on our ability to constantly adapt varieties of plants and animals to overcome disease and enhance yields necessary to feed our rapidly expanding population. As a country, we rely on the world's supply of diverse plant and animal genetic material. World interdependence has never been more evident than in the struggle to produce food.

Given our country's position among world producers, does U.S. agriculture have anything to fear [of] the Convention on Biological Diversity? I think the answer is clearly no. Under the convention, we maintain sovereign control over our natural resources and are not subject to binding dispute resolution procedures. The convention provides a framework for developing stores of strategic genetic resources here and abroad.

The foreign germ plasma that boosted the soybean from a green manure crop 50 years ago to one of the nation's leading cash crops today is just one example of material that will find greater protection and development. Hybrid vigor in both plants and animals will be enhanced through increased cooperation under this agreement.

Our position as the world leader in biotechnology requires that we be in a position to educate the rest of the world about the safety of new products and the economic benefits of improved varieties. We cannot influence other nations on these issues if we remain isolated and refuse to embrace this attempt to generate additional understanding.

The greatest benefit to U.S. agriculture, however, might just as well accrue in the area of soil and water conservation. The convention will not force any constraining new conservation regulations on U.S. farmers. U.S. producers have for years been out front on voluntary adoption of conservation practices. Witness the extensive use of no-till farming and the reduction of nitrogen levels in row

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On September 30, 1990, six Republican Senators made statements on the Senate floor in opposition to the CBD. Senator Kay Bailey Hutchison (R-TX) was first to speak.<sup>190</sup> Senator Hutchison objected to Senate consideration and ratification of the CBD because: (1) the Conference of the Parties of the Convention “will meet after the treaty is in force to negotiate the

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crop systems. The benefits will come as developing nations reduce unsound farming practices and reliance on monoculture.

If the world’s food supply is to keep pace with population growth, the emphasis must shift to produce more on fertile, well-managed soils and less on fragile areas. The United States stands to gain significantly under such a shift. Any move to transfer the billions being paid to idle our most fertile acres into more productive ventures will not only add to the viability of agriculture but boost the U.S. economy as well.

The economy will not be the only area affected. The consumer, when looking at availability of products, maintaining reasonable price levels and having access to more nutritious varieties, will also be effected. Whether you observe from a global perspective and are concerned with general food security or whether you localize the impact, the conclusion is the same: Biodiversity is critical to our future.

Examples can vary greatly. When you walk into a store, one out of four drug-related items that you pick off the shelf is derived from a living organism, a product of biodiversity.

We don’t always think about biodiversity when eating french fries, but the connection is very real. At least 13 species of potatoes have been used in developing the varieties currently grown in the United States. And the next time you grab a handful of peanuts, remember that this popular food is largely dependent upon germ plasm from abroad.

In the 1970s, U.S. farmers were devastated by a severe disease epidemic referred to as southern leaf blight fungus. The salvation of our corn crop was found in diverse varieties resistant to the disease. It is the closet [sic] we have come to breakfast without cornflakes.

Today, the U.S. wheat crop is under siege from a foreign insect known as the Russian wheat aphid. Our only sources of resistance to this pest originated from countries of southwestern Asia and Eastern Europe.

Soybeans, one of the most important agricultural products and exports from the United States, could tremendously benefit from a stronger, disease-resistant variety. Other industries — from walnuts to grapes — depend heavily on the contribution made from biodiversity. The products affected cover every shelf in a grocery store. The consumer should look to the Senate to provide this biological diversity insurance policy.

It is quite clear that U.S. participation in the Convention on Biological Diversity offers no realistic threat to American agriculture. The real fear should come from a lack of cooperation among the world’s food-producing nations as we enter the 21<sup>st</sup> century.

*Id.*

<sup>190</sup> 140 CONG. REC S 13790 (daily ed. Sep. 30, 1994) (statement by Sen. Hutchison), available at <http://thomas.loc.gov>. Senator Hutchison indicated that “on August 5, 35 Senators signed a letter to the majority leader [Senator George Mitchell (D-ME)] . . . request[ing] that the Senate delay consideration of the [Biodiversity] [T]reaty until [the] concerns [of the 35 objecting Senators] were addressed.” *Id.*

details of the treaty” and this would contravene the Senate’s “constitutional responsibilities to concur in treaties;”<sup>191</sup> (2) the CBD prohibition against reservations;<sup>192</sup> (3) the financing mechanism of the Convention;<sup>193</sup> (4) the degree to which intellectual property is protected under the CBD;<sup>194</sup> (5) the voting weights and procedures for member states under the Treaty;<sup>195</sup> and (6) the effect of the Treaty on private property rights.<sup>196</sup>

Senator Conrad Burns (R-MT) voiced opposition to ratification of the CBD because he was “fearful of how this [T]reaty will effect Montana’s agriculture and our other natural resource industries.”<sup>197</sup> Characterizing President Clinton’s request for ratification as “yet another example of the Clinton administration’s war on the West,”<sup>198</sup> Senator Burns opined:

U.S. environmental laws are currently encroaching on our property rights. Provisions like the Endangered Species Act and wetlands laws are dictating what private land owners can and cannot do with their own land. This [T]reaty could give a panel outside the United States the right to dictate what our environmental laws should say. That is wrong.<sup>199</sup>

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* On the issue of private property, Senator Hutchison noted:

Private property is constitutionally protected, yet one of the draft protocols . . . proposes “an increase in the area and connectivity of habitat.” It envisions buffer zones and corridors connecting habitat areas where human use will be severely limited. Are we going to agree to a treaty that will require the U.S. Government to condemn property for wildlife highways? Are we planning to pay for this property?

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Article 10 of the [T]reaty states that we must “protect and encourage customary use of biological resources . . . that are compatible with conservation and sustainable use requirements” — as set by the [T]reaty. Whether our ranchers could continue to use public and private land for grazing could depend not just on the Secretary of the Interior’s latest grazing rulemaking, but on whether grazing is considered a compatible use for conservation under the [T]reaty. This biodiversity [T]reaty could preempt the decisions of local, State, and Federal lawmakers for use of our natural resources. The details that are left for negotiation could subject every wetlands permit, building permit, waste disposal permit, and incidental taking permit to international review.

*Id.* at 13790-91.

<sup>197</sup> *Id.* at S 13791 (statement by Sen. Burns).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

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Senator Larry Craig (R-ID) objected to the ratification of the CBD because “States’ rights and private property rights could be severely compromised.”<sup>200</sup> Specifically focusing on potential impact of the Convention on his home state, Senator Craig argued:

The Federal Government controls 63 percent of the land in the State of Idaho. Our economy and our lifestyle are sensitive to the pull and tug of environmental laws and their interpretation by Federal agencies — particularly so when it comes to the Endangered Species Act. The majority of the State’s land area is encumbered by one or another species listed under the ESA. Unfortunately, the ESA has become a tool for the groups attempting to stop logging, mining, and irrigation, and to remove cattle from the public range. They have used every nuance offered by the ESA and its interpretation in the courts to raise challenges and pursue litigation at an alarming rate. At this very moment, a Federal judge is considering a request for injunction which would shut down all activities on six national forests in Idaho. Environmentalists will stop at nothing in their zeal to extend the power of the ESA, regardless of the disruption and damage which results.<sup>201</sup>

Senator Jesse Helms (R-NC) repeated many of the concerns about ratifying the CBD previously raised by his colleague Senator Kay Bailey Hutchison (R-TX).<sup>202</sup> Senator Helms, however, focused his concern on the indeterminate quality of several Convention obligations for the United States, given the framework convention characteristics of the CBD:

This so-called treaty is scarcely more than a mere preamble, not a treaty. The real treaty — the essential nuts and bolts — is yet to be created at the conference of the parties. If the Senate precipitously ratifies this preamble falsely described as a treaty, it will have given away one of its major constitutional authorities and will have betrayed the trust of the American people.<sup>203</sup>

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<sup>200</sup> *Id.* (statement by Sen. Craig).

<sup>201</sup> *Id.*

<sup>202</sup> *See supra* notes 190-96 and accompanying text.

<sup>203</sup> 140 CONG. REC. S 13792 (daily ed. Sep. 30, 1994) (statement by Sen. Helms), available at <http://thomas.loc.gov>.

Senator Don Nickles (R-OK)<sup>204</sup> and Senator Malcolm Wallop (R-MT)<sup>205</sup> raised concerns about ratifying the CBD that paralleled the previously-aided criticisms of their colleagues.

On October 4, 1994 Senator Claiborn Pell (D-RI), Chairman of the Foreign Relations Committee, vehemently defended the CBD, noting his “strong support for Senate advice and consent to ratification of the Convention on Biological Diversity;”<sup>206</sup> Pell contended that the original concerns which had motivated President George H.W. Bush to refrain from signing the Convention in 1992 had been addressed by the Clinton Administration in proposed interpretation documents such that the pharmaceutical and biotechnology industries had come to support the Treaty.<sup>207</sup> Senator Pell attached several documents to his remarks, inserting them in the *Congressional Record* after his floor statement; among these documents were the following:

(1) a letter of conditional support for CBD ratification by the Biotechnology Industry Organization;<sup>208</sup> (2) a letter of support for CBD ratification by the CEO of Merck & Co., “the world’s largest research-intensive pharmaceutical products company;”<sup>209</sup> (3) a letter of conditional support for CBD ratification by the U.S. Council for International Business;<sup>210</sup> (4) a letter of conditional support for CBD ratification by the American Seed Trade Association;<sup>211</sup> (5) a letter and fact sheet of support for CBD ratification by Archer Daniels Midland Co.;<sup>212</sup> (6) a letter of support for CBD ratification by the American Corn Growers

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<sup>204</sup> *Id.* (statement by Sen. Nickles).

<sup>205</sup> *Id.* at S 13793 (statement by Sen. Wallop). Senator Wallop also raised a new concern: “Article 8 of this [T]reaty mandates that parties to the [T]reaty take appropriate action and special measures to conserve biological diversity in protected areas. What is a protected area? By the Treaty’s definition, it is a geographically defined area which is regulated to achieve specific conservation objectives. In other words, a protected area is whatever an anonymous Federal bureaucrat says it is.” *Id.*

<sup>206</sup> 140 CONG. REC. S 14046 (daily ed. Oct. 4, 1994) (statement by Sen. Pell), *available at* <http://thomas.loc.gov>.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at S 14047 (letter by Carl B. Feldbaum, President of BIO, dated Mar. 9, 1994 to Sen. Claiborne Pell).

<sup>209</sup> *Id.* at S 14048 (letter by P. Roy Vagelos, Chairman & CEO of Merck & Co., dated Mar. 23, 1994 to Sen. Claiborne Pell).

<sup>210</sup> *Id.* (letter from Abraham Katz, President of U.S. Council for International Business, dated April 11, 1994 to Sen. Claiborne Pell).

<sup>211</sup> *Id.* at S 14049 (letter from David R. Lambert, Executive Vice President of American Seed Trade Association, Inc., dated April 14, 1994 to Sen. Claiborne Pell).

<sup>212</sup> *Id.* at S 14049-50.



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Association;<sup>213</sup> (7) a letter from the U.S. Department of State attaching Clinton Administration's Responses to Questions about the CBD;<sup>214</sup> (8) a joint letter from U.S. Secretaries of In-

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<sup>213</sup> *Id.* at S 14050 (letter from Gary Goldberg, President American Corn Growers Association, dated Aug. 24, 1994 to Sen. Claiborne Pell).

<sup>214</sup> *Id.* at S 14050-51 (letter from Wendy R. Sherman, Assistant Secretary of State for Legislative Affairs, dated Aug. 8, 1994, to Sen. George J. Mitchell, Majority Leader with Attachment). The Attachment, prepared by the Clinton Administration, provided the following answers to key questions about the CBD:

1. Why does this convention prohibit state parties from making reservations of any of its provisions? The purpose of the 'no reservations' clause is to prevent parties from picking and choosing which provisions they are willing to accept.

2. Will the understandings set forth in the resolution of ratification protect the U.S. interpretation in the event of a dispute?

The United States is protected in the event of any dispute because the Convention does not require the United States to submit to binding dispute resolution. The understandings are an authoritative statement of the United States' interpretation of the Convention. They will be deposited with the United States instrument of ratification and will be circulated by the United Nations to all parties.

3. Will the U.S. vote in decisions taken under this convention be commensurate with its financial contribution to the funding mechanism?

The United States objective is a rule of procedure relating to the funding mechanism that fully protect its interests as major donor. The United States has supported a rule in the rules of procedure requiring that all decisions related to the funding mechanism be made by consensus. Only as a party will we be able to block consensus on the rules of procedure; as an observer we would have no such ability.

It should also be noted that the Global Environment Facility (GEF) currently operates the financial mechanism. The GEF is responsible for actual decisions on biodiversity project funding. The instrument restructuring the GEF also gives the United States a vote commensurate with our contribution.

4. Could the eradication of 'alien species which threaten ecosystems' called for by Article 8, affect U.S. livestock policies?

No. The Convention will not affect U.S. livestock policies. Cattle (as well as poultry, sheep, and hogs) are considered under the Convention to be 'domestic species' — not alien species — and thus not subject to Article 8(h).

5. Who will interpret 'as far as possible and appropriate,' a clause which appears in several places in the convention?

This phrase is a common one in international agreements. It is a phrase that protects, not restricts, the interests of parties. In this Convention the phrase was deliberately inserted in order to give each party substantial flexibility in determining how best to implement the Convention. The United States will decide for itself how it will implement the Convention and how it interprets the phrase 'as far as possible and appropriate.'

6. Will the United States be subject to mandatory dispute settlement?

No. Dispute resolution involving the United States under the Convention is limited to non-binding conciliation. Binding dispute resolution (either through arbitration or submission of the dispute to the International Court of Justice) is optional.

The United States will not opt for binding dispute resolution under the Convention.

7. How can the Senate, in fulfilling its Constitutional responsibilities to advise and consent, review provisions and processes of the treaty that are not included in the treaty, but will be decided at the Conference of Parties?

It is common practice in international agreements to assign certain functions to the Conference of the Parties. Under treaties such as this, the rules of procedure are always decided at the first Conference of the Parties, typically after the Senate has given advice and consent. Examples include the Vienna Convention for the Protection of the Ozone Layer; the Montreal Protocol on Substances that Deplete the Ozone Layer; the UN Framework Convention on Climate Change; the Antarctic Environmental Protocol; the Cartagena Convention (Caribbean); the SPREP Convention (South Pacific); CITES; London (Dumping) Convention; Convention for a North Pacific Marine Science Organization (PICES); Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean; and the Convention for the Conservation of Salmon in the North Atlantic Ocean.

In addition, the Administration stands ready to apprise, and seek the views of, the Senate Foreign Relations Committee and any other interested Members on the status of U.S. participation in the Convention whenever the Committee deems appropriate. This will enable the Senate to remain fully advised of key developments related to the Convention.

8. How will the ratification of this convention influence the Endangered Species Act, the National Environmental Policy Act and other domestic environmental legislation?

The conservation provisions of the Biodiversity Convention are broad, framework provisions. They deliberately leave to individual countries to determine how the Convention should be implemented, as far as possible and as appropriate for each country.

There are many ways that the United States could craft a statute and still remain in compliance with the conservation provisions. Thus, the Convention will not require any change to any U.S. statute, regulation, or program. No additional implementing legislation is required. At the same time, the Convention would not foreclose amendment of domestic environmental legislation.

9. Will the provisions regarding access to genetic resources (Article 15) impede United States access to germplasm and other genetic resources contained in international collection centers?

No. The United States and all other countries will continue to have open access to collections of the International Agricultural Research Centers of the Consultative Group on International Agricultural Research. The Convention should also serve to facilitate access to collections recently closed to us where some countries have been waiting for a mechanism to establish benefit sharing arrangements. Overall, the Convention will enhance access to germplasm.

10. By what means will the Conference of the Parties promote the transfer of technology to developing countries (Article 16)?

Following a dialogue with U.S. industry and others, we have developed an interpretation of the Convention and an approach for its implementation that we believe is fully consistent with U.S. public and private interests.

However, the Convention is clear: the Convention does not compel the involuntary transfer of technology to developing countries. The Convention promotes transfer of technology by encouraging voluntary, mutual agreements between the countries of origin of genetic resources and those entities that seek to commercially utilize those genetic resources.

11. Is it likely or possible that the Conference of Parties may call for a biological safety protocol that will require a license for the transfer of any biologically modified organism?

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terior, Agriculture and State, attaching a Memorandum of Record;<sup>215</sup> (9) a *Washington Post* editorial entitled “The Biodiversity Treaty;”<sup>216</sup> (10) a *New York Times* editorial entitled “Biodi-

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One of the many reasons the U.S. biotechnology industry and the Administration believe it is essential to promptly ratify the Convention is to ensure that any biosafety protocol — whether it includes a licensing requirement or not — is scientifically based, analytically sound, and does not place undue restrictions on U.S. exports of biotechnology products. Industry believes the United States can more effectively represent its interests in this regard as a party to a biosafety protocol with unacceptable provisions, the existence of a protocol among other countries could have significant adverse impacts on U.S. industry.

*Id.*

<sup>215</sup> *Id.* at S 14051-53 (joint letter from Bruce Babbitt, Secretary of the Interior, Mike Espy, Secretary of Agriculture, and Warren Christopher, Secretary of State, dated Aug. 16, 1994, to Sen. George J. Mitchell, Majority Leader with attachment). The attached Memorandum of Record detailed benefits to American agriculture of CBD ratification; private sector involvement in enhancing biological diversity; and assessment that the CBD may not be used in place of U.S. laws; an assessment that the CBD does not prevent amendment of American environmental legislation; an assessment that the Convention does not provide for a private cause of action; an assessment that the CBD provides for no binding dispute resolution; and a statement of the effect of amendments or protocols of the CBD on the United States. *Id.* at S 14052-53.

<sup>216</sup> *Id.* at S 14054 (Editorial, *The Biodiversity Treaty*, WASHINGTON POST, Sept. 26, 1994). The editorial stated:

One of the casualties of the mismanagement of this session of Congress and the current rush to adjourn could be the international Convention of Biological Diversity. It would be a major loss.

The Clinton administration signed the agreement in June of 1993; the Bush administration had declined. The principal goal is to preserve the present array of living species in the world, and diversity within each species. Scientists estimate that 20 percent of currently living plant and animal species could otherwise be lost by the year 2020. Much of the loss would occur through the destruction of forests and other development in the Third World. But the rest of the world would feel the effect. The United States, for example, is heavily dependent on plant strains from abroad to maintain the vitality of basic crops— [sic] corn, soybeans, wheat — and their ability to resist disease. The same is true for other food-producing countries.

The convention would seek to preserve not just the species themselves but international access to them. Safety and other standards could also be set for world trade in plant and animal strains produced through biotechnology, a subject of huge importance to U.S. industry. And because there are costs to conservation, richer countries, including the United States, would make contributions to help and induce poorer countries to conform.

The Senate Foreign Relations Committee approved the convention this June by 16 to 3. All Democrats and five Republicans — Richard Lugar, Nancy Kassebaum, Hank Brown, James Jeffords and Judd Gregg — voted aye. Three other Republicans — Jesse Helms, Larry Pressler and Paul Coverdell — voted no. Some agricultural groups then expressed alarm about some aspects of the pact, as have conservative organizations that see it as an environmental wedge and threat to U.S. sovereignty. Bob Dole and 34 other Republicans wrote majority leader George Mitchell asking that floor consideration be delayed until some questions could be answered. The administration provided answers; most of the agricultural groups have since withdrawn or muted their objections, and such in-

iversity Pact on the Ropes;"<sup>217</sup> and (11) a *Washington Post* editorial entitled "Biodiversity is Crucial to Our Future."<sup>218</sup>

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fluent agribusiness organizations as the Archer Daniels Midland Co. have joined the biotechnology and pharmaceutical industries in support. But a filibuster or possibly even the threat of one could still derail the convention.

The Republicans asked, among other things, whether the convention would preempt and force changes in U.S. law. The administration says U.S. law is already well in advance of what the convention requires. It also says the convention couldn't be used by environmental groups as a basis for domestic litigation, as some critics profess to fear. Nor would there be a lack of control over the U.S. financial contribution to the undertaking.

A first conference of the parties to begin the implementation of the convention is scheduled Nov. 28. The United States will have a delegation there no matter what, but plainly in a stronger posture if the Senate voted aye. Surely the Senate can find the means to brush aside the remaining weak objections and cast that vote before it goes home.

*Id.*

<sup>217</sup> *Id.* (Editorial, *Biodiversity Pact on the Ropes*, N.Y. TIMES, Sept. 26, 1994). The editorial stated:

Chances that the Senate will ratify an international agreement aimed at preserving the world's biological diversity are diminishing as fast as the organisms the pact is designed to protect. Republican opposition and Democratic lethargy are combining to frustrate approval of the biodiversity convention, thus keeping the U.S. out of step with most of the rest of the world in the fight to save a wide range of biological species and habitats.

The convention was one of the major treaties approved at the 1992 world environmental summit meeting in Rio de Janeiro. It sets no firm requirements to save species or habitats but commits the signatories to develop national plans aimed at doing so. The treaty also seeks to promote an equitable sharing of benefits between the developing nations that possess biological resources and the industrialized nations that seek to use them for medical or agricultural purposes. President Bush positioned the U.S. as an environmental outcast when he refused to sign the treaty because of ambiguous subsidiary clauses that seemed to threaten important American interests. Mr. Bush was right to be worried, and this page largely agreed with his reservations. One clause could be construed as giving poor countries control of the mechanism through which money would be raised and distributed for conservation projects. Other clauses looked as if they might threaten the protection of patents and intellectual property rights or impose undue restrictions, based on bogus safety concerns, on biotechnology exports.

Fortunately, these and other concerns have been addressed through clarifying interpretations issued by the Clinton Administration. President Clinton has signed the treaty and the Senate Foreign Relations Committee has strongly recommended ratification. Even some of the groups originally concerned about the treaty — notably the biotechnology and pharmaceutical industries — are now supporting prompt ratification. So are scientific and environmental organizations.

Even so, ratification has been held up by Republican opposition, triggered initially by Senator Jesse Helms, the ranking Republican on the Foreign Relations Committee, and then swelling to include 35 Senate Republicans, led by Bob Dole, the minority leader. The Republicans argue that the Administration's interpretations are not binding on other signatories and that some clauses could be con-

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strued to undermine this nation's ability to strike its own balance domestically between environmental values and competing interests.

The opponents fretted, for example, that clauses requiring nations to promote the protection of habitats and species might be used to push for 'absolute' protection of the environment in the U.S., at the expense of commercial or even recreational purposes. That seems a far-fetched leap from a vaguely worded treaty with lots of weasel words, especially since the Clinton Administration insists the treaty neither requires nor prohibits changes in American environmental laws.

The opposition has already delayed ratification beyond the deadline that would have allowed the U.S. to participate as a signatory at a critical organizing meeting in late November. Americans can still participate as observers. Better yet, if the Senate ratifies the convention, they could attend with the added influence of a belated signatory.

Delay is not only pointless; it could be harmful. The U.S. needs to join this effort not only to enhance the global environment, but for its own good as well. Otherwise, American leadership in biotechnology and agriculture may be threatened as other countries deny the U.S. access to their genetic and biological resources.

*Id.*

<sup>218</sup> *Id.* (Editorial, *Biodiversity is Crucial to Our Future*, WASH. POST, Oct. 3, 1994).

The editorial stated:

The Convention on Biological Diversity is the first comprehensive international agreement committing governments to conserve the earth's biological resources and use them in a sustainable manner. By producing clean water, oxygen, and food, biodiversity plays a critical role in maintaining the planet's life support systems.

The agreement is now before the Senate for approval. To date the Convention has been signed by over 160 countries and ratified by over 90, including the entire European Union, Japan, the United Kingdom, Germany, and France. The United States is one of the few industrialized nations yet to ratify the agreement. Unfortunately, the Biodiversity Convention has stalled in the Senate because of partisan politics. This must stop. Neither a Democratic or a Republican issue, the Convention is important to our nation as a whole, including U.S. business interests and agriculture.

Though the Convention is currently in limbo, the 103rd Congress is still in session, meaning the Senate still has time to consider the agreement and vote its approval.

The following are examples of the wide support the Convention has received from the environmental, business, and agricultural communities.

The Biotechnology Industry Organization (BIO), representing over 500 biotechnology companies, university labs, and others, 'strongly supports speedy Senate ratification' because the U.S. must be 'at the conference table' to protect U.S. interests in 'matters of importance to our economic future.'

BIO, the Pharmaceutical Manufacturers Association, and the American Seed Trade Association: 'As representatives of major U.S. industries which are successfully working to create new medicines, food, and agriculture products, plus a substantial number of jobs for U.S. citizens, we declare our support for the Biodiversity Convention . . . Senate ratification should proceed at the earliest possible time.'

Merck & Co., a U.S. pharmaceutical company, one of the largest in the world, urges 'support of a speedy ratification of the Convention,' noting that biodiversity has generated 'some of the greatest pharmaceutical breakthroughs of this century.'

October 8, 1994 was the swan song for efforts by proponents of ratification of the CBD before the adjournment of the 103rd Congress. Majority Leader, Senator George Mitchell (D-ME) expressed his frustration by stating that he was “disappointed that some Members of the Senate will not allow the Senate to complete its work on this important treaty which will help the other nations reach the levels of environmental protection that we have in the United States.”<sup>219</sup> Senator Mitchell continued his remarks by noting that “[a]s no document ever is, this treaty is not perfect,”<sup>220</sup> however, in his view “the treaty

New York Biotechnology Association: ‘. . .ratification of the Convention on Biological Diversity is a matter of prime importance to the further development of the biotechnology industry in the State of New York.’

Archer Daniels Midland Company, one of the largest agribusiness companies in the country, states that ‘. . .it is fundamentally important to American agribusiness, agriculture, and other industries that the United States include itself in this Convention. It will be a sad day for us if these meetings have to occur without any participation on our part. We see no downside for our country in ratifying this Convention.’

Farmers Union: ‘The National Farmers Union (NFU) and its 253,000 family farm members strongly urge you to ratify the Convention on Biological Diversity before you adjourn in October.’

The American Corn Growers Association ‘. . . believes that ratification of this treaty will be in the best interest of production agriculture. For U.S. agricultural interests to be addressed, we must first have a seat at the table . . . In addition, by being a party to the Convention, the United States will ensure continued access to genetic resources. This is important to agriculture because access to foreign germplasm for plant breeding programs for such crops as corn will advance our ability to provide quality products to our agricultural processors.’

American Soybean Association: ‘[We] hope for expedited consideration of the treaty.’

National Cooperative Business Association: ‘We believe that prompt consideration [or ratification] by the Senate in September is critical if U.S. interests are to be brought to bear on the implementation of the Convention. [We] hope that its approval is not delayed any further.’

American Farm Trusts represent thousands of farmers, rural residents, and others concerned with protection of farmland and conservation of natural resources. Ratification of the Biodiversity Convention would be a key step in the establishment of a sustainable national agricultural system, which is essential to the livelihood of the American farmer. Protection of biodiversity will help ensure the protection of strategic farmland — a primary resource for the future of American agriculture.

World Wildlife Fund: ‘The Biodiversity Convention is the first concerted effort by the world community to conserve the planet’s irreplaceable, but vanishing biological wealth. An enlightened self-interest, for the benefit of both present and future generations, should compel prompt ratification by the U.S. Senate.’

*Id.*

<sup>219</sup> 140 CONG. REC. S 15066 (daily ed. Oct. 8, 1994) (statement by Sen. Mitchell), available at <http://thomas.loc.gov>.

<sup>220</sup> *Id.*

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was able to be brought before us because of the determined efforts by the [Clinton] administration to address the legitimate concerns that have been raised — particularly with respect to finance, technology transfer, and biotechnology.”<sup>221</sup> Senator Mitchell went on to observe that “[b]iological resources underpin many sectors of the U.S. economy, including farming and the agriculture industry, and development of medicines, medical technology and biotechnology. Some estimate that biological resources contribute more than \$87 billion annually to our gross national product.”<sup>222</sup> Senator Claiborne Pell (D-RI), the Foreign Relations Committee Chairman, expressed his “regret that an objection was made to the majority leader’s unanimous consent request to bring up the Convention on Biological Diversity for Senate consideration.”<sup>223</sup>

Senator Pell lamented that:

[M]ost other countries have recognized the importance and benefits of the convention. Indeed, over 160 nations — including the entire European Union and Japan — have ratified the convention. Most of these countries will participate in the upcoming meeting of the convention as parties.

Because of Senate inaction, the United States will not. Because of Senate inaction, the United States — a world leader in the use of genetic resources in biotechnology agriculture, and pharmaceutical[s] — will attend the meeting as an observer.

To my mind, that is an untenable situation and one that I hope we can rectify. Under Senate rules, the Convention will be referred to the Committee on Foreign Relations. I can assure supporters that I will make action on the convention one of my priorities for the coming Congress.<sup>224</sup>

On October 8, 1994, Senator Patrick Leahy (D-VT), Chairman of the Agriculture, Nutrition and Forestry Committee,

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at S 15067. Various attachments were appended to the record by Senator Mitchell.

<sup>223</sup> *Id.* at S 15068 (statement by Sen. Pell).

<sup>224</sup> *Id.* (statement by Sen. Pell). See generally U.S. Senate Committee on Foreign Relations, S. REP. No. 104-21 (1994), available at <http://thomas.loc.gov> (discussing the fact that the Senate did not act on ratification of the Convention on Biodiversity during the 103rd Congress).

added to the regrets of some of his colleagues that the Senate did not ratify the CBD.<sup>225</sup> The nub of the problem, in Senator Leahy's view, was that "certain groups created a crisis where one doesn't exist"<sup>226</sup> in raising objections to Senate ratification of the CBD. To support this thesis, Senator Leahy attached an article from the *Chicago Tribune* which discussed certain conspiracy theorists as being behind objections to ratification of the CBD.<sup>227</sup>

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<sup>225</sup> *Id.* at S 15068.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* (attaching Jon Margolis, *Odd Trio Could Kill Nature Pact*, CHIC. TRIB., Sep. 30, 1994). The article noted as follows:

It was negotiated by Republicans and signed by a Democrat.

Its language was non-binding and its subject matter — the beauty of nature, the web of life and the love of learning — hardly seemed controversial. Environmental groups and big corporations all thought it was great.

So even in today's contentious political setting, few expected trouble for the Convention on Biological Diversity, more commonly known as the biodiversity treaty. But that was before it ran into a bizarre political trio: the internal dynamics of the Republican Party, the anti-environmental 'Wise Use' movement and political extremist Lyndon LaRouche.

Arising with unexpected fury, this opposition has stalled Senate ratification of the treaty and imperils it in the remaining days of the 103rd Congress.

Although there is little doubt the treaty would be approved if it got to the Senate floor, the opposition of some Republicans could keep it from getting there. Senate Minority Leader Bob Dole (R-Kan.) and 34 of his fellow Republicans have expressed 'a number of concerns' about the treaty in a letter to Majority Leader George Mitchell (D-Maine).

According to government officials and others involved in the ratification effort, Republican doubts about the treaty grew because of opposition from mainstream agricultural organizations.

These organizations, including the American Farm Bureau Federation, had some substantive questions about elements of the treaty. But they were also being pressured from the rank and file, which had been bombarded with anti-treaty information — much of it demonstrably incorrect — from 'wise use' groups, which get most of their money from mining, logging and other resource-using companies.

'Unfortunately, what we've seen is that certain groups tried to create a crisis where one doesn't exist,' said John Doggett, the Farm Bureau's director of governmental relations. Doggett remains unhappy about some elements of the treaty, but he said his organization is no longer opposing ratification.

But it was opposing the treaty early in August, which is when the serious opposition first came to the attention of the government officials responsible for the treaty. 'I was surprised,' said a State Department official. 'It really had not shown up on my radar screen.'

In an effort to discover the reasons for the opposition, government officials met with representatives of agriculture groups at the Washington offices of the Farm Bureau on Aug. 5, 1994.

According to two government officials, one participant held up and read part of an article that had been distributed by the American Sheep Industry Association.



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The article claims that the treaty, which has been ratified by 78 nations, was written by 'extremists' who believe that farming, logging, fishing and mining violate the concept of 'sustainable use' and who want to impose the 'religious philosophy' of 'biocentrism,' defined as 'the view that all species have equal rights.' It also contends that the treaty establishes a 'supranational body' that will override national sovereignty.

In fact, the treaty, which states that 'states have sovereign rights over their own biological resources,' was approved by negotiators appointed by President George Bush. Pressured by some in his own party, Bush did refuse to sign the treaty, but the U.S. scientists and diplomats who negotiated it have continued to support it. It was signed last year by President Clinton.

Although the article was not signed, Tom McDonnell of the sheep industry group confirmed that it was written by Rogelio (sometimes called Roger) Maduro. Maduro is an associate of LaRouche, the conspiracy theorist who was released in January from federal prison, where he was serving a sentence for fraud and conspiracy.

Maduro is associate editor of 21<sup>st</sup> Century, one of LaRouche's magazines, and he writes for another Executive Intelligence Review. A version of his attack on the biodiversity treaty appears in the Sept. 2, 1994 edition of that journal.

McDonnell said that when he distributed the article, which he intended only for other members of his organization, he did not know that Maduro was associated with LaRouche. He also said the Sheep Industry Association is not taking any position on ratification of the treaty.

There is no such document, said a member of the staff of the UN Environmental Program. 'We have a biodiversity treaty and a secretariate,' she said.

The Global Biodiversity Assessment is a process, just beginning, in which scientists from all over the world will monitor the world's biological diversity.

Neither the Farm Bureau's Doggett nor the other participants in the Aug. 5, 1994 meeting said that Maduro's article was the only cause, or even the main cause, of opposition to the treaty. 'It was non-trivial,' said one participant, 'but I'm not sure that it was pivotal. One of the guys from the cattlemen's association held it up to explain the kind of response they were getting from their people.'

According to this participant, the Washington lobbyists knew that the article was irrational 'but even if they didn't think these objections had any substance, how far ahead of their own constituents could they get.'

One government scientist familiar with the situation said that farmers and ranchers, especially in the West, are a receptive audience for conspiracy theories. 'They're all bent out of shape about the Endangered Species Act, property rights and environmental regulations,' he said. "Some of their objections to have legitimate roots, but it makes them receptive to these statements that are paranoid and irrational.'

One of the objections of the treaty, for instance, is that it defines sheep and cattle as 'alien species' in the natural ecosystem. This might seem credible because in academic zoology livestock are so defined. 'But not in law,' said the government scientist. 'They are domesticated species,' and are so labeled in Article 2 of the treaty.

Although some leaders of the 'wise use' movement have been associated with Rev. Sun Myung Moon and other extremists, they have so far steered clear of LaRouche. But Maduro attended a meeting of the Wise Use Leadership Conference in July.

This could pose a problem for Republicans, such as Dole who have grown increasingly friendly toward 'wise use' positions and leaders in the last few years. Although 'wise use' organizations are considered to be politically powerful only in New Mexico, Wyoming and Utah, they have been quietly gaining strength in

#### 4. *Resisting Ratification, 1995-2002*

The midterm congressional elections of November 1994 led to the surprising, and revolutionary, result that the Republicans gained control of both the U.S. House of Representatives and the U.S. Senate.<sup>228</sup> Such a result put the most vocal advocates of ratification of the CBD in the minority in the U.S. Senate, with Senator Bob Dole (R-KS) becoming Majority Leader<sup>229</sup> and Senator Jesse Helms (R-NC) becoming Chairman of the Foreign Relations Committee.<sup>230</sup>

Since 1995, Republicans have played a major role in shaping the environmental agenda and, in particular, the biodiversity agenda in the Congress.<sup>231</sup> The Democrats gained control of the Senate in May of 2001 when Vermont Senator James Jeffords defected from the Republican Party because of disputes with more conservative Republicans. The Senate, however, had not focused on environmental issues during 2001-2002, being preoccupied during the summer of 2001 on budgetary issues and since the September 11, 2001 terrorist attacks on America on domestic security issues.<sup>232</sup>

Since 1995, congressional debates and discussions, as well as biodiversity legislative proposals, have been characterized

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GOP circles as Republican leaders jockeying for the presidential nomination move to the right to get the approval of conservative political activists.

*Id.*

<sup>228</sup> MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS — 1996 xxx-xxiv* (1995) (discussing House and Senate elections of 1994).

<sup>229</sup> *Id.* at 523-26.

<sup>230</sup> *Id.* at 987-88.

<sup>231</sup> With Bill Clinton's re-election as President in 1996, the Clinton Administration, however, had continuing influence, through the start of 2001, in executive enforcement of domestic laws protecting endangered species and with regard to international environmental diplomacy. Moreover, federal government reports, issued throughout Clinton's presidency, continued to have an influence on biodiversity information and policy. See *e.g.*, U.S. DEPT. OF THE INTERIOR, NATIONAL BIOLOGICAL SERVICE, *OUR LIVING RESOURCES: A REPORT TO THE NATION ON THE DISTRIBUTION, ABUNDANCE, AND HEALTH OF U.S. PLANTS, ANIMALS, AND ECOSYSTEMS* (1995) (report providing a comprehensive and valuable analysis of the causes for decline of some species and habitats in the United States, while giving insight into successful management strategies that have resulted in recovery of other species and habitats, and identifying research needs by reviewing information gaps that must be filled). Interestingly, however, the Congress voted in 1995 to eliminate the National Biological Survey — the author of the previous report — and to fold its functions into the U.S. Geological Service. See H.R. CONF. REP. NO. 104-300 (1995), available at <http://thomas.loc.gov>.

<sup>232</sup> See generally, CONGRESSIONAL QUARTERLY, INC., *2001 CONGRESSIONAL QUARTERLY ALMANAC* (2002) (forthcoming).

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by deference to private property rights and restrictions on government power to protect endangered species and ecosystems. For example, the House Committee on Resources, with Congressman Don Young (R-AK) as the new Republican Chairman, submitted the proposed *Endangered Species Conservation and Management Act of 1995*<sup>233</sup> to the House for consideration in conjunction with a report recommending passage.<sup>234</sup> In the section-by-section analysis of the bill, the committee report discussed several ways that the proposed legislation would circumscribe the scope of biodiversity protection under existing law, while advancing economic concerns and states' rights.<sup>235</sup> The Clinton Justice Department issued a vigorous objection to the bill and the legislation did not become law.<sup>236</sup>

During the 104th Congress, defrocked Democrat Senate Committee Chairmen, such as Senator Claiborne Pell (D-RI) and Senator Paul Sarbanes (D-MD) were relegated to voicing effete protests on the floor of the Senate about how the Republican-controlled Senate had prevented consideration of the unratified Convention on Biodiversity.<sup>237</sup>

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<sup>233</sup> H.R. 2275, 104th Cong. (1995), available at <http://thomas.loc.gov>.

<sup>234</sup> H.R. REP. NO. 104-778 (1995),

<sup>235</sup> See, e.g., *id.* § 3 ("Section 3 specifically amends the findings, purposes, and policies of the ESA to state that economic impacts and private property rights are to be given much greater consideration while protecting species"; "The amendments made by this section are intended to set forth the principle that Federal agency action taken pursuant to the ESA shall not use or limit the use of privately owned property when the action diminishes the value of the property without payment of fair market value to the owner of private property"); § 105 ("makes it clear that 103 years of Congressional intent to defer to the States in matters of water administration and allocation and the creation of water rights under State law is not to be usurped by the implementation of the ESA"); § 302 ("amends ESA Section 4 . . . to mandate that scientific peer review of certain actions by the Secretary be conducted. Actions to be reviewed include listing and delisting decisions, designation of critical habitat, [and] a determination that an action is likely to jeopardize the continued existence of a species").

<sup>236</sup> See *id.* "U.S. Department of Justice, Office of Legislative Affairs Report." ("the Justice Department cannot support legislation that would render the Endangered Species Act unenforceable through enforcement loopholes and multiple opportunities for litigation"). See also *id.* "Dissenting Views" ("Of paramount concern are the bill's changes to the definitions of the terms 'harm' and 'species'. By limiting 'harm' to an action that 'proximately and foreseeably kills or physically injures an identifiable member of an endangered species', the legislation abolishes 90% of the ESA's authority to protect habitat. For example, this amendment would eliminate the ESA's ability to prevent commercial development of the entire winter feeding grounds of the highly endangered whooping crane while the birds were on their summer breeding grounds in Canada").

<sup>237</sup> See, e.g., 141 CONG. REC. S 16402 (daily ed. Oct. 31, 1995) (statement by Sen. Sarbanes); 142 CONG. REC. S11257, available at <http://thomas.loc.gov>.

During the remainder of the 1990s and into the new millennium up to the present, the United States Senate failed to call for the ratification of the CBD. What little direct or indirect reference Congress made to the Convention from 1997 forward carried, for the most part, the negative connotation that the CBD was a type of international undertaking that would compromise private property rights, national sovereignty and states' rights,<sup>238</sup> or was undesirable because of the cumbersome financial mechanism inserted in the Convention.<sup>239</sup> Moreover, Congress made scant mention of the Cartagena Biosafety Protocol to the CBD dealing with genetically modified organisms.<sup>240</sup> Whether this situation will change following the defection of Senator Jeffords (VT) from the Republican party in May of 2001, and the subsequent shift in committee leadership dynamics, remains to be seen. Moreover, it seems unlikely that the new President, George W. Bush, who took office in January of 2001, will lead an American effort to implement the CBD.

## II. UNDERSTANDING AMERICA'S RESPONSE

America's response to the CBD by officials of the federal government, from 1989 to 2002, is characterized by four inter-related themes: (a) institutional tension between the President and Congress concerning foreign affairs;<sup>241</sup> (b) conservative concern about the emerging configuration of international environmental law;<sup>242</sup> (c) American corporate interest in maximiz-

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<sup>238</sup> See, e.g., 143 CONG. REC. H 8543 (daily ed. Oct. 7, 1997) (statement by Rep. Emerson), available at <http://thomas.loc.gov>; *id.* at H 8545 (statement by Rep. Duncan); *id.* at E 2029-30 (daily ed. Oct. 21, 1997) (statement by Rep. Young) (attaching resolution from the Colorado and Kentucky legislatures); 144 CONG. REC. E 2001 (daily ed. Oct. 8, 1998) (statement by Rep. Chenoweth), available at <http://thomas.loc.gov>; 145 CONG. REC. E 298 (daily ed. Mar. 1, 1999) (statement by Rep. Young), available at <http://thomas.loc.gov>.

<sup>239</sup> See, e.g., 144 CONG. REC. S 2448 (daily ed. Mar. 23, 1998) (statement by Sen. Feingold), available at <http://thomas.loc.gov>.

<sup>240</sup> See, e.g., 146 CONG. REC. E 2072 (daily ed. Nov. 2, 2000) (statement by Rep. Kucinich), available at <http://thomas.loc.gov>. For background information concerning American involvement in drafting the Cartagena Biosafety Protocol see *supra* notes 24-30 and accompanying text.

<sup>241</sup> See *infra* notes 245-84 and accompanying text.

<sup>242</sup> See *infra* notes 285-307 and accompanying text.

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ing biotechnology profits;<sup>243</sup> and (d) complexity in resolving international physical and economic spillovers.<sup>244</sup>

#### A. INSTITUTIONAL TENSION BETWEEN THE PRESIDENT AND CONGRESS CONCERNING FOREIGN AFFAIRS

Both the vehement criticism by certain members of Congress of President George H.W. Bush's decision not to sign the CBD for the United States<sup>245</sup> in 1992, as well as the impassioned opposition by various members of Congress of President William Jefferson Clinton's action of directing the Convention to be signed in 1993 and submitting it for subsequent Senate ratification<sup>246</sup> should be viewed as predictable perturbations of the longstanding institutional conflict between the President, as head of state, and the Congress, as the national legislature, in conducting foreign affairs and asserting national sovereignty.<sup>247</sup> "Because specific constitutional references to foreign relations are sparse, much of the foreign affairs power has evolved from constitutionally implied powers and, perhaps, from extra-constitutional sources."<sup>248</sup>

It is clear that both President Bush's decision not to sign the CBD and President Clinton's decision to sign the Convention were supported by Article II of the Constitution which specifically empowers the President to make treaties — and, by implication, not to make treaties — with the concurrence of two-thirds of the Senate.<sup>249</sup> Similarly, it is clear that both the supporters of CBD ratification in the Senate, as well as those Senators who opposed ratification, were specifically empowered to provide their "advice" on the inherent wisdom of the United States consenting to the general and specific terms of the Convention.<sup>250</sup> Yet, various historical, legal-policy tensions sur-

<sup>243</sup> See *infra* notes 308-323 and accompanying text.

<sup>244</sup> See *infra* notes 324-25 and accompanying text.

<sup>245</sup> See *supra* notes 90-104 and accompanying text.

<sup>246</sup> See *supra* notes 190-205 and accompanying text.

<sup>247</sup> "The United States, in its capacity as a sovereign nation, must interact with other countries in the international realm, for the ability of a nation to conduct foreign relations is inherent in the concept of sovereignty." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (5th ed. 1995) 204 (footnote omitted) [hereinafter CONSTITUTIONAL LAW].

<sup>248</sup> *Id.*

<sup>249</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>250</sup> *Id.*

round the subject of the constitutional treaty power of the federal government which probably contributed to the ratification stalemate in the Senate regarding the CBD.

The first tension is historical: ever since the Philadelphia Constitutional Convention of 1787, Americans have vigorously debated the appropriate roles of various officials in entering international agreements. "The recurring conflict between the president and Congress over the treaty-making power is rooted in the doctrine of separation of powers, which is basic to the governmental structure of the United States."<sup>251</sup> During the Constitutional Convention it was, at first, "assumed that the existing power of Congress under the Articles of Confederation to approve treaties by a two-thirds majority vote would be transferred intact to the legislative branch of the new government."<sup>252</sup> Interestingly, "[c]ontinued legislative control of treaty-making was taken for granted" by the Constitutional Convention delegates "despite the fact that it was the exclusive prerogative of the executive in all other governments"<sup>253</sup> at the close of the 18<sup>th</sup> century. Alexander Hamilton, however, challenged the prevailing assumption of legislative exclusivity in treaty-making on June 18, 1787 by proposing an executive elected for life, who, "along with other powers, would have with the advice and approbation of the Senate, the power of making all treaties."<sup>254</sup> The fat was in the fire. Following Hamilton's proposal, the delegates devoted considerable attention and debate to the question of treaty-making power; "[s]everal attempts were made to alter the proportion of the Senate whose consent would be required and to add House [of Representatives] participation in treaty making."<sup>255</sup> The institutional tension continued with the experience of President George Washington, who was "confused"<sup>256</sup> by Senate action regarding proper procedures for arriving at "treaties with Indian tribes" as opposed to "treaties with European nations,"<sup>257</sup> and later put off by "the chilly reception he had received in the Senate cham-

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<sup>251</sup> CONGRESSIONAL QUARTERLY INC., 1 GUIDE TO CONGRESS (5th ed. 1999) 198 [hereinafter CQ GUIDE TO CONGRESS].

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* (internal quotation marks omitted).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 199.

<sup>257</sup> *Id.*

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ber”<sup>258</sup> in attempting to orally establish ground-rules for consultation with Senators on future treaties. Indeed, the entire course of American history, for over two hundred years up to the present, has been characterized by stormy relations between the President and the Congress over appropriate responsibilities attending the treaty making power.<sup>259</sup>

The second tension is procedural in nature: a rich American tradition of institutional conflict and disagreement exists over specific questions of how treaties should be negotiated, debated, voted upon, conditioned or reserved, and interpreted. The following issues are provided by way of selected, summary, illustration of some key substantive issues within this tradition. Enduring questions have entailed: (a) the right of the Senate to initiate treaty making by proposing negotiations to the President;<sup>260</sup> (b) the need for the Senate to confirm the President’s appointment of treaty negotiators;<sup>261</sup> (c) the validity of Senate or House advice to the executive by specifying the limits within which negotiations of international agreements were to operate;<sup>262</sup> (d) the appropriateness of Presidential selection of members of Congress as negotiators of treaties.<sup>263</sup> The

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<sup>258</sup> *Id.*

<sup>259</sup> *See id.* at 199-202 (discussing the experiences of various Presidents in dealing with both houses of Congress over the terms of treaties, implementing legislation, appropriations, and treaty-making procedures).

<sup>260</sup> *Id.* at 199. “Proponents have defended such initiatives as the right and duty of the Senate under the Constitution as a demonstration of national unity. Opponents have contended that for the Senate to make the first move was officious and disrespectful, and that it tended to shelter the president from responsibility in treaty making.” *Id.* 199-200 (internal quotation marks omitted).

<sup>261</sup> *Id.* at 201.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* “The first members of Congress selected to negotiate a treaty were Sen. James A. Bayard of Delaware and House Speaker Henry Clay. [President] Madison named them to help negotiate a treaty of peace with Great Britain in 1814. Both resigned their places in Congress on the ground that the two offices were not compatible.” *Id.*

Moreover, on at least *three* occasions resolutions were introduced in the Senate to prohibit members of that body from serving as treaty negotiators. The first resolution, introduced in 1870, was defeated after a heated all-night debate when it was turned into a question of confidence in President Grant. The second was occasioned by President McKinley’s appointment of three members of the Foreign Relations Committee to a commission to negotiate the Treaty of Paris in 1898. The Senate committee to which a resolution of protest was referred, hesitated to make a report that might have appeared to censure some of its own members, but it directed the chairman to visit the president and express the Senate’s strong disapproval.

Senate switched its position by expressing “resentment” of President Wilson’s failure to include any senators on a 1919 peace commission.<sup>264</sup> “After Wilson’s experience, the appointment of senators to important international conferences subsequently became more common,”<sup>265</sup> with “[s]uccessive administrations [in recent decades] follow[ing] the practice of including members of Congress on delegations to international conferences and involving members in negotiations,”<sup>266</sup> (e) the requirements of the Senate voting and debating procedures (i.e. whether a roll call vote on a treaty is appropriate and whether debate should be open to the public or conducted in secrecy);<sup>267</sup> (f) the wisdom and validity of Senate amendments to treaties after the completion of executive negotiations.<sup>268</sup> On two occasions in American history, the Supreme Court has upheld the power of the Senate to amend treaties: *Haver v. Yaker*<sup>269</sup> and *Fourteen Diamond Rings v. U.S.*<sup>270</sup> “One of the best known U.S. qualifications to an international agreement is the so-called Connally reservation to the compulsory jurisdiction clause of the statute of the International Court of Justice;”<sup>271</sup> (g) the wisdom and validity of Senate reservations,<sup>272</sup> declara-

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Theodore Roosevelt’s selection of Sen. Henry Cabot Lodge, . . . to serve on the Alaskan boundary tribunal led to the third attempt of the Senate to prohibit such service by senators. But a resolution opposing the selection was never acted upon.

*Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 202.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 202-03.

<sup>268</sup> *Id.* at 203. “The Constitution sets forth no procedures for, or restrictions on, amending treaties. But since the time of the Jay Treaty with Great Britain the Senate has claimed authority to modify treaties after completion of negotiations.” *Id.* “The wisdom of the Senate practice of amending treaties was questioned as early as 1805 by John Quincy Adams, who was then a senator from Massachusetts. ‘I think amendments to treaties imprudent’, Adams said in Senate debate. ‘By making them you agree to all the treaty except the particular you amend, and at the same time you leave it optional with the other party to reject the whole.’” *Id.* (endnote omitted).

<sup>269</sup> 76 U.S. 32 (1869).

<sup>270</sup> 183 U.S. 176 (1901).

<sup>271</sup> CQ GUIDE TO CONGRESS, *supra* note 251, at 203.

<sup>272</sup> *Id.* at 204. According to a recent Senate Foreign Relations Committee view, Senate “reservations” to a treaty “are presumed to be deliberate changes in the legal effect of treaty provisions, particularly as they affect the country entering the reservation.” *Id.* From the executives’ perspective, “the Senate’s alteration of treaties [by reservation] has become an increasingly serious problem because of the growing tendency to modify U.S. relations through multilateral treaties. Resubmission of a [revised] treaty to foreign governments — any of which may wish to alter other provisions



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tions<sup>273</sup> and understandings<sup>274</sup> as qualifications to consent of a treaty; and (h) the judicial interpretation of treaty law in juxtaposition with constitutional law and domestic federal and state laws.<sup>275</sup> Justice Holmes created an interpretational conundrum in his opinion for the *Court in Missouri v. Holland*,<sup>276</sup> where he suggested that the Supremacy Clause<sup>277</sup> meant that treaties were equal to the Constitution, even if they were not made in pursuance of it.<sup>278</sup> In *De Geofroy v. Riggs*,<sup>279</sup> Justice Field, in dicta, argued that the specific restraints of the Bill of Rights, and other similar constitutional restraints, limit the treaty power. Moreover, Justice Black, in the plurality opinion in *Reid v. Covert*,<sup>280</sup> issued dicta similar to Justice Field's *De Geofroy* dicta. "Given these [presumed] limitations on the scope of the treaty making power, unless treaties are contrary to the Constitution, they are equal in status to congressional legislation, and, as expressly provided in the text of the Constitution, the supreme law of the land."<sup>281</sup>

Concerned about the sweeping potential impact of the CBD on the American constitutional right that "private property [shall not] be taken for public use without just compensation,"<sup>282</sup> and the CBD's potential impact on domestic legal obligations to protect and protect biodiversity, several members of Congress balked at the prospect of having the United States commit to the Convention.<sup>283</sup> Relying on delay tactics, various

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of the treaty in view of U.S. changes — presents almost insuperable obstacles to final agreement." *Id.*

<sup>273</sup> *Id.* According to a recent Senate Foreign Relations Committee view, "declarations" are "statements of intent or policy which accompany ratification, but which are not directly related to provisions of the treaty itself." *Id.*

<sup>274</sup> *Id.* According to a recent Senate Foreign Relations Committee view, "understandings" are "statements of interpretation intended to clarify the legal effect of the agreement without necessarily changing it." *Id.*

<sup>275</sup> The federal courts interpret executive agreements and treaties as a matter of course. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 216 (1972). The Supreme Court affirmed its authority to construe international law in the *Paquete Habana*, stating: "International law is part of our law and must be ascertained and administered by the courts of Justice . . ." 175 U.S. 677, 700 (1900).

<sup>276</sup> 252 U.S. 416, 433 (1920).

<sup>277</sup> U.S. CONST. art. VI, cl. 2.

<sup>278</sup> CONSTITUTIONAL LAW, *supra* note 247, at 216-17.

<sup>279</sup> 133 U.S. 258, 266-67 (1890).

<sup>280</sup> 354 U.S. 1, 16 (1957).

<sup>281</sup> CONSTITUTIONAL LAW, *supra* note 247, at 217 (footnote omitted).

<sup>282</sup> U.S. CONST. amend V.

<sup>283</sup> *See, e.g., supra* notes 190-205 and accompanying text.

Senators successfully prevented full consideration of the CBD by allowing it to languish in the Foreign Relations Committee.<sup>284</sup>

## B. CONSERVATIVE CONCERNS ABOUT EVOLVING INTERNATIONAL ENVIRONMENTAL LAW

In 1972, international environmental law was a fledgling field with less than three dozen multilateral agreements.<sup>285</sup> Since 1972, the burgeoning field of international environmental law has expanded at an extremely rapid rate of growth, with “hundreds of international environmental instruments hav[ing] been concluded.”<sup>286</sup> Indeed, “[i]ncluding bilateral and multilateral instruments . . . there are close to nine hundred international legal instruments that have one or more significant provision addressing the environment.”<sup>287</sup> While the “international community’s learning curve as reflected in international environmental law is surprisingly steep,”<sup>288</sup> it appears that the United States Senate may be reaching “burnout” or “future shock”<sup>289</sup> in agreeing to ever more stringent and broad international environmental undertaking, like the CBD, by the United States.

It is likely, in this regard, that several members of the Senate have been and continue to be sympathetic to the critiques of domestic and international environmental commitments by the United States that have been raised in conservative policy studies. In the first place, some of these theorists challenge the continued existence of the domestic Endangered

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<sup>284</sup> Such a result is not unusual. “In early 1999 there were about fifty treaties and other international agreements awaiting [full Senate] action [and bottled up in the Foreign Relations Committee], including one that dated back to 1949.” CQ GUIDE TO CONGRESS, *supra* note 251, at 197.

<sup>285</sup> INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 3 (Anthony D’Amato & Kirsten Engel eds. 1996) [hereinafter INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY] (citing Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L. J. 675-84, 702-10 (1993)).

<sup>286</sup> *Id.* at 4.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 5.

<sup>289</sup> “Future shock” is a term derived from the book ALVIN TOFFLER, *FUTURE SHOCK* (1970). “[T]he disorientation and stress brought on by trying to cope with too many changes in too short a time.” ALVIN TOFFLER, *POWER SHIFT*, XIX (1990).

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Species Act,<sup>290</sup> let alone the CBD, because of what they perceive as perverse incentives created by the American statute. As argued by one recent conservative policy study, American “[p]roperty owners who expect to experience economic losses if their property is identified as ecologically important,”<sup>291</sup> under the Endangered Species Act, “are tempted to destroy that habitat or species population before public officials become aware of its existence.”<sup>292</sup> Thus, “[n]umerous analysts” have concluded that the “shoot, shovel and shut up dynamic largely explains why the Endangered Species Act . . . has failed to either stabilize listed populations or return a single species to health.”<sup>293</sup>

Second, some conservative theorists argue that the Endangered Species Act “which prevents private property owners from making certain uses of their land in order to secure the public good of biological diversity, should . . . be replaced since it provides no compensation to landowners for public takings.”<sup>294</sup> “Instead,” according to this view, “a federal biological trust should be established that would be funded out of general revenues”<sup>295</sup> and the “trust fund would be used to purchase conservation easements . . . from private landowners in order to protect the habitat of endangered species.”<sup>296</sup>

Third, some conservative commentators have questioned the validity of certain scientific principles underlying interna-

<sup>290</sup> 16 U.S.C. 1531, et. seq.

<sup>291</sup> CATO INSTITUTE, CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 107TH CONG. 485 (2001).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* (internal quotation marks omitted). See also CHARLES C. MANN & MARK L. PLUMMER, NOAH’S CHOICE: THE FUTURE OF ENDANGERED SPECIES 245 (1995) (arguing that the ESA has not provided an effective safety net for declining species, much less promoted species recoveries).

<sup>294</sup> *Id.* at 485-86.

<sup>295</sup> *Id.* at 486.

<sup>296</sup> *Id.* According to this perspective:

The virtue of such a reform is that landowners would have incentives rather than disincentives to protect species habitat. Moreover, the cost of biological preservation would become more transparent, which allows better-informed decision-making about the use of resources. Finally, such a reform would decriminalize the “ranching” of endangered species for commercial species. The ESA prohibits such practices out of a misguided belief that any commercial use of an endangered species inevitably contributes to its decline. Yet, the experience of the African elephant and other threatened species belies that concern and strongly suggests that, if private parties are allowed to own and trade animals as commodities, commercial demand is a critical component of population protection.

*Id.*

tional environmental treaties like the United Nations Framework Convention on Climate Change and the subsequent Kyoto Protocol.<sup>297</sup> By implication, therefore, these theorists might find flaws in the science underlying other international environmental treaties like the CBD.

Fourth, some conservative policy analysts criticize American strategic over-extension<sup>298</sup> in attempting to show global leadership<sup>299</sup> to try to “solve all the world’s problems.”<sup>300</sup> According to this view, which encompasses a challenge to considering the global environment a strategic vital interest,<sup>301</sup> it is folly to consider worldwide biodiversity preservation as a legitimate vital interest of the United States that is strategically important to the nation.<sup>302</sup>

Fifth, some conservative theorists look at the United Nations — the driving force behind the CBD — as a hyperactive organization that “has steadily sought to increase the scope and strength of its authority”<sup>303</sup> in a way that is antithetical with American interests.<sup>304</sup> Accordingly, those who espouse this argument, by implication, hold a jaundiced view of expansive international environmental lawmaking like the CBD.

Sixth, it is fair to assume that most conservative American theorists support a view of international environmental equity that supports “national sovereign rights to exploit resources within a country’s jurisdiction or control, combined with rights to shared or common resources (whether for natural resources or for pollution emissions) on a first-come, first served basis.”<sup>305</sup> Thus, this conservative equity ethic would be expected to have problems with new claims for international environmental equity like “sustainable development,”<sup>306</sup> which forms the foundation of the CBD.<sup>307</sup>

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<sup>297</sup> *Id.* at 499-511.

<sup>298</sup> *Id.* at 514.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 573.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 574-75.

<sup>305</sup> INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY, *supra* note 285, at 6.

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 8.

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## C. AMERICAN CORPORATE INTERESTS IN MAXIMIZING BIOTECHNOLOGY PROFITS

To fully understand the Senate's reticence in ratifying the CBD, it is crucial to appreciate the political salience of fostering American corporate interests in maximizing what they view as their legitimate biotechnology profits by developing and marketing useful biotechnology innovations for agriculture, pharmaceuticals and medicine. While some of the initial objections by American biotechnology firms to America's signing of the CBD<sup>308</sup> were softened, and ameliorated, by the Clinton Administration's efforts to obtain Senate ratification,<sup>309</sup> fundamental problems with the Convention's biotechnology regulatory provisions that emerged from Rio in 1992 probably continued to bother many members of the United States Senate.

First, "[t]he final text of the Convention" on biodiversity trade issues was "muddled, vague and inconsistent, even by the relaxed standards of international agreements."<sup>310</sup>

Second, the April 1993 proceedings of the expert panel established to implement the biotechnology regulatory articles of the CBD<sup>311</sup> — in Article 9 and Article 19<sup>312</sup> — would have opened up the possibility of international regulation of American biotechnology "even where research, development and use [of biotechnologies] were exclusively domestic."<sup>313</sup>

Third, reports concerning the climate of discussions in 1994 by the Intergovernmental Committee for the CBD revealed what one American commentator, writing in 1995, called "an irrational, paranoid and angry coalition."<sup>314</sup> Specific

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<sup>308</sup> See *supra* notes 132-33 and accompanying text.

<sup>309</sup> See *supra* notes 207-18 and accompanying text.

<sup>310</sup> David Downes, *New Diplomacy for the Biodiversity Trade: Biodiversity, Biotechnology and Intellectual Property in the Convention on Biological Diversity*, 4 *TOURO J. TRANSN'L.* 1, 8 (1993).

<sup>311</sup> Henry I. Miller, *Is the Biodiversity Treaty a Bureaucratic Time Bomb?*, *HOOVER INSTITUTION ESSAYS IN PUB. POL'Y* 5 (1995).

<sup>312</sup> "In Article 8, there is language calling for measures to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity." *Id.* at 3 (internal quotation marks omitted). Article 19 of the CBD mentions the possible "need for" an international biosafety protocol. *Id.*

<sup>313</sup> *Id.* at 7 (emphasis omitted).

<sup>314</sup> *Id.* at 8.

impressions of the international negotiating climate in 1994 for a biosafety protocol included the following observations: “widespread ignorance about biotechnology among developing country delegates, coupled with fears based on past experience with dumping of unsafe products from the North;”<sup>315</sup> “a contentious and polarized climate, in which the U.S. views were isolated and demonized;”<sup>316</sup> “grotesque and revisionist misrepresentations by a certain developing country about previous consensus on the need for a biosafety protocol;”<sup>317</sup> and “rabidly anti-biotechnology propaganda by three Non-Governmental Organizations (NGOs) which introduced a series of anti-biotechnology canards, misrepresentations and distortions as factual taken as gospel by the legions of uninformed.”<sup>318</sup>

Fourth, the CBD protocol procedure dealing with NGOs in Article 23, and “the mechanism for exclusion”<sup>319</sup> of NGOs by a vote of “one-third of the countries present”<sup>320</sup> appeared in 1995 “to preclude the participation of organizations that represent commercial mining, timber, agri-business, livestock, fishing, and energy interests.”<sup>321</sup> According to one commentator, writing in 1995:

Under such conditions of negotiation and deliberation, a rational result would be virtually impossible and the United States could be sandbagged into a scientifically bankrupt and anti-innovative regulatory scheme that would damage our biotechnology . . .<sup>322</sup>

Fifth, from the perspective of many individual United States senators in 1993-94 considering the wisdom of ratifying the CBD, the fact that a subsequent biosafety protocol did not have to be submitted to the Senate for separate advice and consent by the Clinton Administration<sup>323</sup> was probably an important concern militating against CBD ratification.

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<sup>315</sup> *Id.* (internal quotation marks omitted).

<sup>316</sup> *Id.* (internal quotation marks omitted).

<sup>317</sup> *Id.* (internal quotation marks omitted).

<sup>318</sup> *Id.* (internal quotation marks omitted).

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 8-9.

<sup>323</sup> *Id.* at 9.

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D. COMPLEXITIES IN RESOLVING INTERNATIONAL PHYSICAL AND ECONOMIC SPILLOVERS

Despite the upbeat and optimistic view of some commentators that the international community is capable and willing to tackle evermore ambitious international environmental problems through imaginative techniques of international lawmaking,<sup>324</sup> the devil is in the details. It is hard enough for a domestic sovereign nation like the United States to rationally and efficiently regulate physical and economic spillovers between the states within its borders.<sup>325</sup> Attempts at international regulation of physical and economic spillovers is, no doubt, at least an order of magnitude more complicated, however, than national regulation. So, it is not surprising that the proposed terms of the CBD generated great controversy, in general, and within the United States, in particular.

III. A VIEW TOWARD THE FUTURE

As American citizens and policymakers ponder the future of global biodiversity protection, on the eve of the World Summit on Sustainable Development in Johannesburg, South Africa, three overarching issues merit special consideration: (a) the importance of American leadership and engagement in global environmental affairs;<sup>326</sup> (b) the wildcard implications of the terrorist attacks of September 11, 2001;<sup>327</sup> and (c) pragmatic concerns.<sup>328</sup>

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<sup>324</sup> See, e.g., ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW xxxiii (1991) (foreword by Maurice F. Strong noting “[t]he power of international law as a regulatory and preventative tool cannot be overestimated”).

<sup>325</sup> ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW 266 (5th ed. 1999).

<sup>326</sup> See *infra* notes 329-70 and accompanying text.

<sup>327</sup> See *infra* notes 371-402 and accompanying text.

<sup>328</sup> See *infra* notes 403-26 and accompanying text. For discussion of the upcoming Johannesburg Summit, see generally DUNCAN BRACK ET AL., FROM RIO TO JOHANNESBURG: THE EARTH SUMMIT AND RIO+10 (Royal Institute of International Affairs Briefing Paper No. 19, March 2001). For further details, see <http://www.johannesburgsummit.org/index.html> (last visited Jan. 10, 2002).

## A. THE IMPORTANCE OF AMERICAN LEADERSHIP IN GLOBAL ENVIRONMENTAL AFFAIRS

Paul E. Hagen has asserted in a recent article:

In an era marked by rapid globalization, new systems of global economic and environmental governance are emerging that require the full engagement and participation of the world's largest economy and only remaining superpower. Many global environmental problems such as the impacts of climate change, the preservation of biological diversity, and trans-boundary air pollution demand multilateral responses that include the participation of the United States, one of the world's most knowledgeable problem-solvers. Unfortunately, while the United States continues to exercise leadership on international economic and security matters, it may be missing a historic opportunity to move governments closer to the goal of sustainable development.<sup>329</sup>

While the CBD and the CBD's Cartagena Protocol on Bio-safety are flawed,<sup>330</sup> it is folly for the United States to opt-out of an emerging international system of biodiversity governance. First, whether we like it or not, the emerging CBD regulatory system will directly impact trade by American corporations and products of biotechnology and will impact the access by American corporations to biological resources in other nations.<sup>331</sup>

Second, in spite of the reactionary view of some American conservative theorists,<sup>332</sup> environmental and natural resources issues are of strategic international importance to the United States.<sup>333</sup> This reality is borne out by recent government report, published by the National Foreign Intelligence Board under the authority of the Central Intelligence Agency (CIA). The report, entitled *Global Trends 2015: A Dialogue About the Fu-*

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<sup>329</sup> Hagen, *supra* note 30, at 28.

<sup>330</sup> See *supra* notes 30 and 166-79 and accompanying text.

<sup>331</sup> Hagen, *supra* note 30, at 28.

<sup>332</sup> See *supra* notes 298-303 and accompanying text.

<sup>333</sup> Hagen, *supra* note 30, at 28. See, e.g., MICHAEL T. KLARE, RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT (Metropolitan Books 2001); Daniel C. Esty, in *Pivotal States and the Environment*, THE PIVOTAL STATES: A NEW FRAMEWORK FOR U.S. POLICY IN THE DEVELOPING WORLD 290 (Robert Chase et al. eds., W.W. Norton & Co. 1999); Alexandre S. Timoshenko, *Ecological Security: Response to Global Challenges*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 413 (Edith Brown Weiss-ed., United Nations University Press 1992).



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*ture With Nongovernment Experts*,<sup>334</sup> identifies seven “major drivers and trends that will shape the world of 2015.”<sup>335</sup> These key drivers and trends are: (1) demographics, (2) natural resources and environment, (3) science and technology, (4) the global economy and globalization, (5) national and international governance, (6) future conflict, and (7) the role of the United States.<sup>336</sup> The report’s analysis of the natural resources and environmental driver is sobering:

Contemporary environmental problems will persist and in many instances grow over next 15 years. With increasingly intensive land use, significant degradation of arable land will continue as will the loss of tropical forests. Given the promising global economic outlook, greenhouse gas emissions will increase substantially. *The depletion of tropical forests and other species-rich habitats, such as wetlands and coral reefs, will exacerbate the historically large losses of biological species now occurring.*<sup>337</sup>

Moreover, the *Global Trends 2015* report notes that while “[t]he consensus on the need to deal with environmental issues will strengthen,”<sup>338</sup> especially “in the developed world,”<sup>339</sup> the “progress in dealing with them will be uneven.”<sup>340</sup> Furthermore, the report concludes that “[s]ome existing [international environmental] agreements, even when implemented, will not be able by 2015 to reverse the targeted environmental damage they were designed to address”<sup>341</sup> and, specifically, that some international agreements, “such as the Convention on Biodiversity, will fall short in meeting their objectives.”<sup>342</sup>

Third, while scientific and technological advances in the biotechnology field “[b]y 2015 . . . will be in full swing with major achievements in combating disease, increasing food produc-

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<sup>334</sup> NATIONAL INTELLIGENCE COUNCIL, CENTRAL INTELLIGENCE AGENCY, GLOBAL TRENDS 2015. A DIALOGUE ABOUT THE FUTURE WITH NONGOVERNMENT EXPERTS (2000) [hereinafter GLOBAL TRENDS 2015].

<sup>335</sup> *Id.* at 5.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 31 (emphasis added).

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

tion, reducing pollution, and enhancing the quality of life,"<sup>343</sup> various "biotechnologies will continue to be controversial for moral and religious reasons"<sup>344</sup> including technologies for "genomic profiling,"<sup>345</sup> "biomedical engineering,"<sup>346</sup> "therapy and drug developments,"<sup>347</sup> "genetic modification,"<sup>348</sup> and "DNA identification."<sup>349</sup> International controversy will be exacerbated if the United States insists on continuing to "go it alone" in developing and marketing biotechnologies in the international market place without feedback from other nations.

Fourth, "U.S. influence and credibility in key international forums is rapidly eroding, as other countries assume leadership while Congress and the Executive Branch"<sup>350</sup> continue to shirk making "the tough decisions and investments required to insure effective participation on the international [environmental] stage."<sup>351</sup>

Fifth, the loss of American influence and credibility in key international environmental forums,<sup>352</sup> by remaining in the background concerning international biodiversity governments, risks bleeding over into other international arenas such as the

<sup>343</sup> *Id.* at 33.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* (capitalization omitted). Genomic profiling, "by decoding the genetic basis for pathology . . . will enable the medical community to move beyond the description of diseases to more effective mechanisms for diagnosis and treatment." *Id.*

<sup>346</sup> *Id.* (capitalization omitted). Biomedical engineering, "exploiting advances in biotechnology and 'smart' materials, will produce new surgical procedures and systems, including better organic and artificial replacement parts for human beings, and the use of unspecialized cells (stem cells) to augment or replace brain or body functions and structures. It also will spur development of sensor and neural prosthetics such as retinal implants for the eye, cochlear implants for the ear, or bypasses of spinal or other nerve damage." *Id.*

<sup>347</sup> *Id.* (capitalization omitted). Therapy and drug developments "will cure some enduring diseases and counter trends in antibiotic resistance." Deeper understanding of how particular diseases affect people with specific genetic characteristics will facilitate the development and prescription of custom drugs." *Id.*

<sup>348</sup> *Id.* (capitalization omitted). Genetic modification "despite continuing technological and cultural barriers . . . will improve the engineering of organisms to increase food production and quality, broaden the scale of bio-manufacturing, and provide cures for certain genetic diseases. Cloning will be used for such applications as livestock production. Despite cultural and political concerns, the use of genetically modified crops has great potential to dramatically improve the nutrition and health of many of the world's poorest people." *Id.*

<sup>349</sup> *Id.* DNA identification "will continue to improve law enforcement capabilities." *Id.*

<sup>350</sup> Hagen, *supra* note 30, at 28.

<sup>351</sup> *Id.*

<sup>352</sup> *See supra* notes 350-51 and accompanying text.

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global economy and globalization,<sup>353</sup> national and international governance,<sup>354</sup> and conflict management.<sup>355</sup>

Sixth, Congressional failure to allow payment of America's share to the Global Environment Facility — currently approximately \$200 million in arrears — and the concomitant attachment of conditions to various appropriations “have had the effect of hindering rather than facilitating the conduct of U.S. environmental diplomacy.”<sup>356</sup>

Seventh, by failing to ratify and implement many of the major international environmental agreements — including the “Basel Convention on the Transboundary Movements of Hazardous Wastes, the Convention on Biological Diversity (including the recently concluded Biosafety Protocol), and the Law of the Sea Convention”<sup>357</sup> — America's “ability to influence their implementation”<sup>358</sup> has been lessened, and America's “credibility in negotiations now under way on new [international] agreements and policy initiatives”<sup>359</sup> has been compromised.

Eighth, an overwhelming percentage of Americans support their federal government's active involvement in world affairs, in general, and in international environmental agreements, in particular.<sup>360</sup>

Ninth, American engagement with the emerging international systems of biodiversity and biotechnology governance can reap real economic benefits for American businesses since evolving international standards “serve to harmonize environmental policies, priorities, and standards across borders, thereby allowing companies to pursue regional and global business plans and compliance strategies with greater cer-

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<sup>353</sup> GLOBAL TRENDS 2015, *supra* note 338, at 34-38.

<sup>354</sup> *Id.* at 38-48.

<sup>355</sup> *Id.* at 49-56.

<sup>356</sup> Hagen, *supra* note 30, at 28.

<sup>357</sup> *Id.* at 29.

<sup>358</sup> *Id.* Indeed, after an environmental treaty is in place, “the United States must participate in numerous conferences and meetings of the parties as well as technical group meetings in order to protect U.S. interests — regardless of whether the United States becomes a party to the agreement.” *Id.* at 32.

<sup>359</sup> *Id.* at 29.

<sup>360</sup> *Id.* “73 percent of Americans agreed with the statement ‘I regard myself as a citizen of the world as well as a citizen of the United States’ and “[a] whopping 77 percent felt that there should be more international agreements addressing environmental concerns.” *Id.*

tainity.”<sup>361</sup> Specifically, “[b]iotechnology companies . . . stand to benefit significantly from the timely implementation of the recently concluded Biosafety Protocol to the Convention on Biological Diversity governing transboundary shipments of living modified organisms, or LMOs.”<sup>362</sup> This is so because “[t]he protocol establishes new Advanced Informed Agreements procedures and risk assessment and management requirements for cross-border shipments of LMOs,”<sup>363</sup> while also “establish[ing] a framework and methodology for governments to follow in evaluating and approving the commercial use of LMOs at a time when most governments have just begun the process”<sup>364</sup> by starting to regulate “the introduction of genetically altered seeds, plants, commodities and other products.”<sup>365</sup>

Tenth, “[a]s evidenced by the [World Trade Organization] WTO ministerial meeting in Seattle [in 1999], future trade liberalization,”<sup>366</sup> which is in the interest of the United States, “may be linked to further accommodation and labor concerns in current and future trade accords.”<sup>367</sup>

Eleventh, “as the foremost power and most advanced nation [in the world] in environmental protection,”<sup>368</sup> the United States has a moral duty to actively participate as a party in shaping the evolving global biodiversity and biotechnology regime, rather than, as currently is the case, being involved in a secondary role as a non-party observer or advisor at international meetings and policy discussions on these subjects.<sup>369</sup>

Twelfth, from a purely selfish perspective, the United States cannot solve its endangered species and biodiversity problems alone. Effectively addressing these problems — as well as other domestic environmental problems — requires

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<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 33.

<sup>367</sup> *Id.*

<sup>368</sup> J. William Futrell & Linda Breggin, *Re-Engagement*, 17 ENVTL. F. 40 (2000).

<sup>369</sup> *Id.* In general, “[w]hether the United States can maintain leadership in [the globalization debate] while remaining outside so many treaty regimes is an important question. A growing perception in Europe and elsewhere is that the United States is powerful, but an irresponsible power.” *Id.* at 41 (internal quotation marks omitted).

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American cooperation with countries along its borders, in its region, and around the planet.<sup>370</sup>

## B. THE STRATEGIC WILDCARD IMPLICATIONS OF THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001

The United States is still absorbing the full meaning of the terrorist attacks of September 11, 2001 and the related anthrax incidents.<sup>371</sup> Beyond the enormous tragedies in loss to human life, complete or partial destruction of landmark American buildings, wrenching economic dislocations and general malaise and increased anxiety, the events of September 2001 have the potential of catalyzing a fundamental strategic shift in global affairs — including America's active involvement and ratification of the CBD, on the one hand, or America's further retreat and isolation from global biodiversity and biotechnology governance, on the other hand.

In broad strategic terms, the pre-9/11 global era might be viewed as exhibiting characteristics that the *Global Trends 2015* report described as a trajectory leading to a “pernicious globalization” scenario<sup>372</sup> or a “regional competition” scenario.<sup>373</sup> The *pernicious globalization scenario* is noted for the thriving of global elites, “but the majority of the world’s population fails to benefit from globalization.”<sup>374</sup> Moreover, under this scenario, “[p]opulation growth and resource scarcities place heavy burdens on many developing countries, and migration becomes a major source of interstate tension,”<sup>375</sup> while “[t]echnologies not only fail to address the problems of developing countries but also are exploited by negative and illicit net-

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<sup>370</sup> *Id.* at 44.

<sup>371</sup> See, e.g., Serge Schmemmann, *A Growing List of Foes Now Suddenly Friends*, N.Y. TIMES, Oct. 5, 2001 at B3 (discussing the immediate and radical shift in American relations with the rest of the world (from the terrorist attacks). On the possible implications of the terrorist attacks for environmental security, see Michael Penders & William L. Thomas, *The Specter of Ecoterror: Rethinking Environmental Security After 9/11*, NAT. RESOURCES & ENV'T, forthcoming January 2002).

<sup>372</sup> GLOBAL TRENDS 2015, *supra* note 338, at 83-4.

<sup>373</sup> *Id.* at 355. For another look at potential global scenarios focusing on environmental concerns, see generally ALLEN HAMMOND, WHICH WORLD?: SCENARIOS FOR THE 21<sup>ST</sup> CENTURY (1998).

<sup>374</sup> GLOBAL TRENDS 2015, *supra* note 338, at 83.

<sup>375</sup> *Id.* (original emphasis omitted).

works and incorporated into destabilizing weapons.”<sup>376</sup> Moreover, under the *pernicious globalization scenario*, “[t]he global economy splits into three: growth continues in developed countries; many developing countries experience low or negative per capita growth, resulting in a growing gap with the developed world; and the illicit economy grows dramatically,”<sup>377</sup> as “[g]overnance and political leadership are weak at both the national and international levels,”<sup>378</sup> while “[i]nternational conflicts increase, fueled by frustrated expectations, inequities, and heightened communal tensions”<sup>379</sup> and weapons of mass destruction “proliferate.”<sup>380</sup> The *regional competition scenario* is characterized by “regional identities sharpen[ing] in Europe, Asia and the Americas, driven by growing political resistance in Europe and East Asia to U.S. global preponderance and U.S.-driven globalization and each region’s increasing preoccupation with its own economic and political priorities.”<sup>381</sup> Moreover, under the *regional competition scenario*, “[t]here is an uneven diffusion of technologies, reflecting differing regional concepts of intellectual property and attitudes toward biotechnology,”<sup>382</sup> while “[r]egional economic integration in trade and finance increases, resulting in both fairly high levels of economic growth and rising regional competition”<sup>383</sup> and “[b]oth the state and institutions of regional governance thrive in major developed and emerging market countries, as governments recognize the need to resolve pressing regional problems and shift responsibilities from global to regional institutions.”<sup>384</sup>

In overarching strategic terms, it is conceivable that the seismic political, economic and cultural shock-waves of September 11<sup>th</sup> and its aftermath on the needs and priorities of the

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<sup>376</sup> *Id.* (original emphasis omitted).

<sup>377</sup> *Id.* at 83-4 (original emphasis omitted).

<sup>378</sup> *Id.* at 84 (original emphasis omitted).

<sup>379</sup> *Id.* (original emphasis omitted).

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* (original emphasis omitted).

<sup>383</sup> *Id.* (original emphasis omitted).

<sup>384</sup> *Id.* (original emphasis omitted). The regional competition scenario is further characterized by the following: “Given the preoccupation of the three major regions with their own concerns, countries outside these regions in Sub-Saharan Africa, the Middle East and Central and South Asia have few places to turn for resources or political support. Military conflict among and within the three major regions does not materialize, but internal conflicts increase in and around other countries left behind.” *Id.* (original emphasis omitted).

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United States to prevent and root out terrorism, while concomitantly leading an international coalition of nations to destroy the Taliban, Osama bin Laden and Al Qaeda and eventually to control other terrorist groups around the planet, could cause a shift from the present global scenarios of *pernicious globalization*<sup>385</sup> or *regional competition*<sup>386</sup> to either (1) a more benign “inclusive globalization” scenario<sup>387</sup> or (2) a more malignant “post-polar world” scenario.<sup>388</sup>

Under a more benign *inclusive globalization scenario*, catalyzed by the events of September 11<sup>th</sup> and its aftermath, “[a] virtuous circle develops among technology, economic growth, demographic factors, and effective governance, which enables a majority of the world’s people to benefit from globalization.”<sup>389</sup> Under this scenario, “[t]echnological development and diffusion — in some cases triggered by severe environmental or health crises — are utilized to grapple effectively with some problems of the developing world,”<sup>390</sup> “[r]obust global economic growth — spurred by a strong policy consensus on economic liberalization — diffuses wealth widely and mitigates many demographic and resource problems.”<sup>391</sup> Moreover, under the *inclusive globalization scenario*, “[g]overnance is effective at both the national and international levels”<sup>392</sup> and “[i]n many countries, the state’s role shrinks, as its functions are privatized or performed by public-private partnerships, while global cooperation intensifies on many issues through a variety of international arrangements,”<sup>393</sup> while “[c]onflict is minimal within and among states benefiting from globalization.”<sup>394</sup>

However, under a more malignant *post-polar world scenario*, triggered by the September 11<sup>th</sup> terrorist attacks and

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<sup>385</sup> See *supra* notes 374-80 and accompanying text.

<sup>386</sup> See *supra* notes 381-84 and accompanying text.

<sup>387</sup> GLOBAL TRENDS 2015, *supra* note 338, at 83.

<sup>388</sup> *Id.* at 84.

<sup>389</sup> *Id.* at 83.

<sup>390</sup> *Id.* (original emphasis omitted).

<sup>391</sup> *Id.* (original emphasis omitted).

<sup>392</sup> *Id.* (original emphasis omitted).

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* (original emphasis omitted). The inclusive globalization scenario is further characterized by the following: “A minority of the world’s people in Sub-Saharan Africa, the Middle East, Central and South Asia, and the Andean region — do not benefit from these positive changes, and internal conflicts persist in and around the countries left behind.” *Id.*

their aftermath, in conjunction with American reaction, "U.S. domestic preoccupation increases as the U.S. economy slows, then stagnates,"<sup>395</sup> while "[e]conomic and political tensions with Europe grow, the U.S.-European alliance deteriorates as the United States withdraws its troops, and Europe turns inward, relying on its own regional institutions."<sup>396</sup> Furthermore, under this unfortunate scenario, "national governance crises creates instability in Latin America, particularly in Columbia, Cuba, Mexico, and Panama, forcing the United States to concentrate on the region;"<sup>397</sup> "Indonesia also faces internal crisis and risks disintegration, prompting China to provide the bulk of an ad hoc peacekeeping force;"<sup>398</sup> "[o]therwise, Asia is generally prosperous and stable, permitting the United States to focus elsewhere."<sup>399</sup> Moreover, pursuant to the *post-polar world scenario*, "these geostrategic shifts ignite longstanding national rivalries among the Asian powers, triggering increased military preparations and hitherto dormant or covert [weapons of mass destruction] programs,"<sup>400</sup> while "[r]egional and global institutions prove irrelevant" to the evolving global conflict situation,<sup>401</sup> and "[g]iven the priorities of Asia, the Americas, and Europe, countries outside these regions are marginalized, with virtually no sources of political or financial support."<sup>402</sup> By implication, under this scenario international environmental governance, like the CBD, withers and dies.

### C. SOME PRAGMATIC SUGGESTIONS

What is to be done by those who would nudge the United States toward a more engaging, pro-active, environmental diplomatic posture — with the hope that America would eventually ratify the CBD, thereby becoming a party to the Convention? In the spirit of pragmatic reasoning that acknowledges

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<sup>395</sup> *Id.* (original emphasis omitted).

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* (original emphasis omitted).

<sup>398</sup> *Id.*

<sup>399</sup> *Id.* "Korea's normalization and *de facto* unification proceed, China and Japan provide the bulk of external financial support to Korean unification, and the United States begins withdrawing its troops from Korea and Japan." *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*



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the wisdom of Shakespeare's vision that "[t]here is nothing either good or bad, but thinking makes it so,"<sup>403</sup> and the pragmatic philosopher who "is a debunker of metaphysical and other occult entities, of philosophical foundations such as the real and the ideal, and of essentialist concepts,"<sup>404</sup> I offer the following succinct suggestions.

*1. Address the Property Rights Concerns of American Critics of Government Overreaching*

The administration and Congress should rethink and reform the Endangered Species Act to ameliorate its impact on American private property owners by expanding the scope of sensible, non-coercive habitat conservation plans and by increasing just compensation funding.<sup>405</sup>

*2. Reassess the Current Sprawling Structure of International Environmental Law and Institutions*

"The United States should lead an international assessment of the current global and regional structure of international environmental law and supporting institutions" with an eye toward consolidating and streamlining the multiple "existing convention secretariats under a better-organized UNEP or perhaps a new World Environmental Organization."<sup>406</sup>

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<sup>403</sup> WILLIAM SHAKESPEARE, Hamlet to Rosencranz in *Hamlet*, Act II, sc. ii, ll. 251-252.

<sup>404</sup> RICHARD A. POSNER, *OVERCOMING LAW* 288 (1995). Posner contends, in this regard, that "[i]t is a lesson particularly worth emphasizing [that] . . . legal reasoning is [unpragmatically] a bastion of dichotomous classifications that oversimplify social reality and confuse local, transient, sometimes uninformed public opinion with durable . . . reality." *Id.*

<sup>405</sup> See generally, A.D. Tarlock, *Local Government Protection of Biodiversity: What is its Niche?*, 60 U. CHI. L. REV. 555 (1993) (discussing the scientific bases of biodiversity and the legal issues of takings and habitat conservation plans).

<sup>406</sup> Hagen, *supra* note 30, at 37.

*3. Reform the Endangered Species Act to Concentrate on Ecosystems and Synoptic Biodiversity Protection While Engaging in Ongoing Diplomacy to Amend the CBD to Make its Norms Come Closer to the Reformed American Standard*

The current single species/costs-be-damned approach of the Endangered Species Act is outmoded and ripe for reform. The administration and Congress should engage in legislative efforts to overhaul the Endangered Species Act by focusing its domestic legal protections and programs on ecosystems and biodiversity as a whole, while instituting a triage system to respond to the current American state of biodiversity loss in a cost-efficient manner.<sup>407</sup> Concomitantly, the administration and selective members of Congress should join in initiating diplomatic overtures to the CBD Secretariat and key national governments to propose an amended CBD that would resemble the reformed American standard, with diplomatic advocacy that a more rational, cost-effective international approach to biodiversity protection would have a better prospect of working on the global level and of being ratified by the United States Senate.<sup>408</sup>

*4. Expand and Upgrade the Funding for American International Environmental Diplomacy*

As cogently argued by Paul E. Hagen, “[t]he dramatic increase in workload that has accompanied the recent expansion of international environmental treaty-making requires that both the Executive Branch and Congress increase the resources”<sup>409</sup> of federal agencies responsible for environmental diplomacy, in general, and biodiversity protection and biotechnology regulation in particular. Key agencies, in this regard, are the State Department, EPA, U.S. Trade Representative, and the Department of the Interior.<sup>410</sup>

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<sup>407</sup> See generally James Drozdowski, *Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts*, 45 CASE WEST. L. REV. 553 (1995) (urging a concentration on ecosystems and biodiversity as a whole and a move away from the single-species approach; counseling a “triage system” to respond to the current state of biodiversity loss in a cost-efficient manner).

<sup>408</sup> Hagen, *supra* note 30, at 37.

<sup>409</sup> *Id.* at 36-38.

<sup>410</sup> *Id.* See also Futrell & Breggin, *supra* note 368, at 41 (reporting comments of

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5. *Champion Direct Approaches to Achieve the Preservation of Biodiversity While De-emphasizing Indirect Approaches*

As demonstrated in the recent work of economists Paul J. Ferraro and R. David Simpson, “[m]ounting evidence suggests . . . that direct conservation measures [as opposed to indirect approaches] are generally most effective”<sup>411</sup> in preserving biodiversity Diplomacy and , therefore, should champion “[d]irect approaches,”<sup>412</sup> that “pay for land to be protected,”<sup>413</sup> such as purchases or leases,<sup>414</sup> easements,<sup>415</sup> and concessions,<sup>416</sup> over “[i]ndirect approaches”<sup>417</sup> that “support economic activities that yield habitat protection as a by-product.”<sup>418</sup>

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former Deputy Assistant Secretary of State for the Environment Brooks B. Yeager that in his “division of the State Department”, as of 2000, “we are dealing with five times the number of [international environmental] agreements, bilateral engagements and treaties, and negotiations and technical issues with the same size staff we had a decade ago”).

<sup>411</sup> Paul J. Ferraro & R. David Simpson, *Cost-Effective Cost Conservation: A Review of What Works to Preserve Biodiversity*, RESOURCES 17, 20 (Issue 143, Spring 2001).

<sup>412</sup> *Id.* at 18.

<sup>413</sup> *Id.*

<sup>414</sup> *Id.* “Land is acquired for parks or reserves.” *Id.*

<sup>415</sup> *Id.* “Owners agree to restrict land use in exchange for a payment.” *Id.*

<sup>416</sup> *Id.* “Conservation organizations bid against timber companies or developers [for example] for the right to use government-owned land.” *Id.*

<sup>417</sup> *Id.* “Indirect approaches support economic activities that yield habitat protection as a by-product.” *Id.* As noted by the authors:

Ecofriendly enterprises have proved profitable in many parts of the world . . . so subsidies are not always required. Many millions, if not billions, of dollars have been devoted to assisting ecofriendly enterprises [on an indirect basis], however. The wisdom of these [indirect] subsidies is suspect for a number of reasons.

First, such subsidies are generally an inefficient way of accomplishing a *conservation* objective. Consider two options facing an organization that wishes to preserve a certain area of land. First, it could pay for land conservation. If an ecofriendly enterprise can profitably be operated on the land, the conservation organization could sell a concession to operate the enterprise. The *net* cost of conservation under this option would be the cost of buying the land less the income received from the concession.

Under the second option, the conservation donor would subsidize the ecoentrepreneur by, for example, investing in hotel facilities to be used by tourists. The ecoentrepreneur would then acquire land for the ecotourism facility. The conservation donor may be able to motivate the protection of more land by providing a higher subsidy. The conservation organization’s net cost of conservation under this option would be the value of the subsidy it offers.

The second approach is more expensive. The basic principle at work is that “you get what you pay for,” and the cheapest way to get something you want is to pay for *it*, rather than things indirectly related to it. While it is extremely difficult to estimate reliably the earnings of ecofriendly projects, we have been able to construct a number of examples that demonstrate dramatic differences in costs under the alternative approaches. The cost of the direct approach can be no greater

6. *Provide Greater Attention to and Emphasis to Nonindigenous Species' Impact on Biodiversity*

The Harvard biologist, E.O. Wilson in his 1992 book, *The Diversity of Life*, describes introduction of alien species and diseases carried by alien species as among the most significant of the "mindless horsemen of the environmental apocalypse."<sup>419</sup> Indeed, nonindigenous species represent the second most common cause of endangerment in the United States.<sup>420</sup> The de-

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than the forgone earnings that would have arisen from land conversion. If any earnings can be generated from ecofriendly activities, they can be subtracted from the cost of protection in computing the net cost of conservation. The cost of the indirect approach can, on the other hand, be several times higher than the cost of outright purchase or lease.

A number of other considerations also weigh against indirect approaches.

There is no guarantee that subsidizing ecofriendly activities will motivate more conservation. Organizations offering such subsidies often assume their effects will be positive, but if, for example, nicer hotel facilities induce would-be ecotourists to spend more time in their rooms than outdoors, the investments would prove counterproductive.

Activities intended to be ecofriendly can have unintended consequences. Careless tourists may damage the sites they visit. Projects to commercialize local collection of forest products may induce overharvesting, or encourage local people to cultivate particular plants at the expense of their regions' broader diversity.

Integrated conservation and development projects may fail to achieve development objectives. Many developing nations would be better served by broader investments. Spending on public health or primary education is likely to pay greater dividends than training specialists in taxonomy or hotel management.

*Id.* at 18-19.

<sup>418</sup> *Id.* at 18. Examples of indirect approaches include:

Payments to encourage land use activities that yield habitat protection as a by-product. Examples include:

Subsidies to ecofriendly commercial ventures. Subsidies assist ecotourism, bioprospecting, and nontimber forest product entrepreneurs with facility construction, staff training, or marketing and distribution.

Payments for other ecosystem services. Payments for carbon sequestration, flood and erosion protection, or water purification provide incentives to maintain the habitats that both provide these services and shelter biodiversity.

Payments to encourage economic activities that direct human resources away from activities that degrade habitats. This "conservation by distraction" approach provides assistance for activities such as intensive agriculture or off-farm employment. These activities may not be eco-friendly, but their expansion can reduce local incentives to exploit native ecosystems.

*Id.*

<sup>419</sup> See EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 253 (1992).

<sup>420</sup> Michael J. Bean, *Strategies for Biodiversity Protection*, in *PRECIOUS HERITAGE: THE STATUS OF BIODIVERSITY IN THE U. S.* 272 (eds. Bruce A. Stein, Lynn S. Kutner, Jonathan S. Adams 2000). See Lyle Glowka, *Bioprospecting, Alien Invasive Species, and Hydrothermal Vents: Three Emerging Legal Issues in the Conservation and Sustainable Use of Biodiversity*, 13 *TUL. ENVTL. L.J.* 329 (2000).

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tails of this biodiversity endangerment are complicated. As explained in one recent authoritative source:

The release of nonindigenous organisms is sometimes deliberate but is more often accidental or unintended. The pathways for such introduction are myriad. They include ballast water in ocean going vessels, which take on water in one area and discharge it in another, releasing countless non-native organisms in the process; nursery stock carrying pests and other organisms in the soil surrounding the roots or on or in the plant itself; aquaculture facilities from which nonindigenous species escape as a result of storms, facility failures, or other reasons; and imported logs, fruits, vegetables, fish and shellfish from throughout the world.<sup>421</sup>

As part of its own future domestic regulatory strategy and in its ongoing international environmental diplomacy efforts, therefore, the United States should concentrate “on preventing new [species] introductions, detecting and eradicating new infestations as early as possible, and controlling and managing any well-established invasions,”<sup>422</sup> while seeking more effective invasive species policies. For example, “[i]n the United States deliberate importing of known harmful species has long been prohibited, [yet] . . . [t]his prohibited list approach . . . is ineffective, since the potential for injury is often discovered only after a species has become established and begun causing damage.”<sup>423</sup> But, “[a] more sensible approach would be to consider any foreign species potentially harmful unless otherwise indicated”<sup>424</sup> and “[i]n this regard, an approved list identifying these species known or suspected to be ecologically benign would be a better basis for making importation decisions.”<sup>425</sup> Such international preventative measures, however, need to be skillfully integrated and reconciled with rapidly emerging globalization trends and World Trade Organization (WTO) free trade rules of international commerce.

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<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

*7. Refine and Improve Currencies and Commodification of Endangered Species Habitat Protection through Environmental Trading Markets*

The United States should try to refine and improve environmental trading markets (ETMs) for endangered species habitat protection under both its own domestic laws as well as part of its ongoing international environmental diplomacy under the CBD. Recent scholarship has produced promising interdisciplinary ideas for perfecting ETMs as a general tool for environmental protection as well as a specific tool for biodiversity protection.<sup>426</sup>

#### IV. CONCLUSION

The American response to the CBD has been characterized by four discrete periods of policy reaction: (1) expressing concern about the problem of global biodiversity protection, from 1989-90;<sup>427</sup> (2) expressing disagreement over the advisability of the United States committing to sign a multilateral biodiversity convention, from 1991-92;<sup>428</sup> (3) debating ratification of the 1992 Rio text of the CBD from 1993-94,<sup>429</sup> and (4) a long and relatively inactive period of resisting ratification from 1995 to the present.<sup>430</sup>

While understanding America's response to the CBD is complicated, four interrelated themes help to put the United States' legal and policy responses to the Convention in perspective: (1) institutional tension between the President and the Congress concerning foreign affairs;<sup>431</sup> (2) conservative concern about the emerging configuration of international environmental law;<sup>432</sup> (3) American corporate interest in maximizing

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<sup>426</sup> See James Salzman & J.B. Ruhl, *Currencies and Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2000); James Salzman, Barton H. Thompson, Jr. & Gretchen C. Daily, *Protecting Ecosystem Services: Science, Economics and Law*, 20 STAN. ENVTL. L. REV. 309 (2001); James Boyd, Dennis King & Lisa A. Wainger, *Compensating for Lost Ecosystem Services: The Need for Benefit-Based Transfer Ratios and Restoration Criteria*, 20 STAN. ENVTL. L. REV. 393 (2001).

<sup>427</sup> See *supra* notes 31-57 and accompanying text.

<sup>428</sup> See *supra* notes 58-153 and accompanying text.

<sup>429</sup> See *supra* notes 154-227 and accompanying text.

<sup>430</sup> See *supra* notes 228-40 and accompanying text.

<sup>431</sup> See *supra* notes 245-84 and accompanying text.

<sup>432</sup> See *supra* notes 285-307 and accompanying text.

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biotechnology profits;<sup>433</sup> and (4) complexities in resolving international economic and physical spillovers through legal policy instruments.<sup>434</sup>

In looking toward the future, American policymakers should be mindful of three broad policy concerns relating to the United States' participation in the CBD: (1) the importance of American leadership and engagement in global affairs;<sup>435</sup> (2) the strategic wildcard implications of the terrorist attacks of September 11, 2001;<sup>436</sup> and (3) the need to focus on pragmatic and effective biodiversity implementation issues.<sup>437</sup>

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<sup>433</sup> See *supra* notes 308-23 and accompanying text.

<sup>434</sup> See *supra* notes 324-25 and accompanying text.

<sup>435</sup> See *supra* notes 329-70 and accompanying text.

<sup>436</sup> See *supra* notes 371-402 and accompanying text.

<sup>437</sup> See *supra* notes 403-426 and accompanying text.