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Amy Royden

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ARTICLE

U.S. CLIMATE CHANGE POLICY UNDER PRESIDENT CLINTON: A LOOK BACK

AMY ROYDEN*

I. INTRODUCTION

On October 22, 1997, President Clinton gave an eagerly anticipated speech at the National Geographic Society outlining the Administration's policy on climate change prior to the Kyoto negotiations on the U.N. Framework Convention on Climate Change (UNFCCC). He said

Today we have a clear responsibility and a golden opportunity to conquer one of the most important challenges of the 21st century -- the challenge of climate change -- with an environmentally sound and economically strong strategy, to achieve meaningful reductions in greenhouse gases in the United States and throughout the industrialized and the developing

* *Amy Royden* is a Senior Staff Associate for the State and Territorial Air Pollution Program Administrators (STAPPA) and Association of Local Air Pollution Control Officials (ALAPCO). She is the lead staff person for issues related to stratospheric ozone and global climate change, criteria pollutants, agriculture and training. Prior to joining STAPPA and ALAPCO in 2001, she worked as consultant, authoring two articles on climate change and advising a major company on interested in expanding its sustainable development business. She was a special assistant to the Assistant Secretary of State for Oceans, Environment and Science from 2000-2001, where she focused on climate change issues. From 1994-2000, she worked as an attorney-adviser for the Department of Energy, serving as special assistant to the General Counsel from 1998-2000. Amy holds a Bachelor of Arts degree from the University of Virginia in Economics and Spanish and a law degree from Harvard Law School. She would like to thank Evan Bloom, David Gardiner, Melinda Kimble, Rafe Pomerance, and David Sandalow for their assistance with this article.

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world. It is a strategy that, if properly implemented, will create a wealth of new opportunities for entrepreneurs at home, uphold our leadership abroad, and harness the power of free markets to free our planet from an unacceptable risk; a strategy consistent with our commitment to reject false choices.

Scientists don't yet know what the precise consequences [of increased greenhouse gas concentrations] will be. But we do know enough now to know that the Industrial Age has dramatically increased greenhouse gases in the atmosphere, where they take a century or more to dissipate; and that the process must be slowed, then stopped, then reduced if we want to continue our economic progress and preserve the quality of life in the United States and throughout our planet. We know what we have to do.¹

It was an ambitious statement, calling for the United States to take on a serious environmental challenge -climate change- and to use its ingenuity and the tools of the market in this effort. It also summarizes the approach the Clinton administration wanted to take on climate change: listen to the scientists, and take action in a way that makes sound economic and environmental sense.

What was the result of this approach? The Clinton administration created numerous programs designed to reduce greenhouse gas emissions. It embarked upon innovative voluntary programs with industry, including electric utilities and the transportation and buildings sectors, and established the Climate Change Technology Initiative (CCTI), a \$6.3 billion, five-year package of spending and tax incentives designed to stimulate the use of energy efficient technologies in building, industrial processes, vehicles, and power generation. It helped write the Kyoto Protocol, an agreement with binding emissions limitations for developed countries that included flexibility mechanisms to promote cost-effective action.

However, the United States ended the decade failing to meet its voluntary commitment under the UNFCCC to reduce emissions by 2000 to 1990 levels. And, on the international front, despite the herculean efforts of U.S. negotiators, parties

¹ President Clinton, Address at National Geographic Society, paragraphs 9 and 13 (Oct. 22, 1997), available at <http://clinton6.nara.gov/1997/10/1997-10-22-remarks-on-global-climate-change.html> [hereinafter Clinton's National Geographic Speech].

were unable to reach an agreement in 2000 that would establish the rules and procedures for the Kyoto Protocol and thus set the stage for its ratification.²

This mixed record underscores the difficulty of addressing climate change. It is not just an environmental issue, but an economic and social one. What will our economy in the future run on - natural gas, sun, hydrogen, nuclear or coal? How fast can we afford to change our infrastructure? What obligations do we have to the developing world, which will feel the most impact from climate change but is least equipped to deal with it? How do we get countries like India and China to grow in a manner that minimizes their growth in greenhouse gas emissions? In addition, the issue of climate change was (and still is) perceived differently domestically than internationally, which left the Administration fighting a battle on the home front as well as abroad.

This article describes the evolution of the Clinton Administration's policy on climate change and point to factors that influenced its deliberations. It focuses on the U.S. positions in international negotiations, international reaction to these positions, and domestic policies and politics that influenced these positions. More detailed analyses of certain issues - such as full descriptions of all the climate change-related activities undertaken by the federal government, both abroad³ and at home⁴ -- are beyond the scope of this article.

² This was accomplished in 2001 at COP-7 without U.S. participation. See http://www.unfccc.de/cop7/documents/accords_draft.pdf.

³ Between 1993 and 2000, the U.S. Agency for International Development (USAID) invested over \$1.4 billion for climate change-related mitigation activities abroad. ROGER S. BALLENTINE ET AL., *MEETING THE CHALLENGE OF CLIMATE CHANGE: THE ACCOMPLISHMENTS OF THE CLINTON-GORE ADMINISTRATION* (Jan. 2001) (on file with the author) [hereinafter *ACCOMPLISHMENTS OF CLINTON ADMINISTRATION ON CLIMATE CHANGE*]. These activities include activities that support the development and transfer of environmentally sound technologies and efforts to improve the ability of people to understand their vulnerability to climate change and increase people's ability to adapt to it. *Id.* In addition, descriptions of many bilateral and multilateral discussions related to climate change are not included.

⁴ These include the U.S. Global Change Research Program, which looks at the science of climate change, including adaptation and vulnerability assessments; numerous Executive Orders (several executive orders to improve the energy efficiency and environmental performance of the federal government), see, e.g. Exec. Order No. 12902 (Mar. 8, 1994); Exec. Order No. 13123 (June. 3, 1999); Exec. Order No. 13149 (Apr. 22, 2000); an executive order to promote bio-energy, Exec. Order No. 13134 (1999); and rules and regulations promoting energy efficiency or other measures that would reduce greenhouse gas emissions, such as the Landfill Rule, *available at*

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II. EVOLUTION OF CLINTON ADMINISTRATION POLICY

A. 1993: BTU TAX AND THE CLIMATE CHANGE ACTION PLAN

When William Jefferson Clinton entered office in January 1993, he was the first Democratic president since Jimmy Carter; it had been 12 years since the Democrats had been in power at the White House. Thus, constituencies that traditionally support the Democratic party – unions, pro-choice groups, gun control advocates, and environmentalists – hoped for action on their pet causes.⁵ But the moderates within the party were more concerned about the economy, thus setting the stage for intraparty tensions.⁶ The Democrats also controlled the House and Senate,⁷ which meant (or so was thought) a favorable reception on the Hill for Administration legislative proposals.

Environmental groups were especially optimistic.⁸ The tenures of Presidents Reagan and Bush had been marked by fierce battles with environmental groups, over issues ranging from acid rain to the weakening of the Environmental Protection Agency (hereinafter “EPA”). Vice President Albert Gore, Jr., on the other hand, had championed environmental causes throughout his tenure as a Senator and was a strong advocate of taking action on climate change.⁹ Clearly, a new administra-

<http://www.epa.gov/ttn/atw/landfill/landflpg.html> (requiring large landfills to capture and combust their landfill gas emissions) and appliance standards for furnaces, water heaters, air conditioners, and refrigerators.

⁵ William Claiborne, *Hopeful Interest Groups Ready Agendas for Clinton*, WASH. POST, Nov. 10, 1992, at A12.

⁶ Thomas B. Edsall, *Taking Credit, Placing Blame; Clinton's Task: Contain Intraparty Tensions*, WASH. POST, Nov. 5, 1992, at A30.

⁷ Ruth Marcus, *Clinton Hosts Meeting with Top Hill Democrats*, WASH. POST, Nov. 16, 1992 (Clinton has his first post-election meeting with “Democratic congressional leadership . . . to ‘talk about our obligations’ now that Democrats will control both branches of government for the first time in 12 years”).

⁸ See, e.g., Colman McCarthy, *Gore's Politics Are Ever Green*, WASH. POST, Aug. 4, 1992, at D20 (the League of Conservation Voters calls Al Gore “an environmental Paul Revere” because he sees and acts on environmental problems early on).

⁹ See generally AL GORE, *EARTH IN THE BALANCE* (1992). See also McCarthy; *supra* note 8 (noting that the League of Conservation Voters marked Gore as voting pro-environment 73 percent of the time in 1991, 95 percent in 1989-90, and 50 percent in 1987-88); Edward Walsh, *Clinton Picks Gore to Form A 'New Generation' Ticket; Tennessean Called Environmentalist and Family Man*, WASH. POST, July 10, 1992, at A1 (noting that “Gore is considered one of Washington's leading environmental advocates”).

tion more friendly to environmental causes was now in town.¹⁰ Industry groups, on the other hand, feared the advent of new environmental regulations.¹¹

The administration started with two bold moves on the environmental front. On February 17, 1993, President Clinton announced his administration's plan, which included a British Thermal Unit (BTU) tax – a tax based on the heat content of energy.¹² Such a tax would have the effect of reducing emissions in addition to raising revenue for the government to help eliminate the deficit. Secondly, on April 21, 1993, (Earth Day), Clinton announced that he would adopt a program to reduce greenhouse gas emissions by 2000 to 1990 levels, in accordance with the UNFCCC.¹³ He called on his administration to “produce a cost-effective plan . . . that can continue the trend of reduced emissions.”

The administration soon discovered that Congress had little appetite for an energy tax, even one that would help reduce

¹⁰ See, e.g., Tom Kenworthy, *Activist Ex-Aide to Gore Tapped to Direct EPA*, WASH. POST, Dec. 12, 1992, at A10 (describing EPA nominee Carol Browner as an environmentalist and activist). While George Bush had signed the United Nations Framework Convention on Climate Change (UNFCCC) and 1992 amendments strengthening the Clean Air Act, he was convinced to do after tremendous lobbying from environmental groups. In addition, his administration's delegates pushed for voluntary rather than binding commitments in the UNFCCC. See J.W. Anderson, *A History of Climate Change as a Political Issue*, Resources for the Future policy paper, 11th paragraph, available at <http://www.weathervane.rff.org/features/feature005.html>. “The American position prevailed over the Europeans’, and the final Framework Convention committed the parties to little more than to make an effort, voluntary and unenforceable, to hold down emissions”. *Id.*

¹¹ See, e.g., Tom Kenworthy, *Ranchers and Loggers are Fearful Landlord Clinton Will Raise the Rent; Pressure Building to Overhaul 1872 Mining Law*, WASH. POST, Nov. 29, 1992, at A4; Daniel Southerland, *Clinton Hasn't Convinced Some Captains of Industry; Executives See Democratic Candidates as Centrists but Worry About Gore, Advisers, Congress*, WASH. POST, Oct. 28, 1992, at G1 (reporting on meeting of National Associations of Manufacturers where participants expressed concern that Clinton as president would interfere with the economy); Tom Kenworthy, *Confirmation Hearing Goes Well for Browner; EPA Designee Tries to Ease Business Concerns*, WASH. POST, Jan. 12, 1993, at A11 (Browner tries to allay industry concerns, saying that she hopes her tenure will mark a “new era in communication between the EPA and America's business community”).

¹² President Clinton, Address to the Joint Sessions of Congress (Feb. 17, 1993), available at <http://clinton6.nara.gov/1993/02/1993-02-17-address-by-the-president-to-the-joint-session-of-congress.html>. Environmental groups helped the administration draft the proposal. See Thomas W. Lippman, *Energy Tax Proposal Has 'Green' Tint; Environmentalists Back Plan They Helped Draft*, WASH. POST, Mar. 2, 1993, at D1.

¹³ White House Office of the Press Secretary, Remarks by the President in Earth Day Speech (Apr. 21, 1993), available at <http://clinton6.nara.gov/1993/04/1993-04-21-presidents-remarks-in-earth-day-speech.html>.

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the deficit and promote environmentally responsible behavior. In the battle over Clinton's proposed budget,¹⁴ the proposal to enact a BTU tax failed to gain enough support and was replaced with a raise in the gasoline tax by 4.3 cents per gallon.¹⁵ Lesson learned: a broad-based carbon or energy tax was politically unacceptable in the United States, even with a Democratic Congress.¹⁶ The administration would need to come up with other tools to address climate change.

In October 1993, President Clinton announced his Climate Change Action Plan (CCAP),¹⁷ which consisted of over 50 new or expanded initiatives that the administration estimated would bring U.S. emissions back to 1990 levels by 2000. It included energy efficiency standards, cooperative programs with industry, and a pilot program for joint implementation (U.S. investment in emissions reductions overseas).¹⁸ CCAP also

¹⁴ See, e.g., Eric Pianin, *Hill Democrats Press for Entitlement Caps; White House Opposes Setting Limits on Mandatory Spending Programs*, WASH. POST, May 18, 1993, at A1 (Clinton administration's tax and deficit reduction bill held up by demands from conservative and moderate Democrats); Eric Pianin and David Hilzenrath, *Clinton Visits Congress to Press Economic Goals; Budget Negotiators Given 'Macro' Advice*, WASH. POST, July 16, 1993, at A4 (Clinton goes to Hill to give broad advice as negotiations begin on budget package; Clinton tells members they are on their own to work out specific differences, including on energy tax).

¹⁵ David S. Hilzenrath, *Politics Overtakes Policy in Energy Tax Debate*, WASH. POST, July 20, 1993, at C1 (describing how proposal for broad-based energy tax was whittled down in the Senate to a 4.3 cents gasoline tax; the House had actually passed a BTU tax).

¹⁶ Whether that was a correct lesson is another matter. An environmental group member who is familiar with the BTU tax campaign remarked that the administration tried to sell the tax as a deficit reduction measure, not as an environmental measure, so it is not clear that the American public wouldn't support a tax with environmental benefits. The administration also could have directed some of the revenue stream from a tax to powerful constituencies who might have lobbied Congress in support of the measure (for example, some of the revenue could have gone to Medicare or Social Security). Interview with Alden Meyer, UCS.

¹⁷ President William J. Clinton and Vice President Albert Gore, Jr., *The Climate Change Action Plan* (Oct. 1993), available at <http://www.gcrio.org/USCCAP/toc.html> [hereinafter *Climate Change Action Plan*].

¹⁸ For example, as part of its strategy of industry cooperation, the plan directed the Department of Energy to enter into voluntary agreements with electric utilities to reduce their emissions by 2000 to 1990 levels or limit emissions under strict performance standards (the program was called "Climate Challenge"). *Id.* at 22. Utilities were given great flexibility in their agreements to implement a portfolio of emissions reductions projects. *Id.* Other partnerships included the Partnership for a New Generation of Vehicles (PNGV), the goal of which was to "develop a revolutionary new class of clean, efficient passenger vehicles;" Climate Wise (technical assistance to manufacturing industries to reduce greenhouse gas emissions); Industries of the Future (develop technologies to increase energy and resource efficiency in the most energy-intensive industries); and Energy Star®, a program for labeling energy efficient products.

committed the Administration to seeking \$1.9 billion in new and redirected funding between 1994 and 2000 to implement the Plan.¹⁹ The administration also projected that investments by firms and individuals in energy saving equipment and technologies would yield significant cost savings over the long term.²⁰

The plan was denounced by many environmental advocacy organizations as inadequate since it did not propose any mandatory emissions reductions.²¹ However, given that Congress would not accept a BTU tax, the administration likely assumed that Congress would not pass any proposal for mandatory emissions reductions, and thus decided to pursue voluntary programs.²²

Though Clinton's plan was designed in a way to minimize the need for legislative or regulatory action,²³ the administration would still need Congressional approval for its funding commitments. This would become extremely difficult in 1995 when the Republicans took control of the House of Representatives and Senate.

The change in the U.S. administration was reflected in the position the U.S. took in the international negotiations on the UNFCCC.²⁴ The U.S. agreed that "science clearly suggests the

ACCOMPLISHMENTS OF CLINTON ADMINISTRATION ON CLIMATE CHANGE, *supra* note 3. These programs lasted throughout the administration.

¹⁹ *Id.* at ii.

²⁰ *Id.* at 7. Administration officials would often point to these cost savings as independent reasons for implementing these measures. See, e.g., White House Office of the Press Secretary, Press Briefing by Gene Sperling, Assistant to the President for Economic Policy, Jim Steinberg, Deputy Assistant to the President for National Security Affairs, and Leon Fuerth, National Security Advisor for the Vice President, (Dec. 11, 1997), available at <http://clinton6.nara.gov/1997/12/1997-12-11-press-briefing-on-kyoto.html> [hereinafter White House Kyoto Press Conference]. ("[Greenhouse gas reduction measures] are measures to improve the efficiency of our economy. They are measures that we would want to take whether or not there is a global regime"). This became especially important following the Knollenberg Amendment, prohibiting officials from "pre-implementation" of Kyoto.

²¹ See Gary Lee, *Clinton Offers Package to 'Halt Global Warming'*, WASH. POST, Oct. 20, 1993, at A4 (citing criticisms by Greenpeace and Sierra Club of the voluntary nature of the program).

²² See The Editorial Board, *Cooling the Climate*, WASH. POST, Oct. 21, 1993, at A30 (when Congress killed the BTU tax, it left the President few options other than voluntary cooperation).

²³ Climate Change Action Plan, *supra* note 17, at 7.

²⁴ The U.S., along with 155 other nations, had signed the UNFCCC at the Earth Summit in 1992; it ratified the treaty in October 15, 1992. See also the UNFCCC Secretariat's ratification list, available at <http://www.unfccc.de/resource/conv/ratlist>.

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need for precautionary action to limit the growth of emissions and concentrations of greenhouse gases”²⁵ and thus “the first step is to discuss the adequacy of commitments with delegates here.”²⁶ Its objectives at the Intergovernmental Negotiating Committee (INC) meetings²⁷ were to “keep the momentum on all [the] issues” going.²⁸

B. 1994: GRIDLOCK AFTER MIDTERM CONGRESSIONAL ELECTIONS

After raising expectations at INC-9 with its statement that current commitments under the UNFCCC are inadequate, the U.S. disappointed environmentalists by its “failure to make specific proposals at INC-10 [held in August 1994] on just how the treaty should be strengthened.”²⁹ The U.S. called for a new post-2000 aim without specifying what it should be, focused on joint implementation,³⁰ and promoted new efforts by the more “advanced” developing countries to limit their greenhouse gas emissions.³¹ The U.S. was criticized by the Climate Action Network (CAN) – a coalition of environmental groups that follow and influence the negotiations – especially for its position on developing countries, since, as CAN noted, the U.S. had not made any new commitment to limit its own emissions.³² (Both environmental groups and industry groups, most notably the Global Climate Coalition,³³ follow the climate negotiations closely.)

pdf. The treaty entered into force on March 21, 1994. See also UNFCCC Secretariat Web site, at <http://www.unfccc.de/resource/convkp.html>.

²⁵ Climate Action Network, *Changing Horses: Rafe Pomerance Interviewed*, ECO (No.10), Aug. 10, 1993, available at http://www.climatenetwork.org/eco/Eco10_0893.html.

²⁶ *Id.*

²⁷ The International Negotiation Committee comprised the parties to the UNFCCC meeting prior to the entry into force of the UNFCCC. *Id.*

²⁸ *Id.*

²⁹ Climate Action Network, *First Review of (In)adequacy of US Efforts at INC 10*, ECO No. 5, Aug. 31, 1994, available at http://www.climatenetwork.org/eco/E5US_Stance.html.

³⁰ See discussion of joint implementation *infra*.

³¹ *Id.*

³² *Id.*

³³ The Global Climate Coalition (GCC), which comprises companies opposed to mandatory greenhouse gas emissions reductions, has extensive contact with negotiations from OPEC countries and considerable influence, much to chagrin of environmental groups. CAN reportedly retrieved talking points prepared by one of the GCC

In November, Congressional elections turned the House and Senate over to the Republicans; Republicans would control both houses for the first time since the 1950s.³⁴ Republicans could now focus on their own agenda – in particular, the so-called “Contract with America”³⁵ -- rather than react to the President’s legislative proposals. The Clinton administration would now have to win over Republicans in order to pass any legislation on environmental matters.³⁶ And Clinton’s foreign policy would face a tough critic in the Senate Foreign Relations Committee: Jesse Helms.³⁷ According to former Acting Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs Melinda Kimble, because of the Republican control of Congress, the administration had to “build consensus from the ground up on every issue,” not just climate.³⁸ It was thus hard to move forward on any issue, let alone climate, resulting in total gridlock.³⁹

representatives for use by Kuwait. Climate Action Network, *The Global Climate Coalition – Bad Behavior*, ECO, Vol. 88 No. 6, Feb. 17, 1995, available at <http://www.climatenetwork.org/eco/6.11.gcc.html> (decrying the “blatant tactics” of a GCC representative of “dashing off anonymous interventions and sending them via runners to representatives of his puppet states” during the discussion of adequacy of commitments).

³⁴ Dan Balz, *A Historic Republican Triumph: GOP Captures Congress; Party Controls Both Houses for First Time Since '50s*, WASH. POST, Nov. 9, 1994, at A1.

³⁵ Hobart Rowen, *Reverse Gridlock?*, WASH. POST, Nov. 10, 1994, at A25 (expressing concern that the Republican control of Congress and its focus on the Contract with America would lead to “gridlock”). Businesses looked forward to a deregulatory agenda. Mike Mills and Frank Swoboda, *After the Rout, It's a New Landscape for Corporate America; Deregulators See Their Chance to Set the Agenda in Congress*, WASH. POST, Nov. 10, 1994, at B13.

³⁶ Though many environmental laws had not had moved forward even with Democrats in control of Congress. See Tom Kenworthy and Gary Lee, *Environmental Bills Still Due; Congress May Quit Without Sending Clinton a Single Major Measure*, WASH. POST, Sept. 16, 1994, at A4 (Sierra Club political director calls the 103rd Congress “the worst environmental Congress since the first Earth Day in 1970;” revisions of clean water, safe drinking water, endangered species, solid waste, the Superfund program, and fisheries management laws stalled).

³⁷ John M. Goshko, *U.S. Policy Faces Review By Helms; State Dept. Nemesis to Flex Muscle as Chairman of Foreign Relations*, WASH. POST, Nov. 13, 1994, at A1.

³⁸ Interview with Melinda Kimble, former Acting Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs (Oct. 4, 2001) [hereinafter Kimble Interview]. Prior to becoming Acting Assistant Secretary in October of 1997, Kimble served in the Bureau of International Organizations at the Department of State.

³⁹ *Id.* The change in Congress also affected regulatory agencies. See Cindy Skrzycki, *New Conservative Climate Chills Agencies' Activism*, WASH. POST, Feb. 18, 1996, at A1 (describing how pressure from Congressional Republicans, budget cutbacks and the Clinton administration’s efforts to cut red tape had changed how agencies operate,

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C. 1995: INTERNATIONAL NEGOTIATIONS AND U.S. CLIMATE BUDGET REDUCTIONS

In March of 1995, international negotiators met in Berlin, Germany, for the first Conference of the Parties (COP-1) to the UNFCCC to assess progress on meeting the goals of the Convention.⁴⁰ In particular, the parties reviewed implementation of Articles 4.2(a) and (b) of the Convention, which required Annex I Parties⁴¹ to “adopt national policies and take corresponding measures on the mitigation of climate change” by limiting emissions of greenhouse gases and enhancing sinks,⁴² and to report on these policies and measures, as well as on projected emissions.⁴³ The Conference of the Parties (COP) concluded in Decision 1/CP.1 that “these subparagraphs are not adequate,” and thus agreed to set up a process with the aim of strengthening these commitments through the adoption of a protocol or other legal instrument.⁴⁴

Most notably, the parties at COP-1 agreed to embark upon a process to draft a legal instrument setting emissions reductions for Annex I parties.⁴⁵ Furthermore, there would be no new commitments for developing-country parties.⁴⁶ At the time, the latter was not a controversial proposition: one of the

making them less likely to aggressively pursue violators or enact regulations).

⁴⁰ The powers and duties of the Conference of the Parties are set out in Article 7 of the UNFCCC. In particular, the Conference of the Parties “shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.” UNFCCC, art. 7.2, *available at* <http://www.unfccc.de>. The INC met for the last time prior to COP-1 in February 1995 (INC-10).

⁴¹ Parties that have made voluntary commitments to reduce greenhouse gas emissions to 1990 levels by 2000. They include the 24 original members of the Organization for Economic Cooperation and Development (including the U.S.), the European Union, and 14 countries with economies in transition (Croatia, Liechtenstein, Monaco and Slovenia joined at COP-3, and the Czech Republic and Slovakia replaced Czechoslovakia). United Nations Framework Convention on Climate Change glossary, *available at* <http://www.unfccc.de/siteinfo/glossary.html>.

⁴² “Sink’ means any process, activity or mechanism which removes a greenhouse gas, an aerosol or a precursor of a greenhouse gas from the atmosphere.” UNFCCC, art. 1(8), *available at* <http://www.unfccc.de>. An example of a sink is a forest, because trees absorb carbon dioxide as they grow.

⁴³ *Id.* at arts. 4.2(a), (b).

⁴⁴ Report of the Conference of the Parties on its First Session, Held at Berlin from March 28 to April 7, 1995, Addendum, Part Two: Action Taken by the Conference of the Parties at its First Session Decision, 1/CP.1, FCCC/CP/1995/7/Add.1, at preamble, *available at* <http://unfccc.int/resource/cop1.html>. [hereinafter COP-1 Report, Part Two].

⁴⁵ *Id.* at art. 2(a)(1).

⁴⁶ *Id.* at art. 2(a)(2).

principles of the UNFCCC, which the U.S. had ratified, stated that “the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”⁴⁷

In a victory for the United States, the parties also agreed to “establish a pilot phase for activities implemented jointly among Annex I Parties and, on a voluntary basis, with non-Annex I Parties that so request.”⁴⁸ “Activities implemented jointly,” or “joint implementation,” refers to emissions reductions, emissions avoidance, or sequestration projects that occur in one country but are sponsored by another, so that the sponsoring country would presumably get some or all credit from the project under a credit regime.⁴⁹ Under Secretary for Global Affairs Timothy Wirth called joint implementation the “signature item” of the conference.⁵⁰

The so-called “Berlin Mandate” – in particular, the agreement of “developed countries go first” – would come to haunt the U.S. delegation in future negotiations because of domestic concerns about the trade implications of excluding China, India and Brazil from emissions reduction commitments. So, why did the United States agree to this? Senior officials in the government believed that the only way to move the process forward was to agree that the developed countries would reach an agreement first.⁵¹ The U.S.’s main objective in Berlin was to “keep the EU from pinning us [the U.S.] down on a target and to save JI [joint implementation].”⁵² The climate issue did not receive high-level attention at agencies other than the Department of State, though when representatives of the economic agencies weighed in, they expressed concern about compromis-

⁴⁷ UNFCCC, art. 3.1, *available at* <http://www.unfccc.de>.

⁴⁸ COP-1 Report, Part Two, *supra* note 44, at Decision 5/CP.1, art. 1.

⁴⁹ These projects could involve collaborations between investors in Annex I countries and developing countries, or among Annex I countries alone. The Kyoto Protocol established a mechanism called “joint implementation” whereby Annex I parties can receive “emission reduction units” for projects it invests in that are in other Annex I parties (per Article 6 of the Kyoto Protocol). Thus, projects by investors in Annex I parties in developing countries began to be referred to “activities implemented jointly” (AIJ). AIJ projects operate under a pilot phase that expired in 2000.

⁵⁰ Referring to U.N. Climate Conference held in Berlin (Apr. 13, 1995), *available at* <http://www.facts.com/cd/95059990.htm>.

⁵¹ Kimble Interview, *supra* note 38; Interview with Rafe Pomerance, former Deputy Assistant Secretary of State for the Environment (Oct. 10, 2001) [hereinafter Pomerance Interview].

⁵² *Id.*

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ing current economic growth to deal with a 100-year problem.⁵³ Thus, at the usual interagency meetings that precede any major international negotiations, people may not have focused on the implications of developed countries agreeing to go first; there were no targets and timetables, so lots of flexibility remained. However, U.S. career-staff at the Berlin negotiations realized that the Berlin Mandate would be “bad news on the Hill,” but at this point, Congress was not focusing on the international climate change negotiations or U.S. positions.⁵⁴ Agreeing to the Berlin mandate was a “tactical step to keep the process moving.”⁵⁵

As noted above, the Clinton administration was unable to focus on climate change in its legislative agenda because it was instead forced to battle with Congress over the federal budget. Republicans in control of Congress pursued a legislative agenda at odds with the Clinton administration, cutting Medicaid, Medicare, education spending, and taxes,⁵⁶ in addition to attempting to strip back environmental regulatory protections, and slashing spending on energy efficiency and renewable energy programs⁵⁷ and CCAP.⁵⁸ In fact, relations degraded to such an extent that on November 14th, over a month into Fiscal Year 1996, parts of the government were shut down for about three weeks because appropriations had not been authorized.⁵⁹

⁵³ Kimble Interview, *supra* note 38.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ R.H. Melton, *Clinton Seeks Budget Cooperation*, WASH. POST, June 29, 1995, at A9 (Clinton complained that the balanced budget plan “cuts too deeply into Medicare, Medicaid, education and training while cutting taxes “for too many who don't need it”).

⁵⁷ Gary Lee, ‘Fuelish’ Report Outlines Threat to Jobs, Efficiency Gains, WASH. POST, June 2, 1995, at A21 (proposed congressional cuts to federal energy efficiency and renewable energy spending decried by environmental groups and the Department of Energy); Dan Morgan, *House Panel Backs Big Cuts For Some Energy Research*, WASH. POST, June 14, 1995, at A20 (House appropriations subcommittee proposes deep cuts for solar power research).

⁵⁸ Dan Morgan, *Senate Panel Votes to Restore Funds for Housing, EPA Programs*, WASH. POST, Sept. 12, 1995, at A4, (noting Senate Appropriations Subcommittee proposed cuts in funding for CCAP).

⁵⁹ Ann Devroy, *Workers Go Home; Talks Go Nowhere; Clinton, GOP at Impasse on Budget*, WASH. POST, Nov. 15, 1995, at A1 (hundreds of thousands of federal workers will stay home for a second day today as Congress and the President fail to find a solution to the budget stalemate); Eric Pianin and John F. Harris, *Clinton Signs Measures to Halt Shutdown*, WASH. POST, Jan. 6, 1996, at A1.

In December of 1995, the Intergovernmental Panel on Climate Change (IPCC)⁶⁰ released a draft of its so-called Second Assessment Report (SAR)⁶¹. This consensus report concluded, in its most publicized finding that “the balance of evidence suggests that there is a discernible human influence on global climate.”⁶² Climate scientists in the United Kingdom issued a report that 1995 was the hottest year on record.⁶³

D. 1996: COP-2 AND THE QUESTION OF BINDING EMISSIONS LIMITS

With the release of the SAR, pressure intensified for negotiators to make progress at COP-2, which was scheduled for July 1996 in Geneva, Switzerland. Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, Eileen Claussen, chaired a group of assistant secretaries

⁶⁰ The IPCC was established in 1998 by the United Nations Environment Program (UNEP) and the World Meteorological Organization (WMO) to investigate global warming by reviewing existing scientific data and report its findings. The IPCC consists of over 2,000 scientific and technical experts from around the world. It has three Working Groups: one group “assesses the scientific aspects of the climate system and climate change,” another group “addresses the vulnerability of socio-economic and natural systems to climate change, negative and positive consequences of climate change, and options for adapting to it,” and the third group “assesses options for limiting greenhouse gas emissions and otherwise mitigating climate change.” See <http://www.ipcc.ch/about/about.htm>. The IPCC's Assessment Reports consists of reports from each of the three Working Groups and a synthesis report.

⁶¹ Intergovernmental Panel on Climate Change, Second Assessment Report (December 1995) (SAR). The IPCC Second Assessment Synthesis of Scientific and Technical Information, along with the Summaries for Policymakers of the three Working Groups, constitute the SAR. *Id.* at vii. The First Assessment Report was released in 1990.

⁶² *Id.* at 22. The report also reported that, for a mid-range emissions scenario, models projected an increase in global mean surface air temperature relative to 1990 of about 2°C by 2100. *Id.* at 23. This was lower by one-third than the “best estimate” in 1990, due mainly to decreased emissions, increased sulfate aerosols, which cool the atmosphere, and a better understanding of the carbon cycle. *Id.* Nevertheless, the SAR's prognosis was still bleak: predicted deleterious impacts of climate change include, inter alia, loss of habitat, sea level rise, loss of forest, desertification, and loss of species. *Id.* at 28-35. The SAR also noted that climate systems may be “non-linear,” meaning that we may see unexpected behavior once some threshold is reached that “switches” a system on or off. *Id.* at 24.

⁶³ Nick Nutall, *Hotter-than-ever World Adds to Fear of Climate Change*, THE TIMES OF LONDON, Jan. 6, 1996; Boyce Rensberger, *What's Hot, What's Not*, WASH. POST, Jan. 8, 1996, at A2 (noting the release the previous week of a preliminary report by the Climatic Research Unit at the University of East Anglia in England saying that the climate in 1995 was the warmest in a record that goes back more than a century, but noting that other scientists disagreed with that finding).

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from various U.S. agencies that met to discuss climate policy. According to former senior officials in the government, the decision that the U.S. would agree at COP-2 to take on a binding target was vetted at this assistant secretary level group, with White House input.⁶⁴ “The implications [of taking on a binding target] were not fully clear at the time,” according to former Deputy Assistant Secretary of State for the Environment Rafe Pomerance.⁶⁵ “We needed a target in order to make emissions trading work”⁶⁶ and the U.S. clearly and strongly supported flexibility mechanisms such as emissions trading. According to Pomerance, the economic agencies did not object, and the White House cleared Wirth’s speech announcing the U.S. decision.⁶⁷

At COP-2, Under Secretary for Global Affairs Timothy Wirth announced that the United States would support a legally binding agreement with emissions limitations if other countries would do so.⁶⁸ This was the first time the U.S. had publicly expressed support for a legally binding agreement.⁶⁹ As Wirth said to *The New York Times*, “This is a big deal Saying that we want to have a target that is binding is a clear indication that the United States is very serious about taking steps and leading the rest of the world.”⁷⁰ Wirth’s statement

⁶⁴ Interview with David Gardiner, former Director of the White House Climate Change Task Force (Aug. 31, 2001) [hereinafter Gardiner Interview]; Pomerance Interview, *supra* note 51; Kimble Interview, *supra* note 38.

⁶⁵ Pomerance Interview, *supra* note 51.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Under Secretary for Global Affairs Timothy E. Wirth, Address before the Second Conference of the parties Framework Convention on Climate Change, Geneva, Switzerland (July 17, 1996), available at <http://www.state.gov/www/global/oes/960717.html> [hereinafter Wirth COP-2 Statement].

⁶⁹ See INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, EARTH NEGOTIATIONS BULLETIN: A SUMMARY REPORT ON THE SECOND CONFERENCE OF THE PARTIES TO THE FRAMEWORK CONVENTION ON CLIMATE CHANGE 1, Vol. 12, No. 38 (July 22, 1996) [hereinafter ENB REPORT ON COP-2] (“The Conference also saw a significant shift in position by the US, which for the first time supported a legally binding agreement to fulfill the Berlin Mandate”). *Id.* At a negotiating session of the Intergovernmental Negotiating Committee (which preceded the Conference of the Parties, prior to entry into force of the Convention), the U.S. had “said only that it supported the need to consider ‘new aims’ through negotiations under the SBI for the post-2000 period, generally avoiding the word ‘protocol.’” INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, EARTH NEGOTIATIONS BULLETIN: A SUMMARY REPORT ON THE FIRST CONFERENCE OF THE PARTIES TO THE FRAMEWORK CONVENTION ON CLIMATE CHANGE 10, (Vol. 12, No. 21) April 10, 1995 [hereinafter ENB REPORT ON COP-1].

⁷⁰ John H. Cushman, Jr., *U.S. Will Seek Pact on Global Warming*, N.Y. TIMES, July

stressed that “science calls upon us to take urgent action; the IPCC report is the best science that we have, and we should use it.”⁷¹

While much of the press (and delegates’ attention) was focused on the United States’ public support for binding emissions limits,⁷² Wirth’s statement also laid out principles that the U.S. believed should underlie the negotiations of an agreement for binding emissions limits and other objectives the U.S. would seek. These principles and objectives are notable because they remained consistent throughout the rest of the tenure of the Administration.

First, Wirth emphasized that the negotiations must focus on outcomes that are “real and achievable.”⁷³ By this, Wirth meant that any targets must be ones that countries could be expected to meet, rather than overly ambitious targets doomed to failure.⁷⁴ Secondly, the U.S. would “continue to seek market-based solutions that were flexible and cost-effective.”⁷⁵ Furthermore, Wirth’s statement stressed that “it is the target that should be binding, not the individual measures, thus allowing maximum flexibility in implementation.”⁷⁶ Third, the U.S. believed that any agreement should “lay the foundation for continuing progress by all nations in the future . . . [because] all nations - developed and developing - must contribute to the solution to this challenge.”⁷⁷ The United States was committed to ensuring that all countries – developed and developing –

17, 1996.

⁷¹ Wirth COP-2 Statement, *supra* note 68, para. 2.

⁷² *Id.* (Comments by the Global Climate Coalition and Environmental Defense Fund focus on the binding target); Karen Capoor and Annie Peterson, *U.S. Acts on Global Warming at Geneva*, ENVTL DEF. FUND NEWSL, Vol. XXVII, No. 5 (Sept. 1996), available at http://www.edf.org/pubs/Newsletter/1996/Sep/h_gwarm.html. “The U.S. statement set off a ripple effect around the world. Surprised delegates sent frantic cables to capitals for further instructions . . .” *Id.*

⁷³ Wirth COP-2 Statement, *supra* note 68, para. 11.

⁷⁴ For example, the Alliance of Small Island States (AOSIS) group at a previous negotiating session had proposed a draft protocol requiring Annex I Parties to the protocol to reduce their CO₂ emissions by 2005 to a level of at least twenty percent below that of 1990. See ENB REPORT ON COP-1, *supra* note 70, at 10.

⁷⁵ *Id.* at para. 12.

⁷⁶ *Id.* at para. 21. The European Union, on the other hand, sought a requirement that governments mandate specific emission reduction initiatives. See EARTH NEGOTIATIONS BULLETIN, SUMMARY OF THE SECOND CONFERENCE OF THE PARTIES TO THE FRAMEWORK CONVENTION ON CLIMATE CHANGE: 8 – 19 JULY 1996 7, Vol. 12, No. 38 (July 22, 1996).

⁷⁷ *Id.* at para. 13.

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“take steps to limit emissions, consistent with the mandate agreed upon last year in Berlin.”⁷⁸

Thus, while the U.S. announced its readiness to embrace a mandatory target, Wirth’s statement made clear that the U.S. sought maximum flexibility in implementation, targets that were real and achievable, and some involvement by developing countries to ensure that they took steps to limit emissions as well. The U.S. consistently stuck to these positions in subsequent negotiations.

The statement by Wirth paved the way for the negotiators to agree to the so-called “Geneva Declaration on Climate Change.”⁷⁹ In this Declaration, ministers and other heads of delegations instructed their representatives “to accelerate negotiations on the text of a legally-binding protocol or another legal instrument to be completed in due time for adoption” at COP-3.⁸⁰ The agreement should contain for Annex I parties “quantified legally-binding objectives for emission limitations and significant overall reductions within specified time-frames,”⁸¹ and commitments for Annex I parties regarding policies and measures.⁸² Regarding developing countries, the Declaration welcomed their efforts to implement the Convention and make their initial communications,⁸³ and called upon the Global Environmental Facility⁸⁴ to provide support to them,⁸⁵ recognizing that continued advancement by developing countries in meeting their commitments depended upon action by

⁷⁸ *Id.* at para. 19.

⁷⁹ Capoor and Petsonk, *supra* note 72. This declaration was included in an Annex to the Report of the Conference of the Parties on its Second Session, Held at Geneva From 8 to 19 July 1996, Addendum: Part Two: Action Taken by the Conference of the Parties at its Second Session, Document FCCC/CP/1996/15/Add.1 [hereinafter COP-2 Report, Part Two].

⁸⁰ *Id.* at 73 (paragraph 8 of the Geneva Declaration).

⁸¹ *Id.*

⁸² *Id.* This commitment to policies and measures, pushed by the European Union, was vague enough to be acceptable to the United States since it did not specify what the commitments should be.

⁸³ *Id.* (paragraph 9 of the Geneva Declaration).

⁸⁴ The multibillion-dollar Global Environmental Facility (GEF) was established in 1990 by the World Bank, U.N. Environment Program and U.N. Development Program. It operates the Convention’s “financial mechanism” on an interim basis and funds developing country projects that have global climate change benefits. United Nations Framework Convention on Climate Change Secretariat- Glossary of Climate Change Acronyms and Jargon, available at <http://www.unfccc.de/siteinfo/glossary.html>.

⁸⁵ *Id.*

Annex II parties,⁸⁶ in particular access to financial resources and environmentally-sound technology.⁸⁷

The U.S. announcement at COP-2 received widespread attention.⁸⁸ While environmental groups were pleased with the U.S. announcement at COP-2, industry groups opposed any binding emissions limitations and were surprised by the U.S. proposal.⁸⁹ Given this controversy, the White House tasked Katie McGinty, Council on Environmental Quality chairman, Gene Sperling of the National Economic Council, and Jim Steinberg of the National Security Council to head up policy-making on climate change and increase coordination among agencies in this policymaking process.⁹⁰ While the White House had been involved in the policy meetings prior to COP-2, after COP-2 the White House led the climate change policy-making process.

1996 was a Presidential election year, and President Clinton defeated challengers Robert Dole and Ross Perot to win a second term in office.⁹¹ In addition, while the House and Senate remained in Republican control, their margin of control decreased.⁹² President Clinton had successfully used his battles with Congress over the budget, especially a shutdown of the federal government at the end of 1995 and beginning of 1996, to hammer Republicans for creating gridlock in the government.⁹³ With a more favorable balance in the Congress, and

⁸⁶ Annex II parties are Annex I parties (developed countries) but not the countries with economies in transition.

⁸⁷ COP-2 Report, Part Two, *supra* note 79 (paragraph 10 of the Geneva Declaration).

⁸⁸ Gary Lee, *U.S. Urges Binding Accord on Global Warming*, WASH. POST, July 18, 1996, at A3; Peter Capella, *Gummer Sounds Alarm Bells on Global Warming*, THE TIMES OF LONDON, July 18, 1996 (noting Wirth's announcement for a realistic but binding target); Cushman, *supra* note 70.

⁸⁹ Lee, *supra* note 88. (The Edison Electric Institute, a trade association for the electric power industry, claims mandatory measures would have severe repercussions for the U.S. economy and that voluntary reductions are working; Environmental Defense Fund praises proposal).

⁹⁰ Gardiner Interview, *supra* note 64.

⁹¹ Dan Balz, *Clinton Wins by Wide Margin; GOP Holds Control of Congress; First Democrat Since FDR to Get 2nd Term*, WASH. POST, Nov. 6, 1996, at A1.

⁹² *Id.*

⁹³ See, e.g., *Eric Pianin and John F. Harris, Clinton Signs Measures to Halt Shutdown*, WASH. POST, Jan. 6, 1996, at A1 (many Congressional Republicans acknowledge that shutdown had become political liability for them).

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some wins under its belt, the administration could perhaps feel more confident about achieving its goals.⁹⁴

E. 1997: BINDING TARGETS, TIMETABLES AND THE KYOTO PROTOCOL

In 1997, the United States government officials involved in climate change focused on the proposal the U.S. would present at COP-3, which would take place in Kyoto, Japan. The White House Climate Change Task Force, headed by Todd Stern, was created in early 1997 to provide support for this process.⁹⁵ Stern quickly realized that the administration also needed to communicate better its climate change strategy to constituencies and educate the public about the climate change issue, so public communication and constituency outreach also became a key activity of the Task Force.⁹⁶ The administration reached out to stakeholders: the State Department met with industry and environmental groups,⁹⁷ and members of the White House Climate Change Task Force talked to environmental groups, labor groups and industry groups, including the power sector.⁹⁸

⁹⁴ *But see*, Thomas B. Edsall and Mario A. Brossard, *Clashing Coalitions Produce Split in Government Power; Religion, Marital Status Among New Predictors of Partisanship*, WASH. POST, Nov. 7, 1996, at A1 (arguing that two bitterly opposed voting coalitions brought the President and Republicans to power, so battles on the Hill will continue).

⁹⁵ *Id.* Todd Stern was formally tapped by the President to coordinate the Administration's efforts on climate change in March of 1998, but he began playing a major role in the Administration on climate change beginning in July 1997. See White House Office of Press Secretary, President Clinton Names Todd Stern to Coordinate Climate Change Effort, (Mar. 11, 1998), available at <http://clinton6.nara.gov/1998/03/1998-03-11-todd-stern-named-to-coordinate-climate-change-effort.html> (announcing Stern's appointment and also noting the role Stern has played on climate change from July 1997).

⁹⁶ Gardiner Interview, *supra* note 64. For example, Stern organized an event at the White House with weathercasters to discuss climate change with the President and Vice President. See White House Office of the Vice President, Remarks by Vice President Al Gore to Weather Forecasters on Global Climate Change, (Oct. 1, 1997), available at <http://clinton6.nara.gov/1997/10/1997-10-01-vp-remarks-on-global-climate-change.html>. This is not to say that the government had not consulted with outside stakeholders prior to the creation of the Task Force; the Department of State had an ongoing dialogue with industry and environmental groups. Pomerance Interview, *supra*, note 51.

⁹⁷ Including in particular the National Association of Manufacturers and the Climate Action Network. Milo Mason, *Interview with Stuart E. Eizenstat*, 13 NAT. RESOURCES & ENV'T 2, Fall 1998), at 432.

⁹⁸ *Id.*

In addition to reaching out to domestic constituencies, the U.S. continued its discussions with other countries to educate them on the U.S.'s positions and win allies.⁹⁹ For example, throughout the year, Under Secretary of Global Affairs Wirth had a series of sessions in Europe and Saudi Arabia, as well as with key ministers from Japan, Australia, Canada, and New Zealand.¹⁰⁰ Other senior officials traveled to Latin America and Asia to discuss U.S. positions.¹⁰¹ The U.S. found the "most extensive areas of common ground with Australia, Canada, Japan and New Zealand," as well as support from Russia and the Eastern European countries.¹⁰²

However, the U.S. and the European Union were at odds.¹⁰³ In March of 1997, the European Union announced its

⁹⁹ As in most international negotiations, coalitions of countries form to promote common interests. JUSSCANNZ comprised the United States, Switzerland, Canada, Australia, Norway and New Zealand. After Kyoto, the Umbrella Group, which included the JUSSCANNZ members plus Austria, Iceland, Russia and Ukraine, was the main coalition that the U.S. participated in. In the Umbrella Group, the U.S. found allies for its positions on emissions trading (among other issues). To simplify the discussion in this article, I will refer only to the U.S. position rather than the JUSSCANNZ or Umbrella Group position, because they were not always the same. The other main negotiating groups are the EU and the G-77/China group. See Marina Cazorla, *Climate Talk: Who's Who? International Negotiating Groups*, Aug. 12, 1999, available at <http://www.weathervane.rff.org/negtable/negtable01.html>.

¹⁰⁰ Under Secretary of Global Affairs Timothy Wirth, Statement before the Senate Foreign Relations Committee, Subcommittee on International Economic Policy, Export and Trade Promotion (Oct. 9, 1997), at para. 6, available at <http://www.state.gov/www/global/oes/971009tw.html> [hereinafter Wirth Testimony].

¹⁰¹ *Id.*

¹⁰² *Id.* at para. 7.

¹⁰³ Because the EU-US dynamic plays such a large role in the international negotiations, it is worthwhile to briefly explore the tensions between these two negotiating units. Former Acting Assistant Secretary for Oceans and International Environmental and Scientific Affairs for the Department of State, Melinda Kimble, notes several differences. First, the Europeans are much more willing to accept tax and regulatory measures to restrict emissions. Their tax burden is high already – they tax gasoline significantly more than it is taxed in the U.S., for example. They also receive more services from their governments, so they accept these high taxes, but U.S. citizens are not tax-friendly (see BTU tax discussion, *supra*). In addition, the European Union and its member countries tend to set "aspirational standards" they know their firms can't achieve, and these standards are not enforced strictly; it is assumed it will take time for firms to adopt. In the U.S., on the other hand, environmental standards are enforced through litigation and penalties. Thus, the Europeans tend to push for higher "aspirational" emissions reductions. Kimble also claims that Europeans view climate change as a way of increasing energy costs in the U.S. and thus making the European economy more competitive with the American economy. This would explain why the Europeans push for a requirement that most emissions reductions be achieved domestically. Furthermore, the EU political apparatus differs significantly from the U.S. It is beyond the scope of this article to elucidate all the differences, but one key one is

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proposal for a treaty in Kyoto: the proposal called for a reduction by all industrialized countries of fifteen percent from 1990 levels by 2010 for the three major greenhouse gases - CO₂, methane and nitrous oxide.¹⁰⁴ The U.S. considered this target “unrealistic and unachievable.”¹⁰⁵ In addition, the EU proposed that its member countries be treated as a “bubble,” and that a target be set for the entire EU to meet, rather than individual countries.¹⁰⁶ The EU would then decide for itself what emissions reductions – or increases – its member countries would need to meet. The U.S. objected to “bubbling” on various grounds, including how compliance would be addressed (who would be held accountable for a failure to meet the target) and how new EU members would be treated.¹⁰⁷ Despite these concerns, the EU announcement put tremendous pressure on the U.S. to come up with its own plan.¹⁰⁸

Additional pressure, this time at a personal and high level, came in June, at the meeting of the major industrial powers in Denver for the G-8 Summit. European leaders approached Clinton and began to “press [him] personally and publicly” on global warming.¹⁰⁹ French President Chirac even went so far as to call Americans “great polluters,” saying “they generate three times as much CO₂ per capita as the French do.”¹¹⁰ While Clinton agreed that global warming was a serious issue, he did not indicate what specific numbers for emissions limitations the U.S. would accept.¹¹¹ One consequence of the European

that EU member countries send their environment ministers to climate change negotiations, and these ministers can be much “greener” than the rest of the government and may present positions that may not be supported by the economics or finance ministries. Finally, Europeans are very concerned about their climate being radically affected by climate change, such as the Gulf Stream no longer warming Europe. See also Kimble Interview, *supra* note 38.

¹⁰⁴ Anderson, *supra* note 10, at para. 16.

¹⁰⁵ Wirth Testimony, *supra* note 100, at para. 8.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at para. 9.

¹⁰⁸ It also created an “unstoppable momentum” towards an agreement with a below 1990 emissions target, according to Pomerance. Pomerance Interview, *supra* note 51.

¹⁰⁹ J.W. Anderson, *Climate Change, Clinton and Kyoto: The Negotiations over Global Warming*, Resources for the Future policy paper, at para. 28 (Nov. 1997), available at <http://www.weathervane.rff.org/features/feature022.html>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

leaders' approaching Clinton was increased attention to the issue of climate change by the President himself.¹¹²

But, complicating U.S. policy development, on July 25, 1997, the U.S. Senate – which must provide its advice and consent regarding ratification of any treaty – passed a resolution directing the President not to sign any emissions reduction agreement that did not also require the developing countries to reduce or limit emissions. By a vote of 95-0, the Senate passed the Byrd-Hagel Resolution declaring that it was the sense of the Senate that the U.S. should not sign any protocol that (A) mandated new commitments to limit or reduce greenhouse gas emissions “unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or (B) would result in serious harm to the economy of the United States . . .”¹¹³ While intense lobbying by energy industry officials prompted this resolution, Congress was also concerned about the trade implications of the U.S. being held to emissions reductions or limits but not some of its major trade competitors – namely China and India.¹¹⁴

The Byrd-Hagel Resolution directly contradicted the Berlin Mandate agreed upon at COP-1: developed countries, which have emitted the vast majority of greenhouse gas emissions already in the atmosphere, should take the first steps in reduc-

¹¹² For example, both President Clinton and Vice President Gore participated in a White House Conference on Climate Change at Georgetown University on October 6, 1997. The President and Vice President engaged in a lively discussion with scientists about the causes of global warming, its impacts, and whether it had started. See White House Office of the Press Secretary, Remarks by the President During Presentations at the White House Conference on Climate Change (Oct. 6, 1997), available at <http://clinton6.nara.gov/1997/10/1997-10-06-president-remarks-during-climate-change-conference.html>. The President's State of the Union address in January 1998 called global warming “our overriding environmental challenge.” White House Office of the Press Secretary, State of the Union Address by the President, (Jan. 28, 1998), available at <http://clinton6.nara.gov/1998/01/1998-01-27-state-of-the-union-address-by-the-president.html>. While the Clinton administration had from the beginning sought to take action on climate change, the President was distracted from this effort by, for example, his battles with Congress over the budget, especially following the Congressional takeover by the Republicans in 1995, and the campaign to win reelection in 1996.

¹¹³ S. Res. 98, 105th Cong. (1997) (enacted) [hereinafter the Byrd-Hagel Resolution]. The legal effect of this resolution is unclear. The Constitution provides that the President has the power to make treaties with the advice and consent of the Senate, provided two-thirds of those present concur. Article II, section 2.

¹¹⁴ Anderson, *supra* note 109, at para. 35.

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ing emissions. Though the United States had pushed for developing country participation in international negotiations,¹¹⁵ now it appeared that this participation was a requirement for ratification. Not only would the Clinton administration need to consider what emissions limitations it could accept, then, it also had to decide how to reconcile two conflicting mandates regarding developing countries, one from U.S. Congress and the other from the rest of the world.¹¹⁶ The resolution also expressed concern about the impact of emissions limitations on the U.S. economy. But as the richest country in the world, undoubtedly the U.S. would have a hard time convincing other countries it could not afford to take action. This conflict in priorities and perception between international and domestic constituencies would complicate the U.S. policymaking process and international negotiations for the rest of the administration's tenure.¹¹⁷ "Byrd-Hagel polarized the relationship between the administration and Congress on climate change," according to Former Acting Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs Melinda Kimble.¹¹⁸

The United States unveiled the proposal it would take to Kyoto on October 22, 1997, in a speech President Clinton gave to the National Geographic Society. First, the United States

¹¹⁵ See Wirth COP-2 Statement, *supra* note 68.

¹¹⁶ And, in another irony, with the exception of the U.S. Agency for International Development, agency funding for climate change projects in developing countries was scarce. Pomerance Interview, *supra* note 51. If the U.S. thought developing countries should work to reduce their emissions, presumably it would direct its funding to assist these efforts. Of course, one must keep in mind that funding for overseas activities is usually not a priority of the Executive Branch or Congress, and the Clinton administration had to pick its funding battles with Congress. Thus, it is not clear that the administration would have had any success if it had pushed for this type of funding.

¹¹⁷ Under Secretary Wirth succinctly described this difference in perspectives between the U.S. and the developing countries in Congressional testimony:

"We look at them and point to the cause of the problem in the future; they look at us and point to the cause of the problem now. We look at them and worry about competitiveness; they look at us, and point to our overwhelmingly better lifestyle and standard of living - which most of them are desperate to duplicate, but are being told is beyond their reach because of the environmental consequences. As President Clinton remarked . . . our problem with China is one of national security - it is that China might follow our emissions path, and in so doing would create a world unlivable for us all. We look to Kyoto and demand that all countries participate; developing countries look to Kyoto and agree to take actions - but only after the industrialized world has moved first."

Wirth Testimony, *supra* note 100.

¹¹⁸ Kimble Interview, *supra* note 38.

would propose that industrialized countries “commit to the binding and realistic target of returning to emissions of 1990 levels between 2008 and 2012.”¹¹⁹ Second, the United States would “embrace flexible mechanisms for meeting these limits,” including emissions trading and joint implementation.¹²⁰ Finally, President Clinton said that the United States would “not assume binding obligations unless key developing nations meaningfully participate in this effort.”¹²¹

Of course, while its proposal was less stringent than the one set forth by the EU,¹²² the administration knew the U.S. stabilizing emissions at 1990 levels by the 2008-2012 time period would still require substantial effort. U.S. emissions of carbon dioxide, the main greenhouse gas, in 1996 were approximately 9.9 percent greater than in 1990.¹²³ Thus, Clinton also announced various efforts the administration was and would be taking at home to move the U.S. to a path of reduced emissions. These efforts included tax cuts and research and development spending worth up to \$5 billion over the next 5 years to encourage energy efficiency and the use of cleaner energy sources,¹²⁴ urging “companies to take early actions to re-

¹¹⁹ Clinton's National Geographic Speech, *supra* note 1, at para. 16. According to Pomerance, Clinton's speech originally had called for a 5 percent reduction in emissions, but a member of Clinton's economic team changed 5 to 0 (i.e., stabilization). Pomerance Interview, *supra* note 51. Because an administration group chaired by the National Economic Council and Council on Environmental Quality had failed to agree upon a target, agreement on a target “number” was left to an internal White House process for clearing Presidential speeches. *Id.*

¹²⁰ Clinton's National Geographic Speech, *supra* note 1, at para. 18.

¹²¹ *Id.* at para. 19. Stuart Eizenstat, who led the negotiations for the U.S. at Kyoto, later elaborated on what the administration meant by “meaningful participation”:

[it] means for us the wealthiest countries on a per capita income basis, and the biggest emitters assume, over a reasonable period of time, binding commitments. They do not necessarily have to be the same commitments as the developed world is taking.

Interview with Stuart Eizenstat, Under Secretary of State for Economic, Business, and Agricultural Affairs (Nov. 26, 1997), available at http://www.state.gov/www/global/oes/971126_eizenstat.html.

¹²² In October, Japan and a group of 77 developing countries also announced what emissions reductions targets they would be seeking at Kyoto. Japan sought a 5 percent reduction in emissions by 2012; the developing countries offered an aggressive proposal to limit emissions at thirty-five percent below 1990 levels by 2020.

¹²³ Author's calculation based on data compiled by the Energy Information Administration (EIA). Energy Information Administration, Summary of Estimated U.S. Emissions of Greenhouse Gases, 1990-1999, available at <http://www.eia.doe.gov/oiarf/1605/ggrpt/tbles1.html> (last modified Oct. 31, 2000).

¹²⁴ *Id.* at para. 22. This package of domestic actions became known as the Climate Change Technology Initiative (CCTI), a package of spending and tax incentives de-

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duce emissions by ensuring that they receive appropriate credit for showing the way,"¹²⁵ increasing the role of the federal government – one specific goal he set was to install 20,000 solar roofs on federal buildings by 2010,¹²⁶ and bringing competition to the electricity industry.¹²⁷

Documents released by the White House Climate Change Task Force provided additional context and background to the U.S. Kyoto strategy. President Clinton's plan was based on five key principles: (1) the policies should be guided by science, (2) the policies should rely on market-based common sense tools (such as international emissions trading), (3) the U.S. should seek "win-win solutions" such as technologies that reduce inefficiencies, thus saving money, and reduce emissions, (4) global participation is essential to addressing a global problem (in other words, developing countries must participate), and (5) the U.S. government must have "regular common-sense reviews" of the economics and science of climate change.¹²⁸ Guided by these principles, the administration's plan would proceed in three stages.¹²⁹ First, the administration would pursue the efforts described above and conduct an economic

signed to stimulate the use of energy efficient technologies in buildings, industrial processes, vehicles, and power generation. The administration would request \$6.3 billion (not \$5 billion) for these activities. THE ACCOMPLISHMENTS OF THE CLINTON ADMINISTRATION ON CLIMATE CHANGE, *supra* note 3, at 7-8

¹²⁵ EIA Summary, *supra* note 123, at para. 23. Various legislative proposals have been introduced to provide credit for entities that take action to reduce emissions prior to the enactment of any mandatory emissions reduction scheme.

¹²⁶ *Id.* at para. 25.

¹²⁷ *Id.* at para. 26. Whether deregulating the electricity industry will reduce greenhouse gas emissions is a matter of debate – renewable energy is generally more expensive than coal or natural gas, so the ability to sell power openly on the market could lead to companies running old polluting inexpensive coal plants at the highest levels possible and selling the cheap energy where it couldn't be sold before, because of market restrictions. Clinton's speech noted that deregulation must occur "in a way that leads to even greater progress in cleaning our air and delivers a significant down payment in reducing greenhouse gas emissions." *Id.* The administration's deregulation proposal called for a requirement that at 5.5 percent of electricity sales be generated from non-hydroelectric renewable sources, subject to a cost cap and included include a \$3 billion Public Benefits Fund, to support conservation and energy efficiency measures, research and development into clean and efficient technology, and deployment of renewable energy technologies. White House Office of the Press Secretary, The Clinton Administration's Comprehensive Electricity Competition Plan, (Mar. 25, 1998), *available at* <http://clinton6.nara.gov/1998/03/1998-03-25-electricity-plan-paper.html>.

¹²⁸ President Clinton's Climate Change Proposal (Oct. 22, 1997), *available at* http://www.state.gov/www/global/global_issues/climate/background.html

¹²⁹ *Id.*

review near the end of this first stage.¹³⁰ The second stage, which would begin around 2004, would include a review of progress and next steps as the U.S. moved “toward a market-based permit trading system for carbon emissions.” A second economic review would occur near the end of this stage.¹³¹ The third stage would be a reduction of emissions to 1990 levels in the 2008-2012 period, and below 1990 levels in the 5-year period after that. However, prior to beginning the third stage, “the second economic update and review would allow Congress and the President to evaluate how the economy had responded to a decade’s worth of experience in the first two stages of the President’s plan.”¹³²

Clinton’s speech at the National Geographic Society and the White House’s follow up documents accomplished the following crucial objectives. Clinton’s speech informed the American public about the seriousness of global warming and the strong science behind the conclusion that human activity was affecting the climate.¹³³ The administration told the public what it was going to do to stave off global warming, domestically and internationally. The administration also let the international community know what it would put on the table in Kyoto. Industry was given notice that the administration planned to move to a permit-based trading system, and what target the administration would seek. The administration also told Congress it would seek the participation of developing countries and conduct economic analyses, as called for in the Byrd-Hagel Resolution. And, finally, all of these proposals were designed to “create an incentive, a market incentive, for people to adopt behaviors that will reduce greenhouse gas emissions.”¹³⁴ Now, all the U.S. needed to do was get the rest of the world on board with its proposal at Kyoto.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Clinton’s National Geographic Speech, *supra* note 1, at para. 12 -13.

¹³⁴ White House Kyoto Press Conference, *supra* note 20. Fuerth mentioned the following elements: a “positive price incentive” through research and development spending and tax relief, a greater consciousness to use energy efficient technologies through public awareness campaigns and labeling, increasing demand for American energy efficient technology abroad by involving developing countries in reducing greenhouse gas emissions, and the certainty of a target and timetable allowing businesses to plan.
Id.

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Immediately prior to the Kyoto negotiations, U.S. negotiators went to Oslo, Norway, for discussions on a proposed land mine treaty that the U.S. opposed. Negotiators were greeted with signs saying "U.S. Go Home."¹³⁵ In the end, the U.S. did not sign on to the treaty and was left isolated. Following this failure, according to Kimble, the Kyoto delegation was told, "Please don't let this be another Oslo."¹³⁶ In addition, because of deep reservations about the economic impact of binding limitations, negotiators were told to "keep as many options on the table to keep costs low."¹³⁷

1. *The Kyoto Negotiations: The U.S. Achieves Most of Its Objectives*

On December 11, 1997, following almost two weeks of negotiations, with the official last day of negotiations stretching out to the following morning,¹³⁸ parties reached a landmark agreement to reduce greenhouse gas emissions, the Kyoto Protocol.¹³⁹ While the U.S. did not achieve all its negotiating objectives,¹⁴⁰ the emissions targets and timetables and menu of market-based options to achieve them all reflect U.S. proposals.¹⁴¹

¹³⁵ Kimble Interview, *supra* note 38.

¹³⁶ *Id.* Pomerance also noted that the experience at the Oslo land mines conference affected the U.S. position at the Kyoto negotiations. See also Pomerance Interview, *supra* note 51.

¹³⁷ Kimble Interview, *supra* note 38.

¹³⁸ And with the much publicized intervention of the Vice President of the United States, Albert Gore, Jr., who flew to Japan to instruct the U.S. negotiators to show flexibility. Kevin Sullivan and Jo Warrick, *Gore Speech On Climate Is Criticized; Visit to Kyoto Talks Leaves Many Confused About U.S. Message*, WASH. POST, Dec. 9, 1997, at A1 (Gore instructs U.S. negotiators to show more flexibility but offered no specifics). According to the lead U.S. negotiator, the Vice President's trip "energized delegations." Press Conference by Under Secretary of State for Economic and Business Affairs Stuart Eizenstat, Kyoto, Japan, as released by the U.S. Delegation at the Climate Change Conference (Dec. 11, 1997), available at http://www.state.gov/www/global/oes/971211_eizen_cop.html [hereinafter Eizenstat Kyoto Press Conference].

¹³⁹ For a description of what the round the clock negotiations were like for the U.S., see Sperling's remarks, White House Kyoto Press Conference, *supra* note 20.

¹⁴⁰ According to Pomerance, the U.S. might have had more success at Kyoto had it negotiated with the EU and the developing countries at one table, rather than meeting with these groups separately. Pomerance Interview, *supra* note 51. Presumably, then, the U.S. could have tied concessions made to one negotiating group to concessions made by the other.

¹⁴¹ The following discussion relies mostly on a fact sheet prepared by the State Department on the Kyoto Protocol. Bureau of Oceans and International Environmental

a. A Five-Percent Reduction in Greenhouse Gas Emissions

Industrialized countries agreed to reduce on average greenhouse gas emissions by five percent below 1990 emissions, with the U.S. agreeing to a seven percent reduction.¹⁴² As discussed above, in October President Clinton said the U.S. would agree to stabilize emissions at 1990 levels, not reduce emissions by seven percent. However, given the structure of the deal reached in Kyoto, U.S. negotiators believed that in essence the U.S. would have to make the same emissions reductions effort as announced by the President, or “at most a three percent real reduction below the President’s initial proposal.”¹⁴³ The issue of sinks and synthetic gases is discussed in greater detail below.

b. Reductions over Five-Year Period Beginning in 2008

Emissions targets are to be reached over a five-year budget period and the first period does not begin until 2008.¹⁴⁴ This was exactly as the U.S. had proposed. By allowing emissions to be averaged over a period of years, short-term fluctuations in economic performance or weather can be smoothed out.¹⁴⁵ The U.S. also pushed for at least a decade before the target period began to give time to U.S. businesses to “make the transition to greater energy efficiency and/or lower carbon technologies.”¹⁴⁶

and Scientific Affairs, Department of State, Fact Sheet on the Kyoto Protocol on Climate Change, (Jan. 15, 1998), available at http://www.state.gov/www/global/oes/fs_kyoto_climate_980115.html [hereinafter Kyoto Fact Sheet]. Two transcripts of press conferences held immediately following the negotiations also provide the Administration’s point of view, in a more colorful fashion, on what the U.S. achieved in Kyoto. See, Eizenstat Kyoto Press Conference, *supra* note 137.

¹⁴² The Kyoto Protocol to the United Nations Framework Convention on Climate Change, 3d Sess., [1997] U.N. Doc FCCC/CP/1997/L.7/Add.1/1997, art. 3.1 (overall goal of 5 percent) and art. 3.7 (describing assigned amounts for Parties in Annex I) reprinted in 37 I.L.M. 32 (1998) [hereinafter Kyoto Protocol]. Each country’s “quantified emissions limitation or reduction commitment” is contained in Annex B to the Kyoto Protocol.

¹⁴³ Kyoto Fact Sheet, *supra* note 141. Pomerance notes that because the U.S. had failed to agree on a target below stabilization prior to Kyoto, the U.S. was “boxed in” at the negotiations. Pomerance Interview, *supra* note 51. It was not clear what the U.S. wanted, whereas the EU had earlier and emphatically agreed to a 15 percent reduction.

¹⁴⁴ Kyoto Protocol, *supra* note 142, at art. 3.1.

¹⁴⁵ Kyoto Fact Sheet, *supra* note 141.

¹⁴⁶ *Id.*

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c. Targets Include all Six Greenhouse Gases

All six major greenhouse gases – carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride – are covered by the targets.¹⁴⁷ The latter three are substitutes for chlorofluorocarbons and are highly potent and long-lived. Because of the lack of data for emissions of these gases in 1990, a 1995 baseline for these gases will be used.¹⁴⁸ This shift to a higher baseline for the U.S. “accounts for about one percent of the seven percent reduction.”¹⁴⁹

d. Sinks Activities

Certain activities that absorb carbon – sinks – may be counted against emissions reductions targets.¹⁵⁰ The U.S. wanted to encourage the planting of trees and other agricultural and forestry activities that would sequester carbon.¹⁵¹ The accounting method adopted in Kyoto differs from the one the U.S. originally used. The U.S. assumed that the 1990 baseline would be lowered by carbon-absorbing activities, but it is not.¹⁵² This accounts for another three percent of the seven percent reduction.¹⁵³

¹⁴⁷ Kyoto Protocol, *supra* note 142, at art. 3.1 and Annex A, which lists the greenhouse gases to be included.

¹⁴⁸ *Id.* at art. 3.8.

¹⁴⁹ Kyoto Fact Sheet, *supra* note 141.

¹⁵⁰ Kyoto Protocol, *supra* note 142, at art. 3.3 and 3.4. Article 3.3 provides in part that the “net changes in greenhouse gas emissions by . . . sinks . . . limited to afforestation, reforestation and deforestation since 1990 . . . shall be used to meet the commitments under this Article of each Party included in Annex I.” Article 3.4 is more complicated. It provides in part that the Conference of the Parties “shall . . . decide upon modalities, rules and guidelines as to how, and which, additional human-induced activities related to . . . sinks in the agricultural soils and the land-use change and forestry categories shall be added to, or subtracted from, the assigned amounts for Parties included in Annex I . . .” *Id.*

¹⁵¹ Kyoto Fact Sheet, *supra* note 141.

¹⁵² *Id.* As senior official Leon Fuerth put it succinctly, the Kyoto formulation is “a more generous scoring of forests than we had in our [proposal].” White House Kyoto Press Conference, *supra* note 20.

¹⁵³ Kyoto Fact Sheet, *supra* note 141.

e. Emissions Trading

Parties may use emissions trading to achieve targets.¹⁵⁴ The agreement to permit emissions trading was another U.S. success. Emission trading allows countries that are able to reduce emissions cheaply to sell such emissions credits to countries that otherwise might have to undertake expensive emissions reduction efforts.¹⁵⁵ This preserved flexibility and made the agreement cost-effective, in the view of the U.S.¹⁵⁶ In addition, if the European Union could, in effect, trade emissions amongst its members by virtue of applying one target to all EU members (the EU “bubble”),¹⁵⁷ then other countries should be able to trade as well.

f. Joint Implementation

The Protocol permits developed countries to acquire and trade “emissions reductions units” from projects in developed countries.¹⁵⁸ In other words, developed country A may sell

¹⁵⁴ Kyoto Protocol, *supra* note 142, at art. 17 (which provides in part that “[t]he Parties included in Annex B may participate in emissions trading for the purpose of fulfilling their commitments under Article 3. Any such trading shall be supplemental to domestic actions for the purpose of meeting [these commitments]”). How “supplemental” trading had to be would be a matter of great debate between the European Union and the U.S. and its supporters. See also Articles 3.10 (additions to the acquiring Party’s assigned amount) and 3.11 (subtractions from the transferring Party’s assigned amount).

¹⁵⁵ Interestingly, several key developing countries (India, China and Indonesia) strongly opposed emissions trading during the Kyoto Conference, almost leading to a breakdown in negotiations. See White House Kyoto Press Conference, *supra* note 20. Why would developing countries care if developed countries use emissions trading? Developed countries might use emissions trading instead of undertaking emissions reductions at home -- especially Russia, which, due to the collapse of its economy, would have many excess credits to sell. See J.W. ANDERSON, THE KYOTO PROTOCOL ON CLIMATE CHANGE: BACKGROUND, UNRESOLVED ISSUES, AND NEXT STEPS, 16 (Jan. 1998).

¹⁵⁶ See Kyoto Fact Sheet, *supra* note 141 (“Structured effectively, emissions trading can provide a powerful economic incentive to cut emissions while also allowing important flexibility for taking cost-effective actions.”).

¹⁵⁷ In fact, at the U.S. press conference on the last day of the negotiations, Under Secretary Eizenstat announced the formation of an “umbrella” group composed for trading of the new emissions rights, which would consist of the U.S., Canada, Japan, New Zealand, Australia and Russia. Other countries were welcome to join. See Eizenstat Kyoto Press Conference, *supra* note 137.

¹⁵⁸ Kyoto Protocol, *supra* note 142, at art. 6. See also art. 3.10 (addition of project-based emissions reductions units to the acquiring Party’s assigned amount) and 3.11 (subtraction of project-based emissions reductions units from the transferring Party’s

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emissions reductions units generated from a project in its country to developed country B. Participation by the private sector (companies) is allowed.¹⁵⁹

g. Clean Development Mechanism

Clean Development Mechanism (CDM) allows for developed country parties to use certified emissions reductions generated by projects in developing countries.¹⁶⁰ One of the most innovative features of the Kyoto Protocol is the CDM. It will allow developed country parties to use certified emissions reductions generated by projects in developing countries towards their targets.¹⁶¹ The U.S. saw this as part of the “down payment” in the Kyoto Protocol on developing country participation.¹⁶² Participation by private sector entities is permitted,¹⁶³ and projects can begin to generate credits as early as the year 2000.¹⁶⁴ Thus, Annex I parties can look all over the world to find the cheapest emissions reductions, and incentives are created to transfer technology to the developing world.¹⁶⁵ In addition, a small portion of the proceeds of the CDM is directed to “assist developing country Parties that are particularly vulner-

assigned amount).

¹⁵⁹ *Id.* at art. 6.3.

¹⁶⁰ *Id.* at art. 12. *See also* art. 3.12 (certified emissions reductions acquired under Article 12 shall be added to the assigned amount of the acquiring Party).

¹⁶¹ Though the CDM evolved from a proposal by Brazil, some developing countries opposed the CDM on the grounds that it constituted “environmental colonialism,” presumably because they feared developed countries would use CDM investments to dictate how Third World countries would develop. Anderson, *supra* note 155. While the CDM would promote investment, developing countries were more interested in developed countries meeting their commitments for “new and additional financial resources.” Kyoto Protocol, *supra* note 142, at art. 11.2(a); UNFCCC, *supra* note 43, at art. 4.3 (to meet developing countries’ full costs in compiling an inventory of greenhouse gases emissions sources and sinks); Anderson, *supra* note 155, at 16-17.

¹⁶² Kyoto Fact Sheet, *supra* note 141.

¹⁶³ Kyoto Protocol, *supra* note 142, at art. 12.9.

¹⁶⁴ *Id.* at Article 12.10.

¹⁶⁵ Or, as Gene Sperling put it:

[The CDM] also creates market incentives in which, through partnerships with other countries, there's opportunities to have, you know, win-win situations where you would be helping retool aspects of another country's economy, but in ways that would profit to American companies and make it easier for us to hit our targets.

White House Kyoto Press Conference, *supra* note 20.

able to the adverse effects of climate change to meet the costs of adaptation.”¹⁶⁶

h. Developing Countries

Despite achieving most of its negotiating objectives, the U.S. did not secure meaningful participation by developing countries. Parties failed to agree to include a proposed Article 10, which would have allowed developing countries to volunteer to take on a binding emissions target.¹⁶⁷ Argentina and a number of other developing countries tried to reopen discussions on this article, but other developing countries evidently blocked this discussion.¹⁶⁸ While the CDM would provide an incentive for emissions reductions projects in developing countries, Under Secretary Eizenstat admitted that this was not sufficient developing country involvement.¹⁶⁹

i. Issues and Details Remaining after Kyoto.

While the Kyoto Protocol set the stage for a binding regime with emissions targets, many details remained to be spelled out in order to make the agreement workable. Some important issues were left unaddressed:

- *Compliance*: Article 18 directed the Conference of the Parties serving as the meeting of the Parties to the Protocol (affectionately known as the “COP/MOP”) to take up the issue of compliance. What would be the consequences of not meeting a target? Who decides who is in compliance with a target? Should only developed country parties judge compliance with targets since they are the parties with that obligation? How do you assess compliance with provisions such as Article 3.14, which states that Annex I parties “shall strive to implement the [emissions reduction] commitment . . . in such a way as to minimize adverse social, environmental and economic impacts on developing country Parties?”

¹⁶⁶ Kyoto Protocol, *supra* note 142, at art 12.8.

¹⁶⁷ Eizenstat Kyoto Press Conference, *supra* note 137.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* (“Clearly, despite the very important step taken through the Brazilian process of creating a Clean Development Mechanism for Credit, that meaningful participation has not yet been taken as a result of the steps that were done here.”). *Id.*

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- *Sinks*: What activities could be credited under Article 3.4? Are sinks counted 100 percent or are they discounted?
- *Emissions trading*: Who will be allowed to trade emissions rights – just government or also private firms? What rules will apply? Who will monitor and broker emissions trades?
- *Supplementarity*: If emissions trading is to be “supplemental” to domestic action, what does “supplemental” mean, if anything? Does it mean that over half of a country’s efforts to reduce emissions must come from domestic action, or is supplemental non-quantifiable?
- *Making the CDM operational*: Emissions reductions are supposed to be certified by “operational entities”¹⁷⁰ – what would these entities be and how would they make their decisions? What would be the certification criteria and how open would the decision-making process be? How would these projects be audited and verified?¹⁷¹ What criteria if any would be used to determine if a project helped a developing country Party “in achieving sustainable development”?¹⁷² For example, are nuclear power plants permissible projects? Sinks projects?¹⁷³
- *Fungibility (transferability)*. The Kyoto Protocol mentions certified emissions reductions (under the CDM), emissions reduction units (from joint implementation) and transfer of assigned amounts (under emissions trading). A key question for the private sector question is whether these “units” are all interchangeable. If they are not, then it would effect

¹⁷⁰ Kyoto Protocol, *supra* note 142, at art. 12.5.

¹⁷¹ *Id.* at art. 12.7.

¹⁷² Article 12.2 provides that part of the purpose of the CDM “shall be to assist Parties not included in Annex I in achieving sustainable development . . .” *Id.* at art. 12.2.

¹⁷³ Environmental groups expressed concern about including sinks, clean coal or nuclear projects in the CDM. See, e.g. Nuclear Power Not Part of Global Warming Solution, World Wildlife Fund Press Release (Apr. 6, 2000); *Renewable Energy, Energy Efficiency & the CDM*, Greenpeace (Nov. 2000), available at <http://www.greenpeace.org/~climate/climatecountdown/renewsinks.pdf> (stating that CDM should only include state-of-the-art renewable energy or high-value demand side efficiency technologies, not coal or sinks). With regard to sinks, some environmental groups were concerned that including sinks in the CDM would provide an incentive to log existing trees and replace them with fast-growing trees (like eucalyptus), in order to gain sequestration credits. See, e.g. *The Clearcut Case: How the Kyoto Protocol Could Become a Driver for Deforestation*, World Wildlife Fund, available at <http://www.panda.org/resources/publications/climate/carbonsinks/carbonsinks.html>.

the liquidity of any market that developed for trading these units.

Thus, despite addressing and resolving a number of difficult issues, including binding targets and timetables, negotiators still had a full plate to tackle before they could bring back a ratifiable agreement to their respective governments. In particular, the U.S. needed to educate many countries about the value of market mechanisms such as emissions trading and how these mechanisms would work,¹⁷⁴ in order to make progress in future negotiations so that these provisions would be operational.¹⁷⁵ Furthermore, developing countries had their own, strikingly different agenda: to compel developed countries to provide the new and additional financial resources and technology transfer called for in both the UNFCCC and the Protocol.¹⁷⁶

The U.S. also faced a number of challenges at home. To satisfy Congress, the U.S. still needed to obtain meaningful participation by developing countries and to show that the Kyoto approach would not hurt the U.S. economy. Key industry groups, such as coal, oil, electric utility, and car companies, opposed the agreement.¹⁷⁷ And while news reports suggest that President Clinton and Vice President Gore felt that failure to reach agreement would have “enraged environmentalists,”¹⁷⁸

¹⁷⁴ As stated by Under Secretary Eizenstat, “When we first proposed these type [sic] of market-based mechanisms in Kyoto, it was almost a foreign concept to other government. They had no experience. . . . So our leadership there [at Kyoto] and our experience in this area are really critical.” Mason, *supra* note 97, at 433.

¹⁷⁵ The importance to the U.S. of this effort on market mechanisms cannot be understated. The agreement would not be cost-effective for the U.S. if these mechanisms were not available. Under Secretary Eizenstat made this clear in testimony before the Senate soon after Kyoto, “Ensuring that we can meet our target reductions cost-effectively will depend significantly on access to the flexibility mechanisms we fought hard to include in the Kyoto Protocol. Let me be very clear: The commitment we made in Kyoto would not have been made – could not have been made – were it not for the flexibility mechanisms that were also agreed there. Until we are satisfied with the rules and procedures yet to be established, the promise of Kyoto will never be realized.” Statement of Stuart E. Eizenstat, Under Secretary of State for Economic, Business and Agricultural Affairs before the Senate Committee on Agriculture, Nutrition and Forestry (Mar. 5, 1998) [hereinafter Eizenstat Senate Committee Statement].

¹⁷⁶ See, e.g., Kyoto Protocol, *supra* note 142, at art. 10(c) (technology transfer) and art. 11 (financial mechanism).

¹⁷⁷ See, e.g., Kevin Sullivan, *Lobbyists Turn Up the Heat at Global Warming Forum; Industry Makes Its Case Against Proposed Treaty*, WASH. POST, Dec. 4, 1997, at A1.

¹⁷⁸ James Bennet, *Warm Globe, Hot Politics: For Clinton and Gore, Fight Looms in the Senate*, N. Y. TIMES, Dec. 11, 1997.

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some environmental groups may have preferred such failure because they believed that the agreement amounted to legitimizing a betrayal and compromise of the UNFCCC's core objectives. The World Wildlife Fund called Kyoto "a flawed agreement that will allow major polluters to continue emitting greenhouse gasses through loopholes."¹⁷⁹

F. 1998: INTERNATIONAL AND DOMESTIC RESISTANCE TO U.S. CLIMATE STRATEGY

In testimony before the Senate in March 1998, Under Secretary of State Eizenstat laid out the administration's agenda following the Kyoto Protocol. First, the U.S. would work hard to "ensure that the rules and procedures adopted enable emissions trading, joint implementation and the Clean Development Mechanism to work smoothly and efficiently . . . [and to] work closely with our industries to be sure they are satisfied that the emissions trading system which is developed is as efficient and effective as possible to meet their needs."¹⁸⁰ The international effort would include workshops in trading held by the U.S. and the EU and work by the U.N. Commission on Trade and Development (UNCTAD) with developing countries.¹⁸¹ Second, the U.S. would "put on a full court diplomatic press to bring developing nations into a meaningful role in helping solve the global climate challenge."¹⁸² This effort would include bilateral agreements and using regional and multilateral fora such as the Summit of the Americas process.¹⁸³ It would also include working with international financing institutions such as the World Bank to promote in developing countries investments in clean energy and energy efficient technology and market-based energy sector policies that will help reduce greenhouse gas emissions.¹⁸⁴ Eizenstat also called on Congress to fully fund the Administration's request for contri-

¹⁷⁹ *Id.* However, Fred Krupp, executive director of the Environmental Defense Fund (now called Environmental Defense), said that while much work remained to be done on the agreement, "Vice President Gore should be commended for coming to Japan and opening the doors to an agreement." *Id.*

¹⁸⁰ Eizenstat Senate Committee Statement, *supra* note 175.

¹⁸¹ Mason, *supra* note 97, at 433.

¹⁸² Eizenstat Senate Committee Statement, *supra* note 175.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

butions for UNFCCC work – in particular the U.S.'s pledge to the Global Environmental Facility (GEF), to which the U.S. owed \$300 million.¹⁸⁵

The Administration announced a \$6.3 billion Climate Change Technology Initiative to cut U.S. greenhouse gas emissions over the next 5 years.¹⁸⁶ The initiative consisted of \$3.6 billion in tax credits for energy-efficient purchases and renewable energy and \$2.7 billion for new research and development (R&D) spending over 5 years.¹⁸⁷ The proposal covered tax credits for consumers who purchased advanced technology, highly efficient vehicles, extensions of wind and biomass power tax credits, research and development spending for highly efficient cars, and a \$100 million increase in appropriations for solar and renewable energy research and development.¹⁸⁸

Why didn't the administration submit a legislative package on emissions reductions in order to put the U.S. on track to meet its Kyoto targets? The Kyoto decision had gotten considerable, mostly favorable press coverage in the United States.¹⁸⁹ However, in January of 1998 news broke that the President had had an affair with White House intern Monica Lewin-

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* As noted previously, this proposal evolved from the President's announcement in October 1997. The \$6 billion proposal was first outlined in the President's State of the Union address in January. The White House Office of the Press Secretary, State of the Union Address by the President, (Jan. 27, 1998) available at <http://clinton6.nara.gov/1998/01/1998-01-27-state-of-the-union-address-by-the-president.html>.

¹⁸⁷ Eizenstat Senate Committee Statement, *supra* note 175.

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., *Kyoto Accord Is a Start Along the Right Track*, L. A. TIMES, Dec. 11, 1997, at 8; *One Step Forward at Kyoto Global Warming*, ST. LOUIS POST DISPATCH, Dec. 12, 1997, at D22 (editorial praising agreement); Joby Warrick, *Climate Pact Rescued in Final Hours; Turbulence Pervaded First Round of Greenhouse Gas Talks*, WASH. POST, Dec. 13, 1997, at A1; *Up to Speed; The Week's Top Stories; Global Warming Pact OK'd*, ATLANTA J.-CONST., Dec. 14, 1997, at D2; Indira A.R. Lakshmanan, *Accord Set on Cutting Emissions; 160 Nations in Agreement; US Hails 'Historic First Step'*, BOSTON GLOBE, Dec. 11, 1997, at A1; Maggie Farley, *Summit Decrees 6% Reduction in Main Global Warming*, L. A. TIMES, Dec. 11, 1997, at 1. Commentators recognized Kyoto's uphill battle in the Senate and that implementation would require substantial work by the Administration. See, e.g., James Gerstenzang, *Global Warming Accord Faces Tough Fight in Senate*, L. A. TIMES, Dec. 11, 1997, at 12; Tom Teepen, *Sensible Public Can Save Global Warming Treaty*, ATLANTA CONST., Dec. 16, 1997, at A27 (editorial saying that public can be administration's biggest ally in getting Kyoto Protocol through the Senate); Fred Hiatt, *Lukewarm Results on Climate Control*, WASH. POST, Dec. 15, 1997, at A27 (editorial saying that to make treaty evolve into something meaningful "will take a sustained and committed administration campaign at home and overseas").

sky.¹⁹⁰ Once that happened, “the administration could do nothing,” said former Acting Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs Melinda Kimble.¹⁹¹ More specifically, once the Lewinsky affair took political center stage, it became difficult for Clinton to move forward with any policies, domestic or international. In addition, more importantly, the administration also lacked a domestic consensus to take action, as there were serious concerns about the costs of undertaking domestic emissions reductions.¹⁹²

The administration faced “real hostility” from several members of Congress upset about the Kyoto Protocol.¹⁹³ The U.S. delegation members were caught up in Congressional subpoenas and hearings and agencies were inundated with letters from Congress submitting questions on climate.¹⁹⁴ Administration officials that needed confirmation from the Senate were held up.¹⁹⁵ Fueling the fire was an EPA document asserting that the EPA had the authority to regulate carbon dioxide under the Clean Air Act, which caused some to worry that the administration might try to establish a domestic regulatory scheme for carbon dioxide prior to ratification of the Kyoto Protocol.¹⁹⁶ To address some Congress members’ concern that the

¹⁹⁰ See, e.g., Susan Schmidt et al., *Clinton Accused of Urging Aide to Lie; Starr Probes Whether President Told Woman to Deny Alleged Affair to Jones’s Lawyers*, WASH. POST, Jan. 21, 1998, at A1 (reporting that Independent Counsel Kenneth Starr was expanding his investigation of Clinton to see whether Clinton encouraged Monica Lewinsky to lie to lawyers for Paula Jones about her affair with the President); Peter Baker and Susan Schmidt, *FBI Taped Aide’s Allegations; Seeking Cooperation, Bureau Confronted Ex-White House Intern*, WASH. POST, Jan. 22, 1998, at A1 (FBI tapes Lewinsky saying that Clinton urged her to lie about their sexual relationship).

¹⁹¹ Kimble Interview, *supra* note 38. Pomerance agrees that after the scandal hit, the administration “had no traction.” Pomerance Interview, *supra* note 51.

¹⁹² Kimble Interview, *supra* note 38.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ See, e.g., Michael Tebo, *Senate Nominees Block Nominee for Top State Department Post Until White House Releases Its Climate Costs Analysis*, (July 17, 1998), available at http://www.weathervane.rff.org/negtable/nominee_blocked.html. (Senator Chuck Hagel says that his panel will not act on the nomination of Frank Loy for Under Secretary of State for Global Affairs until the White House releases information demanded by Congress). *Id.*

¹⁹⁶ An EPA document entitled “Electricity Restructuring and the Environment: What Authority Does EPA Have and What Does it Need,” stated that EPA could regulate carbon dioxide. See Theresa Sotto, *House Members Assert EPA Cannot Regulate CO₂ under the Clean Air Act*, (Mar. 20, 2000), available at <http://www.weathervane.rff.org/features/feature090.html>. Congressman Tom DeLay

Clinton administration was moving too fast on climate change, Representative Knollenberg attached an amendment to a Fiscal Year 1999 appropriations bill stipulating that no funds could be used "for the purpose of implementation, or in preparation for implementation, of the Kyoto Protocol."¹⁹⁷ These battles with Congress over the administration's strategy and approach for addressing climate change would continue until the end of the Administration.

Congressional concerns about the costs to the U.S. of compliance with Kyoto prompted the administration to prepare an economic analysis of Kyoto. In March, Council of Economic Advisers (CEA) Chair Dr. Janet Yellen testified before the House Commerce Committee that compliance with Kyoto would mean for household consumers an increase of three to five percent in energy costs in the years 2008-2012, or in other words, it would raise the average household's energy bill in ten years by between \$70 and \$110 per year.¹⁹⁸ While Yellen did

questioned this interpretation, prompting EPA Administrator Carol Browner to ask for a legal opinion from her General Counsel. *Id.* One month later the then General Counsel Jonathan Z. Cannon submitted a memo to Browner stating that EPA did have authority under the Clean Air Act to regulate carbon dioxide since it met the definition of "pollutant" in the Act. *Id.* Several members of Congress disagreed, prompting a series of correspondence between the Hill and EPA on the matter. Browner eventually stated at a hearing in February 2000 that regulating carbon dioxide was not within EPA's authority, though EPA's general counsel contended that while the Administration currently did not have any intention of enacting such a program, if it wanted to, it could. *Id.* (citing EPA General Counsel Gary Guzy affirming the opinion of his predecessor); Jennifer B. Thatcher, EPA Administrator Browner Cites Global Warming as One of Top Environmental Problems," (Feb. 24, 2000), *available at* <http://www.weather.vane.rff.org/features/feature088.html> (describing Browner testimony about lack of EPA authority on carbon dioxide).

¹⁹⁷ Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, H.R. 4194 (1999) (under "Environmental Programs and Management"). According to Knollenberg, the "main purpose" of his amendment was to "ensure that existing regulatory authority is not misused to implement or to serve as a future basis for the implementation of the Kyoto Protocol in advance of its consideration and approval by the Senate of the United States." CONG. REC. H6565 (daily ed. July 29, 1998). Conceivably any action designed to improve energy efficiency or promote renewable energy abroad or domestically, or to discuss means of implementing Kyoto (such as the flexibility mechanisms), could arguably be deemed "preparation for implementation of the Kyoto Protocol." A shorter version of the amendment was attached to Fiscal Year 2000 legislation as well. U.S. Department of Agriculture Appropriations Act, H.R. 1906, § 739 ("None of the funds appropriated by this Act shall be used to propose or issue rules, regulations, decrees, or orders for the purpose of implementation, or in preparation for implementation of the Kyoto Protocol .").

¹⁹⁸ Dr. Janet Yellen, Chair, Council of Economic Advisers, Statement before the U.S. Senate Committee on Agriculture, Nutrition, and Forestry (Mar. 5, 1998).

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not provide any detailed economic analysis to support these calculations at that time, she did note that this analysis assumed the U.S. would use the flexibility mechanisms in the Kyoto Protocol.¹⁹⁹ In fact, Yellen later testified that the ability to trade among Annex I countries alone would reduce the U.S.' costs of compliance in half:

Estimates derived from the [Second Generation Model] model confirm that emissions trading among Annex I countries can reduce the cost to the United States of achieving its targets for 2008-2012 emissions by about half relative to a situation in which such trading was not available.²⁰⁰

Critics were not satisfied with the White House's analysis, so the House Science Committee requested the Energy Information Administration, an independent entity within the Department of Energy, to conduct its own analysis of the cost of greenhouse gas reductions on the U.S. economy.²⁰¹ EIA's analysis, released in October, indicated that energy prices could increase significantly – much greater than the Admini-

¹⁹⁹ *Id.* The administration's analysis also assumes that the trading system will work with "near-perfect efficiency." Raymond J. Kopp and J.W. Anderson, *Estimating the Costs of Kyoto: How Plausible are the Clinton Administration's Figures?* (Mar. 12, 1998), available at <http://www.weathervane.rff.org/features/feature034.html>. In addition, it also assumes that cheap emissions reductions outside the U.S. will be easily attainable and available. *Id.* On the other hand, the model used (the so-called Second Generation Model) did *not* include the effects of new domestic initiatives such as electricity restructuring and the Climate Change Technology Initiative, which could decrease the costs of compliance. See The White House, Meeting the Challenge of Climate Change at a Reasonable Cost Fact Sheet, (July 31, 1998), available at http://www.state.gov/www/global/oes/fs_climate_costs_980731.html. Avoided costs of environmental and health damage from climate change were also not included. *Id.* For an illuminating discussion of how a model's assumptions can greatly change the estimated costs of a greenhouse gas reduction policy, see Robert Repetto and Duncan Austin, *The Costs of Climate Protection: A Guide for the Perplexed?* (World Resources Institute 1997). Repetto and Austin identified several key assumptions that accounted for more than 80 percent of the differences in economic predictions across sixteen models. These key assumptions included whether emissions trading is allowed, whether the model assumes that non-fossil energy sources will be available at a competitive price, and how quickly technological change is assumed to occur. *Id.* at 5 and 7.

²⁰⁰ Dr. Janet Yellen, Chair, Council of Economic Advisers, Statement before the U.S. House of Representatives Committee on Government Reform and Oversight, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs (May 19, 1998), available at http://www.state.gov/www/policy_remarks /1998/980519_yellen_climate.html.

²⁰¹ Energy Information Administration, What Does the Kyoto Protocol Mean to U.S. Energy Markets and the U.S. Economy? A Briefing Paper on the Energy Information Administration's Analysis and Report Prepared for the Committee on Science, U.S. House of Representatives, 3 (Oct 1998) (Pub. No. SR/OIAF/98-03 (S)).

stration's analysis suggested. For example, in order to meet the emissions reductions in its various scenarios, "average delivered energy costs . . . must be between seventeen and eighty-three percent higher than projected in 2010."²⁰² However, EIA's analysis focused on domestic actions because provisions for international trading, sinks, and the CDM had not been spelled out and it was unclear to what extent other countries would participate in them.²⁰³ EIA's analysis, per the House Committee's request, also used the same assumptions it used in developing its *Annual Energy Outlook*. Thus, EIA's analysis did not consider any proposed changes in federal or state law, policy or standards through the year 2020, and thus did not consider the administration's Climate Change Technology Initiative.²⁰⁴

The EIA analysis also included projected impacts on specific industries such as electricity, coal and gasoline, predicting that these industries faced "major adjustments."²⁰⁵ For example, an additional 10,000 to 43,000 coal miners' jobs could be lost.²⁰⁶ The average price of gasoline could increase by between eleven and fifty-three percent in 2010.²⁰⁷ Of course, these predictions generated a firestorm of controversy: how could the Administration have signed up to such a bad deal for the U.S. economy? Critics were quick to point to the EIA analysis as proof that a greenhouse gas control regime would harm the U.S. economy.²⁰⁸

²⁰² *Id.* at 2. The analysis also predicted that the price of carbon per metric ton would reach between \$67 and \$348 by 2010. *Id.* at 4. The administration's analysis predicted a range of \$14 to \$23 per ton of carbon equivalent in 2008-2012. Yellen Testimony, *supra* note 200.

²⁰³ See <http://www.eia.doe.gov/oiaf/kyoto/scope.html>.

²⁰⁴ *Id.*

²⁰⁵ Energy Information Administration, *supra* note 201, at 5.

²⁰⁶ *Id.* at 7.

²⁰⁷ *Id.* at 10.

²⁰⁸ The debate about how much a greenhouse gas control regime will cost, and what is the upper limit on acceptable costs, continues. As noted by Resources for the Future (RFF), a policy think tank that focuses on providing unbiased policy-relevant analysis, estimates range from \$25 to \$300 per ton of carbon avoided. J.W. Anderson, Richard D. Morgenstern, and Michael A. Toman, *At Buenos Aires and Beyond*, 134 RESOURCES 6-9 (Winter 1999), at 8. One option that has been discussed is to place a ceiling on the cost of compliance. *Id.* That is, a regime would be structured so that if the price of permits reached a certain cost level, the government would step in and sell as many permits as needed at that price. *Id.* This would ensure that the costs of control would not exceed a certain level. *Id.* (This proposal is also known as the "safety valve" proposal.) This would trade certainty of emissions reductions for certainty of costs, but if predictions

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But despite these battles over how much implementation of Kyoto would cost, a growing number of U.S. companies agreed that global warming warranted action and announced actions to reduce, avoid or sequester emissions.²⁰⁹ Earlier in 1998, the Pew Center on Climate Change²¹⁰ launched a \$5 million campaign to build industry support for taking action on climate change, with over 20 major corporations on its Business Environmental Leadership Council.²¹¹ In fact, numerous companies had begun to identify business opportunities that would arise from an international carbon control regime.²¹² Several major industries and the Environmental Defense Fund participated in discussions regarding credit for early action by businesses. This led to the introduction of a bill by Senator John Chafee in October 1998 that would have permitted the president to enter into binding agreements with U.S. businesses that could generate credits usable in any future domestic program that requires mitigation of greenhouse gases before 2008.²¹³

In the meantime, the Administration geared up for COP-4, to be held in Buenos Aires, Argentina, in November 1998.

about costs being low are correct, then the trigger level would not be met. This proposal is currently being advanced by Americans for Equitable Climate Solutions, headed by former Deputy Assistant Secretary of State for the Environment Rafe Pomerance.

²⁰⁹ Stuart Eizenstat, Head of Delegation/Under Secretary of State, U.S. Delegation to the UNFCCC Conference of the Parties-4 Press Briefing (Nov. 14, 1998), *available at* http://www.state.gov/www/policy_remarks/1998/981114_eizen_brief.html [hereinafter Eizenstat COP-4 Press Conference]. ("In Kyoto, only a handful of companies would even acknowledge that the threat of climate change is real. A year later, a growing number are becoming full partners in our efforts and pledging real action to reduce emissions.")

²¹⁰ The Pew Center on Global Climate Change is a non-profit, non-partisan and independent organization working to provide innovative solutions to addressing global climate change. Established in 1998 by the Pew Charitable Trusts, the Center is led by Eileen Claussen, former U.S. Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, *available at* <http://www.pewclimate.org>.

²¹¹ Pew Center on Global Climate Change, Major Corporations Join Effort to Solve Climate Change Problem, (May 7, 1998), *available at* http://www.pewclimate.org/media/pr_major.cfm.

²¹² Summary of the Fourth Conference of the Parties to the Framework Convention on Climate Change 2-13 November 1998, EARTH NEGOTIATIONS BULLETIN, Vol. 12 No. 97, Nov. 16, 1998, at 14.

²¹³ Michael Tebo, *New Senate Bill Introduces Early Credits for Emissions Reductions*, (Oct. 14, 1998) (describing S.2617), *available at* http://www.weathervane.rff.org/negtable/senate_bill.html.

Meetings of the Convention's subsidiary bodies²¹⁴ in Bonn in March indicated that the U.S. would face significant hurdles in gaining acceptance for the flexibility mechanisms in the Kyoto Protocol. For example, the European Union proposed that a cap be placed on a country's ability to use trading to achieve its target, and many developing countries "balked" at pressure to move rapidly on the flexibility mechanisms until they understood them better.²¹⁵ However, parties did agree to request a special report from the IPCC to advise them on the use of sinks,²¹⁶ and the panel was expected to provide a report in 2000.²¹⁷ While this meant that rules on sinks could not be set at COP-4, it did mean that once the report was issued decisions could be made.

1. COP-4: Buenos Aires Plan of Action

The U.S. realized that it was unlikely that parties at COP-4 would make significant progress in making the flexibility mechanisms operational, including the Clean Development Mechanism (CDM). (Credits generated in 2000 from CDM projects may be applied in the first commitment period, so decisions on this mechanism were needed promptly.)²¹⁸ Its goal, then, was to preserve what had been agreed to at Kyoto and keep all options on the table.²¹⁹ But it also hoped that at least some developing countries would indicate a willingness to limit emissions.²²⁰ The U.S. succeeded at Buenos Aires in achieving these goals.

First, the parties agreed to a two-year plan with deadlines for reaching agreement on key issues in order to make the

²¹⁴ The two subsidiary bodies are the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBSTA).

²¹⁵ Michael Tebo, *Bonn Negotiations Wrap Up*, (June 16, 1998), available at http://www.weathervane.rff.org/negtable/bonn_wrapup.html. For an official description of what transpired at the meetings, See Documents FCCC/SBSTA/1998/6 and FCCC/SBI/1998/6, available at <http://www.unfccc.de> (reports of the two subsidiary bodies, the SBI and the SBSTA).

²¹⁶ REPORT OF THE SUBSIDIARY BODY FOR SCIENTIFIC AND TECHNOLOGICAL ADVICE ON ITS EIGHTH SESSION, BONN, 2-12 JUNE 1998, Doc. No. FCCC/SBSTA/1998/6 (Aug. 20, 1998), at paras. 45(e) and (f), available at <http://www.unfccc.de>.

²¹⁷ Michael Tebo, *Bonn Negotiations Wrap Up*, (June 16, 1998), available at http://www.weathervane.rff.org/negtable/bonn_wrapup.html.

²¹⁸ Kyoto Protocol, *supra* note 142, at art. 12.10.

²¹⁹ Kimble Interview, *supra* note 38.

²²⁰ *Id.*

Kyoto Protocol operational, resulting in the “Buenos Aires Plan of Action.”²²¹ In particular, negotiators agreed to decide by the end of 2000 rules and guidelines for Kyoto’s market-based mechanisms and laid out a detailed work schedule.²²² Also important to the U.S., a schedule for considering rules and procedures for compliance, including consequences for noncompliance, was also laid out.²²³ In a success for the U.S., parties agreed to continue the pilot phase for “Activities Implemented Jointly,”²²⁴ which would give developing countries experience in emissions reduction and sequestration projects prior to the operation of the CDM.²²⁵ The COP “urged” developed country parties to “take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of environmentally sound technologies and know-how to developing country Parties and their access thereto,” and support capacity-building in developing country parties.²²⁶ Parties also established a work plan for consideration of adverse impacts of climate change and response measures.²²⁷ The parties also provided further guidance to the Global Environmental Facility²²⁸ with regard to providing funding to developing countries, including calling for it to streamline its procedures, key issues for developing countries.²²⁹ In addition, the parties agreed that the special report on land use, land use change and forestry being prepared by

²²¹ REPORT OF THE CONFERENCE OF THE PARTIES ON ITS FOURTH SESSION, HELD AT BUENOS AIRES FROM 2 TO 14 NOVEMBER 1998, ADDENDUM: PART TWO: ACTION TAKEN BY THE CONFERENCE OF THE PARTIES AT ITS FOURTH SESSION, Decision 1/CP.4 (Doc. No. FCCC/CP/1998/16/Add.1) (Jan. 20, 1999) [hereinafter Buenos Aires Plan of Action (COP-4)].

²²² *Id.* at 22-31 (Decision 7/CP.4).

²²³ *Id.* at 37 (Decision 8/CP.4). See also Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, The Buenos Aires Climate Change Conference, (Dec. 1998), available at http://www.state.gov/www/global/global_issues/climate/fs-cop4_final_981200.html [hereinafter State Department Fact Sheet on COP-4].

²²⁴ Buenos Aires Plan of Action (COP-4), *supra* note 221, at 20-21 (Decision 6/CP.4).

²²⁵ See State Department Fact Sheet on COP-4, *supra* note 223.

²²⁶ Buenos Aires Plan of Action (COP-4), *supra* note 221, at 12 (Decision 4/CP.4, Article 3(a)).

²²⁷ *Id.* at 17-19 (Decision 5/CP.4)

²²⁸ The Global Environment Facility (GEF) serves as the funding mechanism for the UNFCCC, as well as other international agreements. The GEF funds projects in four focal areas: biodiversity, climate change, international waters, and ozone. Projects to address land degradation, as it relates to the four focal areas, are also eligible for funding. See <http://www.gefweb.org/index.html>.

²²⁹ Buenos Aires Plan of Action (COP-4), *supra* note 221, at 5 (Decision 2/CP.4).

the IPCC should inform decisions of the subsidiary bodies on sinks issues.²³⁰ In recognition of the tremendous workload, the U.S. successfully convinced parties to hold an increasing number of high-level consultations.²³¹

Most importantly for the U.S. – and what the U.S. hoped would be the first of many announcements²³² – Argentina, the host of COP-4, announced that it would take on a target for emissions reductions for the period 2008-2012.²³³ No target was specified, but Argentina said it would announce its target by the next COP.²³⁴ In addition, Kazakhstan announced a similar intention to take on a binding target.²³⁵ Underscoring once again the importance of bringing developing countries on board, Vice President Gore issued a statement saying he was “particularly pleased by the growing engagement of developing countries, marked most notably by Argentina's pledge to take on a binding emissions target,” and he “commended” Kazakhstan for its pledge.²³⁶ The head of the U.S. delegation remarked on the “promising new spirit of engagement that is helping to bridge the divide between developed and developing nations.”²³⁷ However, this “bridge” was made of tenuous mat-

²³⁰ *Id.* at 40-41 (Decision 9/CP.4)

²³¹ See Eizenstat COP-4 Press Conference, *supra* note 209.

²³² *Id.* (predicting that developing country reluctance to take on targets will “dissipate as the model of Argentina spreads”).

²³³ Address by the President of the Republic of Argentina, contained in the REPORT OF THE CONFERENCE OF THE PARTIES ON ITS FOURTH SESSION, HELD AT BUENOS AIRES FROM 12 TO 14 NOVEMBER 1998, PART ONE: PROCEEDINGS, 35 (Jan. 20, 1999). It is unclear how a developing country emissions target would be incorporated into the Protocol. See State Department Fact Sheet on COP-4, *supra* note 223 (noting that the announcements by Argentina and Kazakhstan “present a new challenge to the parties” since the Protocol does not contain provisions for developing countries to voluntarily agree to binding emission targets). Observers speculate that Argentina may have agreed to take on a target because of its status as the host country for the negotiations, its candidacy to join the OECD and the close relationship between Presidents Menem and Clinton. Summary of the Fourth Conference, *supra* note 212, at 13.

²³⁴ Address by the President of the Republic of Argentina, *supra* note 233. Argentina never has announced a target and subsequent economic difficulties make it unlikely it will.

²³⁵ State Department Fact Sheet on COP-4, *supra* note 223. See also Michael Tebo, *COP-4 Concludes with a ‘Sea Change in Attitude’ and a Special ‘Plan of Action’*, available at <http://www.weathervane.rff.org/features/feature054.html> (“Kazakhstan expressed its intention to join the group of industrialized countries and accept a legally binding target.”).

²³⁶ The White House Office of the Vice President, Statement by Vice President Gore on the Buenos Aires Climate Change Agreement, (Nov. 14, 1998), available at http://www.state.gov/www/global/global_issues/climate/981114_gore_climate.html.

²³⁷ Eizenstat COP-4 Press Conference, *supra* note 209. Eizenstat also noted a

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ter, perhaps of the same fiber as the fabled Emperor's new clothes: Argentina had to strike an item on voluntary commitments for developing countries off the provisional agenda for the COP because of overwhelming opposition from other developing countries.²³⁸ Nevertheless, both Eizenstat and Maria Julia Alsogaray, the COP President, asserted that several other developing countries had expressed interest in "Argentina's approach."²³⁹

The day before the conference was slated to end, the United States signed the Kyoto Protocol.²⁴⁰ This brought the number of countries that had signed the Protocol to 60, with two having ratified it.²⁴¹ Republicans attending the meeting in Buenos Aires organized a press conference to protest the U.S. signature. Senator Chuck Hagel said that "[I]n signing the Kyoto Protocol, the President blatantly contradicts the will of the US Senate."²⁴²

With the Protocol signed, a schedule established, all options still on the table, and a door opened for voluntary commitments for developing countries, the U.S. looked to be in good shape. But the U.S. still faced opposition from domestic constituencies, and the requirement for "meaningful participation of developing countries" hung like a 100-pound weight around U.S. negotiators' necks at the international negotiations. Furthermore, developing countries' demands for access to clean technology and to additional financial resources were growing stronger with every COP.²⁴³

change in developing countries' views on CDM, specifically mentioning that China and several African countries had asked about speeding its implementation. *Id.*

²³⁸ Summary of the Fourth Conference, *supra* note 212, at 13.

²³⁹ *Id.*

²⁴⁰ U.S. Department of State, Bureau of Oceans, Environmental and International Scientific Affairs, United States Signs the Kyoto Protocol, (Nov. 12, 1998), available at http://www.state.gov/www/global/global_issues/climate/fs-us_sign_kyoto_981112.html. Signing the agreement does not bind the United States, but it does indicate to other countries that the U.S. does intend to ratify the Protocol

²⁴¹ *Id.*

²⁴² Summary of the Fourth Conference, *supra* note 212, at 13.

²⁴³ *Id.* at 14. For an excellent synopsis of issues that remained to be resolved, including underlying issues such as equity and a long-term strategy, see Andersen et al., *supra* note 208.

G. 1999: COP-5 AND CONTINUED DOMESTIC RESISTANCE

In his State of the Union address, Clinton called global warming “our most fateful new challenge.”²⁴⁴ In February 1999, the Administration released its proposed budget for Fiscal Year 2000 (which would begin October 1999), containing \$4.1 billion for climate-related policies and programs.²⁴⁵ It was a dramatic increase of thirty-four percent from the last year’s budget. Highlights included a Clean Air Partnerships Fund, which would provide grants to state, local and private efforts to reduce emissions, continued support for research and development on renewable energy and energy efficiency, continued

²⁴⁴ White House Office of the Press Secretary, Remarks as Prepared for Delivery by President William J. Clinton State of the Union Address, (Jan. 19, 1999), *available at* <http://clinton6.nara.gov/1999/01/1999-01-19-state-of-the-union-as-prepared-for-delivery.html>. In 1998 and 1999, President Clinton increasingly mentioned climate change in his speeches, and in some cases at great length. *See, e.g.*, White House Office of the Press Secretary, Statement By the President in Xian, China, (Jan. 27, 2000), *available at* <http://clinton6.nara.gov/2000/01/2000-01-27-state-of-the-union-address.html> (describing Million Solar Roofs Initiative); White House Office of the Press Secretary, Radio Address by the President to the Nation, (July 25, 1998), *available at* <http://clinton6.nara.gov/1998/07/1998-07-25-radio-address-on-protecting-our-environment.html> (describing new efforts to improve the federal government’s efficiency and use of renewable energy); Statement at 150th Anniversary of the Department of the Interior, (Mar. 14, 1999) (asking Interior employees to help the American people “get rid of an old, wrong idea” that reducing greenhouse gas emissions will hurt the economy); White House Office of the Press Secretary, Statement by the President in the Rose Garden, (June 3, 1999), *available at* <http://clinton6.nara.gov/1999/06/1999-06-03-statement-by-the-president-on-budget-and-kosovo.html> (describing domestic efforts to reduce greenhouse gas emissions); White House Office of the Press Secretary, Remarks by the President at Bio-Energy Climate Change Event (Aug. 12, 1999), *available at* <http://clinton6.nara.gov/1999/08/1999-08-12-remarks-by-the-president-at-bio-energy-event.html> (discussing how increasing use of bio-energy will help reduce greenhouse gas emissions); White House Office of the Press Secretary, Remarks by the President to the People of New Zealand, Antarctic Center, Christchurch, New Zealand, (Sept. 15, 1999), *available at* <http://clinton6.nara.gov/1999/09/1999-09-15-remarks-by-president-to-people-of-new-zealand.html> (19 paragraphs on climate change); White House Office of the Press Secretary, Remarks by the President to the 54th Session of the United Nations General Assembly (Sept. 21, 1999), *available at* <http://clinton6.nara.gov/1999/09/1999-09-21-remarks-by-the-president-to-un-general-assembly.html> (discussing need for both developed and developing countries to take action on climate change); White House Office of the Press Secretary, Remarks by the President to the Luncheon in Honor of the Ministers Attending the Meetings of the World Trade Organization, The Four Seasons Hotel, Seattle, Washington (Dec. 1, 1999), *available at* <http://clinton6.nara.gov/1999/12/1999-12-01-remarks-to-wto-ministers-at-luncheon-in-seattle.html> (7 paragraphs on climate change).

²⁴⁵ Catherine E. Howard, *White House Releases FY2000 Climate Change Budget Proposal* (Feb. 5, 1999) *available at* <http://www.weathervane.rff.org/features/feature058.html>.

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support for research on the science of climate change, support for research into forestry and sequestration, and continued support for the Climate Change Technology Initiative first announced in October 1997.²⁴⁶

Legislation supporting credit for early action gained more backers, with President Clinton pledging his full support to “work with Congress to reward companies that take early, voluntary action to reduce greenhouse gases.”²⁴⁷ Senators Chafee, Mack and Lieberman in March reintroduced the bill they had first introduced in October, modifying it to be a free standing law rather than an amendment to the Clean Air Act and changing the credit period, as well as incorporating “minor” changes requested by environmental and industry groups.²⁴⁸ In July, Rep. Lazio proposed similar legislation in the House.²⁴⁹

Notably on the legislative front, several avowed enemies of the Kyoto Protocol introduced legislation in the spring of 1999 proposing “a different course from that of the Kyoto Protocol” on energy and climate change.²⁵⁰ Senators Frank Murkowski, Chuck Hagel, Robert C. Byrd, and Larry Craig introduced “The Energy and Climate Policy Act of 1999,” which would create a Climate Technology Research, Development and Demonstration Program costing \$200 million annually over the next 10 years, with private sector contributions, designed to develop new technologies to avoid or reduce greenhouse gas emissions.²⁵¹ It also would establish an Office of Global Climate Change at the Department of Energy, and strengthen the voluntary reporting of greenhouse gas reductions under the exist-

²⁴⁶ *Id.*

²⁴⁷ Catherine Howard, *Clinton Boosts Senate Bill on Early Emissions Credits in State of the Union Address* (Jan. 29, 1999), available at http://www.weathervane.rff.org/trading_post/S2617_update.html.

²⁴⁸ Catherine Howard, *Senators Reintroduce Legislation for Early Voluntary Greenhouse Gas Reductions*, (Mar. 16, 1999), available at http://www.weathervane.rff.org/trading_post/S547.htm (S. 547 introduced to replace S.2617). While members of the business and environmental community helped craft the bill, support was not unanimous; opponents included the National Environmental Trust, the World Wildlife Fund, the Competitive Enterprise Institute, and the Small Business Survival Committee, among others. *Id.*

²⁴⁹ Jennifer B. Thatcher, *Early Credit Legislation Introduced in the House*, (July 16, 1999), available at <http://www.weathervane.rff.org/features/feature076.html> (discussing introduction of H.R. 2520).

²⁵⁰ Marina Cazorla, *Senators Introduce The Energy and Climate Policy Act of 1999*, (Apr. 29, 1999), available at <http://www.weathervane.rff.org/features/feature066.html>.

²⁵¹ *Id.*

ing Energy Policy Act section 1605 provisions.²⁵² The bill also rejected the implementation of measures to comply with Kyoto Protocol emissions reduction assignments until developing countries participate in greenhouse gas reductions as called for in the Byrd-Hagel Resolution 98.²⁵³ Several of the bill's provisions – devoting funds to finding better technology and promoting voluntary reductions – echoed policies of the Clinton Administration. Murkowski also stated that he intended to pursue other legislative changes in keeping with Clinton policies, such as to promote exports of clean technology and pursue changes to the tax code to promote activities that sequestered or avoided greenhouse gas emissions.²⁵⁴ Environmental groups criticized the bill's continued reliance on voluntary measures as opposed to mandatory requirements, as voluntary measures taken to date had not slowed emissions growth in the U.S. While the groups agreed that increased investment in technology was needed for long-term solutions, they also believed that more immediate action was required as well.²⁵⁵

The Energy and Climate Policy Act of 1999 marked a turn in the domestic debate, but not a reversal of position by the Kyoto opponents.²⁵⁶ Rather than reject the concept of global warming outright, by introducing the Act the Senators acknowledged the need to deal with the issue, but charted a slower course, betting on finding technological solutions in the long term and relying on voluntary actions in the short term. The continuing hostility of Congress to the Clinton Administra-

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Another example of this turn, but not reversal is the introduction by Senator Larry Craig in October of the Climate Change Tax Amendments of 1999 (S.1777) and the Climate Change Energy Policy Act (S.1776). S.1777 would have amended the tax code to provide credits for research and development into reducing greenhouse gas emissions and called for the Secretaries of Energy and Treasury to “jointly study possible additional incentives” voluntary greenhouse gas reduction expenditures. Jennifer B. Thatcher, *Sen. Craig Calls for Coordinated Approach to Climate Change Research*, Policy (Nov. 11, 1999), available at <http://www.weathervane.rff.org/features/feature082.html>. Craig stated that S.1777 should not be confused with the Chafee credit for early action bill: “Let’s not offer false hope that their [(companies’)] efforts will be rewarded in some kind of negotiable credits.” *Id.* Early action credits would only have value if a domestic or international emissions scheme was enacted; thus, opponents of Kyoto viewed credit for early action bills with suspicion. S. 1776 would have made the Department of Energy responsible for coordinating climate change policy and research. *Id.*

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tion's tack was evident at an April 1999 subcommittee hearing on the administration's Climate Change Technology Initiative (CCTI).²⁵⁷ Congressional representatives claimed that the CCTI violated the Knollenberg Amendment by spending money on programs that implemented the Kyoto Protocol.²⁵⁸ Administration officials countered that virtually all the CCTI programs were expansions or extensions of existing programs and not in violation of the amendment.²⁵⁹ Though CCTI did not propose mandatory emissions reductions, many members of Congress apparently viewed almost any action by the administration related to climate as "pre-implementation" of Kyoto. Senator Murkowski's chief of staff dubbed this "the Kyoto effect" – programs that Congress usually supported on a bipartisan basis, such as energy efficiency and renewable energy, would now face opposition from members of Congress worried that the administration was trying to implement the unratified Kyoto Protocol.²⁶⁰

1. COP-5: Developing Country Participation

The ambitious work plan set out at COP-4 kept U.S. negotiators busy, with the U.S. making more than 25 submissions to the UNFCCC Executive Secretariat in 1999 prior to Bonn.²⁶¹ In May 1999, the EU stated that at least half of its reduction commitment would come from domestic emissions reductions.²⁶² The U.S. said that the EU was "rewriting prior agreements" if it intended to require that countries obtain a certain percentage of their target from domestic reductions.

²⁵⁷ Jennifer B. Thatcher, *Administration's Climate Budget Request Under Fire* (May 24, 1999), available at <http://www.weathervane.rff.org/features/feature069.html>.

²⁵⁸ *Id.* Representative Knollenberg urged Congress to "remain vigilant in ensuring that the Kyoto treaty is not rammed through the backdoor." *Id.*

²⁵⁹ *Id.* Deputy Secretary of Energy T.J. Glauthier, Acting Deputy Director for Management of the Office of Management and Budget Deirdre Lee, and Assistant Administrator for Policy of the Environmental Protection Agency David Gardiner testified for the administration. *Id.*

²⁶⁰ Sally Clarke, *Republican, Democratic Staffers Say Kyoto is a No Go, But Action on Climate Needed* (May 25, 2000), available at <http://www.weathervane.rff.org/features/feature098.html>.

²⁶¹ These submissions are listed at http://www.state.gov/www/global/global_issues/climate/climate_1999_submiss.html and include submissions of the U.S. as part of the Umbrella Group.

²⁶² Marina Cazorla, *After Negotiations, EU Agrees on Common Climate Policy* (May 20, 1999), available at <http://www.weathervane.rff.org/features/feature068.html>.

The U.S. also questioned the EU's motives since the EU countries had additional flexibility that other countries did not – they could trade within the EU bubble.²⁶³ Clearly the U.S. would need to continue to press for the freedom to use the flexibility mechanisms at COP-5.²⁶⁴

COP-5 took place October 25 – November 5, 1999, in Bonn, Germany. The U.S. negotiating position going into COP-5 had not changed much from COP-4: keep all options on the table, keep working hard to resolve issues related to the flexibility mechanisms, and keep pushing for developing country participation.²⁶⁵ While COP-5 continued the forward momentum to COP-6, so many issues remained unresolved that the negotiators agreed to double their efforts in the time period leading up to COP-6.²⁶⁶

²⁶³ *Id.* (Comments of Under Secretary of State for Global Affairs Frank Loy). The EU bubble refers to the collective commitment by the member countries of the EU to a reduction target, which puts the countries to under one “bubble.” The EU had other motives as well:

The Clinton administration also used figures implying that the United States could buy from other countries as much as 85 percent of the emissions reductions it needed to meet its Kyoto obligations, which would lessen the impact of the Kyoto cuts on U.S. businesses and consumers. These purchases could include a large quantity of low-cost surplus emissions permits that might be supplied by Russia. Other countries, especially several European nations, have denounced the U.S. strategy on several grounds. These include fears of lost competitiveness vis-à-vis the United States, doubts about the long-term U.S. commitment to reducing greenhouse gases at home, concerns about the integrity of Russian emissions permits, and beliefs that international equity requires domestic sacrifice by all developed countries.

Andersen et al., *supra* note 208.

²⁶⁴ Interestingly, at the time that the EU made this announcement, it admitted that it was not on course to meet its Kyoto target. Emissions were projected to rise by 6 percent from 1990 levels in 2010, while the EU had committed to an 8 percent reduction. Marina Cazorla, *After Negotiations, EU Agrees on Common Climate Policy* (May 20, 1999), available at <http://www.weathervane.rff.org/features/feature068.html>.

²⁶⁵ See, e.g., Press Statement by James P. Rubin, Spokesman for the Department of State, Climate Change Conference, (Oct. 26, 1999) available at <http://secretary.state.gov/www/briefings/statements/1999/ps991026b.html>. Sometime in this time period (1998-1999), the administration likely decided to delay pushing for certain decisions until after the 2000 election. If Gore won, then presumably the administration could be more aggressive. Former Acting Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs Melinda Kimble confirmed this impression. Kimble Interview, *supra* note 38. For this reason, the U.S. also pushed for COP-6 to be held in early 2001, rather than in late 2000, but it could not convince other countries to go along. See Loy COP-5 Closing Statement, *infra* note 267.

²⁶⁶ REPORT OF THE CONFERENCE OF THE PARTIES ON ITS FIFTH SESSION, HELD AT BONN FROM 25 OCTOBER TO 5 NOVEMBER 1999, ADDENDUM: PART TWO: ACTION TAKEN BY THE CONFERENCE OF THE PARTIES AT ITS FIFTH SESSION (Doc. No. FCCC/CP/1999/6/Add.1) (Decision 1/CP.5) (calling on the subsidiary bodies to “intensify

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Under Secretary of State for Global Affairs Frank Loy sounded positive notes in his closing statement at COP-5:

We have made significant progress across the full spectrum of substantive issues, from emissions trading to sinks to compliance. . . Here, we began the hard substantive job of actually assembling the very nuts and bolts. We leave Bonn with a mandate to negotiate text that will refine these elements and weave them into an environmentally strong and economically sound agreement. This is absolutely critical. Without these buildings blocks, we can not get from Kyoto to a fully operational, ratifiable Kyoto treaty.²⁶⁷

The Parties agreed to work on a single negotiation text on the mechanisms that focused on the “principles, modalities, rules and guidelines” for operation of the mechanisms, with a view to completing work by COP-6.²⁶⁸ Again, this served a key objective of the U.S. in bringing the operation of the market mechanisms closer to reality.²⁶⁹ The Parties also endorsed a work program on sinks designed to resolve key sinks issues by COP-6, including definitions of forestry activities under Article 3.3 as well as additional sinks categories under Article 3.4.²⁷⁰

While no other developing countries took up the gauntlet thrown down by Argentina and Kazakhstan at COP-4, Argentina and Kazakhstan both pressed forward with their commitments. Argentina announced a voluntary binding emissions target for 2008-2012, following up on its statement of intention at COP-4.²⁷¹ Kazakhstan formally requested inclusion in An-

their work program” and for the parties to support this effort) [hereinafter COP-5 Action Report].

²⁶⁷ Under Secretary of State for Global Affairs Frank Loy, Closing Statement at Fifth Session of the Conference of the Parties to the UN Framework Convention on Climate Change, (Nov. 4, 1999) *available at* http://www.state.gov/www/policy_remarks/1999/991104_loy_climate.html (hereinafter [Loy COP-5 Closing Statement]).

²⁶⁸ COP-5 Action Report, *supra* note 266, at Decision 14/CP.5.

²⁶⁹ *See, e.g.*, Loy COP-5 Closing Statement, *supra* note 267. (“While progress was made on all the substantive issues before this Conference, the United States is particularly gratified by the growing recognition that the issue of cost-effectiveness must be squarely addressed.”).

²⁷⁰ COP-5 Action Report, *supra* note 266, at Decision 16/CP.5. *See also* U.S. Department of State Bureau of Oceans and International Environmental and Scientific Affairs, The Bonn Climate Change Conference: Fact Sheet, (Nov. 1999) (summarizing the accomplishments at COP-5 in a more readable form than the Secretariat documents).

²⁷¹ The target picked by Argentina was a two to ten percent reduction below a “business-as-usual” scenario in the 2008-2012 period. *See* Summary of the Fifth Conference

nex I of the UNFCCC,²⁷² though action on this request was deferred until COP-6.²⁷³ The U.S. called for a “new dialogue” to explore the “full range of market-oriented strategies that can create sustainable development opportunities for developing countries that voluntarily reduce their emissions.”²⁷⁴

In a development troubling to the Clinton administration, the NGO community's campaign to ratify Kyoto by 2002 gained increasing recognition at COP-5.²⁷⁵ Setting a deadline for ratification was impolitic for the U.S., since Senate advice and consent is required for ratification. The 2002 date was also premature until the U.S. could be sure that it would have an agreement that could be ratified, which it did not yet.

H. 2000: FINAL PUSH FOR AN AGREEMENT TO ELABORATE RULES FOR KYOTO

In his State of the Union address, President Clinton devoted three paragraphs to topic of global warming, calling it “the greatest environmental challenge of the new century.”²⁷⁶ He also stressed that cutting greenhouse gas emissions would not slow economic growth; instead, “new technologies make it possible to cut harmful emissions *and* provide even more growth.”²⁷⁷ The administration's budget for Fiscal Year 2001 proposed devoting \$2.4 billion in funding to combat global climate change, a forty-three percent increase over enacted levels for Fiscal Year 2000.²⁷⁸ In addition to the CCTI, the Clean Air Partnership Fund, and other continuing programs, the budget included a new International Clean Energy Initiative, which

of the Parties to the Framework Convention on Climate Change October 25 – November 5, 1999, *EARTH NEGOTIATIONS BULLETIN*, Vol. 12, No. 123, Nov. 8, 1999, at 13. Loy noted that Argentina's action showed that a developing country “can fashion a target that benefits the environment while contributing to its sustainable development.” Loy COP-5 Closing Statement, *supra* note 267.

²⁷² The result of which would put it in the same category as developed countries.

²⁷³ COP-5 Action Report, *supra* note 266, at § II, para. 4.

²⁷⁴ Loy COP-5 Closing Statement, *supra* note 267.

²⁷⁵ See Summary of the Fifth Conference of the Parties, *supra* note 271, at 15.

²⁷⁶ White House Office of the Press Secretary, President William J. Clinton State of the Union Address, (Jan. 27, 2000), available at <http://clinton6.nara.gov/2000/01/2000-01-27-state-of-the-union-address.html>.

²⁷⁷ *Id.* (emphasis in the original). CCTI was designed to spur development and adoption of these technologies.

²⁷⁸ UNITED STATES: DOMESTIC PROGRESS ON CLIMATE CHANGE, at 4 (Nov. 2000) (part of press packet handed out at COP-6).

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would devote \$201 million to help accelerate the deployment of clean energy technologies around the world.²⁷⁹

But the Administration's perennial push for increased funding for climate change actions faced the usual opposition on the Hill. The House Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs requested that the Energy Information Administration (EIA) analyze how much CCTI would reduce greenhouse gas emissions, and EIA released its report in May 2000 concluding that the tax incentives would have only a relatively small effect.²⁸⁰ Republicans pushed for alternative bills, the Energy and Climate Policy Act of 1999 (S. 882),²⁸¹ and the Climate Change Energy Policy Response Act of 1999 (S.1776).²⁸² The Administration opposed centralizing authority for climate change in the Department of Energy since it needed the expertise of many agencies in addressing climate change, and said that the bills duplicated existing programs and did not provide a complete strategy.²⁸³

But as these Republican bills suggested, the opposition on the Hill was mainly to the Kyoto Protocol rather than questioning the science of climate change or the need to take some action on climate change. Senator Murkowski's chief of staff pointed to flaws he saw in the Protocol – too short term, drafted without the input of the Senate, imposing economic pain without environmental gain, and failure to include all countries, but he also said that these flaws do “not absolve us from trying to resolve the underlying problem.”²⁸⁴

²⁷⁹ *Id.* at 5.

²⁸⁰ Jennifer B. Thatcher, *EIA Analysis Reveals CCTI Will Have Small Impact on Emissions* (May 11, 2000), available at <http://www.weathervane.rff.org/features/feature096.html>. EIA concluded that the tax incentives would reduce carbon emissions by 1.3 million metric tons in 2010—only 0.07 percent below baseline projections for that year as estimated in the *Annual Energy Outlook 2000*. *Id.* It said that the short duration of the incentives was a factor in keeping the impact small. EIA also said that it was difficult to quantify the emissions impact of the \$1.4 billion proposed for research and development (R&D). *Id.* See Energy Information Administration, *Analysis of the Climate Change Technology Initiative (CCTI): Fiscal Year 2001*, (May 2000), available at <http://www.eia.doe.gov/oiaf/climate>.

²⁸¹ See description *supra*.

²⁸² See description *supra*.

²⁸³ Jennifer Lee, *Senate Committee Hears Testimony on Climate Change Bills* (April 4, 2000), available at <http://www.weathervane.rff.org/features/feature092.html>. By centralizing all climate change programs in one agency, it would also be easier to track spending, cut spending and oversee administration action on climate.

²⁸⁴ Sally Clarke, *Republican, Democratic Staffers Say Kyoto is a No Go, But Action on Climate is Needed* (May 25, 2000), available at <http://www.weathervane.rff.org>

A major U.S. scientific report underscored the need to take action on climate change, finding that climate change could cause serious harm to the United States. In June, the U.S. Global Change Research Program released the first national assessment of the possible effects of global warming on various regions in the United States.²⁸⁵ The study found that if global temperatures continued to rise at current levels, the United States “may experience substantial consequences in coming decades, including higher crop production, increased erosion of coasts, extreme dry and wet conditions, and disproportionately hotter urban areas.”²⁸⁶ Hundreds of leading scientists participated in the effort, which included 20 regional workshops, and the draft report was peer-reviewed by independent scientists.²⁸⁷ The document received widespread attention in the press²⁸⁸ and underscored the need to reduce greenhouse gas emissions to avert the harmful impacts to the U.S. outlined in the report.²⁸⁹ In another relatively positive announcement, draft figures from the Environmental Protection Agency showed a modest one-half percent growth in U.S. greenhouse gas emission in 1999.²⁹⁰ This growth was significantly lower than the average growth rate of 1.3 percent in 1990 through 1998. How-

[/features/feature098.html](#).

²⁸⁵ Sally Clarke, *First National Assessment Projects Major Climate Change Effects Across the U.S.* (June 13, 2000). The assessment was called for by a 1990 federal law and was written by the National Assessment Synthesis Team (NAST), a committee of experts drawn from governments, universities, industry, and non-governmental organizations. NATIONAL ASSESSMENT SYNTHESIS TEAM, U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS ON THE UNITED STATES: THE POTENTIAL CONSEQUENCES OF CLIMATE VARIABILITY AND CHANGE: OVERVIEW REPORT (December 2000), available at <http://www.gcrio.org/NationalAssessment/> or <http://sedac.ciesin.columbia.edu/NationalAssessment>. NAST also produced a longer “Foundation Report.”

²⁸⁶ Clarke, *supra* note 285.

²⁸⁷ *Id.*

²⁸⁸ See, e.g., Curt Suplee, *Drastic Climate Changes Forecast; Global Warming Likely to Cause Droughts, Coastal Erosion in U.S., Report Says*, WASH. POST, June 12, 2000, at A3; H. Josef Hebert, *Rising Temps Forecast Changes*, ASSOCIATED PRESS, June 6, 2000; *Forecast for 2100: Hotter*, USA TODAY, June 13, 2000, at 4A.

²⁸⁹ For example, the report said that sugar maples could disappear from New England, and some coastal cities, faced with sea level rise and more frequent storm surges, may have to redesign and adapt water, sewer and transportation systems. Hebert, *supra* note 288. The risk of drought in the Midwest is substantial. Suplee, *supra* note 288.

²⁹⁰ Jennifer B. Thatcher, *11.5% Increase in US GHG Emissions Since 1990, EPA Says* (Mar. 8, 2000), available at <http://www.weathervane.rff.org/features/feature089.html>.

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However, EPA attributed this drop to a relatively mild winter, and U.S. total emissions were still increasing - now 11.5 percent above emissions in 1990.

As usual, the European Union announced the positions it would espouse at the next Conference of Parties, COP-6, well before the meetings. In June, the EU ministers agreed to take a hard line position on sinks: additional sinks and sources under Articles 3.3 and 3.4 should not be included until after the first commitment period and sinks projects should not be allowed to qualify for the Clean Development Mechanism.²⁹¹ The EU stated that there should be "strict consequences for non-compliance" with the Kyoto Protocol, including loss of eligibility to use the flexibility mechanisms and tough financial penalties.²⁹² It also reaffirmed its commitment to create "the conditions for ratification and entry into force of the Kyoto Protocol by 2002 at the latest."²⁹³

The U.S. approach on sinks and compliance was markedly different from the EU's, especially with respect to sinks. In August, the U.S. submitted its views to the UNFCCC Secretariat concerning the role sinks should play in the Kyoto Protocol.²⁹⁴ It advocated a comprehensive approach based on sound science that would provide strong incentives for sound management of carbon stocks.²⁹⁵ In particular, the U.S. supported inclusion of broad land management categories together with comprehensive greenhouse gas accounting.²⁹⁶ The U.S. indicated it was willing to consider a "phase-in" for the first commitment period so that only a portion of sinks would be credited during this period "to address the concerns of some countries about the effect of comprehensive greenhouse gas account-

²⁹¹ Jennifer B. Thatcher, *EU Adopts Strong Stance on Sinks and Compliance* (June 27, 2000), available at <http://www.weathervane.rff.org/negtable/EUstancefor COP6.html>.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ United States Submission to UNFCCC on Land-Use, Land-Use Change, and Forestry, (Aug. 1, 2000), available at http://www.state.gov/www/global/global_issues/climate/000801_unfccc1_subm.pdf.

²⁹⁵ See Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Department of State, *U.S. Views on Land Use, Land-Use Change and Forests, Framework Convention on Climate Change: Fact Sheet*, (Aug. 1, 2000), available at http://www.state.gov/www/global/global_issues/climate/fs-000801_unfccc1_subm.html.

²⁹⁶ *Id.*

ing on the first budget period targets.”²⁹⁷ In other words, unlike the EU, the U.S. supported inclusion of broad categories of sinks activities, but it recognized that this approach could result in large sinks credits in the first budget period and so was willing to consider accepting partial credit for sinks in the first period. Presumably in subsequent budget periods, parties would factor in sinks credits into their targets, so such a phase-in would not be necessary after the first period. The submission did not address sinks in the CDM. The U.S. also supported a strong compliance regime, but rather than paying financial penalties, parties in violation should be required to “make up” the tons they had missed, with additional penalty tons. This would “make the atmosphere whole, and thereby help improve the environment.”²⁹⁸

At the meetings of the subsidiary bodies in Lyon in September, sinks, supplementarity,²⁹⁹ and the CDM dominated discussions.³⁰⁰ The Subsidiary Body for Scientific and Technological Advice adopted a text laying out options on sinks for the parties to decide upon at COP-6, but there was little agreement among the groups to narrow the options down.³⁰¹ The EU continued to insist that parties achieve most of their emissions reductions domestically, and the EU and the U.S. differed on whether CDM projects should be limited to a “positive” list (EU) or whether developing countries, which would host such projects, should be free to select CDM projects appropriate to their circumstances (U.S.).³⁰² With only two months remaining until COP-6, the Lyon meetings left many crucial issues to be resolved, so the UNFCCC planned numerous informal consultations.³⁰³

A week after the Lyon meetings, the Senate Foreign Relations and Energy and Natural Resources Committees held a

²⁹⁷ *Id.*

²⁹⁸ Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs David B. Sandalow, Statement at Thirteenth Sessions of the Subsidiary Bodies, Framework Convention on Climate Change, (Sept. 14, 2000), available at http://www.state.gov/www/policy_remarks/2000/000914_sandalow_lyon.html.

²⁹⁹ The term “supplementarity” refers to the issue of how much of their emissions commitments did Annex I parties need to achieve at home.

³⁰⁰ Jennifer Lee, *The 13th Sessions of the Subsidiary Bodies Conclude Talks in Lyon* (Sept. 22, 2000), available at <http://www.weathervane.rff.org/negtable/LyonSB13.html>.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

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joint hearing to discuss the U.S. position at the upcoming COP-6 negotiations. Under Secretary of State for Global Affairs Frank Loy testified for the administration, stating that three fundamental issues needed to be addressed at the upcoming negotiations: environmental effectiveness, economic cost, and developing country participation.³⁰⁴

- *Environmental effectiveness.* The U.S. would continue to “[take] the lead in developing comprehensive, effective, and binding rules to estimate, report and review emissions, and to track trading.”³⁰⁵ The U.S. would also continue to support legally binding consequences for exceeding targets.³⁰⁶

- *Economic cost.* To promote cost-effective action, the U.S. would seek to ensure that “the Kyoto [flexibility] mechanisms and the Protocol’s sinks provisions can be implemented as simply as possible, while preserving the environmental integrity of the Protocol.”³⁰⁷ The U.S. would resist efforts to put a cap on the ability of a Party to use the mechanisms.³⁰⁸ On sinks, as noted above, the U.S. would support a comprehensive, broad-based accounting system and broad inclusion of sinks activities, with a phase-in for the first budget period.³⁰⁹ Senator Murkowski questioned whether cost-effective action under Kyoto was possible, citing the 1998 EIA study finding that Americans could face gas prices fifty-three percent higher if Kyoto went into effect.³¹⁰ Loy noted that the EIA study did not factor in emissions trading or sinks, which would reduce the costs.³¹¹

- *Developing country participation.* Loy noted that key developing countries needed to join the fight against climate change, but he did not indicate in his statement what the

³⁰⁴ Statement of Under Secretary of State for Global Affairs Frank E. Loy before the U.S. Senate Committee on Foreign Relations and the Committee on Energy and Natural Resources, (Sept. 28, 2000), available at http://www.state.gov/www/policy_remarks/2000/000928_loy_unfccc.html [hereinafter Loy Pre-COP-6 Senate Statement].

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Jennifer Lee, *Senate Committees Hold Joint Hearing on Status of Kyoto Negotiations* (Sept. 29, 2000), available at <http://www.weathervane.rff.org/negtable/JointHearing.html> [hereinafter Pre-COP-6 Senate Hearing Article].

³¹¹ *Id.*

U.S. strategy at COP-6 would be. Instead, he noted the progress the U.S. had made in engaging developing countries:

- Argentina had announced a national emissions target, and “Kazakhstan and Bolivia have announced a willingness to do the same.”³¹²
- In March, the U.S. and India signed a joint statement on cooperation on energy and environment issues.³¹³ In this statement, India “outlined” two goals: that ten percent of its new electric power would come from renewable energy sources by 2012, and that it will improve energy efficiency in power production by 15% by 2007-2008.³¹⁴
- In May, the U.S. and China signed a joint statement on environmental cooperation, committing to further ongoing cooperation to address global environmental challenges, including climate change.³¹⁵ Loy noted that China had opposed international dialogue regarding developing countries taking action on climate change, so this represented a “new openness to engagement.”³¹⁶
- Loy also reported that developing countries now evidenced “genuine and enthusiastic support” for the CDM.³¹⁷

³¹² Loy Pre-COP-6 Senate Statement, *supra* note 304.

³¹³ White House Office of the Press Secretary, Joint U.S.-India Statement, (Mar. 21, 2000), available at <http://clinton6.nara.gov/2000/03/2000-03-21-joint-us-and-india-statement.html>.

³¹⁴ White House Office of the Press Secretary, Fact Sheet on President Clinton's India Trip: Protecting the Environment, Promoting Clean Energy Development and Combating Global Warming, (Mar. 22, 2000), available at <http://clinton6.nara.gov/2000/03/2000-03-22-fact-sheet-on-protecting-the-environment-and-clean-energy.html>. The U.S. would help in this effort in part by providing \$45 million through the U.S. Agency for International Development to promote energy efficiency use and production in India, and \$50 million to promote clean energy throughout South Asia. *Id.*

³¹⁵ White House Office of the Vice President, Joint Statement on Cooperation [sic] Environment & Development Between the United States and China, (May 19, 2000), available at <http://clinton6.nara.gov/2000/05/2000-05-19-statement-on-cooperation-between-united-states-and-china.html>.

³¹⁶ Loy Pre-COP6 Senate Statement, *supra* note 304.

³¹⁷ *Id.* Energy efficiency and clean energy projects under the CDM will help developing countries reduce their emissions growth.

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Loy concluded that the U.S. anticipated “that many of these highly complex issues [would] come to a head at The Hague [COP-6].”³¹⁸ This was an understatement: as the Lyon meetings had shown, the EU and U.S. differed sharply on a number of issues, and the G-77/China countries had their own agenda to pursue regarding financial resources and technology transfer, and would likely suspect U.S. overtures would be linked to taking on an emissions reduction commitment.

And, in a development expected by none, no clear victor emerged from the U.S. Presidential election.³¹⁹ U.S. negotiators left for The Hague unsure whether the next President would be a Democratic or a Republican. While U.S. negotiators believed that environmental integrity, cost effective action and developing country participation were principles both parties would support, clearly they would be disadvantaged in negotiations with other countries when countries would wonder if the as-yet unknown U.S. President would support any deal struck at The Hague.

1. COP-6: EU-US Disagreement over Sinks Scuttles Deal

The purpose of COP-6 was to work out rules to implement the vague language of the Kyoto Protocol so that countries would be able to ratify it.³²⁰ Thus, expectations for the meeting were high. However, ministers arrived the second week of COP-6 for the high-level negotiations portion of the COP with a full plate of issues remaining.³²¹ In hopes of moving the negotiations along, Dutch Environment Minister Jan Pronk, the chair of COP-6 created four “contact” groups³²² to deal with the

³¹⁸ *Id.*

³¹⁹ Ron Fournier, *Bush, Gore Locked in Close Contest*, ASSOCIATED PRESS NEWSWIRE, Nov. 8, 2000 (describing how Gore called to concede to Bush on election night when the networks called Florida for Bush but then retracted his concession when it was not clear who had won Florida); Peter Slevin, *Bush's Florida Lead Shrinks to 300 Justification Required on Recounts In Media Spotlight, Recount Staggers On*, WASH. POST, Nov. 15, 2000, at A1 (vote recount in Florida still leaves race undecided). Gore finally conceded on December 13, 2000, after an unfavorable ruling from the Supreme Court regarding the recount of votes in Florida. Ron Fournier, *Gore Concedes, Bush Calls for Unity*, ASSOCIATED PRESS NEWSWIRE, Dec. 13, 2000.

³²⁰ See, e.g., John W. Anderson, *Opening Moves in the Hague* (Nov. 14, 2000), available at <http://www.weathervane.rff.org/features/feature109.html>.

³²¹ See EARTH NEGOTIATIONS BULLETIN, Vol. 12, No. 163, Nov. 27, 2000, at 1.

³²² Contact groups are smaller groups than the plenary sessions, which include all countries.

following issues: developing country issues,³²³ mechanisms,³²⁴ sinks issues,³²⁵ and compliance and accounting.³²⁶ This allowed delegates to consider crosscutting issues within the groups, and thus could then hopefully facilitate negotiations. However, by Thursday, Nov. 23, negotiations appeared stalled.

With the media reporting a severe lack of progress at the negotiations, activist groups became increasingly concerned that the parties would be unable to reach agreement.³²⁷ From the start of the meeting, environmental groups and the press had consistently criticized the U.S. for purportedly advocating the use of "loopholes."³²⁸ The EU did not move much from its opening positions on sinks,³²⁹ while the U.S. showed flexibility on a number of issues in hopes of reaching an agreement, including sinks, CDM, the participation of developing countries,³³⁰ and a new fund for developing countries.³³¹ Neverthe-

³²³ Capacity building, technology transfer and funding.

³²⁴ Emissions trading, the clean development mechanisms and joint implementation.

³²⁵ Land-use, land-use changes and forestry.

³²⁶ EARTH NEGOTIATIONS BULLETIN, *supra* note 321.

³²⁷ See, e.g., *UN Climate Conference Quotes: Pain, Gain, and Turkeys*, AGENCE FR. PRESSE ENGLISH WIRE, Nov. 23, 2000 (quoting Greenpeace saying that the next 48 hours would determine the fate of the Kyoto Protocol, and it could be saved if the U.S. and Japan would show leadership rather than "leading the race to cheat their way out of action").

³²⁸ Every day in their briefings, spokespersons for the NGOs reportedly criticized the behavior of the U.S. C. Gerald Fraser, *Activists: Coming of Age*, EARTH TIMES, Nov. 24, 2000, at 6. World Wildlife Fund (WWF) campaigner Jennifer Morgan criticized the U.S. position on sinks "at practically every news briefing WWF was involved in." *Id.* The U.S. Public Interest Group accused the U.S. of trying to "take credit for doing nothing." *Id.* See also, e.g., Alex Kirby, *Protests Fail to Derail Climate Talks*, BBC NEWS ONLINE, Nov. 22, 2000, available at http://news.bbc.co.uk/1/hi/english/sci/tech/newsid_1036000/1036211.stm (the U.S. is "seen here by many other delegations, and by most environmental campaigners, as so wedded to the protection of its own narrow short-term interests that the chasm surrounding it is now almost unbridgeable"). The European press in particular challenged the U.S. position. See, e.g., Press Briefing by Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs (OES) David Sandelow et al., (Nov. 13, 2000), available at http://www.state.gov/www/global/global_issues/climate/cop6/cop6_11-13-00pb.html (Reuters reporter asks whether "the U.S. trying to dodge its political burden by trying not to take any domestic measures and do you think there should be a cap on the flexible mechanisms?").

³²⁹ See, e.g., Robin Pomeroy, *U.S. Says Chirac Pollution Attack Unhelpful*, REUTERS ONLINE, Nov. 20, 2000 (EU remains opposed to the U.S. sinks position).

³³⁰ See Press Briefing by Under Secretary of Secretary of State for Global Affairs and Head of the U.S. Delegation Frank E. Loy et al., (Nov. 21, 2000), available at http://www.state.gov/www/global/global_issues/climate/cop6/cop6_11-21-00pb.html (stating that "the United States has shown considerable flexibility in a number of the positions we have taken" during COP-6: the U.S. was not going to seek targets from developing countries, was proposing a phase-in period for sinks, was adopting a differ-

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less, protesters appeared to blame mainly the U.S. for the apparent lack of progress. Tensions at the conference finally boiled over on Wednesday of the second week. Protesters threw a pie in the face of the chief U.S. negotiator Frank Loy³³² and a group of 40 protesters “stormed” into a meeting room and used noisemakers to disrupt the session; ten of the protesters sat down in the room, locked arms and refused to leave.³³³

Late Thursday evening, with one official day left in the conference, Pronk issued a paper (the “Pronk paper”)³³⁴ that he called a “balanced package”³³⁵ outlining his proposals on key issues in an attempt to reach consensus.³³⁶ Rather than focus-

ent definition for forests under Article 3.3 in order to avoid incentives for deforestation, was considering a preference for small projects in the CDM, and was willing to discuss whether nuclear projects should be allowed in the CDM.) On sinks, the U.S. modified its proposal so that fewer sink tons would count in the first budget period. As described by Loy, the U.S. proposal would allow countries to “fully count as a first interval not more than 20 million metric tons of annual carbon sequestration in managed forests. In addition, currently projected sequestration beyond that level would be discounted by two-thirds.” Press Briefing by Under Secretary of State for Global Affairs and Head of the U.S. Delegation Frank E. Loy et. al., (Nov. 20, 2000), available at http://www.state.gov/www/global/global_issues/climate/cop6/cop6_11-20-00pb.html.

³³¹ *US Sees New Climate Fund for Poor as Deadline Looms at UN Talks*, AGENCE FR. PRESSE ENGLISH WIRE, Nov. 23, 2000 (U.S., Japan and Canada propose new \$1 billion fund to help developing countries combat climate change).

³³² Loy, the consummate diplomat and good sport, later issued a statement saying that, “On the eve of Thanksgiving, pumpkin pie would have been a more traditional choice, but what I really want is a strong agreement to fight global warming.” Kirby, *supra* note 328.

³³³ John A. Dillon and Jennifer Morrow, *Protests Disrupt Conference; Delegates Struggle to Complete Negotiations in Uncertain Mood – Pie Hurlled at Loy; Negotiations Slow*, EARTH TIMES, Nov. 23, 2000, at 12. The protesters said the “delegates were catering to corporate lobbyists rather than pushing for drastic cuts in greenhouse gases” the protesters thought were needed. *Id.* There were also numerous peaceful protests, demonstrations and expressions of opinion, including the construction of a “dike” around the conference center, World Wildlife Fund members dressed in polar bears, the construction of ice sculptures, and the usual “Fossil of the Day” awards by the CAN. See, e.g., “Demonstrators build sand barrier at UN conference,” *Agence France Presse English Wire*, (Nov. 18, 2000); Richard Ingham, *Guerrillas in Our Midst: Green Protest Permeates Climate Talks*, AGENCE FR. PRESSE ENGLISH WIRE, Nov. 22, 2000 (describing the “street theatre” of the protesters at the talks).

³³⁴ REPORT OF THE CONFERENCE OF THE PARTIES ON THE FIRST PART OF ITS SIXTH SESSION, HELD AT THE HAGUE FROM 13 TO 25 NOVEMBER 2000 ADDENDUM PART TWO: ACTION TAKEN BY THE CONFERENCE OF THE PARTIES AT THE FIRST PART OF ITS SIXTH SESSION (Doc. No. FCCC/CP/2000/5/Add.2) (Apr. 4, 2001) [hereinafter COP-6 REPORT], (Annex to Decision 1/CP.6 titled “Note by the President of the Conference of the Parties at its sixth session, dated 23 November 2000”).

³³⁵ Malini Goel and Rabya Nizam, *Pronk’s Plan – Negotiators Unable to Complete Work but Officials Warn that Climate Conference May not be Extended: Analysis: Clock Ticks for Hague Agreement*, EARTH TIMES, Nov. 24, 2000.

³³⁶ EARTH NEGOTIATIONS BULLETIN, *supra* note 321, at 1.

ing on the work of the four contact groups, all attention then turned to the Pronk paper. It quickly became clear that the paper's suggested compromises would not be accepted by the parties in the time remaining.³³⁷

In hopes of salvaging some result from the process, the European Union and the Umbrella Group then met separately to try to reach agreement on three key issues: complementarity, sinks and compliance.³³⁸ In the early hours of Saturday morning, several members of the EU, including Minister Voynet, and members of the Umbrella Group shook hands on an agreement. But when this group went to present the agreement to the whole EU, it was rejected, reportedly because some of the EU members not present at the negotiations with the Umbrella Group could not accept the number of sinks tons allowed.³³⁹ Later that afternoon a subdued and disconsolate Pronk declared that the parties were unable to reach agreement.³⁴⁰ The parties adopted a decision to suspend COP-6: it

³³⁷ *Id.* at 18 (reviewing Pronk's paper and offering its views on how parties would object to his suggested solutions). Environmental groups thought the Pronk paper reflected mainly the U.S. positions and thus was completely unacceptable. Climate Action Network, *EU: Salvage Your Dignity!* ECO, Vol. 105, No. 12, Nov. 24, 2000, available at http://www.climatenetwork.org/eco/eco12_1100.html. In CAN's view, Pronk's paper contained "a huge free gift" to the U.S. on sinks, no restrictions on emissions trading and thus could promote the trading of "hot air" from Russia, weak compliance measures and inadequate controls on the types of projects in the CDM. See Climate Action Network, *No to A License To Emit – Yes to Action*, ECO, Vol. 105, No. 12, Nov. 24, 2000, available at http://www.state.gov/www/global/global_issues/climate/cop6/001124_loy_cop6.html. However, the U.S. said it was "deeply disappointed" with the Pronk paper and considered it "unacceptably imbalanced." Statement of Under Secretary for Global Affairs and Head of U.S. Delegation Frank E. Loy, Nov. 24, 2000, available at http://www.state.gov/www/global/global_issues/climate/cop6/001124_loy_cop6.html.

³³⁸ These were considered "developed country" issues (i.e., not the CDM or financial resources or technology transfer), but the EU and the Umbrella Group were criticized for excluding developing countries from the discussion, since developing countries had a stake in the outcome. As reported in the Earth Negotiations Bulletin:

Much of the media's coverage on the collapse of the talks has focused on the apparent inability of the EU and US to reach a compromise on sinks and complementarity. However, to imagine that agreement on these issues alone would have saved the talks in the last hour is to make the arrogant – and mistaken – assumption that this would have proved acceptable to the G-77/China. Not only does the Group have its own strong position on these issues, but there were also a number of unresolved differences on concerns of particular importance to the Group: funding and adverse effects, technology transfer and adaptation under the UNFCCC.

Earth Negotiations Bulletin, *supra* note 321, at 18.

³³⁹ *Id.*

³⁴⁰ REPORT OF THE CONFERENCE OF THE PARTIES ON THE FIRST PART OF ITS SIXTH

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stated that the COP decides to suspend its 6th session and it further requested Pronk to “seek advice on the desirability of resuming that session in May/June 2001.”³⁴¹ Pronk’s paper, the texts from the COP-6, and the texts from the Lyon sessions were all forwarded to the resumed session.³⁴²

Despite acrimonious public statements pinpointing the blame on each other for the failure at the Hague,³⁴³ the EU and some members of the Umbrella Group met in early December in Ottawa to try to resuscitate the “almost” agreement of Saturday morning.³⁴⁴ They were not successful.³⁴⁵

Why weren’t parties able to strike a deal at COP-6? The EU certainly wanted an agreement in order to stay on track with its goal of ratification of the Kyoto Protocol by 2002, and the U.S. negotiators likely wanted to end the Clinton administration on a successful note. One of the chief negotiators for the U.S. remarked that “some countries have viewed this agreement as more narrowly focusing on reducing emissions from the industrial sector and other countries have tended to view this as an agreement focused on fighting global warming.”

SESSION, HELD AT THE HAGUE FROM 13 TO 25 NOVEMBER 2000 PART ONE: PROCEEDINGS (Doc. No. FCCC/CP/2000/5/Add.1) (April 4, 2001,) at § XI.B.2 (para. 113). See also EARTH NEGOTIATIONS BULLETIN, *supra* note 321, at 18. (At the Informal High-Level Plenary Saturday afternoon, Pronk expressed “his disappointment” that no agreement had been reached and that the “expectations of the ‘outside world’ had not been met”).

³⁴¹ COP-6 REPORT, *supra* note 334, at Decision 1/CP.6.

³⁴² *Id.* See also Doc. No. FCCC/CP/2000/5/Add.3 (texts from COP-6) and Doc. No. FCCC/CP/2000/INF.3 (texts from Lyon).

³⁴³ See, e.g., Under Secretary of State for Global Affairs Frank E. Loy, Statement to the Sixth Session of the Conference of the Parties to the UN Framework Convention on Climate Change (COP 6); The Hague, Netherlands, (Nov. 25, 2000), available at http://www.state.gov/www/policy_remarks/2000/001125_loy_cop6.html (while not naming the EU, it is clear that Loy is referring to the EU when he says that too many of the parties held fast to “positions shaped more by political purity, than practicality; more by dogmatism, than pragmatism”), Jeremy Lennard, *Bitter Recriminations Fly After UN Climate Talks Flop*, AGENCE FR. PRESSE ENGLISH WIRE, Nov. 26, 2000 (French Environment Minister Voynet says U.S. demanded too many concessions; London Observer criticized the US for “apparently believ[ing] it should come under no scrutiny for running its own industry with inefficient, environmentally damaging technologies long abandoned by Europe”); *UN Climate Conference President Says EU Also to Blame for Failure*, AGENCE FR. PRESSE ENGLISH WIRE, Nov. 26, 2000 (Pronk says EU began too late to negotiate). There was also finger pointing within the EU.

³⁴⁴ Howard Williams, *Top Environment Bureaucrats Meet in Secret, Hope to Kick-Start Climate Talks*, AGENCE FR. PRESSE ENGLISH WIRE, Dec. 6, 2000.

³⁴⁵ Xinhua Asia Worldsources, Inc., *No Ministerial Climate Talks for Now*, ASSOCIATED PRESS NEWSWIRE, Dec. 8, 2000 (quoting EU official saying that “some progress was made at the meeting, but a lot still remained to be done”).

In other words, the EU's positions on sinks, supplementarity and the CDM were aimed at forcing countries to achieve most of their reductions domestically, while the U.S. wanted to make use of every tool it could, including sinks and emissions reductions abroad.³⁴⁶ With such radically different views, could agreement have been achieved? And when one throws the financial and technology transfer demands of the G-77/China countries into the mix,³⁴⁷ the prospects for agreement seem even more ephemeral.

III. CONCLUSION

In the end, the gap between domestic and international viewpoints was too wide for the Clinton administration to bridge. Powerful domestic constituencies were concerned about the economic cost of reducing emissions and the lack of developing country participation, while foreign negotiators were more concerned with tamping down the U.S. economy (and concomitant large greenhouse gas emissions) and providing financial resources to developing countries. Also, Clinton's compromised position (adopted to help secure broader support) cost him the support of many U.S. environmental groups. The Clinton administration was unable to "make good" on its ambitious commitment at Kyoto to reduce emissions. Nevertheless, the scientific evidence of the negative impacts of global warming continues to mount,³⁴⁸ and the rest of the world is moving forward on implementing the Kyoto Protocol.³⁴⁹ As the largest

³⁴⁶ See also Loy Statement, *supra* note 243 (stating the U.S.'s deep disappointment that no agreement was reached and appearing to put much of the blame for the failure on the EU).

³⁴⁷ At COP-6 the United States and other members of the Umbrella Group did propose a new fund of \$1 billion over 5 years to help developing countries, but "there was no closure on the details." John W. Anderson, *Why the Climate Change Conference Failed: An Analysis* (Dec. 4, 2000), available at http://www.weathervane.rff.org/negtable/COP6/analysis_anderson.htm.

³⁴⁸ Odile Meuvret, *Global Warming Crisis Worse Than Thought: UN Report*, AGENCE FR. PRESSE ENGLISH WIRE, Nov. 2, 2000 (draft Third Assessment Report by the IPCC warns that global warming will be worse than thought).

³⁴⁹ See, e.g., Eric Pianin, *Warming Pact a Win for European Leaders; Negotiators Rally Global Community but Say Impact May Be Modest Without U.S. Role*, WASH. POST, Nov. 11, 2001, at A2 (COP-7 in Marrakesh results in an agreement paving the way for ratification of the Kyoto Protocol, but the U.S. is not a party to this agreement as President Bush in March said he would not submit the Protocol to the Senate for ratification).

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greenhouse gas emitter, the U.S. needs to be a part of the global solution. But what mix of policies will play on both the domestic and international fronts? Ay, there's the rub.