

COMMON BUT DIFFERENTIATED RESPONSIBILITY: THE KYOTO PROTOCOL AND UNITED STATES POLICY

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INTRODUCTION

The Framework Convention on Climate Change (Climate Convention),¹ signed at the 1992 United Nations “Earth Summit” in Rio de Janeiro, is the first international legal instrument to address climate change and is arguably the most comprehensive international attempt to address adverse changes to the global environment. The overriding goal of the Convention is the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”² Industrialized countries voluntarily agreed to reduce their emissions of greenhouse gases (GHGs) to 1990 levels by 2000.³ Few of those countries, however, will meet this target. The United States, which contains only about four percent of the world’s population and produces about one-quarter of the world’s greenhouse gases, is expected to exceed the target by about thirteen percent.⁴

The Climate Convention is a framework agreement. It lays out several commitments and principles, but the most important specific ways in which those provisions will be actualized—i.e., which countries will lower GHG emissions and by how much—

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¹ United Nations Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 [hereinafter FCCC].

² *Id.* art. 2, 31 I.L.M. at 854.

³ *See id.* art. 4(2)(b), 31 I.L.M. at 857.

⁴ *See* ENERGY INFO. ADMIN., ANNUAL ENERGY REVIEW 1996 (1997); ENERGY INFO. ADMIN., EMISSIONS OF GREENHOUSE GASES IN THE UNITED STATES 1996 (1997).

were left to subsequent international negotiations and protocols.⁵ In an effort to achieve more concrete action on GHG emissions, parties to the Convention agreed to negotiate, in time for the third Conference of the Parties in Kyoto at the end of 1997, a protocol laying out binding targets and timetables for reductions of GHGs by developed countries.⁶

Among the key principles in the Convention left to be operationalized was that of “common but differentiated responsibility” (CBDR), whereby industrialized developed countries would take the lead in addressing the climate problem, specifically excluding developing countries from binding GHG emissions reductions.⁷ This principle is grounded in shared notions of fairness: the developed countries are disproportionately responsible for historical GHG emissions and have the greatest capacity to act.⁸ Thus, the Convention makes few demands on the much less responsible and usually much less capable developing countries. The exclusion of developing countries became one of the most contentious issues before and during the Kyoto conference (and remains so), especially because the United States insisted that developing countries make “meaningful” contributions to future GHG reduction efforts.⁹ These U.S. demands appear to contradict the CBDR principle.

I

COMMON BUT DIFFERENTIATED RESPONSIBILITY AND CLIMATE CHANGE

As a nascent principle of international environmental law, “common but differentiated responsibility” evolved from the notion of the “common heritage of mankind.” The latter concept gained stature in the United Nations Convention on the Law of the Sea,¹⁰ as well as the international designation of certain areas

⁵ See FCCC, *supra* note 1, arts. 4, 17, 31 I.L.M. at 855-59, 869.

⁶ See *Review of the Implementation of the Convention and of Decisions of the First Session of the Conference of the Parties*, U.N. Framework Convention on Climate Change Conference of the Parties, 2d Sess., Agenda Item 5, at 3, U.N. Doc. FCCC/CP/1996/L.17 (1996).

⁷ See FCCC, *supra* note 1, pmb. & arts. 3-4, 31 I.L.M. at 851-56.

⁸ See *id.* pmb., 31 I.L.M. at 851 (noting, *inter alia*, that “the largest share of historical and current global emissions of greenhouse gases has originated in developed countries”).

⁹ See discussion *infra* Parts I.B-C, II.A-B.

¹⁰ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261. This concept dates to the 1950s and was also

(e.g., Antarctica and the deep seabed) and resources (e.g., whales) as “common interests” of humankind.¹¹ Bearing in mind that humans depend on a healthy climate for their survival, the General Assembly went further by recognizing the earth’s climate as a “common concern” of humankind.¹² This implicates not only the need for international cooperation to protect human interests, but also a “certain higher status inasmuch as it emphasizes the potential dangers underlying the problem of global warming and ozone depletion [and suggests] that international governance regarding those ‘concerns’ is not only necessary or desired but rather essential for the survival of humankind.”¹³

Insofar as the climate is of such crucial “common concern” to humankind, it follows that there is a responsibility on the part of countries to protect it. This begs the question of who is responsible for climate pollution. The answer is a function of each country’s historical responsibility for the problem, its level of economic development, and its capability to act. This was suggested by Principle 23 of the 1972 Stockholm Declaration, which states that it is essential to consider “the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for developing countries.”¹⁴

The CBDR principle is described succinctly in Principle 7 of the Rio Declaration on Environment and Development:¹⁵

integrated into the 1979 Moon Agreement. See Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, Dec. 5, 1979, 18 I.L.M. 1434. See generally Frank Biermann, “Common Concern of Humankind:” *The Emergence of a New Concept of International Environmental Law*, 34 ARCHIV DES VOLKERRECHTS 426 (1996).

¹¹ See Biermann, *supra* note 10, *passim* (providing a more detailed discussion). Cf. Antarctic Treaty, *opened for signature* Dec. 1, 1959, *pmb.*, 12 U.S.T. 794, 795, 402 U.N.T.S. 71, 74 (entered into force June 23, 1961); International Convention for the Regulation of Whaling, Dec. 2, 1946, *pmb.*, 161 U.N.T.S. 72; G.A. Res. 2574, *Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of the Present National Jurisdictions, and the Use of Their Resources in the Interests of Mankind*, U.N. GAOR, 24th Sess., Supp. No. 30, at 10, U.N. Doc. A/7630 (1969), *reprinted in* 9 I.L.M. 419, 422.

¹² See Biermann, *supra* note 10, at 431.

¹³ *Id.*

¹⁴ Declaration of the United Nations Conference on the Human Environment, June 16, 1972, *princ.* 23, 11 I.L.M. 1416, 1420 (Stockholm Declaration).

¹⁵ United Nations Conference on Environment and Development: The Rio Declaration on Environment and Development, June 13, 1992, 31 I.L.M. 874 [hereinafter Rio Declaration].

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.¹⁶

According to this principle, while all countries are responsible for global environmental problems (e.g., global warming and stratospheric ozone depletion), some countries are more responsible than others. This principle was implicit in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer,¹⁷ and it has been recognized in other important international undertakings.¹⁸ More to the point, while all countries must join in efforts to reduce emissions of greenhouse gases that contribute to climate change, the developed countries are required by the Climate Convention to take the lead.

A. *The Framework Convention on Climate Change*

Climate change is caused, at least in part, by anthropogenic sources of various greenhouse gases, especially carbon dioxide, which comes from the burning of fossil fuels.¹⁹ All countries could suffer from climate change, although it is likely that poor countries will suffer most, due to their vulnerable geographies and economies.²⁰ In addition, it is the economically developed

¹⁶ *Id.* princ. 7, 31 I.L.M. at 877.

¹⁷ Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989).

¹⁸ The principle of common but differentiated responsibility has been acknowledged by, inter alia, the U.N. General Assembly in G.A. Res. 228, U.N. GAOR, 44th Sess., Supp. No. 49, at 152, U.N. Doc. A/44/49 (1989), and several climate-related meetings, including the Second World Climate Conference, meetings of the Preparatory Committee of the United Nations Conference on Environment and Development, the Toronto Conference Statement, the Hague Declaration, and the Noordwijk Declaration. See Philippe Sands, *The "Greening" of International Law: Emerging Principles and Rules*, 1 IND. J. GLOBAL LEGAL STUD. 293, 295-96 (1994).

¹⁹ See CLIMATE CHANGE 1995: THE SCIENCE OF CLIMATE CHANGE (J.T. Houghton et al. eds., 1996).

²⁰ See CLIMATE CHANGE 1995: IMPACTS, ADAPTATIONS AND MITIGATION OF CLIMATE CHANGE (Robert T. Watson, et al. eds., 1996); OFFICE OF GLOBAL INTEGRATED ENVTL. HEALTH, WORLD HEALTH ORG., CLIMATE CHANGE AND HUMAN HEALTH (1996); Intergovernmental Panel on Climate Change, *Sum-*

countries of the so-called global North that have generated the most GHGs since the advent of the Industrial Revolution, and they have thereby benefited from using the global atmosphere as a sink for the harmful by-products of their economic development.²¹ During the negotiations for the Climate Convention, developing countries were unified in emphasizing the historical responsibility of developed countries for climate change.²² They agreed to participate in the climate negotiations only on the condition that they not be required to accept any substantial commitments of their own.²³

The developed countries remain the largest sources of greenhouse gases, but the developing countries are expected to overtake them in coming decades.²⁴ The United States currently produces more GHGs than any other country, but China is currently in second place and will rival the United States for output within a generation.²⁵ Thus, it is essential that the large developing countries eventually join in limiting their greenhouse gases.

The first basic principle of the Climate Convention, Article 3(1), states:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.²⁶

mary for Policymakers—The Regional Impacts of Climate Change: An Assessment of Vulnerability (visited Nov. 10, 1998) <<http://www.usgcrp.gov/ipcc/html/RISPM.html>>.

²¹ See CLIVE PONTING, *A GREEN HISTORY OF THE WORLD* 387-92, 405-06 (1991).

²² See Delphine Borione & Jean Ripert, *Exercising Common but Differentiated Responsibility*, in *NEGOTIATING CLIMATE CHANGE* 77, 83-84 (Irving M. Mintzer & J. Amber Leonard eds., 1994).

²³ See *id.*

²⁴ See INTERNATIONAL ENERGY AGENCY, *WORLD ENERGY OUTLOOK* 2-3 (1995).

²⁵ See WORLD RESOURCES INST. ET AL., *WORLD RESOURCES* 315-25 (1996); see also INTERNATIONAL ENERGY AGENCY, *supra* note 24, at 2-3.

²⁶ FCCC, *supra* note 1, art. 3(1), 31 I.L.M. at 854. Specific commitments to limit GHG emissions apply to Organization for Economic Cooperation and Development (OECD) countries (except Mexico, which joined in 1994) and twelve Eastern European and former Soviet “economies in transition.” See FCCC, *supra* note 1, Annex I, 31 I.L.M. at 872. The poorest countries of the world are excluded from commitments, but so too are South Korea, Singapore, Saudi Arabia, and similarly “less developed”—but hardly poor—countries. See *Bonn*

The Climate Convention recognizes that all countries are responsible for climate change and should endeavor to limit the pollution that causes it.²⁷ However, following the CBDR principle, the treaty does not require developing countries to reduce their greenhouse gases. It instead requires the developed countries to take the “lead in modifying longer-term trends in anthropogenic emissions [of greenhouse gases] consistent with the objective of the Convention.”²⁸ Thus, there is a double standard built into the Climate Convention—a double standard that is meant to achieve the Convention’s objective of reducing GHGs to manageable levels in ways that are both effective and fair.²⁹ It would be unfair to expect developing countries to limit their economic development when wealthy countries are most responsible for present concentrations of atmospheric greenhouse gases *and* the expected consequences of this pollution for the global climate in the next century.³⁰

B. *The Berlin Mandate*

The CBDR principle was reaffirmed in 1995 at the first conference of the FCCC parties in Berlin. Countries agreed to the “Berlin Mandate,” whereby developed countries pledged to act first to reduce their GHG emissions before requiring developing

to Kyoto: The Administration’s Position on the Climate Change Treaty, Hearing Before the House Comm. on Int’l Relations, 105th Cong. 10 (1997) [hereinafter Bonn to Kyoto] (statement of Timothy Wirth, Under Secretary of State for Global Affairs). The United States wanted the CBDR principle to be extended to countries within the non-Annex I (developing countries) group. Under such a formula, the poorest countries would remain exempt from commitments, but the relatively affluent developing countries and the largest GHG emitters would agree to emissions limitations. See *Global Climate Negotiations: Obligations of Developed and Developing Countries, Hearings Before the House Comm. on Int’l Relations, 105th Cong. 63 (1997) [hereinafter Global Climate Negotiations]* (statement of Timothy Wirth, Under Secretary of State for Global Affairs).

²⁷ See FCCC, *supra* note 1, art. 3, 31 I.L.M. at 854-55.

²⁸ *Id.* art. 4(2)(a), 31 I.L.M. at 856.

²⁹ See Paul G. Harris, *Considerations of Equity and International Environmental Institutions*, 5 ENVTL. POL. 274, 291-94 (1996).

³⁰ On the notions of fairness and equity in the context of climate change and other international environmental issues, see, e.g., CLIMATE CHANGE 1995: ECONOMIC AND SOCIAL DIMENSIONS ch. 3 (James P. Bruce et al. eds., 1996); EQUITY AND SOCIAL CONSIDERATIONS RELATED TO CLIMATE CHANGE (Richard Samson Odingo et al. eds., 1994); Paul G. Harris, *Affluence, Poverty, and Ecology: Obligation, International Relations, and Sustainable Development*, 2 ETHICS & ENV’T 121, 129-30 (1997); Paul G. Harris, *Environment, History and International Justice*, 40 J. INT’L STUD., July 1997, at 1.

countries to do so.³¹ The Berlin Mandate declares that the process of implementing the Climate Convention shall be guided, inter alia, by the CBDR principle.³² It reminds parties that they are required to consider the special needs of the developing countries and that “the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that the per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.”³³ It goes on to state: “[T]he global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.”³⁴

Clearly, negotiations for the Kyoto Protocol between 1995 and 1997 were premised on the CBDR principle. The United States, along with other developed countries party to the Convention, accepted this standard because they knew developing countries would not—and in many cases could not—limit their emissions otherwise.³⁵ To many observers, however, the U.S. policy toward common but differentiated responsibility and climate change appeared to shift in the months before the Kyoto gathering. Indeed, the common interpretation was that the United States had abrogated its responsibility with regard to the CBDR principle.³⁶

C. *The Kyoto Protocol*

Throughout the international negotiations on a protocol to the Climate Convention, developing countries consistently declared that they would not agree to any limitations (least of all

³¹ See *Report of the Conference of the Parties on its First Session, Held at Berlin from March to 7 April 1995*, U.N. Framework Convention on Climate Change Conference of the Parties, 1st Sess., at 1, U.N. Doc. FCCC/CP/1995/7/Add.1 (1995).

³² See *id.* art. I(1)(a), at 4 (quoting Article 3(1) of the Climate Convention).

³³ *Id.* art. I(1)(d), at 5.

³⁴ *Id.* art. I(1)(e), at 5.

³⁵ Cf. Group of Seven Industrialized Countries (G-7) and Russia, *Final Communiqué of the Denver Summit of the Eight*, ¶¶ 14-17 (June 22, 1997) <<http://sung7.univ-lyon2.fr/toronto/denver/g8final.htm>>.

³⁶ This was evident in press reports. See, e.g., William K. Stevens, *Greenhouse Gas Issue: Haggling over Fairness*, N.Y. TIMES, Nov. 30, 1997, § 1, at 6.

reductions) in their GHG emissions until the developed countries substantially reduced theirs.³⁷ In short, those responsible for the problem—the developed countries, particularly the United States—would have to agree to binding limitations on their own greenhouse gas emissions before they could rightfully expect the poor countries to do likewise. The stiff resolve of the developing countries was further demonstrated by a comment from one of their delegates at the October 1997 climate change talks in Bonn, made in response to President Clinton’s announcement of the U.S. position that same month (which called on developing countries to take on new commitments for reducing their greenhouse gases): “[N]o protocol is better than a protocol with new developing country commitments.”³⁸

The developing countries acted on these sentiments in Kyoto, vetoing any language in the Protocol that would call on them to make even voluntary commitments to limit their emissions of greenhouse gases.³⁹ Accordingly, the Kyoto Protocol of December 10, 1997⁴⁰ requires *developed* countries to reduce their aggregate emissions of greenhouse gases by five percent below 1990 levels by 2012.⁴¹ The United States agreed to reduce its emissions by seven percent, the Europeans by eight, and the Japanese by six.⁴² A handful of developed countries, such as Australia, were allowed to increase their emissions.⁴³

Conforming to the Climate Convention’s provisions for the CBDR principle and specifically reaffirming the Berlin Mandate, the Kyoto Protocol does not require the developing countries to take on new commitments to limit their GHG emissions. Indeed, the Protocol is devoid of references to commitments of developing countries.⁴⁴ Rather, all of its provisions apply to the devel-

³⁷ See *After Kyoto, New Round of Battle Coming Up*, J. GROUP 77 (Sept.-Nov. 1997) <<http://www.g77.org/Journal/sepnov97/06.htm>>.

³⁸ Paola Bettelli et al., *Highlights from the Meeting of the FCCC Subsidiary Bodies*, 12 EARTH NEGOTIATIONS BULL. 1, ¶ 16 (Oct. 24, 1997) <<http://www.iisd.ca/linkages/download/asc/enb1260e.txt>> (on file with author).

³⁹ See Paola Bettelli et al., *Report of the Third Conference of the Parties to the United Nations Framework Convention on Climate Change: 1-11 December 1997*, 12 EARTH NEGOTIATIONS BULL. 1, ¶ 74 (Dec. 13, 1997) <<http://www.iisd.ca/linkages/download/asc/enb1276e.txt>> (on file with author).

⁴⁰ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

⁴¹ See *id.* art. 3(1), 37 I.L.M. at 33.

⁴² See *id.* Annex B, 37 I.L.M. at 43.

⁴³ See *id.*

⁴⁴ See *id.*

oped “Annex I” countries. In Article 10, the Protocol explicitly reaffirms the CBDR principle, stating that all parties must take into account “their common but differentiated responsibilities and their specific national and regional development priorities, objectives, and circumstances, without introducing any new commitments for Parties not included in Annex I [i.e., the developing countries].”⁴⁵

II

COMMON BUT DIFFERENTIATED RESPONSIBILITY FOR CLIMATE CHANGE AND THE U.S. GOVERNMENT

The U.S. government⁴⁶ has consistently supported common but differentiated responsibility in the context of climate change, despite contrary interpretations in most press reports. It is true that the U.S. position on CBDR differs somewhat from that of other countries, especially if one is concerned with rhetoric from Congress and strict interpretations of proposed treaty wording.⁴⁷ This was evident during the months before Kyoto when the Clinton Administration called for “new” and “meaningful” commit-

⁴⁵ *Id.* art. 10, 37 I.L.M. at 36-37. It bears noting that the CBDR principle is not tied to the distinction between developed and developing countries: the principle can be invoked even *among* developed countries. For example, while both the United States and Canada must act before the developing countries, the United States must reduce its emissions more than Canada. *See id.* Annex B, 37 I.L.M. at 43. On the other hand, the United States, far and away the largest source of greenhouse gases and the wealthiest economy in the world, is required to reduce its emissions less than the European Union. *See id.* This is so despite the fact that E.U. citizens produce fewer greenhouse gases in the aggregate and especially less per capita than do the Americans. *See* WORLD RESOURCES INST. ET AL., *supra* note 25, at 319. Most developed countries are required to reduce their GHG emissions, but Australia (for example) is permitted an eight percent increase. *See* Kyoto Protocol, *supra* note 40, Annex B, 37 I.L.M. at 43. This differentiation is ostensibly based on national circumstances, but in reality it was largely a function of political bargaining in the Kyoto process.

⁴⁶ References in this Article to “the U.S. government” mean the Clinton Administration (and the applicable Executive agencies) *and* Congress, notably the Senate, which must ratify international treaties signed by the President. *See* U.S. CONST. art. II, § 2, cl. 2.

⁴⁷ The greatest divergences from the U.S. position have been advanced by many of the developing countries, notably China, which do not want any treaty references to new developing country commitments. *See Bonn to Kyoto*, *supra* note 26, at 7 (statement of Timothy Wirth, Under Secretary of State for Global Affairs).

ments from developing countries in the Protocol.⁴⁸ This position was highly contentious, in large measure because the developing countries feared that any language calling for new commitments would set dangerous precedents.⁴⁹ Additionally, these developing countries may have felt that the U.S. position would be impossible to sell to their domestic constituencies, regardless of the wording and even if this position permitted *increased* GHG emissions on their part.⁵⁰ However, it would be wrong to say that the United States expected developing countries to take on “common” responsibilities instead of “common *but differentiated*” responsibilities. Recall that the U.S. government joined the 1995 Berlin Mandate, thereby reaffirming the CBDR provisions of the Climate Convention. Even Congress, particularly the Senate, declared its support for CBDR, as indicated by extensive debate on the Senate floor.⁵¹ In substance, the U.S. government accepted and actively promoted the CBDR principle in the climate change negotiations.

A. *The U.S. Senate’s Byrd-Hagel Resolution*

In July 1997, by a vote of 95-0, the U.S. Senate adopted Senate Resolution 98 (SR-98), the so-called Byrd-Hagel Resolution.⁵² SR-98 stated, *inter alia*, that the United States should not be a signatory to any protocol to, or other agreement regarding, the Climate Convention that would

(A) mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I [developed country] Parties, un-

⁴⁸ See White House, *Comprehensive Framework for Effective, Sensible Action* (Oct. 22, 1997) <<http://www.whitehouse.gov/Initiatives/Climate/framework-plain.html>>; President William J. Clinton, Remarks by the President on Global Climate Change at the National Geographic Society (Oct. 22, 1997) [hereinafter Remarks] reprinted in *Bonn to Kyoto*, *supra* note 26, at 19 (transcript available at <http://www.whitehouse.gov/Initiatives/Climate/1997_1022-6127.html>).

⁴⁹ See *The Third Conference of the Parties to the UN Framework Convention on Climate Change: 1 December 1997*, 12 EARTH NEGOTIATIONS BULL. 1, ¶ 18 (Dec. 2, 1997) <<http://www.iisd.ca/linkages/download/asc/enb11268e.txt>> (on file with author).

⁵⁰ See generally Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT’L L. 519, 545-46 (1991).

⁵¹ See *infra* Part II.B.

⁵² S. Res. 98, 105th Cong., 143 CONG. REC. S8138-39 (daily ed. July 25, 1997). For a transcript of the Senate floor debate on the Byrd-Hagel Resolution, see *id.* at S8113-38.

less 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 States⁵³

The Byrd-Hagel Resolution reflected concerns about the effects of any climate treaty on the U.S. economy and distrust among both Republican and Democratic senators of an agreement that would exclude the developing countries. On a first reading, the Resolution sounds ominous to those concerned about CBDR and international fairness, and observers could be forgiven for interpreting it as a “treaty killer.” But such an interpretation would miss the Resolution’s message. Rather than focusing on the rhetoric of the most outspoken anti-Climate Convention senators, it is instructive to look at the meaning of the Resolution made explicit by senators in floor debate, as well as the interpretation of the Resolution adopted by the Clinton Administration in its public statements. Such an examination shows that the Byrd-Hagel Resolution was based fundamentally on conceptions of CBDR and notions of fair and equitable international burden-sharing.

B. *Senate Debate and Common but Differentiated Responsibility*

The Senate’s concerns about developing country participation in the FCCC process were at least twofold. First, rightly or wrongly, there was a concern that developing countries would have an unfair economic advantage because they would not be facing the same restrictions on economic output as the United States.⁵⁴ Gross National Product is, for better or worse, still largely proportional to energy use and thus to GHG emissions (especially carbon dioxide).⁵⁵ There was also the concern that U.S. manufacturing, and hence U.S. jobs, would move abroad to take advantage of relaxed environmental regulations there.⁵⁶

⁵³ *Id.* at S8138.

⁵⁴ *See id.* at S8115-16 (statement of Sen. Hagel); *Global Climate Negotiations*, *supra* note 26, at 4-5 (statement of Rep. Rohrabacher).

⁵⁵ *See* Peter Passel, *Trading on the Pollution Exchange*, N.Y. TIMES, Oct. 24, 1997, at D1.

⁵⁶ *See* 143 CONG. REC. at S8115 (daily ed. July 25, 1997) (statement of Sen. Hagel).

Second, the Senate believed that an effective climate treaty absolutely required developing country participation.⁵⁷ During floor debate on the Resolution, senator after senator cited the future emissions of China as justification for their position.⁵⁸ Some senators pointed out that by 2015 China will surpass the United States to become the world's leading producer of GHGs and noted that other large developing countries were rapidly increasing their emissions as well.⁵⁹

Perhaps the greatest confusion about the Byrd-Hagel Resolution concerns its requirement that any climate agreement “mandate[] new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period” as the United States and other developed country parties.⁶⁰ During floor debate, several senators went to great lengths to establish the precise interpretation of this provision. Most senators accepted that the U.S. was more responsible for the problem, that the developing countries—while they must undertake “specific scheduled commitments” in the “same compliance period”—should not be required to undertake the same commitments as the developed countries, and that the poorest and least capable countries should have the least stringent requirements (or none at all) placed upon them.⁶¹ Indeed, one could readily interpret the Resolution as accepting that many developing countries would *increase* their GHG emissions but that those increases ought to be codified in the agreement. Indeed, this was the U.S. negotiating position at the Kyoto conference.⁶²

The comments of several senators readily demonstrate that the U.S. Senate accepted the fundamental provisions of the Cli-

⁵⁷ See *id.* at S8117 (statement of Sen. Byrd); *id.* at S8122 (statement of Sen. Roberts). This is based on the widespread assumption, backed by scientists, that there is a climate change problem. It is important to note, however, that some U.S. legislators in both the Senate and House of Representatives still doubt that climate change is a problem at all (or at least that is what they have said publicly). See *Global Climate Negotiations*, *supra* note 26, at 4-5 (statement of Rep. Rohrabacher).

⁵⁸ See 143 CONG. REC. at S8122 (daily ed. July 25, 1997) (statement of Sen. Roberts); *id.* at S8124 (statement of Sen. Lott).

⁵⁹ See *id.* at S8126 (statement of Sen. Kyl); *id.* at S8127 (statement of Sen. Thomas).

⁶⁰ *Id.* at S8138.

⁶¹ See *id.* at S8113-39.

⁶² See Bettelli et al., *supra* note 39, ¶ 210.

mate Convention and the CBDR principle. Many legislators recognized that the United States was the largest part of the climate change problem and that the U.S. should act to reduce its GHG emissions while assisting developing countries with their actions.

For example, in a statement on the Senate floor, Senator Patty Murray said:

Regarding the developed-developing nation debate, I believe it is also clear that we developed nations have historically emitted more greenhouse gases per capita than have developing countries. In addition, we are economically more able to absorb whatever increased costs occur based on the need to reduce emissions. Therefore, we should assist our neighbors through technology transfer, economic assistance, and joint ventures in meeting whatever emissions goals are established.⁶³

Senator Robert Byrd, primary co-sponsor of SR-98, interpreted the developing country provisions of the Resolution as essentially ad hoc obligations:

Now, does this mean that the Senate is insisting on commitments to identical levels of emissions among all the parties? Certainly not. The emissions limitations goals, to be fair, should be based on a country's level of development. The purpose is not to choke off Mexico's development or China's development.⁶⁴

Similarly, Senator John Kerry offered a subjective interpretation of the seemingly objective phrase, "same compliance period":

[I]t means essentially that we want countries to begin to reduce while we are reducing, we want them to engage in a reasonable schedule while we are engaged in a reasonable schedule, but that if a developing nation needs more time to get a plan in place or needs to have more time to raise the funds and be able to purchase the technology and do the things necessary, that as long as there is a good-faith track on which they are proceeding, that if it took them a number of years . . . to reach a particular goal, that certainly means within the same compliance period . . . [I]t is reasonable to permit some flexibility in the targets and timing of compliance while at the same time requiring all countries to agree to make a

⁶³ 143 CONG. REC. at S8124 (daily ed. July 25, 1997) (statement of Sen. Murray).

⁶⁴ *Id.* at S8117 (statement of Sen. Byrd).

legally binding commitment by a date certain. That is reasonable. But I think most of my colleagues would agree that if some country simply doesn't have the capacity, the plan, the money, or the technology, it may be they have to take a little more time and we should want to be reasonable in helping them to do that because the goal here is to get everybody to participate, not to create a divisiveness that winds up with doing nothing.⁶⁵

Senator Max Baucus reiterated the need for the developing countries to have the same compliance period, adding: "But since developing and developed nations are starting from different places, it makes sense to require different targets. Here again, the language crafted by Senator Byrd helps. It does not specify that developed and developing countries meet the same targets and timetables."⁶⁶

Senator Robert Kerrey echoed these remarks, explaining that the Senate Resolution would allow developing countries "appropriate" flexibility in their commitments to abate GHG emissions.⁶⁷ He added that it was the developed countries who were "in a better position to implement emissions-curbing activities and technologies at low cost and impact, and to also transfer these abilities and technologies to developing countries and to aid in their economic advancement in a way that tempers emissions growth."⁶⁸

Senator Joseph Lieberman reinforced these interpretations in the following statement:

New commitments by developing countries regarding their performance under the [FCCC], of course, need to be consistent with their historic responsibility for the problem, as well as their current capabilities. The ground rules for the negotiations—the Berlin [M]andate—recognize these common, but differentiated responsibilities.

It is clear that the Berlin [M]andate can be carried out in a way that is consistent with Senate Resolution 98. The resolution says that developing countries can start with a commitment that is lower relative to the industrialized countries at first. . . .

⁶⁵ *Id.* at S8120 (statement of Sen. Kerry).

⁶⁶ *Id.* at S8125 (statement of Sen. Baucus).

⁶⁷ *Id.* at S8128 (statement of Sen. Kerrey).

⁶⁸ *Id.*

Senate Resolution 98 says that it is entirely appropriate for industrialized countries to start making quantified emissions reductions first⁶⁹

To put to rest confusion about the interpretation of the developing country provisions of the Byrd-Hagel Resolution, Senator Jeff Bingaman entered a colloquy with Senator Byrd:

[Mr. Bingaman:] I was greatly encouraged by the remarks on this issue made by the sponsor of this resolution [who said that] countries at different levels of development should make unique and binding commitments of a pace and kind consistent with their industrialization . . . [and] consistent with a fair sharing of any burden. . . .

. . . Would it be correct to interpret the use of the words “new commitments” in both phrases as suggesting that the United States should not be a signatory to any protocol unless Annex I Parties and Developing Country Parties agree to identical commitments?

Mr. Byrd: That would not be a correct interpretation of the resolution. . . . In [the committee hearings for SR-98,] I made the following statement and deliberately repeated it for emphasis: “Finally, while countries have different levels of development, each must make unique and binding commitments of a pace and kind consistent with their industrialization.” I believe that the developing world must agree in Kyoto to binding targets and commitments that would begin at the same time as the developed world in as aggressive and effective a schedule as possible given the gravity of the problem and the need for a fair sharing of the burden. That is what the resolution means. The resolution should not be interpreted as a call for identical commitments between Annex I Parties and Developing Country Parties.⁷⁰

To be sure, it would be much easier for international negotiators and for the Clinton Administration if the Senate had never passed the Byrd-Hagel Resolution. One might even assume that some senators were not interested in international fairness; they might be happy to see developing countries subjected to immediate mandated reductions in their greenhouse gases. Nevertheless, as the senators’ statements show, the Resolution was not what it might appear to be. That is, SR-98 was not a renunciation

⁶⁹ *Id.* at S8129 (statement of Sen. Lieberman).

⁷⁰ *Id.* at S8131 (statements of Sen. Bingaman & Sen. Byrd).

of the CBDR principle but rather an alternative interpretation of it, albeit a less robust one than the developing countries wanted.

C. *Common but Differentiated Responsibility and
the Clinton Administration*

Responding to the Byrd-Hagel Resolution, and bearing in mind the increasing emissions of greenhouse gases from developing countries, President Clinton announced on October 22, 1997 his Administration's negotiating position for the Kyoto conference.⁷¹ He called on the industrialized countries to commit to a binding and "realistic" target of returning emissions of GHGs to 1990 levels between 2008 and 2012, and of reducing emissions below 1990 levels between 2012 and 2017.⁷² President Clinton declared that "both industrialized and developing countries must participate in meeting the challenge of climate change."⁷³ Clinton added that "[d]eveloping countries have an opportunity to chart a different energy future consistent with their growth potential and their legitimate economic aspirations."⁷⁴ He said that "key" developing countries (those that are the wealthiest and the largest emitters among the developing parties, including China, India, and Mexico) must take "meaningful" action, but that the "industrialized world must lead."⁷⁵ Thus, meaningful participation of key developing countries did not mean equal participation.

Affirming that the U.S. position was to support, not harm, economies in the developing world, President Clinton said that he would not propose changes to the Climate Convention that would adversely affect the growth of developing countries, which feared emissions reductions might penalize them, because their industries are often less pollution-conscious.⁷⁶ The President said that the United States wanted to help the developing nations grow as much as they would without a treaty, but using a "different energy future than the one we charted in the past when we

⁷¹ See Remarks, *supra* note 48, ¶¶ 15-30.

⁷² See *President Clinton's Climate Change Proposal* (Oct. 22, 1997) <<http://www.whitehouse.gov/Initiatives/Climate/proposal-plain.html>>.

⁷³ Remarks, *supra* note 48, ¶ 19.

⁷⁴ *Id.* ¶ 20.

⁷⁵ *Id.* ¶ 19.

⁷⁶ See Remarks by President Clinton and President Cardoso at Signing of Declaration on Education (Oct. 14, 1997) <<http://www.pub.whitehouse.gov/urires/I2R?urn:pdi://oma.eop.gov.us/1997/10/20/1.text.1>>.

were at the same stage of development.”⁷⁷ In his October 22 announcement of the U.S. Kyoto negotiating position, Clinton again acknowledged the special U.S. responsibility for the problem: “The United States has less than five percent of the world’s people, enjoys 22 percent of the world’s wealth, but emits more than 25 percent of the world’s greenhouse gases.”⁷⁸

In Senate testimony, then-Under Secretary of State for Global Affairs Timothy Wirth described the U.S. position on many of the most contentious questions of equity and fairness in the context of climate change.⁷⁹ Despite facing hostile questions from some senators, his description of U.S. policy accommodated the CBDR principle, especially with regard to U.S. expectations of the developing countries.⁸⁰ Wirth noted that the developing countries would have to be part of the treaty, because their GHG emissions were increasing rapidly.⁸¹ At the same time, however, he pointed out that the developing countries’ per capita emissions would continue to remain “far below our own,”⁸² and he defended the actions that the developing countries had already taken to reduce their GHG emissions despite, as he made clear, their relative poverty.⁸³ Wirth said that the United States “must determine what we ask of developing countries with realistic and fair appreciation of how they see the world as well. The level and timing of each country’s commitments must be commensurate with its national abilities and level of development. Balance and fairness must be maintained.”⁸⁴ His remarks, like those of Vice

⁷⁷ *Id.*

⁷⁸ Remarks, *supra* note 48, ¶ 15.

⁷⁹ See *Hearings on Global Climate Change Before the Subcomm. on Int’l Econ. Policy, Export and Trade Promotion of the Senate Foreign Relations Comm.*, 105th Cong. (1997) [hereinafter *Senate Subcomm. Climate Hearings*] (statement of Timothy Wirth, Under Secretary of State for Global Affairs), available in 1997 WL 631222.

⁸⁰ See *id.* at *14.

⁸¹ See *id.*

⁸² *Id.* at *9.

⁸³ See *id.* at *11-12.

⁸⁴ *Id.* at *16. As one solution to the question of developing country participation, the Clinton Administration proposed that the most affluent, non-Annex I, developing countries (e.g., South Korea, Singapore, Saudi Arabia, and the like) be placed in a new “Annex B” with different—and more stringent—commitments than the poor developing countries. See *Global Climate Negotiations*, *supra* note 26, at 63 (statement of Timothy Wirth, Under Secretary of State for Global Affairs).

President Gore⁸⁵ and other Administration officials,⁸⁶ mirrored the CBDR principle contained in the Climate Convention.⁸⁷

The phrasing of the Senate resolution (“limit or reduce”) left room for the Clinton Administration to agree that developing countries should be able to *increase* their GHG emissions.⁸⁸ That is precisely what the United States diplomats proposed at the Kyoto conference: American diplomats called for *voluntary* commitments by developing countries (specifically excluding the least developed among them) to “abate the increase” in their emissions.⁸⁹ The U.S. diplomats said that developing country

⁸⁵ See Vice President Al Gore, Press Conference at the United Nations Comm. on Climate Change (Dec. 8, 1997) <http://www.state.gov/www/global/oes/971208a_gore_cop.html>.

⁸⁶ See *Implications of the Kyoto Protocol on Climate Change, Hearing Before the Senate Comm. on Foreign Relations*, 105th Cong. 41 (1998) [hereinafter *Implications of Kyoto*] (statement of Stuart E. Eizenstat, Under Secretary of State for Econ., Bus. and Agric. Affairs). Therein Eizenstat said:

Some developing countries believe—wrongly—that the developed world is asking them to limit their capacity to industrialize, reduce poverty and raise their standard of living. . . .

. . . .
 . . . In determining what developing countries ought to do, we should be aware that the circumstances of developing countries vary widely, along a kind of continuum. . . .

Any “one-size-fits-all” approach to the “meaningful participation of developing countries” and to satisfy the Byrd-Hagel Resolution is thus unlikely to prevail. . . .

. . . .
 Recognizing our “common but differentiated responsibilities and respective capabilities” it will be necessary to develop an approach that provides for a meaningful global response to the threat of global warming, while acknowledging the legitimate aspirations of developing countries to achieve a better life for their peoples. . . .

Id. at 45-46.

⁸⁷ Wirth subsequently left the Clinton Administration, some say because he thought the Administration’s proposals for lowering U.S. GHG emissions did not go far enough. See, e.g., John H. Cushman, Jr. & David E. Sanger, *No Simple Fight: The Forces That Shaped the Clinton Plan*, N.Y. TIMES, Dec. 1, 1997, at 3.

⁸⁸ See William K. Stevens, *Global Warming Talks Open in Kyoto*, N.Y. TIMES, Dec. 2, 1997, at A10; see also *U.S. Delegation to the 3rd Conference of the Parties: Press Briefing* (Dec. 5, 1997) [hereinafter *Press Briefing*] <http://www.state.gov/www/global/oes/971205_cop.html>.

⁸⁹ One U.S. delegate at Kyoto (Daniel Reifsnyder, U.S. Department of State) told reporters at a news conference that “[w]e fully acknowledge that [the developing countries] are going to grow as their needs for development, you know—as they seek to develop. But what we’re looking for, I think, is an effort to try to, if you will, abate the increase in those emissions” *Press Briefing*, *supra* note 88, ¶ 19. Another delegate (Robert Dixon, Director, U.S.

emissions targets could be *growth* targets and that such commitments should not inhibit economic development in those countries.⁹⁰ In other words, the Clinton Administration wanted (and, presumably, still wants) the large developing countries to plan their future emissions and commit themselves to adhering to those plans. The U.S. diplomats only wanted something—virtually anything—in the Protocol’s wording that would allow the Administration to tell Congress that developing countries were “limiting” their emissions in “meaningful” ways. Thus, the U.S. position was not, as it was billed by almost everyone but the Clinton Administration, an abrogation of the CBDR principle.

CONCLUSION: FROM KYOTO TO BUENOS AIRES—AND BEYOND

The principle of common but differentiated responsibility has been established in international environmental instruments negotiated over the last few decades.⁹¹ It is a recognition that all countries are responsible for limiting damage to common global environmental areas, but that the developed industrialized countries should take on much greater responsibility in preventing and mitigating global pollution, and indeed in helping developing countries in their own efforts to protect the global commons.⁹² CBDR has moved from being a “soft” international legal principle (as in the Rio Declaration on Environment and Development)⁹³ to a nascent but increasingly robust component of international law (as demonstrated by its codification in the Framework Convention on Climate Change).⁹⁴ According to the Climate Convention, developed countries are required to reduce their emissions of greenhouse gases; the developing countries, which are required to take some minor actions on behalf of the global climate (e.g., creating inventories of their GHG emissions),⁹⁵ are not required by the treaty to reduce their GHG

Initiative on Joint Implementation) said that “we are interested in developing countries at least agreeing to a process by which they would come to accept their own binding targets, even though those might be growth targets.” *Id.* ¶ 32.

⁹⁰ *See id.*; *see also* Bettelli et al., *supra* note 39, ¶ 210.

⁹¹ *Cf.* Biermann, *supra* note 10, at 426.

⁹² *See id.* at 432-65.

⁹³ *See* Rio Declaration, *supra* note 15, princ. 7, 31 I.L.M. at 877.

⁹⁴ *See* FCCC, *supra* note 1, art. 3(1), 31 I.L.M. at 854.

⁹⁵ Even here the assumption is that they will receive assistance from the developed countries in doing so. *See id.* art. 4(7), 31 I.L.M. at 858 (“The extent to which developing country Parties will effectively implement their commit-

emissions. The Berlin Mandate and the recent Kyoto Protocol to the Climate Convention reaffirmed this principle.

CBDR is not, in the U.S. interpretation, incompatible with new “commitments” by some developing countries. What the U.S. government wants is for the developing countries to plan their GHG emissions *increases* and to adhere to those levels. Bearing in mind provisions in the Climate Convention for financial assistance and technology transfer from the industrialized countries and plans for more joint implementation projects, it is probable that developing countries will bolster their economic development and growth in the long term by undertaking such commitments.⁹⁶ Developing countries have already taken many steps to make themselves more energy efficient.⁹⁷ Indeed, by doing so, they are saving scarce capital and making themselves more competitive vis-à-vis the United States and other industrialized countries.

This brief examination of the CBDR principle and the U.S. position with regard to it and climate change suggests at least two things. First, U.S. support for CBDR bodes well for the principle’s future in international environmental law and suggests that the North-South cooperation essential to effective international environmental cooperation need not suffer a setback on this score. The U.S. government—both the Administration and Congress—supports the basic principle of CBDR (despite a preference that some developing countries, especially the most affluent ones and those with the largest economies, take on much greater commitments).⁹⁸ The Senate made that support part of U.S. law by ratifying the Climate Convention. Most importantly, as demonstrated by the Senate debate, by statements from Presi-

ments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology. . . .”).

⁹⁶ “Joint implementation” generally refers to projects undertaken jointly by firms or governments of both developed and developing countries, usually meaning that entities in developed countries undertake GHG emissions limitations in developing countries at costs lower than they would incur were those limitations implemented at home. There is an ongoing dispute over whether developing countries benefit from such programs. See Philippe Sands, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW I: FRAMEWORKS, STANDARDS AND IMPLEMENTATION*, 132-33 (1995).

⁹⁷ See *Senate Subcomm. Climate Hearings*, *supra* note 79, at *11-12.

⁹⁸ See, e.g., *Implications of Kyoto*, *supra* note 86, at 46 (statement of Stuart E. Eizenstat, Under Secretary of State for Econ., Bus. and Agric. Affairs).

dent Clinton and members of Executive agencies, and by the positions of U.S. diplomats in international negotiations, the United States approaches questions of climate change commitments with the underlying assumption that the essential character of the CBDR principle should be upheld.

This is positive news. If the developing countries recognize that the U.S. position is one of fundamental support for common but differentiated responsibility, they are more likely to participate in efforts to protect the climate of the earth. The question is whether diplomats can find wording for a side agreement to the Kyoto Protocol that meets the Senate's requirement for those countries to agree to "new specific scheduled commitments to limit" their GHGs but that does not require those countries to make near-term reductions or to sacrifice their economic development goals. The latter is the stated objective of the Clinton Administration and many Senators.⁹⁹

This leads to an important second point highlighted by this situation: the U.S. position is actually an *opportunity* for climate change negotiators as they prepare for future international deliberations.¹⁰⁰ At Kyoto, U.S. diplomats called on the developing countries to agree to *voluntary* schedules for GHG emissions *increases* (i.e., "limitations").¹⁰¹ This proposal, though rejected by most developing countries at the time, could serve as the basis for negotiation of a side agreement to the Kyoto Protocol.

An agreement along these lines would not place any binding commitments on the developing countries; they would be free, if they so choose, to focus on their economic growth and to do as little as the United States did in the years following its ratification of the voluntary commitments in the Climate Convention. However, such an agreement would place the largest and most affluent developing countries on a clearer path toward energy efficiency and GHG limitations. Such a path is essential if climate change is to be addressed effectively in the long term. Since the developing countries will suffer the greatest harm from future climate changes, they stand to benefit the most from preventative

⁹⁹ See *id.* at 45; 143 CONG. REC. at S8117 (daily ed. July 25, 1997) (statement of Sen. Byrd); *id.* at S8120 (statement of Sen. Kerry).

¹⁰⁰ For details of the U.S. positions in the run-up to the November 1998 conference of the parties in Buenos Aires, see Paul G. Harris, *Les États-Unis: Un Joueur Clé* [Key Issues in U.S. Climate Change Policy: A Buenos Aires Preview], 39 LIAISON ÉNERGY FRANCOPHONIE 11, 15 (1998).

¹⁰¹ See *Press Briefing*, *supra* note 88, ¶ 18.

actions taken now. They will also benefit from having energy-efficient industries and economies that will be more competitive in the globalized free-market economy.

Building on the U.S. proposal at Kyoto, developing countries would reaffirm that they have “common” responsibilities to address climate change, but their responsibilities would remain firmly “differentiated” from those of the more responsible and much more capable industrialized countries. The CBDR principle would remain a guiding norm in the international climate protection regime. Such an agreement would also mean that the Kyoto Protocol itself would stand a much better chance of being ratified by the U.S. Senate and gaining Congressional funding. While the United States will limit its GHG emissions even if it never becomes a legal party to the Protocol, ratification and Congressional consent are essential if the U.S.—still the largest emitter of greenhouse gases—is to take the major steps necessary to substantially reduce its pollution of the earth’s atmosphere.