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KYOTO PROTOCOL TO THE
UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

The Parties to this Protocol,

Being Parties to the United Nations Framework Convention on Climate Change, hereinafter referred to as "the Convention",

In pursuit of the ultimate objective of the Convention as stated in its Article 2,

Recalling the provisions of the Convention,

Being guided by Article 3 of the Convention,

Pursuant to the Berlin Mandate adopted by decision 1/CP.1 of the

Conference of the Parties to the Convention at its first session,

Have agreed as follows:

Article 1

For the purposes of this Protocol, the definitions contained in Article 1 of the Convention shall apply. In addition:

1. "Conference of the Parties" means the Conference of the Parties to the Convention.

2. "Convention" means the United Nations Framework Convention on Climate Change, adopted in New York on 9 May 1992.

3. "Intergovernmental Panel on Climate Change" means the Intergovernmental Panel on Climate Change established in 1988 jointly by the World Meteorological Organization and the United Nations Environment Programme.

4. "Montreal Protocol" means the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted in Montreal on 16 September 1987 and as subsequently adjusted and amended.

5. "Parties present and voting" means Parties present and casting an affirmative or negative vote.

6. "Party" means, unless the context otherwise indicates, a Party to this Protocol.

7. "Party included in Annex I" means a Party included in Annex I to the Convention, as may be amended, or a Party which has made a notification under Article 4, paragraph 2(g), of the Convention.

Article 2

1. Each Party included in Annex I, in achieving its quantified emission limitation and reduction commitments under Article 3, in order to promote sustainable development, shall:

(a) Implement and/or further elaborate policies and measures in accordance with its national circumstances, such as:

(i) Enhancement of energy efficiency in relevant sectors of the national economy;

(ii) Protection and enhancement of sinks and reservoirs of greenhouse gases not controlled by the Montreal Protocol, taking into account its commitments under relevant international environmental agreements; promotion of sustainable forest management practices, afforestation and reforestation;

(iii) Promotion of sustainable forms of agriculture in light of climate change considerations;

(iv) Research on, and promotion, development and increased use of, new and renewable forms of energy, of carbon dioxide sequestration technologies and of advanced and innovative environmentally sound technologies;

(v) Progressive reduction or phasing out of market imperfections, fiscal incentives, tax and duty exemptions and subsidies in all greenhouse gas emitting sectors that run counter to the objective of the Convention and application of market instruments;

(vi) Encouragement of appropriate reforms in relevant sectors aimed at promoting policies and measures which limit or reduce emissions of greenhouse gases not controlled by the Montreal Protocol;

(vii) Measures to limit and/or reduce emissions of greenhouse gases not controlled by the Montreal Protocol in the transport sector;

(viii) Limitation and/or reduction of methane emissions through recovery and use in waste management, as well as in the production, transport and distribution of energy;

(b) Cooperate with other such Parties to enhance the individual and combined effectiveness of their policies and measures adopted under this Article, pursuant to Article 4, paragraph 2(e)(i), of the Convention. To this end, these Parties shall take steps to share their experience and exchange information on such policies and measures, including developing ways of improving their comparability, transparency and effectiveness. The Conference of the

Parties serving as the meeting of the Parties to this Protocol shall, at its first session or as soon as practicable thereafter, consider ways to facilitate such cooperation, taking into account all relevant information.

2. The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.

3. The Parties included in Annex I shall strive to implement policies and measures under this Article in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties, especially developing country Parties and in particular those identified in Article 4, paragraphs 8 and 9, of the Convention, taking into account Article 3 of the Convention. The Conference of the Parties serving as the meeting of the Parties to this Protocol may take further action, as appropriate, to promote the implementation of the provisions of this paragraph.

4. The Conference of the Parties serving as the meeting of the Parties to this Protocol, if it decides that it would be beneficial to coordinate any of the policies and measures in

paragraph 1(a) above, taking into account different national circumstances and potential effects, shall consider ways and means to elaborate the coordination of such policies and measures.

Article 3

1. The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.

2. Each Party included in Annex I shall, by 2005, have made demonstrable progress in achieving its commitments under this Protocol.

3. The net changes in greenhouse gas emissions by sources and removals by sinks resulting from direct human-induced land-use change and forestry activities, limited to afforestation, reforestation and deforestation since 1990, measured as verifiable changes in carbon stocks in each commitment period, shall be used to meet the commitments under this Article of each Party included in Annex I. The greenhouse gas emissions by sources and removals by sinks associated with those activities shall be reported in a transparent and verifiable manner and reviewed in accordance with Articles 7 and 8.

4. Prior to the first session of the Conference of the Parties serving as the meeting of the Parties to this Protocol, each Party included in Annex I shall provide, for consideration by the Subsidiary Body for Scientific and Technological Advice, data to establish its level of carbon stocks in 1990 and to enable an estimate to be made of its changes in carbon stocks in subsequent years. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session or as soon as practicable thereafter, decide upon modalities, rules and guidelines as to how, and which, additional human-induced activities related to changes in greenhouse gas emissions by sources and removals by 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, taking into account uncertainties, transparency in reporting, verifiability, the methodological work of the Intergovernmental Panel on Climate Change, the advice provided by the Subsidiary Body for Scientific and Technological Advice in accordance with Article 5 and the decisions of the Conference of the Parties. Such a decision shall apply in the second and subsequent commitment periods. A Party may choose to apply such a decision on these additional human-induced activities for its first commitment period, provided that these activities have taken place since 1990.

5. The Parties included in Annex I undergoing the process of transition to a market economy whose base year or period was established pursuant to decision 9/CP.2 of the Conference of the Parties at its second session shall use that base year or period for the implementation of their commitments under this Article. Any other Party included in Annex I undergoing the process of transition to a market economy which has not yet submitted its first national communication under Article 12 of the Convention may also notify the Conference of the Parties serving as the meeting of the Parties to this Protocol that it intends to use an historical base year or period other than 1990 for the implementation of its commitments under this Article. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall decide on the acceptance of such notification.

6. Taking into account Article 4, paragraph 6, of the Convention, in the implementation of their commitments under this Protocol other than those under this Article, a certain degree of flexibility shall be allowed by the Conference of the Parties serving as the meeting of the Parties

to this Protocol to the Parties included in Annex I undergoing the process of transition to a market economy.

7. In the first quantified emission limitation and reduction commitment period, from

2008 to 2012, the assigned amount for each Party included in Annex I shall be equal to the percentage inscribed for it in Annex B of its aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A in 1990, or the base year or period determined in accordance with paragraph 5 above, multiplied by five. Those Parties included in Annex I for whom land-use change and forestry constituted a net source of greenhouse gas emissions in 1990 shall include in their 1990 emissions base year or period the aggregate anthropogenic carbon dioxide equivalent emissions by sources minus removals by sinks in 1990 from land-use change for the purposes of calculating their assigned amount.

8. Any Party included in Annex I may use 1995 as its base year for hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride, for the purposes of the calculation referred to in paragraph 7 above.

9. Commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex B to this Protocol, which shall be adopted in accordance with the provisions of Article 21, paragraph 7. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall initiate the consideration of such commitments at least seven years before the end of the first commitment period referred to in paragraph 1 above.

10. Any emission reduction units, or any part of an assigned amount, which a Party acquires from another Party in accordance with the provisions of Article 6 or of Article 17 shall be added to the assigned amount for the acquiring Party.

11. Any emission reduction units, or any part of an assigned amount, which a Party transfers to another Party in accordance with the provisions of Article 6 or of Article 17 shall be subtracted from the assigned amount for the transferring Party.

12. Any certified emission reductions which a Party acquires from another Party in accordance with the provisions of Article 12 shall be added to the assigned amount for the acquiring Party.

13. If the emissions of a Party included in Annex I in a commitment period are less than its assigned amount under this Article, this difference shall, on request of that Party, be added to the assigned amount for that Party for subsequent commitment periods.

14. Each Party included in Annex I shall strive to implement the commitments mentioned in paragraph 1 above in such a way as to minimize adverse social, environmental and economic impacts on developing country Parties, particularly those identified in Article 4, paragraphs 8 and 9, of the Convention. In line with relevant decisions of the Conference of the Parties on the implementation of those paragraphs, the Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, consider what actions are necessary to minimize the adverse effects of climate change and/or the impacts of response measures on Parties referred to in those paragraphs. Among the issues to be considered shall be the establishment of funding, insurance and transfer of technology.

Article 4

1. Any Parties included in Annex I that have reached an agreement to fulfil their commitments under Article 3 jointly, shall be deemed to have met those commitments provided that their total combined aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases

listed in Annex A do not exceed their assigned amounts calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of Article 3. The respective emission level allocated to each of the Parties to the agreement shall be set out in that agreement.

2. The Parties to any such agreement shall notify the secretariat of the terms of the

agreement on the date of deposit of their instruments of ratification, acceptance or approval of this Protocol, or accession thereto. The secretariat shall in turn inform the Parties and signatories to the Convention of the terms of the agreement.

3. Any such agreement shall remain in operation for the duration of the commitment period specified in Article 3, paragraph 7.

4. If Parties acting jointly do so in the framework of, and together with, a regional

economic integration organization, any alteration in the composition of the organization after adoption of this Protocol shall not affect existing commitments under this Protocol. Any alteration in the composition of the organization shall only apply for the purposes of those commitments under Article 3 that are adopted subsequent to that alteration.

5. In the event of failure by the Parties to such an agreement to achieve their total

combined level of emission reductions, each Party to that agreement shall be responsible for its own level of emissions set out in the agreement.

6. If Parties acting jointly do so in the framework of, and together with, a regional

economic integration organization which is itself a Party to this Protocol, each member State of that regional economic integration organization individually, and together with the regional economic integration organization acting in accordance with Article 24, shall, in the event of failure to achieve the total combined level of emission reductions, be responsible for its level of emissions as notified in accordance with this Article.

Article 5

1. Each Party included in Annex I shall have in place, no later than one year prior to the start of the first commitment period, a national system for the estimation of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol. Guidelines for such national systems, which shall incorporate the methodologies specified in paragraph 2 below, shall be decided upon by the Conference of the Parties serving as the meeting of the Parties to this Protocol at its first session.

2. Methodologies for estimating anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol shall be those accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties at its third session. Where such methodologies are not used, appropriate adjustments shall be applied according to methodologies agreed upon by the Conference of the Parties serving as the meeting of the Parties to this Protocol at its first session. Based on the work of, *inter alia*, the Intergovernmental Panel on Climate Change and advice provided by the Subsidiary Body for Scientific and Technological Advice, the Conference of the Parties serving as the meeting of the Parties to this Protocol shall regularly review and, as appropriate, revise such methodologies and adjustments, taking fully into account any relevant decisions by the Conference of the Parties. Any revision to methodologies or adjustments shall be used only for the purposes of ascertaining compliance with commitments under Article 3 in respect of any commitment period adopted

subsequent to that revision.

3. The global warming potentials used to calculate the carbon dioxide equivalence of anthropogenic emissions by sources and removals by sinks of greenhouse gases listed in Annex A shall be those accepted by the Intergovernmental Panel on Climate Change and agreed upon by the Conference of the Parties at its third session. Based on the work of, *inter alia*, the Intergovernmental Panel on Climate Change and advice provided by the Subsidiary Body for Scientific and Technological Advice, the Conference of the Parties serving as the meeting of the Parties to this Protocol shall regularly review and, as appropriate, revise the global warming potential of each such greenhouse gas, taking fully into account any relevant decisions by the Conference of the Parties. Any revision to a global warming potential shall apply only to commitments under Article 3 in respect of any commitment period adopted subsequent to that revision.

Article 6

1. For the purpose of meeting its commitments under Article 3, any Party included in

Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy, provided that:

(a) Any such project has the approval of the Parties involved;

(b) Any such project provides a reduction in emissions by sources, or an enhancement of removals by sinks, that is additional to any that would otherwise occur;

(c) It does not acquire any emission reduction units if it is not in compliance with its obligations under Articles 5 and 7; and

(d) The acquisition of emission reduction units shall be supplemental to domestic actions for the purposes of meeting commitments under Article 3.

2. The Conference of the Parties serving as the meeting of the Parties to this Protocol may, at its first session or as soon as practicable thereafter, further elaborate guidelines for the implementation of this Article, including for verification and reporting.

3. A Party included in Annex I may authorize legal entities to participate, under its responsibility, in actions leading to the generation, transfer or acquisition under this Article of emission reduction units.

4. If a question of implementation by a Party included in Annex I of the requirements referred to in this Article is identified in accordance with the relevant provisions of

Article 8, transfers and acquisitions of emission reduction units may continue to be made after the question has been identified, provided that any such units may not be used by a Party to meet its commitments under Article 3 until any issue of compliance is resolved.

Article 7

1. Each Party included in Annex I shall incorporate in its annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol, submitted in accordance with the relevant decisions of the Conference of the Parties, the necessary supplementary information for the purposes of ensuring compliance with Article 3,

to be determined in accordance with paragraph 4 below.

2. Each Party included in Annex I shall incorporate in its national communication, submitted under Article 12 of the Convention, the supplementary information necessary to demonstrate compliance with its commitments under this Protocol, to be determined in accordance with paragraph 4 below.

3. Each Party included in Annex I shall submit the information required under

paragraph 1 above annually, beginning with the first inventory due under the Convention for the first year of the commitment period after this Protocol has entered into force for that Party. Each such Party shall submit the information required under paragraph 2 above as part of the first national communication due under the Convention after this Protocol has entered into force for it and after the adoption of guidelines as provided for in paragraph 4 below. The frequency of subsequent submission of information required under this Article shall be determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol, taking into account any timetable for the submission of national communications decided upon by the Conference of the Parties.

4. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall adopt at its first session, and review periodically thereafter, guidelines for the preparation of the information required under this Article, taking into account guidelines for the preparation of national communications by Parties included in Annex I adopted by the Conference of the Parties. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall also, prior to the first commitment period, decide upon modalities for the accounting of assigned amounts.

Article 8

1. The information submitted under Article 7 by each Party included in Annex I shall be reviewed by expert review teams pursuant to the relevant decisions of the Conference of the Parties and in accordance with guidelines adopted for this purpose by the Conference of the Parties serving as the meeting of the Parties to this Protocol under paragraph 4 below. The information submitted under Article 7, paragraph 1, by each Party included in Annex I shall be reviewed as part of the annual compilation and accounting of emissions inventories and assigned amounts. Additionally, the information submitted under Article 7, paragraph 2, by each Party included in Annex I shall be reviewed as part of the review of communications.

2. Expert review teams shall be coordinated by the secretariat and shall be composed of experts selected from those nominated by Parties to the Convention and, as appropriate, by intergovernmental organizations, in accordance with guidance provided for this purpose by the Conference of the Parties.

3. The review process shall provide a thorough and comprehensive technical assessment

of all aspects of the implementation by a Party of this Protocol. The expert review teams shall prepare a report to the Conference of the Parties serving as the meeting of the Parties to this Protocol, assessing the implementation of the commitments of the Party and identifying any potential problems in, and factors influencing, the fulfilment of commitments. Such reports shall be circulated by the secretariat to all Parties to the Convention. The secretariat shall list those questions of implementation indicated in such reports for further consideration by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

4. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall adopt at its first session, and review periodically thereafter, guidelines for the review of implementation

of this Protocol by expert review teams taking into account the relevant decisions of the Conference of the Parties.

5. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, with the assistance of the Subsidiary Body for Implementation and, as appropriate, the Subsidiary Body for Scientific and Technological Advice, consider:

(a) The information submitted by Parties under Article 7 and the reports of the expert reviews thereon conducted under this Article; and

(b) Those questions of implementation listed by the secretariat under

paragraph 3 above, as well as any questions raised by Parties.

6. Pursuant to its consideration of the information referred to in paragraph 5 above, the Conference of the Parties serving as the meeting of the Parties to this Protocol shall take decisions on any matter required for the implementation of this Protocol.

Article 9

1. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall periodically review this Protocol in the light of the best available scientific information and assessments on climate change and its impacts, as well as relevant technical, social and economic information. Such reviews shall be coordinated with pertinent reviews under the Convention, in particular those required by Article 4, paragraph 2(d), and Article 7,

paragraph 2(a), of the Convention. Based on these reviews, the Conference of the Parties serving as the meeting of the Parties to this Protocol shall take appropriate action.

2. The first review shall take place at the second session of the Conference of the Parties serving as the meeting of the Parties to this Protocol. Further reviews shall take place at regular intervals and in a timely manner.

Article 10

All Parties, taking 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, but reaffirming existing commitments under Article 4, paragraph 1, of the Convention, and continuing to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4, paragraphs 3, 5 and 7, of the Convention, shall:

(a) Formulate, where relevant and to the extent possible, cost-effective national

and, where appropriate, regional programmes to improve the quality of local emission factors, activity data and/or models which reflect the socio-economic conditions of each Party for the preparation and periodic updating of national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed upon by the Conference of the Parties, and consistent with the guidelines for the preparation of national communications adopted by the Conference of the Parties;

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change:

(i) Such programmes would, *inter alia*, concern the energy, transport and industry sectors as well as agriculture, forestry and waste management. Furthermore, adaptation technologies and methods for improving spatial planning would improve adaptation to climate change; and

(ii) Parties included in Annex I shall submit information on action under this Protocol, including national programmes, in accordance with Article 7; and other Parties shall seek to include in their national communications, as appropriate, information on programmes which contain measures that the Party believes contribute to addressing climate change and its adverse impacts, including the abatement of increases in greenhouse gas emissions, and enhancement of and removals by sinks, capacity building and adaptation measures;

(c) Cooperate in the promotion of effective modalities for the development, application and diffusion of, and take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies, know-how, practices and processes pertinent to climate change, in particular to developing countries, including the formulation of policies and programmes for the effective transfer of

environmentally sound technologies that are publicly owned or in the public domain and the creation of an enabling environment for the private sector, to promote and enhance the transfer of, and access to, environmentally sound technologies;

(d) Cooperate in scientific and technical research and promote the maintenance and the development of systematic observation systems and development of data archives to reduce uncertainties related to the climate system, the adverse impacts of climate change and the economic and social consequences of various response strategies, and promote the development and strengthening of endogenous capacities and capabilities to participate in international and intergovernmental efforts, programmes and networks on research and systematic observation, taking into account Article 5 of the Convention;

(e) Cooperate in and promote at the international level, and, where appropriate,

using existing bodies, the development and implementation of education and training programmes, including the strengthening of national capacity building, in particular human and institutional capacities and the exchange or secondment of personnel to train experts in this field, in particular for developing countries, and facilitate at the national level public awareness of, and public access to information on, climate change. Suitable modalities should be developed to implement these activities through the relevant bodies of the Convention, taking into account Article 6 of the Convention;

(f) Include in their national communications information on programmes and activities undertaken pursuant to this Article in accordance with relevant decisions of the Conference of the Parties; and

(g) Give full consideration, in implementing the commitments under this Article, to Article 4, paragraph 8, of the Convention.

Article 11

1. In the implementation of Article 10, Parties shall take into account the provisions of Article 4, paragraphs 4, 5, 7, 8 and 9, of the Convention.

2. In the context of the implementation of Article 4, paragraph 1, of the Convention, in accordance with the provisions of Article 4, paragraph 3, and Article 11 of the Convention, and through the entity or entities entrusted with the operation of the financial mechanism of the Convention, the developed country Parties and other developed Parties included in Annex II to the Convention shall:

(a) Provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in advancing the implementation of existing commitments under Article 4, paragraph 1(a), of the Convention that are covered in

Article 10, subparagraph (a); and

(b) Also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of advancing the implementation of existing commitments under Article 4, paragraph 1, of the Convention that are covered by Article 10 and that are agreed between a developing country Party and the international entity or entities referred to in Article 11 of the Convention, in accordance with that Article.

The implementation of these existing commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among developed country Parties. The guidance to the entity or entities entrusted with the operation of the financial mechanism of the Convention in relevant decisions of the Conference of the Parties, including those agreed before the adoption of this Protocol, shall apply *mutatis mutandis* to the provisions of this paragraph.

3. The developed country Parties and other developed Parties in Annex II to the

Convention may also provide, and developing country Parties avail themselves of, financial resources for the implementation of Article 10, through bilateral, regional and other multilateral channels.

Article 12

1. A clean development mechanism is hereby defined.

2. The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.

3. Under the clean development mechanism:

(a) Parties not included in Annex I will benefit from project activities resulting in certified emission reductions; and

(b) Parties included in Annex I may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

4. The clean development mechanism shall be subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Protocol and be supervised by an executive board of the clean development mechanism.

5. Emission reductions resulting from each project activity shall be certified by operational entities to be designated by the Conference of the Parties serving as the meeting of the Parties to this Protocol, on the basis of:

(a) Voluntary participation approved by each Party involved;

(b) Real, measurable, and long-term benefits related to the mitigation of climate change; and

(c) Reductions in emissions that are additional to any that would occur in the absence of the certified project activity.

6. The clean development mechanism shall assist in arranging funding of certified project activities as necessary.

7. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, elaborate modalities and procedures with the objective of ensuring transparency, efficiency and accountability through independent auditing and verification of project activities.

8. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall ensure that a share of the proceeds from certified project activities is used to cover administrative expenses as well as to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation.

9. Participation under the clean development mechanism, including in activities mentioned in paragraph 3(a) above and in the acquisition of certified emission reductions, may involve private and/or public entities, and is to be subject to whatever guidance may be provided by the executive board of the clean development mechanism.

10. Certified emission reductions obtained during the period from the year 2000 up to the beginning of the first commitment period can be used to assist in achieving compliance in the first commitment period.

Article 13

1. The Conference of the Parties, the supreme body of the Convention, shall serve as the meeting of the Parties to this Protocol.

2. Parties to the Convention that are not Parties to this Protocol may participate as

observers in the proceedings of any session of the Conference of the Parties serving as the meeting of the Parties to this Protocol. When the Conference of the Parties serves as the meeting of the Parties to this Protocol, decisions under this Protocol shall be taken only by those that are Parties to this Protocol.

3. When the Conference of the Parties serves as the meeting of the Parties to this Protocol, any member of the Bureau of the Conference of the Parties representing a Party to the Convention but, at that time, not a Party to this Protocol, shall be replaced by an additional member to be elected by and from amongst the Parties to this Protocol.

4. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall keep under regular review the implementation of this Protocol and shall make, within its mandate, the decisions necessary to promote its effective implementation. It shall perform the functions assigned to it by this Protocol and shall:

(a) Assess, on the basis of all information made available to it in accordance with

the provisions of this Protocol, the implementation of this Protocol by the Parties, the overall effects of the measures taken pursuant to this Protocol, in particular environmental, economic and social effects as well as their cumulative impacts and the extent to which progress towards the objective of the Convention is being achieved;

(b) Periodically examine the obligations of the Parties under this Protocol, giving due consideration to any reviews required by Article 4, paragraph 2(d), and Article 7, paragraph 2, of the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge, and in this respect consider and adopt regular reports on the implementation of this Protocol;

(c) Promote and facilitate the exchange of information on measures adopted by the Parties to address climate change and its effects, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under this Protocol;

(d) Facilitate, at the request of two or more Parties, the coordination of measures adopted by them to address climate change and its effects, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under this Protocol;

(e) Promote and guide, in accordance with the objective of the Convention and the provisions of this Protocol, and taking fully into account the relevant decisions by the Conference of the Parties, the development and periodic refinement of comparable methodologies for the effective implementation of this Protocol, to be agreed on by the Conference of the Parties serving as the meeting of the Parties to this Protocol;

(f) Make recommendations on any matters necessary for the implementation of this Protocol;

(g) Seek to mobilize additional financial resources in accordance with

Article 11, paragraph 2;

(h) Establish such subsidiary bodies as are deemed necessary for the implementation of this Protocol;

(i) Seek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies; and

(j) Exercise such other functions as may be required for the implementation of this Protocol, and consider any assignment resulting from a decision by the Conference of the Parties.

5. The rules of procedure of the Conference of the Parties and financial procedures applied under the Convention shall be applied *mutatis mutandis* under this Protocol, except as may be otherwise decided by consensus by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

6. The first session of the Conference of the Parties serving as the meeting of the Parties to this Protocol shall be convened by the secretariat in conjunction with the first session of the Conference of the Parties that is scheduled after the date of the entry into force of this Protocol. Subsequent ordinary sessions of the Conference of the Parties serving as the meeting of the Parties to this Protocol shall be held every year and in conjunction with ordinary sessions of the Conference of the Parties, unless otherwise decided by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

7. Extraordinary sessions of the Conference of the Parties serving as the meeting of the

Parties to this Protocol shall be held at such other times as may be deemed necessary by the Conference of the Parties serving as the meeting of the Parties to this Protocol, or at the written request of any Party, provided that, within six months of the request being communicated to the Parties by the secretariat, it is supported by at least one third of the Parties.

8. The United Nations, its specialized agencies and the International Atomic Energy

Agency, as well as any State member thereof or observers thereto not party to the Convention, may be represented at sessions of the Conference of the Parties serving as the meeting of the Parties to this Protocol as observers. Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by this Protocol and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties serving as the meeting of the Parties to this Protocol as an observer, may be so admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure, as referred to in

paragraph 5 above.

Article 14

1. The secretariat established by Article 8 of the Convention shall serve as the secretariat of this Protocol.

2. Article 8, paragraph 2, of the Convention on the functions of the secretariat, and

Article 8, paragraph 3, of the Convention on arrangements made for the functioning of the secretariat, shall apply *mutatis mutandis* to this Protocol. The secretariat shall, in addition, exercise the functions assigned to it under this Protocol.

Article 15

1. The Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation established by Articles 9 and 10 of the Convention shall serve as, respectively, the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation of this Protocol. The provisions relating to the functioning of these two bodies under the Convention shall apply *mutatis mutandis* to this Protocol. Sessions of the meetings of the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation of this Protocol shall be held in conjunction with the meetings of, respectively, the Subsidiary Body for Scientific and Technological Advice and the Subsidiary Body for Implementation of the Convention.

2. Parties to the Convention that are not Parties to this Protocol may participate as observers in the proceedings of any session of the subsidiary bodies. When the subsidiary bodies serve as the subsidiary bodies of this Protocol, decisions under this Protocol shall be taken only by those that are Parties to this Protocol.

3. When the subsidiary bodies established by Articles 9 and 10 of the Convention exercise their functions with regard to matters concerning this Protocol, any member of the Bureaux of those subsidiary bodies representing a Party to the Convention but, at that time, not a party to this Protocol, shall be replaced by an additional member to be elected by and from amongst the Parties to this Protocol.

Article 16

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, as soon as practicable, consider the application to this Protocol of, and modify as appropriate, the multilateral consultative process referred to in Article 13 of the Convention, in the light of any relevant decisions that may be taken by the Conference of the Parties. Any multilateral consultative process that may be applied to this Protocol shall operate without prejudice to the procedures and mechanisms established in accordance with Article 18.

Article 17

The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3. Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under that Article.

Article 18

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.

Article 19

The provisions of Article 14 of the Convention on settlement of disputes shall apply *mutatis* *mutandis* to this Protocol.

Article 20

1. Any Party may propose amendments to this Protocol.

2. Amendments to this Protocol shall be adopted at an ordinary session of the Conference of the Parties serving as the meeting of the Parties to this Protocol. The text of any proposed amendment to this Protocol shall be communicated to the Parties by the secretariat at least six months before the meeting at which it is proposed for adoption. The secretariat shall also communicate the text of any proposed amendments to the Parties and signatories to the Convention and, for information, to the Depositary.

3. The Parties shall make every effort to reach agreement on any proposed amendment to this Protocol by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. The adopted amendment shall be communicated by the secretariat to the Depositary, who shall circulate it to all Parties for their acceptance.

4. Instruments of acceptance in respect of an amendment shall be deposited with the Depositary. An amendment adopted in accordance with paragraph 3 above shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three fourths of the Parties to this Protocol.

5. The amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits with the Depositary its instrument of acceptance of the said amendment.

Article 21

1. Annexes to this Protocol shall form an integral part thereof and, unless otherwise expressly provided, a reference to this Protocol constitutes at the same time a reference to any annexes thereto. Any annexes adopted after the entry into force of this Protocol shall be restricted to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character.

2. Any Party may make proposals for an annex to this Protocol and may propose amendments to annexes to this Protocol.

3. Annexes to this Protocol and amendments to annexes to this Protocol shall be adopted at an ordinary session of the Conference of the Parties serving as the meeting of the Parties to this Protocol. The text of any proposed annex or amendment to an annex shall be communicated to the Parties by the secretariat at least six months before the meeting at which it is proposed for adoption. The secretariat shall also communicate the text of any proposed annex or amendment to an annex to the Parties and signatories to the Convention and, for information, to the Depositary.

4. The Parties shall make every effort to reach agreement on any proposed annex or amendment to an annex by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the annex or amendment to an annex shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. The adopted annex or amendment

to an annex shall be communicated by the secretariat to the Depositary, who shall circulate it to all Parties for their acceptance.

5. An annex, or amendment to an annex other than Annex A or B, that has been adopted in accordance with paragraphs 3 and 4 above shall enter into force for all Parties to this Protocol six months after the date of the communication by the Depositary to such Parties of the adoption of the annex or adoption of the amendment to the annex, except for those Parties that have notified the Depositary, in writing, within that period of their non-acceptance of the annex or amendment to the annex. The annex or amendment to an annex shall enter into force for Parties which withdraw their notification of non-acceptance on the ninetieth day after the date on which withdrawal of such notification has been received by the Depositary.

6. If the adoption of an annex or an amendment to an annex involves an amendment to this Protocol, that annex or amendment to an annex shall not enter into force until such time as the amendment to this Protocol enters into force.

7. Amendments to Annexes A and B to this Protocol shall be adopted and enter into force in accordance with the procedure set out in Article 20, provided that any amendment to Annex B shall be adopted only with the written consent of the Party concerned.

Article 22

1. Each Party shall have one vote, except as provided for in paragraph 2 below.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member States that are Parties to this Protocol. Such an organization shall not exercise its right to vote if any of its member States exercises its right, and vice versa.

Article 23

The Secretary-General of the United Nations shall be the Depositary of this Protocol.

Article 24

1. This Protocol shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations which are Parties to the Convention. It shall be open for signature at United Nations Headquarters in New York from

16 March 1998 to 15 March 1999. This Protocol shall be open for accession from the day after the date on which it is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary.

2. Any regional economic integration organization which becomes a Party to this Protocol without any of its member States being a Party shall be bound by all the obligations under this Protocol. In the case of such organizations, one or more of whose member States is a Party to this Protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol. In such cases, the organization and the member States shall not be entitled to exercise rights under this Protocol concurrently.

3. In their instruments of ratification, acceptance, approval or accession, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Protocol. These organizations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification in the extent of their competence.

Article 25

1. This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession.

2. For the purposes of this Article, "the total carbon dioxide emissions for 1990 of the Parties included in Annex I" means the amount communicated on or before the date of adoption of this Protocol by the Parties included in Annex I in their first national communications submitted in accordance with Article 12 of the Convention.

3. For each State or regional economic integration organization that ratifies, accepts or

approves this Protocol or accedes thereto after the conditions set out in paragraph 1 above for entry into force have been fulfilled, this Protocol shall enter into force on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval or accession.

4. For the purposes of this Article, any instrument deposited by a regional economic

integration organization shall not be counted as additional to those deposited by States members of the organization.

Article 26

No reservations may be made to this Protocol.

Article 27

1. At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary.

2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.

3. Any Party that withdraws from the Convention shall be considered as also having withdrawn from this Protocol.

Article 28

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the

United Nations.

DONE at Kyoto this eleventh day of December one thousand nine hundred and ninety-seven.

IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have affixed their signatures to this Protocol on the dates indicated.

Annex A

Greenhouse gases

Carbon dioxide (CO_2)

Methane (CH_4)

Nitrous oxide (N_2O)

Hydrofluorocarbons (HFCs)

Perfluorocarbons (PFCs)

Sulphur hexafluoride (SF_6)

Sectors/source categories

Energy

Fuel combustion

Energy industries

Manufacturing industries and construction

Transport

Other sectors

Other

Fugitive emissions from fuels

Solid fuels

Oil and natural gas

Other

Industrial processes

Mineral products

Chemical industry

Metal production

Other production

Production of halocarbons and sulphur hexafluoride

Consumption of halocarbons and sulphur hexafluoride

Other

Solvent and other product use

Agriculture

Enteric fermentation

Manure management

Rice cultivation

Agricultural soils

Prescribed burning of savannas

Field burning of agricultural residues

Other

Waste

Solid waste disposal on land

Wastewater handling

Waste incineration

Other

Annex B

Party Quantified emission limitation or

reduction commitment

(percentage of base year or period)

Australia 108

Austria 92

Belgium 92

Bulgaria* 92

Canada 94

Croatia* 95

Czech Republic* 92

Denmark 92

Estonia* 92

European Community 92

Finland 92

France 92

Germany 92

Greece 92

Hungary* 94

Iceland 110

Ireland 92

Italy 92

Japan 94

Latvia* 92

Liechtenstein 92

Lithuania* 92

Luxembourg 92

Monaco 92

Netherlands 92

New Zealand 100

Norway 101

Poland* 94

Portugal 92

Romania* 92

Russian Federation* 100

Slovakia* 92

Slovenia* 92

Spain 92

Sweden 92

Switzerland 92

Ukraine* 100

United Kingdom of Great Britain and Northern Ireland 92

United States of America 93

* Countries that are undergoing the process of transition to a market economy.

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BACKGROUND INFORMATION ON THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC)

- May 9, 1992: The U.N. Framework Convention on Climate Change (UNFCCC) was adopted by the international negotiating community. Under that treaty, the U.S. and other developed countries committed to a non-binding target of containing greenhouse gas emission levels at 1990 rates by the year 2000.

- June 12, 1992: President Bush signed the treaty at the Rio Earth Summitt.

- September 8, 1992: the Convention was transmitted to the Senate for advice and consent to ratification.

- October 7, 1992: the U.S. Senate gave its advice and consent to ratification of the UNFCCC (Senate Executive Order 102-55).

- October 13, 1992: President Bush singed the UNFCCC Instrument of Ratification.

- March, 1994: The UNFCCC treaty was entered into force.

U.S. commitments, obligations and authorities under the UNFCCC include:

- All parties shall engage in comprehensive efforts to address climate change. From developing and implementing programs to address climate change, to considering climate change in the development of social, economic, and environmental policies and actions, to cooperating on education and institutional development, Article 4 of the UNFCCC treaty contains an obligation to address climate change seriously and to participate in international venues.
- More specifically, under subparagraph 1(b) of Article 4, the U.S. has committed to formulate programs to mitigate climate change by addressing anthropogenic (human-induced) emissions.
- Additionally, under subparagraph 1(c) of Article 4, the U.S. has committed to promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors.
- Article 6 of the UNFCCC provides that in promoting and cooperating in education, training and public awareness, the UNFCCC contemplates the broadest outreach for public participation. Subparagraph 6(c) provides that parties to the UNFCCC shall cooperate in and promote, at the international level, the development and exchange of educational and public awareness material on climate change and its effects.
- Subparagraph 6(c) also states that the parties shall cooperate in and promote the development and implementation of education and training programs, including the strengthening of national institutions and the exchange of personnel to train experts in this field.

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EDISON ELECTRIC INSTITUTE

Paul C Bailey
Vice President
Environmental Affairs

August 16, 1999

Honorable Frank Loy
Under Secretary of State for Global Affairs
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20052

Dear Under Secretary Loy:

Prior to the 10th sessions of the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI) to the Framework Convention on Climate Change (FCCC), the Edison Electric Institute (EEI) wrote to then Acting Assistant Secretary Melinda Kimble about several Kyoto Protocol issues. While our letters indicated, for reasons explained therein, that EEI continues to oppose the Protocol, we nevertheless took notice of the several decisions that form the Buenos Aires Plan of Action, particularly Decisions 7/CP.4 and 8/CP.4, and provided detailed comments about the Kyoto market mechanisms, particularly Articles 12 and 17, and compliance matters. A copy of our letters dated February 26 and May 11, 1999, are enclosed for your information and referral. The objective of this letter is to supplement and, in some instances, restate those remarks in light of subsequent actions at the 10th sessions of the subsidiary bodies, the State Department's submissions to the FCCC Secretariat, and the forthcoming 11th sessions of the subsidiary bodies as well as the fifth meeting of the Conference of the Parties (COP-5).

When the FCCC Parties met in Bonn at the 10th sessions of the subsidiary bodies, slow progress was made toward implementation of the Buenos Aires Plan of Action, which has as its aim to have the Parties make some decisions at COP-6 in order to "maintain political momentum." As an industry that would be significantly affected if and when the Kyoto Protocol is ratified by the U.S. and enters into force, our interest is in what might be called the "nuts and bolts" of the Protocol, *i.e.*, the policies and procedures that must be formulated and adopted by the FCCC Parties, consistent with the conditions of Senate Resolution 98, which, as you know, was adopted unanimously by the Senate in July 1997.

The Kyoto market mechanisms are one particular area of concern to EEI because, as the U.S. delegation said in its June 1, 1999, intervention in Bonn, the Kyoto Protocol targets for Annex I Parties are "ambitious." Indeed, we believe they are overly ambitious, and certainly cannot be achieved without, as noted in the U.S. intervention, "full implementation," at a minimum, of all of the Kyoto market mechanisms and sinks. The key question is what constitutes "full implementation," because too narrow a characterization of this concept would lead to unattainable Annex B commitments.

The answer to that question remains cloudy at best, even in the case of the U.S. delegation, which is the foremost champion of the market mechanisms, and the other members of the Umbrella Group. Obviously, both the European Union (EU) and the Group of 77 and China have expressed viewpoints about some or all of the market mechanisms that are inconsistent, in a number of ways, with the positions of the U.S. and the remainder of the Umbrella Group. The issue of supplementarity is one example. There are several others. Certainly, the rules, modalities, guidelines and procedures that are ultimately adopted could severely limit the effectiveness of any or all of the market mechanisms.

Closely related to the market mechanisms, as well as other provisions of the Protocol, are Articles 5, 7 and 8 and the work of the newly established Joint Working Group (JWG) on compliance that met for the first time at the 10th sessions of the subsidiary bodies pursuant to Annex II of Decision 8/CP.4. The JWG is to report on its "progress" to COP-5, and COP-5 is requested by that decision to take further steps, "including, if necessary, the establishment of an ad hoc working group on compliance or other procedure, with a view to adopting a decision" at COP-6.

At this juncture we would not want to hazard a guess whether any meaningful decision on compliance could be taken at COP-6. We question whether it would be wise or necessary to reconstitute the JWG as an ad hoc body, such as the Ad hoc Group on FCCC Article 13 or the Ad hoc Group on the Berlin Mandate, within only a few months after its initiation. While we understand that one of the co-chairs of the JWG is likely to be elected to chair one of the standing subsidiary bodies, we do not think that is reason enough to create a new ad hoc group on compliance. We look forward to learning before October the views of the State Department and the U.S. delegation on this aspect of Decision 8/CP.4.

In addition to providing the enclosed detailed comments so that the U.S. delegation is fully aware of our concerns as it considers making further submissions and prepares for the 11th sessions of the subsidiary bodies and COP-5, we wish to raise an important process issue. We are aware that the Global Climate Coalition (GCC) wrote to you on August 5, 1999, about the Secretariat's latest invitation to the International Chamber of Commerce to nominate one person, based on the Secretariat's criteria, for an FCCC workshop in Africa on technology. As a member of GCC, we share the concern expressed by its letter to you, particularly in light of the fact that many additional workshops are planned or requested by the Parties, including one in October on compliance, that we and others from U.S. industry and business may want to participate in. The approach adopted by the Secretariat is at odds with the FCCC, the rules as applied and the conclusions of the Parties regarding the compliance workshop. We recognize that the Secretariat is operating with budget constraints, which can affect the location and adequacy of facilities. Nevertheless, such issues should not be addressed by foreclosing the participation of U.S. business, labor, and agricultural non-governmental organizations (NGO's). We, like the GCC, believe it is no longer a recurring irritation but a genuine problem that the Administration must address directly with the Secretariat and the COP, if necessary. We strongly urge that you do so. U.S. business, labor and agricultural NGO's should not need to seek your assistance in the case of every workshop in order to obtain representation, either as participants or observers.

Finally, we would of course appreciate receiving copies of any submissions made since the 10th sessions of the subsidiary bodies on these and other matters by the U.S. delegation or the Umbrella Group pursuant to the Buenos Aires Plan of Action or the conclusions of the 10th sessions. We appreciate your continued use of the World Wide Web for this purpose.

If you have any questions about our comments, please contact John Novak, Director, Environmental Activities, (202) 508-5655, or Bill Fang, Deputy General Counsel, (202) 508-5617.

Sincerely yours,

Paul Bailey

Paul Bailey

Enclosures (3)
PB:nf
cc (w/ encs):
Ambassador Mark Hambley
Jeffrey Miotke
Susan Biniaz
Roger Ballentine
Jefferson Seabright
David Sandalow
David Gardiner
Mark Mazur
Richard Bradley
David Doniger

ENCLOSURE

EDISON ELECTRIC INSTITUTE COMMENTS ON KYOTO PROTOCOL MARKET MECHANISMS; ARTICLES 5, 7 AND 8; AND COMPLIANCE

August 16, 1999

I. Background

At the 10th sessions of the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation of the Framework Convention on Climate Change (FCCC), the two subsidiary bodies jointly initiated consideration of the Kyoto Protocol market mechanisms, taking into consideration a synthesis of proposals by FCCC Parties, including the Umbrella Group (of which the U.S. is a member), and other matters. At the end of the 10th sessions, SBSTA and SBI invited Parties to "submit further proposals" by July 31, 1999, on the issues of paragraph 1 of Decision 7/CP.4 and on elements for a plan to facilitate capacity building. They also requested the chairmen of the subsidiary bodies to prepare a "revised and consolidated synthesis of proposals, identified by sources" for the 11th sessions of the subsidiary bodies (see FCCC/SB/1999/CRP.4).

In addition, SBSTA adopted conclusions "broadly" endorsing a work programme set forth in a "Note by the secretariat" (see FCCC/SB/1992/2) on methodological issues related to Articles 5, 7 and 8 of the Protocol, while "noting that some aspects relating to Article 3" may need further discussion in relation to aforementioned articles (see FCCC/SBSTA/1999/L.3). An Annex to the work programme in the Secretariat's Note sets forth a timetable of "Key activities," starting with 10th session approval of the work programme and preliminary approval of the revised UNFCCC inventories, and continuing through COP-7 in 2001. At SBSTA-11 and the fifth meeting of the

Conference of the Parties (COP-5), the Annex calls for agreement on the "basic elements of national systems" under Article 5.1 (although adoption of the guidelines would not occur until COP-6), adoption of revised inventory guidelines for Annex I Parties, and agreement on guidelines for strengthening the review process under the FCCC.

It is unclear whether SBSTA, in "broadly" endorsing the work programme at its 10th session, provided the "approval" contemplated by the Secretariat's Note. As you know, the revised, non-mandatory Annex I guidelines (Part I) for inventories under FCCC Article 12 have been proposed for adoption by COP-5 on a two-year trial basis only. Consideration of the review guidelines (Part II) has been deferred until the 11th sessions of the subsidiary bodies. In addition, the U.S. intervention of June 1, 1999, included a number of comments on the work programme that do not appear to have been fully addressed by the joint contact group, which was to consider these matters under agenda item 4(a) regarding "Guidelines for the preparation of national communications." Apparently the contact group did not have sufficient time to meet and consider this agenda item adequately, unless some meetings took place in closed session, which we hope was not the case.

SBSTA also decided to "consider characteristics of national systems relating to adjustments" under Protocol Article 5 at its 11th session, and requested that two workshops be arranged for 2000 (see FCCC/SBSTA/1999/L.3). The Parties were requested to submit views on these matters by August 15, 1999.

In the case of compliance, the Joint Working Group (JWG) was established pursuant to Decision 8/CP.4, and it developed 23 questions for the Parties to respond to through submissions to the

Secretariat due by August 1, 1999. These comments respond to some of those questions. We look forward to the State Department's submission on all of the questions. The Parties are also invited to address other issues.

In addition, the Parties agreed to hold a workshop in October on compliance matters that is to be "open" to Parties and "observers," and recommended a second workshop between the 11th and 12th sessions of the subsidiary bodies (see FCCC/SB/1999/CRP. 3/Rev.1). We understand that one of the subjects of the workshop is to be an examination of other international environmental agreements on compliance issues. Sections II.B and C of our comments below contain a detailed discussion of one such agreement in particular, namely, the Convention on Long-Range Transboundary Air Pollution.

Lastly, the JWG co-chairs are to produce for the 11th sessions of the subsidiary bodies a "synthesis of all proposals" to "update" the non-paper made available by the Secretariat on May 31, 1999, and "include elements related to a compliance system under the Protocol." This document apparently will not be available until just prior to the 11th sessions. This is unfortunate, because it will likely not afford adequate time for preparation prior to the sessions.

A discussion of these and other matters and identification of the areas where we have concerns or suggestions follow.

II. Compliance and the Kyoto Mechanisms

A. General Comments on Protocol Amendment Issues that also Relate to Compliance and Other Matters

We understand from a new "Note by the secretariat" that Kazakhstan, which announced at COP-4 that it would join Annex I of the FCCC and Annex B of the Protocol, has submitted, pursuant to Articles 15 and 17 of the FCCC, an amendment proposing to add itself to the list of Parties contained in Annex I of the Convention (FCCC/CP/1999/2). The Note states that the text of the amendment must be circulated to the Parties "at least six months before the meeting at which it is proposed for adoption." The Secretariat's Note added that transmittal was made on May 3, which apparently means the amendment cannot, because of the six-month rule, be considered at COP-5.[1/]

1/ According to the State Department's letter of May 4, 1999, to Chairman James Sensenbrenner of the House Science Committee, which responds to his questions of November 18, 1998, Argentina also "pledged to take on a legally binding emissions target during the first commitment period of 2008-2012, but indicated that it does not intend to join Annex I or Annex B." The letter went on to say that Argentina's commitment will be "announced, if appropriate analysis is completed, at COP-5." The reply also stated that a "binding" emission target is "intended to mean a target that would constitute an obligation under international law." (See answers to questions 1.1, 1.2 and 1.4.) We presume that Argentina's target will not qualify as a "target that would constitute" such an obligation because Argentina will not join Annex I or Annex B.

The State Department's letter to Chairman Sensenbrenner (supra n.1) stated that under FCCC Article 4.2(g) a Party, like Kazakhstan, may "at any time" notify the COP of its "intent to be bound by Article 4.2 (a) and (b)" of the FCCC, and that "does not require approval" of the Parties. However, in the case of Annex B, the State Department agreed with Chairman Sensenbrenner that Kazakhstan cannot join Annex B because to do so would require amending the Kyoto Protocol, which has yet to enter into force. Nonetheless, the Department said it would be "possible" for the COP to "adopt a legal instrument before the Protocol enters into force that would have the effect of modifying the Protocol upon its entry into force" (see reply to question 11.3).

While former Under Secretary of State Stuart Eizenstat previously said in congressional testimony that such a modification was an option, he appeared at that time to be limiting the Administration's position only to addressing the issue of non-Annex I commitments. The above letter suggests that the option of modification upon entry into force could apply to a much broader range of matters. The State Department response added that such a "modification would include an addition to Annex B" and at least implied that such a "modification" could do more.[2]

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[2] As to the process for adopting such a "modification," in a June 23, 1999, response to "Questions for the Record for OES Assistant Secretary Designate David Sandalow Submitted by Senator Chuck Hagel," the State Department said (question 4(a)):

> The same authority that permitted the Conference of the Parties to adopt the Kyoto Protocol (including Articles 7 and 17 of the Framework Convention on Climate Change) would allow it to adopt another instrument modifying that Protocol. The procedure for adopting such an instrument would depend upon whether the Convention's rules of procedure had been agreed upon. If they had, the relevant decision-making rule would apply. In the absence of agreed rules of procedure (which is currently the case), the default decision-making rule would be consensus. Because the new instrument would have the effect of modifying the Kyoto Protocol as of its entry into force, it would not be an "amendment" or an

Indeed, this interpretation was confirmed by the State Department in your June 23 reply to question 4(c) of Senator Hagel (supra n.2). That reply indicates that other governments have discussed with the State Department the concept of using the modification mechanism for the "notion of developing countries adopting binding international commitments to implement climate friendly policies and measures" and in addressing the Article 18 issue of "binding consequences" in the case of noncompliance.[3/] That reply does not explain what constitutes "climate friendly policies and measures."

As comments enclosed with our February 26, 1999, letter explain (at p. 3), EEI has "emphasized that if legally binding greenhouse gas emission reduction obligations and emission caps . . . are to be . . . ratified by the United States after advice and consent by the Senate, they should include effective and uniform compliance measures applicable to all Parties" to the Protocol. Comments enclosed with that letter noted (at p. 3) that the only relevant compliance provision in the Protocol is Article 18, which is "vague and uncertain at best," and that "before binding consequences under Article 18 could be effective, an amendment to the Protocol" after its entry into force would be required. While these weaknesses of the Protocol are clear, we seriously question whether they warrant consideration of such a broad use of a modification instrument,

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"amendment to an annex." Amendments to the Protocol would be those modifications that take place after the Protocol enters into force.

[3/] By way of justification for this concept for the compliance regime, the State Department, in response to question 4(c), said:

> We have noted that an advantage of including a binding non-compliance regime in a modification to the Protocol before it enters into force is that it would bind all Parties to the Protocol. Such an approach would promote our objective of parallel consequences for similar cases of non-compliance. In contrast, an amendment pursuant to Article 18 would only bind those Parties that ratified it.

especially as an apparent means to circumvent the amendment process as specified in Article 18. Such discussions are also quite premature because even the basic outlines of a compliance regime have yet to be spelled out, understood, debated and reviewed. In addition, we think the amendment process as set forth in the Protocol is far more open and transparent.

Moreover, as we understand the modification proposition, in order to be binding on the Parties that ratify the Protocol any such modification decision would have to be made by the COP before the Protocol enters into force. However, the State Department in its June 23, 1999, response to Senator Hagel (supra n.2) said that a decision at COP-6 related to the Protocol "would only be binding on the United States" if the Protocol "enters into force, the United States ratifies the Protocol, and the Protocol authorizes the COP to take a binding decision on the topic addressed." The reply, referring to such matters as a modification instrument, went on to say (see question 5(a)): "the only area in which the Protocol authorizes the COP (as opposed to the COP/MOP) to take a binding decision are those matters addressed under Article 17."

If that is the case, we do not understand how the COP could take a decision on a modification instrument applicable to "binding consequences" under Article 18 or, for that matter, additions to Annex B or policies and measures for developing countries.[4/] The State Department's reply to

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[4/] The Daily Environment Reporter of July 26, 1999, quotes the Secretary of Energy, Bill Richardson, as expecting to reach agreement in July with Latin American countries on reducing greenhouse gas emissions, and the Clean Air Report of August 4, 1999, reports that the Energy Department plans a study on promoting climate friendly technologies. The July 26 article states:

> Richardson told BNA July 23 that the objective of the United States "is to improve the dialogue with Latin American countries on the reduction of greenhouse gas emissions. The United States has encouraged developing countries and others to develop tangible mechanisms to reduce greenhouse gas emissions, like targets.

Senator Hagel said that as to decisions "within the purview" of the COP serving as the meeting of the Parties to the Protocol (COP/MOP), "technically the COP can only make recommendations to the COP/MoP as to the decisions it considers the COP/MoP should adopt." The State Depatment notes that as a "practical matter" the COP/MOP would follow the recommendation of the COP." However, the COP/MOP cannot meet until after the Protocol enters into force. 'A modification instrument adopted at that time would appear to be an amendment under Article 20 of the Protocol.[5/] Moreover, the modification proposition appears to suggest that even though 12 countries have already ratified the Protocol, the remainder should not do so until the modification approach is fully explored and, if possible, utilized.

We may have misunderstood the several State Department comments to the Congress on this complex subject, as well as the nature and scope of any modification instrument, notwithstanding the fact that we agree with the State Department comments that the Protocol does not authorize

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> "What we want to see is stronger commitments to reduce greenhouse gas emissions, but on hemispheric terms. We respect that the views of Latin American countries are somewhat different than ours. We want to see if through a commitment to renewable energy, through increased energy cooperation, through reliance on technology to develop ways to address greenhouse gas emissions . . .we can come forth with a statement that continues the dialogue towards ratification of the Kyoto Protocol. . . ."

We wonder whether these are the "climate friendly policies and measures" referenced above and, if so, how they could qualify as "meaningful commitments."

5/ The State Department letter in reply to question 5(b) said: "[T]o the extent that such COP decisions are available at the time the President submits the Protocol to the Senate for its advice and consent to ratification, such decisions would be sent along with the Protocol for the Senate's information." We do not understand what the State Department meant by the words "for the Senate's information." Does it mean that the modification would accompany the Protocol? Would the Senate's advice and consent, if given, and the U.S.'s ratification cover such modification? And could the modification later be changed only by amendment, or could it be changed by another modification?

COP decisions except in the case of Article 17. Obviously, we would not want to see adoption of binding consequences only for Article 17. Therefore, we look forward to your clarification of this matter and a discussion of the process that the U.S. delegation plans to follow in the case of "binding consequences." However, at this juncture we share the view expressed by the Global Climate Coalition (GCC) in comments enclosed with its letter of May 19, 1999, to you -- citing at p. 5 n.5 the view also of South Africa -- that "procedures and mechanisms" under Article 18 "entailing binding consequences can only be adopted through an Amendment to this Protocol" (emphasis in original).

B. Other International Instruments and Compliance

As noted above, the conclusions of the JWG explain that one purpose of the compliance workshop is to exchange information "related to experience in other conventions to help Parties obtain a better understanding of a compliance system needed under the Kyoto Protocol." Unfortunately, it appears that the JWG did not ask the Secretariat to examine other environmental conventions in particular to see what has been established by them on compliance and how they have worked, or for that matter to examine other, non-environmental agreements with compliance provisions for comparison and experience.

We note that the General Accounting Office (GAO) issued in May 1999 a "Staff Study" entitled "International Environment -- Literature on the Effectiveness of International Environmental Agreements" (GAO/RCED-99-148). It indicates that there is little to go on from the standpoint of other conventions. It stated (at pp. 1, 22):

> Ensuring compliance with environmental treaties is a widely recognized problem. Experts in the area acknowledge the need to better specify reporting, monitoring, and enforcement mechanisms, but little agreement exists on how best to do so and

> there is limited experience to point the way. There is consensus, however, that now -- while those provisions for the Kyoto Protocol are being framed -- is the time to explore these issues. To assist in that effort, we convened a panel of experts in December 1998 to discuss these issues, and we will issue a report on the results of the expert panel later this year. To assist the panel, we prepared a background paper on ensuring compliance with international environmental agreements. We are publishing that background paper as a staff study to provide a brief summary of the current thinking on compliance issues for the Congress and other policy makers who are considering the workability of the Kyoto Protocol.
>
> * * * * *
>
> Enforcement is the final element needed to help ensure that nations comply with their international environmental obligations. Few agreements contain formal provisions for enforcement, however, and the enforcement provisions that do exist are used infrequently or inconsistently. Limited funding and international jurisdiction are two of the reasons that the enforcement of international environmental agreements has not been effective. International organizations, such as the United Nations Environment Programme (UNEP), often lack the jurisdiction to enforce their decisions.

Unfortunately, the GAO Staff Study was only a literature survey, citing various authors without verifying the accuracy of the information. It did not identify and thoroughly examine various international environmental agreements for compliance provisions, or the lack thereof, and their adequacy and effectiveness.

We further note that at the JWG session some Parties mentioned compliance under the 1979 Convention on Long-Range Transboundary Air Pollution (LRTAP) of the Economic Commission for Europe (ECE). EEI is quite familiar with the LRTAP, having participated in the LRTAP process as a non-governmental organization (NGO). EEI first participated as part of the International Chamber of Commerce and then by itself as an accredited NGO. We participated for some years in the sessions that negotiated several protocols, including the two most recently adopted Protocols on Heavy Metals and Persistent Organic Pollutants. Thus, we believe that there may be some misconceptions about compliance under the LRTAP.

The 15th session of the Executive Body (EB) for the LRTAP adopted Decision 1997/2 in December 1997, establishing an Implementation Committee for the review of compliance and extending that decision to existing and future protocols to the LRTAP, "but not to the Convention itself."[6] Until that decision only two of the LRTAP protocols had a compliance regime (see ECE/EB.AIR/53 report of January 7, 1998, which in Annex III contains Decision 1997/2). That earlier regime "was based on the provision on compliance made for the 1994 Protocol on Further Reductions of Surplus Emissions," which is one of the LRTAP protocols that has not been signed or ratified by the U.S., and on a 1991 Volatile Organic Compounds Protocol, which the U.S. has signed but not ratified.

Under the new LRTAP compliance regime, an eight-Party Implementation Committee was established, with the requirement that "each member of the Committee shall be a Party to at least one Protocol." (Initially, the Committee was expanded to nine on an "interim basis.") The Committee is to meet at least twice a year to review "periodically" compliance of the Parties with "reporting requirements"; consider submissions by Parties or referrals by the Secretariat; be "satisfied, before considering such a submission or referral, that the quality of data reported by a Party has been evaluated"; and prepare, at the request of EB and based on experience gained, "a report on compliance." First, one or more Parties to a protocol "that have reservations about another Party's compliance with its obligations" can make a submission, as can a Party "that

[6] The UN/ECE is a United Nations organization established in 1947. It is composed of European members of the U.N., plus the U.S., Canada, Switzerland, Israel, and the Central Asian and Caucasian former Soviet Republics. The EB is the equivalent of the COP for the LRTAP, which entered into force in 1983. However, the U.S. is not a Party to all of the LRTAP Protocols.

concludes that, despite its best endeavors, it is or will be unable to comply" with its obligations. Second, the Secretariat can make a referral to the Committee if, based on a review of reports under a protocol, it becomes aware of "possible non-compliance," it requests the Party to "furnish information about the matter," and there is no response or the matter is unresolved after three months. Under either pathway, the Committee may gather information. However, the decision specifies that the "Committee shall ensure the confidentiality of any information that has been provided to it in confidence." The Party affected is "entitled to participate in the consideration" of the Committee, but not in the "preparation and adoption of any Committee report or recommendation."

The Committee must report at least annually to the EB. Regarding the EB, Decision 1997/2 provides:

> 11. The Parties to the protocol concerned, meeting within the Executive Body, may, upon consideration of a report and any recommendations of the Committee, decide upon measures of a non-discriminatory nature to bring about full compliance with the protocol in question, including measures to assist a Party's compliance. Any such decision shall be taken by consensus.

Unlike the Kyoto Protocol, none of the LRTAP protocols includes an article on "binding consequences" of noncompliance. The above-mentioned "measures" are, like "binding consequences," not defined. In one of the most recent LRTAP Protocols, on Heavy Metals (which the U.S. signed in June 1998), Article 9 merely provides: "Compliance by each Party with its obligations under the present Protocol shall be reviewed regularly." It then refers to the Implementation Committee established by Decision 1997/2.

Further discussion of the LRTAP and compliance issues follows in the next section.

C. Issues Raised by LRTAP for a Kyoto Protocol Compliance Regime, Taking into Consideration the Questions Asked in the JWG Report of the 10th Sessions

1. Question 1

Question 1 of the JWG Report asks what should be the "objectives and nature of a compliance system." In the case of the LRTAP, that issue was answered in the context of deciding a name for the committee established under the LRTAP. The LRTAP Parties, like some at the JWG session, emphasized that the role of the Committee is to facilitate compliance. That is primarily why it is called an "Implementation Committee." Enforcement is secondary, at best. Indeed, the entire process for considering submissions about a Party's compliance is designed in nearly every step to include the allegedly non-compliant Party and to afford that Party a way to achieve compliance. Ultimately, even the EB decision on considering the Committee's report and recommendation is aimed at deciding "measures" that will "bring about full compliance."

However, one significant concern is, as noted in section II.C of the comments above, the uncertainty or vagueness of the term "measures" to bring about compliance. If that concept were applied to the Kyoto Protocol and if it were to include special or unusual exceptions to the Protocol's targets and timetables, we would find that unacceptable in that it could create competitive advantages or disadvantages.

2. Questions 8-10

Questions 9 and 10 of the JWG Report asks who should be able to initiate a procedure "for determining and addressing non-compliance with the Protocol" and from what sources can the process seek, receive and consider information. Question 8 and its several parts raise the issue of the role of the "expert review team" under Article 8 of the Kyoto Protocol.

The answer to questions 8 and 10 suggested by the LRTAP is that only the Parties, and in a limited fashion, the Secretariat, can initiate submissions or referrals about a Party's "compliance with its obligations." Of course, the LRTAP protocols have no review team provisions. However, at this stage of the process, we do not yet know how the "expert review teams" under Article 8 of the Kyoto Protocol will be selected, what "guidelines" will be adopted for the teams and their functions, or what will be their expertise and experience. (Section III of our comments below refers to the Secretariat's proposed work programme that relates to the Article 8 guidelines.) Nevertheless, the LRTAP approach generally may provide a useful working model, given the fact that Parties to the FCCC are sovereign nations. Clearly, the expert review teams can report information to the Secretariat, who, in turn, following the LRTAP approach, may bring the matter to those conducting the inquiry. However, we point out that the LRTAP takes great pains to ensure that the information on which submissions and referrals are made is of high quality, that such information can be provided by Parties "in confidence," and that the LRTAP Committee "shall ensure" its "confidentiality." Certainly, the FCCC Parties should want to ensure that such information is also of high quality. However, the confidentiality issue does not seem to square with the concept of transparency, often cited in the FCCC process.

3. <u>Questions 11-15</u>

Questions 11-15 of the JWG Report ask whether the "institutional arrangements" should be "ad hoc or standing," how frequently a standing body should meet, what should be its size and composition, what should be its expertise, what procedural rules apply, and how could such rules ensure due process and transparency.

In the case of the LRTAP, the EB has established a standing committee composed of a limited number of Parties and requires it to meet at least "twice a year." No expertise is specified and no rules have, to our knowledge, been adopted. As to due process, the EB, in adopting the decision in 1997, called for consensus decisions, which is the normal EB process, and that the decisions are to be made by the EB, not the Committee; we presume that this would be, in the end, the view of the COP/MOP under the Kyoto Protocol. Regarding the size issue, we note that the LRTAP, in terms of the number of Parties ratifying the Convention, is much smaller than the FCCC -- 55 Parties compared to 178 Parties -- and does not include developing countries. While we would not like to see more costly institutions started on a standing basis, the LRTAP standing committee approach or a similar approach is probably the most efficient, recognizing that it can be changed after some experience. However, we realize that in the case of the report of the Ad hoc Group on FCCC Article 13, it has not been finally adopted because of the membership issue, among other reasons.

As to the issue of "transparency," the EB in adopting Decision 1997/2 also adopted a report of the session in 1998, which included the following paragraph:

> 48. The Chairman of the Executive Body reminded delegations of the high priority given to the Implementation Committee. Delegations provided some corrections to the draft decision and to its annex on structure, functions and procedures. The Chairman of the Expert Group stressed, for clarification, that only a Party to the protocol in question could review the compliance of another Party to that same Protocol. It was understood by the delegations that the Implementation Committee's proceedings were meant to be closed meetings and that the Executive Body's decisions

> concerning compliance were not legally binding unless a provision in the protocol in question rendered them so.

EEI notes that before the above decision was made on closed meetings, we and others asked the U.S. delegation, which in the LRTAP context is normally headed by the Environmental Protection Agency (EPA), about the concept in light of the general policy under U.S. law of open meetings. We were surprised to learn that the U.S. delegation openly supported the closed meeting statement in paragraph 48. We also point out that most, if not all, of the Parties to the LRTAP, who also supported or raised no objection the "closed meeting" concept, are also Annex I Parties to the FCCC. In the context of the Kyoto Protocol, the U.S. and other members of the LRTAP appear to be suggesting that there be a more open process, although we note that the issue of process and the concept of an institution to consider issues of facilitating compliance and acting on noncompliance have not really been debated in the JWG or negotiated. EEI continues to disagree strongly with the LRTAP closed-meeting decision and would not like to see it adopted under the Kyoto Protocol.

4. Question 5

Question 5 asks whether "procedures and mechanisms entailing binding consequences" should be adopted, where only guidelines are called for under Articles 5, 6 and 7; where modalities and procedures are contemplated under Article 12; and where rules, modalities, guidelines and procedures are specified in the case of Articles 3 and 17.

First, we take note of the U.S. submission of March 1, 1999 (FCCC/SB/1999/MISC.4), which states (at p. 26):

- In several aspects, the substantive provisions of the Protocol need to be elaborated, e.g., mechanisms, national estimation of emissions, reporting.

> It will be important to think about the future compliance regime when elaborating such provisions. (For example, it does not appear that the current guidelines for national communications under the Convention would form a solid bases for assessing compliance.) It would be desirable, from a compliance point of view, if negotiators charged with elaborating substantive rules/guidelines/etc. would:
>
> -- make clear which are requirements and which are recommendatory; and
>
> --structure any requirements in such a way that compliance therewith can be ascertained with reasonable ease.

Since at this time the "substantive provisions" are unknown -- as are whether rules, guidelines, modalities and procedures are "requirements" or "recommendatory" -- it is difficult to reply adequately to this question. Nevertheless, we think it is also difficult, if not impossible, to style any provision that is a guideline or modality as a "requirement" that could, if not complied with, result in "binding consequences." Even provisions that are called "rules" and "procedures" can, in fact, include "recommendatory" aspects that do not easily lend themselves to enforcement.

Second, as to the Kyoto market mechanisms, we note that Articles 6 and 12 are project-based and the term "rules" is not found in these articles. Given the fact that the word "rules" is specifically included in one of the three mechanisms (*i.e.*, Article 17), we can only assume that its omission in Articles 6 and 12 was deliberate. Of course, the Parties appear to have different recollections about the Kyoto negotiations, and possibly one or more Annex I Parties could take issue with our statement. Absent a report of the negotiations, we could not dispute them. Nevertheless, in the case of Article 12, there are operational entities, an Executive Board and the COP/MOP to oversee its implementation. We question what "procedures and mechanisms entailing binding consequences" would be warranted, desirable or needed -- particularly since they will likely to involve private entities to a large extent.[7] In the case of Article 6, the mandatory features are set forth in subparagraphs 1(a)-(d). They make it clear that an Annex I Party cannot transfer or acquire emission reduction units (ERU's) unless:

(a) The project is approved by the "Parties involved."

Comment: This clearly means that without such approval, there can be no project, and a rule emphasizing that would seem unnecessary.

(b) There is additionality.

Comment: This may require recommendatory guidelines, but no rules, for determining additionality, recognizing that, in many cases, project-by-project determinations may need to be the norm and that ERU's may be allocated among the Parties in arm's length transactions determining assigned amounts.

(c) The Party is in "compliance with its obligations in Articles 5 and 7."

Comment: This is a determination that presumably will be made under those articles, not Article 6. This should be rather straightforward and should not even need a guideline, although deciding whether there is a factual basis, compliance or noncompliance may not always be as straightforward a determination.

(d) The acquisition of such units is "supplemental to domestic actions."

7/ In the comments enclosed with the GCC letter of May 19, 1999, to you, page 16 footnote 19 refers to the State Department's letter to Chairman Sensenbrenner, wherein the Department makes clear that the Protocol regime will apply to "Parties, as they are the subjects of the Protocol's obligations," not private entities. We think that is the best approach, although we note that Article 12 authorizes guidance to the public and private sectors by the Executive Board. However, such guidance if ever exercised presumably would only be "recommendatory" and not entail "binding consequences." In addition, in the comments enclosed with our letter of May 11, 1999, to the State Department (at p. 14), we expressed the view, which we believe you support, that this guidance should come from the Party of such a sector, not the Executive Board.

Comment: In light of the controversy over this phrase, this does not appear to lend itself easily to a COP-devised rule for which there would or could be binding consequences.

We again emphasize that Articles 6 and 12 are project-based. While there will be similarities between projects, there will also be differences, making it difficult to apply rigid, "one-size-fits-all" rules across the board. We support flexible guidelines rather than inflexible rules.

In the case of Article 12 particularly, EEI, in the comments enclosed with our letter of May 11, 1999, to the State Department, identified a number of mechanical and institutional issues that need to be addressed. We think that most of these issues can be addressed without rules that might entail "binding consequences." On page 5, footnote 3 of those comments, we said:

> 3/ This Article differs from Article 17 in several ways. First, many of the details of the CDM are "defined." Second, the COP/MOP, not the COP, will "elaborate" on modalities and procedures to further define this mechanism. Third, there is no mention of "rules" for the CDM, although we understand that the U.S. delegation and the Umbrella Group may be contemplating the use of rules in order to address compliance issues effectively, since the guidelines may not be effective for compliance objectives. In its May 4, 1999, responses to questions from House Science Committee Chairman Sensenbrenner, the State Department stated (question 2) that the "absence of the word 'rules'" in Articles 6 and 12 "does not mean that the COP/MOP lacks the power to develop rules, procedures and the like to which Parties would need to adhere." That is a rather expansive construction of the Protocol and of the powers of the COP.
>
> Fourth, Article 12.4 clearly states that the CDM "shall be subject to the authority and guidance" of the COP/MOP. Fifth, Article 12.9 expressly authorizes involvement of the private sector. Sixth, Article 12 includes developing country Parties.

We might add a seventh difference, namely, the obligation that all CDM projects achieve sustainable development. Our understanding is that criterion will be determined by the project site Party.

Whether the COP/MOP "lacks the power" to impose "rules," even where Article 12 fails to include that term, is not the primary concern. The concern is that "rules" tend to be followed by so-called "binding consequences" or penalties. In the context of project development, such a regulatory/enforcement attitude seems inappropriate, particularly when in many cases the projects will involve contractual and funding arrangements with Parties and the private sector. We do not believe that activities implemented jointly and U.S. Initiative for Joint Implementation projects have suffered because of a lack of "rules" with concomitant penalties.

Third, in the case of Article 17, the word "rule" clearly appears. In comments enclosed with its February 10, 1999, letter to then Acting Assistant Secretary Kimble, the GCC made remarks about Article 17 that are pertinent to the JWG question (at pp. 2, 4-5):

> Of the three Kyoto Protocol mechanisms, Article 17 is the shortest and, as a result, has the fewest details. The lack of such details may be a blessing because for emissions trading to be really effective, it should not be constrained or limited by governmental directives and mandates, particularly those that are normally associated with command and control instruments.
>
> Article 17 simply provides, that after entry into force, Parties included in Annex B "may participate in emissions trading for the purposes of fulfilling their commitments under Article 3." In short, trading is authorized at the Parties' discretion. The only directives are that:
>
> - "such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments" under Article 3; and
>
> - the COP, not the COP/MOP, "shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting, and accountability for emission trading." [Footnote omitted.]
>
> * * * * *
>
> COP3, in adopting the Protocol for future ratification of the FCCC Parties, included, after much debate, Article 17 as a tool, albeit not the only tool, to facilitate implementation of the Protocol consistent with a Part[y's] obligations

under Article 3. The objective of the United States, the [Umbrella] Group, and other FCCC Parties should be to make it workable and not to hamstring it with a host of restrictions or limitations that could make Article 17 ineffective or too costly for the potential users, namely the Parties to the Protocol and the private entities of such Parties.

The results from Buenos Aires under Decision 7/CP.4 with its 32 "elements" for consideration are contrary to the objective that we just described. The enumeration and possible application of one or more of these "elements" under this Article indicates that there is a strong interest by some in involving governments at the international level in trading across country boundaries for reasons that seem inconsistent with the Article. We believe the opposite should be the case. The test should be in each and every case whether the principle, modality, rule, or guideline, is "relevant" to the purpose of the Article. We assume that purpose in the eyes of the U.S. is to achieve compliance at the least cost to U.S. interests. Unless it is needed for purposes of "verification, reporting and accountability[,]" or simply to make trading work effortlessly, we suggest that its relevance for any other purpose must be clearly demonstrated. Beyond that, it is important to ensure that trading is market-based, cost-effective, open, non-discriminatory, accountable, and free of influences that, directly or indirectly, form barriers to competition or create unfair advantages for one or more Parties and their private sectors.

In making these relevancy comments, we stress that Article 17 empowers Parties to "participate in emissions trading" at their discretion. The objective of the COP should be to adopt principles, rules, etc., that will provide basic uniformity in trading in order to encourage the widest possible participation by Protocol Parties, consistent with their national laws, and to ensure that the emission reductions traded are fungible, are a valuable asset, and will be recognized as such by all Parties to the Protocol so long as they are issued and outstanding.

In short, the objective of the Parties, particularly the U.S., in implementing Article 17 and the other articles should not be to devise "requirements" that may entail "binding consequences," but to make the mechanisms function so as actually to reduce the costs of meeting the Article 3 targets and timetables. If some requirements in the form of rules are really needed, they should be few and far between, and their objective should be to facilitate the availability and use of the market mechanisms. The commitment period is far too short and the market mechanisms, including Article 17, are far too new and unfamiliar to most Parties for them to be designed with "binding consequences" in mind.

5. Questions 17-20

Questions 17-20 raise a number of issues regarding enforcement and the "binding consequences" of noncompliance. They give at least an impression that -- unlike the LRTAP -- noncompliance, rather than facilitating compliance, is the primary objective of Article 18. In particular, we are struck by the lack of any questions about the language in Article 18 stating that the COP/MOP, with respect to noncompliance "with the provisions of this Protocol," include "the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance." In our view, the word "indicative" does not necessarily suggest the idea of "automatic" penalties. Just as importantly, whatever the list, these four aforementioned factors must be considered fully. These factors can be viewed as having a mitigating aspect to penalties, as well as a basis for establishing a graduated set of penalties. In addition, the concept of "automatic" penalties would require a matching of the automatic penalty to the alleged "offense." That matching could be difficult, since not all Annex I Parties are on an equal footing from an economic standpoint.

Question 19 raises the issue of whether "financial penalties" should be used and "for what purposes" should the proceeds be applied. There are the added factors of who collects, accounts for and holds the proceeds and what criteria would be established not only for their ultimate distribution, but also for their use. None of these issues, to our knowledge, has been debated at the JWG.

To the extent Parties want to agree internationally that "binding consequences" include some form of financial penalties, one might conclude that, in the first instance, these are government decisions. However, the stark reality of the situation is that governments must generate the money for any such fund from somewhere. In the U.S., the source would probably be the general taxpayer, fees and taxes on industry, or a combination thereof. Accordingly, EEI has a significant interest in this issues. In this context we take note of Senator Hagel's question 6 and the State Department's reply (supra n.2), which was as follows:

> In regard to the issue of compliance, I also understand that the U.S. delegation and other Parties have discussed the idea of a fund into which a Party determined to be in non-compliance with the Protocol would pay money. Is the Administration considering, or has it considered, such an international fund? If so, what would be the source of payments by the United States into such fund if the United States were determined to be in non-compliance with the Kyoto Protocol? Would the source be the Treasury of the United States? Would monies be paid to the Treasury (or otherwise directly or indirectly into the fund) by means of taxes, fees, penalties, or any other form of charges to be paid by U.S. industry or other U.S. citizens? Whether or not such a fund has been, or currently is being, considered by the Administration, does the Administration agree that any payments into such a fund, in respect of U.S. non-compliance with the Kyoto Protocol, would have to be authorized and appropriated by Congress? Please state the legal basis of any authority, which the State Department believes may exist, by which the State Department and/or the U.S. delegation to the COP could commit the United States, through the mechanism of a COP decision, to make any payments into such fund?
>
> Answer 6:
>
> Various proposals have been made by Parties and other groups concerning what the consequence should be for a Party whose emissions exceed its assigned amount. The U.S. delegation and other Parties have discussed these proposals, which include a proposal for an international fund. If an international fund were pursued, numerous issues would need to be addressed. In addition to those raised in your question, a threshold issue would be whether the fund would be available, on a voluntary basis, for the acquisition of emissions credits, or whether payments to the fund would be mandatory. **We are not aware of any current legal authority for the United States to bind itself to mandatory payments to an international fund in the event it exceeds its target. Were the non-compliance regime to include such an element, Congressional approval would be necessary.**

(Emphasis added.) We note that several of the Senator's questions about the source of revenues for such a fund have obviously been left unanswered, which is troubling to us because discussions in Bonn with other delegations indicate that the State Department has raised issues about such a fund and the source or sources of revenue for such a fund. Apparently, there has even been mention of fees or taxes on sources. Clearly, until we know more about such a fund and its purposes, and the source of revenue in the U.S., we could not support it. Note also the State Department's last two sentences in the above response. Moreover, the question is when such "Congressional approval" would be requested, *i.e.*, before or after mandatory payments to an international fund. We strongly believe, and trust that you agree, that congressional approval would occur before mandatory payments to an international fund.

We want to make clear that we are not, at this time, taking a position in favor of the LRTAP approach discussed herein. We merely referred to it for comparison and discussion purposes.

III. Articles 5, 7 and 8

As briefly discussed above, we are not aware of any significant opportunity in Bonn in June for the relevant contact group to discuss in open meetings these articles or the "Note by the secretariat" on a work programme on methodological issues related to these Articles. Nevertheless, we understand that this programme apparently was called for by Decision 8/CP.4 with respect to Articles 5.1, 5.2, 7 and 8 "with a view to completion by COP-6." The tasks referred to in Annex II of Decision 8/CP.4 are:

> Guidelines for national systems under Article 5.1 and methodologies for the application of adjustments under Article 5.2
>
> Guidelines for the preparation of information under Article 7, with respect to both annual inventories and national communications from Annex I Parties.
>
> Guidelines for the review of implementation by expert review teams under Article 8.

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>
> Guidelines for the review of implementation by expert review teams under Article 8.

In addition, that Annex sets forth a task of "Modalities" for the accounting of assigned amounts under Article 7.4 "with a view to completion by COP-6, or as soon as practicable." The Note explains that the "goal" of the "proposed" work programme "is to develop the guidelines and modalities. . . to assist Parties in meeting commitments in a consistent and transparent manner":

> Special attention will be given to those issues relevant to ensuring compliance with Article 3, due to their importance and their methodological complexity. The guidelines and modalities should ensure confidence in the quality and accuracy of a Party's GHG inventories and estimations of assigned amounts, and should constitute the foundation of any compliance regime for effective implementation of the Protocol.
>
> *   *   *   *   *
>
> An attempt has been made in preparing this work programme to bring components of the work as far forward as possible to minimize the risk of delays at later stages, since the timing of the work programme is tight.

The Note goes on to say that timely completion of the guidelines and modalities "would allow their testing in *simulated* conditions, but using actual data, prior to the start of the commitment period"; that "work" on all of the clusters "needs to be advanced in an integrated and coordinated fashion"; that the work programme "needs to be integrated" with the mechanism work programme, which "should ensure that mechanisms data" are designed to "compatible" with national inventory data; and that the results of this work programme "are also relevant to the identification of compliance related elements" of the Protocol.

As a general comment, the U.S. called for "front loading" information gathering from the Parties because of the amount of work needed and the little time available to do it. The U.S. urged submission of "preliminary views" on all issues. In particular, the U.S. urged that Parties make submissions on the "basic elements" of a national system and views for the guidelines before COP-5. The U.S. apparently wants the guidelines completed at COP-6, except in the case of the reporting guidelines. For the latter, the U.S. said:

> In addition, we suggest that the Secretariat might want to reconsider the timing of the preparation of reporting guidelines under Article 7. Since these reporting guidelines will formalize the mode of reporting on the information developed under other work efforts, we feel that they should be developed after the other work efforts are completed. Given the technical nature of the reporting guidelines, we believe that such delay would not pose a problem and would enable a more efficient technical effort on the work. It is certainly possible to prepare parts of the guidelines by COP6, but our view is that it would be more efficient to deal with these Guidelines in their entirety at COP7, at which time the necessary information on national systems, LUCF and other elements should be available. We look forward to hearing from other Parties on this issue.

As to adjustments, the U.S. also said:

> Regarding Cluster A/2 on Adjustments: We request that Parties submit views on the subject of adjustments before COP5, so that the need for and scope of any activities in this cluster can be determined at that time. We do not believe that the Secretariat should request Parties to redo their national inventories using national and default methods at this time. Undertaking such a task at this point is a lower priority, in our opinion, than ensuring that the next inventory submissions can test the Common Reporting Framework.

As noted above, SBSTA plans to consider the "characteristics of national systems and issues related to adjustments" at COP-5, and it requested views by August 15.

We observe that the requirement in Article 5.1 is for Annex I Parties to the Protocol to have "in place" a "national system of the estimation of anthropogenic emissions by sources and removals by sinks" of greenhouse gases. The article requires that this happen "no later than one year prior to the start of the first commitment period," subject, of course, to the Protocol entering into force. The article provides for guidelines, not rules, for such systems, and Annex II of Decision 8/CP.4 provides that this task is to be conducted by SBSTA "with a view to completion" at COP-6. (Of course, even if the Parties adopt guidelines at COP-6, they must still be adopted by the COP/MOP after entry into force of the Protocol.) According to the Secretariat's Note, the Secretariat "assumed" that a national system "might include" institutional and procedural arrangements "required" to collect, process, communicate and use greenhouse gas inventory data.

The issue of collection could be a significant one for all Parties, including the U.S., because 1) it likely involves action of national legislatures in authorizing or mandating some form of collection from some or all domestic sources, and 2) it raises related issues, such as costs, use, confidentiality and even competition. Even in the U.S., there are no mandates for the collection of all such gases, although electric utilities subject to title V of the Clean Air Act are subject to section 821 of Public Law No. 101-549.[8/] In addition, important to this discussion is the extent to which Parties will uniformly apply any such guidelines to their national systems. Such application could differ significantly from Party to Party, and that could have various consequences, including those related to economic competition.

Paragraph 32 of the Secretariat's Note, in still referring to Article 5.1 guidelines, suddenly states that they could include "minimum technical requirements for national systems to ensure the reliability of the national GHG inventories in demonstrating compliance" with Article 3 commitments, and that those requirements "may be defined" under this work programme. The paragraph adds that such information "may be relevant to define elements related to compliance with the provisions of Article 5," which suggests some connection with the "binding consequences" of Article 18. It is our understanding that while guidelines can be statements of policy and procedure to be followed voluntarily, they are normally not understood to have a compelling or obligatory feature to them. While there is an obligation for national systems, there does not appear to be a basis for even suggesting that the referenced "guidelines" are any more than "guidance" to the Protocol Parties. The Secretariat's Note regarding Articles 7 and 8 clearly indicates a link with Part II guidelines for the review of national guidelines. As observed earlier in these comments, Part II was deferred to the 11th sessions of the subsidiary bodies, and the Parties are encouraged to make submissions. Obviously, those submissions should take into consideration the Secretariat's Note.

Finally, we note the U.S. intervention's comments on paragraphs 48 and 50 of the Note regarding "Modalities for accounting of assigned amounts," and we agree that these paragraphs raise issues of concern about adjusting and banking assigned amounts. Those comments help to demonstrate that the issues regarding Articles 5, 7 and 8 need further elaboration and debate in an open contact group, presumably after the 11th sessions of the subsidiary bodies.

8/ Pub. L. No. 101-549 amended the Clean Air Act in 1990. However, section 821 is not part of the latter act; it is free-standing.

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Paul C. Bailey
Vice President
Environmental Affairs

February 26, 1999

The Honorable Melinda L. Kimble
Acting Assistant Secretary for Oceans,
International Environment, and Scientific Affairs
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Re: Compliance and Land-use Change and Forestry (LUCF) under the Kyoto Protocol

Dear Madame Kimble:

We want to express our appreciation to Ambassador Mark Hambley, Daniel Reifsnyder and you for holding and chairing on February 11, 1999, the Climate Change Workshop to discuss with non-governmental organizations (NGO's), such as the Edison Electric Institute (EEI), the compliance and mechanism issues outlined in your February 5, 1999, letter to NGO's. We also appreciate the participation of Dirk Forrister and others from the U.S. delegation.

The effort was useful, and we urge that similar efforts be repeated as frequently as possible before and after the 10th sessions in Bonn in May-June of the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBSTA), and as the Conference of the Parties (COP) negotiation process continues toward COP-5 and COP-6. We are particularly appreciative of your sharing with the NGO's the draft "Example of Step-by-Step Process for CDM Power Plant Project in Country X." It is a good basis for initial discussion, and we will have more to say about it and related CDM and joint implementation matters in the near future. It is always helpful in participating in your briefings or such workshops for the Administration to provide a draft of the matters under consideration so that we can respond intelligently and constructively. The above-mentioned draft was a good first step in this regard. We trust that in the future you will go farther.

You may recall that last September EEI wrote to you about the Kyoto Protocol mechanisms as you prepared for COP-4. We believe the matters discussed therein, together with the February 10, 1999, comments of the Global Climate Coalition, are pertinent to the issues being considered now by the U.S. delegation for your submissions to the Secretariat in preparation for the 10th sessions of the SBI and SBSTA.

Enclosed with this letter is EEI's follow-up to some of the compliance issues raised at the recent workshop. In addition, it is important that you are made aware of the importance that we attach to land-use change and forestry (LUCF) issues and their relation to the cost estimates by the Administration of the Kyoto Protocol. In the very near future, we will provide you with our early views and concerns on "policy and procedural issues associated with Article 3.3 and 3.4 of the Kyoto Protocol" as you prepare a submission, pursuant to Decision 9/CP.4 at Buenos Aires, either with the Umbrella Group or on behalf of the United States. In the meantime, we enclose our views on some procedural issues relating to LUCF. Enclosed, therefore, are EEI's comments on both matters.

We provide these comments because EEI is the association of the nation's shareholder-owned electric utilities and industry affiliates worldwide, with 200 member companies in the U.S. and 43 affiliate members in 15 countries. Our U.S. members serve more than 90 percent of all customers served by the shareholder-owned segment of the industry. They generate approximately three-quarters of all electricity produced by electric utilities in the country and serve about 70 percent of all ultimate customers in the nation.

Moreover, EEI has been an active NGO in the Framework Convention on Climate Change process since its inception. Our members have an enormous stake and high interest in the Kyoto Protocol mechanisms, compliance and LUCF issues.

EEI appreciates the opportunity to submit the enclosed comments, and we would be happy to discuss them with you. We also would appreciate your providing copies of any submissions that the U.S. and the Umbrella Group make pursuant to COP-4 decisions at Buenos Aires to the Secretariat concerning these matters, as well as on mechanisms under Articles 6, 12, and 17 of the Kyoto Protocol. We would particularly ask that you provide copies of these submissions prior to the workshops on mechanisms and sinks.

If you have any questions about our comments, please contact John J. Novak, Director, Environmental Activities (202-508-5655); or William L. Fang, Deputy General Counsel (202-508-5617) or me at (202-508-5640).

Sincerely yours,

Paul Bailey

Paul Bailey

Enclosure
PB:nff
cc (w/ enc):
Ambassador Mark Hambley
Daniel Reifsnyder, Esq.
Richard Bradley
Susan Biniaz, Esq.
Dirk Forrister, Chairman, White House
Climate Change Task Force
David Gardiner, Assistant Administrator,
Environmental Protection Agency
David Sandalow, Associate Director,
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Enclosure

EDISON ELECTRIC INSTITUTE'S COMMENTS ON COMPLIANCE AND LAND-USE CHANGE AND FORESTRY MATTERS RELATING TO PROPOSED SUBMISSIONS BY THE U.S. DELEGATION AND THE UMBRELLA GROUP PURSUANT TO DECISIONS 8/CP.4 and 9/CP.4 AT BUENOS AIRES IN NOVEMBER 1998

February 26, 1999

At Buenos Aires in November 1999, the Fourth Session of the Conference of the Parties (COP-4) issued Decision 1/CP.4, whereby the Parties to the Framework Convention on Climate Change (FCCC) determined to "prepare for the future entry into force of the Kyoto Protocol" to the FCCC by adopting the Buenos Aires Plan of Action described in several decisions. One of those decisions is Decision 8/CP.4, which, among other matters, addresses compliance issues under the Protocol. Another is Decision 9/CP.4, which relates to land-use change and forestry (LUCF) matters, as well as agricultural soils. Both decisions invite the Parties to the FCCC to make submissions by March 1, 1999, to the Secretariat concerning "matters relating to compliance" under the Protocol and to "policy and procedural issues associated with Article 3.3 and 3.4" of the Protocol. Regarding compliance, the State Department's Climate Change Workshop on February 11, 1999, particularly brought to mind some matters that the Edison Electric Institute (EEI) believes deserve discussion, in addition to those set forth by the Global Climate Coalition. Thus, the EEI respectfully submits the comments set forth below, which we hope will be viewed as informative and constructive by the U.S. delegation as it prepares these submissions and considers these matters.

I. Introduction

As we said in our September 2, 1998 letter to you, EEI continues to oppose legally binding emission reduction obligations and emission caps -- including those in the Kyoto Protocol -- because of their severe consequences to the American economy if they were applied to the U.S. by international agreement or domestic action. From an international standpoint, the failure to extend the commitments under the FCCC to all greenhouse gas-emitting nations is compounded by the failure to require all nations to abide by the legally binding commitments of the Kyoto Protocol. Without commitments by all Parties to the FCCC to meet such obligations, greenhouse gas emission reductions of the magnitude and in the time period specified in Kyoto would unfairly impose severe burdens on American consumers, who are EEI member companies' customers, with little or no benefit in limiting global greenhouse gas emissions.

EEI continues to believe that greenhouse gas emissions should be addressed through international and domestic commitments to voluntary, flexible and cost-effective actions that involve all Parties to the FCCC, all greenhouse gases, and all sources and sinks. We note that through the Fiscal Year 2000 Annual Performance Plan of the Environmental Protection Agency (EPA) and the Congressional Justification recently provided to the Congress, the Administration points to numerous voluntary actions by business, states, local governments and others through EPA's programs that will reduce greenhouse gases in 1999 by 35 million metric tons of carbon equivalent (MMTCE) and in 2000 by 50 MMTCE (see p. VI-27).[1] Indeed, the EPA states, "Through 1998, EPA Climate Change programs have reduced U.S. greenhouse gas emissions by 260 million tons of carbon dioxide equivalent (70 million metric tons of carbon equivalent)."

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1 The EPA report states:

Reduce Greenhouse Emissions

In 2000 Greenhouse gas emissions will be reduced from projected levels by more than 50 million metric ton carbon equivalent per year through EPA partnerships with businesses, schools, State and local governments, and other organizations. Reduction level will increase 10 million metric tons over 1999.

In 1999 Reduce U.S. greenhouse gas emissions by 35 million metric ton carbon equivalent (MMTCE) per year through partnerships with businesses, schools, state and local governments, and other organizations.

Performance Measures	FY 1999	FY 2000
Methane Programs - Annual Greenhouse Gas Reductions	8.5 MMTCE	
HFC/PFC Programs - Annual Greenhouse Gas Reductions	11.5 MMTCE	
Annual Greenhouse Gas Reductions - All EPA Programs	35 MMTCE	50 MMTCE
ENERGY STAR Buildings and Green Lights - Annual Greenhouse Gas Reductions	3.9 MMTCE	
ENERGY STAR Labeled Products - Annual Greenhouse Gas Reductions	4.8 MMTCE	

Baseline: Performance Baseline: The baseline for evaluating program performance is a forecast of U.S. greenhouse gas emissions in the absence of the Climate Change Action Plan programs. The baseline was developed as part of an interagency evaluation of the Climate Change Action Plan in 1997, which built on a similar baseline forecast that was developed in 1993 for the Climate Change Action Plan. The updated baseline includes updated energy forecasts and economic growth projections. The baseline is discussed at length in the Climate Action Report in 1997, which includes a discussion of differences in baselines between the original Climate Change Action Plan and the 1997 baseline update.

Add to those actions the voluntary partnership between the Department of Energy (DOE) and the electric utility industry in the Climate Challenge program that EEI and 650 electric utilities participate in, which are projected by DOE to reduce, avoid or sequester 174 million metric tons of CO_2-equivalent (47.5 MMTCE) greenhouse gases in 2000. These are formidable voluntary efforts by business and industry and other American entities that have received little recognition in the climate debate. The EPA and DOE voluntary programs demonstrate that the voluntary approach works, is successful and has enormous potential to yield significant environmental and economic benefits without the disruptions that would undoubtedly result from binding targets and timetables. We are, therefore, pleased to see the EPA presentation in support of its appropriation request, and further note for the record the tremendous voluntary efforts of the electric utility industry under the Climate Challenge. **We only wish such information were more widely circulated both in the U.S. and at FCCC negotiations.** It would help to show that the U.S. is and has been taking significant and meaningful domestic actions.

II. Compliance

Both at the January 15, 1999, briefing for business, labor and agriculture NGO's and at the February 11 Climate Change Workshop, some government officials commented about earlier statements purported to be made by business and industry NGO's to the effect that they have supported strong compliance measures. We believe that such statements were made in the context of whether there should be binding targets and timetables.

EEI does not favor compliance measures in a vacuum. We have emphasized that if legally binding greenhouse gas emission reduction obligations and emission caps, such as those in the Kyoto Protocol, are to be adopted internationally and ratified by the United States after advice and consent by the Senate, they should include effective and uniform compliance measures applicable to all Parties to that international instrument. Simply stated, the Kyoto Protocol does not provide such measures or the procedures for implementing them in a fair manner.

The only relevant provision is Article 18. However, it is vague and uncertain at best. Moreover, before binding consequences under Article 18 could be effective, an amendment to the Protocol -- which cannot occur until the Protocol enters into force -- would be required. That process, utilizing the provisions of Article 20, if and when tried after entry into force of the Protocol, provides little assurance that the results will be of the nature just described. Furthermore, we are unaware of any proposals for such an amendment to be negotiated between now and COP-6 or thereafter.

Until Decision 8/CP.4, compliance by FCCC Parties received scant attention with regard to either the FCCC or the Protocol.[2] Now SBI and SBSTA are called upon by that decision to

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[2] We note that the European Union at its October 6, 1998, Environmental Ministers meeting concluded: "The Council stresses the importance of a comprehensive compliance regime

establish a "joint working group on compliance" under these subsidiary bodies. Decision 8/CP.4 fails to either state the composition of the group or indicate who will chair it. We hope that it will not follow the pattern implemented by the FCCC Article 13 subsidiary body, which has limited composition and diversity. We also urge that the U.S. insist that the deliberations of the joint working group be open to NGO's.

The joint working group is, among other things, to identify "compliance-related elements" in the Protocol, follow the development of such elements -- "including for example, elements on substantive rules and consequences of non-compliance" -- and develop procedures by which "compliance with obligations under the Protocol "should be addressed."[3] At the Climate Change Workshop, several questions were proposed by the State Department concerning compliance "procedures" and "consequences," which elicited some comment by NGO's at the workshop. The questions were:

- What kind of procedure should we set up to assess compliance with Protocol obligations?
- Should there be more than one procedure and, if so, for what purposes?
- Should the consequences for noncompliance be decided in advance, left to a body to determine or a hybrid of the two approaches?
- What should the consequences be for exceeding the target (after an assumed grace period, during which a Party has the opportunity to cure any overage)?
- Other key concerns?

As much as EEI believes that effective compliance is absolutely necessary if the U.S. were to ratify the Kyoto Protocol with its target and timetables, we also believe that such a compliance regime is not likely to be effective unless compliance with the current reporting requirements under the FCCC for national inventories and communications are vastly improved from, at a minimum, the standpoints of timeliness, quality, completeness, accuracy, reliability, uniformity and transparency. EEI and other business and industries would not want, for example, to see "consequences" established for Parties that fail to meet their Article 3 commitment based on the communications and inventories reported to date under the FCCC, particularly in light of the September 4, 1998, "note by the secretariat" entitled "Methodological Issues Identified While

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covering all issues under the Protocol, including compliance regarding flexible mechanisms, and ensuring regular reporting by the Parties as a prerequisite for assessing compliance with the provisions of the Protocol. Procedures and mechanisms to address cases of non-compliance, including binding consequences, should have regard to the proportionality of consequences and the establishment of a due process. Work on the development of such a regime should start at COP4 as a matter of urgency."

[3] At this stage, it is difficult to ascertain what is encompassed by the phrase "compliance-related elements" because this portion of Decision 8/CP.4 was entirely negotiated in closed sessions of the Parties with no opportunity for NGO's to attend.

Processing Second National Communications: Greenhouse Gas Inventories" (FCCC/SBSTA/1998/7). The note states (pp. 12, 13, 17):

> Although information improved compared to the first national communications, it is clear that the information on uncertainties is still not comparable among Parties.
>
> * * * * *
>
> The IPCC Guidelines do not provide guidance on how to estimate uncertainties over time, and neither the IPCC nor the UNFCCC guidelines request this information from Parties.
>
> The need for technical and scientific work to develop compatible ways to estimate and report uncertainty of the GHG emission estimates and the overall uncertainty associated with GHG inventories is evident. **In addition to the uncertainty of an emission estimate, the uncertainty of an emission reduction may also be relevant.**
>
> * * * *
>
> In general, the quality of the inventory data presented in the second national communications was higher than in the first communications, but many problems remain which hamper reporting GHG inventories in a transparent, complete and consistent way. This will require an improvement and expansion of the current reporting practices and procedures for meeting emissions limitation or reduction objectives.

(Underscored emphasis in original; boldface emphasis added.)

The second national communication by Annex I Parties was due April 15, 1997. Many Parties were late. We understand that Italy, Lithuania, Luxembourg, Romania and the Russian Federation had not submitted their communications as of the end of 1998. The European Union's communication was received in June 1998, which was more than a year late. Japan's was received in December 1997, and the U.S. delivered its communication in August 1997.[4]

In response to February 11, 1998, questions from Sen. Hagel, the State Department discussed the adequacy of national inventories and said (p. 7-4):

> Under the Framework Convention on Climate Change, all Annex I Parties have been required to prepare and submit national emissions inventories in accordance with the 1996 IPCC guidelines. However, the GHG inventory information

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[4] See FCCC/CP/1998/4 of Sept. 18, 1998, pp. 6, 7.

presented by Annex I Parties to date has often been incomplete and of mixed quality. For this reason, the United States achieved the inclusion of Article 5, which requires Annex I Parties to have rigorous GHG emission estimation systems.[5]

Unfortunately, it is difficult to see how Article 5 is any more "rigorous" than the requirements of the FCCC. While the Protocol article is longer and more detailed, except for the added requirement of guidelines -- which are not rules and thus are likely to be unenforceable -- we see little difference between this article and Article 12 of the FCCC that would make the former "rigorous."

We note that Article 7 requires that Annex I Parties to the Protocol "incorporate" in their annual inventory "supplementary information for purposes of ensuring compliance with Article 3, to be determined" in accordance with paragraph 4 of Article 7, which also calls for guidelines -- ones that presumably, like the guidelines under Article 5, are also unenforceable.

We also note that Annex II of Decision 8/CP.4 calls for a work programme to provide for Article 5 guidelines by SBSTA and another work programme for Article 7 guidelines by SBSTA in "cooperation" with the SBI. The work programmes are to be carried out "with a view to completion" by COP-6. However, no mention is made of a COP-6 decision regarding these Articles, although Decision 9/CP.4 recommends that at the first session following the completion of the Intergovernmental Panel on Climate Change (IPCC) special report a "draft decision" by the Conference of the Parties serving as the Meeting of the Parties (COP-MOP) should be adopted on Article 7 guidelines.

In short, EEI believes that in light of this history and the Secretariat's criticisms, the FCCC Parties need to focus, as a priority matter, on resolving the many problems associated with the quality, timeliness and reliability of national communications and inventories before embarking on the rather elaborate compliance regimes proposed and discussed at the Climate Change Workshop. The work programmes could provide the opportunity to establish the "rigorous GHG emission estimation systems" contemplated by the U.S. Without such systems for all FCCC Parties to the Protocol and their timely utilization, an effective regime to address failures of the

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5 The U.S. inventory due in April 1998 was submitted about four months late. As correspondence with Rep. Sensenbrenner indicated, this was because the period for public comment on the inventory was extended. That was fortunate because EPA, in a September 16, 1998, letter to Rep. Sensenbrenner, said that the "public review process generated valuable feedback" and "resulted in a more accurate inventory document of higher quality than we would have otherwise produced."

We understand that Bulgaria, the European Community, Estonia, Finland, Hungary, Ireland, Italy, Lithuania, Luxembourg, Portugal, Romania, Russian Federation, Spain and the Ukraine had not submitted their national inventory data as of January 1, 1999.

Parties to comply with their obligations, particularly their Article 3 commitments, will not likely be established.

III. Land-Use Change and Forestry (LUCF)

Related to LUCF issues is the workshop scheduled for April or May 1999 in Indianapolis, Indiana. As we indicated in discussions with Acting Assistant Secretary Melinda Kimble and others in the U.S. delegation, the EEI would like the opportunity to participate in that workshop. (Since it is scheduled for the heartland of the U.S., it is likely that the level of interest from many in the U.S. may be high, and we wonder how the Secretariat plans to accommodate that interest, including media representatives.)

We note that in response to inquiries by Rep. Sensenbrenner on September 18, 1998, the State Department said (in reply to question 5.1.3) that the "Administration has widely solicited names of technical experts to participate in the technical portions of the workshop -- nominating individuals with academic, environmental organization, and private sector backgrounds to participate, as well as those from within the government." The Department added that the Administration "also held consultations" on LUCF issues "with members of forest and forest product industries, seeking to fully understand both their concerns, and possible proposals to address these concerns." Finally, the Department said that members of the private sector "are thus able to attend the workshop as observers as long as they register appropriately."

Unfortunately, the Administration has not "solicited" experts from the EEI, and it has been extremely difficult to determine how and where to "register appropriately" in order, at a minimum, to attend as a participant or an observer. That is not a good sign of openness on the part of the Secretariat. We would greatly appreciate your assisting in ensuring that we will be able to participate, because, as recognized by the Departments of Agriculture and Energy, EEI and our members have considerable experience and expertise to offer regarding these matters.

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Vice President
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May 11, 1999

The Honorable Melinda L. Kimble
Acting Assistant Secretary for Oceans,
International Environment, and Scientific Affairs
U.S. Department of State
2201 C Street, N.W.
Washington, D.C. 20520

Re: The Clean Development Mechanism under the Kyoto Protocol

Dear Ms. Kimble:

The principal reason for writing today is to follow up on our earlier letter of February 26, 1999, with comments on one mechanism of the Kyoto Protocol. The Edison Electric Institute (EEI) also wants to commend you and your colleagues for releasing on the State Department's Web site the several "U.S. Submissions on Climate Change in 1999" to the U.N. Framework Convention on Climate Change (FCCC) and to the Intergovernmental Panel on Climate Change (IPCC). We urge that you continue this initiative regarding future submissions, including any additional submissions to be made pursuant to decisions of the Fourth Conference of the Parties (COP-4), and in the development of U.S. delegation positions for FCCC and IPCC sessions.

We note that the Web site did not include any submission by the U.S. due to be made last December on means of promoting the implementation of Article 6 of the FCCC pursuant to FCCC/SBSTA/1998/6. We also understand that the U.S. did not make any submission on February 28, 1999, for "further proposals on principles, modalities under Article 6, 12 and 17 of the Kyoto Protocol" pursuant to Decision 7/CP.4 at Buenos Aires. Instead, the U.S. delegation participated in the submissions by the Umbrella Group regarding these Articles, which were recently posted on the State Department Web site. Those are also helpful.

In addition, we appreciate your efforts regarding the mechanisms workshop in Bonn to persuade the Secretariat to include our representative, John Novak, as a participating expert. As you know, John was able to participate in the workshop. Furthermore, representatives from the electric utility industry were able to participate in the land-use change and forestry workshop in Indianapolis, Indiana.

If you have any questions about our comments, please contact John Novak, Director, Environmental Activities (220-508-5655), or Bill Fang, Deputy General Counsel (202-508-5617).

Sincerely yours,

Paul Bailey

Paul Bailey

Enclosure
BNF:bwt
cc (w/ enc):
Ambassador Mark Hambley
Daniel Reifsnyder, Esq.
Richard Bradley
David Gardiner
Todd Stern, Esq.
David Sandalow

ENCLOSURE

EDISON ELECTRIC INSTITUTE'S COMMENTS
ON THE CLEAN DEVELOPMENT MECHANISM

May 11, 1999

I. Introduction

At Buenos Aires in November 1998, the Fourth Session of the Conference of the Parties (COP-4) issued Decision 1/CP.4, the "Buenos Aires Plan of Action," whereby the Parties to the Framework Convention on Climate Change (FCCC) resolved to "demonstrate substantial progress" in each of six decisions outlined therein in accordance with the "time-frames contained" in each decision. In the case of Decision 7/CP.4 on the mechanisms Articles of the Protocol, the COP decided on a "work programme" to be carried out "with priority given to the clean development mechanism, and with a view to taking decisions on all the mechanisms under Articles 6, 12, and 17 of the Kyoto Protocol at its sixth session." As to Article 12, paragraph 1(b) of Decision 7/CP.4 called for "[m]odalities and procedures" for the clean development mechanism (CDM) "with the objective of ensuring transparency, efficiency and accountability through independent auditing and verification of project activities" and, most importantly, "including implications of Article 12.10" of the Protocol, which provides for the use of certified emission reductions from 2000 to the beginning of the commitment period to "assist" in achieving compliance in that period.

Decision 1/CP.4 also states that the COP is "[d]etermined to strengthen the implementation of the United Nations Framework Convention on Climate Change and prepare for the future entry

An added purpose of equal significance is to "assist" such Annex I Parties "in achieving compliance" with their quantified emission limitation and reduction commitments under Article 3. For the U.S. and other Annex I Parties, this added purpose could be called the *quid pro quo* for participation in the program by Annex I Parties and "private and/or public entities" of such Parties.

One of the "Key Findings" in the March 3, 1999, Submission of the Untied States on the "Review of the Activities Implemented Jointly (AIJ) Pilot Phase" is that in the "absence of credits, the private sector has been reluctant to participate in AIJ," since many companies found that the "costs of participation outweighed the expected return." Article 12 provides an opportunity for credits for CDM projects that were not afforded to AIJ projects and, as such, CDM certified emission reductions will be available to supplement the "assigned" amount for an Annex I Party. In addition, we emphasize that it provides for the use of credits "obtained" during the period of 2000 to the start of the first commitment period under Article 3. Reportedly, developing countries participating in AIJ projects are negotiating with project developers to retain emission reductions for the Parties' future use, sale or transfer.[1] Moreover, credits alone

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1 In February 1998 questions "For the Record" to Senator Hagel, the State Department was asked (in question 6.8) if developing countries not listed in Annex B of the Protocol could retain such "certified emission reductions" from an Article 12 project and sell or transfer them pursuant to Article 17 or any other Protocol provision to another nation. The State Department replied:

> The answer to the first part of this question is "yes" -- however, a developing nation not listed in Annex B and which retains "certified emission reductions" from a project within its territory pursuant to Article 12 could not sell or transfer all or any of those "certified emission reductions" pursuant to Article 17; such developing nations could only sell or transfer all or any of those "certified emission reductions" pursuant to Article 12 because only Annex B nations may participate in international emissions trading under Article 17. Such developing nations could also sell or transfer all or any of the "certified emission reductions"

CDM.[3] Thus, while the CDM is defined by the Protocol, many critical details regarding its establishment and operation were deferred to the COP/MOP. These include creation of the Executive Board; details on how the CDM will be "supervised" by that Board; the role that the Board will play in providing "guidance" to "private and/or public entities"; the designation, functions and number of the operational entities; the adoption of methodologies for such entities to follow in certifying emission reductions "resulting from each project activity"; the eligibility of sinks' projects; the meaning and application of the term "part of" in Article 12.3; and the determination of the "share of the proceeds from project activities" for "administrative expenses" and for the costs of adaptation for developing countries "particularly vulnerable to the adverse effects of climate change." We continue to urge the U.S. delegation and the Umbrella Group to oppose applying quantified or qualitative limits regarding the term "part of" in Article 12.3 and the term "supplemental to" in Articles 6 and 17.

In recent informal discussions with members of the U.S. delegation, we understand that of the three Protocol mechanisms, there is some reluctance on the part of the U.S. to be too

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3 This Article differs from Article 17 in several ways. First, many of the details of the CDM are "defined." Second, the COP/MOP, not the COP, will "elaborate" on modalities and procedures to further define this mechanism. Third, there is no mention of "rules" for the CDM, although we understand that the U.S. delegation and the Umbrella Group may be contemplating the use of rules in order to address compliance issues effectively, since guidelines may not be effective for compliance objectives. In its May 4, 1999, responses to questions from House Science Committee Chairman Sensenbrenner, the State Department stated (question 2) that the "absence of the word 'rules'" in Articles 6 and 12 "does not mean that the COP/MOP lacks the power to develop rules, procedures and the like to which Parties would need to adhere." That is a rather expansive construction of the Protcol and of the powers of the COP.

Fourth, Article 12.4 clearly states that the CDM "shall be subject to the authority and guidance" of the COP/MOP. Fifth, Article 12.9 expressly authorizes involvement of the private sector. Sixth, Article 12 includes developing country Parties.

Whatever the procedure at the 10th sessions of the subsidiary bodies, we understand that the U.S. delegation is quite rightly considering CDM issues in preparation for that session. For example, there has been considerable discussion at an interagency level about "additionality" issues and the possible use of benchmarking as a tool to determine certified emission reductions resulting from projects under the CDM. The delegation has involved non-governmental organizations (NGO's), including EEI, in the discussion of "benchmarking," which we appreciate.[5] We want

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5 Another "Key Finding" in the March 3, 1999, AIJ submission is: "Standard guidelines in estimating greenhouse gas benefits would lower transaction costs, ensure objectivity and facilitate verification. The use of benchmarks might be useful in this regard[.]" The submission also discusses the development of U.S. performance standards for a given sector to standardize how greenhouse (GHG) benefits from project activities would be measured:

> The U.S. government has already begun to develop guidelines to standardize methods used to calculate project GHG benefits. Under AIJ, emissions reductions are estimated by comparing performance to a counter-factual baseline that is established using the JI approval process. The counter-factual baseline seeks to estimate what would have occurred in the absence of the project. Estimating emissions in the absence of a particular project requires assumptions about many different factors. Most factors allow more than one reasonable assumption, each of which can drastically alter the baseline and thus the magnitude of project reductions. For example, an important assumption driving a project baseline for a hydroelectric project was the type of energy that the hydroelectric project would displace. The scenario assumed the project would initially displace 100% of the fossil fuel. The percentage of fossil fuel was assumed to decline to zero from 1998 to 2001 (in accordance with the country's announced national goal). An alternative scenario could have assumed a future fuel mix based upon factors such as resource mix, energy demand, fuel cost projections, and installed and planned capacity in the country. The latter assumption estimates that fossil fuels will continue to be used for electricity production well after 2001 and, therefore, the hydroelectric project would offset more greenhouse gas emissions. In this case, an alternative baseline would increase the emissions reductions claimed.
>
> While standard methodologies are somewhat straightforward for estimating project emissions, estimating emissions that would occur absent the project activity is less direct and more subjective. Broad

Equally important to EEI and presumably other business and industry NGO's are Articles 12.5 and 12.9 of the Protocol.[7] Article 12.5 provides that "emission reductions resulting from" project activities "shall by certified by operational entities to be designated" by the COP/MOP.

Article 12.9 provides that participation under the CDM, including in the "acquisition" of "certified emission reductions," may "involve private and/or public entities," subject to "whatever guidance" the Board may provide. Once again, however, details are lacking in both of these provisions.

-- To accredit organizations -- governmental or otherwise -- to systematically offer to the highest bidder the certificates of emission reductions available at the Secretariat, without prejudice to an open negotiation by anyone else.

-- To accredit, through the International Standards Organization, organizations -- governmental or otherwise -- to pre-certify the emission reductions as requested by non-Annex I Parties.

-- To verify periodically, through accredited organizations, the correspondence between the pre-certified and the realized emissions reductions, and to issue the corresponding certificates of emission reductions.

-- To establish and periodically review the list of project activities for which emission reduction certificates may be issued. This global list should take into account exclusively the aspects related to the establishment of a credible baseline, leaving to governments the authority to establish their own list of eligible projects, taken from the former list. The national list will take into account, additionally, the sustainable development priorities.

[7] The Umbrella Group Non-Paper states that the "structure" of these institutions will be "critical" to the operation of CDM, while noting that the structure "may be guided in part by the function of the CDM."

industry organization. The Umbrella Group Non-Paper suggests that to "ensure cost-effectiveness and efficiency," such entities "could be drawn from private sector institutions (e.g., international accounting firms/certification bodies)," that they should be "accredited" by the Board "based on guidance" from the COP/MOP, and that it would be "valuable to have multiple" entities. On the other hand, China in a February 25, 1999, paper included in a Secretariat's Note (FCCC/SB/1999/MISC.3) said that the entities "shall be limited in number to ensure transparency and credibility."

We assume that none of these suggested organizations would perform this function without some charge, which could be significant, particularly if, as also suggested by the Umbrella Group Non-Paper, the function of these entities involve review and registration of projects prior to implementation, the certification of project emission reductions or removals "after they have occurred," the issuance of certified emission reductions (CER's), and the submission of "Activity Reports" to the Board.

We have serious misgivings about the wide acceptability to the Parties and the private sector of some of these suggestions by various Parties. Nevertheless, we think that the Umbrella Group's suggestions are helpful and would like to learn more about the U.S. delegation's thinking regarding these entities, the scope of their functions, and how the entities would carry the functions out.

Crucial to any designation is that the entities be independent, that their duties and functions be spelled out, and that they be closely supervised by the Board or the COP/MOP. In addition, the of acceptance of that determination. There should not be an opportunity to second-guess the host country.[10]

Incidentally, the Protocol does not indicate whether, once made, a designation is permanent. We think it probably should not be permanent, particularly if it is an inter-governmental body.[11]

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10 China, in a February 25, 1999, paper entitled "inputs from China on CDM" provided in a "Note by the Secretariat" on March 30, 1999 (see FCCC/SB/1999/MISC.3), clearly sees no role for anyone but the host country. China said, "Whether a CDM project could promote sustainable development of a developing country Party shall be decided by the developing country Party itself, not by other Parties or international institutions." Germany (on behalf of the European Community and its member States and Bulgaria, Croatia, Czech Republic, Hungary, Latvia, Poland, Romania and Slovenia), in a paper on the CDM also provided by the Secretariat (see FCCC/SB/1999/MISC.3), refers to the "validation" of project activities, which is the "binding assessment by an operational entity" that a "specific" project activity "meets the requirements laid down in the rules for the CDM," and provides a list of eight requirements for such validation. One requirement seems to require more from the host country than suggested by either the Umbrella Group or China. It states:

> e) The Party not included in Annex I involved in the project activity confirms in a written statement how the project activity
>
> -- assists that Party in achieving sustainable development taking into account its economic, environmental and social conditions according to its own priorities and needs and the need to minimize adverse environmental, social and economic effects taking into account existing guidance for sustainable development;
>
> -- contributes to the ultimate objective of the UNFCCC.

The "guidance" referenced in the German/European Union paper is not identified. Moreover, any suggestion that operational entities are to be charged with deciding whether a project meets the "ultimate objective" of Article 2 of the FCCC is a concern since there are no established criteria for such a decision and since, as you know, what constitutes that objective involves substantial political considerations.

11 The Umbrella Group Non-Paper is silent on this issue, although we note the comment in the paper that "multiple" operational entities may gain "expertise," which suggests a long term for these entities, and the comment that the entities "should lose their accreditation" if they fail to abide by "CDM and/or Executive Board guidelines," which suggests that the Umbrella Group envisions permanency. We should think that such entities would serve at the pleasure of the Executive Board through contractual arrangements or agreements that would be subject to periodic renewal or termination.

entities." None of these is a minor task. However, they all will be subject to the authority and guidance of the COP/MOP.

We note that the Umbrella Group Non-Paper suggests that the Board could provide "guidance" on "operational and technical issues," as well as review reports submitted by operational entities and provide synthesis reports to the COP/MOP. The Non-Paper does not elaborate on what those "issues" might be or how and what "guidance" is contemplated for the Board to provide. We would like to hear the U.S. delegation's explanation of what is intended by the Group in this regard.

As noted, the Protocol specifies that operational entities will be "designated" by the COP/MOP. However, the Non-Paper states that the Board also "would accredit" these entities, based on guidance from the COP/MOP. In addition, it provides that the Board will maintain a "list" of such entities for public availability. No explanation is provided as to whether the Protocol contemplates both a COP/MOP designation and a Board accreditation of these entities, why both are necessary, and whether such an entity could operate if it was designated by the COP/MOP but not accredited by the Board. The Non-Paper states that they "should be accredited" by the Board "on guidance from the COP/MOP." It would seem that whatever guidance is required would apply equally to the designation. Our concern is that these seemingly duplicative actions by the COP/MOP and the Board appear to raise conflicts between the two and could possibly add to the administrative costs. We do not see the added benefit of accreditation, and we would like to learn more from the U.S. about this proposal.

decide. Of course, the Board could elevate such decisions to the COP/MOP, but that would likely result in delay and no better assurance of sound decisions.

To carry out these duties, the Board will need a staff. The Brazilian paper referred to in footnote 6, *supra*, suggests the Secretariat, as does the Umbrella Group Non-Paper. However, the Secretariat is already serving the COP/MOP, as well as the COP, SBSTA and SBI, and it has been proposed that the Secretariat take on additional functions regarding inventories. Consideration should be given to a small staff for the Board that is independent of the staff serving the COP/MOP, which gives "guidance" to the Board.

One function in the Protocol that is not assigned to any of the organizations is the arrangement of "funding" of certified project activities "as necessary" (see Article 12.6). This function, which itself is vague, could be performed by the COP/MOP. However, it is difficult to see how such a large operational entity could do so effectively and in a timely manner. Presumably, the Board would be a better entity for this function, with the COP/MOP providing guidance as to when the Board finds it "necessary" to arrange such funding and how it could engage in this activity. However, the Protocol is not much help in explaining how the CDM "shall assist in arranging funding" and on who should be the beneficiaries of the assistance. We note that on the issue of funding, the Chinese paper, *supra* n.10, states:

> Funding for the CDM project shall be additional to ODA, GEF, and other financial commitments of the developed country Parties under UNFCCC, under the Kyoto Protocol and commitments under other relevant international conventions and their protocols. Moreover, funding for the CDM project shall be provided by the project participating developed country Party to the project participating developing country Party on a grant basis, with the CERs acquired from the CDM project as returns for the participating developed country Party for meeting part of its QELROs, in accordance with the relevant provisions of Article 12 and Article 3 of the Kyoto Protocol.

produce greater reductions than others, depending on the sector involved, the country involved and other factors. In addition, the Protocol is unclear about whether all proceeds are to be lumped together from all projects, wherever located, and then shared globally or shared just in the region where derived. Either approach presents problems and possible inequities.

In the case of administrative expenses, a fixed percentage may be inadequate, although there is a clear need to keep such expenses at a minimum to "ensure," as stated by the Umbrella Group Non-Paper, "that the CDM remain a cost effective vehicle for investment." In addition, there is no provision in the Protocol for the Parties to supplement these proceeds, which presents problems in the case of administrative expenses, as there appears to be no funds to start up the CDM in advance of reductions that produce "proceeds." We also assume that the developing countries that would benefit from proceeds for adaptation will not want to see proceeds subject to Article 12.8 dissipated for administrative expenses.[14]

As noted above, the Protocol provides that the "proceeds" will be derived from CER's. However, none of the submissions by Parties, including the Umbrella Group, explain how and when these CER's will be transformed into money for administrative expenses and adaptation, nor is there any indication whether this will be accomplished by the operational entities, the Board, the COP/MOP or some other organization. There are issues of timing, as well as issues

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understanding on other basic issues," which the paper lists as baselines, monitoring, and adaptation measures. We question the wisdom of such deferral.

[14] China's paper, *supra* n.10, states, "The issue of 'Adaptation Costs' is an important issue and needs further study. This issue has to be resolved in conjunction with the implementation of Article 4.8 and 4.9 of the Convention. A special fund should be established to assist covering the adaptation costs taking into account the implementation of Article 4.8 and 4.9 of the Convention."

-- As noted, "credible standards for environmental integrity" were used to test "additionality," but experience showed that the "criteria" were "difficult to evaluate." Thus, it was not possible to "apply the same standard of additionality to all projects under consideration because of unique circumstances and available data associated with the project."

-- Meeting USIJI criteria for additionality "has often increased overhead costs for project developers."

-- A "critical element in determining emissions additionality is establishing a credible baseline scenario and emission projection both for the reference case and the project itself."

Article 12 defines additionality solely in terms of environmental, or emissions, additionality. Article 12.5(c) states that emission reductions shall be certified on the basis of "[r]eductions in emissions that are additional to any that would occur in the absence of the certified project activity." Further guidance is lent by Article 12.5(b), which speaks in terms of "[r]eal, measurable, and long-term benefits related to the mitigation of climate change." Nowhere does Article 12 encompass the concepts of program additionality and financial additionality. In its March 3 AIJ submission, the U.S. agrees with our view on program additionality, stating, "The need to make subjective judgments argues for eliminating programmatic additionality in future regimes." However, that U.S. submission is not clear about the fate of financial additionality, only saying that difficulties of evaluation (due to the intermingling of overseas development assistance, Global Environment Facility and other funds) make it necessary to consider how this type of additionality should be addressed in the future. EEI submits that financial additionality is irrelevant to CDM projects under Article 12, and that the sole criterion on this issue should be environmental additionality.

Consistent with the previously discussed AIJ "Findings," the U.S. delegation is examining the benchmark idea of creating performance standards for sectors and measuring project activity not only viable, but urged. Another concern is with the word "standard." A better word might be "guidance." Finally, we note that the Chinese paper, *supra* n.10, said, "Only project-by-project, not sector or country baseline, shall be applied to CDM project."

When we wrote to you on February 26, 1999, we noted a draft "discussion" paper of a "Step-by-step Process for CDM Power Plant Project," which was distributed at the State Department's February 11, 1999, Climate Change Workshop. Under each "step" the paper raised a number of questions under the heading "Issues that arise for further consideration" that in many cases are quite pertinent and that still remain largely unanswered. One question that is not clearly asked is whether the "issues" raised under these steps, including those related to benchmarking, are to be addressed by the COP/MOP, the Board, the operational entities or some combination of all of these authorities. Two of the steps are set forth below as examples:

> Step III: Submit to Operational Entity for Registration:
>
> *CDM Related Requirements:*
> - Project developers provide host government certification [implies "voluntary participation by both Parties"]
> - Project developers prove "real, measurable, and long-term benefits" -- baseline and projected emissions will demonstrate this
> - Project developers demonstrate how project meets "additionality" requirements -- saved emissions should satisfy "additionality" test
>
> *Issues that arise for further consideration:*
> - Who should provide proof of host government approval?
> - What is the nature of verification? Is it pro-forma or is there an evaluation? Does operational entity do verification or authorize third party verification? Are project developers required to submit verification plan?
> - Should there be a requirement for a submission or other environmental implications, such as transboundary effects?
> - Regarding "voluntary participation approved by each Party involved" (section 12.5a of KP), how is this proved? Is host government certification enough or must each government provide such a certification (this could involve more than 2 if a multinational company wanted to divide CERs among more than one Annex

E. Sinks and Confidential Business Information

1. Land-use change and forestry projects

The above discussion of issues of concern is not intended to be exhaustive. There are many more important issues, and it is likely that we and others will raise them before, during and after the 10th sessions of SBSTA and SBI. For example, we think that the words "mitigation of climate change" in Article 12.5(b), which includes sources and sinks, makes eligible land-use change and forestry project activities under the CDM. We would want to discuss this point further if the U.S. delegation has a different view. The State Department's reply of May 4, 1999, to House Science Committee Chairman Sensenbrenner (question 5) assures him that the U.S.

> will continue strongly to support a comprehensive approach to dealing with the threat of climate change, including all gases, their sources and sinks. Our support for a comprehensive approach also extends to the inclusion of sinks in all of the mechanisms under the Kyoto Protocol.

We welcome this statement on sinks.

2. Confidential business information

Another area of concern was addressed in the U.S. AIJ submission of March 3, 1999, on the "Uniform Reporting Format," wherein the U.S. said that it is "essential that project-based activities be conducted in a way that is credible, transparent, and verifiable" and that an "essential element" is a "sound reporting system." We generally agree. However, again the "devil is in the details."

In its AIJ submission the U.S. referred to the Uniform Reporting Format, which the U.S. "found" a "beneficial framework" for AIJ. However, the U.S. said that it "does not contain any time-frames contained" in those decisions. As to Decision 7/CP.4, the pertinent words are "with a view to taking decisions" on "all" mechanisms at COP-6. There is, in fact, no mandate for a firm or final decision, especially if the proposed decision is incomplete or not well-thought out.

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SUBJECT: MEDEA Publication Entitled, *THE ~~KYOTO~~ PROTOCOL: A FRAMEWORK FOR UNDERSTANDING ~~THE MONITORING~~ CHALLENGE*

MEDEA was requested by the Director of Central Intelligence Environmental Center to conduct a classified analysis of the challenge of monitoring Kyoto Protocol to the UN Framework Convention on Climate Change. MEDEA assumed that the US has an interest in detecting significant non-compliance by other nations, and deterring possible outright fraud in any emissions trading regime that could affect US economic interests. The report is scheduled to be released this week. Their most important conclusions are:

- Understanding the challenge of monitoring the Kyoto Protocol must begin by distinguishing between effectiveness and compliance. **Effectiveness** relates to whether the Protocol meets its goal of reducing the growth in actual concentrations of anthropogenic greenhouse gases in the atmosphere. **Compliance** relates to commitments of Parties to reduce their estimated emissions, as determined by agreed methods. This distinction is important because the functioning of the Protocol can partially uncouple effectiveness from compliance. why?

- The most important source of functional complexity in the Protocol is due to the introduction of **net** emissions, and as a result, the need to account for sources and uptakes associated with human-induced land use change and forestry. With the introduction of net emissions, the Protocol ventures into difficult scientific terrain. sinks are very important to us.

- Today, there is not an adequate quantitative understanding of the inaccuracies affecting reported national greenhouse gas emissions, even for fossil fuels, much less for land use change and forestry. There are two types of inaccuracies due to the procedure for estimating national emissions...those related to emissions factors and global warming potentials (GWP), and those related to national activity data (e.g. quantity of coal consumed).

- It should be expected that overall uncertainty in national emissions estimates will be approximately as great as the effects that the Protocol seeks to produce. Separating the inaccuracies in good faith reporting from the effects of possible, deliberate misrepresentation will be a significant challenge of a national monitoring effort. It is likely that the magnitude of inadvertent errors will outweigh all but the most egregious misrepresentations.

- As a consequence of the approach to national emissions estimation taken by the Protocol, there is a significant scientific uncertainty introduced into predicting its actual effectiveness. However, the uncertainties in GWP values have no bearing on determining compliance with national commitments.

- It is important for the US to develop an independent understanding of baseline (1990) emissions for those nations deemed to be most critical to US national interests in regard to the UNFCCC. The 1990 emissions are equally important as the differentiated national fractions contained in the Protocol; however, the Parties have not yet agreed upon the baseline emissions values, and thus not upon the allocated amounts.

- Direct reconstruction of a nation's entire emissions budget using independently acquired data is technically infeasible. More promising will be indirect methods, such as checking the internal consistency of national reports, and spot-checking components of emissions budgets. To make spot-checking feasible, it may be necessary for national reporting to contain geographic detail regarding agriculture and land use change and forestry. A key to successful monitoring and verification will be comprehensive, transparent reporting.