

University of Miami International and Comparative Law Review

Volume 10

Issue 1 *The University of Miami-University of Leipzig Bi-National Conference in Leipzig May 16-20, 2001 UNITED STATES VS. EUROPEAN UNION: TRASATLANTIC DEBATE ON ISSUES CLOSE TO HOME*

Article 8

10-1-2002

The United States's Obligation to Lower Greenhouse Gas Emissions: An American Perspective of the Kyoto Protocol

Kara K. Davis

Follow this and additional works at: <https://repository.law.miami.edu/umiclr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Kara K. Davis, *The United States's Obligation to Lower Greenhouse Gas Emissions: An American Perspective of the Kyoto Protocol*, 10 U. Miami Int'l & Comp. L. Rev. 97 (2001)
Available at: <https://repository.law.miami.edu/umiclr/vol10/iss1/8>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

The United States's Obligation to Lower Greenhouse Gas Emissions: An American Perspective of the Kyoto Protocol

Kara K. Davis*

I. Introduction

The Kyoto Protocol is a tool for the implementation and enforcement of concrete goals in accordance with the aspirational objectives that are set forth in the United Nations Framework Convention on Climate Change.¹ The United States ratified the Framework Convention on Climate Change in 1992,² but has yet to ratify the Kyoto Protocol.³ While the Framework Convention on Climate Change listed several goals to limit the emission of greenhouse gasses, there are no legal mechanisms to enforce such action. The Framework Convention on Climate Change merely sets up a backdrop by which later requirements and legal obligations can both be implemented and monitored. The United States has yet to assent to any legal requirements under the Framework Convention on Climate Change. As a result, the United States is not bound by the Kyoto Protocol. However, the United States may have an obligation under customary international law to take steps to protect the environment in general.

Despite the lack of direct legal obligations on the part of the United States, several commentators have suggested various means to

* (J.D.) University of Miami School of Law, 2002. I would like to thank Professor Richard Williamson for providing me with the background information and the initial starting points that form the basis of this note. Additionally, I would like to thank Bryan Hanes for his patience in reading draft after draft and for always giving me honest, but kind, feedback.

¹ *Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol*, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M.22, 32 (1998) [hereinafter *Kyoto Protocol*]; *United Nations Conference on Environment and Development: Framework Convention on Climate Change*, United Nations Framework Convention on Climate Change, *opened for signature* June 4, 1992, 31 I.L.M. 849, 851 (1992).

² See *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, (last updated November 7, 2000) available at <http://www.unfccc.de/resource/docs/convkp/kpeng.html>.

³ *Expressing Sense of Senate Regarding the U.N. Framework Convention on Climate Change*, 143 CONG. REC. S. 8113-05, S. 8138 (1997).

force the United States to comport with the Kyoto Protocol.⁴ Ultimately, such strategies will fail because the United States does not have any obligation to act in accordance with a treaty it has not ratified. The better tactic may be to pursue novel legal tools to prod the United States into taking additional action to protect the environment instead of requiring strict compliance with the Kyoto Protocol. If the United States does have an obligation under international law, the obligation is under customary international law to protect the environment generally and not specifically against greenhouse gas emissions.

Hasty programs enacted to reduce the level of greenhouse gas emissions, without further study, may create more harm than good. Additionally, if the United States has a duty to protect the environment, it also has a corresponding duty to protect its citizens. Any attempt to meet the European-friendly standards of the Kyoto Protocol would entail drastic measures by the United States that could have the unintended side effects of injuring the environment and the people of our country; the end result being that the United States ends up a failure in both its duties.

As mentioned above, commentators have suggested many innovative theories to obligate the United States to act to reduce greenhouse gas emissions.⁵ One such theory is the Framework Convention on Climate Change.⁶ This theory is inaccurate because the Framework Convention on Climate Change was only intended to be a starting point. In the United Nations' own materials describing the Framework Convention on Climate Change, the United Nations Environment Programme notes that, "It establishes a framework and a process for agreeing to specific actions—later. The diplomats who wrote the Framework Convention on Climate Change saw it as a launching pad

⁴ See generally Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 Am. J. Int'l L. 259, 264-6 (1992) (discussing the usage of customary international law to bind the United States to various treaties) [hereinafter Palmer]; James Gustave Speth, *Bush Sr. Obligated the U.S. to Act on Global Warming*, INTERNATIONAL HERALD TRIBUNE, May 9, 2001, at 9 (arguing the Framework Convention on Climate Change obligates the United States to lower greenhouse gas emissions) [hereinafter Speth]; Patrice Hill, *Provision for Global Warming is Budget Add; Would Direct Bush to Negotiate Treaty*, WASHINGTON TIMES, May 10, 2001, at A1 (postulating that a provision on a State Department budget bill was to pressure President Bush into reconsidering the Kyoto Protocol).

⁵ *Id.*

⁶ Speth, *supra* note 4, at 9.

for potential further action in the future.”⁷ The clear intent of the convention, as expressed by the parties, was not to bind the parties to any specific action, but to take into consideration the possible impact of greenhouse gas emissions when implementing domestic policy. This intent to consider a topic in some unspecified future time does not bind the United States to subsequent treaties that it did not ratify.

It is important to acknowledge that while the Framework Convention on Climate Change does not bind the United States to any particular standards, nor does any unratified treaty, under the Vienna Convention on the Law of Treaties, the United States does have a duty to act in ways that do not directly contradict the spirit of either one.⁸ Until the United States specifically disavows the Kyoto Protocol, it should not act contrary to the spirit of the Protocol. However, unless the United States intends to make pollution a focus of the current administration, it will probably comport with this standard by not actively working against the treaties and continuing its own environmental policies.

II. International Law as Justification for the American Perspective

Proponents of environmental protection have pointed to a handful of cases in international law as precedents that could be utilized as tools to force the United States to lower greenhouse gas emissions.⁹ Specifically, the Trail Smelter Arbitration¹⁰ and the Corfu Channel Case¹¹ are of interest. While the application of these cases to the United States’ efforts to reduce greenhouse gas emissions is instructive, these cases do not apply to this particular situation. Both cases have a stronger causal link between the action on the part of the perpetuating country and the harm felt by the ‘injured’ country. The two cases also have specific, quantifiable injuries felt by the ‘injured’ country as well.

⁷ United Nations Framework Convention on Climate Change, Understanding Climate Change: A BEGINNER’S GUIDE TO THE UN FRAMEWORK CONVENTION, UNEP/WMO Information Unit on Climate Change; Chatelaine, Switzerland: December 1994 [hereinafter Guide].

⁸ Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331.

⁹ Palmer, *supra* note 4, at 265-66.

¹⁰ Trail Smelter (U.S. v. Can.), 3 R. Int’l Arb. Awards 1905 (1938 & 1941) [hereinafter Trail Smelter].

¹¹ Corfu Channel (UK v. Alb.), 1949 I.C.J. Rep. 4 (Judgment of Apr. 9) [hereinafter Corfu].

The Trail Smelter Arbitration involved a specific plant creating a great deal of pollution, separable from general pollution, directly on an international border. The pollution traveled into the State of Washington and had a specific and discernible impact on land around the Columbia River in that state.¹² Any attempt to bring a similar suit against the United States for its failure to reduce greenhouse emissions, based on this case, would be futile to reduce greenhouse emissions because it is impossible to separate the effects of the greenhouse gas emissions of the United States from the greenhouse gas emissions of other countries. In other words, proving that any specific damage was caused solely by the United States, not to mention that an excess of greenhouse gasses caused the damage, would be impossible.

The Trail Smelter Arbitration dealt with specific pollution and a direct causal link resulting from the damages of that pollution. Greenhouse gas emissions come from everywhere. Methane, a gas emitted from cows and during the growing of rice, is a greenhouse gas.¹³ Every nation emits greenhouse gasses. It is therefore impossible to link any injury directly to a specific piece of pollution from the United States. Also, since the exact effects of greenhouse gas emissions are unclear,¹⁴ it is highly unlikely that any country would be able to prove that a specific harm was caused by greenhouse gas emissions themselves and not the vagaries of nature. The Trail Smelter Arbitration is inapplicable to this type of scenario.

The Corfu Channel case is equally inapplicable. In the Corfu Channel case, British Ships hit mines that the Albanian government allowed to be placed in their territorial waters. While the Albanians probably did not place the mines in the water themselves, Albania consented to having the mines placed in their water. This consent made the Albanian government responsible for the damages to the British ships and sailors.¹⁵ Again, this case is dissimilar in its facts from the situation of the United States. There was a very specific action, or lack thereof, on the part of the Albanian government that led to a specific injury to the United Kingdom. Whatever the failings of the United States' environmental policies, any country would be hard pressed to show a specific act on the part of the United States that led to damage to the complaining party.

¹² Trail Smelter, *supra* note 10.

¹³ Guide, *supra* note 7.

¹⁴ Patrick J. Michaels, *Holes in the Greenhouse Effect?* WASHINGTON POST, June 22, 1997, at CO2 [hereinafter Michaels].

¹⁵ Corfu, *supra* note 11.

A stronger argument can be made that the United States has obligated itself to lower greenhouse gas emissions through customary international law. Even though the United States has not specifically obligated itself to the Kyoto Protocol, the prevalence of so many treaties regarding the environment indicates a general acceptance of certain, basic principles to the end of protecting the environment.¹⁶ The current state of international law regarding the emission of greenhouse gasses is not nearly strong enough to amount to a prevailing and accepted practice enforceable through customary international law. Reduction of greenhouse gas emissions engenders a large amount of vocal support as an ecologically sound idea, but there has been more talk than action in the arena of international law.

As noted above, the Framework Convention on Climate Control is merely aspirational and does not attempt to bind any of the parties to any specific action. The Kyoto Protocol, which does attempt to legally bind parties has only eighty-four signatories, and at this time has only been ratified by thirty-three of those signatories.¹⁷ The insignificant number of countries agreeing to specific reduction levels of greenhouse gas emissions does not constitute a practice with such a high level of general acceptance that all other countries are obliged to adopt or follow the practice.

However, many countries, including the United States, have been involved in several treaties regarding the environment. Among the major international environmental agreements are treaties on air pollution, climate change, desertification, endangered species, marine life conservation, ozone layer protection, and many others.¹⁸ Many countries have adopted these environmental treaties. These treaties have become widespread since more people now understand the environmental effects of pollution. The combination of all these treaties together may indicate that there is a general international obligation to protect the total environment, if not against greenhouse gas emissions

¹⁶ Palmer, *supra* note 4, at 270-78.

¹⁷ *Id.*

¹⁸ See, e.g., *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere*, Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193; *Montreal Protocol on Substances that Deplete the Ozone Layer*, March 23, 1997, 32 I.L.M. 874; *Agreement of Cooperation Regarding Pollution of the Marine Environment by Discharge of Hydrocarbons and other Hazardous Substances*, March 30, 1981, U.S.-Mexico, 32 U.S.T. 5899, 1241 U.N.T.S. 225 (a sampling of international environmental agreements on endangered species, the ozone layer and marine life conservation).

specifically. If there is a set of standards strong enough to constitute customary international law, then that set is focused on the protection of the environment *generally*.

Furthermore, there is a growing number of international law experts who believe a country may be held responsible for its lawful activities that create transboundary harm under the theory that a sovereign nation should exercise its rights in a way that does not interfere with any other nation's rights.¹⁹ This is especially true in the case of environmental disasters, such as the Chernobyl incident.²⁰ Some nations have demonstrated an acceptance of the view, at least to some degree, as seen in the adoption of the Basel Convention. The Basel Convention disallows, at the very least, the importation/exportation of environmentally harmful waste between countries.²¹ However, this doctrine has usually been discussed in terms of discrete incidents that have harm separable from the aggregate of all other sources.²² Again, this might indicate that the United States has more of a general duty to protect the environment as a whole and not specifically against greenhouse gas emissions. In addition, the harm of environmental waste is so discrete that it can be tracked up to a certain point. However, while we know what harm greenhouse gasses *may* cause, we have no way to prove that any specific activity is the result of greenhouse gas emissions. Finally, up to this point, this theory has not been applied to general domestic practices regarding pollution, but it could become a source of future problems for the United States. As technology improves, so will

¹⁹See generally, Daniel Barstow Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability"*, 80 AM. J. INT'L L. 305 (1986) [hereinafter Magraw]; Corfu Channel Case (UK v. Alb.), 1949 I.C.J. Rep. 4 (Judgment of Apr 9); Trail Smelter (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (1938 & 1941); Nuclear Tests (N.Z. v. Fr.) 1974 I.C.J. Rep. 253 and 257 (Judgment of Dec.20); Nuclear Tests (Austl. v. Fr.) 1973 U.C.J. Rep. 99 and 135 (Interim Protection Order of June 22).

²⁰CHERNOBYL: LAW AND COMMUNICATION. TRANSBOUNDARY NUCLEAR AIR POLLUTION: THE LEGAL MATERIALS, Phillippe Sands, ed., Grotius Publications Ltd, 1998 (exploring the obligation to inform other countries about internal disasters with extraterritorial impact as well as the possible obligation to repair damage from such acts).

²¹United Nations Environment Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes: Final Act and Text of Basel Convention, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, art. 4, 28 I.L.M. 649, 661-63 (1989).

²²Magraw, *supra* note 19, at 305.

the ability to allocate the harm caused by specific gas emissions. These different legal theories concerning transboundary harm, duties under customary international law to protect the environment, and other theories could combine to find the United States liable for harm to other countries if the United States government does not do something substantial to lower emissions.

III. Defending the U.S. Position

Meanwhile, the United States has not ignored either the problems with greenhouse gases or the environment. While the United States might not be as active in reducing greenhouse gas emissions as some might wish, the United States has consistently implemented policies to protect the environment. Often, the United States takes these steps before any other countries. The United States has a long list of environmental regulations such as the Clean Air and Water Acts. Furthermore, Congress is currently considering several bills whose goals are to decrease energy consumption and therefore decrease greenhouse gas emissions. These bills include the CLEAR Act introduced by Senator Hatch, which would give tax deductions for vehicles that use both gas and electricity.²³ Also being considered are tax incentives for more energy efficient office buildings and homes.²⁴ These bills should be viewed with respect to the strong history in the United States of business and governmental alliances in problem solving.

Recently, Ford Motor Company announced plans to voluntarily work toward better fuel consumption rates in its vehicles, particularly sports utility vehicles. Ford also acknowledged that emissions from cars are a large factor in the greenhouse effect.²⁵ This is a good first step toward encouraging car companies to work toward solutions to protect the environment. Ford Motor Company's plans also demonstrate that the government's practice of combining laws with actions in the private sector work well together. Perhaps the government is using its position to

²³ Clean Efficient Automobiles Resulting from Advanced Car Technologies (CLEAR) Act, S. 760, 107th Cong. (2001).

²⁴ National Energy Security Act, S. 389, 107th Cong. (2001); Energy Security and Tax Incentive Policy Act, S. 596, 107th Cong. (2001); Amendment to the Internal Revenue Code of 1986 to produce incentives to introduce new technologies to reduce energy consumption in buildings, S. 207, 107th Cong. (2001).

²⁵ Jeffery Ball, *Warming Trend: Auto Makers Juggle Substance and Style in New Green Policies*, WALL ST. J., May 15, 2001, at A1.

influence private industries to behave in an environmentally responsible manner without implementing specific legislation. The United States has in the past and will continue to take action to protect the environment, even if that action does not fall within the specific framework of the Kyoto Protocol.

Even if the United States were to implement the Kyoto Protocol, it would face specific challenges in implementing the goals of the Protocol that other nations would not face, particularly with the energy shortages of the United States. These constraints are even more apparent when comparing the aims of the Kyoto Protocol against the goal of protecting the environment generally. The United States has been facing energy shortages which have wreaked economic havoc in various parts of the country. Obviously, only so much reduction can be done at once. Any attempt to reduce greenhouse gas emissions very quickly and drastically would necessarily include an increase in energy production from sources that, while not emitting greenhouse gasses, may not be the best solution for the environment.

Recently, Vice President Cheney discussed various energy options for the United States.²⁶ Among these alternative energy sources was nuclear power. The United States could generate more power through nuclear or hydroelectric sources. However, each of these energy sources has its own negative environmental impact.²⁷ The disposal of nuclear waste would be a threat to the environment. Hydroelectric power is 'clean,' meaning that hydroelectric power does not create or emit greenhouse gasses. Yet, the dams that manufacture the power damages the ecosystems of the rivers upon which the dams are built, not the air.²⁸

While the United States would face these extreme hardships in implementing the Kyoto Protocol, European countries would not face the same problems. The European countries that have been urging the ratification of the Kyoto Protocol are much more compact than the United States and therefore have different energy needs. For instance, Germany is slightly smaller than the state of Montana and the United Kingdom is slightly smaller than the state of Oregon. The total land area of Western Europe is approximately half the size of America.²⁹ The smaller size of these countries makes centralized transportation more

²⁶ Jim VendeHei, *Bush's Energy Plan to Rely Mostly on Efforts of Public Industry*, WALL ST. J., May 14, 2001, at A20 [hereinafter VendeHei].

²⁷ *Id.*

²⁸ Michael Gardner, *Hydroelectric Supply Ebbs at a Bad Time*, SAN DIEGO UNION TRIB., Sept. 24, 2000, at A1.

²⁹ CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK, 2000.

practicable. Furthermore, the regular travel distances for things such as work commutes are much shorter in these smaller countries than in the United States. With the greater ability to create centralized mass transit systems and less need for long distance travel within the country, European countries are in a much better position to decrease fuel consumption and therefore decrease greenhouse gas emissions than the United States.

The United States also tends to have hotter summers and colder winters than most European countries.³⁰ This climate differential means that Americans spend more energy heating their houses in the winter and cooling their houses in the summer than their European counterparts. Because of the energy demands unique to the United States, the emphasis on environmental concerns is not so much on an immediate reduction of emissions through the lack of energy consumption but rather exploring ways to become more energy efficient. Again, this is an ideal place for the private sector to implement changes more effectively than the government.

Vice President Cheney has stated that President Bush plans to advocate an increase in national spending on research and development for energy efficiency.³¹ Over the past two decades, research and development projects on energy efficiency in the United States has, according to the Department of Energy, saved the nation over \$30 billion in energy costs.³² The current plans to continue contributing to the research and development of more energy efficient projects reflect the United States' commitment toward protecting the environment through long-term sustainable development and through following proven methods that have worked for the government in the past.

Since there is, arguably, a duty to protect the environment, the United States also has a duty to ensure that any standards undertaken to reduce greenhouse gas emissions do not exacerbate some other environmental problem. Ten years ago, a main concern of the international community was the depletion of the ozone layer,

³⁰ *Id.*

³¹ VendeHei, *supra* note 26, at A20.

³² *Hearing on Energy Realities: Rates of Consumption, Energy Reserves and Future Options: Before the Comm. on Science, Energy Subcomm. of Consumption, Energy Reserves and Future Options*, Cong. Testimony (May 3, 2001) (testimony of Howard Geller, Former Executive Director of the American Council for an Energy-Efficient Economy (ACEEE)).

culminating in a couple of treaties for protection of the ozone layer.³³ One of the leading causes of ozone layer depletion was the use of chlorofluorocarbons. The United States was one of the first countries to identify the problem of ozone layer depletion and also one of the first countries to develop alternative resources to replace chlorofluorocarbons. However, by implementing legislation banning the use of certain chlorofluorocarbons, the United States government unwittingly led to an increase of greenhouse gas emissions in the usage of new products bought to replace the banned ones.³⁴ Any attempt to focus on the problem of greenhouse gas emissions alone, without further understanding and developing the options, could lead to another solution that is just as harmful as the problem. This also raises the possibility that next time the harm will be without any apparent solutions.

IV. The Kyoto Protocol: A Utopian Solution to a Complex Problem

In addition to the obstacles the United States faces in implementing the Kyoto Protocol, it should be recognized that the Kyoto Protocol is not necessarily a perfect solution to the problem of greenhouse gas emissions. If the United States were to ratify the Kyoto Protocol, some very serious flaws in the Protocol would need to be corrected first. The Kyoto Protocol undervalues the contribution of the private sector to the solution of greenhouse gas emissions problems. The Protocol specifically allows for cooperation between countries in certain instances but not businesses. Currently, countries are able to work out emissions trading schemes between themselves. The result is that if one country is able to lower its emissions below its target, then that country may trade or sell the excess reduction to another country that cannot meet its emissions target.³⁵ However, there are no provisions for projects taken on with the private sector or emissions trading between private companies. Historically, the United States' strength in protecting the environment has been a highly successful cooperation between the public and private sector.

³³ Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541; Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 26 I.L.M. 1529.

³⁴ Claire Breidenich, Daniel Magraw, Anne Rowley, and James W. Rubin, *The Kyoto Protocol to the United Nation Framework Convention on Climate Change*, 92 Am. J. Int'l L. 315, 321-2 (1998) [hereinafter Breidenich].

³⁵ Kyoto Protocol, *supra* note 1, at 34.

One of the main issues the United States government has consistently had with implementing the Protocol is the lack of requirements put on developing nations. The Kyoto Protocol puts no requirements on the developing countries.³⁶ Many experts have forecasted the greenhouse gas emissions from developing countries to explode in the next twenty years, eventually surpassing the emission levels of the United States.³⁷ The Kyoto Protocol has recognized that the development of poorer countries may be impeded by restrictions on greenhouse gas emissions. However, countries like the United States have already made the mistake of developing without concern for the environment. Rectifying problems after they have already been created is more difficult than avoiding the problems in the first place.

If the developing countries, with the help of already developed countries, can be encouraged to grow using energy sources that are not as harmful it will benefit all people. Emerging economies need to develop technology so that undeveloped countries do not make the same mistakes as the United States and Europe. Additionally, if provisions for crediting countries with reduction of emissions through work in developing countries were in the Protocol, the developing countries would benefit from cheaper energy sources produced at no cost to them.

The Kyoto Protocol also undervalues those contributions that the United States has already made to the protection of the environment. For instance, the United States has traditionally done very well at creating and maintaining forested areas of the country in order to prevent or alleviate environmental air pollution. These forested areas, or sinks as they are called, are provided for in the Kyoto Protocol. There are provisions in the Protocol that specify rewards and penalties solely for actions regarding forestation that are taken, but only actions after 1990.³⁸ The United States, which has been carefully maintaining the forested areas of the country for much longer than the last ten years, is effectively penalized. Countries with rampant deforestation may reap the benefits of the provisions for sinks by simply stopping or slowing that deforestation. The United States does not receive proper credit toward greenhouse gas emissions for having those sinks already in place.

Another dispute that arose over the sink provisions is the lack of a mechanism to ensure that the sinks, which process carbon dioxide, are properly taken into consideration when calculating the level of

³⁶ Kyoto Protocol, *supra* note 1, at 37-8.

³⁷ Energy Information Administration (EIA), *Informational Energy Outlook* (Washington, D.C. 2001).

³⁸ Kyoto Protocol, *supra* note 1, at 33-34.

greenhouse gas emissions from that country. Each country is allowed to take into consideration the sinks located within the country and the impact they may have on the overall level of emissions.³⁹ Each country has a different way of calculating this effect. This leads to different results when evaluating the effectiveness of a particular country's emission reduction efforts.

Despite the problems with the Kyoto Protocol and its Eurocentric outlook, the majority of attention regarding the Protocol has been on the status of ratification of the protocol in the United States. The United States should not be singled out for its greenhouse gas emissions. Other countries appear to be using the United States as a distraction technique to avoid addressing their own problems. Any obligation that the United States has under customary international law to generally protect the environment is applicable to other nations as well. Other nations that criticize the United States for its greenhouse gas emissions have taken actions or created programs that are also harmful to the world environment. For instance, Australia is the world's worst per capita emitter of greenhouse gasses. Australia emits two percent of the world's greenhouse gasses, but only accounts for about one percent of the world's economic activity. Currently, Australia is stating that they will not join the Protocol unless the United States ratifies the Protocol.⁴⁰ This seems like a jaded attempt to deflect criticism from Australia about its own lack of responsiveness to environmental issues or at least this particular issue.

Australia is not the only country that appears to be saying one thing while doing another. Ireland has not only failed to meet its targets for emission reduction, it has actually increased emissions levels. The government in Ireland claims that up to this point it has been impossible for the government to separate the economic effects of the reduction programs from the environmental effects. However, none of the programs the Irish government has been discussing as a solution to the problem have been implemented at this time. The government has failed to implement any of the suggested programs.⁴¹

France and Germany have been relatively successful at reducing the emission of greenhouse gases in their countries. France is the world's

³⁹ Briedenich, *supra* note 34, at 322.

⁴⁰ Deutsche Presse-Agentur, *Australia Says Kyoto Protocol is Dead*, Apr. 15, 2001 [hereinafter *Deutsche*].

⁴¹ Frank Mac Donald, *Ireland Fails to Meet Greenhouse Gas Targets, Figures Reflect Inability to Decouple Emissions from Economic Growth*, *IRISH TIMES*, May 8, 2001, at Home News at 5.

leading per capita producer of nuclear energy.⁴² This type of energy may not emit greenhouse gases, but is it necessary to point out the environmental hazards that nuclear waste may pose? Germany also has been successful at reducing greenhouse gas emissions below the 1990 level. However, in 1990, Germany was divided into two countries and East Germany contained many old, communist factories that were putting out a lot of pollution.⁴³ For today's unified Germany to meet these standards, when those factories no longer exist, is not as difficult as for other countries struggling to meet the same standards. In fact, Germany's total carbon dioxide emissions dropped by over 20 million metric tons (or almost 10%) between 1990 and 1991.⁴⁴ Effectively, Germany would have to increase its greenhouse emissions to meet its old 1990 standards.

Every nation and every person has a duty to protect the environment. The United States is working toward legislation and goals that are the best possible solution for the country. However, other countries seem to be using the United States as an excuse for not living up to their obligations. Countries such as Australia are stating they will not even attempt to ratify the Protocol if the United States does not ratify the Protocol.⁴⁵ This is unfortunate because every country's responsibility to protect the environment exists independent of any obligation on the part of the United States.⁴⁶

The current administration in the United States has an obligation to consider not only the future, but the present as well. The people of the United States are facing a severe energy shortage. California has suffered rolling blackouts periodically since January. Analysts are warning that further blackouts could occur during the summer and winter, extending to the Pacific Northwest, New York and New England.⁴⁷ In the Northwest, factories in small towns shut down to sell their electricity.

⁴² Energy Information Administration, *Country Analysis Brief: France* (last modified Dec. 13, 2000), available at <http://www.eia.doe.gov/emeu/international/total.html>.

⁴³ Energy Information Administration, *Country Analysis Brief: Germany* (last modified Nov. 9, 2000), available at <http://www.eia.doe.gov/emeu/cabs/germany.html>.

⁴⁴ Energy Information Administration, *International Total Primary Energy and Related Information* (last visited July 31, 2001) available at <http://www.eia.doe.gov/emeu/international/total/html>.

⁴⁵ Deutshe, *supra* note 40.

⁴⁶ Breidenich, *supra* note 34, at 322.

⁴⁷ Hal Berton, *NW Winter Blackouts Feared, Drought Darkens Long Range Forecast*, SEATTLE TIMES, May 16 2001, at A1.

The energy problem has a profound economic effect in these geographic areas. The United States needs to protect people in these areas. Reducing the amount of energy produced and consumed in the United States would decrease the amounts of greenhouse gases being emitted in the United States. The amount of energy that is available right now for consumption in the United States is not enough. Immediate reduction of consumption is also inadequate. The levels of greenhouse gases being emitted, while the nation is unable to produce enough energy to prevent blackouts, is already well above the limits of the Kyoto Protocol. Immediate reduction below even the current crisis levels is not feasible. Like Ireland, the United States has not been able to separate the two factors of the environment and the economy as of yet and is not willing to sacrifice the economic well-being of the population.

The drawback to the current administration's approach is that a free market economy may not act to protect the environment. The future effects of greenhouse gasses are so uncertain and so far in the future that it may not be economically feasible for the private sector to worry about climate change. This is especially true when combined with the years of dire warnings that have not come to pass as predicted.⁴⁸

V. Conclusion

The United States is not bound to any specific action to lower greenhouse gas emissions. Any legal obligation on the part of the United States is a general obligation to protect all aspects of the environment. Lack of specific legal obligations notwithstanding, it is to the benefit of all nations to take steps toward improving the environment and reducing greenhouse gas emissions. The United States does need improvement in this area. Strident complaints and criticisms of the United States environmental policy by concerned nations in such an obviously one-sided fashion may have the unintended effect of cementing the government's position and making compromise or reconciliation more difficult.

Unfortunately, what is often overlooked in the sea of criticism regarding the United States' international environmental policies is that the United States has continued to focus on the environment. The United

⁴⁸ See generally Michaels, *supra* note 14 (arguing that environmental predictions have been vastly exaggerated and repeatedly proven wrong in the past).

States is a leading source of knowledge about and advancement of the environmental sciences. Currently, the United States is pursuing several different avenues to protect the environment. Any perceived weakness in American solutions toward environmental policies is being exploited to overlook and excuse weaknesses in other countries' policies.

The best solution is to keep creating treaties and protocols that address environmental issues. With the incremental acceptance of the severity of environmental problems comes the international obligation to correct those problems. A strong belief in the importance of these standards needs to be imparted to all the countries of the world. Once this is done, the force of customary international law may be used to leverage recalcitrant countries into compliance.

