

# A Stop on the Road to Copenhagen: Implications of a U.S. Climate Bill

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# A STOP ON THE ROAD TO COPENHAGEN:

## IMPLICATIONS OF A U.S. CLIMATE BILL

by Lisa Novins\*

### INTRODUCTION

As the world prepares for the December 2009 UN Climate Change Conference in Copenhagen, Parties are far from focused on any singular issue that will make or break the negotiations over a successor agreement to the Kyoto Protocol. The U.S. role in international talks has been a topic of discussion for many years and the Obama administration's reengagement on the issue has been an important development both domestically and internationally.<sup>1</sup> The fate of the recently released discussion draft on domestic climate legislation will certainly have an ongoing impact on negotiations taking place in preparation for Copenhagen.<sup>2</sup> The discussion draft incorporates a number of provisions that may impact U.S. positioning in the coming months. Of particular note are the international clean technology and international adaptation provisions which are important because: (1) they reflect the principle of common but differentiated responsibilities that is essential to the existing international climate framework and (2) they are considered essential to balancing the continuing needs of developed countries with the growth and development of emerging economies.<sup>3</sup> Together these two provisions offer a unique preview of the U.S. position on important issues as well as some insight into the U.S. posture on the governance structure of the UN Framework Convention on Climate Change ("UNFCCC"), the Kyoto Protocol, and the international climate discourse generally.

### AN EMERGING PARADIGM FOR THE UNITED STATES IN POST-2012 CLIMATE NEGOTIATIONS

On March 31, 2009, U.S. House Energy and Commerce Committee Chairman Henry Waxman and Energy and Environment Subcommittee Chairman Edward Markey released a discussion draft of the American Clean Energy and Security Act, frequently referred to as the U.S. climate bill.<sup>4</sup> They touted the bill as "clean energy legislation that will create jobs, help end

our dangerous dependence on foreign oil, and combat global warming."<sup>5</sup> Although the draft legislation may offer less concrete technology investment than previous climate bills or than the Obama administration has advocated,<sup>6</sup> it is real a starting point for constructive U.S. engagement in both domestic and international climate debates.<sup>7</sup>

In its 648 pages, the proposed bill includes two provisions which can provide insight into the U.S. position on the international deployment of climate mitigation and adaptation technologies during post-Kyoto negotiations.<sup>8</sup> First, the Exporting Clean

Technology subtitle creates the International Clean Technology Fund ("ICTF") which acknowledges the importance of clean technology export for combating climate change. It provides "assistance to encourage widespread deployment, in developing countries, of technologies that reduce greenhouse gas emissions"<sup>9</sup> by funding projects that "achieve substantial reductions in greenhouse gas emissions through deployment of low- or zero-carbon technologies."<sup>10</sup>

Second, the Adapting to Climate Change subtitle includes an International Climate Change Adaptation Program ("ICCAP"). The ICCAP encourages and facilitates the "deployment of technologies that would help the most vulnerable developing

countries respond to the destabilizing impacts of climate change and encourage the identification and adoption of appropriate renewable and efficient energy technologies that are beneficial in increasing community-level resilience to the impacts of global climate change in those countries."<sup>11</sup>

The requirements and objectives of the Clean Technology Fund and the Climate Adaptation Program shed some light on the potential U.S. position in the upcoming post-2012 negotiations which will likely include extensive discussion of international

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adaptation, mitigation, and technology transfer. In this context, it is informative to consider the impacts of the discussion draft's basic framework in terms of the existing UNFCCC governance structure and financial additionality requirements. This, in turn, may provide some insight into the discussion draft's implicit statement on the successes and failures of the expiring Kyoto Protocol.

#### EXPLORING THE CLIMATE BILL: EXPORTING CLEAN TECHNOLOGY

The text of the discussion draft outlines the ICTF's establishment, governance, country eligibility, funding, and reporting requirements.<sup>12</sup> It would be administered by an interagency group including: the Secretary of State as chairperson, the Secretaries of Energy and the Treasury, the Administrator of the Environmental Protection Agency, and any other agency head or executive branch appointee that the President designates (the "interagency group").<sup>13</sup> Any project receiving money from the ICTF must serve an identified purpose, be in an eligible country, meet certain criteria, and funds must be distributed through a specific mechanism. Depending on the fund distribution mechanism, the reporting and approval requirements are slightly different in form if not in function.<sup>14</sup>

As noted, the Fund's purpose is to encourage widespread deployment of GHG reducing technologies and assist that effort in a way that encourages countries to adopt their own measures to reduce emissions.<sup>15</sup> Any funded project should "achieve substantial reductions in greenhouse gas emissions through the deployment of low- or zero-carbon technologies" and must be included in one of several categories.<sup>16</sup> Those categories include: deploying carbon capture and sequestration technologies, deploying renewable electricity generation technologies, achieving increases in energy efficiency, or reducing transit sector emissions.<sup>17</sup> The interagency group would develop project selection criteria that both achieve these goals and include certain required and preferred components.<sup>18</sup> See Figure 1.

Any country eligible to receive assistance from the Fund would first have to be identified as a developing country by the

World Bank.<sup>19</sup> It must then be included on a list of countries established by the President no later than January 1, 2012 based on criteria including that the country "has signed and ratified an international treaty or agreement that requires [it] to undertake nationally appropriate [GHG] mitigation activities [and] . . . has undertaken nationally appropriate mitigation activities that will achieve substantial reductions in [GHG] emissions, relative to business-as-usual levels, in a measurable, reportable, and verifiable manner."<sup>20</sup>

To achieve these goals, funding would be distributed by any one or a combination of the following three mechanisms:

- Direct assistance;
- Agreements with the World Bank, multilateral development banks ("MDBs"), or international development institutions; and/or
- A UNFCCC fund or agreement negotiated under the Convention.<sup>21</sup>

If distributed directly, the Secretary of State would be authorized to select projects and provide funding for eligible countries in the form of grants, loans, or other aid.<sup>22</sup> However, for funding distributed either through a MDB or UNFCCC fund, a mechanism would be established that would apply and enforce the ICTF's requirements including selection criteria.<sup>23</sup> Regardless of who approves and funds the project, rigorous reporting requirements would begin with an initial report no later than March 1, 2012.<sup>24</sup> Finally, it appears that the Secretary of State would have the ability to unilaterally suspend funding for any project—funded by a domestic or international fund—through a yet to be determined process.<sup>25</sup>

#### EXPLORING THE CLIMATE BILL: INTERNATIONAL CLIMATE CHANGE ADAPTATION

The International Climate Change Adaptation Program is clearly written with a different purpose than the International Clean Technology Fund. Aside from the obvious distinctions between funding clean technology and adaptation programs, the underlying findings and purposes of the sections explicitly touch on different objectives and needs. The Adaptation Program is based on two general findings: (1) that the most vulnerable

Criteria for Project Selection: Clean Technology Fund	
Required Criteria	Preferred Criteria
substantial, measurable, reportable, verifiable reductions in GHG emissions relative to business as usual	maximize GHG emissions per dollar of assistance
no significant adverse effects on human health, safety, or welfare, the environment, or natural resources	promise to achieve large-scale GHG reductions at the sectoral or cross-sectoral level
the project owner/operator has demonstrated capacity to implement and maintain any technologies purchased or installed	have the potential to catalyze a shift within the host country towards widespread deployment of low- or zero-carbon energy technologies
the project will not cause any net loss of U.S. jobs or displacement of U.S. production	
the project meets other requirements of the interagency group	
the project will be co-financed by the host country government, private sector institutions, or a MBD	

Figure 1. Criteria for CTF Project Selection.

developing countries will likely be the hardest hit by the impacts of climate change and (2) instability caused by these disproportionate impacts could potentially be a threat multiplier for global instability.<sup>26</sup>

More explicitly, the ICCAP finds that the most vulnerable developing countries, with their lack of resource capacity to adapt, may experience extreme increases in poverty and social and economic destabilization.<sup>27</sup> Consequently, it is in the national security, economic, and environmental interests of the United States<sup>28</sup> to assist these countries in developing resilience to impacts on “water availability, agricultural productivity, flood risk, coastal resources, timing of seasons, biodiversity, economic livelihoods, health and diseases, and human migration.”<sup>29</sup> Furthermore, it is a U.S. obligation under the UNFCCC to provide funding that is “predictable, sustainable, and additional to international agreed levels of overseas development assistance” to aid in the cost of adaptation.<sup>30</sup>

Under the direction of the Administrator of the U.S. Agency for International Development (“USAID”)<sup>31</sup> the Adaptation Program would have two primary functions. One would be to engage in research and fund aid programs with the goal of carrying out adaptation programs in the most vulnerable developing countries.<sup>32</sup> The second would be to mandate community engagement through full disclosure of information, public participation, a locally tailored consultation process, and, to the extent practicable, alignment with the recipient country’s broader development, poverty alleviation, and natural resource management objectives.<sup>33</sup> In executing these functions, the program would establish fairly substantial and immediate reporting requirements.<sup>34</sup>

Interestingly, these reporting requirements would apply not only to monies directly distributed by USAID but also to assistance through international adaptation funds<sup>35</sup> “created pursuant to the [UNFCCC] . . . or an agreement negotiated under the Convention.”<sup>36</sup> Any project eligibility requirements would also apply to a hypothetical UNFCCC fund. In order to comply, any fund would be required to:

- Specify the terms and conditions under which the United States is to provide monies to the fund and under which the fund will disburse monies to recipient countries;
- Ensure that U.S. assistance to the fund and the fund’s principal and income are disbursed only for purposes adhering to those specified in the Adaptation Program;
- Require a regular meeting of the fund’s governing body that includes representation from the most vulnerable developing countries and provides full public access;
- Require that local communities and indigenous peoples in areas where activities or programs are planned are engaged through full disclosure of information, public participation, and consultation;
- Spend not more than ten percent of the amounts available to the fund in any single country in any year; and
- Require the international fund to prepare and make public an annual report adhering to specific requirements.<sup>37</sup>

Examining the ICTF and ICCAP provides insight into pre-Copenhagen U.S. positioning not only by simply highlighting

priorities but also through an evaluation of the implicit criticisms of the existing framework’s governance structure and Party participation. Whether or not a climate agreement moves forward this year, a frequent theme is present throughout both sections of the discussion draft: preparation for participation in a UNFCCC post-2012 climate negotiation and agreement.<sup>38</sup>

## EXISTING INTERNATIONAL FRAMEWORK: UNFCCC & THE KYOTO PROTOCOL

The UNFCCC creates “an institutional framework for the progressive development of the [climate] regime through protocols or amendments.”<sup>39</sup> The UNFCCC’s Kyoto Protocol, which sets emission reduction targets for developed country Parties,<sup>40</sup> expires in 2012. It has faced criticisms of its substance, enforceability, and the impact of its key market and its flexibility mechanisms, which include emissions trading, the Clean Development Mechanism, and Joint Implementation.<sup>41</sup>

The UNFCCC “sets an overall framework for intergovernmental efforts to tackle the challenge posed by climate change.”<sup>42</sup> Its objective is to stabilize GHG “concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”<sup>43</sup> In order to achieve this objective, Parties should protect the climate system “on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.”<sup>44</sup> The concept of equitable, global protection is reflected in the allocation of Parties’ voting rights. Unlike many other international instruments or funding mechanisms, the UNFCCC gives each Party to the Convention one vote—regardless of population or financial status.<sup>45</sup>

Consistent with the concept of common but differentiated responsibilities, the UNFCCC requires developed country Parties to “provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations.”<sup>46</sup> This financial additionality requirement should lead to increased support for technology development, transfer, and deployment from developed to developing countries.<sup>47</sup> In fact, many developing countries expect that developed country Parties will increase their funding because of the “moral and practical claim that [they] bear a much larger share of the responsibility for historical and current greenhouse emissions, and have greater financial and technical resources.”<sup>48</sup>

The Kyoto Protocol also allocates one vote to each Party<sup>49</sup> and requires “new and additional financial resources to meet the agreed costs incurred by developing country Parties.”<sup>50</sup> However, Kyoto goes significantly beyond the UNFCCC by creating quantified emissions reductions. It creates mechanisms to achieve these goals, particularly the Clean Development Mechanism (“CDM”), which is informative in this discussion since it represents a significant facet of the existing UNFCCC structure for expansion of clean technologies in developing countries.<sup>51</sup>

The CDM allows projects in developing countries to earn emission reductions credits that can then be traded in a carbon market.<sup>52</sup> It also creates an alternative mechanism for developed countries to meet their obligations without directly reducing their

own emissions, which is arguably more economically efficient. Theoretically, this dual goal helps developed countries meet their GHG emission reduction targets while stimulating sustainable development and emission reductions in developing countries.<sup>53</sup> However, the relationship between CDM projects and sustainable development is frequently the subject of debate:<sup>54</sup> does the CDM help developing countries achieve sustainable development or does it help developed countries create low-cost emission reduction credits?<sup>55</sup> Criticisms have ranged from the actual impact of offsets to the cost of reductions, and from local environmental integrity and community involvement to the CDM's long term viability as a mechanism to promote sustainable development.<sup>56</sup> As the prelude to Copenhagen continues, developing countries are calling for more effective technology transfer than the CDM has yet achieved.<sup>57</sup>

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*Clean technology transfer and climate adaptation are among the most important topics to be discussed in upcoming UNFCCC negotiations.*

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**THE PROPOSED U.S. CLEAN TECHNOLOGY FUND & INTERNATIONAL CLIMATE CHANGE ADAPTATION PLAN: INTERNATIONAL LEGAL IMPLICATIONS**

Clearly, the ICTF language was crafted considering the expiration of Kyoto. "Not later than January 1, 2012, and annually thereafter, the President shall determine and publish a list of countries eligible for assistance."<sup>58</sup> It goes on to require that an eligible country must have "signed and ratified an international treaty or agreement"<sup>59</sup> and explicitly authorizes distribution of assistance through a fund created pursuant to the UNFCCC or agreement negotiated under the Convention.<sup>60</sup> The Adaptation Fund was also drafted with the existing international climate structure in mind. It requires that 40–60% of its funding be distributed through an international fund created under the UNFCCC or agreement pursuant to the Convention.<sup>61</sup> Furthermore, it notes that under the United States' UNFCCC obligations, funding for adaptation programs must be predictable, sustainable, and additional to existing overseas development aid.<sup>62</sup>

**THE INTERNATIONAL CLEAN TECHNOLOGY FUND**

The ICTF presents several issues when considering how it might fit into a UNFCCC framework. First and foremost, since the UNFCCC, Kyoto Protocol, and CDM all have additionality requirements,<sup>63</sup> which is an extremely important point for developing country Parties, it is safe to assume that a similar requirement will be included in any future agreement.<sup>64</sup> However, the ICTF includes no financial additionality language. This is particularly significant since the ICCAP includes explicit reference to the UNFCCC additionality requirement.<sup>65</sup> The difference may imply that it was intentionally excluded from the ICTF subtitle. Further, the absence of additionality language leaves some ambiguity as to whether or how it could fulfill any additionality requirements in a future protocol. Although it is clearly

new funding today, it may be difficult to differentiate it from existing overseas development aid, which is ineligible to fulfill the UNFCCC's "new and additional" requirement.<sup>66</sup>

The ICTF could also create potential conflicts in terms of non-financial requirements and governance mechanisms. For example, regardless of how or where monies are distributed, all projects must conform to the Fund's extensive selection criteria and reporting requirements.<sup>67</sup>

Thus, if funds are to be distributed through an agreement to be negotiated under the UNFCCC there would be two options for compliance. First, the agreement would have to incorporate the explicit requirements included in the U.S. legislation. Or second, the agreement would have to incorporate a mechanism by which Parties could specifically approve and enforce unique, individual requirements. On top of the obligation to comply with U.S. requirements, the discussion draft incorporates a component

which may preclude any ICTF-funded project from incorporation into an international fund: it appears to give the U.S. Secretary of State the authority to unilaterally suspend or terminate assistance if a facet of a project does not operate in compliance with its original approval.<sup>68</sup> Not only does this appear to be an impracticable demand to incorporate, but it also conflicts with the UNFCCC's themes of equity and the concepts of fostering sustainable development as defined by the host-country and encouraging local control of internationally financed projects.

Finally, the ICTF's requirements for identifying eligible countries could decrease the feasibility of distributing funds through an international mechanism. It defines eligible country as a developing country that has already taken measures towards considerable overall improvements and mitigation activities "that will achieve substantial reductions [in GHG emissions]. . . relative to business-as-usual levels."<sup>69</sup> While this may make environmental sense, it does not reflect the standards under which the UNFCCC, Kyoto Protocol, or CDM programs should operate.<sup>70</sup> The Convention does not explicitly include guidance regarding the contributions of developing countries to technology development,<sup>71</sup> but the recent Bali Action Plan recognizes the importance of developed countries' role in assisting developing countries with technology finance and "taking into account social and economic conditions [of a developing country] and other relevant factors."<sup>72</sup> Inflexibly requiring a developing country to "prove itself" before becoming eligible for funding does not reflect a program created on the "basis of equity and in accordance with . . . common but differentiated responsibilities and respective capabilities."<sup>73</sup>

**THE INTERNATIONAL CLIMATE CHANGE ADAPTATION PLAN**

The ICCAP is more explicitly written to reflect current UNFCCC and future protocol obligations. It includes specific reference to

## THE PROPOSED U.S. CLEAN TECHNOLOGY FUND & CLIMATE CHANGE ADAPTATION PLAN: INTERNATIONAL POLICY IMPLICATIONS

UNFCCC additionality requirements and requires a percentage of assistance to go through a hypothetical UNFCCC or future protocol fund. It does not include, however, specific language explaining how or when its funding should be considered new and additional. The inclusion of language in domestic legislation specifying an intention that overseas development funding is new and additional pursuant to the UNFCCC requirements is by no means required. But given the longstanding confusion regarding how to determine exactly what is new and additional and the requirement that donor countries “clarify how they have determined that [resources are] . . . new and additional,”<sup>74</sup> it would be good practice for a donor country to be explicit about its intention upon creation of new funding.

The Plan’s requirements also invoke language of sustainable development and community engagement.<sup>75</sup> Although the goals of adaptation programs and the CDM are certainly not analogous, the language here appears to be aimed at addressing some of the contentious issues identified in CDM implementation—issues that inherently arise when developed countries fulfill international obligations within the boundaries of developing countries. For example, it requires quantifiable performance goals, the creation of specific performance indicators, extensive, country-specific community engagement, and alignment with each country’s development goals.<sup>76</sup> While these are laudable inclusions, there currently are not mechanisms identified to further develop, define, and implement these goals at an international level.

Much like the ICTF, the ICCAP subtitle would impose its own to be established requirements, enforcement, and reporting mechanisms equally on any project funded through an international fund. The ICCAP even goes a step further by outlining specific requirements for an eligible fund which include reporting, governing body meeting, and eligibility standards. This is a bold prerequisite for a hypothetical funding mechanism and has the potential to create substantial ambiguities and enforcement challenges, as well as conflicts between negotiators, funding partners, and the developing countries where the projects ultimately occur.

Finally, creating a haze over all of its requirements, the ICCAP would have two overarching purposes. In addition to aiding the most vulnerable developing countries in adapting to climate impacts, its second stated purpose is protecting U.S. security interests.<sup>77</sup> This significantly changes the UNFCCC climate discourse and emphasizes the U.S.-centric focus of the entire legislation.<sup>78</sup> While national security may have become part of the global climate discourse, it certainly not part of the existing legal framework. Focusing on U.S. security interests will help a bill pass in the U.S. House of Representatives, but focusing on global political stability and its contribution to peace will be more significant at the international level, and these things, arguably, are not too different.

Despite the potential conflicts between the U.S. climate bill and the existing international legal infrastructure and discourse, it is important to acknowledge that the proposed legislation is simply a discussion draft. As the United States re-engages in the international climate debate,<sup>79</sup> the discussion draft’s value may be its insight into how and why these provisions strengthen and clarify the U.S. position. In order for the 2009 Copenhagen negotiations to be successful in creating a post-2012 agreement many experts agree that “the United States must lead at home.”<sup>80</sup> To achieve this, comprehensive domestic legislation to reduce emissions is essential, particularly legislation that includes support for developing countries.<sup>81</sup> By discussing this bill in the U.S. Congress, the United States is beginning to indicate the level of support it may be prepared to give developing countries in the global fight against climate change. This bill could be read as a first step towards putting “a concrete and comprehensive offer on the table.”<sup>82</sup>

In preparation for international negotiations, any domestic legislation must include international technology diffusion and development which are increasingly considered essential to combating climate change.<sup>83</sup> This is particularly true where international policy structures do not have full international participation.<sup>84</sup> Including international technology provisions in domestic legislation may be a signal that the United States is prepared to go forward with negotiations even without full or substantially equal international participation, a longtime roadblock to U.S. involvement.

### CONCLUSION

Experts continue to identify countless “essential” points to a successful Copenhagen outcome.<sup>85</sup> Two recurring themes are “actions by developing countries [and] finance for mitigation and adaptation.”<sup>86</sup> The international technology provisions of the discussion draft address those two concerns directly and signal a potential shift in the U.S. policy outlook. While domestic legislation outlining technology and adaptation priorities is important, it is equally important not to unilaterally impose U.S. will upon the world. How the proposed provisions will function domestically must be more thoroughly developed. Perhaps more importantly, how these policies will be incorporated into a post-Kyoto agreement must continue to be a vital part of the discourse, since clean technology transfer and climate adaptation are among the most important topics to be discussed in upcoming UNFCCC negotiations.



## Endnotes: A Stop on the Road to Copenhagen

<sup>1</sup> Juliet Eilperin, *Top Emissions Negotiator an Expert on Political Climate, Too*, WASH. POST., Apr. 15, 2009, at C01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/14/AR2009041403444.html>.

<sup>2</sup> Cheryl Hogue, *A Climate of Change*, CHEM. & ENG’G NEWS, Apr. 6, 2009, <http://pubs.acs.org/cen/government/87/8714gov2.html>.

<sup>3</sup> Posting of Michael Wriglesworth to UN Climate Change Conference Blog, <http://en.cop15.dk/blogs/view+blog?blogid=1017> (Apr. 10, 2009, 14:20).

<sup>4</sup> See Press Release, Committee on Energy and Commerce, Chairmen Waxman, Markey Release Discussion Draft of New Clean Energy Legislation (Mar.

31, 2009), <http://energycommerce.house.gov/> (select Newsroom hyperlink, select New Clean Energy Legislation); *see also* Darren Samuelsohn & Ben Gelman, *House Democrats release draft energy, climate bill*, N.Y. TIMES, Mar. 31, 2009, <http://www.nytimes.com/gwire/2009/03/31/31greenwire-house-democrats-release-draft-energy-emissions-10364.html>.

<sup>5</sup> *See* Press Release, Energy and Commerce, *supra* note 4.

<sup>6</sup> *See* Posting of Jesse Jenkins to Breakthrough Blog, [http://thebreakthrough.org/blog/2009/04/new\\_climate\\_bill\\_proof\\_of\\_misp.shtml](http://thebreakthrough.org/blog/2009/04/new_climate_bill_proof_of_misp.shtml) (Apr. 1, 2009, 9:55 PM) (“The draft Markey-Waxman climate bill is proof that the green groups leading the climate charge won’t fight for investments in clean energy technologies and a new energy economy. Instead, they’ll throw these critical investments overboard to preserve precious regulations and an increasingly compromised “cap” on carbon.”).

<sup>7</sup> *See* Press Release, Union of Concerned Scientists, Waxman-Markey Draft Sets Stage for Climate Legislation (Mar. 31, 2009), [http://www.ucsusa.org/news/press\\_release/waxman-markey-draft-sets-pace-0214.html](http://www.ucsusa.org/news/press_release/waxman-markey-draft-sets-pace-0214.html).

<sup>8</sup> *See* American Clean Energy and Security Act of 2009, discussion draft, 111th Cong., §§ 451-56, 491-96 [hereinafter Climate Bill], *available at* [http://energycommerce.house.gov/Press\\_111/20090331/acesa\\_discussiondraft.pdf](http://energycommerce.house.gov/Press_111/20090331/acesa_discussiondraft.pdf) (establishing an International Clean Technology Fund and International Climate Change Adaptation Program); *see also* Posting of Melanie Nakagawa to NRDC Switchboard, [http://switchboard.nrdc.org/blogs/mnakagawa/waxman\\_markey\\_bill\\_shows\\_stron.html](http://switchboard.nrdc.org/blogs/mnakagawa/waxman_markey_bill_shows_stron.html) (Apr. 3, 2009).

<sup>9</sup> Climate Bill, *supra* note 8, § 451.

<sup>10</sup> *Id.* at § 455.

<sup>11</sup> *Id.* at § 455. *See also* Nakagawa, *supra* note 8 (outlining the some of the benefits of the exporting clean technology provisions as providing “assistance to encourage widespread deployment of clean technologies to developing countries . . . specif[y]ing] that only developing countries that have ratified an international treaty and undertaken . . . mitigation activities . . . are eligible . . . establish[ing] an International Clean Technology Fund . . . [and identify- ing] criteria for project selection.”)

<sup>12</sup> Climate Bill, *supra* note 8, §§ 451-60.

<sup>13</sup> *Id.* at § 453.

<sup>14</sup> *See* discussion *infra*, n.24, n.70 and accompanying text.

<sup>15</sup> Climate Bill, *supra* note 8, § 451.

<sup>16</sup> *Id.* at § 455.

<sup>17</sup> *Id.* at § 455.

<sup>18</sup> Climate Bill, *supra* note 8, § 455; *see also* Figure 1.

<sup>19</sup> Climate Bill, *supra* note 8, § 454.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at § 455.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at § 454.

<sup>24</sup> *Id.* at § 456.

<sup>25</sup> Climate Bill, *supra* note 8, § 455.

<sup>26</sup> *Id.* at § 491 (“[G]lobal climate change is a potentially significant threat multiplier for instability around the world . . . increasing hunger and poverty and causing increased pressure on developing countries.”).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (“[T]he consequences of global climate change . . . are likely to pose a long-term threat to the national security, foreign policy, and economic interests of the United States.”).

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

<sup>30</sup> *Id.* (“[U]nder the [UNFCCC] and under the Bali Action Plan, developed country parties, include in the United States, committed to provide ‘new and additional financial resources’ to assist developing countries in meeting the costs of adaptation.”).

<sup>31</sup> Climate Bill, *supra* note 8, § 492.

<sup>32</sup> *Id.* at § 494.

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

<sup>34</sup> *Id.* (establishing reporting requirements that begin no later than 180 days after enactment).

<sup>35</sup> *Id.* at § 495.

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

<sup>37</sup> Climate Bill, *supra* note 8, § 495.

<sup>38</sup> Throughout the Fund and Adaptation Program text of the bill, there is frequent reference to the World Bank and to existing or hypothetical future international funds. For example, developing country is defined as “a country eligible to receive financial assistance from the” World Bank. Climate Bill, *supra* note 8, § 452. Distribution of assistance is authorized through agreements with the World Bank, “other multilateral development banks, or international development institutions.” *Id.* at § 455. Furthermore, the criteria for Fund project selection require that any approved project be “co-financed by the host

country government, private sector institutions, or a multinational development bank.” *Id.* And explicitly, the Adaption Program language references the financial additionality requirement under the UNFCCC which has been controversial in its enforceability particularly in light of recent developments with emerging international funding mechanisms such as the World Bank’s Climate Investment Funds. *See generally*, Addie Haughey, *The World Bank Clean Technology Fund: Friend or FOE to the UNFCCC?*, SUSTAINABLE DEV. L. & POL’Y, Winter 2009, at 57.

<sup>39</sup> DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 670 (2007).

<sup>40</sup> See Christopher Carr & Flavia Rosembuj, *Hot Markets: The Future of the American Legal Practice in the Regulation and Business of Greenhouse Gases*, 16 N.Y.U. ENVTL. L.J. 44, 45 (2008).

<sup>41</sup> *See id.*; *see also* DAVID HUNTER ET AL., *supra* note 39, at 691 (explaining the four key flexibility mechanism – including the Article 4 “Bubbles” and noting that there has been considerable “debate over the technical rules to ensure the flexibility mechanism are in fact leading to additional reductions”); and Commentary, *Kyoto out of kilter*, CHRISTIAN SCI. MONITOR, at 8, Dec. 6, 2005, available at <http://www.csmonitor.com/2005/1206/p08s02-comv.html?s=wdep>.

<sup>42</sup> UN Framework Convention on Climate Change [UNFCCC] Website, Essential Background, [http://unfccc.int/essential\\_background/convention/items/2627.php](http://unfccc.int/essential_background/convention/items/2627.php) (last visited Apr. 22, 2009).

<sup>43</sup> UNFCCC, art. 2, May 9, 1992, 1771 U.N.T.S. 165.

<sup>44</sup> *Id.* art. 3.

<sup>45</sup> *See id.* art. 18; *see also* Haughey, *supra* note 38, at n.57, n.58 and accompanying discussion.

<sup>46</sup> *See* UNFCCC, *supra* note 43, art. 4, para. 3.

<sup>47</sup> TARYN FRANSEN ET AL., WORLD RESOURCES INSTITUTE, MEASURING THE WAY TO A NEW GLOBAL CLIMATE AGREEMENT 5 (2008), available at [http://pdf.wri.org/measuring\\_the\\_way\\_to\\_a\\_new\\_global\\_climate\\_agreement.pdf](http://pdf.wri.org/measuring_the_way_to_a_new_global_climate_agreement.pdf).

<sup>48</sup> *See* Manish Bapna & Heather McGray, Financing Adaptation: Opportunities for Innovation and Experimentation (forthcoming in 2009 in Brookings Institution, Climate Change and Global Poverty: A Billion Lives in the Balance?), available at [http://pdf.wri.org/financing\\_adaptation.pdf](http://pdf.wri.org/financing_adaptation.pdf); *see also* UNFCCC, *supra* note 43, art. 4 (requiring all Parties to develop, update, and publish national inventories of anthropogenic emissions of GHG, cooperate in preparing for adaptation, promote scientific and technological research, promote exchange of said scientific and technological research, among numerous other commitments).

<sup>49</sup> Kyoto Protocol to the UNFCCC, Dec. 10, 1997, 37 I.L.M. 22, art. 11 [hereinafter Kyoto Protocol].

<sup>50</sup> *Id.*

<sup>51</sup> *See* Morton Anderson, Saving up for the “Copenhagen Protocol,” COP15 United Nations Climate Change Conference Copenhagen (Apr. 9, 2009), <http://en.cop15.dk/news/view+news?newsid=1065>.

<sup>52</sup> *See* UN ENV’T PROGRAM, LEGAL ISSUES GUIDEBOOK TO THE CLEAN DEVELOPMENT MECHANISM 6 (2004); *see also* UNFCCC, Conference of the Parties, *Report of the Conferences of the Parties on its Seventh Session*, Decision 17/CP.7, UN Doc. FCCC/CP/2001/13/Add.2 (Jan. 21, 2002) [hereinafter *Seventh Session Report*] (establishing that public funding for CDM projects must also be additional and should not result in the diversion of overseas development aid).

<sup>53</sup> UNFCCC Website, About CDM, <http://cdm.unfccc.int/about/index.html> (last visited Apr. 20, 2009).

<sup>54</sup> *See generally* Karen Holm Olsen, *The clean development mechanism’s contribution to sustainable development: a review of the literature*, CLIMATIC CHANGE, Sept. 2007, at 59; *see also* Hunter et al., *supra* note 39, at 694.

<sup>55</sup> *See generally* Joyceline A. Goco, Head IACC Secretariat, Presentation at the First National Workshop on Capacity Development for the Clean Development Mechanism in the Philippines, The UNFCCC, the Kyoto Protocol, and an Introduction to CDM, available at <http://www.cd4cdm.org/Asia/Philippines/First%20National%20Workshop/unfcccintrotocdm.ppt>; and U.S. Gov. ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS NO. GAO 09-151, INTERNATIONAL CLIMATE CHANGE PROGRAMS: LESSONS LEARNED FROM THE EUROPEAN UNION’S EMISSIONS TRADING SCHEME AND THE KYOTO PROTOCOL’S CLEAN DEVELOPMENT MECHANISM (2008), available at <http://www.gao.gov/new.items/d09151.pdf>.

<sup>56</sup> *See* Karen Holm Olsen, The Clean Development Mechanism’s Contribution to Sustainable Development [http://www.cd4cdm.org/Publications/CDM&SustainDevelop\\_literature.pdf](http://www.cd4cdm.org/Publications/CDM&SustainDevelop_literature.pdf) (last visited Apr. 20, 2009); Int’l Rivers, Bad Day in Congress for the CDM (Mar. 6, 2009), <http://internationalrivers.org/en/blog/patrick-mccully/bad-day-congress-cdm>; and INT’L RIVERS & CDM WATCH, THE GOOD, THE BAD, AND THE DAMMED UGLY (2003), available at <http://internationalrivers.org/files/gbduimcdmwatch.pdf>.

<sup>57</sup> *See* FRANSEN ET AL., *supra* note 47, at 5-6 (noting that one aspect of that call includes redeveloping a governance structure that mandates that “any funding not under the authority and guidance of the UNFCCC shall not be regarded as the fulfillment of [financial] commitments by developed countries”); and Proposal by the G77 & China

For A Technology Mechanism under the UNFCCC, [http://unfccc.int/files/meetings/ad\\_hoc\\_working\\_groups/lca/application/pdf/technology\\_proposal\\_g77\\_8.pdf](http://unfccc.int/files/meetings/ad_hoc_working_groups/lca/application/pdf/technology_proposal_g77_8.pdf) (last visited Apr. 22, 2009).

<sup>58</sup> Climate Bill, *supra* note 8, § 454.

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

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

<sup>61</sup> *Id.* at § 495.

<sup>62</sup> *Id.*

<sup>63</sup> *See Seventh Session Report*, *supra* note 52; Kyoto Protocol, *supra* note 49 and UNFCCC, *supra* note 43, art. 3.

<sup>64</sup> In fact, after the CDM was created, it began requiring that public CDM funding should not result in a diversion of ODA. *See Seventh Session Report*, *supra* note 52.

<sup>65</sup> *See* Climate Bill, *supra* note 8, § 491.

<sup>66</sup> *See* UNFCCC, Conference of the Parties, *Report of the Conferences of the Parties on its Fifth Session, Review of the Implementation of Commitments and of Other Provisions of the Convention*, UN Doc. FCCC/CP/1999/7 (Feb. 16, 2000), available at <http://unfccc.int/resource/docs/cop5/07.pdf> (establishing that public funding for CDM projects must also be additional and should not result in the diversion of overseas development aid).

<sup>67</sup> *See* Climate Bill, *supra* note 8, § 495.

<sup>68</sup> *Id.* at § 455.

<sup>69</sup> *Id.* at § 454.

<sup>70</sup> Live from the Wall Street Green Trading Summit, Red, Green, and Blue (Apr. 1, 2009), <http://redgreenandblue.org/2009/04/01/live-from-the-wall-street-green-trading-summit/> [hereinafter Live from Wall Street]. This is particularly troubling in the sense of offsets. HEATHER MCGRAY ET AL., THE WORLD RESOURCES INSTITUTE, WEATHERING THE STORM: OPTIONS FOR FRAMING AND ADAPTING DEVELOPMENT 27 (2007) [hereinafter WEATHERING THE STORM], available at [http://pdf.wri.org/weathering\\_the\\_storm.pdf](http://pdf.wri.org/weathering_the_storm.pdf).

<sup>71</sup> *See* WEATHERING THE STORM, *supra* note 70, at 33.

<sup>72</sup> UNFCCC, Provisional Agenda of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Fulfillment of the Bali Action Plan and components of the agreed outcome, Fifth Session, Note by the Chair, Part II, Bonn, F.R.G., Mar. 29-Apr. 8, 2009, UN Doc. FCCC/AWGLCA/2009/4 (Mar. 18, 2009) 3, 17-22, available at <http://unfccc.int/resource/docs/2009/awglca5/eng/04p02.pdf>.

<sup>73</sup> UNFCCC, *supra* note 43, art. 3.

<sup>74</sup> *See* Haughey, *supra* note 38, at n.49.

<sup>75</sup> *See* Climate Bill, *supra* note 8, § 494.

<sup>76</sup> *Id.* at § 496.

<sup>77</sup> *See* discussion *supra*, n.27, n.28 and accompanying text.

<sup>78</sup> *See* Live from Wall Street, *supra* note 70.

<sup>79</sup> *See* Eilperin, *supra* note 1.

<sup>80</sup> *Roadmap from Poznan to Copenhagen – Preconditions for Success: Hearing before the H. Select Comm. on Energy Independence and Global Warming*, 111th Cong. 2 (2009) (statement of Elliot Diringer, Vice President, International Strategies, Pew Center on Global Climate Change) available at <http://globalwarming.house.gov/tools/3q08materials/files/0099.pdf>.

<sup>81</sup> *Id.* at 5.

<sup>82</sup> *Id.* at 7.

<sup>83</sup> LEON CLARKE ET AL., TECHNOLOGY AND INTERNATIONAL CLIMATE POLICY I (The Harvard Project on Int’l Agreements, Discussion Paper 08-21, 2008) available at <http://belfercenter.ksg.harvard.edu/files/ClarkeWeb2.pdf> (last visited Apr. 10, 2009).

<sup>84</sup> *Id.* at 1-2.

<sup>85</sup> *See, e.g.*, James Russell & Janet Sawin, *Help Wanted: International Climate Change Mitigation Seeks Leader*, E2 – EYE TO EARTH, Sept. 25, 2007, <http://www.worldwatch.org/node/5369> (indicating that China’s participation is essential); Videotape Transcript: UNFCCC chief de Boer discusses U.S. role in Copenhagen talks (OnPoint, Mar. 5, 2009), <http://www.eenews.net/tv/transcript/958> (identifying four political essentials for moving forward at Copenhagen: clarity on how much industrialized countries willing to reduce



their emissions, clarity on how much major developing countries like China and India are willing to limit their emissions growth of their emissions; clarity on finance will be essential to help engage developing countries in reducing emissions and adapting to impacts of climate change; and decisions on how money will be managed).

<sup>86</sup> *See Roadmap from Poznan to Copenhagen – Preconditions for Success: Hearing before the H. Select Comm. on Energy Independence and Global Warming*, 111th Cong. 4 (2009) (written statement of Ambassador John Bruton, Ambassador to the Delegation of the European Commission to the USA)

*available at* <http://globalwarming.house.gov/tools/3q08materials/files/0100.pdf>; *see also* Conference of European Churches, CSC Briefing on the Commission Proposal for Post-Kyoto Negotiations (2009), <http://www.cec-kek.org/pdf/EuropeUpdate23PostKyoto.pdf>; ANDREW KEELER & ALEXANDER THOMPSON, INDUSTRIALIZED COUNTRY MITIGATION POLICY AND RESOURCE TRANSFERS TO DEVELOPING COUNTRIES: IMPROVING AND EXPANDING GREENHOUSE GAS OFFSETS 11, 16 (The Harvard Project on Int'l Agreements, Discussion Paper 08-05, 2008), *available at* <http://belfercenter.ksg.harvard.edu/files/KeelerWeb4.pdf>.