

THE CONVENTION ON BIOLOGICAL DIVERSITY: United States Participation, Signature, and Pending Ratification

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Abstract

This paper studies United States participation in the process of adopting the United Nations Biodiversity Convention. It traces the origin and development of the convention's adoption and discusses United States participation in the negotiation process. Examining reasons for the Bush Administration's decision not to sign the Convention, the paper analyzes the changing U.S. position under the Clinton Administration and addresses the U.S. Senate Committee action and debates on the treaty. Finally, exploring the obstacles to and likelihood of U.S. ratification of the Biodiversity Convention, the paper concludes that while obstacles remain, United States ratification is a possibility. Ratification, it is argued, is largely dependent on the Clinton Administration placing the issue at the top of its environmental policy agenda.

Key Words: United States, Biodiversity Convention,
Participation, Ratification

I. Introduction

After more than three years of hard bargaining, the Convention on Biological Diversity (hereinafter the Biodiversity Convention)¹ was finally adopted by the Conference for Adoption of the Agreed Text of the Convention on Biological Diversity, held at United Nations Environment Programme (UNEP) Headquarters, Nairobi, Kenya, on May 22, 1992.² On June 5 the same year, at the United Nations Conference on Environment and Development (UNCED), held in Rio De Janeiro, Brazil, the Biodiversity Convention was signed by 153 states and the European Community.³ Only about 18 months later, this Convention rapidly entered into force on December 29, 1993.⁴

The three objectives of the Biodiversity Convention are: (1)

¹ Convention on Biological Diversity of the United Nations Conference on the Environment and Development, opened for signature June 5, 1992, U.N. Doc. DPI/1307, reprinted in *31 I.L.M.* 818.

² For the text, Final Act of the Conference, declarations made upon signature, and signatories of the Convention, see United Nations Environment Programme, *Convention on Biological Diversity*, Environment Law and Institutions Programme Activity Centre, June 1992.

³ See "Industry Wants U.S. to Sign Treaty by Deadline Even If Statement Unfinished," *Daily Environment Report (BNA)*, June 1, 1993.

⁴ Under Article 36 (1), the Convention on Biological Diversity would enter into force "on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession." As of September 29, 1993, 31 nations had ratified the Convention. As a result, the Convention entered into force on December 29, 1993. See "Biodiversity Treaty to Take Effect in December, UNEP Executive Director Says," *International Environment Reporter Current Report (BNA)*, Vol. 16, No. 20, October 6, 1993, at 708 and "Summary of the First Session of the Intergovernmental Committee on the Convention on Biological Diversity (ICCBD): 11-15 October 1993," *Earth Negotiation Bulletin*, available on the World Wide Web at <http://www.iisd.ca/linkages/vol09/090600le.html>.

the conservation of biological diversity; (2) the sustainable use of its components; and (3) the fair and equitable sharing of the benefits arising from the use of genetic resources, including by appropriate: (a) access to genetic resources, taking into account all rights over those resources; (b) transfer of relevant technologies, taking into account all rights to technologies; and (c) funding.⁵ This Convention is hailed as “a landmark in the environment and development field,”⁶ mainly because: (1) it is the first time that biodiversity is comprehensively addressed in a treaty; (2) it is the first time that genetic diversity is specifically covered in a binding global treaty; and (3) it is also the first time that the conservation of biodiversity is recognized as the common concern of humankind.⁷ This Convention is seen as “the centerpiece of the international community’s effort to protect and sustainably use some of the earth’s greatest riches—the diversity of life including genes, species, and ecosystems.”⁸ It is also considered as “one of the most significant recent developments in international law, international relations, and the fields of environment and development.”⁹ As of June 1, 1997, 169 countries and the European Union (formerly the European Community) have become parties to the Biodiversity Convention.¹⁰

⁵ Article 1 of the Biodiversity Convention, *supra* note 1.

⁶ ICUN, *A Guide to the Convention on Biological Diversity* (Cambridge, U.K.: the Burlington Press, 1994), at ix.

⁷ *Ibid.*, at 3.

⁸ See UNEP, “1997 to be Critical Year for Global Action on Biological Diversity,” Press Release, available on the World Wide Web at <http://www.ch/bio/pr12-96.html>.

⁹ See UNEP, “An Explanatory Leaflet About the Convention on Biological Diversity,” available on the World Wide Web at <http://www/unesp.ch/bio/leaf.html>.

¹⁰ See United Nations Environment Programme (UNEP), List of Ratifications for the Convention on Biological Diversity, available on the World Wide

The United States is the only major member of the United Nations which has not yet joined the Convention.

The United States was an origin proponent of an international legal instrument to protect the world's biodiversity. However, when the Biodiversity Convention was opened for signature on June 5, 1992, the Bush Administration declined to sign it, mainly because of the dissatisfaction with the provisions of the Convention relating to technology transfer and intellectual property rights, as well as provisions concerning biotechnology, biosafety, and funding.¹¹ In September 1993, the new Clinton Administration reversed the U.S. position by signing the Convention and transmitting it to the United States Senate for its advice and consent subject to certain understandings.¹² Nevertheless, nearly four years and eight months have elapsed since the United States signed the Biodiversity Convention on June 4, 1993¹³ and about four years have passed since President Clinton transmitted the Convention to the Senate for its advice and consent on November 19, 1993, and it is still not clear whether and

Web at <http://www.biodiv.org/conv/ratify.html>.

¹¹ See United States: Declaration Made at the United Nations Environment Programme Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, in *Convention on Biological Diversity* (June 1992), U.N. Doc. UNEP/Z/SER.F/6, at 20, reprinted in 31 I.L.M. 848 (1992).

¹² William J. Clinton, "Message to the Congress Transmitting the Convention on Biological Diversity, November 19, 1993," in *William J. Clinton: Public Papers of the President of the United States*, Book II (1993) (Washington: United States Government Printing Office, 1994), at 2029-2030. See also Message from the President of the United States Transmitting the Convention on Biological Diversity, with annexes, done at Rio de Janeiro, Brazil on June 5, 1992, and signed by the United States in New York on June 4, 1993, S. Treaty Doc. No. 20, 103d Con. 1st Sess., 1994.

¹³ See "As It Signs Treaty, United States Call for Global Patent Protection for Biotech," *Daily Environment Report (BNA)*, June 7, 1993.

when the Senate will give its advice and consent to ratification. Because of not being a party member to the Biodiversity Convention, the United States has been participating in the Conference of Parties (COP), which has met three times since the entry into force of the Convention in December 1993,¹⁴ only as observers with no right to vote. There are other disadvantages for the U.S. remaining outside the Biodiversity Convention, such as, "prevent[ing] the United States from working most effectively to ensure access to and conservation of crucial biological resources"¹⁵ and putting the U.S. pharmaceutical companies and biotechnology firms in a less competitive position than foreign companies of those countries which have ratified the Convention.¹⁶ At present, there are some in the United States, who still oppose the U.S. ratification of the Biodiversity Convention. However, it seems that the Clinton Administration, the environmental groups, the biotechnology industry, and agricultural associations in the United States are taking a view that the

¹⁴ Under Article 23 of the Biodiversity Convention, "the first meeting of the Conference of the Parties shall be convened by the Executive Director of the United Nations Environment Programme not later than one year after the entry into force of this Convention. Thereafter, ordinary meetings of the Conference of the Parties shall be held at regular intervals to be determined by the Conference at its first meeting." The first COP was held between November 28 and December 9, 1994, at Nassau, Bahamas; the second COP, November 6-17, 1995, Jakarta, Indonesia; the third COP, November 4-15, 1996, Buenos Aires, Argentina. The fourth COP is scheduled for May 4-15, 1998 at Bratislava, Slovakia.

¹⁵ "Congress Fails to Ratify Treaty to Protect World's Biological Diversity," *International Environment Reporter Current Report (BNA)*, Vol. 17, No. 21, October 19, 1994, at 845.

¹⁶ "Biodiversity Treaty Unlikely to Get U.S. Senate Nod in 1995, White House Says," *International Environment Reporter Current Report (BNA)*, Vol. 18, No. 5, March 8, 1995, at 172.

United States should become a party to this Convention.¹⁷ Although it is not clear whether and when the United States Senate will ratify the Biodiversity Convention, it is believed that the U.S. ratification of the Convention would have a profound impact on the development of conserving biodiversity globally and domestically. The purpose of this paper is to study the United States participation in the Biodiversity Convention in the past, present, and future. Section II traces back the origin and development of the adoption of the international legal regime for conserving the world's biodiversity. Section III deals with the United States participation in the negotiation process for adopting a global treaty on biodiversity. Reasons for the Bush Administration's decision not to sign the Convention are stated and analyzed in Section IV. Section V focuses on the changing position of the United States under the Clinton Administration. Section VI addresses the Senate Committee action and debates on the Biodiversity Convention. Section VII explores the obstacles to and likelihood of U.S. ratification of the Convention.

II. The Origin and Development of an International Legal Regime for Conserving Biodiversity

A. Biodiversity, Biodiversity Loss, and Importance of Conserving Biodiversity

The terms "biological diversity"—biodiversity for short—listed in the glossary section of Edward O. Wilson's book *The Diver-*

¹⁷ In June 1993, 78 percent of the American public felt that the United States should sign the Biodiversity Convention, according to a nationwide survey conducted by the Defenders of Wildlife. See "As It Signs Treaty, United States Calls for Global Patent Protection for Biotech," *Daily Environment Report (BNA)*, June 7, 1993.

sity of Life, are described as:

The variety of organisms considered at all levels, from genetic variants belonging to the same species through arrays of species to arrays of genera, families, and still higher taxonomic levels; includes the variety of ecosystems, which comprise both the communities of organisms within particular habitats and the physical conditions under which they live.¹⁸

Article 2 of the Biodiversity Convention defines the terms “biological diversity” as

the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.¹⁹

The same terms, used in a report which reviews progress in the implementation of the aims set out in Chapter 15 of Agenda 21 (Conservation of Biological Diversity)²⁰ since the UNCED, are defined as

the variety and variability of all plants, animals and micro-organisms that exist on earth and the ecological complexes of which they are part as well as the way in which they interact with one another and with their physical surroundings, includ-

¹⁸ Edward O. Wilson, *The Diversity of Life* (Cambridge, Massachusetts: the Belknap Press of Harvard University Press, 1992), at 393.

¹⁹ *Supra* note 1.

²⁰ For Chapter 15 of Agenda 21, see U.N. Department of Public Information, *Agenda 21: Programme of Action for Sustainable Development*, U.N. Publications -Sales No. E.93.1.11 (1993), at 131-135.

ing ecosystem diversity, species diversity and genetic diversity.²¹

In short, biological diversity simply means "the total variety of genetic strains, species and ecosystems."²² It is "the sum total of all life forms that exist on earth; it is the wealth of species, ecosystems, and ecological processes that help make possible our economic and environmental systems."²³

Estimates of the total number of species on earth range from 10 to 100 million.²⁴ However, according to the book *Global Biodiversity Assessment*, which was published in 1995,²⁵ only some 1.75 million of the estimated existing species have been scientifically identified.²⁶ These genes, species, and ecosystems are the outcome

²¹ Commission on Sustainable Development, third session, 11-28 April 1995, *Review of Sectoral Clusters, Second Phase: Land, Desertification, Forests and Biodiversity*, Conservation of Biological Diversity, Report of the Secretary-General, E/CN.17/1995/7, February 7, 1995.

²² IUCN/WWF/UNEP, *Caring for the Earth*, Gland, 1991, at 28.

²³ "Ratification Sought for the Convention on Biological Diversity," Timothy E. Wirth, statement before the Senate Foreign Relations Committee, Washington, D.C., April 12, 1994, in *4/18/94 U.S. Dep't St. Dispatch* 213.

²⁴ Wilson, *supra* note 18, at 132.

²⁵ This 1,140-page document, prepared under the direction of the United Nations Environment Programme and released at the second Conference of Parties to the Biodiversity Convention in November 1995, was published by Cambridge University Press in 1995. This document has 12 sections, which were written by more than 300 experts from some four dozen countries and then were exhaustively reviewed in whole or in part by another 1,200 scholars in the field. It covers almost all aspects of biological diversity from its characterization, magnitude, and distribution to schemes for monitoring, assessment, conservation, and sustainable use. For a review of the book, see Arthur H. Westing, *Global Biodiversity Assessment (Book Reviews)*, *Environment*, Vol. 38, No. 8, October 1, 1996.

²⁶ *Ibid.*, quoted in "Biodiversity Study Sees More Species in Danger," *The New York Times*, November 14, 1995, at 9. See also "UNEP Release First Global

of over 3,000 million years of evolution.²⁷ Some species were extinguished naturally during the evolutionary process. Direct human exploitation is another reason for species extinction. However, the major threat causing the loss of species is habitat alteration and destruction that result from the expansion of human populations and human activities. As pointed out in the book—*Biodiversity Conservation: Problems and Policies*,²⁸

Habitat change by humans is caused directly through land use change, urbanization, infrastructure development and industrialization, and indirectly through environmental effects caused by the use and extraction of resources from the environment, and the discharge of various wastes to air, soil, and water.²⁹

Due to human activities, the rate of destruction of biological diversity has been rapidly increased over past decades.³⁰ The loss of biodiversity is taking place in many habitats, in particular, tropical rain forests, rivers and lakes, deserts and temperate forests, alpine meadows, and on mountains and islands. According to Wilson's "most conservative estimate that can be reasonably based on our

Biodiversity Assessment Report," U.N. Press Release HE/916, November 14, 1995.

²⁷ "An Explanatory Leaflet about the Convention on Biological Diversity," *supra* note 9.

²⁸ C.A. Perrings, et al., *Biodiversity Conservation: Problems and Policies* (Dordrecht and Boston: Kluwer Academic, 1994).

²⁹ C.A. Perrings, et al., "Biodiversity and Economic Development: The Policy Problem," in *ibid.*, p. 6.

³⁰ For more discussion, see the references given in *Conserving Biodiversity: A Research Agenda for Development Agencies*, Report of a Panel of the Board on Science and Technology for International Development, U.S. National Research Council (Washington, D.C.: National Academy Press, 1992), at 17-18.

current knowledge of the extinction process,"³¹ the number of species being lost by reduction in rain forests area is 27,000 per year, 74 per day, and 3 per hour.³² Moreover, human activities have increased extinction of species between 1,000 and 10,000 times over the normal background level in rain forests around the world by reduction in area alone.³³ One of the most recent estimates predicts that "at the current rate of deforestation, some two to eight percent of the Earth's species will disappear over the next 25 years."³⁴

"Biodiversity is fundamental to human life. It is a basic feature of the way in which living organisms are structured . . . When genetic variations are lost, therefore, not only are specific and potential properties and adaptations also lost, but with them species are diminished, ecosystems are impaired and the ability to sustain human life is damaged."³⁵ It has been argued that biodiversity should be conserved because: (1) all species deserve respect regardless of their biological relationship to humanity; (2) they are all components of our life-support system; and (3) biological wealth supplies food, raw material and genetic material for agriculture, medicine and industry.³⁶

³¹ Wilson, *supra* note 18, at 280.

³² *Ibid.*

³³ *Ibid.*

³⁴ See An Explanatory Leaflet about the Convention on Biological Diversity, *supra* note 9.

³⁵ Progress Report on Biodiversity for the Second Session of the Preparatory Committee for the UNCED, quoted in Simone Bilderbeek, ed., *Biodiversity and International Law: The Effectiveness of International Environmental Law* (Amsterdam/Oxford/Washington, D.C./Tokyo: IOS Press, 1992), at 11.

³⁶ Alan E. Boyle, "The Convention on Biological Diversity," in *The Environment After Rio: International Law and Economics*, edited by Luigi Campiglio, et al. (London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff, 1994), at 112.

B. The Evolution of the Biodiversity Convention

Twenty-five years ago, the very first session of the Governing Council for the UNEP had identified the "conservation of nature, wildlife and genetic resources as a priority area."³⁷ However, it was in the 1980s, due to the growing concern over the unprecedented loss of biodiversity, that the international community recognized the necessity to take concerted action to protect the world's biodiversity. Beginning in 1980, the International Union for Conservation of Nature and Natural Resources (IUCN),³⁸ UNEP³⁹ and the World Wildlife Fund⁴⁰ together adopted the world conservation strategy, in

³⁷ UNEP, An Explanatory Leaflet about the Convention on Biological Diversity, *supra* note 9.

³⁸ The IUCN—the World Conservation Union, founded in 1948, is a non-governmental organization, that brings together states, government agencies and a diverse range of non-governmental organizations in a unique world partnership. The organization has over 800 members in all, spreading across some 125 countries. It aims to influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable. The organization is headquartered in Switzerland. It also has an Environmental Law Centre in Bonn, Germany, which conducts research and prepares recommendations and draft conventions to further the development of international environmental law.

³⁹ Governing Council and secretariat of the UNEP were established by the U.N. General Assembly in December 1972.

⁴⁰ The Fund, now named World Wide Fund for Nature (WWF), is non-governmental organization. It was founded September 11, 1961 at Morges, Switzerland. The Fund aims to conserve nature and ecological processes by preserving genetic, species and ecosystem diversity; ensure that use of renewable resources is sustainable both now and in the longer term; promote actions to reduce pollution and wasteful exploitation and consumption of resources; and create awareness of threats to the natural environment. See *Yearbook of International Organizations*, 1996/97, Vol. 1, edited by Union of International Associations, published by K.G. Saur Munchen/New Provi-

which the preservation of genetic diversity and the sustainable utilization of species and ecosystems was included as one of the main objectives of the strategy.⁴¹ In 1981, at the 15th General Assembly, the IUCN launched the idea of establishing a global convention to protect the world's biodiversity by instructing the Secretariat of the Union to conduct a preliminary study of the matter.⁴² In October 1982, the U.N. General Assembly adopted the resolution 37/7, known as World Charter for Nature, which declares that "[e]very form of life is unique, warranting respect regardless of its worth to man, and to accord other organisms such recognition, man must be guided by a moral code of action."⁴³ In 1983, an "Undertaking" on Plant Genetic Resources was adopted in an FAO conference, aiming at ensuring that these resources should be explored, preserved, evaluated and made available for plant breedings and scientific purposes.⁴⁴ In 1984, the IUCN General Assembly requested its Secretariat to develop a number of principles to serve as a basis for a preliminary draft of an international instrument on the conservation of the world's biodiversity.⁴⁵ In 1987, the World Commission on

dence/London/Paris, 1996, at 1663.

⁴¹ For the strategy, see International Union for the Conservation of Nature and Natural Resources, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (1980).

⁴² Cyrille de Klemm and Clare Shine, *Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems* (Gland, Switzerland: IUCN, 1993), at 17.

⁴³ See the Preamble of the resolution, G.A. Res. 7, U.N. GAOR, 37th Sess., Supp. No. 51, *U.N. Doc. A/36/51* (1983) (adopted on October 28, 1982). Generally, see NASH, *The Regime of Nature*, Wisconsin, 1989.

⁴⁴ See FAO Res. 8/83 (1983). However, it should be noted that most developed states reserved their position on this resolution.

⁴⁵ *Supra* note 42, at 17. A final draft was completed in June 1989.

Environment and Development⁴⁶ recommended that states “investigate the prospect of agreeing to a ‘Species Convention’, similar in spirit and scope to the Law of the Sea Treaty and other international conventions reflecting principles of ‘universal resources’.”⁴⁷ The Commission’s proposal led UNEP to initiate the process of drafting an international convention on protecting biodiversity. In 1987, the UNEP Governing Council established an Ad Hoc Working Group of Experts on Biological Diversity to investigate “the desirability and possible form of an umbrella convention to rationalize current activities in this field (conservation of biodiversity), and to address other areas which might fall under such a convention.”⁴⁸ In May 1989, the UNEP Governing Council authorized its Executive Director to convene “an ad hoc working group of legal and technical experts with a mandate to negotiate an international legal instrument for the conservation of the biological diversity of the planet.”⁴⁹ In December 1989, the U.N. General Assembly adopted Resolution 44/228, which brought the conservation of biodiversity within the mandate of the UNCED. Accordingly, it was required that the negotiations in the UNEP should result in a

⁴⁶ In 1983, the U.N. General Assembly established a special Commission on Environment and Development, later renamed the World Commission on Environment and Development. This Commission is widely referred to as the “Brundtland Commission” after its chairperson, Norwegian Prime Minister Gro Harlem Brundtland.

⁴⁷ World Commission on Environment and Development, *Our Common Future* (1987), at 162.

⁴⁸ UNEP Governing Council Res. 14/26 (1987), reprinted in Fiona McConnell, *The Biodiversity Convention: A Negotiating History* (London/the Hague/ Boston: Kluwer Law International, 1996), Annex A.

⁴⁹ UNEP Decision 15/12, May 15, 1989. For the Decision, see McConnell, *ibid.*, Appendix B.

convention ready for signature at Rio in June 1992.⁵⁰ By early 1990, the ad hoc working group had reached a consensus that a new world convention on conserving biodiversity, in the form of a framework treaty, building on existing conventions,⁵¹ was urgently needed. The formal negotiating process started in May 1991 when the UNEP Governing Council decided to rename the Ad Hoc Working Group of Legal and Technical Experts on Biological Diversity the "Intergovernmental Negotiating Committee for a Convention on Biological Diversity."⁵² The negotiations made very slow progress, mainly because of serious disagreements between developed and developing states.⁵³ For the developing countries, the key issues in the negotiation of the biodiversity convention were:

⁵⁰ See General Assembly Resolution 44/228 of December 22, 1989, *General Assembly Official Records: Forty-fourth Session*, Supplement No. 49 (Doc. A/44/49).

⁵¹ These conventions include: the World Heritage Convention (protection of natural sites), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (prohibition of trade in endangered species), the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (RAMSAR) (preservation of specific habitats), the Convention on the Conservation of Migratory Species of Wild Animals (CMS) (conservation of species), the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and for Desertification, particularly in Africa, and the Regional Sea Programmes.

⁵² UNEP Decision 16/27, May 31, 1991. For the decision, see McConnell, *supra* note 48, Appendix E.

⁵³ It was reported that "[p]rogress was slow and negotiations difficult, especially during the final negotiating sessions. . . . The negotiations were often close to breaking down. Even on 22 May (1992), the final day of the final negotiating session in Nairobi, it was not clear until the last moment whether the Convention would be adopted." See *A Guide to the Convention on Biological Diversity*, *supra* note 6, at 3. For a detail account, see Fiona McConnell, *The Biodiversity Convention: A Negotiating History* (London/the Hague/Boston: Kluwer Law International, 1996).

- (1) The establishment of special systems of intellectual property rights and appropriate mechanisms for compensating the South for the biological resources provided by it;
- (2) The establishment of mechanisms giving the South access to the biotechniques that are developed through the use of the genetic resources that it provides; and
- (3) Additional funding to facilitate implementation of the convention and access to technology.⁵⁴

For the developed states, especially the United States, it was difficult to accept the Convention's provisions concerning technology transfer, financing and access to biological resources.⁵⁵ In spite of the difficulties and tensions in the negotiations, thanks to the deadline set in the U.N. General Resolution 44/228,⁵⁶ the Convention was finally adopted by the Conference for Adoption of the Agreed Text of the Convention on Biological Diversity, held at UNEP Headquarters, Nairobi, Kenya, on May 22, 1992, so that it could be ready for signature at the UNCED. On June 5, 1992, 153 states and the European Community signed the Biodiversity Convention, which entered into force on December 29, 1993.⁵⁷

C. The Nature and Major Provisions of the Biodiversity Convention

The Biodiversity Convention is a framework agreement which contains general obligations and leaves it up to individual contract-

⁵⁴ Alan E. Boyle, *supra* note 36, at 114.

⁵⁵ For more discussions on the disagreements between developed and developing states, see McConnell, *supra* note 48. For the U.S. position, see *infra* section III.

⁵⁶ *Supra* note 50.

⁵⁷ *Supra* note 2.

ing parties to decide how most of the Convention's provisions are to be implemented. For example, Articles 5-11 and 14 deals primarily with the preservation and conservation of biodiversity. Under these articles, contracting parties are obligated to undertake measures to protect biodiversity. However, these obligations are qualified, because the terms "as far as possible and as appropriate" are incorporated in the above-mentioned articles. It is a framework agreement also because of the possibility for the COP to further negotiate annexes and protocols to the Biodiversity Convention.⁵⁸

The Biodiversity Convention contains 42 articles, two annexes, and three resolutions in the Appendix. Major articles include: 1 (objective), 3 (principle), 6-11 (measures for conservation and sustainable use), 15 (access to genetic resources), 16 (access to and transfer of technology), 19 (handling of biotechnology and distribution of its benefits), 20 (financial resources), 21 (financial mechanism), 23-25 (establishing the Convention's various institutions), and 27 (settlement of disputes).⁵⁹

Article 1 of the Convention sets out the main objectives: "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources." Article 3 reproduces verba-

⁵⁸ Article 23 of the Biodiversity Convention outlines the Conference of the Parties' broad responsibilities and requires it to take other specific actions, such as adopt rules of procedure for itself and subsidiary bodies. In addition, a number of articles in the Convention, such as Articles 14 (2), 18 (3), 19 (3), 20 (2), and 21 (1) also direct the Conference of the Parties to take specific actions. For the character of the Convention, see *A Guide to the Convention on Biological Diversity*, *supra* note 6, at 1-2. For recent activities of the Conference of Parties, see *infra*, note 67-70, and the accompanying pages 21-22.

⁵⁹ For excellent analyzes of all the articles of the Convention, see *A Guide to the Convention on Biological Diversity*, *supra* note 16.

tim Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment, adopted in 1972. The principle recognizes that states have the sovereign rights to exploit their own resources in accordance with their own environmental policies. Article 6 obligates the contracting parties to develop national biodiversity strategies, plans or programmes, and integrate the conservation of biodiversity and the sustainable use of its components into relevant sectoral and cross-sectoral plans, programmes, and policies. Article 7 obligates each contracting party to identify the components of biodiversity important for conservation and sustainable use; to monitor the components of biodiversity; to identify and monitor processes and categories of activities having or likely to have significant adverse impacts on the conservation and sustainable use of biodiversity; and to maintain and organize the data derived from identification and monitoring activities. Articles 8 and 9 deal with *in-situ* and *ex-situ* conservation. *In-situ* conservation is defined in Article 2 as “the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.” *Ex-situ* conservation is defined in the same article as “the conservation of components of biological diversity outside their natural habitats.” Under articles 8 and 9, contracting parties are obligated to take possible and appropriate measures to conserve biodiversity, which include: designation of protected areas; regulations and management of biological resources both inside and outside protected areas; protection of ecosystems, natural habitats, and viable populations of species; environmentally sound and sustainable development in areas adjacent to protected area; rehabilitation of degraded areas and recovery of

species; control of use and release of modified living organisms where these are likely to have adverse environmental impact; protection of threatened species and populations; and regulation or management of processes and activities which threaten biodiversity.⁶⁰

Under Article 10, each contracting party should, "as far as possible and as appropriate," undertake measures to ensure sustainable use of biodiversity. Contracting Parties, under Article 11, also should, "as far as possible and as appropriate," adopt economically and socially sound incentive measures to conserve biodiversity and to ensure sustainable use of its components. Article 15 addresses the issue of access to genetic resources. While recognizing "the sovereign rights of states over their natural resources, the authority to determine access to genetic resources," each contracting party is obligated to "endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention."

Article 16 deals with access to and transfer of technology. It is pointed out that Article 16, together with Articles 19, 20, and 21, is probably the most controversial article in the Biodiversity Convention.⁶¹ It defines the basic obligations of contracting parties regarding technology transfer, the basis of transfer to developing states and what measures are to be adopted to institute the transfers contemplated. Article 19 addresses three aspects of biotechnology relevant to the conservation of biodiversity and the sustainable use of its components: (1) participation of the contracting parties, especially developing countries, in biotechnological research activities

⁶⁰ Article 8 (a)-(h). *Supra* note 1.

⁶¹ *A Guide to the Convention on Biological Diversity*, *supra* note 6, at 84.

using the genetic resources they have provided; (2) access of the contracting parties, especially developing countries, to the results and benefits arising from biotechnologies based upon genetic resources they have provided; and (3) obligations of the contracting parties to consider the need for a “biosafety” protocol and to provide information on living modified organisms prior to providing it to another contracting party.

Under Article 20, the contracting parties commit themselves, at the national level, to provide financial resources which are to be spent on biodiversity conservation and the sustainable use of its components. The contracting parties, which fall in the category of “the developed states,”⁶² are obligated to provide new and additional financial resources to developing countries. The same article also calls for the consideration of the specific needs, conditions, and situation of the particular groups of developing countries. Article 21 creates a financial mechanism to make funds available to developing contracting parties to enable them to implement the Convention. Article 39 designated the Global Environment Facility (GEF) of the United Nations Development Programme (UNDP), the UNEP and the International Bank for Reconstruction and Development (the World Bank) as the interim institutional structure for the period between the Convention’s entry into force and the first meeting of the Conference of the Parties or until the COP decides otherwise.

Article 23 establishes the Convention’s highest organ: the COP. Article 24 establishes the Convention Secretariat. Article 25 establishes the Subsidiary Body on Scientific, Technical and Technologi-

⁶² It should be noted that the term “developed states” is not defined in the Biodiversity Convention. Thus, an interpretation problem regarding which countries should be treated as developed states, and which as developing countries, could possibly arise.

cal Advice (SBSTTA), which is a separate multidisciplinary subsidiary body to provide the COP and its other subsidiary bodies with scientific, technical and technological advice. Article 27 provides for the methods of conflict resolution, which include binding and non-binding procedures. However, a clear priority is given to non-binding procedures, such as negotiations, good offices, mediation and conciliation.

D. The Current Legal Status and Recent Developments of the Convention

As mentioned earlier, the Biodiversity Convention entered into force on December 29, 1993. As of June 1, 1997, 169 states and the European Union had ratified the Biodiversity Convention. Before entry into force of the Convention, the UNEP Governing Council established the Intergovernmental Committee on the Convention on Biological Diversity (ICCBD) in May 1993 to prepare for the first meeting of the COP and to ensure effective operation of the Convention upon its entry into force. The first session of the ICCBD met in Geneva from October 11 to 15, 1993.⁶³ Two working groups⁶⁴ were established during the meeting, but failed to

⁶³ "Summary of the First Session of the Intergovernmental Committee on the Convention on Biological Diversity (ICCBD): 11-15 October 1993," *Earth Negotiating Bulletin*, available on the World Wide Web at <http://www.iisd.ca/linkage/vol09/090600le.html>.

⁶⁴ Working Group I addressed the conservation and sustainable use of biodiversity, the scientific and technical work between meetings, and the issue of biosafety. Working Group II dealt with issues related to the financial mechanisms, the process for estimating funding needs, the meaning of "full incremental costs," the rules of procedure for the COP, and technical cooperation and capacity-building. See "Intergovernmental Committee on the Convention on Biological Diversity (ICCBD)," *Earth Negotiating Bulletin*, Vol. 9, No. 29, available on the World Wide Web at <http://www.mbnet>.

produce reports. At the end, the Plenary of the ICCBD adopted only two decisions: "the establishment of a scientific and technical committee that would meet before the second session of the ICCBD; and a request to the Secretariat to use the unadopted Working Groups' reports as guidance during the intersessional period."⁶⁵ The second session of the ICCBD met in Nairobi from June 20 to July 1, 1994. Substantive negotiations on critical issues such as the need for a biosafety protocol, ownership of and access to *ex-situ* genetic resources, farmers' rights, and the financial mechanism, were postponed during the meetings.⁶⁶

Between November 28 and December 9, 1994, the first session of the COP (COP1) met in Nassau, the Bahamas. Major decisions adopted by the COP1 include: adoption of the medium-term work programme; designation of the Permanent Secretariat; establishment of the clearing-house mechanism; establishment of the SBTTA; designation of the GEF as the interim institutional structure for the financial mechanism.⁶⁷ However, no substantive decisions on such matters as biosafety and the GEF were taken at the COP1. The COP2 was held between November 6 and 17, 1995, in Jakarta, Indonesia. Major decisions adopted by the COP2 include: the Jakarta Mandate on Coastal and Marine Biodiversity, agreement to start drafting a protocol on biosafety, agreement that the GEF continue to serve as the Convention's funding mechanism on an interim basis, and designation of Montreal as the permanent seat

mb.ca/linkages/vol09/0929003e.html.

⁶⁵ *Ibid.*

⁶⁶ "Summary of the Second Session of the Intergovernmental Committee on the Convention on Biological Diversity: 20 June–1 July 1994," *Earth Negotiating Bulletin*, *ibid.*

⁶⁷ "First Conference on the Parties," *Earth Negotiating Bulletin*, Vol. 9, No. 29, available on the World Wide Web, *supra* note 64.

of the Secretariat for the Biodiversity Convention.⁶⁸ The COP3 was held between November 4 and 15, 1996 in Buenos Aires, Argentina. During the meetings, the delegates discussed the COP's internal mechanisms as well as the COP's role vis-a-vis other relevant international instruments and processes. In terms of the COP's internal mechanisms and processes, the delegates addressed the need to focus the work programme and took some action to exert its authority over the interim financial mechanism and the administration of the Permanent Secretariat. As far as external affairs are concerned, the delegates discussed the question of how to interface with a variety of other international fora, including those related to Intellectual Property Rights (IPR), forests and Agenda 21.⁶⁹ The COP4 is scheduled for May 4-15, 1998 in Bratislava, Slovakia.⁷⁰

In addition to the meetings mentioned above, there are other relevant meetings and workshops which have been held or are scheduled to be convened. These meetings include:

1. SBSTTA—SBSTTA-1 was held between September 4 and 8, 1995, in Paris; SBSTTA-2 was held between September 2 and 6, 1996 in Montreal, and SBSTTA-3 was held between September 1-5, 1997 also in Montreal;
2. First Meeting of Experts on Marine and Coastal Biodi-

⁶⁸ "Conference of Parties to Biodiversity Convention Adopts Ministerial Statement and Launches New Initiative on Coastal and Marine Areas," U.N. Press Release HE/918, November 24, 1995.

⁶⁹ For more information, see "A Brief Analysis of COP3," *Earth Negotiating Bulletin*, Vol. 9, No. 65, available on the World Wide Web at <http://www.mbnet.mb.ca/linkages/vol09/0965028e.html>.

⁷⁰ For more information, see "Convention on Biological Diversity," *Earth Negotiating Bulletin*, *ibid.*; also "Decisions Adopted by the Third Meeting of the Conference of the Parties," available on the World Wide Web at <http://www.iisd.ca/linkages/biodiv/cop3/cop30000.html>.

- versity was held in March 1997, in Indonesia;
3. The Opened-Ended Ad Hoc Group of Experts on Biosafety met in Madrid between July 24 and 28, 1995; an Open-Ended Ad Hoc Working Group on Biosafety met between July 22 and 26, 1996 in Aarhus; the Ad Hoc Expert Group on Biosafety was held between May 12-16, 1997, in Montreal; the fourth meeting of the Open-Ended Ad Hoc Working Group on Biodiversity will be held in Montreal from 5 to 13 February 1998;
 4. The Workshop between the FAO and the Secretariat of the Convention on Biodiversity was held in May 1997, in Montreal;
 5. The International Panel on Forests was held in February 1997, in New York;
 6. A Special Session of the U.N. General Assembly was held in New York to review the progress made so far on achieving Rio's goals in June 1997.⁷¹

III: United States Participation in the Negotiation Process

The United States participation in the development of the Biodiversity Convention can be traced back to late 1980s. In 1987, the United States proposed at the 14th Governing Council of UNEP to pursue a global convention on biodiversity.⁷² In 1989, at UNEP's 15th Governing Council, the United States took the same

⁷¹ For more information, see "Convention on Biological Diversity," *Earth Negotiating Bulletin*, *supra* note 63, and "1997 to be Critical Year for Global Action on Biological Diversity," U.N. Press Release, December 29, 1996.

⁷² Fiona McConnell, *supra* note 48, at 5; see also David Eugene Bell, "The 1992 Convention on Biological Diversity: The Continuing Significance of U.S. Objections at the Earth Summit," 26 *GW J. Int'l L. & Econ.* 479, 501 (1993).

position, but reacted strongly against the inclusion of biotechnology in proposals for a new convention. The developing countries, on the other hand, made it clear that if biotechnology was not included, there would be no convention on biodiversity.⁷³

The formal negotiation process of developing an international agreement on biodiversity began in June 1991 when the first International Negotiating Committee (INC) for a Biodiversity Convention met in Madrid. During the meetings, the U.S. negotiating team opposed any measure that might inhibit global trade and objected to regulations on biotechnology.⁷⁴ It became clear that the United States was increasingly isolated during the meetings, mainly because of its position on biotechnology. Several days before the G7 Economic Summit⁷⁵ held in London in July 1991, it was disclosed that the United States, as a result of the "disastrous" Madrid INC, would not sign up to any endorsement whatsoever of the Biodiversity Convention.⁷⁶ By the end of the Summit, the U.S. position on the Biodiversity Convention was reflected in its statement included in the Economic Declaration, which reads:

We support the negotiation, under the auspices of UNEP, of an acceptable framework convention on biodiversity, if possible to be concluded next year. It should concentrate on protection of ecosystems, particularly in species-rich areas, without imped-

⁷³ *Ibid.*, at 11.

⁷⁴ *Ibid.*, at 47-50.

⁷⁵ Every year, the seven leading industrialized states, namely Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States, together with representatives of the European Union, meet at the Heads of State and Government level to discuss major global issues.

⁷⁶ *Ibid.*, at 52.

ing positive developments in biotechnology.⁷⁷

On March 24, 1992, in the Annual Report of the Council on Environmental Quality which was sent by the White House to the U.S. Congress, President Bush listed “[l]aunch[ing] an action program to conserve biodiversity and, if possible, sign[ing] a satisfactory global framework convention on biodiversity” [emphasis added] as one of his priorities for the upcoming historic U.N. Conference on Environment and Development.⁷⁸ In April 1992, however, a White House memo warned that the draft convention on biodiversity would create serious problems for the United States. These problems included: the expansion of the role of government in environmental matters; the need for “new compensation legislation” that would increase litigation; the need to pass legislation to benefit indigenous populations; the restriction on domestic and international trade in biodiversity; and the requirement of international transfer of biotechnology.⁷⁹ The memo suggested that the Bush Administration could avoid the flawed convention “either completing a ‘significant redraft’ or agreeing to have another negotiating session.”⁸⁰ At the same time, the U.S. negotiating teams were employing delaying tactics during the second, third, fourth and final sessions of the INC, contemplating that a convention on biodiversity would not be ready for signature at the upcoming UNCED.⁸¹ In

⁷⁷ See paragraph 53 of the Group of Seven (G-7) Summit Declarations, *U.S. Department of State Dispatch*, July 22, 1991.

⁷⁸ Congressional Record—Senate, 102nd Cong. 2nd Sess., 138 *Cong. Rec.* S 4094, March 24, 1992.

⁷⁹ “White House Memo Warns of Problems with Draft Biodiversity Convention,” *International Environment Daily (BNA)*, May 8, 1992.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*, at 63, 66, 70-71, and 84. See also “U.S. Accused of Stonewalling At-

the end, the U.S. strategy failed to postpone the adoption of the Convention on Biodiversity by the Final Act Conference, held on May 22, 1992. When signing the Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, the United States handed in a short declaration, expressing its dissatisfaction with the adoption of a “seriously flawed” treaty, which reads as the following:

1. In signing the Final Act, the United States recognizes that this negotiation has drawn to a close.
2. The United States strongly supports the conservation of biodiversity and, as is known, was an original proponent of a convention on this important subject. We continue to view international cooperation in this area as extremely desirable.
3. It is deeply regrettable to us that—whether because of the haste with which we have completed our work or the result of substantive disagreement—a number of issues of serious concern in the United States have not been adequately addressed in the course of this negotiation. As a result, in our view, the text is seriously flawed in a number of important respects.
4. As a matter of substance, we find particularly unsatisfactory the text’s treatment of intellectual property rights; finances, including, importantly, the role of the Global Environment Facility (GEF); technology transfer and biotechnology.
5. In addition, we are disappointed with the development of issues related to environmental impact assessments, the legal relationship between this Convention and other international agreements, and the scope of obli-

tempts to Draft Convention on Biodiversity,” *International Environment Daily (BNA)*, May 15, 1992.

gations with respect to the marine environment.

6. Procedurally, we believe that the hasty and disjointed approach to the preparation of this Convention has deprived delegations of the ability to consider the text as a whole before adoption. Further, it has not resulted in a text that reflected well on the international treaty-making process in the environmental field.⁸²

On May 29, 1992, the State Department announced that the United States decided not to sign the Convention on Biodiversity.⁸³ In spite of the announcement, there were people both within and outside the United States, who tried to reverse the U.S. government's decision. For instance, Mostafa Tolba, executive director of UNEP, stated on June 2, 1992 that he appealed to the United States "with all passion to sign the Convention. It would be joke if we don't have this treaty after four years of talks for it."⁸⁴ Timothy E. Wirth, the then U.S. Senator, also suggested that "the United States should sign the biodiversity convention with the intension of improving its workings over time."⁸⁵ William Reilly, Environmental Protection Agency Administrator and the chief U.S. negotiator at the UNCED, worked very hard at the Earth Summit, trying to find a way to enable the U.S. to sign the convention. He even made a last-minute appeal to the White House on June 3, 1992, to reverse the govern-

⁸² For the U.S. Declaration, see *supra* note 2, at 20.

⁸³ See Gareth Porter, "The United States and the Biodiversity Convention: the Case for Participation," *African Centre for Technology Studies*, Biopolicy International Series No. 12, 1993, at 9.

⁸⁴ "Earth Summit: A Plea for U.S. to Sign Biodiversity Treaty," Inter Press Service Global Information Network, available on West law online search, Database MAGSPUS, 1992 WL 2474261.

⁸⁵ Congressional Record—Senate, 102nd Cong. 2nd Sess., 138 *Cong. Rec.* S 7265, June 2, 1992.

ment's decision, but was rebuffed by President Bush's domestic policy chief Clayton Yeutter "who rejected any effort to change the American position."⁸⁶ Unfortunately, Reilly's cable on the biodiversity convention, which he sent to Yeutter, was leaked to the public. The disclosure of the cable was believed to have eliminated any chance that the United States might have signed a modified biodiversity convention.⁸⁷ On June 5, 1992, President Bush affirmed that the United States would not sign the Biodiversity Convention.⁸⁸

IV: Major Reasons for U.S. Objections to the Convention on Biodiversity

On June 11, 1992, the day President Bush travelled to Rio de Janeiro, he spoke at Andrews Air Force Base in Camp Springs, Maryland about the Earth Summit that he was to attend. In his remarks, the President pointed out that the Biodiversity Convention "contains provisions that have nothing to do with biodiversity."⁸⁹ He gave one example to support the accusation:

The private sector is proving it can help generate solutions to our environmental problems. The treaty includes provisions

⁸⁶ "White House '92—Bush: White House Cleaning?" American Political Network, *The Hotline*, Vol. 5, No. 174, June 5, 1992.

⁸⁷ "Leak of Reilly Cable on Biodiversity Treaty Said to Eliminate Possibility of U.S. Signature," *Environment Reporter (BNA)*, Vol. 23, No. 7, June 12, 1992, at 646.

⁸⁸ *Ibid.*

⁸⁹ "Remarks on Departure for the United Nations Conference on Environment and Development," June 11, 1992, in *George Bush: Public Papers of the Presidents of the United States*, Book I—January 1 to July 31, 1992 (Washington, D.C.: United States Government Printing Office, 1993), at 920.

that discourage technological innovations, treat them as common property though they are developed at great cost by private companies and American workers. We know what will happen. Remove incentives, and we'll see fewer of the technological advances that help us protect our planet.⁹⁰

On June 13, 1992, in his speech made before world leaders at the Earth Summit, President Bush reiterated that the Convention "threatens to retard biotechnology and undermine the protection of ideas."⁹¹ He also stated that the Convention's financing scheme would not work.⁹² At the end of his speech, the President reasserted his belief that environmental protection and economic growth, environment and development, are inseparable.⁹³ On June 18, 1992, during a question-and-answer session with employees of Evergreen Oil held in Newark, California, President Bush said,

I could not sign that biodiversity treaty because, . . . it would take technological innovation . . . and hand it over to others and dry up our technology and dry up the labs. I stood up there against the whole world and said, "Look, we want to share our technology. We want to continue to lead on the environment, but I simply also, as President, must consider the working man and woman, the families of this country."⁹⁴

President Bush's concern over the development of the U.S. domes-

⁹⁰ *Ibid.*

⁹¹ For excerpts from President Bush's speech, see *The New York Times*, June 13, 1992, at 5.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Question-and-Answer Session with Employees of Evergreen Oil in Newark, California, June 18, 1992, in *George Bush: Public Papers of the President of the United States*, *supra* note 89, at 972.

tic economy, given as one of the major reasons for the U.S. unwillingness to sign the Convention, was echoed in the remarks made by some other governmental officials, such as Secretary of State James A. Baker III and Counsellor to the President for Domestic Policy Clayton Yeutter. Baker declared that "[t]his so-called biodiversity treaty . . . would put people out of business in this country" and that the Convention would infringe the U.S. patent protection for biological invention.⁹⁵ Yeutter, in his letter to the editor of the *Washington Post*, defended President Bush's "balanced, sensible position on the issue of environment and development."⁹⁶ He listed three major reasons for U.S. objections to the Biodiversity Convention. First, the Convention asks the United States and other developed states to contribute money that developing countries would spend as they see fit. Second, the Convention runs against the U.S. efforts to protect its citizens' intellectual property rights—patents and copyrights. Finally, the Convention demands the transfer of U.S. technology to the developing countries, which could lead to the pirating of technology.⁹⁷ In one of the U.S. Department of State's publications, three major reasons were given to prove that the Biodiversity Convention is "seriously flawed" and, therefore, the United States decided not to sign it.⁹⁸ First, the Convention contains provisions that "go beyond legitimate biodiversity protection goals."⁹⁹ Second, it fails to contain acceptable language, establishing the GEF

⁹⁵ "U.S. Stance Under Fire At Summit; Lawmakers Hear Complaints, Worries," *The Washington Post*, June 7, 1992, at A27.

⁹⁶ Clayton Yeutter, "The President's Trip to Rio," Letters to the Editor, *The Washington Post*, June 12, 1992.

⁹⁷ *Ibid.*

⁹⁸ Fact Sheet: U.S. Environmental Accomplishments in Support of UNCED, *U.S. Department of State Dispatch*, July 1, 1992.

⁹⁹ *Ibid.*

as providing financial aid.¹⁰⁰ Finally, it “would retard the development of new technology to meet future needs by providing inadequate protection of intellectual property rights and implying that biotechnology development is unsafe.”¹⁰¹ U.S. Senator Nickles also supported President Bush’s decision, arguing that “it is the best interests of the United States that the United States not be a signatory to the Biological Diversity Convention.”¹⁰² He stated:

The reasons the United States is not signing the Biological Diversity Convention are grounded not in the positive provisions that would protect biodiversity, but in the provisions of the Convention that relate to treatment of intellectual property rights, biotechnology and, . . . the language concerning financial obligations and responsibilities. These problematic provisions are almost side issues to the protection of endangered species and habitat. However, these problematic provisions are the heart of the agenda of the developing nations at Rio. They want our money with only vague accountability and they want our technology for free, without any understanding of the effectiveness of private sector investment to assist in meeting biodiversity goals.¹⁰³

Alarmed that the Convention on Biodiversity might open the way to intellectual property claims, the major U.S. organizations related to the biotechnological industry, such as the Association of Biotechnology Companies (ABC), the Industrial Biotechnology Association (IBA), and the Pharmaceutical Manufacturers’ Associa-

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² For Senator Nickles statements, see Congressional Record—Senate, 102nd Cong. 2nd Sess., 138 *Cong. Rec.* S 8375, June 17, 1992.

¹⁰³ *Ibid.*

tion (PMA) expressed their opposition to the Convention.¹⁰⁴ Before President Bush attended the Earth Summit, the IBA and the PMA sent letters to the President, urging him not to sign the Convention.¹⁰⁵ The PMA reminded President Bush that the Convention "would undermine the great progress [the Bush] Administration has made in encouraging other countries . . . to strengthen their patent laws."¹⁰⁶ The IBA stressed that the Convention "not only constitutes a threat to continued U.S. leadership in biotechnology, it also undermines the very incentives which serve to encourage the development of technologies that would preserve biological diversity."¹⁰⁷

To some people in the United States, the reasons given by the President, U.S. officials, and the biotechnological industry for refusing to sign the Convention were not persuasive. Others suggested that the decision not to sign the Convention was a result of misinterpreting the provisions of the Convention. According to a nationwide survey conducted by the Defenders of Wildlife, 78% of the American public believed that the United States should sign the Convention.¹⁰⁸ A number of environmentalists and Democratic members of the U.S. Congress, while agreed that the Convention

¹⁰⁴ See "U.S. Industry Waiting to See If Competitor Nations Ratify Treaty," *Daily Environment Report (BNA)*, July 1, 1992. For more information, see Gareth Porter, "The United States and the Biodiversity Convention: the Case for Participation," *African Centre for Technology Studies*, Biopolicy International Series No. 12, 1993, at 9-11.

¹⁰⁵ For the letters, see Congressional Record—Senate, 102nd Cong. 2nd Sess., 138 *Cong. Rec.* S 8375-76, June 17, 1992.

¹⁰⁶ *Ibid.*, at S 8375.

¹⁰⁷ *Ibid.*, at S 8376.

¹⁰⁸ The results of the survey were released by the Defenders of Wildlife on June 4, 1993. See "As It Signs Treaty, United States Calls for Global Patent Protection for Biotech," *Daily Environment Report (BNA)*, June 7, 1993.

did raise some problems for the United States, believed that the United States should play a leadership role in protecting the world's biodiversity, and therefore that the United States should sign the Convention first and work on the "problematic provisions" of the Convention later.¹⁰⁹

In his study of the Biodiversity Convention, David Eugene Bell concluded that although the Convention's premise is a positive first step toward conserving the world's biological resources, the substantive provisions which the Bush Administration opposed actually undermine the Convention's objectives.¹¹⁰ Bell argued that, among those reasons given by the Bush Administration for not signing the Convention, the technology transfer and intellectual property rights (IPR) objections were the strongest and most defensible.¹¹¹ However, he pointed out in the conclusion that

[t]he United States' objections to the financial mechanism, transfer requirements, and the treatment of intellectual property rights contained in Articles of 15, 16, 19, 20, and 21 were echoed by other developed nations. Many of these countries signed the Convention hoping to "clarify" or even change provisions of the Convention during the Conference of the Parties. Whatever their motivation for signing, be it a desire to be "politically correct," a belief that acceptable changes could yet be effected, or simply a confidence that the Convention was the best way to ensure and improve the Earth's biological diversity, other developed countries did not oppose the Convention publicly.¹¹²

¹⁰⁹ "Leak of Reilly Cable on Biodiversity Treaty Said to Eliminate Possibility of U.S. Signature," *supra* note 87.

¹¹⁰ David Eugene Bell, *supra* note 72, at 482.

¹¹¹ *Ibid.*, at 526.

¹¹² *Ibid.*, at 534-535.

Finally, he commented, the U.S. substantive objections to the Convention did not signal the inherent unworkability of a Biodiversity Convention.¹¹³

Gareth Porter of the Environmental and Energy Study Institute in Washington D.C., argued that the Bush Administration's decision not to sign the Biodiversity Convention was based on a misreading of the text.¹¹⁴ After examining the three issues cited by the Bush Administration as major reasons for rejecting the Convention, namely, intellectual property rights (IPR), biotechnology safety regulation and the financial mechanism, he concluded

[t]he convention does not obligate any contracting party to compel private industry to transfer patented technologies. Nor does it give international legal status to misusing compulsory licensing as a means of technology transfer. The convention's text will not materially affect the outcome of the TRIPR (Trade Related Intellectual Property Rights) and bilateral trade negotiations, which will determine whether or not many countries will provide stronger IPR protection in the future. . . . The other problems with the convention cited by the Administration in its initial announcement of the decision against signing (i.e., the biotechnology regulations provisions and the financial mechanism) do not justify the U.S. decision either.¹¹⁵

Accordingly, he argued that "U.S. interests would be better served by signing the convention first and then seeking adjustment or clarification, where necessary, through diplomatic efforts."¹¹⁶ He also

¹¹³ *Ibid.*, at 536.

¹¹⁴ See "U.S. Objections to Biodiversity Treaty Based on Misreading of Text, Study Says" *International Environment Reporter Current Report (BNA)*, Vol. 15, No. 22, November 4, 1992, at 704.

¹¹⁵ Porter, *supra* note 83, at 25.

¹¹⁶ *Ibid.*, at 26.

believed that

U.S. withdrawal from active participation in regimes for global environmental protection and sustainable development is not only bad for the rest of the world, but bad for the United States. When the United States is tempted to defy the rest of the world and reject a global environmental agreement, it is probably ignoring the considerable opportunities it has to protect its interests through participating in the agreement.¹¹⁷

Adam L. Steltzer's study on the impact of the Convention on the U.S. biotechnology also concluded that "[t]he net effect of this Convention may be nothing for the U.S. to fear."¹¹⁸ "Even assuming a short-term economic detriment upon biotechnology-based industries," the study argued, "the Convention may actually further the development of biotechnology through expansion of access to biological resources and increased opportunities for research and development of those resources."¹¹⁹ In another study on the Biodiversity Convention's provisions concerning biotechnology industry, Karen Anne Goldman suggested that "[b]y signing the Biodiversity Convention, the United States can participate in the development of protocols that will determine how the Convention will actually operate. . . . By signing the Biodiversity Convention, the United States also gained the opportunity to influence the Convention's effectiveness in preserving biodiversity."¹²⁰ In general, it is believed that

¹¹⁷ *Ibid.*

¹¹⁸ Adam L. Steltzer, "U.S. Biotechnology Intellectual Property Rights as an Obstacle to the UNCED Convention on Biological Diversity: It Just Doesn't Matter," 6 *Transnat'l Law* 271, 299 (Spring 1993).

¹¹⁹ *Ibid.*

¹²⁰ Karen Anne Goldman, "Compensation for Use of Biological Resources under the Convention on Biological Diversity: Compatibility of Conserva-

U.S. refusal to sign the Biodiversity Convention could put the United States "at a considerable disadvantage in bidding for environmental contracting jobs overseas,"¹²¹ "block U.S. access to genetic resources in developing countries,"¹²² "hurt financing of conservation of biological resources,"¹²³ forfeit the U.S. influence in the follow-up negotiations,¹²⁴ and, in the long-term, lead to a loss of opportunities for the U.S. biotechnology industry to protect genetic resources.¹²⁵

V. A Shift of U.S. Position Under the Clinton Administration

Shortly after the November 1992 presidential election, it was speculated that the new Clinton Administration would give strong support to international efforts dealing with global environmental issues, such as conservation of the world's biodiversity.¹²⁶ At the

tion Measures and Competitiveness of the Biotechnology Industry," *Law and Policy in International Business*, Vol. 25, No. 2, January 1994, at 695.

¹²¹ "At the Issue: the Earth Summit: Was the United States Right Not to Sign the Biodiversity Convention?" 78 Sept. *ABA J.* 42 (1992).

¹²² "U.S. Objections to Biodiversity Treaty Based on Misreading of Text, Study Says," *supra* note 114.

¹²³ *Ibid.*

¹²⁴ Comments of Kenton Miller, director of the biodiversity programme at the World Resources Institute, quoted in Richard Stone, "The Biodiversity Treaty: Pandora's Box or Fair Deal?" *Science*, Vol. 256, No. 5064, June 19, 1992.

¹²⁵ Comments of Margaret Mellon, director of the National Wildlife Federation's Biotechnology Policy Center, quoted in "U.S. Industry Waiting to See If Competitor Nations Ratify Treaty," *supra* note 104.

¹²⁶ "President-elect Seen Giving Strong Support to International Efforts to Curb Pollution," *International Environment Reporter Current Report (BNA)*, Vol. 15, No. 23, November 18, 1992, at 762.

same time, the international community was still hoping that the United States would change its position by signing the Biodiversity Convention.¹²⁷ On April 21, 1993 (the day before Earth Day), President Clinton declared:

For too long we have been told that we have to choose between the economy and the environment . . . between our obligations to our own people and our responsibilities to the future and to the rest of the world; between public action and private economy. I am here today in the hope that we can together take a different course of action, to offer a new set of challenges to our people.¹²⁸

He then announced that the United States would sign the Biodiversity Convention.¹²⁹ In spite of this announcement, it must be noted that President Clinton also expressed concern that certain provisions of the Biodiversity Convention would have negative impacts on patent protection of biotechnology. It was therefore expected that the Clinton Administration would attach an "interpretative statement" to the U.S. signature in order to protect the interests of the U.S. biotechnology industry.¹³⁰

The Clinton Administration's decision to sign the Biodiversity

¹²⁷ See, for example, the British Environment Secretary Michael Howard's comments, in "U.K. Environment Secretary Encouraging Clinton to Sign Biodiversity Convention," *Daily Environment Report (BNA)*, March 3, 1993.

¹²⁸ *Public Paper of the United States Presidents, William Clinton*, Book I, (Washington, D.C.: GOP, 1994), at 469.

¹²⁹ *Ibid.*, at 470; see also "EC Ministers Welcome Clinton's Signing of Rio Agreements As Spur to International Progress," *International Environmental Reporter Current Report (BNA)*, Vol. 16, No. 9, May 5, 1993, at 346.

¹³⁰ "The United States on Sustainable Development: From Reactionary to Global Leader," in *A Global Agenda: Issues Before the 47th General Assembly of the United Nations 92-93* (University Press of America, 1993), at 183.

Convention was the outcome of months of negotiations between biotechnology industry officials and environmentalists.¹³¹ On June 4, 1993, the last day for signing the Biodiversity Convention, the U.S. Permanent Representative to the United Nations Madeleine Albright and the State Department's Counselor of Global Affairs Timothy Wirth signed the Convention on behalf of the United States at U.N. Headquarters in New York.¹³² While signing the Convention, the U.S. representatives stressed

the value of voluntary involvement of the private sector in developing new technologies based on genetic resources, and noted the importance of adequate protection for intellectual property rights to encourage such involvement . . . [and] also noted U.S. intentions to ensure an effective relationship between the Conference of the Parties to the Convention and the Global Environment Facility, to provide funding for suitable biodiversity projects.¹³³

¹³¹ In December 1992, the newly-elected President asked officials of three biotechnology companies (Genentech Inc., Shaman Pharmaceuticals Inc. and Merck & Co.) and three environmental groups (the World Resources Institute, the World Wildlife Fund and the Environmental and Energy Study Institute) to "review the text of the Biodiversity Convention and study ways in which both environmental and economic interests could be reconciled, thereby allowing the United States to become a party." Victor Marroguin, "Wildlife Utilization," *Law and Pol'y Int'l Bus.*, January 1995, at 303, 333. On April 14, 1993, a final 3-page interpretive statement aimed at protecting intellectual property rights was sent to Vice President Gore by heads of the six organizations. See "Clinton's Earth Day Pledge Guards Gene Pools and Patents," *The Weekly of Business Aviation*, Vol. 56, No. 19, May 10, 1993.

¹³² *United States Participation in the United Nations—1993*, Department of State Publication 10055, Bureau of International Organization Affairs, released August 1993, at 141-142.

¹³³ *Ibid.*, at 142; for the statement, see also "As It Signs Treaty, United States

However, no "interpretive statement" was issued by the U.S. representatives at the time of signing the Convention. It was noted that the United States would address interpretative issues at the time of ratification.¹³⁴ Three days later, Timothy Wirth said that "he expects the Senate to agree to ratify the international biodiversity treaty in less than a year,"¹³⁵ which proved to be his wishful thinking. However, he was right that the Administration would send the Biodiversity Convention, along with the "interpretative statement", to the U.S. Senate for advice and consent to ratification in less than a year.

On November 16, 1993, the U.S. Department of State submitted the Biodiversity Convention, with Annexes, to President Clinton and recommended that the Convention be transmitted to the U.S. Senate for its advice and consent to ratification.¹³⁶ The letter of Submittal stated that since the time the United States decided not to sign the Biodiversity Convention due to its concerns with certain provisions in the Convention in June 1992,

Calls for Global Patent Protection for Biotech," *Daily Environment Report (BNA)*, June 7, 1993.

¹³⁴ *United States Participation in the United Nations*, *supra* note 132, at 142.

¹³⁵ "Wirth Predicts Biodiversity Treaty Will be Ratified within One Year," *Daily Environment Report (BNA)*, June 8, 1993.

¹³⁶ For the Letter of Submittal, see *Message from the President of the United States transmitting the Convention on Biological Diversity, with Annexes Done at Rio De Janeiro June 5, 1992, and Signed by the United States in New York on June 4, 1993*, 103rd Cong. 1st Sess., Senate Treaty Doc. 103-120, at V-XIX. For summary of the State Department's report, see "Exclusive Rights to Technology Stressed by Administration in Document on Treaty," *International Environment Reporter Current Report (BNA)*, Vol. 16, No. 24, December 1, 1993, at 889.

... under the chairmanship of the Department of State, all relevant federal agencies conducted a comprehensive review of the Convention and the Department of State met with members of Congress, the private sector, and non-governmental environmental organizations with a view to determining how the United States concerns could best be addressed. As a result of that view and consultative process, all agencies recommend that the United States ratify the Convention subject to several understandings ...¹³⁷

There are seven understandings, formerly called the "interpretative statement", proposed in the Department of State's Letter of Submittal, which are important to help understand the U.S. government's position on the Convention, and, accordingly, are quoted in total as follows:

1. Article 3 Understanding (Principle): The Government of the United States of America understands Article 3 references a principle to be taken into account in the implementation of the Convention;
2. Article 16 Understanding (Access to and Transfer of Technology): It is the understanding of the (U.S.) Government ... that:
 - a. "fair and most favorable terms" in article 16 (2) means terms that are voluntarily agreed to by all parties to the transaction;
 - b. with respect to technology subject to patents and other intellectual property rights, Parties must ensure that any access to or transfer of technology that occurs recognizes and is consistent with the adequate and effective protection of intellectual property rights, and that article 16 (5) does not alter this obligation;

¹³⁷ *Ibid.*

3. Article 19 Understanding (Conduct and Location of Research Based on Genetic Resources): It is the understanding of the (U.S.) Government . . . that:
 - a. Article 15 (6) applies only to scientific research conducted by a Party, while article 19 (1) addresses measures taken by Parties regarding scientific research conducted by either public or private entities;
 - b. Article 19 (1) cannot serve as a basis for any Party to unilaterally change the terms of existing agreements involving public or private U.S. entities;
4. Article 20 Understanding (Costs): It is the understanding of the (U.S.) Government . . . that, with respect to Article 20 (2), the financial resources provided by developed country Parties are to enable developing country parties to meet the agreed full incremental costs to them of implementing measures that fulfill the obligations of the Convention and to benefit from its provisions and that are agreed between a developing country Party and the Institutional structure referred to in article 21;
5. Article 21 Understanding (Interpretation of the term "authority"): It is the understanding of the (U.S.) Government . . . that, with respect to article 21 (1) (a), the "authority" of the Conference of the Parties with respect to the financial mechanism relates to determining, for the purposes of the Convention, the policy, strategy, programme priorities and eligibility criteria relating to the access to and utilization of such resources;
6. Article 21 Understanding (Conference of the Parties and "Amount of Resources Needed"): The (U.S.) Government . . . understands that the decision to be taken by the Conference of the Parties under article 21, paragraph 1, concerns "the Amount of Resources Needed" by the financial mechanism, and that nothing in article 20 or 21 authorizes the Conference of the Parties to

take decisions concerning the amount, nature, frequency or size of the contributions of the Parties to the institutional structure;

7. Understanding regarding sovereign immune vessels: The (U.S.) Government . . . understands that although the provisions of this Convention do not apply to any warship, naval auxiliary, or other vessels or aircraft owned or operated by a State and used, for the time being, only on government noncommercial service, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.¹³⁸

The State Department's recommendation was accepted by President Clinton, who transmitted the Convention, with Annexes, to the U.S. Senate for advice and consent on November 19, 1993.¹³⁹ Although President Clinton expressed the U.S. strong support for the Convention as a whole in terms of the Convention's goals,¹⁴⁰ he made clear U.S. reservations on certain provisions in the Convention, which deal specifically with intellectual property rights issues. The President stated that "[t]he Administration will . . . strongly resist

¹³⁸ Compiled by the author based upon the Department of State's report contained in its Letter of Submittal to President Clinton on November 16, 1993, see Senate Treaty Doc. 103-120, *ibid.*, at VIII-XVII.

¹³⁹ "Message to the Congress Transmitting the Convention on Biological Diversity," in *William J. Clinton: Public Papers of the President of the United States*, 1993, Book II—August 1 to December 31, 1993 (Washington, D.C.: USGPO, 1994), at 2029-2030. See also "Convention on Biological Diversity Sent by Clinton Administration to Senate," *Daily Environment Report (BNA)*, November 23, 1993.

¹⁴⁰ See *supra* note 12.

any actions taken by Parties to the Convention that lead to inadequate levels of protection of intellectual property rights, and will continue to pursue a vigorous policy with respect to the adequate and effective protection of intellectual property rights in negotiations on bilateral and multilateral trade agreement.”¹⁴¹ As far as U.S. obligations to implement the Biodiversity Convention are concerned, President Clinton pointed out that the “existing [U.S.] programmes and authorities are considered sufficient to enable any activities necessary to effectively implement [the U.S.] responsibilities under the Convention.”¹⁴²

Up to this stage, there are several questions that must be addressed before proceeding to the next section which deal with the Senate’s debates regarding whether the U.S. should ratify the Biodiversity Convention and the obstacles to—as well as likelihood—of U.S. ratification of the Convention. First, did it really signal a policy shift of the United States when the Clinton Administration signed the Biodiversity Convention in June 1993 and then transmitted it to the U.S. Senate for advice and consent in November 1993? Second, what would be the legal effect of those “interpretative statements” or “understandings” made by certain states upon signature or ratification of the Convention? Would the obligations of state parties under the Convention be affected and thus undermine the goals of the Convention because of the attachment of these “interpretative statements” or “understandings”? Third, what could be the major reasons which led the U.S. biotechnology industry to shift its position from opposing U.S. signing the Convention to supporting the Convention “even if an accompanying U.S. statement of interpreta-

¹⁴¹ *Ibid.*, at 2029.

¹⁴² *Ibid.*

tion is not finished"?¹⁴³

Regarding the first question, this writer does not accept the view of Timothy Wirth presented on June 7, 1993 that "[s]ignature of the biodiversity convention was one of the three major policy shifts on international environmental issues since the Clinton administration took office in January (1993)."¹⁴⁴ In my view, the U.S. policy has not been changed or reversed since the Bush Administration's decision not to sign the Convention in June 1992. What has been changed, in fact, is the U.S. diplomatic/negotiating strategy. By joining "the Club" in time, that is, signing the Convention before the deadline of June 4, 1993, the United States was hoping that those "problematic provisions" could be "fixed" later on by U.S. participation in the COP. As pointed out in his remarks on April 21, 1993, President Clinton noted that the Biodiversity Convention "had some flaws" but they could be fixed.¹⁴⁵ In his Message to the Congress Transmitting the Convention on Biological Diversity, President Clinton also stressed that "early ratification (of the Convention) will best allow the United States to fully represent its national interests at the first Conference of the Parties."¹⁴⁶ [Emphasis added]. In addition, a careful reading of the seven understandings proposed in the Department of State's recommendation letter to President Clinton in comparison with the Bush Administration's oppositions to the Biodiversity Convention leads to the same conclusion, i.e., the U.S. position has not changed; what had been changed is the strat-

¹⁴³ "Industry Wants U.S. to Sign Treaty by Deadline Even If Statement Unfinished," *Daily Environment Report*, June 1, 1993.

¹⁴⁴ "Wirth Predicts Biodiversity Treaty Will be Ratified within One Year," *supra* note 135.

¹⁴⁵ "Clinton's Earth Day Pledge Guards Gene Pools and Patents," *supra* note 131.

¹⁴⁶ *Supra* note 12, at 2030.

egy.¹⁴⁷ As examined in Sections III and IV of this paper, the Bush Administration decided not to sign the Biodiversity Convention mainly because of Articles 16, 19, 20, and 21, which contain certain language that the United States has difficulty accepting.¹⁴⁸ The Clinton Administration's position on intellectual property rights, transfer and access to biotechnology, and the financial mechanism as detailed in the understandings proposed in the Department of State's report in my view, is not much different from the Bush Administration's. Besides, signing the Biodiversity Convention does not entitle the United States to status as a contracting party to the Convention. It is still necessary to go through the ratification process in order to actually "join the club."

Regarding the second question, it must first be noted that Article 37 of the Biodiversity Convention provides that "[n]o reservations may be made to this Convention."¹⁴⁹ The reason for excluding all reservations, is "probably the desire to preserve the balance between the various obligations created by the Convention which would otherwise be threatened if Parties had the right to make reservations."¹⁵⁰ Even though no reservations are allowed under the

¹⁴⁷ Mr. Pell, chairman of the Senate Foreign Relations Committee stated in the Congress that the seven understandings addressed each of the concerns first identified by the Bush administration. See Congressional Record—Senate, 103rd Cong. 2nd Sess., 140 *Cong. Rec.* S 14046, October 4, 1994, at S 14047.

¹⁴⁸ See *supra* note 110.

¹⁴⁹ A reservation is a formal declaration by a state, at the time it takes action needed to become a party to a convention, such as signing the document, whereby it announces that it does not consider itself bound by some of the convention's provisions. The text of any convention may restrict the contracting parties' right to make reservations. See *A Guide to the Convention on Biological Diversity*, *supra* note 6, at 127.

¹⁵⁰ *Ibid.*

Biodiversity Convention, states, such as Japan, the United Kingdom, France, Italy, and Switzerland did issue interpretative statements when they signed the Convention in June 1992.¹⁵¹ On June 12, 1992, for instance, the United Kingdom filed its interpretative statement on signature of the Convention, which was confirmed upon its ratification of the agreement. The declaration reads:

The Government . . . declare their understanding that Article 3 of the Convention sets out a guiding principle to be taken into account in the implementation of the Convention. The Government . . . also declare that the decisions to be taken by the Conference of the Parties under paragraph 1 of Article 21 concern "the amount of resources needed" by the financial mechanism, and that nothing in Article 20 or Article 21 authorizes the Conference of the Parties to take decisions concerning the amount, nature, frequency or size of the contributions of the Parties under the Convention.¹⁵²

Switzerland stated, *inter alia*, in its declaration made upon signature of the Convention on June 12, 1992 that

[i]t is our understanding that genetic resources acquired under the procedure specified in article 15 and developed by private research institutions will be the subject of programmes of co-operation, joint research and the transfer of technology which will respect the principle and rules for the protection of intel-

¹⁵¹ For the declarations made at the time of adoption of the agreed text of the Convention, at the time of adoption of the recommendation of the credential committee, and made upon signature of the Convention, see *Convention on Biological Diversity*, *supra* note 2, at 15-22.

¹⁵² For the declaration, see United Nations Home Page, in TREATY section, at http://www.un.org/Depts/Treaty/fin...les/part_boo/xxviiboo/xxii_8.html.

lectual property.¹⁵³

On November 21, 1994, when ratifying the Biodiversity Convention, Switzerland declared, *inter alia*,

[f]or Switzerland, transfer of technology and access to biotechnology, as defined in the text of the Convention on Biological Diversity, will be carried out in accordance with article 16 of the said Convention and in compliance with the principles and rules of protection of intellectual property, in particular multilateral and bilateral agreements signed or negotiated by the Contracting Parties to this Convention.¹⁵⁴

The legal effect of these "interpretative statements" or "understandings" filed by the states mentioned above is a question deserving further study, given the fact that Article 37 of the Biodiversity Convention excludes all reservations. David Downs suggested that interpretative statements filed after the adoption of the final text have no legal significance. He further argued that the U.S. understandings filed with an instrument of ratification would fall into the "no legal significance category."¹⁵⁵ When the early draft of the U.S. interpretative statements¹⁵⁶ was leaked to the public in May 1993, Vincente Sanchez, Chile's ambassador to UNEP, com-

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ "Biodiversity Treaty to be Sent to Senate Before Congressional Recess, McGinty Says," *Daily Environment Report (BNA)*, October 28, 1993.

¹⁵⁶ It seems that the U.S. biotechnology industry and environmental groups reached agreement in early April 1993. A draft interpretative statement was then sent to Vice President Gore's staff. On April 14, 1993, final copy of the interpretative statement was given to the Vice President himself by heads of the six organizations. See "Clinton's Earth Day Pledge Quads Gene Pools and Patents," *supra* note 131.

mented that "I consider it extremely dangerous for the Convention."¹⁵⁷ He warned that "[t]he United States' interpretation could change the whole spirit and essence of the Convention."¹⁵⁸ David Downes was also concerned about that "if the United States deposits its interpretation statement with the instrument of ratification, some countries may accuse the United States of moving unilaterally to get the protection it was unable to obtain in international negotiations on the accord."¹⁵⁹

In spite of the aforementioned questions and concerns, it must be noted that Article 309 of the 1982 United Nations Convention on the Law of the Sea¹⁶⁰ provides that "[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."¹⁶¹ Nevertheless, more than fifty contracting parties to the 1982 Convention filed declarations when they signed or ratified the agreement.¹⁶² For instance, paragraph 2 of France's declaration made upon signature of the 1982 Convention on December 10, 1982 states,

¹⁵⁷ "Environment: U.S. to Unveil Biodiversity Model to Development World," Inter Press Service Global Information Network, May 26, 1993, available at West law online search, Database MAGSPLUS, 1993 WL 2540727.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ The United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 21 I.L.M. 1261 (1982), reprinted in *The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea*, U.N. Sales No. E.83.V.5 (1983).

¹⁶¹ *Ibid.*

¹⁶² For the declaration, see United Nations Home Page, under TREATY section, at http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/xxi_boo/xxi_6.html.

[t]he provisions of the Convention relating to the area of the sea-bed and ocean floor beyond the limits of national jurisdiction show considerable deficiencies and flaws with respect to the exploration and exploitation of the said area which require rectification through the adoption by the Preparatory Commission of draft rules, regulations and procedures to ensure the establishment and effective functioning of the International Sea-Bed Authority.¹⁶³

Greece filed an interpretative declaration on the subject of straits when it signed the Convention on December 10, 1982. On July 21, 1995, Greece filed another declaration when it ratified the 1982 Convention. Paragraph 2 of that declaration reiterates Greece's interpretative declaration on straits which it deposited at the time of the Convention's adoption and at the time of its signature.¹⁶⁴ In addition, it should also be noted that the 1982 Convention is not a framework convention, but a comprehensive "Constitution for the Oceans," which was a product of lengthy codifying efforts made by more than 150 states and entities during the Third United Nations Conference on the Law of the Sea (UNCLOS III) (1973-1982).¹⁶⁵

Seeing that the Convention on Biodiversity is nothing but a framework agreement, along with the vague language found in its provisions, such as "as far as possible and as appropriate," it leaves wide open the interpretation and implementation of the Convention's provisions. As one commentator points out

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ For detailed analysis of the Conference, see William Wertenbaker, "A Reporter at Large: The Law of the Sea-I," *The New Yorker*, August 1, 1983, at 38 and "A Reporter at Large: The Law of the Sea-II," *The New Yorker*, August 8, 1983, at 58.

[t]he Biodiversity Convention has been criticized for its weak conservation provisions because it requires few concrete measures to preserve biodiversity. The Convention calls for a variety of very general *in situ* conservation measures. Such measures are not required, but need be undertaken only "as far as possible and as appropriate" Specific conservation provisions, such as a global list of biogeographic areas of species importance for the conservation of biodiversity and a list of species threatened with global extinction, were deleted from the Convention. Nor was the critical and controversial issue of population pressures addressed.¹⁶⁶

As mentioned in section II of this paper, indeed there are important issues relating to intellectual property rights, biosafety protocol, and the financial mechanism which were discussed or decided in those meetings, in particular the three sessions of the Conference of Parties, held since the entry into force of the Biodiversity Convention on December 29, 1993. In December 1994, the United States participated in the COP1 as an observer. At the Conference, the United States expressed its satisfaction with the decision taken in the meeting with respect to restructuring GEF.¹⁶⁷ It was also at this Conference that the United States issued its opposition to a biosafety protocol in the discussion of the subject matter. The United States also argued that the intellectual property rights issue should be addressed separately.¹⁶⁸ However, in November 1995, it was re-

¹⁶⁶ Karen Anne Goldman, *supra* note 120.

¹⁶⁷ See "Conference of Parties of the Convention on Biological Diversity," Timothy E. Wirth, Under Secretary for Global Affairs, Address before the First Conference of Parties of the Convention on Biological Diversity, Nassau, the Bahamas, December 7, 1994, in *U.S. Department of State Dispatch*, Vol. 5, No. 52, December 26, 1994, at 858.

¹⁶⁸ See "Setbacks," in *Earth Negotiation Bulletin*, Vol. 9, No. 28, available on the World Wide Web at <http://www.iisd.calinkages/vol09/0928024e.html>.

ported that the U.S. officials expressed frustration at their inability to influence the discussions and deliberations on a biosafety protocol to the degree they could have had the United States ratified the Biodiversity Convention.¹⁶⁹

Regarding the third question, the U.S. biotechnology industry, as mentioned briefly in section IV, opposed the Convention on Biodiversity mainly because of its concerns over the intellectual property rights issue. Some of the U.S. biotechnology-based industries worried about the possibility that the Convention would obligate the U.S. government to force them to give away their patented technologies and trade secrets not only to governments but to other companies based in the developing states.¹⁷⁰ Others feared that American courts would find something in the Convention's text which would obligate their government to force transfer of technology through compulsory licensing.¹⁷¹ Still others were afraid that the Convention would make it much more difficult to achieve minimum standards of protection of intellectual property rights for their biotech-products in developing countries through the Trade Related Intellectual Property Rights negotiations.¹⁷² At the end of 1992, it was reported that the biotechnology industry continued to oppose U.S. signature of the Convention. For instance, spokesmen from the IBA and the ABC pointed out that their organizations maintained their position against the Convention. At the same time, it was also reported that the two major biotechnology organizations were willing to work cooperatively with the newly-elected Clinton Admini-

¹⁶⁹ See "Convention on Biological Diversity Draws Attacks," *The National Law Journal*, October 28, 1996, at C39.

¹⁷⁰ Gareth Porter, *supra* note 83, at 9.

¹⁷¹ *Ibid.*, at 9-10.

¹⁷² *Ibid.*, at 10.

stration, which was expected to endorse the Convention on Biodiversity.¹⁷³ About five months later, the president of the new Biotechnology Industry Organization (BIO), which combined the IBA and the ABC, said that her organization supported the Convention.¹⁷⁴

Several reasons can be given to explain why the U.S. biotechnology industry changed its position a year after the adoption of the Convention on Biodiversity. First, it could be a result of the talks, arranged by the U.S. officials, between the biotechnology industry and the environmental groups during the first half of 1993. Second, the industry believed that the newly-elected President would keep his promises which he made on the eve of Earth Day in 1993, namely, the President would protect the U.S. biotechnology industry's interests by "fixing some flaws" in the Convention. Third, the industry itself was involved in the process of hammering out the U.S. interpretative statements, which allowed them to express their concerns much more clearly and directly. Fourth, the reason could be the industry's awareness that the Convention, with or without U.S. participation, was very likely to enter into force anyway, with its potential impacts on future development of the biotechnology industry. Signature of the Convention would enabled the United States to participate in future international discussion on biodiversity. Finally,

¹⁷³ See "Treaty Wording Too Vague, Poses Risk to Biotech Firms, U.S. Industry Officials Say," *International Environment Reporter Current Report (BNA)*, Vol. 15, No. 25, December 16, 1992, at 822 and "President-elect Seen Giving Strong Support to International Efforts to Curb Pollution," *International Environment Reporter Current Report (BNA)*, Vol. 15, No. 23, November 18, 1992, at 762.

¹⁷⁴ "Clinton's Earth Day Pledge Guards Gene Pools and Patents," *supra* note 131 and "Industry Wants U.S. to Sign Treaty by Deadline Even If State-ment Unfinished," *supra* note 143.

it might be the industry officials' or businessmen's careful calculations that the gains from U.S. signing of the Convention would exceed the costs of staying outside the Convention. Albers-Shonberg, a researcher for Merck Co. (A U.S. major pharmaceutical company), stated that "[w]ithout question, we benefit from being a player in this process than remaining on the sidelines."¹⁷⁵ As commented by Indonesian Environment Minister Emil Salim, "[w]e shouldn't depend too much on one country only, we can work with Japan or the European countries. They have the technology that can make use of the biological resources of the developing countries without the United States."¹⁷⁶ Cheryl D. Hardy also warned that

[i]f the developing nations are not permitted to share in the social and economic profits to be gained from U.S. biotechnology products, they soon may refuse to supply U.S. biotechnology companies with raw materials necessary to manufacture these products. Developing nations may be induced to supply raw materials instead to Europe and Japan, which will lead to a loss of business for the U.S. biotechnology industry and a subsequent loss of U.S. competitiveness in the highly profitable, and expanding industry.¹⁷⁷

¹⁷⁵ "Swift Senate Action on Biodiversity Pact Seen as Best Protection for U.S. Business," *International Environment Reporter Current Report (BNA)*, Vol. 17, No. 8, April 13, 1994, at 373.

¹⁷⁶ "Earth Summit: A Plea for U.S. to Sign Biodiversity Treaty," Inter Press Service Global Information Network, Tuesday, June 2, 1992, available at West law online search, Database MAGSPLUS, 1992 WL 2474261.

¹⁷⁷ Cheryl D. Hardy, "Comment: Patent Protection and Raw Materials: The Convention on Biological Diversity and Its Implications for U.S. Policy on the Development and Commercialization of Biotechnology," 15 *U. Pa. J. Int'l Bus. L.* 299, 325-326 (1994).

VI. The Committee Action and Senate Debates

A. The Committee Action

As urged in President Clinton's Letter of Transmittal to the U.S. Senate, a prompt approval of the Biodiversity Convention "will best allow the United States to fully represent its national interest at the first Conference of the Parties,"¹⁷⁸ which was scheduled to meet in November 1994. In spite of this appeal, it was reported that the U.S. Senate's approval would not be easy, given the fact that the Biodiversity Convention "would seem to have little short-term benefit and considerable short-term liability."¹⁷⁹ Accordingly, it was believed that the Clinton Administration would need to work hard in order to get the Convention approved by the U.S. Senate.¹⁸⁰ In fact, the White House did urge representatives in the biotechnology and other groups with strong interests in the Biodiversity Convention to lobby the U.S. Senate Committee on Foreign Relations for the approval of the treaty.¹⁸¹

On April 12, 1994, a hearing on the Convention on Biodiversity was held before the Senate Foreign Relations Committee.¹⁸² During the hearing, Chairman of the Committee Senator Claiborne Pell, Senators Max Baucus (D-Mont) and John Chafee (R-RI), and

¹⁷⁸ *Supra* note 12.

¹⁷⁹ "Diversity of Life in Peril," *St. Louis Post-Dispatch*, January 15, 1994, at 14B.

¹⁸⁰ *Ibid.*

¹⁸¹ "Biodiversity Treaty Unlikely to Get U.S. Senate Nod in 1995, White House Says," *International Environment Reporter Current Report (BNA)*, Vol. 18, No. 5, March 8, 1995, at 172.

¹⁸² "The Convention on Biological Diversity," Hearing before the Committee on Foreign Relations, U.S. Senate, 103rd Congress, 2nd Session, April 12, 1994 (Washington, D.C.: GPO, 1994).

Counselor to the State Department for Global Affairs Timothy Wirth urged swift ratification of the Biodiversity Convention. Representatives from major biotechnology companies, such as George Albers-Shonberg of Merk & Co., Inc., and Lisa A. Conte of Shaman Pharmaceuticals, and environmental groups such as Walter V. Reid of the World Resources Institute, were also testifying before the Committee, urging early ratification of the Convention.¹⁸³ However, Senators Jesse Helms (R-NC) and Hank Brown (R-Colo), in their prepared statements also included in the record of the Committee, urged the Senate not to ratify the Convention.¹⁸⁴

It is important to point out that Senator Max Baucus was the chairman of, and Senator John Chafee the ranking minority member of, the Senate Environment and Public Works Committee, who, I believe, were interested, to a large degree, in environment protection issues and therefore were in support of a global treaty that aims at protecting the world's biodiversity. As stated by Senator Chafee, "[t]he loss of species is one of the world's most serious environmental problems."¹⁸⁵ At the end of the statement, he cited E.O. Wilson's advice¹⁸⁶—"to conserve first and ask questions later."¹⁸⁷ Senator Baucus gave his strong support to the Senate's approval of

¹⁸³ For Senator John H. Chafee's statement, see *ibid.*, at 3-4; for Senator Max Baucus's, at 19-21; for Timothy Wirth's statement and Annex I (the Statements of Understanding and the Relationship of the Convention to the GATT TRIPS Agreement), see *ibid.*, at 9-17; George Albers-Shonberg's statement, at 29-33; Lisa A. Conte's, at 37-40; and Walter V. Reid's, at 43-51.

¹⁸⁴ For Senator Jesse Helms' statement, see *ibid.*, at 53, and for Senator Hank Brown's, *ibid.*, at 53-54.

¹⁸⁵ *Ibid.*, at 3.

¹⁸⁶ *Supra* note 18.

¹⁸⁷ *Op. cit.*, at 4.

the Convention. He pointed out that the conservation of biodiversity is one of the most critical challenges facing the people of the world today. He, too, cited those reasons discussed in Wilson's book¹⁸⁸ for protecting the world's biodiversity as major reasons for the U.S. joining the other nations of the world in efforts to conserve biodiversity.¹⁸⁹ Timothy Wirth testified at the hearing, saying that "[w]e believe that U.S. interests will be best served by ratifying the Convention and working to implement its provisions in an effective manner."¹⁹⁰ He emphasized that the U.S. biotechnology industry's concerns about the Convention's languages relating to the issues of intellectual property rights protection, terms of transfer of technology, and participation in U.S. research projects would be addressed and that the United States' interests could be best protected by:

1. Sending clear messages to the rest of the world as to how the U.S. expects these provisions to be implemented by all parties;

¹⁸⁸ These reasons include: "From the 1940's to the 1980's, population densities of migratory songbirds in the mid-Atlantic United States dropped 50 percent, due largely to deforestation in the West Indies, Mexico, and Central and South America; about 20 percent of the world's freshwater fish species are either extinct or in a state of dangerous decline; the Center for Plant Conservation has identified more than 200 plant species that are known to have become extinct in the United States and another 680 species and subspecies that are in danger of extinction by the year 2000; We lose the potential for miraculous medicines like taxol, derived from the bark of the Pacific yew tree, which has proven to be the most effective treatment for ovarian cancer; We lose the ability to protect our food crops from insects and blight; We lose jobs; We lose the opportunity to pass on to our children an irreplaceable legacy, a world rich in wildlife and plants and the values they hold for us all. *Supra* note 18, at 256.

¹⁸⁹ *Supra* note 181, at 19-20.

¹⁹⁰ *Supra* note 181, at 9.

2. Participating actively in the convention to protect U.S. intellectual property rights interests; and
3. Depositing with our instrument of ratification statements of understanding on specific issues raised in articles of the convention.¹⁹¹

While continually expressing the industry's concerns about the Convention's language relating to patents and intellectual property rights, George Albers-Shonberg said at the hearing that

Should the Senate ratify the Convention, the United States will have several opportunities to emphasize the link between intellectual property rights and the goals of biodiversity conservation and sustainable development. The Convention establishes numerous committees, working groups, task forces and Conference of the Parties—all of which offer opportunities for the U.S. to make clear its position on the necessity of adequate and effective protection of intellectual property. Without question, we benefit more from being a player in this process than remaining on the sidelines.¹⁹²

Lisa Conte, president of Shaman Pharmaceuticals, also strongly urged U.S. ratification of the Biodiversity Convention at the hearing. As she concluded at the end of her statement,

[t]he Convention on Biological Diversity has a great deal of momentum. It has support from all different corners of the Earth. It has great cooperation now between the North and the South. The U.S. can have the greatest influence by ratifying the treaty and participating in the conference of parties, and par-

¹⁹¹ *Supra* note 181, at 11-12.

¹⁹² *Supra* note 181, at 32.

ticipating in the development of rules and procedures.¹⁹³

Walter V. Reid, a biologist and vice president of World Resources Institute, stated that the Biodiversity Convention is "a cornerstone of the global response to the biodiversity crisis."¹⁹⁴ He believed

[i]t is the United States interest and in the global interest that we ratify the convention and do so swiftly. Quick ratification will encourage other nations to take the steps it calls for to conserve their biodiversity. It will ensure our full involvement in procedural decisions to be taken by the conference of parties. And it will ensure that U.S. industry is not left out—and thereby shut out—of the new framework that will govern trade in genetic resources.¹⁹⁵

Senators Jesse Helms and Hank Brown took a different view, arguing that the Senate should not ratify the Biodiversity Convention. Senator Helms believed that the Biodiversity Convention "reflect[ed] a rather common view among so-called developing nations that this treaty is some sort of an international cash cow to transfer wealth and technology from developed nations while promoting the economic growth of developing nations without interfering in any way with their sovereignty."¹⁹⁶ I assume that Senator Helms knows the character of a framework Convention and the reasons for having such a convention. Nevertheless, he viewed this Convention as nothing but a preamble, because its "treatment of intellectual property rights, finances, voting procedures, technology transfer and biotechnology are dangerously muddled, vague and

¹⁹³ *Supra* note 181, at 36.

¹⁹⁴ *Supra* note 181, at 41.

¹⁹⁵ *Ibid.*, at 41.

¹⁹⁶ *Ibid.*, at 53.

disturbing.”¹⁹⁷ Accordingly, he suggested that the Senate should not ratify a preamble. In spite of his opposition to U.S. ratification of the Convention, Senator Helms suggested that the U.S. State Department should participate in the COP. In addition, he believed, the U.S. negotiating position at the COP would be strengthened because of the U.S. financial participation to the Convention.¹⁹⁸ Senator Hank Brown, while recognizing the importance of the Convention’s goals, stated that the Convention’s provisions, in particular those dealing with “what may appear to be open-ended financial commitments,”¹⁹⁹ were problematic. Therefore, he suggested that it would be important “to articulate clearly the relationship between the Conference of the Parties and the governing body of the financial mechanism.”²⁰⁰

After the hearing, on June 29, 1994, the Senate Foreign Relations Committee adopted a resolution which required the President of the United States to send annual reports to the chairman of the Senate Foreign Relations Committee and to the Speaker of the House on the following matters:

1. Whether decisions under the biodiversity accord provide adequate and effective protections for intellectual property rights such as patents. Specifically, the president would have to determine whether those protections are weaker than that provided by U.S. laws, other industrialized countries, or the General Agreement on Tariffs and Trade.
2. Costs of U.S. participation in the United Nations Framework Convention on Biological Diversity.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*, at 54.

²⁰⁰ *Ibid.*

3. The channel through which money flows from industrialized countries to help developing countries protect biodiversity—and whether this financial mechanism is the restructured global Environment Facility. . . .
4. Whether the U.S. got a vote in all aspects of treaty business that is “commensurate with its level of contribution.”
5. If a biosafety protocol is adopted by the conference of the parties, whether it was adopted in consultation with the Senate and with U.S. industry. A biosafety protocol under the biodiversity convention, proposed by some countries, would establish standards for handling genetically engineered organisms.²⁰¹

On the same day, the Committee, by a vote of 16 to 3, decided to report favorably the Convention on Biodiversity and recommended that the Senate gives its advice and consent to ratifications, subject to seven understandings proposed by the State Department on November 16, 1993,²⁰² transmitted to the Senate by President Clinton on November 19, 1993,²⁰³ and set forth in the accompanying Resolution of Ratification.²⁰⁴ On July 11, 1994, Senator Pell,

²⁰¹ The resolution was introduced on June 29, 1994 by Senator Hank Brown. The Senate Foreign Relations Committee adopted this resolution on a voice vote the same day. Later on, Senator Brown rewrote his amendment to the resolution, striking the withdrawal provisions, because of the concern that these provisions would encroach upon the President’s constitutional right to set foreign policy and enter into treaties. Senator Brown offered it as a free-standing resolution. See “Resolution to Require Annual Report on Patent Protections Sent to Full Senate,” *Daily Environment Report (BNA)*, June 30, 1994.

²⁰² *Supra* note 138 and the quotation in page 41-42 of this paper.

²⁰³ *Supra* note 139.

²⁰⁴ For the Resolution of Ratification, see Convention on Biological Diversity, *Report Together with Minority Views*, submitted from the Committee on

Chairman of the Foreign Relations, submitted the Committee Report on the Convention on Biological Diversity, along with minority views of Senators Helms, Pressler, and Coverdell, to the Senate full floor to decide whether the Convention should be ratified.²⁰⁵ In the report, the Committee pointed out that it had received numerous statements and letters of support for Senate advice and consent to ratification of the Convention on Biodiversity. In addition to the statements given in the Committee's hearing held on April 12, 1994, the report also includes quite a few supportive letters sent by U.S. biotechnology companies.²⁰⁶ Reasons for postponing consideration of the Convention on Biodiversity as stated by the three Senators in the Committee, were given in Part XI of the Report. The three Senators recommended postponing consideration of the Convention until the questions related to the following issues were decided: "the financing mechanism, the degree to which intellectual property is protected, the definition of developed and developing states, the voting weights and procedures for member states."²⁰⁷ The Committee also reported the adopted resolution (Senate Resolution 239) to the Floor.

B. The Senate Debates

In order for the United States to participate as a full member of the Biodiversity Convention in the COP1, which was scheduled to be held on November 28, 1994, the U.S. Senate had to ratify the treaty before August 31, 1994, because Article 36 of the Convention

Foreign Relations, 103rd Congress, 2nd Session, Senate, *EXEC Rept. 103-30*, July 11, 1994, at 24-25.

²⁰⁵ *Ibid.*

²⁰⁶ For these letters, see Annex of the Report, *ibid.*, at 28-54.

²⁰⁷ *Ibid.*, at 26-27.

provides that “[f]or each Contracting Party which ratifies, . . . this Convention . . . after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, it shall enter into force on the ninetieth day after the date of deposit by such Contracting Party of its instrument of ratification, . . .”²⁰⁸ This deadline was not met as the Senate recessed at the end of August 1994 without ratifying the Biodiversity Convention.

In summer 1994, as a result of a campaign against the ratification of the Convention on Biodiversity conducted by “ultra-conservative grassroots groups,”²⁰⁹ the U.S. agricultural community, including the Farm Bureau and a ranchers’ group, became concerned about the Convention on Biodiversity.²¹⁰ The concerned agricultural organizations wanted to know the impacts of the treaty on existing U.S. environmental, natural resource, and agricultural laws and regulations. Accordingly, they asked Senate Minority Leader Robert Dole (R-Kan) to delay a full Senate vote on advice and consent to the Biodiversity Convention.²¹¹ In response, on August 5, 1994, Senator Dole sent a letter signed by 35 Republicans to Senate Majority Leader George Mitchell (D-Maine), requesting that “the Senate delay consideration of the Convention until [a number of concerns regarding the Biodiversity Convention] can be addressed.”²¹² The Senators indicated in the letter that a filibuster

²⁰⁸ *Supra* note 1.

²⁰⁹ See “No Vote for U.S. at Upcoming Talks Due to Legislative Delays in Senate,” *Daily Environment Report (BNA)*, September 8, 1994.

²¹⁰ *Ibid.*

²¹¹ It was reported that August 8, 1994 was the day scheduled to vote to ratify the Convention on Biodiversity. See “Council on Biodiversity Misses the Point,” *Bangor Daily News* (Bangor, Maine), August 5, 1994.

²¹² For the letter, see “Convention on Biological Diversity,” Congressional Record—Senate, 103rd Congress, 2nd Session, 140 *Cong. Rec.* S 14050,

would be used if a delay was not possible.²¹³ On August 8, 1994, the State Department provided a comprehensive response to the eleven questions raised in the 35 Senators' letter.²¹⁴ On August 16, 1994, Secretary of the Interior, Secretary of Agriculture, and Secretary of State together sent a letter, enclosed with a "memorandum of record," to the Senate Majority Leader George Mitchell.²¹⁵ The memo explained the importance of rapid ratification of the Biodiversity Convention and further elaborated on the letter and questions and answers submitted to the Senate Majority and Minority Leaders by the State Department on August 8, 1994. Three days later, on August 19, 1994, the agricultural organizations withdrew their request to delay the vote on the Convention on Biodiversity.²¹⁶ "By the time the request for a delay was withdrawn," as pointed out in *Daily Environment Report*, "the Senate was embroiled in discussions over the crime bill, which it passed just before leaving on its August recess."²¹⁷

After the Congress resumed its legislative works on September

September 8, 1994.

²¹³ *Ibid.*

²¹⁴ *Ibid.*, at S14050-51.

²¹⁵ For the letter, see *ibid.*, at S14051-53.

²¹⁶ One of the major reasons for the agricultural organizations' withdrawal of their request to delay the vote was the answers provided by the Administration in the "memorandum of notes." As stated in the *Washington Post's* editorial, "[t]he administration provided answers; most of the agricultural groups have since withdrawn or muted their objections, and such influential agribusiness organizations as the Archer Daniels Midland Co. have joined the biotechnology and pharmaceutical industries in support" of the ratification of the Convention on Biodiversity. See "The Biodiversity Treaty," *The Washington Post*, September 26, 1994.

²¹⁷ "No Vote for U.S. at Upcoming Talks Due to Legislative Delays in Senate," *supra* note 208.

12, 1994, the concerned U.S. officials, Senators, biotechnology industry, environmental and agricultural groups, and the mass media all made extra final efforts, urging the Senate to ratify the Convention, or not ratify the Convention, in accordance with their respective positions on the issue, before the Senate's scheduled adjournment on October 7, 1994. On September 13, 1994, for example, Senator Simon asked to insert a commentary, entitled "Senate Inaction Threatens Biodiversity Treaty," into the *Congressional Record* for the purpose of urging the Senate to act on the Convention.²¹⁸ In the commentary, Howard G. Buffett, vice president and assistant to the chairman for the Archer Daniels Midland Co. of Decatur, Illinois, wrote,

[o]ur position as the world leader in biotechnology requires that we be in a position to educate the rest of the world about the safety of new products and the economic benefits of improved varieties. We cannot influence other nations on these issues if we remain isolated and refuse to embrace this attempt to generate additional understanding.²¹⁹

He also believed that "U.S. participation in the Convention on Biological Diversity offers no realistic threat to American agriculture. The real fear should come from a lack of cooperation among the world's food-producing nations as we enter the 21st century."²²⁰

On September 20, 1994, the Alexis de Tocqueville Institution and the National Wilderness Institute, two conservative groups in

²¹⁸ See "Senate Inaction Threatens Biodiversity Treaty," *Congressional Record*—Senate, 103rd Congress, 2nd Session, 140 *Cong. Rec.* S 12825, September 13, 1994.

²¹⁹ See "Senate Inaction Threatens Biodiversity Treaty," *St. Louis-Post Dispatch*, August 31, 1994, at 7D.

²²⁰ *Ibid.*

the United States, released a report which criticized the Environmental Protection Agency's policy on ecosystem management and urged the Senate to withhold its consent to U.S. ratification of the Biodiversity Convention.²²¹ Mark Pollot, one of the co-authors of the report and a former Justice Department attorney, argued that the Convention on Biodiversity "will cause more litigation than all other treaties entered into by the United States combined."²²² In addition, he believed, the Convention may open the door for attacks on private property.²²³ Moreover, Pollot alleged that under the Convention, the United States would be obligated to transfer sensitive military and satellite technology to developing countries. And the United States "will end up paying through the nose."²²⁴ Furthermore, he criticized the use of ecosystem management by the Clinton Administration as a paradigm for environmental regulation.²²⁵ Allan Fitzsimmons, the other author of the report, claimed that the Convention on Biodiversity "misappropriates ecosystems as a geographic guide for regulation."²²⁶ He suggested that the calls for protection of ecosystems found in the Convention on Biodiversity "would increase government erosion of property rights."²²⁷

On September 26, 1994, both *the New York Times* and *the Washington Post*, the two leading national newspapers in the United States, published editorials, urging the Senate to ratify the Convention. *The Washington Post's* editorial stated: "One of the casualties

²²¹ "Conservative Groups Blast Treaty, Criticize Use of Ecosystem Management," *International Environment Daily (BNA)*, September 21, 1994.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ *Ibid.*

²²⁷ *Ibid.*

of the mismanagement of this session of Congress and the current rush to adjourn could be the international Convention of Biological Diversity. It would be a major loss."²²⁸ The editorial of *the New York Times* pointed out, not only the Clinton Administration and the Senate Foreign Relations Committee, but also the biotechnology and pharmaceutical industries as well as scientific and environmental organizations supported prompt ratification of the Convention on Biodiversity. "Even so," the editorial continued, "ratification has been held up by Republican opposition, triggered initially by Senator Jesse Helms, the ranking Republican on the Foreign Relations Committee, and then swelling to include 35 Senate Republicans, led by Bob Dole, the minority leader."²²⁹ The editorial ended with the following comments:

Delay is not only pointless; it could be harmful. The U.S. needs to join this effort not only to enhance the global environment, but for its own good as well. Otherwise, American leadership in biotechnology and agriculture may be threatened as other countries deny the U.S. access to their genetic and biological resources.²³⁰

On September 27, 1994, Deputy Agriculture Secretary Richard Rominger urged the Senate to ratify the Convention on Biodiversity, since the Convention "is crucial for continued U.S. crop-variety development."²³¹

In response to the appeal for prompt ratification of the Convention on Biodiversity, Senate Majority Leader Mitchell intended

²²⁸ "The Biodiversity Treaty," *The Washington Post*, September 26, 1994.

²²⁹ "Biodiversity Pact on the Ropes," *The New York Times*, September 26, 1994.

²³⁰ *Ibid.*

²³¹ "Science Brief," *The Orange County Register*, September 28, 1994.

to bring up the issue for consideration before adjournment. This action was opposed strongly by several Republican Senators who accordingly spoke at the Senate floor to oppose the Senate's consideration of the Convention. Senator Hutchison stated that: "I do not feel comfortable, . . . giving a blank check, passing a treaty which is a very important constitutional responsibility of this Senate, before we have fully negotiated the treaty and know what will be in it."²³² Senator Burns said he was fearful of how the Convention on Biodiversity would affect his state's agriculture and other natural resources industries and how this Convention could be twisted to push legitimate, job creating activities, off not only public, but private lands. He also pointed out that each Senator should have received a letter from 293 groups in the United States, that opposed the Convention.²³³ Senator Craig cited the report written by Mark Pollot and Allan Fitzsimmons²³⁴ to express his concerns about the Convention. He stated that "the Convention would lend even more strength to the ESA (Endangered Species Act) and offer further opportunity for those who oppose traditional Western public land uses."²³⁵ He believed that

The convention simply is not ready for ratification by the Senate. Terms are too vague and definitions are lacking. The convention needs much more thorough review by committees with jurisdiction before any action is taken. One hearing was held in the Foreign Relations Committee. I believe the Committee on Energy and Natural Resources, and perhaps others, have an in-

²³² "Opposing Consideration of the Convention on Bio-Diversity," Congressional Record—Senate, 103rd Congress, 2nd Session, 140 *Cong. Rec. S* 13790, September 30, 1994.

²³³ *Ibid.*, at S 13791.

²³⁴ *Supra* note 220.

²³⁵ *Op. cit.*, at S 13791.

terest and should have time to hold hearings and develop the record in terms of public land and agricultural implications.²³⁶

Senator Helms also spoke on the Senate floor, repeating his long-standing opposition to the Convention. He reiterated that the Convention "is some sort of an international cash cow to be milked by transferring, with no strings attached, wealth and technology from developed nations to promote the economic growth of developing nations,"²³⁷ and that "[t]his so-called treaty is scarcely more than a mere preamble, not a treaty."²³⁸ In Senator Helms' view, a real treaty on biodiversity was the one to be created at the COP.²³⁹ At the end of his statement, Senator Helms offered the following solution:

Article 23, paragraph 5 of the treaty provides that any state not party to this convention may be represented as observers at meetings of the conference of parties. Even if the United States ratifies the convention now, it could participate in this first conference of parties only as observers. But that is just fine: the United States' voice will be heard loud and clear. The United States is the single largest contributor to this convention; it plans to fund it to the tune of \$ 420 million over 5 years. If that does to count for something, then we are crazy to even consider ratification. When some of the vagueness of this convention is cured—the voting rules, financial procedures, definitions of developed and developing States, definition of terms like "alien species" and "biosystem," "technology transfer arrangements," biotechnology issues, et cetera then bring it back to the Senate for hearings and consideration. The more this administration

²³⁶ *Ibid.*

²³⁷ *Ibid.*, at S 13792.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

tries to push this through at the eleventh hour of the 103rd Congress, the more suspicious I get.²⁴⁰

Senator Nickles expressed his concern over the potential impacts of the Convention on the constitutionally protected property rights of individuals and the rights of state, local, and tribal governments to control uses of land within their jurisdictions. He was also of the opinion that the Senate should not rush through its advice and consent to the Convention's ratification until more information became available.²⁴¹ Finally, Senator Wallop believed that the best advice the Senate could give to President Clinton was "to wait until the Convention on Biological Diversity has been completed before asking for [the Senate's] consent."²⁴²

The Republican Senators' opposition to the Convention was criticized acutely in an advertisement appeared in *the Washington Post* and *the Washington Times*. On October 3, 1994, *the Washington Post* and *the Washington Times* published a full page advertisement sponsored by the World Wildlife Fund and the many business and agricultural organizations concerned with U.S. interests in conserving biodiversity. The advertisement stated that "the Biodiversity Convention has stalled in the Senate because of partisan politics. This must stop. Neither a Democratic nor a Republican issue, the Convention is important to our nation as a whole, including U.S. business interests and agriculture."²⁴³ At the same time, Senator Pell continued to urge the Senate to act on the Convention.²⁴⁴ On

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*, at S 13793.

²⁴² *Ibid.*

²⁴³ "Biodiversity is Crucial to Our Future," *The Washington Post*, October 3, 1994.

²⁴⁴ Senator Pell provided the Senate floor with quite a few of important mate-

October 8, 1994, the day the Congress was to adjourn, Senate Majority Leader Mitchell spoke on the Senate floor in support of the Convention on Biodiversity's ratification. He pointed out that "[t]he administration has answered every question that has been raised about the treaty." "With these steps completed," he continued, "it was hoped that we could move toward floor consideration—but we could not clear a unanimous consent agreement on the Republican side."²⁴⁵

Senator Mitchell submitted the letter sent by the State Department to Senator Dole on October 6, 1994 in response to those legal questions on the Convention, raised by Senators Dole, Nickles and Shelby in the letter sent to the State Department on September 30, 1994. The three Senators' letter asked "whether the Convention on Biodiversity, if ratified, would prompt unwanted and costly litigation or would overturn state, local and tribal laws."²⁴⁶ The State Department replied that U.S. ratification of the Convention would not have any such effect, because "[t]he conservation obligations of the Convention are sufficiently flexible as to allow the United States to implement them without disturbing either the overall balance of federal and state responsibilities or further preempting any state, local or tribal law."²⁴⁷ The Senator's letter also asked whether the Convention on Biodiversity contained provisions granting a private right of action in the domestic courts of the contracting parties of

rials and urged his colleagues to look at these materials, hoping that they would give their support to the Convention on Biodiversity. For the Senator's speech and the materials he provided, see "Convention on Biological Diversity," *supra* note 147, at S 14046-55.

²⁴⁵ "The Convention on Biological Diversity," Congressional Record—Senate, 103rd Congress, 2nd Session, 140 *Cong. Rec.* S 15066, October 8, 1994.

²⁴⁶ *Ibid.*, at S 15066.

²⁴⁷ *Ibid.*

the Convention. The State Department repeated the answers provided in the "Memorandum of Records," saying that private parties in the United States could not successfully challenge governmental action, at any level, because the Convention on Biodiversity is not a self-executing treaty. Accordingly, the State Department confirmed that "a private right of action would not . . . be created by ratification of [the Convention on Biodiversity] or by the supremacy clause of the [U.S.] Constitution."²⁴⁸ Moreover, the State Department cited the Supreme Court case *Defenders of Wildlife v. Lujan* to support its statement that "U.S. ratification of the Convention . . . would not give a private party in the United States standing to bring such an action in any case in which such a party otherwise lacked standing."²⁴⁹ The State Department also rebutted Mark Pollot's assertion that U.S. ratification of the Convention on Biodiversity would cause a "well-spring of litigation, making the Convention a likely candidate for the most litigated treaty in American history."²⁵⁰ Finally, the State Department replied that the Convention would not affect property rights protected by the U.S. Constitution. Nothing in the text of the Convention could be interpreted to violate the U.S. Constitution.

Senator Mitchell then quoted the letter sent by eight agricultural and industry groups to Senator Ted Stevens on September 29, 1994, in which the groups wrote: "We believe that concerns raised earlier about the impact of the Biodiversity Treaty have been adequately addressed and that Senate ratification is desirable to protect the interests of U.S. agriculture."²⁵¹ The letter further elaborated

²⁴⁸ *Ibid.*, at S 15067.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

²⁵¹ For the letter, see *ibid.*, at S 15066-67.

that

[q]uestions about the treaty's possible impact on public and private property rights, whether the treaty itself could be used as a basis for Regulatory action or give rise to citizen's suit and whether it would in any way impede the amendment of U.S. environmental law have all been appropriately dealt with in a Memorandum of Record forwarded to the Senate by the Secretaries of State, Agriculture, and Interior.²⁵²

In addition to the letter, Senator Mitchell also provided a list of 29 industry associations, nongovernmental organizations, and U.S. companies which had been actively supporting the Convention on Biodiversity.²⁵³ Finally, he gave three reasons to explain why the Senate should ratify the Convention:

- (1) Biological resources underpin many sectors of the U.S. economy, including farming and the agriculture industry, and developments of medicines, medical technology, and biotechnology. Some estimate that biological resources contribute more than \$ 87 billion annually to [U.S.] gross domestic product.
- (2) Ratification of the treaty would provide access to plant genetic resources vital to agricultural production. The Office of Technology Assessment reports that biodiversity has added \$ 3.2 billion to U.S. annual soybean production, and \$ 7 billion to [U.S.] corn production.
- (3) The convention will protect U.S. access to genetic resources critical to the development of substances that may cure diseases such as AIDS virus. Over 3,000 antibiotics are derived from microorganisms on the world's biological resources. The treaty protects the

²⁵² *Ibid.*

²⁵³ For the list, see *ibid.*, at S 15066-67.

United States from unnecessary restrictions on trade in biotechnology products.²⁵⁴

On October 8, 1994, an objection was made to the Senate Majority Leader's unanimous consent request to bring up the Biodiversity Convention for Senate consideration. Frustrated by this objection, Senator Pell criticized the "delaying tactics" used by the Republicans to prevent the Senate from considering the ratification of the Biodiversity Convention. At the end of his speech, Senator Pell assured the supporters of the Convention that he would make action on the Convention one of his priorities for the coming Congress.²⁵⁵ Unfortunately, after the November's mid-term Congressional election, the Republican Party became the majority party of the Senate, which made it much more difficult for Senator Pell to work on U.S. ratification of the Biodiversity Convention.

VII. Obstacles to and Likelihood of U.S. Ratification

It was believed that if the Convention on Biological Diversity got to the Senate floor, it would have been approved.²⁵⁶ Why did it fail? What are the major reasons that caused the Senate's failure to consider the ratification of the Convention before the end of 103rd Congress? Jon Margolis suggested that the Senate's failure to act on the Convention was the result of "a bizarre political trio: the internal dynamics of the Republican Party, the anti-environmental 'Wise

²⁵⁴ *Ibid.*, at S 15066.

²⁵⁵ "The Convention on Biological Diversity," Congressional Record—Senate, 103rd Congress, 2nd Session, 140 *Cong. Rec.* S 15068, October 8, 1994.

²⁵⁶ "Odd Trio Could Kill Nature Pact," *The Chicago Tribune*, September 30, 1994.

Use' movement, and political extremist Lyndon LaRouche."²⁵⁷ The GOP's doubts about the Convention on Biodiversity grew, according to Margolis, because of opposition from mainstream agricultural organizations, whose members "had been bombarded with anti-treaty information—much of it demonstrably incorrect—from 'wise use' groups, which get most of their money from mining, logging and other resource-using companies."²⁵⁸ As pointed out by John Doggett, the Farm Bureau's director of governmental relations, "certain groups (impliedly wise use groups) tried to create a crisis where one doesn't exist."²⁵⁹ In addition, Margolis wrote that the U.S. agricultural sectors' concerns about the Convention grew significantly in early August 1994 partly because of the article written by Rogeio Maduro, an associate of Lyndon LaRouche, the conspiracy theorist, which attacked the Biodiversity Convention and appeared in the September 2, 1994 edition of the *Executive Intelligence Review*.²⁶⁰ Maduro claimed that the Convention on Biodiversity was written by " 'extremists' who believe that farming, logging, fishing and mining violate the concept of 'sustainable use' and who want to impose the 'religious philosophy' of 'biocentrism,' defined as 'the view that all species have equal rights.' "²⁶¹ Maduro also alleged that the Convention established a "supranational body" that would override national sovereignty.²⁶² It was not certain to what extent Maduro's article contributed to the agricultural organizations' opposition to the Biodiversity Convention in August 1994. However, it

²⁵⁷ *Ibid.*

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ For the article, see *Executive Intelligence Review*, September 2, 1994.

²⁶¹ *Supra* note 257.

²⁶² *Ibid.*

was believed “non-trivial.”²⁶³ Moreover, Margolis cited one government scientist’s observation which suggested that “farmers and ranchers, especially in the West, are a receptive audience for conspiracy theories,” because “[t]hey’re all bent out of shape about the Endangered Species Act, property rights and environmental regulations.”²⁶⁴ At the end, Margolis noted that the Republicans, such as Senator Dole, had become increasingly friendly toward “wise use” position and leaders in the last few years. Although “wise use” groups are considered to be politically powerful only in western states such as New Mexico, Wyoming and Utah, they were able to influence the GOP, mainly because “Republican leaders jockeying for the presidential nomination move[d] to the right to get the approval of conservative political activists.”²⁶⁵

Margolis’ account for the Republican Senators’ opposition and therefore the Senate’s failure to ratify the Convention on Biodiversity is quite well taken. It is indeed true that partisan politics played an important role in the process of considering whether the Convention on Biodiversity, no matter how noble its goals are, should be ratified by the United States. The Convention was brought up to the Senate several months before the Congressional elections to be held in November 1994. The Republicans, as a whole, opposed the ratification of the Convention on Biodiversity, because “treaties are viewed as triumphs for a president, and the Republicans are not about to give it to them.”²⁶⁶ It was important for the Republicans

²⁶³ “Odd Trio Could Kill Nature Pact,” *supra* note 257.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ Comments of Richard Godown, president of the Biotechnological Industry Organization. See “Biodiversity Treaty Unlikely to Get U.S. Nod in 1995, White House Says,” *International Environment Reporter Current Report (BNA)*, Vol. 18, No. 5, March 8, 1995, at 172.

to win in the Congressional elections, given the fact that it had already lost in the presidential election 1992. In addition, for those incumbent or new Republican candidates, it was important to obtain the support from their conservative constituents to be re-elected or elected. Naturally, the U.S. Senators would and should pay more attention to their states' interests, given the fact that they are elected by the people in their respective states. A careful study of the states from which the 35 Senators were elected to the Senate would help explain why these Republicans paid so much attention to the agricultural sectors concerns and therefore opposed the ratification of the Biodiversity Convention.²⁶⁷

It should be noted that by late 1994, the Clinton Administration and most of the U.S. biotechnology and pharmaceutical industries, agricultural associations, and non-governmental organizations such as environmental, scientific, and academic groups supported

²⁶⁷ The 32 Senators' names and home States are : Senator Robert F. Bennett is from Utah; Christopher S. Bond from Missouri; Hank Brown from Colorado; Conrad Burns from Montana; Daniel Coats from Indiana; Thad Cochran from Mississippi; Larry Craig from Idaho; John Danforth from Missouri; Bob Dole from Kansas; Pete Domenici from New Mexico; Lauch Faircloth from North Carolina; Slade Gorton from Washington; Phil Gramm from Texas; Charles E. Grassley from Iowa; Orrin G. Hatch from Utah; Jesse Helms from North Carolina; Kay Bailey Hutchison from Texas; Dirk Kempthorne from Idaho; Trent Lott from Mississippi; Connie Mack from Florida; John McCain from Arizona; Mitch McConnell from Kentucky; Don Nickles from Oklahoma; Bob Packwood from Oregon; Larry Pressler from South Dakota; Alan K. Simpson from Wyoming; Robert C. Smith from New Hampshire; Arlen Specter from Pennsylvania; Ted Stevens from Alaska; Strom Thurmond from South Carolina; Malcolm Wallop from Wyoming; and John W. Warner from Virginia. Three Senators' names are not provided in the letter sent to Senator George Mitchell, Majority Leader, U.S. Senate. For the letter, see "Convention on Biological Diversity," *Congressional Record*, *supra* note 212.

the ratification of Convention on Biodiversity. However, more than two years after the end of 103rd Congress, the Convention still has not been ratified by the U.S. Senate. Why not? What could be the obstacles to the U.S. ratification? What is the likelihood of U.S. ratification in the year 1997 or beyond? These are the last two questions addressed in this paper.

After the 1994 November Congressional election, the GOP became the majority in the U.S. Congress. Due to the GOP majority in the Senate, Jesse Helms, the Republican ranking member in the Senate Foreign Relations Committee, became the new chairman of that committee in January (or February) 1995. It was believed that the new chairman's position on foreign affairs in general and the Convention on Biodiversity in particular made it unlikely for the U.S. Senate to ratify the Convention. As reported, Senator Helms "dislikes foreign aid and considers it little more than hard-earned U.S. tax dollars being flushed 'down foreign ratholes'"²⁶⁸ In addition, he "hates most international treaties and calls the United Nations 'that longtime nemesis of millions of Americans.'"²⁶⁹ As a result, "[a] series of treaties that must pass through Helms's committee before they can be enacted are imperiled. A treaty on chemical weapons and United Nations convention on biodiversity, the law of the sea . . . could be sidelined."²⁷⁰ In December 1994, Timothy Wirth of the State Department said that the Clinton Administration would resubmit the Convention on Biodiversity to the U.S. Senate

²⁶⁸ "The GOP Majority in Congress Will Challenge Clinton on a Host of Foreign Policy Fronts," *U.S. News & World Report*, Vol. 117, No. 21, November 28, 1994.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

during the early days of the 104th Congress.²⁷¹ However, knowing that Senator Helms is “not a great fan of treaties,” Wirth told the Bureau of National Affairs (BNA) that “[o]ur hope is he will recognize the compelling economics of this treaty.”²⁷² In February 1995, Timothy Wirth again told BNA that “State Department officials had been talking to staff members on the Senate Foreign Relations Committee ‘to get the ball rolling’ but that Helms is opposed to the treaty.”²⁷³ In March 1995, it was reported that Senator Helms would not bring up the Convention on Biodiversity in his Committee in the year 1995 to prevent the Senate from giving its advice and consent to ratify it.²⁷⁴ In June 1995, Senator Helms announced a “hit list” of United Nations activities from which he wanted the United States to withdraw, which included the Montreal Protocol on global warming.²⁷⁵ Based upon these reports, if Senator Helms continues to hold the chairmanship of the Senate Foreign Relations Committee, the chance to have another hearing on the Convention on Biodiversity is extremely slim. Given the fact that Senator Helms had been serving as a goalkeeper at the Senate Foreign Relations Committee, and that it was U.S. presidential election year, in which the incumbent Democratic candidate running for a second term, it is no surprise to see that the U.S. Senate did not take action on ratifying the Convention on Biodiversity in 1996 either.

²⁷¹ “Dowdeswell Calls on Nations to Set Clear Policies, Priorities Under Treaty,” *International Environment Reporter Current Report (BNA)*, Vol. 17, No. 25, December 14, 1994, at 1020.

²⁷² *Ibid.*

²⁷³ “Biodiversity Treaty Unlikely to Get U.S. Senate Nod in 1995, White House Says,” *supra* note 182.

²⁷⁴ *Ibid.*

²⁷⁵ “Conservationists Share Fears of U.S. About-face on Environment,” *The Fresno Bee*, June 4, 1995, at B8.

Will the U.S. Senate ratify the treaty in 1998 or the years beyond? The answer should be yes; eventually the United States will ratify the Biodiversity Convention. Will it be in the year 1998? The answer is not clear. Several factors must be considered when trying to determine how high the likelihood of U.S. ratification of the Convention would be, which include: (1) the Clinton Administration's policy; (2) the development of the Biodiversity Convention and the decisions made at the COP and other relevant meetings; (3) the political climate in the U.S. Congress; (4) the performance of American economy; and (5) the rise of a possible market crisis.

As mentioned earlier, the Clinton Administration had been trying to push the Senate Foreign Relations Committee to take action on the Convention, but without avail. Way back in December 1994, Timothy Wirth of the State Department stated before the COP1 of the Convention on Biodiversity that President Clinton is committed to U.S. ratification of the treaty. He said, "the United States and its citizens look forward to joining with all nations . . . in ratifying this Convention—which President Clinton is pursuing vigorously . . ."²⁷⁶ Starting in January 1996, the Clinton Administration put environmental issues on the top of its policy priorities. On January 18, 1996, Secretary of State Warren Christopher, in a speech at Harvard University, pledged that the State Department in 1996 would "strive to fully integrate environmental goals into [U.S.] diplomacy—something that has never been done before."²⁷⁷ He also said that the Clinton Administration would seek Senate approval for the ratification of two-environment-related treaties—the

²⁷⁶ *Supra* note 169, at 857.

²⁷⁷ "Official Instructs State Department to Integrate Environment Into Operations," *International Environment Reporter Current Report (BNA)*, Vol. 19, No. 5, March 6, 1996, at 178.

Convention on Biodiversity and the 1982 Law of the Sea Convention.²⁷⁸ On February 14, 1996, Christopher wrote a memo to his under secretaries and assistant secretaries, in which he said that "America's national interests are inextricably linked with the quality of the Earth's environment," and that "Worldwide environmental decay threatens U.S. national prosperity."²⁷⁹ On April 9, 1996, in an address at Stanford University, Christopher pointed out that Senate ratification of the Convention on Biodiversity would be among the top foreign policy and environmental priorities of the Clinton Administration if the president were elected to a second term.²⁸⁰ As we know, President Clinton was elected for another four years. If he indeed fulfills his campaign promise, the chances for the U.S. ratification of the Biodiversity Convention would be greater. However, more work need to be done by the Clinton Administration, including: (1) continuing to explain the importance of ratifying the Biodiversity Convention to the American public in general and the biotechnology and pharmaceutical industries and the agricultural sectors in particular; (2) continuing to make clear that the sufficiency of the Convention's provisions concerning intellectual property rights protection, the noncoercive nature of those provisions relating to technology transfer, and the leverage to protect U.S. economic interests if the Convention is ratified by the United States; (3) continuing to persuade the American public that the ratification of the treaty is not only in the U.S. national interests but the international community's interests; (4) continuing to participate actively in the COP of the Convention on Biodiversity and other

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*

²⁸⁰ "Convention on Biological Diversity Draws Attacks," *The National Law Journal*, October 28, 1996, at C39.

relevant meetings; and (5) continuing to take actions to ask representatives of those groups having great interests in the treaty to lobby the Senate Foreign Relations Committee to hold hearings and business session on the Biodiversity Convention.

Second, the outlook for U.S. ratification of the Biodiversity Convention would be brighter if those decisions taken at the meetings of the COP of the Biodiversity Convention would address certain U.S. concerns made in the seven understandings as proposed by the State Department in November 1993. As we recall, Senator Helms suggested at the Senate in October 1994 that, if some of the vagueness of the Convention is cured, which include the voting rule of the COP, financial mechanisms, definitions of developed and developing countries, definition of terms like "alien species," "biosystem," "technology transfer arrangements," etc., then he would be open bringing the Convention back to the Senate for hearings and consideration.²⁸¹ Since the COP1 held in November 1994, another two Conferernces of the Parties of the Convention had been held in November 1995 and November 1996 respectively. The fourth conference is scheduled to be held in May 1988. Several decisions taken at the COP1, COP2, and COP3 are related to Senator Helms's concerns.²⁸² Accordingly, it is important to provide Senator Helms with up-to-date information concerning the development of the COP and the Convention as well as the decisions taken at the meetings of the COP. If Senator Helms were of the opinion that his major concerns about the Convention on Biodiversity were satisfactorily dealt with, the chance for a Senate hearing on the Convention would be much greater. In addition, if the United States wants to participate in the COP4 to be held at Bratislava, Slo-

²⁸¹ *Supra* note 233.

²⁸² *Supra* notes 67-70 and accompanying pages 21-22.

vakia between May 4-15, 1998, the Senate must ratify the Convention on Biodiversity before February 26, 1998. Accordingly, this deadline could be used as one of the reasons to push the process of the Senate's consideration of the Convention in early 1998.

The third factor which might increase the possibility of U.S. ratification of the Convention on Biodiversity is the change of political climate after the 1998 mid-term Congressional election. If the Democratic Party could become the majority in the Senate, the chance for the Senate's consideration of ratifying the Biodiversity Convention would increase to a large degree, simply because Senator Helms would be forced to step down the chairmanship of the Senate Foreign Relations Committee. It is likely that the new Democratic chairman of the Committee would hold hearings on the Convention on Biodiversity, as Senator Pell did in April 1994.

Fourth, in this writer's view, the performance of the U.S. economy as a whole would also have an impact on the possibility of U.S. ratification of the Convention on Biodiversity. If the American economy is better off in the years beyond, the likelihood of U.S. ratification of the treaty would be increased. One of the reasons is that the United States would be able to provide funds for UN programmes related to environmental issues. In December 1994, Timothy Wirth of the U.S. State Department stated at the COP1 that the United States was providing first-year fund for a global coral reef monitoring position under the combined auspices of the UNEP.²⁸³ On June 28, 1995, the United States, Indonesia, and Japan signed an agreement to protect Indonesia's biodiversity as part of commitments made at the 1992 Earth Summit.²⁸⁴ Under the

²⁸³ *Supra* note 169, at 858.

²⁸⁴ "Indonesia, Japan and U.S. Sign Biodiversity Pact," *Reuters North American Wire*, June 28, 1995.

agreement, the U.S. Agency for International Development would provide \$ 19.5 million to help set up the Indonesian Biodiversity Foundation to give grants to groups and scientists in the biodiversity field.²⁸⁵ The United States is also one of the major contributors to the GEF. The United States will continue providing the needed funds for international environmental programmes, provided that the U.S. economy is in good shape. Unfortunately, in a recent report, Christopher Flavin, senior vice president for Washington's World-watch Institute criticized the U.S. failure to ratify the Convention on Biodiversity and its slashing of funds for UN environmental programmes.²⁸⁶

Finally, the chances for U.S. ratification of the Biodiversity Convention would increase if a market crisis occurs, in which a serious shortage of the supplies of those biological or genetic resources much needed by the U.S. biotechnology and pharmaceutical industries or the agricultural sectors appears in the international market, arising from the denial of access to these resources by the developing countries which became impatient of waiting any longer for U.S. participation in the Convention on Biodiversity. A sharp increase of the costs for importing the needed resources from the developing countries would have impacts on the U.S. domestic economy and accordingly raises the likelihood of U.S. ratification of the Biodiversity Convention.

VIII. Conclusion

Based upon the speedy entrance into force of the Biodiversity

²⁸⁵ *Ibid.*

²⁸⁶ "Rio Summit Finds It's Not Easy Being Green," *Christian Science Monitor*, March 20, 1997.

Convention and the fact that, as of June 1, 1997, 169 states had ratified the Convention, it is safe to conclude that the Biodiversity Convention is indeed a good, needed treaty, not only acceptable but beneficial to the international community as a whole in terms of protecting the Earth's biological diversity. It can also be expected that the negotiations to be pursued in and the decisions to be made at those meetings, such as the COP4, SBSTTA-3, and the *ad hoc* Expert Group on Biosafety, as mandated by the Biodiversity Convention, will have important impacts on humankind's efforts to accomplish the goals of conserving the world's biodiversity, sustainably using its components, and fairly and equitably sharing the benefits arising from the use of genetic resources.

Although the United States is the country which initially proposed to have a global treaty on biodiversity in the late 1980s at UNEP meetings, unfortunately, it has ended up as the only developed state that has not yet ratified the Biodiversity Convention. A non-party status has prevented the United States from exerting its full influence on the developments of the Biodiversity Convention since the COP1, which was held in November 1994 at Nassau, Bahamas. It is likely that the U.S. influence would be further frustrated if the United States continues to remain outside the Convention, given the fact that a number of important issues dealing with different aspects of conservation of biodiversity are to be negotiated and decisions are to be made in the scheduled meetings in the coming years. It is also possible that the U.S. non-party status would preclude American industries from gaining access to genetic and biological resources found in other countries. As a result, the U.S. industries could be placed in a relatively disadvantaged position in a competitive international market. Accordingly, it might become much more difficult for U.S. industries to compete against foreign

companies, such as the European and Japanese, which will have access to the resources. These disadvantages eventually might lead to the loss of U.S. domestic profits, taxes, and jobs, which were among the fundamental policy considerations for the Bush Administration's decision not signing the Biodiversity Convention in 1992.

President Bush's decision not to sign the Convention was based on his Administration's reading of those provisions concerning intellectual property rights, transfer of technology, biotechnology safety regulations and the financial mechanism issues. These provisions were interpreted as having negative impacts on the development of U.S. domestic economy if adopted. Although the Clinton Administration signed and then transmitted the Convention to the U.S. Senate for advice and consent to ratification, the U.S. position on the Convention's provisions, in particular, those dealing with intellectual property rights, transfer of technology, financial mechanism, and decision-making process, as reflected in the seven understandings (or interpretative statements) attached in the State Department's Letter of Submittal, is not much different from the Bush Administration's. The Clinton Administration's decision to sign the Biodiversity Convention in June 1993 enabled the United States to participate in the COP, but only as an observer. It is the Clinton Administration's position that ratification of the Convention will provide the United States, as a full member, with opportunities to exert its influence, in accordance with the State Department's seven understandings of certain provisions of the Biodiversity Convention, in those meetings dealing with biodiversity.

Will the United States ratify the Convention in the year 1998 or beyond? The answer is not clear. What is clear is that the majority of the American public, the biotechnology and pharmaceutical industries, the agricultural associations, the environmental groups,

and the academic community are of the opinion that the United States should join the world by ratifying the Biodiversity Convention and that the United States will benefit more from becoming a full member of the treaty. Nevertheless, there are still several obstacles to U.S. ratification of the Convention. One of the obstacles is rooted in one of America's fundamental values, namely, the protection of private property rights. Similar to the fears arising from the implementation of certain U.S. domestic legislation concerning the protection of biodiversity, in particular, the Endangered Species Act, landowners, influenced by ultra-conservative groups, such as the Wise Use and private right movements, have raised their concerns about and/or opposition to the Biodiversity Convention. The debates between the need to conserve biodiversity and the need to protect private property rights will continue to slow down the process of U.S. ratification of the Biodiversity Convention. Another obstacle to the U.S. participation in the treaty is the fiscal problem. If the U.S. economy remains in a bad shape, it would be difficult to ask U.S. senators to give their support for the ratification of the Biodiversity Convention, simply because the financial obligations under the Convention will affect the already-tightened U.S. national budgets. The third obstacle arises from the way American politics in general and the Senate Committee in particular operate. During the presidential or mid-term election years, it is less likely for the U.S. senators who do not belong to the incumbent president's party to ratify a global treaty which is supported by that president, mainly because "treaties are viewed as triumphs for a president."²⁸⁷ In addition, it seems difficult to understand that in a much developed democratic country, such as the United States, it can not only be

²⁸⁷ *Supra* note 266.

tolerated but respected when an individual U.S. senator, holding an important position in one of the Senate committees, taking a very different position from the majority of the American public, has the "dictator-like" power to decide which global treaty should or should not be considered in his committee and accordingly, has the power to delay or even kill the possibility of U.S. ratification of the Biodiversity Convention.

In spite of these obstacles, the possibility for the United States to ratify the Biodiversity Convention still exists. No one can be certain that the GOP will win in the U.S. Senate again in the coming 1998 mid-election. If the Democratic Party were to become the majority in the Senate, the likelihood of U.S. ratification of the Convention would be greater. Even if the GOP actually wins the 1998 election and controls more seats in the Senate than the Democratic Party, it would still be possible for the U.S. to ratify the Biodiversity Convention, because Senator Helms's position on this treaty could be softened or changed by the future developments of the Convention, which, to certain degree, meet the requirements listed in the seven U.S. understandings proposed by the State Department and transmitted by President Clinton to the Senate in November 1993 and Senator Helms's proposal made in the Senate in October 1994. Senator Helms's position on the Convention could also be changed because of the Clinton Administration's efforts to ask representatives of the biotechnology and pharmaceutical industries, the agricultural sectors, and the environmental groups to lobby the Foreign Relations Committee to hold hearings on the Biodiversity Convention and thus lead to the Senate's consideration of ratification of the Convention. As one of the most recent reports stated, the Clinton Administration's plan to reorganize the State Department "came on a day when Mr. Helms finally agreed to allow a Senate

vote on a long-delayed chemical weapons treaty.”²⁸⁸ In the end, the Convention on Chemical Weapons was finally ratified by the Senate on April 25, 1997.²⁸⁹ For this possibility to be realized for the Biodiversity Convention, the Clinton Administration must put U.S. ratification of the Convention on the top of its policy agenda and continue to work hard to carry it out. Taking an optimistic view, the United States might be able to participate in the COP4 as a full member because of the U.S. Senate finally agreed to ratify the Biodiversity Convention in or before February 1998.

²⁸⁸ “State Dept. Set for Reshaping, Pleasing Helms,” *The New York Times*, April 18, 1997, at A1.

²⁸⁹ “Vote on Chemical Arms Bolsters Clinton Policy,” *International Herald Tribune* (Hong Kong), April 26-27, 1997, at 1.

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美國參與、簽署與是否批准 生物多樣性公約之研究

宋燕輝

摘要

本文主要目的在研究美國參與、簽署與是否批准一九九三年十二月生物多樣性公約的情形。儘管美國是推動起草制定保護生物多樣性的主要國家之一，但此公約通過後，基於智慧財產權、科技移轉、經費等問題，前美國總統布希決定不簽署生物多樣性公約。柯林頓總統就任後改變美國的政策，簽署了生物多樣性公約，並將此公約送交國會參議院請求該院同意美國批准。但至今，美國仍是國際社會上極為少數尚未批准此公約的國家之一。本文先就生物多樣性公約通過之源起與發展做一回顧；其後，針對美國參與生物多樣性公約的協商、起草、通過過程與政策逐一討論。美國批准生物多樣性公約的障礙與可能也在文中予以說明與評估。本文在結論中指出，儘管美國批准生物多樣性公約的障礙猶存，但未來，只要柯林頓政府將生物多樣性之保護列為環保政策重要議題之一，並且努力去推動此政策之執行，美國還是有可能批准生物多樣性公約的。

關鍵詞： 美國、生物多樣性公約、參與、批准