

QUO VADIS, KYOTO?

PITFALLS AND OPPORTUNITIES

Key Note, presented at the Civil Society Outreach of the
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by

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“If our economies are to flourish, if global poverty is to be banished, and if the well-being of the world's people enhanced – not just in this generation but in succeeding generations – we must make sure we take care of the natural environment and resources on which our economic activity depends. ... And we now have sufficient evidence that human-made climate change is the most far-reaching – and almost certainly the most threatening – of all the environmental challenges facing us. ... And it is the poorest members of the community – those most dependent on the natural world for their survival, and those with the fewest resources to buy their way out of unhealthy environments – that suffer the most. ... Climate change is an issue of justice as much of economic development. It is a problem caused by the industrialised countries, whose effects will disproportionately fall on developing countries.”

UK Chancellor Gordon Brown
G8 meeting of Environment and Energy Ministers, 15 March 2005

THE STATUS QUO

Arguably the most important achievement in the global effort to fight climate change to date is the creation of greenhouse gas emission reductions as an economic good through permit trading schemes such as the European Trading Scheme and, most importantly, the international emission cap-and-trade regime of the Kyoto Protocol.

By creating monetary value for emission reductions, these trading schemes can – like top-down technology initiatives – catalyse research and development of emission reducing (‘low’ or ‘no-carbon’) technologies. Unlike them, however, cap-and-trade regimes can also efficiently drive the *dissemination* of these technologies among the ‘engine of the global economy’: the Northern consumers. And given the realities of technology diffusion, the technologies developed and adopted in the North will eventually find their way to the South through a process often euphemistically referred to as ‘technology spill-over’ (or even ‘technology transfer’), a.k.a. technology exports.

Of course, it would be possible to promote such exports in the absence of domestic caps and emission trading – the intention behind the latest US climate change legislation proposal by US Senator Chuck Hagel, erstwhile co-sponsor of the (in)famous ‘Byrd-Hagel Resolution’^b – but it would be difficult for such a scheme to compete with the spill-over of high carbon technologies that would continue to be demanded by the Northern economic engine with ‘business as usual appetites,’^c not to mention the doubtful moral situation this would raise.^d

The success of emission trading in helping to reduce emissions depends on the participants expecting these markets to be here to stay, and the value of the permits to increase significantly over time. The only *reliable* way of achieving this is by way of a sequence of *ever tightening mandatory caps* on permissible emissions,^e i.e. by continuing the Kyoto regime – possibly with some ‘safety-valves’ such as the introduction of maximum permit prices.^f

Ever since President Bush repudiated the Kyoto Protocol in early 2001, his administra-

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tion has been openly opposed to the idea of carbon emission caps, let alone to mandatory ones, and has instead opted for a voluntary regime with ‘intensity targets’ and technology (export) initiatives. They have officially ruled out a review of their climate change plan before 2012, and have repeatedly indicated that they will not participate in any Kyoto follow-up negotiations, certainly not before this internal review. At the sub-national (State, corporate, community) level, however, a lot of measures are underway which could lend themselves to be integrated with Kyoto Protocol-type flexibility mechanisms, be it emission trading or joint implementation.⁸

Based on the Framework Convention’s ‘principle of common but differentiated responsibilities and capabilities,’ most developing countries categorically refuse to even contemplate emission reduction targets for the near to medium-term. At the same time, many of them are, and have been, carrying out significant emission mitigation efforts, and they are putting their hope in the Clean Development Mechanism to support and enhance these efforts. Yet the refusal – especially by the large developing country emitters (China and India) – to take on reduction commitments continues (particularly in the US) to fuel the spectre of an unfair competitive disadvantaged under a regime that would continue to exempt these countries from adopting emission reduction targets.

THE WAY FORWARD

The Industrialised World and Meaningful US Participation

The worst course of action with regard to industrialised countries would be to undermine the expectation about the longevity of emission trading markets and about the increasing value of the permits. Yet this would be the effect of moving away from the idea of mandatory emission caps on the global economic motor, say towards a Bush administration style regime or something like Senator Hagel’s Technology Deployment initiative (recently alleged to being considered by Prime Minister Blair as an alternative to Kyoto^h). The most likely consequences of proceeding along these

lines would be tragic, for it stands to reason that all that would be achieved is the collapse of any meaningful carbon trading without actually bringing Washington back into the fold.

The focus of UK and EU policy should be on taking genuine leadership to continue the Kyoto-track negotiations, possibly with certain changes in the rules, such as the introduction of price ‘safety valves’ and allowing sub-national entities of non-Parties to participate in the flexibility mechanisms, in order to re-engage the remaining industrialised non-Parties, i.e. Australia and, more importantly, the US. This would, for one, lend support to the current efforts at the sub-national (State and corporate) level in the US, and might thus help put domestic pressure on the Federal authorities (the only way to lead them, if not to ‘meaningful participation,’ at least to meaningful action).

It would also have larger, longer-term benefits. The fact is: the US has a long tradition of having to treat treaties ‘as-if-ratified.’ Many international agreements are – and historically have been – signed *and kept* by the US government, even though they are not (yet) ratified by the Senate. Moreover, ratification – if and when it happens – may often take a lot longer than the time it took for the treaty to have entered into force.¹

Such a lag can be due to a number of factors. For one, the government itself – e.g. after a change of administration – can become uninterested in, or even antagonistic towards ratification. But, generally, governments who sign do so in good faith; they intend to keep the treaty and have it ratified. One of the key factors in explaining the phenomenon of US ratification lag is the inordinate hurdle which the Founding Fathers have set when they gave the President the constitutional ‘Power, by and with the Advice and Consent of the Senate, to make Treaties, *provided two thirds of the Senators present concur*’,¹ a condition much more onerous than the usual international entry-into-force conditions of multilateral treaties.¹

¹ US Constitution, Article II, section 2, clause 2, emphasis added.

Of course, a willing (future) administration could – a simple majority in Congress permitting – even now try to keep the Kyoto target (or any second commitment period target it chooses to sign up to) without ratification. But the Kyoto rules (prohibiting non-Party participation in the flexibility mechanisms) would not permit this to be done *as-if-ratified*. Thus far, the idea seems to have been that this prohibition to engage would drive countries to ratify. At least in the case of the US, it is – and always has been – very unlikely to do so. Any treaty aiming to have the US participate meaningfully should make provisions to allow for the participation of ‘*as-if-Parties*.’

An admission of sub-national entities of non-Parties (or even non-Parties) to the flexibility mechanisms – conditional, of course, on them keeping to the relevant rules (i.e. keeping the treaty, in the case of governments) – would overcome this hitherto not well publicised obstacle to realistic US participation in the existing Kyoto architecture, namely the need to be *able to participate fully as if having ratified*.

With regard to the present US Administration, however, the only way forward is to engage with them where they are willing to engage – to forge some joint technology initiatives. But as a *complement* to the Kyoto-track, *not* as a substitute for it! It is probably correct to say with some American commentators that insisting for the US to ‘enact mandatory *domestic* emission controls’² is at present more helpful than pressing them to return to the Kyoto process. But this can and must be done in ways other than to scuttle that very process – abandoning among other things the benefits of effective international permit trade.

Meaningful Engagement of Developing Countries.

In the time of the Clinton administration it may have been possible – as witnessed at

² Nigel Purvis, as quoted in *The Kyoto Protocol: Its Development, Implication, and the Future*, IRES, Vol.5 No.1, 2004:p.8.

COP6 in The Hague – for the US, the EU and Japan to push forward the negotiations pretty much on their own. In the present constellation, developing countries’ concerns cannot be ignored by anyone – either side of the Atlantic – who wants to influence the direction of the multilateral climate change negotiations.

The paramount climate change concern for a large number of developing countries is actually not a post-Kyoto mitigation regime, but how *industrialised* countries can themselves be made to ‘participate meaningfully’ in dealing with the consequences of climate change – that is to say with (unavoided) climate change impacts. In other words, for developing countries, in particular, climate change is not only a mitigation issue, or, for that matter one of what has become known as ‘adaptation’. It is a cross-cutting issue of *disaster management*, of *desertification*, of *biodiversity*, of *trade*, and, above all, of *development*.

It thus cannot be in the interest of anyone who is intent on leading the multilateral climate change efforts either to force a post-Kyoto mitigation agenda at the expense of negotiations on adaptation and impacts, or to isolate climate change from being discussed in these cross-cutting arenas. Indeed, it has to be in the interest of anyone concerned about the problem, North or South, to work together and counter vigorously any such ‘ghettoization’ attempts.^k

It would also be useful, as a much needed trust-building measure, if the affluent Parties to the Convention were to bring themselves to finally redeem their pledges to fill the different funds they promised the developing world, and to do so without bureaucratic preconditions concerning a perfect set of operational rules. This is precisely what trust is about, and it should really be possible, given the relatively minor amounts involved.

As concerns post-2012 developing country *mitigation* strategies, there are a number of reasons why emission reduction targets – which have in particular been suggested to address the aforementioned competitiveness worries – are unlikely to be an acceptable way

forward for most developing countries, including Brazil, China and India.¹

Apart from the well-known equity-based objections regarding the North-South difference in existing responsibilities, there are economic reasons why this is so. For one, there is the fact that industrialised countries will, for the most part, develop the world's low carbon technologies. And developing countries could not comply with emission reduction commitments without spending considerable sums on importing these technologies. For in reality, 'technology transfer' will remain to be a euphemism for North-South technology *exports*, a realisation which only adds to the reasons for repudiating such reduction *commitments*.

However, there are a number of ways *short of imposing emission reduction targets* to address both the problem of rising developing country emissions and industrialised country concerns about unfair competitive advantages associated with the Kyoto architecture. Developing country emissions, for one, could be addressed by supporting the Clean Development Mechanism, by reforming export credit rules,³ or by generally removing perverse incentives in the international trade regime (WTO Doha Round).

One possibility to address the competitiveness worries of capped industrialised countries without imposing developing country emission reduction targets, in turn, would be to follow the recent Chinese example of addressing the same worries (particularly in the US) in the context of the abolition of the international textile quota system by introducing export duties on carbon intensive developing country products.⁴ In short: there are measures – and there are bound to be many more like them – which (i) could lead to a further reaching engagement of developing countries, while (ii) addressing Northern

concerns about competitiveness and developing country emissions, without (iii) involving the presently unacceptable idea of them having to submit to emission reduction commitments.

Summary

The key both to meaningful US participation and developing country engagement is to face the fact that there are – and will be for some time – significant differences between industrialised and developing countries and to incorporate them accordingly in a Kyoto successor architecture. It is possible to construct an environmentally effective follow-up of the Kyoto Protocol in which everyone could meaningfully participate or engage, but only if it is allowed to be sufficiently diverse in character, involving not only the Kyoto architecture, but alternatives to *address* developing country Parties, and even to *integrate* willing non-Party actors.

In short, the key positions in the way forward at the upcoming post-2012 negotiations must be:

- Staunchly resist attempts to force climate change into a ghetto, ensure that issues of impacts and adaptation are addressed in such way as to give developing countries confidence in a post-2012 regime, and redeem the promises made to fill the funds created under the Convention and the Protocol speedily and without artificial bureaucratic preconditions.
- Keep to the Kyoto-track (i.e. differentiated mandatory emission caps & flexibilities) negotiations for industrialised countries.
- Make provisions for 'as-if-Parties' (including sub-national actors) who are willing and able to play by the rules of the treaty but have not managed to (or cannot) obtain formal ratification.
- Engage developing countries by addressing their emissions without imposing additional economic burdens, for example, by giving the Clean Development Mechanism much needed support.

³ For more, see Kevin Baumert, Chandrashekhar Dasgupta and Benito Müller (2004), 'Can the Transatlantic Partners Help in Addressing Developing Country Emissions', available at www.OxfordClimatePolicy.org

⁴ For more on this option, see Müller, Benito (2005), 'Overcoming the "Meaningful Participation" Impasse', Oxford: OIES www.OxfordEnergy.org (forthcoming).

Additional Notes (some emphases added)

^a The author would like to thank John Ashton, Justin Mundy, and Claire Parker for their valuable feed-back on earlier drafts of this note.

^b The Climate Change Technology Deployment in Developing Countries Act of 2005

Press Release: Hagel Introduces Comprehensive Climate Change Legislation, 15 February 2005, http://hagel.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=219286&Month=2&Year=2005.

'This bill promotes the adoption of technologies that reduce greenhouse gas intensity in developing countries by:

- providing the Secretary of State with new authority for coordinating assistance to developing countries for demonstration projects and technologies that reduce greenhouse gas intensity;
- **establishing an inter-agency working group to promote the export of greenhouse gas intensity reducing technologies and practices from the United States;**
- **directing the U.S. Trade Representative to negotiate the removal of trade related barriers to the export of greenhouse gas intensity reducing technologies;** and
- authorizing fellowship and exchange programs for foreign officials to visit the United States and acquire the expertise and knowledge to reduce greenhouse gas intensity in their countries.'

^c To be fair, Sen. Hagel's legislative proposal consists of a triptych of technology deployment bills, two of which actually concerned with *domestic* deployment of greenhouse gas intensity reducing technologies, be it through '\$2 billion over 5 years in the form of direct loans, loan guarantees, standby default coverage, and standby interest coverage' or '\$2 billion over 5 years in tax credits.' Yet, while loans, and particularly tax incentives, may be able to exert a significant demand pull in deploying the relevant technologies, it is highly questionable whether the sums of money suggested in Sen. Hagel's initiative would be able to make any significant inroads at all:

In February 2000 the Clinton Administration requested from Congress \$201m in tax incentives for FY2001 as part of the *Climate Change Technology Initiative* (CCTI), just about half of Sen. Hagel's annual figure. In April of the same year, the US Energy Information Administration (EIA) published their *Analysis of the Climate Change Technology Initiative: FY2001*. In it the EIA, focusing primarily on the effects of the proposed tax incentives, came to rather sobering conclusions. The estimated CO₂ emission reduction in 2010 due to the tax-incentives and accelerated efficiency standards envisaged under the CCTI was 8.4MtC or 0.47 percent of the EIA's 2010 'business-as-usual' projection in its *Annual Energy Outlook 2000*.

^d In light of the existing common but differentiated responsibilities for the problem, trying to increase export revenues from developing countries under the guise of saving the global environment — particularly in the absence of any meaningful domestic action — would for any industrialised country be at least morally questionable.

^e Global Warming

Business Week, COVER STORY August 16, 2004

http://www.businessweek.com/magazine/content/04_33/b3896001_mz001.htm

[...] Remarkably, business is far ahead of Congress and the White House. Some CEOs are already calling for once-unthinkable steps. "We accept that the science on global warming is overwhelming," says John W. Rowe, chairman and CEO of Exelon Corp. (EXC) "**There should be mandatory carbon constraints.**"

Exelon, of course, would likely benefit as the nation's largest operator of commercial nuclear power plants. But many other companies also are planning for that future. American Electric Power Co. (AEP) once fought the idea of combating climate change. But in the late 1990s, then-CEO E. Linn Draper Jr. pushed for a strategy shift at the No. 1 coal-burning utility -- preparing for limits instead of denying that global warming existed. It was a tough sell to management. Limits on carbon emissions threaten the whole idea of burning coal. But Draper prevailed. Why? "We felt it was inevitable that we were going to live in a carbon-constrained world," says Dale E. Heydlauff, AEP's senior vice-president for environmental affairs.

Now, AEP is trying to accumulate credits for cutting CO₂. It's investing in renewable energy projects in Chile, retrofitting school buildings in Bulgaria for greater efficiency, and exploring ways to burn coal more cleanly. Scores of other companies are also taking action -- and seeing big benefits. [...]

Indeed, there is surprising consensus about the policies needed to spur innovation and fight global warming. **The basic idea: mandatory reductions or taxes on carbon emissions, combined with a worldwide emissions-trading program.** [...] As a result, there is a powerful incentive for everyone to find the lowest-cost and most effective cuts -- and to move to lower-carbon technologies.

A key element is long-term predictability. If the world sets goals for the next 50 years, as Britain has done, and then implements the curbs or taxes needed to reach them, companies will figure out solutions. "Give us a date, tell us how much we need to cut, give us the flexibility to meet the goals, and we'll get it done," says Wayne H. Brunetti, CEO and chairman of Xcel Energy Inc. (XEL), the nation's fourth-largest electricity and gas utility.

^f Given the failure of the voluntary approach under the Framework Convention, and the lack of demonstrable progress in reducing *emissions* – as opposed to some relative figures such as *carbon emissions per unit of GDP* ('*carbon intensities*') – of the current voluntary federal US climate change regime, it seems unlikely that anything but a mandatory scheme could provide the level of incentive needed to achieve the required (industrialised country) mitigation. As regards the type of target required, it may well be that, in order to assuage certain concerns about excessive mitigation costs, one might wish to modify the Kyoto regime by introducing some sort of 'safety valve'. But, as I have argued previously elsewhere [see "Price related Sensitivities of Greenhouse Gas Intensity Targets" or "Rejecting Kyoto", both available at www.OxfordClimatePolicy.org], it would be a grave mistake to resort to macro-economic emission intensities, in particular when there is a much simpler option of introducing a permit price cap.

^g Some states flirt with Europe on carbon controls

USA Today, 16 December 2004

http://www.usatoday.com/weather/resources/climate/2004-12-16-states-climate_x.htm

BUENOS AIRES, Argentina (AP) — **Two sets of Americans have come here to talk global warming: the United States, opposed to controls on carbon emissions, and a bloc of united states, from Maine to Delaware, that plan to impose them. "It's not an in-your-face thing,"** Kenneth Colburn, a spokesman for those north eastern states, **said of the seeming defiance of the Bush administration. "They're doing what they think needs to be done." That may even include linking up with the Europeans in a backdoor trading scheme on emissions** — although a key Republican says that would meet a "lot of skepticism" in Congress.

In the U.S. Northeast, New York Gov. George Pataki, a Republican, in April 2003 invited other states to develop a regional plan for "cap and trade" on power-plant emissions of carbon dioxide — a system whereby plants that don't use up their reduced quotas of emissions can sell "offsets," or credits, to other companies that overshoot their allowances. Under an existing consortium, the Northeast States for Coordinated Air Use Management, eight other states joined in: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey and Delaware. Four have Republican governors, four Democratic. Combined, they account for 14% of U.S. carbon emissions. A proposed design for the system is expected next April, and the states may be trading carbon emission credits in two or three years, said Colburn, executive director of the Boston-based consortium. "It's a question of 'when,' not 'if,'" he said.

[...] New York is seeing London take the lead in "carbon trading," which may balloon into a multibillion-dollar market. "We're missing out on this economic opportunity," he said. The 25-nation European Union launches its own carbon-trading system on Jan. 1, and it has left the door open for outside participants, a possibility the U.S. states are examining. "I don't see why our own individual power plants couldn't register and purchase allowances in the European system," Colburn said. [...] Colburn questioned the need for federal authorization, saying any trans-Atlantic trades would be pure commercial transactions, not government-to-government. In some states the plan won't even need legislative approval, but could be enacted via executive regulations, he said. The list of trading states may grow. Washington, Oregon and California, jointly developing plans to control carbon dioxide, are studying the possibility of carbon trading.

^h Hagel prepares new initiative on climate change

Lincoln Journal Star (Lincoln, Nebraska), 15 December 2004, by Don Walton

<http://www.journalstar.com/articles/2004/12/15/local/doc41c0cbe363f46910808618.txt>

U.S. Sen. Chuck Hagel [Republican, Nebraska], who led Senate opposition to the Kyoto global warming accord seven years ago, said Wednesday he's fashioning an alternative initiative to address climate change. **His plan, he said, is compatible with the strategy being formulated by British Prime Minister Tony Blair.** Hagel met this week with Blair in London, [...] Hagel said he plans to introduce legislation early next year focusing on **the development and sharing of clean energy technology,** while providing tax incentives to U.S. businesses that operate in an environmentally-friendly way. "I've always believed that **if we can get at developing countries early while they are developing their energy infrastructure,** they can use new technology to leapfrog the dirty energy sources" that fueled the development of industrial nations, Hagel said. While the United States is the largest emitter of so-called greenhouse gases today, China will assume that position within the next few years, Hagel said. China and India are among the developing nations not covered by mandatory emission standards in the Kyoto protocol.

"Blair was very clear that Kyoto is dead," Hagel said, "but he believes there are some things we could do together if we find the right mechanism and framing of priorities." Hagel said he feels an obligation to offer an alternative since he helped lead U.S. opposition to Kyoto. "

Blair questions the wisdom of Kyoto II

Climate Change Management, London: Newzeye Publications,
www.climatecm.com
Issue 20, November 2004, page 1

Prime minister Tony Blair has suggested that **the only way to get America to engage with the world community on climate change is to move away from the Kyoto process.** [...]

The prime minister has said that climate change will be a priority during the UK's presidency of the G8 in 2005. Asked at his monthly press conference on 29 November how his Presidency could be "fully efficient when the Bush Administration does not intend at all to sign the Kyoto agreement", he said: "It is clear the Kyoto Protocol will come into being because of the Russian ratification, on the other hand I don't think anyone is believing that America is actually going to come into this themselves. What I am trying to do is to find a different way, therefore, in order to handle this issue."

He added that: "However much we want to criticise America, without America's participation there is not much of a prospect of getting the action that we require". He did not specify what the 'different way' might be, except to say that "the most important thing is to try and get a dialogue with America on how we recognise both the scale of the problem on greenhouse gas emissions, and a process that enables us to confront and deal with it."

ⁱ A cursory look at the UN database on the status of multilateral treaties deposited with the Secretary-General (<http://untreaty.un.org/>) reveals some interesting points. While it took just over two years (Dec. 1948 – Jan. 1951) for the Convention on the Prevention and Punishment of the Crime of Genocide to enter into force, it had to wait 20 times longer after being signed by the US Administration (Dec. '48) to be also ratified by the US Senate. And similarly for the International Convention on the Elimination of All Forms of Racial Discrimination, which took 28 years from US signature to ratification, but only 3 enter into force. At the other end of the spectrum, as it were is the astonishing fact for the UNFCCC, the lag between signature and ratification of the UNFCCC was a mere 4 months (sic!) and it was 2½ years before entry into force!

^j The entry into force conditions of treaties are usually much weaker, requiring ratification by around a quarter or even less of the present UN membership, and if they are not – as was arguably the case for the Kyoto Protocol due to its 55% emissions of Annex I condition – entry into force not surprisingly becomes equally problematic.

^k UNFCCC COP10 Buenos Aires, Argentina, 6-17 December 2004

<http://www.iisd.ca/vol12/enb12259e.html>

Exchange of Views on UNFCCC Activities Relevant to other Intergovernmental Meetings: On reporting the activities of the ten-year review of the Barbados Programme of Action (BPOA+10), the World Conference on Disaster Reduction (WCDR) and CSD processes to the UNFCCC, **the US suggested only reporting to SBSTA-23 and only on CSD activities. SAUDI ARABIA said there should be no reporting to the UNFCCC whatsoever.** AOSIS and the EU insisted on keeping provisions on reporting on the relevant processes to COP-11 and referring to the submissions of Parties regarding activities relevant to these processes contained in UNFCCC miscellaneous documents. Following discussion throughout the afternoon and evening, Parties agreed on text with deletion of references to miscellaneous documents, and including text on reporting to SBSTA on the CSD and BPOA+10 activities.

World Conference on Disaster Reduction, Kobe, Japan, 18-22 January 2005

<http://www.munichre.com/>

Climate change only a marginal issue

Climate change as the factor causing a higher risk of natural catastrophes was marginalised at this conference. This was due not only to the discussions about tsunami losses and early detection of tsunamis (which dominated the conference) but also to the strategy of the US delegation, which was clearly aimed at avoiding the issue of climate change wherever possible.

23rd Session of the UNEP Governing Council / Global Ministerial Environment Forum

<http://www.iisd.ca/vol16/enb1644e.html>

On the draft decision on keeping the world environment situation under review, **the US said it was opposed to the paragraph on climate change.**

^l The standard demand is that (key) DCs take on *binding emissions caps*. But, to be sure, many caps – such as an allocation on a per capita basis with its surplus permits – would not remedy these competitiveness concerns. In order to address the competitiveness concerns properly, only a cap that amounts to an emission *reduction* target will do, something which is very difficult to square with the existing differentiated responsibilities.