



# Quo vadis, Kyoto? Pitfalls and opportunities

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COMMENTARY

## Quo vadis, Kyoto? Pitfalls and opportunities

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### 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 a 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’), otherwise known as 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 ‘Byrd–Hagel Resolution’ – 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,’ not to mention the dubious moral situation this would raise.

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, i.e. by continuing the Kyoto regime – possibly with some ‘safety-valves’ such as the introduction of maximum permit prices.

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

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this internal review. Instead, the US administration has chosen the regional, voluntary approach, exemplified in the recently announced *Asia-Pacific Partnership on Clean Development and Climate*, with Australia, Japan, China, India and South Korea. Although it was officially presented not as a substitute but as a complement to the Kyoto Protocol, the reaction in the media of the Kyoto Parties was typified by the *Financial Times* headlines: ‘US unveils alternative plan to Kyoto treaty’, and ‘Asia deal on table to counter Kyoto’. At the sub-national (State, corporate, community) level, however, a lot of measures are underway which could lend themselves to being integrated with Kyoto Protocol-type flexibility mechanisms, be it emission trading or joint implementation.

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 (CDM) 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 USA) to fuel the spectre of an unfair competitive disadvantage under a regime that would continue to exempt these countries from adopting emission reduction targets.

### **The way forward**

#### *The industrialized world and meaningful US participation*

The worst course of action with regard to industrialized 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 be under consideration by Prime Minister Blair as an alternative to Kyoto). 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 industrialized non-Parties (i.e. Australia and, more importantly, the USA). While, following entry into force of the Kyoto Protocol, the Linkage Directive of the EU Emission Trading Scheme (EU-ETS) already suggests the Commission ‘should examine, whether it could be possible to conclude agreements with countries listed in Annex B to the Kyoto Protocol which have yet to ratify it, to provide for the recognition of allowances between the EU-ETS and mandatory greenhouse gas emissions trading schemes capping absolute emissions established within those countries’, it may make sense – given that Washington, in particular, is unlikely to even contemplate such agreements in the foreseeable future – to conclude them directly with willing sub-national entities (and to include project-based mechanisms). This would, among other things, lend support to the current efforts at the sub-national (i.e. State and corporate) level in the USA, 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 USA 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 have not (yet) been 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.

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 US ratification lag phenomenon is the inordinate hurdle which the Founding Fathers erected 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*’,<sup>1</sup> a condition much more onerous than the usual international entry-into-force conditions of multilateral treaties.<sup>2</sup>

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 USA, it is – and always has been – very unlikely to do so. Any treaty aiming to have the USA 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 obstacle to realistic US participation in the existing Kyoto architecture, namely the need to be *able to participate fully as if having ratified*.<sup>3</sup>

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 that the USA should ‘enact mandatory *domestic* emission controls’<sup>4</sup> 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 trading.

### *Meaningful engagement of developing countries*

In the time of the Clinton administration it may have been possible – as witnessed at COP-6 in The Hague – for the USA, 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 *industrialized* 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.

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 make available 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.

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 industrialized 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 as a euphemism for North–South technology *exports*; a realization 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 industrialized 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,<sup>5</sup> or by generally removing perverse incentives in the international trade regime (WTO Doha round).

One possibility for addressing the competitiveness worries of capped industrialized 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 USA) in the context of the abolition of the international textile quota system by introducing export duties on carbon-intensive developing country products. In short: there are measures – and there are bound to be many more like them – which (1) could lead to a further reaching engagement of developing countries, while (2) addressing Northern concerns about competitiveness and developing country emissions, without (3) 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 industrialized 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:

- To staunchly resist attempts to force climate change into a ghetto, to ensure that issues of impacts and adaptation are addressed in such way as to give developing countries confidence in a post-2012 regime, and to redeem the promises made to release the funds created under the Convention and the Protocol speedily and without artificial bureaucratic preconditions.
- To keep to the Kyoto-track (i.e. differentiated mandatory emission caps and flexibilities) negotiations for industrialized countries.
- To 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.
- To engage developing countries by addressing their emissions without imposing additional economic burdens; for example, by giving the Clean Development Mechanism much-needed support.

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### Notes

- 1 US Constitution, Article II, section 2, clause 2, *emphasis added*.
- 2 See also Michael Zammit Cutajar (2004), Reflections on the Kyoto Protocol: looking back to see ahead. *International Review for Environmental Strategies* 5(1), 61–70.
- 3 Similar ideas have recently been advocated by Frank Biermann (2005), Between the USA and the South: strategic choices for European climate policy. *Climate Policy* 5(3), 273–290, and Michael Grubb (2004), Kyoto and the future of international climate change responses: from here to where? *International Review for Environmental Strategies* 5(1), 15–38.
- 4 Nigel Purvis, as quoted in *The Kyoto Protocol: Its Development, Implication, and the Future*. *International Review for Environmental Strategies* 5(1), 8.
- 5 For more, see Kevin Baumert, Chandrashekhar Dasgupta and Benito Müller (2004), How Can the Transatlantic Partners Help in Addressing Developing Country Emissions? [available at <http://www.OxfordClimatePolicy.org>].