

Chapter 5

Introduction to the Kyoto Protocol

I. Introduction (p. 189)

The Kyoto Protocol to the UNFCCC is a complex and ambiguous document, but also one that has launched much of the world into an ambitious and innovative attempt at curbing greenhouse gas emissions through the creation of a cap-and-trade regime and an associated carbon market. The Protocol was the result of a contentious and politically charged negotiation and reflects deep compromises and has many shortcomings. It also enjoys the support of much of Europe as well as many other countries, which has allowed it to weather the rejection of the United States.

Although the United States is not a Party to the Kyoto Protocol, the Protocol is still very relevant to U.S. law students. In implementing the Protocol, Europe in particular has created a vibrant carbon market with a unified price for carbon. The Clean Development Mechanism has approved billions of dollars worth of projects in developing countries through which investors receive certified emission reductions. The climate secretariat has created a massive bureaucracy to administer the carbon market and to monitor and verify Parties' actions.

All of this activity under the Protocol's auspices has also influenced developments here in the United States. State and regional cap-and-trade systems are developing in a conscious way to be able to link with the carbon markets created under the Kyoto Protocol's carbon trading mechanisms. Private U.S. companies, subject in their overseas operations to the Kyoto Protocol, are implementing similar policies in the United States. Proposed legislation in the U.S. Congress is also designed with an eye toward linking up with any international carbon markets operating in the post-Kyoto period. Finally, the Copenhagen negotiations are designed, at least in part, to extend the Kyoto Protocol's institutional and policy approaches beyond 2012 (when the Kyoto Protocol's first reporting period ends).

The approach in this chapter is to give a general overview and expose students to some of the complexity found in the international climate regime. For professors who want to delve deeper into the international climate regime under the Kyoto Protocol, the next three chapters address emissions trading and the carbon market (Chapter 6), forests and land-use management (Chapter 7), and compliance and dispute resolution (Chapter 8). Chapter 9 then addresses the post-Kyoto discussions leading up to Copenhagen. Professors who want to spend more time on domestic climate policy can skip from this chapter and go directly to Chapter 9.

II. Negotiating the Kyoto Protocol (p. 190)

A. The First CoP and the Berlin Mandate (p. 190)

Understanding how the international climate negotiations progressed from the UNFCCC through the Berlin Mandate to the Kyoto Protocol can be an important way for students to

understand the continuity in the regime as well as how the regime is designed to allow for dynamic evolution. Article 4.2(d) of the UNFCCC required the Parties to review the developed country commitments under the convention to determine if they were adequate to meet the objective of the convention. When the Parties reviewed their commitments in Berlin, they found the existing commitments to be inadequate and this required them to launch a new set of negotiations as outlined by the Berlin Mandate. The Berlin Mandate then became the “terms of reference” for negotiating the Kyoto Protocol.

The UNFCCC set a clear deadline for reviewing the adequacy of the developed country commitments, and the Berlin Mandate set clear deadlines for negotiating what would become the Kyoto Protocol. Setting a clear date in international environmental treaty-making is critical for building political will, because many different stakeholders begin vesting in the success of that negotiation by that date. Part of the role of civil society groups is to push politicians and governments into making commitments that center around the specific time schedule. Thus, as governments started making clear statements that they would go to Kyoto and agree to a binding target, the pressure built on the United States to do the same thing. Just as deadlines focus the minds of students on term papers, deadlines focus negotiators on their need to reach agreements. Compromises come at the end, so that no country is tarred with the label of having killed “Kyoto” or a similar process.

Questions and Discussion (p. 191)

1. The Berlin Mandate clearly limited the Kyoto negotiations only to expanding commitments for developed countries, including explicitly the development of targets and timetables for reducing GHG emissions. The Berlin Mandate also explicitly provided that developing countries would not be asked to take on any further commitments. The Berlin Mandate also reflected the principle of common but differentiated responsibilities by requiring developed countries to go first in reducing emissions given that their historical contribution to climate change far exceeded any of the developing countries (this was particularly true in 1995 before the great expansion of the Chinese and Indian economies).
2. By setting a timetable for reviewing its adequacy, the UNFCCC virtually assured that the Parties would have to consider additional steps soon after the convention was negotiated. This was part of the original compromise of the UNFCCC—there would be no clear commitment to curbing GHG emissions, but there would be a timetable for revisiting the commitments should the science dictate the need to address emissions.

B. Prelude to Kyoto: Building Political Will (p. 191)

The discussion of the various activities taken by opponents and proponents, alike, in the run-up to Kyoto (described beginning on page 191) allows students to understand how outside activities operate to build pressure and support international climate negotiations. The same processes are ongoing with respect to the Copenhagen negotiations, and students should be able to see the similarities between the strategies used in the run-up to Kyoto and strategies used today to build political will for Copenhagen or for domestic policies. Encouraging students to read and report on current newspaper accounts can be a good way to help them identify current

strategies by the many climate stakeholders in trying to shape current policymaking.

Questions and Discussion (p. 195-96)

1. As noted above, the Berlin Mandate reflects the principle of common but differentiated responsibilities. This question is intended as well to remind students that the developing countries are historically not the major cause of the climate change problem, even as their relative emissions are currently increasing. The question also suggests the counter-argument to the U.S. position that it need not make substantive commitments until China and other large emitters reciprocate.
2. This question can be used to elicit a general discussion of steps that have occurred more recently to build political will in the face of political opposition to climate change policies. Prime examples include Al Gore's PowerPoint presentation, his movie *An Inconvenient Truth*, and his Academy Award and Nobel Peace Prize; the publicity around the IPCC's Fourth Assessment report and its sharing in the Nobel Peace Prize; judicial decisions relating to climate change such as *Massachusetts v. EPA*; the myriad state and local laws passed to address climate change; the dropping of political banners by Greenpeace at the 2009 G-20 meeting in Pittsburgh; or the UN Summit on climate change held in September 2009 to try to overcome gridlock in the negotiations.
3. The Byrd-Hagel Resolution had no legal consequence, but it did send a clear political signal that any international climate agreement would have difficulty in the U.S. Senate, particularly if it imposed costs on the U.S. economy with no similar commitments on developing countries. The Resolution clearly contravenes the principle of common but differentiated responsibilities and, in that respect, the Resolution is probably in contravention of the UNFCCC.

C. Negotiations at Kyoto (p. 196)

Questions and Discussion (p. 204-05)

1. This note is self-explanatory. There are many examples in international environmental law where talented chairpersons have helped to bring negotiations to a successful close. Students can be asked to research the statements, speeches, and role of Yvo De Boer, the UNFCCC executive secretary and one of the key leaders in the post-Kyoto Copenhagen negotiations.
2. Many of the same North-South and EU-U.S. splits persisted between the UNFCCC negotiations and the Kyoto negotiations.
3. The United States prevailed in the general approach of cap-and-trade, the extensive availability of offsets, and the inclusion of land-use and forest management, among other things. The general point is that the United States was successful in gaining much of what it wanted in the agreement, only to repudiate it later.
4. This note is self-explanatory.

III. The Kyoto Protocol (p. 205)

The Kyoto Protocol is a very complex, ambitious, and in some places ambiguous agreement. The critical part of the Protocol is that it included the first binding targets and timetables to reduce net GHG emissions. Each industrialized country negotiated an assigned amount of net emissions reductions from a baseline year (typically 1990). The United States negotiated a 7% reduction in its emissions from 1990 levels. These emission reductions were to be achieved in the first reporting period, 2008-2012.

The complexity in the Protocol is not in the targets, but rather in the rules for calculating and achieving the targets. In particular, the Protocol endorsed certain “flexibility mechanisms” such as emissions trading and the Clean Development Mechanism that were meant to help countries meet their targets. Calculating the emission reductions also meant that some rules for addressing the role of forests and other land-use practices would need to be developed. We typically focus our discussion of the Protocol on the flexibility mechanisms and accounting rules.

How these mechanisms and accounting rules would be written would directly affect the cost of compliance with the reduction target. The Protocol masked large differences in how the Parties intended to implement the flexibility mechanisms and accounting rules. These issues were saved for negotiations after Kyoto. Agreement would finally be reached for these issues in 2001, but not until after the United States (under the new Bush Administration) would withdraw from the Protocol. Europe and Japan decided to go forward with the Protocol, which entered into force in 2004.

The remainder of this chapter reviews several of the primary issues arising from the text and implementation of the Kyoto Protocol: targets and timetables, policies and measures, forests and land-use, emissions trading, and implementation and compliance. As mentioned above, some of these issues are taken up in greater detail in Chapter 6 (emissions trading and the carbon market), Chapter 7 (forests and land-use management), and Chapter 8 (compliance and dispute resolution).

Questions and Discussion (p. 206-07)

1. *Reading the Treaty.* The following are the citations to those provisions of the Kyoto Protocol that provides answers to these questions:

- (a) Article 3.2 requires Parties to make demonstrable progress by 2005.
- (b) Article 6 addresses conditions on emission reduction units.
- (c) Article 12.2 provides the purpose of the CDM.
- (d) Article 25 states that the Protocol enters into force after 55 Parties, which account for at least 55 % of total CO₂ emissions in 1990, have ratified it.

(e) Article 13.4 outlines the authorities and responsibilities of the Conference of the Parties convening as the Meeting of the Parties (or the “CoP/MoP”).

(f) Article 18 calls on the Parties to develop an “indicative list of consequences” for noncompliance.

2. As required by the Berlin Mandate, the Kyoto Protocol clearly sets new targets and timetables on developed countries and establishes no new commitments on developing countries.

3. This note is self-explanatory.

A. Emission Reduction Targets and Timetables (p. 207)

The targets and timetables were, of course, one of the most important and controversial parts of the Protocol, but they are not conceptually difficult to understand. Students should be asked to review Annex B of the Protocol to see the variations in commitments under the Protocol. Students should also recognize that Parties who were formerly part of the Soviet bloc and have economies in transition are able to choose a different baseline than other developed countries (which all have a baseline set on 1990 emissions).

Questions and Discussion (p. 210)

1. This note is self-explanatory.

2. The “basket of gases” approach allows countries to reduce some gases more than others to meet their overall emissions reduction targets. Much like emissions trading, Parties can choose to reduce some gases (presumably those that are cheaper to reduce) rather than other gases. This can reduce the overall costs facing the Party.

3. This note is self-explanatory.

B. Policies and Measures (p. 210)

In addition to setting emission targets and timetables, the Protocol also encourages countries to take other policies and measures although the language is not mandatory. Many observers wanted the Kyoto Protocol to mandate certain policies and measures, but in the end the negotiators chose to rely almost completely on the imposition of the overall cap, leaving it to each country to choose the policies and measures they want to meet the cap. Note, however, that interest in mandatory policies and measures continues and may be an important part of the Copenhagen negotiations.

Questions and Discussion (p. 212-13)

1. This note is self-explanatory.

2. This note is self-explanatory.

C. Forests and Other Sinks (p. 213)

The Kyoto Protocol's approach to forests and land-use is complicated and politicized. It is treated in more detail in Chapter 7. The treatment in this section is simply meant to whet the appetite of the students in anticipation of further discussions around Chapter 7.

Questions and Discussion (p. 214-15)

1. This note is self-explanatory.

2. This note is self-explanatory.

3. This note is self-explanatory.

D. Emissions Trading and Other Flexibility Mechanisms (p. 215)

The core of the Kyoto Protocol is its “cap-and-trade” approach. This section introduces the four flexibility mechanisms identified in the Kyoto Protocol: emissions trading, the EU “bubble,” joint implementation and the Clean Development Mechanism. These mechanisms are complex, interrelated, and conceptually difficult to understand without more reading and discussion than is provided in this chapter. We provide that information in Chapter 6.

The Kyoto cap-and-trade system and its flexibility mechanisms are innovative and influential developments in international environmental law generally and climate policy specifically. The Kyoto Protocol provides the background for the European Union's emissions trading system and is also a model for regional and state cap-and-trade systems in the United States. Proposed climate legislation in the United States also seeks to link with the international carbon markets created under the auspices of the Kyoto Protocol. Understanding the basic approach is critical for understanding climate policy at all levels. Thus, we recommend that students also be assigned Chapter 6, which provides more information regarding cap-and-trade and carbon markets, including the EU's emission trading system.

Questions and Discussion (p. 218-19)

1. The question of additionality is central to the effectiveness of CDM projects in providing any permanent reductions in GHG concentrations. Additionality is a central part of Chapter 6's treatment of the CDM.

2. Again, this question foreshadows the issues addressed more fully in Chapter 6. Before students get to Chapter 6, however, it can be useful to have them think about what the bureaucratic and policy requirements would be to ensure that the flexibility mechanisms have some integrity with respect to overall GHG emissions. In general, emissions trading requires clear carbon accounting at the national level and at the regulated entity level. In addition, reductions in GHG emissions must be monitored and verified and compared to the estimated

baseline emissions for the project. Only the incremental reductions can be counted.

3. This note is self-explanatory. Students sometimes have difficulty seeing how the different flexibility mechanisms all fit together to contribute to a country's compliance with the Kyoto Protocol. This note is meant to provide an example for the students to consider and to discuss in class, if the professor chooses.

E. Implementation and Compliance (p. 219)

This section highlights some of the forgotten provisions of the Kyoto Protocol that addressed critical issues of implementation and compliance. For most students, the enforceability of international treaties (including the Kyoto Protocol) raises significant questions. Decisions under the Protocol have begun to establish a system for monitoring compliance that includes independent expert review teams to evaluate Parties' compliance. The Parties have also developed a list of indicative consequences for noncompliance. Despite the attention paid to compliance, we do not yet know whether any sanctions will be meaningful under the Protocol for any country that does not meet its commitments in the first reporting period. More information is provided on compliance and dispute resolution procedures in Chapter 8.

Questions and Discussion (p. 221)

This note is self-explanatory.

IV. Towards Ratification: Negotiating the Marrakesh Accords (p. 221)

This section describes the process of negotiating the Marrakesh Accords, which provided the detail necessary to fill out the gaps of the Kyoto Protocol. Only by negotiating further detail could the Parties move forward with ratification of the Protocol. Much of the substance found in the Marrakesh Accords is included in the treatments of the flexibility mechanisms, forests, and compliance in the ensuing three chapters.

Questions and Discussion (p. 223-24)

1. This note is self-explanatory. For further information on the role of civil society organizations in the climate negotiations, see Kal Raustiala & Natalie Bridgeman, *Non-State Actors in the Global Climate Regime*, in *INTERNATIONAL RELATIONS OF GLOBAL CLIMATE CHANGE* (forthcoming, 2d Ed., MIT Press), available on SSRN at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028603.

2. This question is another invitation for students to consider how international environmental treaties are made and particularly the role of multiple, non-state stakeholders in building the political will to get governments to make stronger commitments. This is a continual process that also aims at ensuring governments comply with their commitments and make progressive changes to the regime over time.

3. Students may have strong feelings about the Kyoto Protocol, or at least about a global cap-

and-trade system for GHG emissions. This can be a starting point for a class discussion about the value of the Kyoto Protocol architecture and whether it should be retained in the post-Kyoto negotiations.

4. There is no clear answer to the questions in this note, but it should get students thinking about whether the U.S. repudiation of Kyoto was harmful to the long-term momentum for global climate policy. Recall as well the principle of common but differentiated responsibility, which all countries (including the United States) had agreed in the UNFCCC would guide the climate regime. The whole philosophy of the Framework-Protocol method of treaty-making also presupposes continual, dynamic progress in the development of the regime; the U.S. repudiation was meant to kill the progress under the climate regime, although ultimately this did not happen, and the Kyoto Protocol would establish the backdrop for, among other things, the European Union's innovative emissions trading system (discussed in Chapter 6).

5. This note is self-explanatory.