WHERE TO FROM KYOTO?

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Climate Change And International Law: An Overview “Will We Turn In Time?”


This brief paper considers climate change law from an inter- and intra-national perspective. Three issues are touched upon. Firstly, given that New Zealand is likely to fall short of its Kyoto emissions reduction target, the ramifications of non-compliance are considered. Secondly the scenario post 2012 is addressed and a prediction made as to the architecture of the ‘Copenhagen Protocol 2009’. Finally, strategies adopted by other states are mentioned and those likely to have a direct impact on New Zealand, highlighted.

Introduction

The inherent limits of the atmosphere and its susceptibility to human influence can be neatly illustrated. If it were possible to liquefy the atmosphere, its volume would equate to 1/500th that of the world’s oceans1. The actions of the six billion human inhabitants and our carbon-based economies are adding c. two parts per million of carbon dioxide equivalent to the atmosphere each year and this is increasing annually. In 2005, there were c. 379 ppm of carbon dioxide equivalent in the atmosphere; once the concentration exceeds 450 ppm scientists have calculated that there is a 20% chance of reaching a tipping point from which there is no return2.

Against this seemingly fraught backdrop, the gaze of all actors rests upon the international legal regime and questions are posed in the media, academia, policy departments, by business and individuals. Will states meet their Kyoto emissions reduction targets3? Will the United States and Australia ratify? What will the regime look like post 2012? But international law is a slow and cumbersome mechanism for change and it is frustratingly impotent in the face of adversity. What can the international legal regime hope to achieve and more critically, can change be effected in time?

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1 Speech given by Professor Tim Flannery (Macquarie University, Sydney, author of The Weather Makers: The History and Future Impact of Climate Change Text Publishing, Melbourne, 2005) to the University of Otago on 7th August 2007.


Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA.

Compliance with the Kyoto Protocol

In the absence of further, more significant targets, the actual effect on global warming of the Kyoto Protocol will be minimal. Models have calculated that the consequence of Kyoto would be a temperature decrease in 2100 of 0.15% less than if Kyoto had not been implemented. The emissions reduction targets are acknowledged to be woefully inadequate. To ensure that temperatures do not rise above 2.4°C, global emissions must be 50% to 85% less in 2050 than they were in 2000. Bert Bolin, prior director of Intergovernmental Panel on Climate Change (IPCC), said that the targets were a "first step... but far from what is required to reach goal of stabilising the concentration of CO2 in the atmosphere." Given these factors, it is important that states demonstrate that emissions are beginning to reduce. Historically, compliance with multilateral environmental treaties has been good. Have the parties to the Kyoto Protocol been able to comply with the ‘ introductory’ targets set in Annex B to the Protocol?

Article 3 (2) of the Protocol states that "Each Party included in Annex 1 shall, by 2005, have made demonstrable progress in achieving its commitments under this Protocol." To date, the secretariat has received thirty-five ‘Fourth National Communications’ and thirty-two Demonstrable Progress Reports from the thirty-nine Annex 1 nations. It is clear that the number of countries exceeding their emissions reduction target, in the absence of radical policy change, is likely to be significant.

The Position of New Zealand

The most recent reports on New Zealand’s emissions status, the ‘Fourth National Communication’ and the ‘Report on Demonstrable Progress’ were submitted to the secretariat on 4th May 2006. The relevant in-depth expert review (IDR) is dated 18th January 2007. Between 1990 and 2004 total greenhouse gas emissions increased by 21.3% excluding emissions and removals from land use, land use change and forestry ("LULUCF") or by 17.9% if LULUCF is taken into account. Carbon dioxide emissions increased by 34.2%, nitrous oxide emissions by 27.2% and methane emissions by 5.8% during this period. The government has yet to announce the policies that will be implemented to bring New Zealand into compliance with international law. It is highly unlikely that domestic measures alone will enable New Zealand to return emissions to 1990 levels during the commitment period of 2008 to 2012. Although acquiring emissions reduction units (ERUs), assigned amount units (AAUs), certified emissions reduction units (CERs) or removal units (RMUs) from abroad must be ‘supplemental’ to domestic action no limits have been established to define ‘supplemental’.

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8 Note of course, that Australia and the US have not ratified the Protocol although they are included in Annex 1 to the UNFCCC.
9 See ‘Fourth National Communications’ and ‘In-Depth Review Reports’ available from the UNFCCC website page titled ‘Annex I National Communications and Reports Demonstrating Progress under the Kyoto Protocol’ available at http://unfccc.int/national_reports/annex_1_national_communications/items/3625.php last accessed 21st August 2007. Potentially fifteen states will not meet their targets without increasing significantly their use of the flexible mechanisms and obtaining credits via Article 17 trading, joint implementation and/or clean development mechanism projects. Neither Australia nor the US will meet the targets that had been established for them in Annex B to the Protocol.
11 IDR, supra note 10 at p 5.
12 Article 17 of the Kyoto Protocol.
Theoretically, therefore there are three options open to New Zealand: invest heavily in such units\(^\text{13}\), withdraw from Kyoto\(^\text{14}\) or face the prospect of non-compliance. Investment will be expensive and withdrawal, diplomatically unacceptable\(^\text{15}\). What would be the legal consequences of non-compliance for New Zealand?

**Non-compliance mechanisms**

Article 18 of the Protocol provides for the development of non-compliance mechanisms within the Protocol. The Marrakesh Accords, adopted at the seventh COP in 2001, provides the details of the rulebook for the Kyoto Protocol. Specifically, Decision 24/CP.7 of the Marrakesh Accords sets down the procedures and mechanisms relating to compliance under the Protocol.\(^\text{16}\)

Decision 24/CP.7 established the compliance committee whose aim is to “facilitate, promote and enforce compliance”\(^\text{17}\). The compliance committee consists of a plenary and a bureau (primarily concerned with administrative functions), a facilitative branch and an enforcement branch. The facilitative branch is concerned with all parties to the Protocol. Its aim is to aid implementation of the Protocol, to provide technical and financial advice and assistance and to make recommendations to parties. The facilitative branch cannot make findings of non-compliance. The enforcement branch deals only with Annex 1 countries. The enforcement branch is responsible for determining cases of non-compliance with “quantified emission limitation... methodological and reporting requirements... the eligibility requirements under Articles 6, 12, and 17 of the Protocol...”. Whilst decisions of the compliance committee including the facilitative branch may be passed by a three quarters majority of the committee, a decision of the enforcement branch must receive a double majority i.e. a majority vote from both Annex 1 and non-Annex 1 country members\(^\text{18}\).

After a ‘submission’ raising ‘questions of implementation’ is made, the matter is referred to the compliance committee who will then allocate the matter to the appropriate branch according to their mandate and depending upon the type of non-compliance. A party defaulting on its emissions reduction target is granted one hundred days after completion of the final expert review to further attempt compliance (by for example acquiring credits in the form of ERU’s, CER’s, AU’s and / or RMU’s). Thereafter, a preliminary screening investigation will ensue. If matters proceed, rules provide for an independent quasi-judicial process.\(^\text{19}\)

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\(^{13}\) It is extremely difficult to anticipate the likely cost to New Zealand of purchasing units. Are all defaulting parties relying on purchasing cheap “hot air” from the transitional economies?

\(^{14}\) Article 27 of the Kyoto Protocol provides simple rules for withdrawal stating that, “any time after three years from the date on which the Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary”.

\(^{15}\) See presentation given by John Whitehead, Secretary to the Treasury, ‘An Emissions Trading Scheme for New Zealand’ on 8 August 2007 to ‘Journalists Trading Organisation training forum on sustainability, in conjunction with the Ministry for the Environment and PricewaterhouseCoopers’, “New Zealand’s action on the world stage can make a difference, and that New Zealand’s action and the world’s perception of it can have very real consequences for our economy and our relationships... burying our heads in the sand on climate change would hurt our reputation and interests, and, worse, would encourage others to do the same.” available at [http://treasury.govt.nz/speeches/climatechange/08aug07.asp](http://treasury.govt.nz/speeches/climatechange/08aug07.asp) last accessed 21st August 2007.

\(^{16}\) The Report of the Conference of the Parties on its Seventh Session, Held at Marrakesh from 29th October to 10 November 2001 Part Two: Action Taken by the Parties, Volume III (The Marrakesh Accords’) FCCC/CP/2001/13/Add.3 available at [http://unfccc.int/resource/docs/cop7/13a03.pdf](http://unfccc.int/resource/docs/cop7/13a03.pdf) last accessed 20th August 2007. Following the Kyoto Protocol coming into force the CMP, at its first session, adopted decision 27/CMP.1 and its annex containing the procedures and mechanisms relating to compliance under the Kyoto Protocol.

\(^{17}\) The Marrakesh Accords, supra note 16, Decision 24/CP.7 Section I.

\(^{18}\) The Marrakesh Accords, supra note 16, Decision 24/CP.7 Section II. See Section V for composition of the enforcement branch.

\(^{19}\) Article 18 of the Kyoto Protocol states that if a party is found to be in default, consequences will be applied in a graduated manner and will depend upon consideration of the cause, degree and frequency of the non-compliance.
In the event of a party failing to comply with its emissions reduction target, the enforcement branch shall apply the following consequences:

(i) Declare that the party is not in compliance,
(ii) Deduct ‘from the parties assigned amount for the second commitment period ...a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions’ (the ‘1.3 penalty rule’),
(iii) Direct the party to develop a compliance action plan within three months; the implementation of the plan will be reviewed and assessed by the enforcement branch and
(iv) Suspend a party’s ability to transfer or acquire units under Article 17 of the Protocol.20

The efficacy of the compliance mechanisms
Writing before the adoption of the Marrakesh Accords and Decision 24/CP.7, Birnie and Boyle stated “[i]f adopted these enforcement measures would transform Kyoto non compliance procedure into a quasi judicial process more akin to WTO dispute settlement than the Ozone Protocol non-compliance process. This would be a highly significant development in the enforcement of environmental agreements”21. How effective will the consequences be, of the enforcement branch, pursuant to Decision 24/CP.7 section XV paragraph 5? How significant could they be for New Zealand?

Declaration of non-compliance - Decision 24, section XV, paragraph 5
The adverse publicity associated with a declaration of non-compliance could, in theory, be a powerful tool. Whereas the prospect for adverse publicity is unlikely to influence some countries, there is an argument for stating that this may be un-welcomed by countries such New Zealand. However the galvanising effect of adverse publicity associated with a declaration of non-compliance is diluted in the event of mass default. If a great number of countries fail to comply, defaulting states will be able to point to other countries, band together and blame the impossibility of the regime for failure as opposed to their own inactions.

The ‘1.3 penalty rule’ - Decision 24, section XV paragraph (5) (a)
This will only be relevant if states adopt emissions reduction targets for a further commitment period. Fundamentally, a target cannot be imposed upon a state without its consent. As stated above, the specific negotiations as to future emissions reductions have not yet commenced, however most states know now whether they are likely to be in default of their present targets. It is quiet feasible that a potential non-compliant party, will simply take the 1.3 penalty rule into account when negotiating the target for the next commitment period. In any event, if a party has failed to meet its reduction target, such additional burdens are likely to place compliance even further out of reach. States may simply accumulate penalties, passing them on to the next commitment period, like a bad debt. In the absence of alternate and stronger penalties, how likely is the ‘1.3 penalty rule’ likely to achieve the desired result? The COP rejected a proposal that non-compliant parties suffer financial penalties. That penalty would have been paid into a fund to finance greenhouse gas reduction programmes.

Compliance Action Plan - Decision 24, section XV paragraph (5)(b)
In response to concerns akin to those stated above, a procedure was introduced to ensure that a defaulting party must produce a ‘compliance action plan’ detailing measures it will take to ensure compliance. The enforcement branch will review and assess this plan. How efficacious will this monitoring process prove? To assume that this procedure will produce the desired result, entails an assumption that any measures proposed in the ‘compliance action plan will actually be implemented (that is, pass national political and parliamentary accession) and further, will prove successful in reducing greenhouse gas emissions. The enforcement branch has no power to dictate what policies and measures a state should implement within its own territory, no power to order, for example, that a government introduce environmental taxes or penalties.

20 The Marrakesh Accords, supra note 16, Decision 24/CP.7 Section XV.

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Depending upon the political circumstances of the time, it would be surprising however if a country such as New Zealand, anxious to preserve its role as a ‘good global citizen’, wilfully disregarded recommendations of the compliance committee. Additionally, in a democracy with a free press and an educated populace, public opinion will exert pressure on governments to comply with environmental treaties. Reviews such as those conducted by the OERC Environment Directorate also influence government action.

**Suspension of a party’s ability to trade - Decision 24, section XV paragraph (5)(c)**

Parties found to be in non-compliance will be suspended from transferring or acquiring emissions units pursuant to Article 17. If a party has authorised other legal entities to transfer or acquire units, those entities will also be prevented from trading during the period of suspension.\(^{22}\) The suspended party’s ability to trade will only be re-instated when the enforcement branch accepts that the ‘compliance action plan’ will prove successful.\(^{23}\) The timetable set down in Decision 24, sections IX and X for the compliance committee to undertake its work in this regard is extremely tight. In effect, a preliminary decision on non-compliance will be made within fourteen weeks and fourteen weeks thereafter the enforcement branch shall reach a final determination.\(^{24}\) This is essential for the proper functioning of the market system. Will these timetables be realistic? To date, the process of verifying compliance with the Protocol is taking as long as fifteen months after receipt of a country’s national communication. A delay of this magnitude would not assist the smooth running of the market mechanisms. Further, the compliance committee has expressed concern that it does not have the financial resources available to it to support the expected intensifying workload.\(^{25}\)

A final important point to note is that at present, and in the absence of an amendment to the Protocol, the non-compliance mechanism contained within Decision 24/CP.7 is not legally binding on parties. Article 18 of the Kyoto Protocol states inter alia, “Any [non-compliance] procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.” The process of agreeing to the necessary amendment follows standard treaty law. Parties must first attempt to reach a consensus. Failing that, a majority of three quarters is required in order for the amendment to be adopted. Thereafter, the amendment will only enter into force ninety days after three quarters of the parties have ratified it and of course, it would only bind those that had ratified.

Saudi Arabia has invited parties to consider the necessary amendments to the Protocol at the COP/MOP to be held in Bali, 2007\(^{26}\). There are a number of difficulties inherent in this process but the primary question is this; given the likelihood that a significant number of states will fail to comply with the emissions targets, is it likely that those states would agree to expose themselves to a legally binding non-compliance mechanism? The prospect that a consensus could be obtained may be unrealistic. It may be possible to obtain majority support for the amendment, however, if this were to transpire, a wholly unsatisfactory situation would exist whereby the legal status of non-compliance would differ between parties; only those that agreed to the amendment would be exposed to legally enforceable consequences for non-compliance. Given the impotency of the international legal system this may well prove an empty argument but it is the lack of uniformity that is the greatest concern. A fragmented compliance mechanism may ultimately prevent the climate change regime and market

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\(^{23}\) That is, enable the party to meet its emissions reduction commitments in the subsequent commitment period. See the Marrakesh Accords, supra note 16, Decision 24/CP.7 section X paragraphs 4 and 5.

\(^{24}\) Matters relating to eligibility requirements for the flexible mechanisms are expedited; decisions must be reached within a maximum of 20 weeks see the Marrakesh Accords, supra note 16, Decision 24/CP.7 section X paragraph 1.


mechanisms from functioning properly; of necessity, the compliance committee will focus upon those parties legally bound and suspend their ability to transfer units. Further, lack of uniformity in terms of compliance has the potential to prove divisive and may hinder progress in further negotiations.

Clearly, there are weaknesses in the compliance mechanisms and they may not be the strong drivers for compliance that they were intended to be. However, it would be politically unpalatable for New Zealand to face non-compliance and certainly, the suspension of the ability to trade may be an important factor to avoid.

The question posed at the beginning of this paper was, "what can the international legal regime hope to achieve?" From this brief analysis it seems clear that the legally binding imperatives contained in the Kyoto Protocol, taken in conjunction with the compliance mechanisms, have been insufficient alone to guarantee change. There is scope for a new Protocol to replace Kyoto from 2012. What will international climate change law post 2012 be likely to look like?

Post 2012

The meeting of the United Nations in Copenhagen in 2009 will be a critical forum for reaching a new global agreement. The Climate Change Summit is, realistically, the last opportunity to put in place a post 2012 regime if there is to be no lacuna following Kyoto. To date, no clear consensus has emerged as to the way forward post 2012 but it may be possible to anticipate the future architecture of the international climate change regime if one considers the interplay of three factors: political statements, negotiations within the conferences and meetings of the parties (COP/MOP) to the international regime and proposed models.

Proposed models

Securing the participation of all states, ultimately, to an international regime that sets a global limit on emissions is critical and ensuring the greater involvement of developing states has been much debated. Academic theorists have posited various ways forward. For example, suggestions have been made that future Protocols should adopt models based upon:

1. Contraction and convergence (per capita emissions converge over time to an equal level for all);
2. Common but differentiated convergence (similar to the above but developing countries convergence starts when their per capita emissions reach a certain percentage threshold of the gradually declining global average);
3. Multistage commitments (states enter the regime at various stages and move to higher stages when certain thresholds are exceeded eg: based on emissions per capita or GDP per capita. The stages are 'no commitments', 'commitment to enhanced sustainable development', 'moderate absolute target' and 'absolute reduction target');
4. A global triptych (allocating emission allowances amongst a group of states. States are grouped according to several national indicators);
5. A sectoral approach (imposing the same targets and rules for a particular sector across states. May be used to impose a sectoral reduction target either in combination with an economy wide target or in isolation for developing nations);

27 Non-compliance with multilateral environmental treaties is rare. Supra note 7.
28 Further research will be required on how this might affect trading on a domestic ETS linked internationally that utilises Kyoto units.
29 See the speech given by UN Secretary-General Ban Ki-moon on 1st August 2007 at the Headquarters of the United Nations in New York opening the General Assembly's first-ever thematic plenary debate devoted exclusively to climate change available at www.unfccc.int last accessed 14th August 2007.
30 Conference of the Parties to the United Nations Framework Convention on Climate Change Fifteenth Sessions (COP 15) and Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol Fifth Session (MOP 5).
6. A policy approach33 (states without binding targets at present undertake to adopt specific policies);
7. Carbon intensity targets linked to GDP.

Clearly there are advantages and disadvantages to each of the theories posited34 but are any emerging as a model to overlay or even replace Kyoto?

**Negotiations within the COP / MOP**

Within the United Nations Framework for Climate Change (UNFCCC)35, specific rules have been established to guide negotiations as to future action between the 191 parties to the Convention. The UNFCCC ‘Dialogue on long-term co-operative action to address climate change by enhancing implementation of the Convention’,36 agreed at the Eleventh Conference of the Parties, is premised upon the basis that the Dialogue “will not open any negotiations to new commitments” rather the focus is upon filling in the details of the Convention by discussing development goals, adaptation, clean technology and market-based opportunities.

The parties to the Kyoto Protocol have established the ‘Ad Hoc Working Group on Further Commitments for Annex I Parties’ (AWG) to address article 3 (9) of the Protocol. Article 3 (9) provides that the COP/MOP shall initiate consideration of future emissions reductions at least seven years before the end of the first commitment period. These negotiations concern the future commitments of Annex I Parties only. The AWG aims to complete its work at the earliest possible time so to ensure that there is no gap between the first and second commitment period of the Kyoto Protocol. The fourth session of the AWG will be held in Vienna from 27 – 31 August 2007. No clear guidance has emerged, as yet, from the AWG as to future national economy-wide reduction targets for Annex 1 parties. A proposal raised in the AWG by the Russian Federation to develop procedures for the approval of reduction commitments voluntarily made by non-Annex 1 states met with resistance from developing countries. Whilst the proposal was not opposed in principle, the opposing states believed that continued discussion of the proposal "would distract attention from the important task of negotiating further commitments by Annex 1 parties under the Kyoto Protocol"37.

**Political statements**

The developing nations within the Group of 77 and China have not given any indication that they are prepared to accede to economy wide binding targets for the period following 2012. They have focused upon the need for Annex 1 states to fulfil their commitments particularly with regards to technology transfer, capacity building and funding for adaptation.38 China’s stated national position is to address the greenhouse gas intensity of GDP and proposes to introduce a raft of domestic measures to introduce the necessary institutional framework in order to, inter alia, put a price on carbon and to fully utilise market mechanisms.39

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35 See Appendix 1 attached hereto for a brief summary.
39 See, for example, statement on behalf of the Group of 77 and China by H.E. Mukhdoon Faisal Saleh Hayat, Minister for Environment, Pakistan, during the General Assembly’s Informal Thematic Debate on “Climate Change as a Global Challenge” 1 August 2007 at the Headquarters of the United Nations in New York available at www.unfccc.int last accessed 14th August 2007. Further, see Saudi Arabia’s calls for an amendment to the Kyoto Protocol to incorporate the rules as to compliance into the Protocol, United Nations Climate Change Conference (COP 11 and COP/MOP 1)’ Procedures and mechanisms relating to compliance under the Kyoto Protocol’ Decisions adopted by COP 11 and COP/MOP 1 available at <http://unfccc.int/files/meetings/cop_11/application/pdf/cmp1_23_7_procedures_and_mechanisms_compliance.pdf> last accessed 14th August 2007.
At the 2007 meeting of the Group of 8, the German Chancellor had proposed that the G8 agree a long-term target of reducing emissions by 50% between 1990 and 2050. It proved impossible for the parties to reach this agreement. The G8 Declaration stated that, "we will consider seriously the decisions made by the EU, Canada and Japan which include at least a halving of global emissions by 2050". Certain states, particularly those in Europe, are in the process of enshrining significant long-term emissions reduction targets within domestic legislation. The European Council has made the position of the EU clear. In announcing an integrated climate and energy policy, the Council reaffirmed that absolute emission reduction commitments are the back-bone of a global carbon market and asserted that, "developed countries should continue to take the lead by committing to collectively reducing their emissions of greenhouse gases in the order of 30% by 2020 compared to 1990. They should do so also with a view to collectively reducing their emissions by 60% to 80% by 2050 compared to 1990". Regardless of the outcome of international negotiations, the EU has made "a firm independent commitment to achieve at least a 20% reduction of greenhouse gas emissions by 2020 compared to 1990". The Council asserts that negotiations should build upon and broaden the Kyoto Protocol architecture which entails, "the strengthening and extension of global carbon markets, the development, deployment and transfer of the necessary technology to reduce emissions, appropriate adaptation measures to deal with the effects of climate change, action on deforestation and addressing emissions from international aviation and maritime transportation".

Several multilateral meetings are planned for late 2007 to address the issue of global co-operation. The President of the United States has organised a meeting to take place in September 2007 between the fifteen nations that produce the highest levels of greenhouse gas emissions. The President is to propose a "new international framework" that focuses upon setting a global long-term target and establishing national mid-term energy security and environmental goals and strategies based on the nations' individual characteristics. To facilitate the transfer of clean-energy technologies and services, the President proposes to conclude the WTO Doha negotiations on eliminating tariffs and other barriers to trade by the conclusion of 2007.

Within the United States, a stark chasm has opened up between federal and state policy, which is neatly encapsulated in the Supreme Court decision of Massachusetts v EPA, the states have been pro-active whereas the federal government has not. However, the 110th Congress has seen the introduction of no less than ten bills addressing climate change regulation, nine of which address the introduction of a federal emissions trading scheme (ETS). They differ as to the detail but all propose cap-and-trade schemes. Five of the bills propose economy-wide reductions; the others

46 Canada, Japan, Russia, US, UK, France, Germany, Italy.
48 G8 2007, supra note 41 at pp 15 – 16.
49 For example the UK 'Draft Climate Change Bill', March 2007, DEFRA, proposes reductions of 60% between 1990 and 2050; the French "Factor 4" programme aims at reducing emissions by 75% by 2050 (see "Fourth National Communication for France" available at <http://unfccc.int/resource/docs/natc/franc4f.pdf> last accessed 21st August 2007); Norway proposes to be "carbon neutral" by 2050 (see 'Norway: The official site in the UK', page 'Norway carbon neutral by 2050' available at http://www.norway.org.uk/policy/news/carbon-neutral.html last accessed 20th August 2007).
51 European Council, supra note 44 paragraphs 27 – 32.
52 European Council, supra note 44 paragraph 29.
53 In addition to the COP 13 / MOP 3 to be held in Bali 2007, a meeting of APEC will take place in Sydney, 2007.
55 Massachusetts et al v Environmental Protection Agency et al. No. 05-1120. Certiorari to the United States Court of Appeals for the District of Columbia Circuit. Argued November 29, 2006 – Decided April 2, 2007. The US Supreme Court determined that greenhouse gasses were air pollutants for the purposes of the Clean Air Act and must be addressed by the EPA.
56 S. 317 Electric Utility Cap and Trade Act of 2007 (Feinstein, Carper); S. 280 Climate Stewardship and Innovation Act of 2007 (Leiberman, McCain); S. 309 Global Warming Pollution Reduction Act (Sanders, Boxer); S. 485 Global Warming Reduction Act of 2007 (Kerry, Snowe); S. 1168 The Clean Air Climate Change Act of 2007 (Alexander); S. 1177 The Clean Air Planning Act of 2007 (Carper); The Clean Power Act of 2007 (Introduced 24 April 2007)(Sanders); H.R. 620 Climate Stewardship Act of 2007 (Olver, Gilchrest); H.R. 1590 Safe Climate Act of 2007 (Waxman); H.R. 2069 Save Our Climate Act of 2007 (Stark) (carbon tax).
address energy generation only. Four bills explicitly permit international linkages from the start although suggest that the percentage of allowances purchased abroad to meet domestic commitments be limited in some way. Given the presidential elections in 2008, there is unlikely to be a significant change in federal policy pre-election, however there is a realistic possibility that the US will adopt a national cap-and-trade scheme before 2012 and actively re-engage in international negotiations in 2009. For the sake of completeness, Australia is likely to introduce a cap-and-trade domestic trading system before 2012.

Copenhagen 2009

In light of the above, what might a Copenhagen Protocol look like? Essentially, it appears clear that the international community will not abandon the present architecture encapsulated in Kyoto. The regime has subsisted much time, effort and cost. There will continue to be a flexible framework with common but differentiated responsibilities. Will developing nations accept binding nationwide targets within the next round? No, but they may undertake various, specific and binding policy commitments as a pre-cursor to binding sectoral targets. And it may well be that technology transfer and stronger support for adaptation will be dependant upon this agreement. In addition, the Russian Federation’s proposal discussed above is likely to be progressed after new commitments for Annex 1 countries have been agreed. Certain states, such as Belarus and Kazakhstan will accede to Annex B of the Convention and adopt binding targets. This mechanism will open up an avenue for other developing nations to adopt binding targets and thus utilize emissions trading.

Will the United States and Australia adopt binding targets? There are many variables that would influence the answer to this question however one driver may be the underlying circumstances required to link emissions trading schemes. It is not essential for linkages to be made only between Kyoto Annex 1 parties but for many reasons this is desirable. In addition, a cap-and-trade scheme cannot work without a cap and if the US and Australia adopt domestic ETS they will have to establish binding targets of some kind. Whether this fact would translate into an acceptance of those caps being reflected in international treaty law may depend to an extent upon the scope and design of the national ETS. If the ETS were to cover specific sectors only (as opposed to an economy-wide ETS) and contain safety valve clauses that prevented the carbon price from rising above a certain point, it is less likely that Australia and the US will accede to economy wide targets enshrined in international law. Clearly, the creation of a global trading market that puts a price on carbon and the means to involve as many states as possible in such a market will influence bilateral and multilateral climate change negotiations over the coming decade. There are a number of existing ETS but the European Union Emissions Trading Scheme dwarfs all and this regional response to international legal commitments may well exert a significant influence on the domestic actions of other states.

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54 A simple example might be the increased protection of tropical rainforests or agreements for specified countries to promote energy efficiency via building regulations (the vast majority of the world does not have energy efficiency standards in place in regulations governing construction and building). The Intergovernmental Panel on Climate Change (IPCC) Fourth Assessment Report ‘Climate Change 2007: Mitigation of Climate Change’, places pre-eminent emphasis on buildings. The report notes that the highest rate of greenhouse gas emissions from all the sectors studied are linked to commercial and residential buildings. The Chinese Vice-Minister for Construction has recently acknowledged that there must be a wholesale national review of the law and policy to promote ‘green’ building (see Marrakech (2007) Marrakech Taskforce on Sustainable Buildings and Construction, ‘Buildings for a Better Future’, Ministry of the Environment, Finland) and the IPCC urges all governments to introduce policies and remove market barriers to promote sustainable construction and buildings (see IPCC supra note 2). Capped building will also play an essential role in supporting the development of such policy.
Domestic Actions of Other States: New Zealand Take Note

The European Emissions Trading Scheme\(^{56}\) (EU ETS) has become a central pillar of European policy. The cap-and-trade EU ETS began trading on 1\(^{st}\) January 2005 and the market covers c. 40 – 50% of all carbon dioxide emissions in the EU. Allowances are fully tradeable throughout EU states. Phase I ends at the close of 2007. Phase II will cover the first Kyoto commitment period. It is still too early to assess the efficacy of this ‘grand experiment’ (the first period was always intended as a “learning-by-doing” phase) but critical expertise in carbon trading has developed, the mistakes to be rectified have been noted and other nations have been watching as a precedent unfolds. The most fraught issue has been the approval by the EU Commission of national caps, over allocation of allowances and National Allocation Plans.\(^{57}\) In essence, over allocation of allowances hinders the environmental efficacy of the scheme. From an economic perspective, certain requirements to promote a fully functioning market have emerged, notably that national governments must set clear intermediate and long-term targets (to ensure predictability and stability), tradeable units must be valid for more than one market phase (flexibility to allow for banking; to promote stability) and that linking to other markets is as an imperative.\(^{58}\) In terms of the later, a larger market should be more liquid and therefore more efficient in allocating resources in the most cost-effective way. The EU Directive that establishes the EU ETS explicitly recognises the benefits of linking the scheme with other ETS established by parties to the Kyoto Protocol\(^{59}\). Linkages will be formed by bi-lateral negotiations and schemes to be linked will have to be compatible, if not identical. A report by the International Energy Agency highlighted some of the factors that must be taken into account in promoting the compatibility of schemes\(^{60}\). These are factors that New Zealand would wish to take into account in designing a domestic emissions trading scheme\(^{61}\).

Interested parties in New Zealand should also note future expansions to the EU ETS. Article 2 (2) of the Kyoto Protocol requires Annex 1 parties to pursue means to limit or reduce emissions from aviation fuels by working through the International Civil Aviation Organization (ICAO). The ICAO has approved the principle of emissions trading for the aviation industry and the EU proposes to include aviation within the EU ETS\(^{62}\). Initially the scheme will only apply to flights within the EU but from 2012 it shall be extended to include flights to and from the EU. Aircraft operators will be allocated units based on a cap set at 2004 – 2006 levels. Units will be fully tradeable and the allocation will be by way of benchmarking and auctioning.

Other EU policies might have a direct effect on New Zealand’s approach to mitigating climate change and will influence business decisions. For example, consumer labelling has proven to be a critical plank in EU policy and it is now mandatory for the energy efficiency of electrical goods and buildings to be labelled or certified at point of sale (or rental)\(^{63}\). Labelling of electrical goods has proved to be

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\(^{56}\) EU Directive 2003/87/EC

\(^{57}\) Six member states (all transitional economies) are to initiate legal action against the European Commission in the ECJ over the second National Allocation Plans, see EurActive, page titled 'Latvia joins revolt against EU caps' available at http://www.euractiv.com/en/climate-change/latvia-joins-revolt-eu-co2-caps/article-165990 last accessed 22nd August 2007


\(^{59}\) EU Directive 2003/87/EC Article 25

\(^{60}\) Blyth, supra note 58. For example the relative stringency of schemes (generous allocation of units or otherwise) may be an important political point in linking negotiations, as an over allocation of units in one state would undermine the environmental performance of the entire market. Other issues include the ability to bank credits, monitoring, reporting and verification procedures and the desirability of similar penalty clause for non-compliance. It would be necessary for the recognition of trading units to be harmonised.

\(^{61}\) The New Zealand Energy Minister, David Parker, has indicated that the government is investigating the prospect of linking a greenhouse gas emissions trading scheme with Australia, see 'Australia, NZ to set up joint emissions-trading programme', New Zealand Herald, pA6, 27 April 2007.


extremely effective\textsuperscript{64}. It is likely that the use of labelling will be extended to other consumer products in the near future. The UK Carbon Trust is completing a pilot study that examines how the embodied carbon content of goods (including foodstuffs) might be measured and displayed on the products\textsuperscript{65}. The demand for bio-fuels in Europe is also likely to grow exponentially within the next decade. Heads of state within the EU have agreed to binding targets to ensure that 10\% of transport fuel consumption is from bio-fuels by 2020. In addition, agreement has been reached that 20\% of overall energy shall be obtained from renewable sources\textsuperscript{66}. Such policies have the potential to close off markets to certain products whilst opening new doors and domestic policy in New Zealand must address these future changes.

\textbf{Which states are likely to meet their Kyoto targets?}

Exempting states with economies in transition, the Annex 1 parties likely to meet their Kyoto Protocol targets\textsuperscript{67} by utilising ‘domestic action as a significant element’ are all European Union member states. They are Denmark, Germany, Sweden, France and the UK. Clearly, a complexity of factors has facilitated compliance within these states and a simple traverse of policy would be too crude to explain their success. Nevertheless, there are general, common factors present that will enable the present results to be built upon and these are worth considering. All have:

- strongly decoupled GDP and greenhouse gas emissions;
- introduced ecological tax reform (essentially shifting the tax burden from labour and energy saving initiatives onto environmentally unacceptable practices and all have a wide panoply of fiscal incentives and disincentives in this regard);
- achieved significant reductions in methane and nitrous oxide emissions by implementing economic instruments and command control measures to address waste management and fertilizer use;
- failed to stem rising emissions from transport (apart from Germany and there may be reasons for this that do not related to Germany’s proactive measures) however all have recently implemented economic measures to favour fuel efficient vehicles. The EU Commission is presently considering ways to move from voluntary measures and labelling to more stringent regulations to increase the fuel efficiency of vehicles.\textsuperscript{68}
- placed significant import on alternatives to fossil fuel for primary energy generation (all have nuclear generators or import electricity from nuclear plants in other countries but all promote and subsidise energy from renewable sources);
- set or are in the process of setting in domestic legislation radical long-term emissions reduction commitments\textsuperscript{69}. Of course setting an ambitious target does not automatically deliver results however an ancillary aim is to promote a realistic price for carbon and to give clear indicators to business.
- played a part in the EU ETS.

\textsuperscript{64} The success of energy labels in the EU for household appliances is irrefutable. In 1999 only 2\% of fridge freezers sold in the UK had a maximum energy efficient rating of A. Eight years later, following implementation of the EU Directive 92/75/EEC on Labelling Household Appliances more than 66\% sold in the UK are A rated, see Culhane, M, ‘Put on the Best Performance’ \textit{Solicitors Journal Property}, June 2007 pp 6 – 10, London, UK.


\textsuperscript{66} See European Council, supra note 44.

\textsuperscript{67} Though not necessarily their commitments within the EU ‘bubble’.


\textsuperscript{69} See UK Draft Climate Change Bill et al, supra note 43.
The World Bank has cautioned against seeing ETS as the panacea for all ills as, “the market does not set the level of the cap, policy makers do. The market can only be a tool to help achieve that target”; policy makers still have to make sensible policies.70 The states mentioned above have what the OECD would refer to as a ‘good mix of regulatory, economic and voluntary instruments’71 to mitigate greenhouse gas emissions; something that New Zealand, to date, does not.

Conclusion

At the outset, the following question was posed, ‘what can the international regime hope to achieve and more critically can change be effected in time?’ International climate change law has not, as yet, lead to any reduction in global greenhouse gas emissions and the prospects of falling foul of the compliance mechanism has not proved to be a strong driver for action. Arguably, however, it is not the architecture of the Kyoto Protocol that is at fault72, rather the success of international law may be gauged by how successfully states translate international commitments into individual action. There are certain states that have demonstrated a genuine commitment to compliance with the international targets. The domestic or regional policies adopted by such states may prove to have a galvanising effect on others that have, as yet, failed to translate their sovereign duties to their citizens. The move towards national ETS, linked internationally, is likely to drive progress but as noted above, cannot operate in a policy vacuum and importantly, ETS still require states to determine caps that will result in effective environmental protection. The question remains however, ‘will change be effected in time?’

72 As opposed to the applicability of targets to some states and not others. Allegedly, the selective coverage of targets has influenced the decisions of the US and Australia not to ratify.
## ANNEX 1

### Summary of the strengths and weaknesses of the major approaches

<table>
<thead>
<tr>
<th>Strengths</th>
<th>Weaknesses</th>
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| **Contraction & Convergence** | • Participation of all countries  
• Certainty about global emissions  
• Simple, clear concept  
• Includes cost-effective reduction options in developing countries through full international emissions trading  
• Support for least developed countries through excess emission rights  
• Compatible with Kyoto Protocol (reporting and mechanisms, CDM not necessary) | • National circumstances (including historical responsibility) not accommodated (optionally countries within one region can redistribute allowances to accommodate national concerns)  
• Substantial reduction for countries with high per capita emissions, also developing countries  
• Also least developed countries need to be capable of participating in emissions trading (national greenhouse gas inventories and emission trading authorities)  
• Excess emission rights for least developed countries need to be compensated by more stringent reduction targets for developed countries. |
| **Common but diff. convergence** | • Applies simple rules, thus, making approach transparent and comprehensive  
• Delay of non-Annex I countries takes account of the responsibility for past emissions  
• Certainty about global emissions  
• Eliminates the component of "hot air" (no excess allowances for low emission countries)  
• Compatible with Kyoto Protocol (reporting and mechanisms) | • National circumstances not accommodated, except per capita emissions and current membership of Annex I  
• Possibly too simple and not considering detailed national circumstances |
| **Multistage** | • Gradual phase-in of countries, in line with UNFCCC spirit, taking into account national circumstances  
• General framework that can accommodate many ideas and satisfy many demands  
• Allows for gradual decision making | • Can lead to a complex system, requires many decisions and allows for exceptions  
• Risk that countries enter too late so that some long-term stabilisation options are lost  
• Incentives needed for countries to participate in a certain stage |
- Trust-building as industrialised countries take the lead
- Compatible with Kyoto Protocol (reporting and mechanisms)

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<tr>
<th>Triptych</th>
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<td>- National circumstances are explicitly accommodated</td>
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<td>- Explicitly allowing for economic growth at improving efficiency in all countries</td>
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<td>- Aims to put internationally competitive industries on the same level</td>
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<td>- Has successfully been applied (on EU level) as a basis for negotiating targets</td>
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<td>- Compatible with Kyoto Protocol (reporting and mechanisms)</td>
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<td>- High complexity of the approach requires many decisions and sectoral data, making global application a challenge and may be perceived as not transparent</td>
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<td>- Agreement on required projections of production growth rates for heavy industry and electricity may be difficult</td>
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<th>Sectoral</th>
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<tr>
<td>- Explicit consideration of national circumstances per sector</td>
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<tr>
<td>- Provides focus on most important sectors and particular reduction options</td>
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<td>- If dynamic, provides flexibility and allows for growth in production</td>
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<td>- Makes participation of many selected sectors and consequently of countries easier</td>
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<td>- If applied equally globally, decreases competitiveness concerns</td>
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<td>- Can be build into the Kyoto system</td>
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<td>- Only partial coverage of sectors may make it less feasible to reach low stabilisation levels</td>
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<td>- Requires detailed sectoral information, which is currently only available for selected countries and sectors</td>
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<tr>
<td>- Require careful target setting</td>
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<tr>
<td>- Reduce certainty on the global emission level, environmental effectiveness not guaranteed since increases in production volumes (and thus GHG emissions) are possible</td>
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<th>Intensity</th>
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<td>- Allowing for economic growth and focuses on improving the carbon efficiency of the economy</td>
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<tr>
<td>- Compatible with Kyoto Protocol (reporting and mechanisms)</td>
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<td>- Uncertainty of the global emission level, environmental effectiveness not guaranteed</td>
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<tr>
<td>- Problematic if GDP is reduced due to economic difficulties</td>
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<td>- Such targets are difficult to set and to compare between</td>
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and mechanisms), but requires additional rules for emission trading

• Requires monitoring of the GDP