


Leonardo Massai

THE KYOTO PROTOCOL IN THE EU

European Community and Member States
under International and European Law



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 Springer

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 Springer

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ISBN 978-90-6704-323-6

e-ISBN 978-90-6704-571-1

DOI 10.1007/978-90-6704-571-1

© T.M.C. ASSER PRESS, The Hague, The Netherlands, and the author 2011

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl

Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag, Berlin Heidelberg

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Cover design: eStudio Calamar, Berlin/Figueres

Printed on acid-free paper

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The Kyoto Protocol in the EU

To my family

Preface

In a period when the international community is fully committed to seek an appropriate solution to respond to the threat of climate change, the role and example provided by the international climate regime composed of the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol is still relevant in the field of international environmental law and within the existing multilateral environmental agreements. It is my view that the rules, procedures, instruments and particularities of the international climate regime are and will remain innovative and pioneer in many aspects, whatever will be the structure and details of the post-2012 agreement.

The participation of the European Community (EC) and the Member States in the international climate change regimes is a complex and unique issue. In the case of the Kyoto Protocol, this is rendered more complicated by two considerations: the fact that for the purposes of Article 4 of the Protocol, the membership of the EC and Member States is frozen at a particular point in time; and the enlargement of the European Union of 1 May 2004 and 1 January 2007. It is only by addressing the architecture of the Kyoto Protocol and the various types of obligations established both under international and European law that one is able to identify the responsibility of the European Community and the Member States in the event of non-compliance with those obligations.

This dissertation is dedicated to all those who gave their time, support and insights during the research and writing process. Much credit lies with my family. I am especially indebted to Professor Michael Bothe for his precious advice and support, countless inspiring discussions, invaluable feedback and firm encouragement. Furthermore, I would like to express my gratitude to Professor Eckard Reh binder for his endorsement and feedback. Special thanks also go to the T.M.C. Asser Institute for the support. Finally, the last remark is for Alessandra Becattini who brilliantly interpreted the re-sized version of Europe based on the level of greenhouse gas emissions provided by Worldmapper.

The Hague, July 2010

Leonardo Massai

List of Abbreviations

A

AAU	Assigned Amount Units
AGBM	Ad Hoc Group on the Berlin Mandate
AIE	Accredited Independent Entities
AIJ	Activities Implemented Jointly
AOSIS	Alliance of Small Island States
AP	Accession Partnerships

B

BAPA	Buenos Aires Plan of Action
BSA	Burden Sharing Agreement
BVerfG	Bundesverfassungsgericht (German Constitutional Court)

C

CAP	Common Agricultural Policy
CCAP	Centre for Clean Air and Policy
CCPM	Common and Coordinated Policies and Measures
CCPMs	Coordinated and Common Policies and Measures
CDM	Clean Development Mechanism
CEEC	Central and Eastern European Countries
CER	Certified Emission Reduction
CG11	Central Group 11
CHP	Combined Heat and Power
CITL	Community Independent Transaction Log
CO ₂	Carbon Dioxide
COP	Conference of the Parties of the UNFCCC
COP/MOP	Conference of the Parties serving as Meeting of the Parties

CPR	Commitment Period Reserve
CRF	Common Reporting Format

D

DESA	Department of Economic and Social Affairs
DFP	Designated Focal Point
DNA	Designated National Authority
DOE	Designated Operational Entity

E

EAEC	European Atomic Energy Community
EATD	European Allowance Trading Directive (2003/87/EC)
EB	Executive Board
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECCP	European Climate Change Programme
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECR	European Court Report
ECSC	European Coal and Steel Community
EEA	European Environment Agency
EEC	European Economic Community
EIB	European Investment Bank
EIT	Economies in Transition
EJIL	European Journal of International Law
EPA	Environmental Protection Agency
ERT	Expert Review Team
ERU	Emission Reduction Unit
ET	Emissions Trading
EU10	EU candidate countries before the enlargement of 1 May 2004 excluding Malta and Cyprus
EU15	EU Member States before the enlargement of 1 May 2004
EU12	EU candidate countries before the enlargement of 1 May 2004
EU25	EU Member States after the enlargement of 1 May 2004
EU27	EU Member States after the enlargement of 1 January 2007
EUA	European Union Allowance
EURATOM	European Atomic Energy Community
EUROSTAT	Statistical Office of the European Communities
EU ETS	European Emissions Trading System

F

FAO Food and Agriculture Organisation

G

GATT General Agreement on Tariff and Trade
GDP Gross Domestic Product
GEF Global Environment Facility
GHG Greenhouse Gases
GIS Green Investment Scheme

I

ICEP Integrated Climate and Energy Package
IEA International Energy Agency
IET International Emissions Trading
ILC International Law Commission
INC Intergovernmental Negotiating Committee
IPCC Intergovernmental Panel on Climate Change
IPPC Integrated Pollution Prevention and Control
ITL International Transaction Log

J

JI Joint Implementation
JRC Joint Research Centre
JISC JI Supervisory Committee
JUSSCANNZ Coalition of non-EU Annex I Parties, guided by Japan, the United States of America, Switzerland, Canada, Australia, Norway and New Zealand

K

KP Kyoto Protocol

L

ICER Long-term Certified Emission Reduction
LDC Least Developed Countries
LULUCF Land Use, Land-Use Change and Forestry

M

MEA	Multilateral Environmental Agreement
MoU	Memorandum of Understanding
MRV	Monitoring, Reporting and Verification

N

NAP	National Allocation Plan
NGO	Non-governmental Organisation
NIR	National Inventory Report
NOAA	National Oceanic and Atmospheric Administration
NPAA	National Plan for the Adoption of the Acquis

O

OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal of the European Union

P

PAM	Policies and Measures
POPs	Persistent Organic Pollutants

Q

QELRC	Quantified Emission Limitation and Reduction Commitment
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R

RDP	Report on Demonstrable Progress
REC	Regional Environment Centre
REIO	Regional Economic Integration Organisation
RMU	Removal Unit

S

SAR	Second Assessment Report of the IPCC
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
SCCF	Special Climate Change Fund

T

TAR	Third Assessment Report of the IPCC
tCER	Temporary Certified Emission Reduction
TEC	Treaty of European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the EU

U

UN	United Nations
UNCBD	United Nations Convention on Biological Diversity
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNITAR	United Nations Institute for Training and Research

W

WCP	World Climate Programme
WMO	World Meteorological Organisation
WRI	World Resources Institute
WTO	World Trade Organisation

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Chapter 1

Introduction

Climate change is often associated with the word ‘global’: climate change is a global phenomenon, climate change is a global threat. According to the majority of scientists, climate change is mainly caused by global warming, i.e., the increase of atmospheric concentrations of greenhouse gas emissions (GHG) mainly due to anthropogenic activities. Climate change is definitively one of the most serious environmental challenges of the Twenty-first century. This is confirmed not only by increasing scientific evidence, but also by the huge attention from the media as well as politicians, stakeholders and citizens. There are two main reasons for the increasing general interest in the issue of global warming. First, the frequency of adverse effects in the ecosystem due to the warming of the earth is constantly increasing. The report on worldwide greenhouse gas concentrations released by the National Oceanic and Atmospheric Administration (NOAA) in 2005 announced an increase in the level of these gases by 1.25% in 2005 compared to the previous year, and by 21.5% compared with 1990 levels; the findings of the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) clearly stated that the ‘warming of the climate system is unequivocal [...] global GHG emissions due to human activities have grown since pre-industrial times, with an increase of 70% between 1970 and 2004 [...] most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic GHG concentrations.’ Second, the Kyoto Protocol, the major instrument adopted by the international community to respond to the phenomenon of climate change, entered into force on 16 February 2005, establishing GHG reduction commitments for all industrialised countries which have accepted it. Furthermore, the Kyoto Protocol set the stage for climate-friendly objectives, policies and strategies to be defined with a view to the post-2012 phase.

The leading role assumed by the European Community (EC) in the international climate regime in terms of adopted and planned policies and measures, as well as ambitious greenhouse gas emissions reduction targets, is mainly due to the constant and decisive efforts of the European Commission, especially since 2001,

the year in which the US decided to leave the process of ratification of the Kyoto Protocol. Quite unexpectedly, in 2001 in Marrakech—the location of the yearly international talks on the development of rules aimed at the implementation of the Kyoto Protocol, the 7th Conference of the Parties of the United Nations Framework Convention on Climate Change (UNFCCC)—the Commission presented a fundamental legislative package including three proposals: (1) the details of the future ratification of and commitment to the Kyoto Protocol by the EC and the Member States, COM(2001)579¹; (2) the foundations of the European Climate Change Programme (ECCP) aimed at the development of European policies and measures to combat climate change in line with the international obligations, COM(2001)580²; and (3) the proposal for the establishment of a Europe-wide system for the exchange of greenhouse gas emission allowances commonly defined as EU Emissions Trading System (EU ETS), COM(2001)580.³ Since then, the EC has even reinforced its strong interest in the establishment of a solid and concrete response from the international community to climate change. This is confirmed by the international negotiations and talks on the future of the Kyoto Protocol following the first commitment period of 2008–2012, namely on the definition of, among others, new binding greenhouse gas emission reduction commitments for industrialised and non-industrialised countries in the post-2012 phase. The leading role of the EC in the international negotiations on the post-2012 phase is confirmed by many European documents and official positions, among which the Presidency Conclusions of the 2007 European Spring Council (8–9 March 2007). The latter identifies important binding targets and measures aimed at ensuring that the global average temperature will not exceed pre-industrial levels by more than 2°C by 2100. The Integrated Climate and Energy Package (ICEP) adopted by the EU heads of state and government in March 2007 included the following targets.

- Reduction of greenhouse gas emissions by 30% for developed countries by 2020 in respect of 1990 levels, provided that an international agreement is adopted on this issue.
- Reduction of greenhouse gas emissions by 20% for EU27 by 2020 compared with 1990 levels regardless of the decisions adopted at the international level.
- Increase of the share of renewable energy in the energy consumption by 20% by 2020.

¹ Proposal of the Commission for a Council Decision concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, COM(2001)579, Brussels, 23 October 2001.

² Communication from the Commission on the implementation of the first phase of the European Climate Change Programme, COM(2001)580, Brussels, 23 October 2001.

³ Proposal of the Commission for a Directive of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, COM(2001)581, Brussels, 23 October 2001.