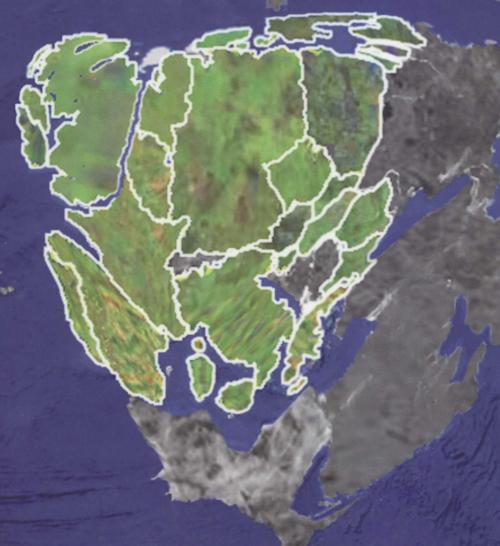
Leonardo Massai

THE KYOTO PROTOCOL IN THE EU

European Community and Member States under International and European Law

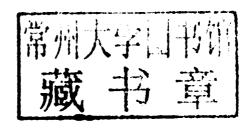


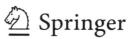
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The Kyoto Protocol in the EU

European Community and Member States under International and European Law





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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 Rehbinder 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

CO₂ Carbon Dioxide

COP Conference of the Parties of the UNFCCC

COP/MOP Conference of the Parties serving as Meeting of the Parties

xiv List of Abbreviations

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

List of Abbreviations xv

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 AgencyIET International Emissions TradingILC 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

xvi List of Abbreviations

\mathbf{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

0

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

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

List of Abbreviations xvii

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 climatefriendly 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,

2 1 Introduction

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.