

# **EEI Policy Note**

**An Assessment of Kyoto and Emerging Issues for the 12<sup>th</sup> Conference of the Parties:**

*Europe's Performance, California Dreaming, Trade Wars and Waiting for Godot*

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13<sup>th</sup> November 2006

## **Introduction and Overview**

In late October 2006 the European Commission issued a [report](#), “Greenhouse Gas Emission Trends and Projections in Europe 2006”. This most-recent in a series, issued coincident with the annual Kyoto Protocol negotiations, revealed continued worsening of Europe’s greenhouse gas (GHG) emissions profile, and [announced](#) that the “EU must take immediate action on Kyoto targets”. This report is the best source for tracking Europe’s Kyoto progress, and provides critical insight into the ever-changing numbers and official assumptions underlying EU claims to be the “world leader” in addressing the issue of climate change. This Policy Note assesses its meaning.

Europe’s Kyoto promise, as originally ratified by the EU-15 individually, was to lower each of the nations’ GHG emissions to 8% below 1990 levels by 2010. Making the most of the 1990 baseline that they insisted guide Kyoto, the EU subsequently modified these promises with a “[Burden Sharing Agreement](#)” (BSA). This internal understanding collectively capitalized on and distributed emission reductions arising from two political decisions preceding and unrelated to Kyoto: the UK’s “dash to gas”, and shutting much inefficient East German manufacturing capacity after German reunification.

Despite such internal arrangements, other built-in advantages described, *infra*, and Kyoto’s “mechanisms”, Europe is struggling to meet even its re-engineered promise of an 8% overall *collective* reduction. Possibly as a result of such looming problems, Europe appears to have finally turned a corner from routine issuance of triumphalist rhetoric about its purported success, to tempering such claims and offering exhortative calls for expedited action. The October EU report represents a new, positive step in that direction.

This most recent report is also important, however, for what it shows about the internal numbers constituting such an assessment, given Europe’s growing emission increases and fading chances to comply under Kyoto in a straightforward manner.

In this context, the following Policy Note addresses emerging topics likely to take the stage at the “COP-12” talks in Nairobi, Kenya this month. Europe’s performance is unlikely to suddenly become a hot topic at these talks, which generally are directed at specific haggling over terms such as “Supplementarity” and the rhetoric aimed at the non-Party U.S. Regardless, Europe’s self-proclaimed role as “world leader” in climate change policy demands that this Note provide *an updated assessment of Europe’s emissions*.

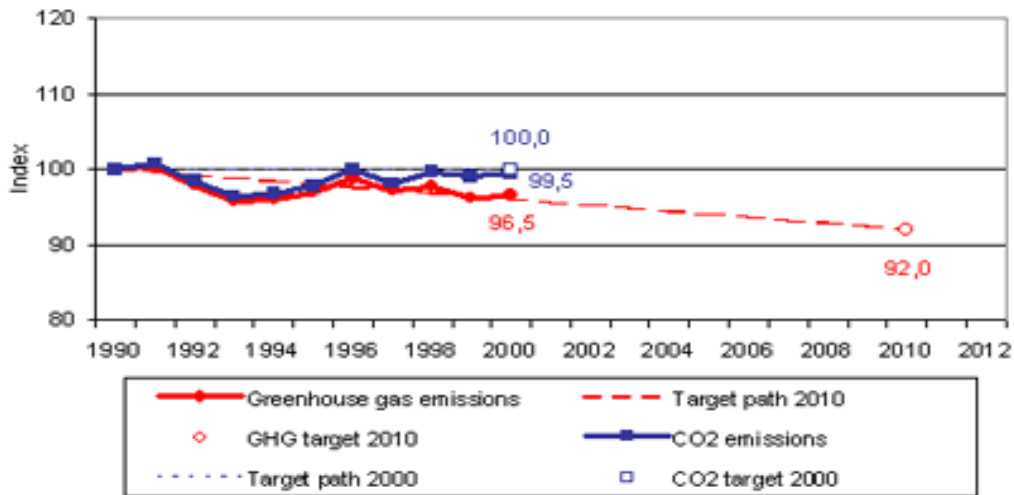
The topics addressed herein likely to emerge in Nairobi include idea of a “privileged partnership” for California so as to *allow the UK/Europe to purchase GHG “credits”* from a Kyoto non-Party – and the political accommodation this would require. Also addressed is Europe’s idea of imposing border adjustments on energy intensive products from countries that do not ration CO2 emissions, thereby starting a “*climate trade war*”. Finally, this Note comments on the UNFCCC proposal of *delaying talks seeking deeper “post-2012” Kyoto commitments*, purportedly to wait for a different U.S. administration though long-expected as an inevitable result of Kyoto’s own troubles.

## Europe's Kyoto Performance

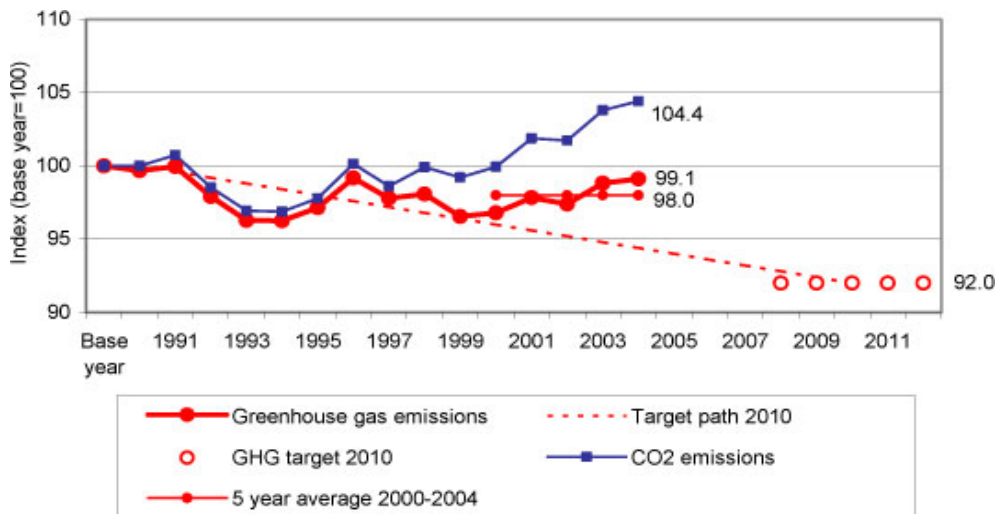
Europe is leading the charge in Nairobi for a “post-2012” Kyoto agreement making deeper emission-reduction promises than found in the first Kyoto. As such, EU emissions performance to date deserves scrutiny.

*That was then, this is now.*

Here is how Europe's GHG emission performance looked to the [European Environment Agency \(EEA\)](#) in April 2002:



Here is how Europe's GHG performance [looks](#) to EEA as of June 2006:

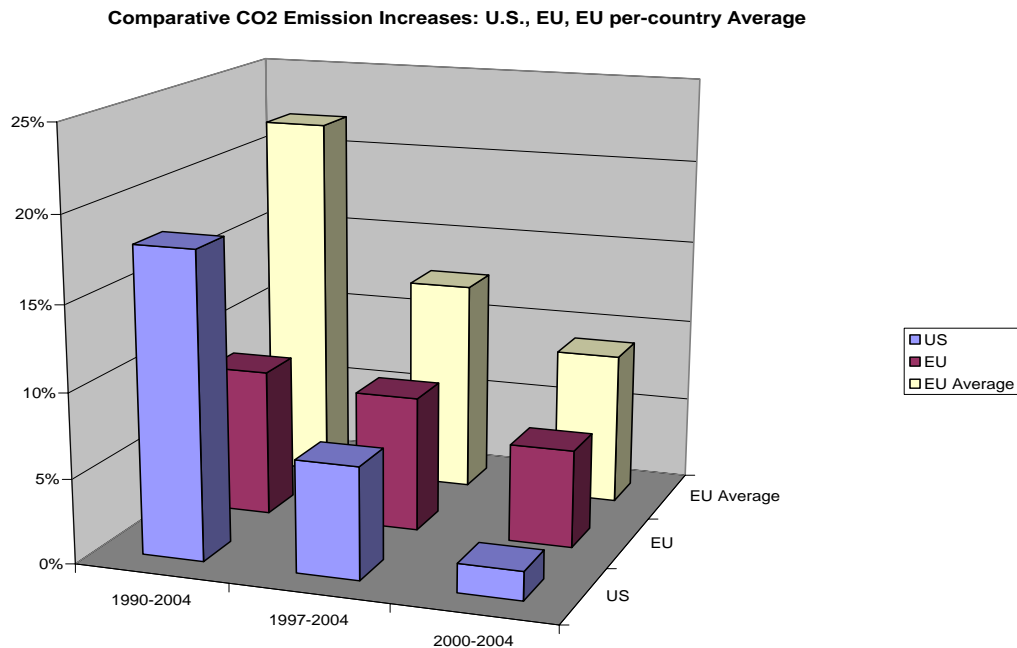


Why the EU previously couched its emissions graph in the parameters of +20 and -20% is unclear, though that does assist in visually flattening emission trends. What is clear, however, is that Europe is not reducing its greenhouse gas emissions. In 2004, the

latest year for which data are available, Europe's GHG emissions rose for the 5<sup>th</sup> time in the seven years (since making its 1997 promise in Kyoto).

Over the most recent five years for which we have data (2000-2004) Europe's GHG emissions have increased twice as fast as those of the U.S. Carbon dioxide (CO<sub>2</sub>) remains the principal target of Kyoto-style regulation, with methane and nitrous oxide emissions having largely stabilized. The average EU country's carbon dioxide emissions have increased over this period up to *five times as fast* as those of the U.S.

The following chart illustrates relative [CO<sub>2</sub> emissions](#), compiled by the U.S. Energy Information Administration as of July 2006, for the U.S., EU and an EU per-country average (individual figures are provided in Annex I to this paper).



Citing the collective EU figure as the EEA prefers does provide a less-stark contrast, spreading around the UK and German *pre-Kyoto* “cuts” among the entire bloc. For national comparisons, however, the “EU per-country average” mitigates that illusion somewhat by also spreading about the actual percentage increases, including some quite large jumps by numerous EU countries even over this late period, more than a dozen years after the first “global warming” [treaty](#) was agreed in 1992.

Viewing this chart, Europe's motivation is quite clear for insisting in Kyoto on the ability to collectivize emissions, and on the 1990 baseline as the measure of “success”. Still, this cannot hide the obvious. Gauzy rhetoric, however, can obscure it.

In an October 2006 [report](#) issued in the run-up to Nairobi, “*Greenhouse gas emission trends and projections in Europe 2006*”, the EU lowered its projected *reduction* of emissions by 2010 to 0.6%. Despite continued regulatory efforts, this assessment of reductions to possibly be attained “under existing laws” represents degradation by about

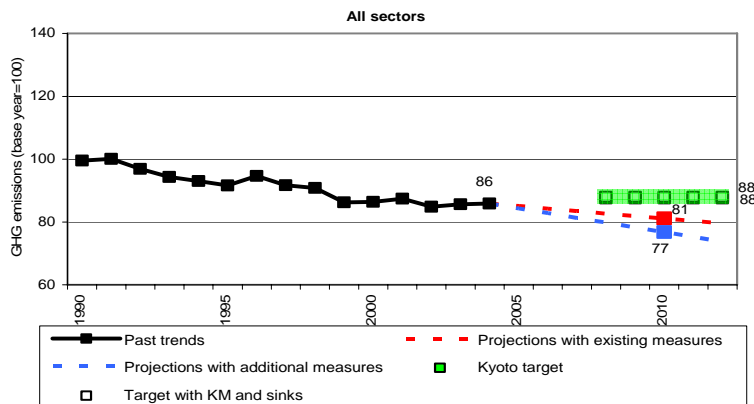
half from the [1.6% projected](#) one year earlier, which itself was in turn a significant degradation from the 4.7% cut [projected](#) in 2002. Obviously, things are headed in the wrong direction for Europe to be able to legitimately claim compliance with Kyoto.

It is important to note that, under its Burden Sharing Agreement, 10 of the EU-15 secured promises less stringent than ratified under Kyoto, with 7 of the EU-15 escaping promises of *reducing* emissions altogether. In fact, allowances were given to *increase* emissions by as much as 27%. As such, with [clever negotiating](#) Europe appeared on its way to a diplomatic success, if not so much an environmental one. Yet all might be undone, with European countries now projecting 2010 emissions exceeding 1990 levels by up to 72%.

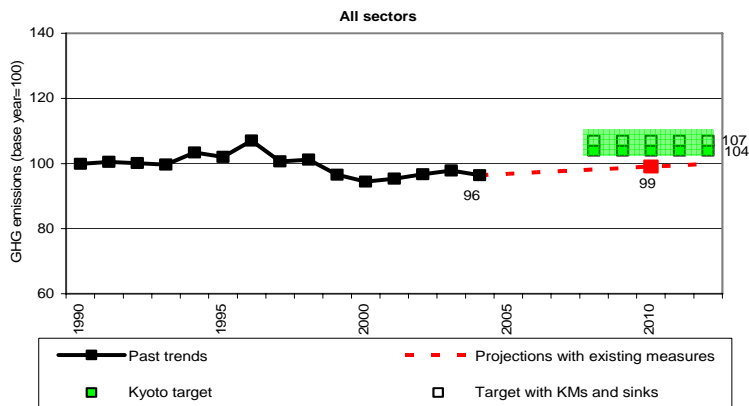
### Europe's Star Performers

Only two EU-15 countries project that they will outdo their Kyoto promise, as modified by the [Burden Sharing Agreement](#) (BSA): the UK and Sweden. The UK did this through a one-off political decision made for economic and not environmental reasons, the 1990s' "[dash-for-gas](#)". The emissions drop [leveled off](#) in the late 1990s and since 2002 [UK emissions](#) have slightly ticked upward.

The following graphic, from the UK's [report to the EEA](#), reflects that despite this slight upward trend, beginning the next year the long-advertised downward trend will occur or in this case resume. Such projections have become quite common throughout the EU over recent years, though they have with equal regularity been disproved by the next year's emission figures.



Sweden also claims victory, though without emphasizing that this is found in a promise to not allow emissions to *increase* more than 4% above 1990 levels, a much more favorable deal than actually agreed to in Kyoto and, obviously, not a promise to reduce emissions at all. As Sweden's [report to the EEA](#) shows, emission reductions have ceased there, as well, and their projection of complying with a revised Kyoto promise involves being back above 1990 levels by the time Kyoto's five-year term expires.



Remember, these are Europe’s two star performers. The [charts](#) for Italy, Spain, Portugal, Greece, Ireland, Finland and others are not nearly so rosy. (In terms of the Burden Sharing Promise, Denmark suddenly becomes Europe’s worst Kyoto violator, despite its emission increase being not nearly as large as many others’.)

This is not only inconsistent with long-running EU rhetoric about its Kyoto progress (for example last year’s [claim](#) that “[t]he EU is well on its way” to Kyoto compliance, and by “reducing emissions” no less). It also is an obvious disappointment because, despite the clear intent of the BSA to mitigate any actual emissions *reductions* required of Europe under Kyoto by spreading around the UK and Germany pre-Kyoto cuts, EU Commissioner Wallström long [made clear](#) that the “EU cannot rely on a few Member States to reach [its] Kyoto target.” Regardless, that is what the EU must do, along with working a number of accounting fixes to claim compliance, as noted herein.

#### *The October 2006 Report: A Shift in Tone, New Language and Revealing Numbers*

The EEA’s October 2006 emissions report shifts course, from ritual trumpeting of Europe’s purported Kyoto success to calling for increased urgency in taking additional actions. Such actions are necessary to avoid significant political embarrassment as well as potentially costly penalties, all of which to one degree or another also confront Canada, Japan and New Zealand.

In order for Europe to claim that emissions have actually been “reduced”, even if not in relation to the (very EU-friendly) 1990 baseline, EEA now speaks in terms of *but-for* tons (see, *e.g.*, FN 7 in the October report’s Summary, and the Note to Figure 0.1). That is, “but for” EU policies, emissions would be higher, prompting the EU to claim emission “reductions” *from what otherwise might have been*.

Kyoto of course does not speak in terms of what might have been, but solely in terms of the 1990 baseline. Yet although this “but for” claim likely true to some extent, if difficult to quantify, whatever these reductions may be remains unspecified to date.

“But for” language is presumably for purposes of ensuring Europe is permitted to “trade” emission credits under the [Emissions Trading Scheme](#) (ETS) for purposes of

Kyoto. This is due to the “Supplementarity” requirement, demanding that such “mechanisms” as buying credits, obtaining them through the Clean Development Mechanism with exempt Parties to Kyoto, or Joint Implementation with covered countries, may only be employed as “supplemental to” actual domestic *reductions*.

On its face, the Supplementarity requirement indicates that a Party must actually *reduce* at least half of its Kyoto “reduction” requirement, obtaining the other half through “hot air” purchases or otherwise. The EU has already weakened this requirement such that actual reductions must merely constitute a “[significant](#)” portion of the promise. Resistance continues among green pressure groups to further such weakening. But in truth they appear aware that, unless they capitulate and ensure that whatever such ploys must be allowed to claim compliance will be allowed, Kyoto will prove a dead letter.

Until Kyoto formally recognizes that “Supplementarity” will mean whatever is necessary to perpetuate the treaty, a Party not reducing emissions *compared to 1990* obviously faces a problem as they seek to “trade” emission credits. Given this, one sees the benefit of speaking not exclusively in terms of 1990, but instead of “but for”.

After the 2005 COP-11, in which the [previously agreed](#), mandatory Marrakech (penalties and enforcement) Accord was [adopted](#) in a greatly weakened, discretionary form, it now is entirely up to the [UNFCCC](#) (Kyoto’s Parties) to determine whether “but for” claims are sufficient to circumvent Kyoto’s obvious intent.

As noted, the October EEA report modified prior claims, including lowering the EU’s possible emission “reduction” scenario. Less than one year ago Europe projected that it would attain actual emissions *reductions* of 1.6% by 2010 under existing laws, another 5.2% through additional, non-existent laws that they might possibly enact (bringing their total reduction to -6.8%), and then rely upon Kyoto mechanisms for another 2.5% of “reductions” bringing their total to -9.3%.

This year, EEA projects the precisely-as-promised 8% reduction below 1990 levels. The claims changed such that instead of a reduction under existing laws of 1.6%, Europe projects a reduction of 0.6%. But instead of relying on hypothetical laws for 5.2% of additional reductions, they only build-in reliance upon such measures for 4% of the promised 8% reduction (The projected use of mechanisms ticked upward only slightly to an expected 2.6% reduction, up from last year’s projection of 2.5%.)

This modification oddly implies that the laws in existence have proven less effective than anticipated, yet at the same time the need for (or likelihood of) new laws has been reduced.

As such and in sum: Europe lowered its projected “reduction” overall by 1.3%, from 9.3% down to the precise 8% promise. This came about through lowering the reductions expected from existing laws by 1%, and the reductions expected from new laws, by 1.2%, while adding .8% expected to be attained through “sinks”.

The following statement, however, proves to be one of the most noteworthy:

“For the EU-15, the total net emissions removal from activities under Articles 3.3 and 3.4 [NB: “sinks”] are projected to amount to 32.6 million tonnes per year. *This contribution is relatively small, yet it is important since the EU-15 would fail to reach its 8% reduction target without accounting for carbon sinks.*” (emphasis added)

As the above analysis demonstrates, Europe’s numbers are quite fluid over even a very short period of time. This, and the assertion that 0.8% is a material and potentially determinative figure, raises the uncomfortable issue that Europe’s baseline figure(s) for 1990 are still-shifting – and, generally *upward* and therefore in their favor – despite more than 15 years passing.

Of the at-least-five collective 1990 baseline figures the EEA has published since 2000 – in late June the EU [published](#) its highest ever – Europe’s claim as to what it emitted in 1990 deviates by at minimum 41 million metric tonnes. This is more than the “sinks” figure the EU just now cited as significant and possibly even determinative, and represents an internal deviation of almost 1% (0.96%).

A footnote in the most recent emissions compilation asserted that “The base year emissions in this table are preliminary and the final emissions will be agreed in 2006 within Council Decision (2002/358/EC).” The Commission has plainly stated in a response to at least one Member of the European Parliament that this delay is its right under Kyoto, with some defensiveness about – but still no explanation as to – the significant deviation.

What is further worrying about the inherent risk of manipulation exposed by these figures is that if EU Member States are allowed to cherry-pick their most favorable number – and there is no reason to believe that Brussels would stop such a move – the baseline could deviate by as much as 92 million metric tons, or more. Just this deviation accounts for over 2% of Europe’s total emissions, and if the higher figures are claimed it would significantly move Europe toward their promised reduction of 8%, without actually reducing one ton but merely by administratively choosing, without explanation or justification, the most favorable figures.

Incredibly, this latter deviation represents a greater emission total than the annual GHG output of 7 of the EU-15 Member States. With its comment about the significance of its “sinks” figure, the EU has recognized the important role possibly played by their baseline creeping upward in their favor in claiming “compliance” with Kyoto.

For a discussion of this development and the related implications and considerations as they stood prior to the most recent June 2006 upward revision, see this author’s 2005 EEI Policy Note, “[The Gambler's Dilemma](#)”, particularly pages 15-16.



Finally, it is important to note that the EU also affirmed that that the Emissions Trading Scheme is the program “projected to contribute most to achieving the targets”. This does not bode well for Europe, with that scheme having faced alarming volatility, been exposed as having its figures subject to political manipulation, having already led to carbon leakage,<sup>1</sup> and generally being deemed a [bust](#).

It may be for these reasons that in late 2006, a delegation led by the UK’s [DEFRA](#) began visiting Member State ministries speaking of “temporary exemptions” for energy-intensive industry in those states already suffering under the ETS. Obviously, any such exemptions must be made up by others in that Member State, or at minimum by the rest of the EU-15. This is discussed further in “CO2 Trade War”, *infra*.

In order to garner support for agreeing to a deeper, “post-2012” round of promises, a particularly egregious idea was floated during these visits. This was that high-level (read: official) support would be given a claim that certain Member States – which actually were permitted among the largest *increases* under the Burden Sharing Agreement – actually got a raw deal and therefore deserved even more forgiveness.

### **California: A Kyoto “Privileged Partnership”?**

In July 2006, a story [leaked](#) that California Governor Arnold Schwarzenegger and British Prime Minister Tony Blair intended to strike a deal whereby California would provide GHG “credits” to the UK. Given Europe’s internal trading deal and the fungible nature of GHG ERUs, California would thereby serve as a source of credits not just to one Party to Kyoto, the UK, but to the EU.

The Governor’s aides quickly disputed that any such deal amounting to a treaty existed, or frankly that they were engaged in anything more than “an agreement to share ideas and information”. No subsequent details about this agreement, whatever its form, were in fact announced as had been suggested.

This backpedaling is for good reason. There are obvious political and technical problems with bringing such an agreement on line. Experience indicates that these obstacles are insufficient impediments to a committed Kyoto establishment that to date has shown a willingness to wink at rules and the letter of the agreement itself. Whether U.S. courts or the U.S. Senate would be as accommodating is less clear.

#### *Structural and Political Problems*

One glaring problem with Europe obtaining GHG credits from California which are recognized for purposes of their Kyoto commitment is that California is not a Party to the Kyoto treaty in any form. Particularly, Kyoto is plainly drafted so as to permit direct acquisition of credits, or “emission reduction units” (ERUs; under Article 6) solely from

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<sup>1</sup> Acerinox’s Chief Executive Victoriano Munoz vows to export future growth to the U.S. and South Africa as a result of Kyoto, and has already added 175 new jobs in Kentucky (North American Stainless Steel).

an Annex I Party to the treaty.<sup>2</sup> This is not a mere technicality; in fact, Parties must also satisfy a series of requirements to be eligible for various schemes, including the Article 6 emissions trading provision. In fact, therefore, simply being a Party is not a sufficient credential to provide credits or engage in GHG credit “trading” (see “Supplementarity”).

Therefore, the frontal approach to setting up a scheme with California requires that the treaty be amended, and amendments must be adopted by the Kyoto membership pursuant to Kyoto's established procedures. This means that, per Article 21, amending Kyoto requires consensus approval and, should that fail, adoption by a three-fourths vote. We could be confident that this will not happen, were there no other evidence than the eight-year wait experienced during Kyoto's initial march to ratification.

However, other evidence does exist that no substantive, potentially controversial effort requiring adoption is likely to occur. Specifically, at the Montreal [COP-11/MOP-1](#) the Saudis proposed the required amendment –under Article 18<sup>3</sup> – to make Kyoto's penalties binding and enforceable. Canada and Europe objected by acknowledging that gaining approval for an amendment (particularly this one) is difficult. In the face of this reality the relevant body instead adopted a non-binding “Decision” – the watered-down “Marrakech” terms cited above – claiming that Kyoto has binding penalties.<sup>4</sup>

Alternately, California could try to accede to Kyoto, as a covered (“Annex I”) Party. On its face this option seems to be prohibited, or at minimum impeded, not by Kyoto's terms but by the U.S. Constitution. That document not only reserves the power to enter treaties to the federal government<sup>5</sup> but, for non-treaty tie-ups, asserts that “[n]o State shall, without the Consent of Congress...enter into any Agreement or Compact with another State, or with a foreign Power.”

It is not immediately clear how the courts or Congress would treat California attempting to enter Kyoto as a Party,<sup>6</sup> once again for the little-advertised fact that Kyoto

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<sup>2</sup> Kyoto Article 6.1 states “For the purpose of meeting its commitments under Article 3, any Party included in Annex I may transfer to, or acquire from, *any other such Party* emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy,” with the rest of the Article providing the conditions, none of which nullify the condition precedent that all parties involved be “Parties”. (*emphasis added*)

<sup>3</sup> Article 18 reads in pertinent part, “Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.

<sup>4</sup> For discussion of this, see Christopher C. Horner, “An Assessment of Montreal Cop-MOP-1: Implications for the Kyoto Protocol “Post-2012” of the “First Meeting of the Parties” Weakening Kyoto's Emission Reduction Promises and Prospects for Enforceability”, Center for Science and Public Policy (2006), found at [http://ff.org/centers/csspp/pdf/20060126\\_horner.pdf](http://ff.org/centers/csspp/pdf/20060126_horner.pdf) esp. pp 9-11.

<sup>5</sup> U.S. constitution Article 1, Section 10, states in pertinent part, “No State shall enter into any Treaty, Alliance, or Confederation.”

<sup>6</sup> Ultimately, whether any such treaty-style tie-up passes muster under the U.S. Constitution could come down to how the U.S. Supreme Court treats the precedent of U.S. *Steel v. Multistate Tax Commission* (1978), an opinion which gutted the Compact Clause though in a case involving a purely domestic compact. If the Court were presented the question, and decided that this opinion impliedly overruled *Holmes v. Tennessee* (1840) (enforcing the Compact Clause with full rigor, and no exceptions, in a case

is not in fact binding which militates toward such a deal being viewed as a compact and not a treaty. In that case, it is acceptable but only upon receiving Congress's blessing.

Of course, this would require California and others going on the record with one of Kyoto's best-kept secrets – that it is not “binding and enforceable” – and as such it may not be an appealing option for Europe or Kyoto's parent-body, the UNFCCC.

The next problem California faces should it seek to accede as an Annex I Party is that, despite the hype, California's [enacted GHG scheme](#) promises a radically different metric: achieving 1990 levels by 2020 is certainly not the same as 8% (or the putative U.S., and therefore California, promise of 7%) *below* 1990, and *by 2010*. Yet, effectively dropping the requirement that California actually *reduce* emissions relative to the baseline should not be offensive to European Parties; after all, many of them were granted fairly substantial emission *increases*. However, pushing back the deadline by a decade poses political and technical integration problems of its own.

Therefore, bringing California into Kyoto for purposes only of receiving wealth transfers – by selling possible “credits,” which it might generate under a promise far more forgiving than that applying to Kyoto's few covered Parties no less – might cause significant internal problems and be yet another impediment to the required “consensus” or three-fourths vote.

So, it is apparent that California is not likely to engage or be engaged under the trading scheme envisioned in Kyoto's Article 6. California is also barred from providing credits to Europe under the “joint implementation” scheme, again because that is for dealings solely among Annex I Parties. Participation under the Clean Development Mechanism or CDM is again reserved for “a *Party* not included in Annex I” according to Article 12, and California is not one of those 105 “Parties” to the Treaty not included under Annex I that this term obviously intends. Further, admitting California on essentially the same terms as China would doubtless cause dissent among others constituting Kyoto's 35 covered Parties.

*How might California and Europe get around these problems?*

The above realities continue to beg the question: *how can Kyoto grant (Europe) credit for buying ERUs from outside the system?*

It isn't entirely clear that Kyoto was ever [intended](#) to permit such a thing. However, gutting Marrakech and putting off consummating Kyoto's hallmark of being “binding and enforceable” as advertised prove that committed Kyotophiles are

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involving a Vermont-Canada compact), then they won't find a Compact Clause violation in California entering a treaty-style arrangement under or in pursuit of Kyoto.

However, were the Court or the Senate to reject the idea that *Tennison* was impliedly overruled in *Multistate Tax Commission*, then it is conceivable that they would find that the California-EU Pact is fact a violation of the Compact Clause. In short, this is a matter left to politics (the Senate, in deciding whether to approve the agreement), or the whims of the Supreme Court as it is constituted at any given moment.

remarkably adept at working around problems such as Kyoto's original intent or actual language. As such, it remains quite possible that an entirely different arrangement could be proposed, subject as always to the approval of Kyoto's other Parties.

The most likely such arrangement is for California to become Europe's agent under Kyoto, for purposes of generating and selling Europe "ERUs", if from outside the system.

Specifically, Europe would seek to have California approved as a "legal entity" authorized under Article 6.3, which allows "A Party included in Annex I [to] authorize legal entities to participate, under its responsibility, in actions leading to the generation, transfer or acquisition under this Article of emission reduction units".

Obviously, this provision was written in contemplation of parties being created to facilitate emission trading, not bootstrapping in various among the United States of America. As such, the same possible objections to allowing California in to Kyoto solely for purposes of receiving wealth transfers would have to be weighed against the potential benefits to be gained from incorporating the State in this way. These potential benefits include a) the political boost that seems to be a primary driver of this idea, in that Europe would claim a triumph over President Bush who is viewed as keeping the U.S. out of Kyoto, and b) any ERUs that California might provide Europe as it struggles to comply with Kyoto, although it is not entirely clear that such reductions would exist even under the much more sympathetic deal that California has cut for itself.

These latter two issues are discussed, below.

*Would buying credits from California be a victory?*

Initially symbolic though it may be, incorporating California into Kyoto, under Article 6.3 or otherwise, might not be the victory over the United States that Europe seeks. In fact, in the final analysis this might provide American opponents of entering Kyoto the last laugh, for the following reasons.

Apparently a popular belief exists that, were a large state such as California to somehow join Kyoto and particularly if just as a possible supplier of credits, this might entice other states to agitate for U.S. ratification, and/or a new U.S. president to view a post-2012 Kyoto more favorably (this latter point is discussed, *infra*).

This is counterintuitive. In this scenario, no claim by a state that it is somehow being held back by Washington will have any political (or logical) currency. With California having successfully joined up to Kyoto Washington is actually relieved of the pressure that such complaints might otherwise engineer.

U.S.-style federalism, under which states compete and are the laboratories of democracy and policy, dictates this. If that rare state might find that it would have credits to sell and/or decides to enact California-style Kyoto-lite, then Washington simply

responds that *Europe needs you and has proven a desire to accommodate*. This liberates Washington from individual state calls to ratify the pact. This is relatively better for the state, as well, as it isn't compelled to join Kyoto and burden itself with all of the pact's baggage. It is instead granted a "privileged partnership," a concept with which EU nations are familiar.

What does not occur, however, is pressure Washington to join Kyoto as is obviously hoped for when recruiting California. The opposite is instead true.

*There's more to the story: "Supplementarity" and California Dreaming*

There are other ways in which California petitioning for such a "privileged partnership" in Kyoto further dashes the enticing prospect of a mildly beneficial but politically enticing slap at President Bush: it raises the issue on which Europe has been granted a free pass to date, that being "Supplementarity." Again, this is the Article 6.1(d) requirement (repeated with significant malleability of meaning, in numerous provisions and subsequent formal documents) that "The acquisition of emission reduction units *shall be supplemental to* domestic actions for the purposes of meeting commitments under Article 3."

Yet in the context of 1990 EU emission baseline figures creeping steadily upward to Europe's financial benefit, having voted to keep Kyoto non-binding, and already weakening the meaning of "Supplementarity" once, further diminishing the spirit of the requirement by outsourcing their emission reductions to a non-Party seems small beer.

California might also see political gain as a motivation to seek such an arrangement, though the ultimate benefit is difficult to discern. In addition to the angle of green politics, it appears that this is being driven by those businesses in the state which believe they will individually have credits to sell, in many cases because they moved operations elsewhere (a common practice in a state whose environmental policies are so distinct from the rest of the country's). Yet California's current emission levels indicate that these credits will still fetch a price in the state by 2020, judging by the state's past failures at mandating, *e.g.*, renewable energy and zero-emission vehicles.

Adding to such a checkered policy history, the question remains why California, state-wide, believes it is going to have ERUs to sell. At first blush such a prospect seems highly unlikely. After all, the state [recently announced](#) that its GHG emissions as of 2004 were over 14% above 1990 emission levels. Already California consumers are undertaking [efforts](#) to work around the emissions regime. Finally, the emissions increases being [experienced around the world](#), over even the most recent five years, hints at California's slim chances to reduce their own number over the next fifteen.

As such, the sole benefit of a tie-up with Europe would be for select California businesses by adding one more market, possibly more desperate need of credits, which merely exports the ERUs and raises the cost of domestic credits to that state's citizens.

## **Climate Protectionism: A CO2 Trade War?**

### *Questionable Advice*

Seeking to incorporate California as a source of ERUs is not Europe's only remarkable response to the fallout from its own Kyoto implementation. On October 11, the EU internet portal Euractiv published a [story](#) with the lede: "EU moots border tax to offset costs of climate action. In Short: A paper drafted for the Commission suggests taxing goods imported from countries that do not impose a CO2 cap on their industry as a way to compensate for the costs of climate- change measures."

Comments of industry representatives working with the Commission on this matter included, "Cembureau President Paul Vanfrachem welcomes the idea, saying that the tax would help offset the competitive disadvantage that the ETS forces on the European cement industry," and "John Hontelez, secretary-general of the European Environment Bureau, a federation of 143 environmental organisations, says that he supports the idea of a border tax adjustment."

Less enthusiastic support was also represented, reflecting consideration not just of the competitive disadvantages that Kyoto has placed on Europe but also on the implications of such a move. "Although supported by the cement sector, the idea is generally not welcomed by EU businesses. Climate-change expert Daniel Cloquet at UNICE, the European employers' association, expressed the 'highest reserves' over the idea, saying that it holds the potential to launch 'a commercial war' with the US or China, which do not have cap-and-trade systems."

An *ad hoc* committee to further advance this idea was [established](#) in early November, by the Commission's [High Level Group \(HLG\) on Competitiveness, Energy and the Environment](#). This HLG is to "focus on economic growth and jobs within the context of the EU's Sustainable Development Strategy". It now implicitly and to a great degree explicitly acknowledges that Kyoto has harmed and will continue to harm Europe's competitiveness. Here, the HGL addresses something they acknowledge as undermining EU competitiveness but which is also a "sustainability" measure. Its preferred solution appears to be to equally impair the competitiveness of others in lieu of remedying that which is acknowledged as undermining EU competitiveness. As such this reveals the HLG's unique view of its "competitiveness" portfolio.

The [assessment](#) apparently influencing HLG is actually a *nine-year-old*, pre-Kyoto exhortation for higher U.S. energy taxes (followed by border adjustments on countries which do not follow suit) by two long-time American advocates of this agenda. The document is notable for denying that a proven complication of Kyoto would in fact occur (*i.e.*, jobs being lost to exempt countries), while elsewhere acknowledging that "[t]he purchase of [ERU] credits would still impose a significant cost disadvantage on energy-intensive plants selling into highly competitive global markets".

The document resolves this confusion by concluding that a global regime, and preferably a scheme of “border tax adjustments” (BTAs) on imported, energy-intensive goods is necessary to mitigate such carbon “leakage” prompted by the cost of buying ERUs – minimal though it purportedly would be. The idea is that the carbon embedded in such goods if produced in countries outside of a carbon-rationing scheme would represent the unfair subsidy of that nation refusing to adopt Europe’s climate policies.

Distilled, the document’s opening premise – that a Kyoto-style agenda wouldn’t harm one’s economy – is not only contradicted internally but flies directly in the face of the argument in purported support of which the document is invoked: *Kyoto is harming Europe’s competitiveness*. As a result, so the argument goes, it is unfair for countries to remain outside of the EU’s chosen climate/taxation policies.

It is worth noting that this pre-Kyoto paper makes curious distinctions-without-a-difference about those jobs that might be lost under the authors’ desired regimes. For example, comfort is offered in the claim that U.S. coal mining jobs wouldn’t be lost *to Chinese miners* because the tax would apply to all coal-burned no matter the source. This is of dubious succor to the miner put out of work, regardless, because the carbon tax placed on his product is *designed* to dramatically mitigate its use.

It is also important to note how the paper takes an early slap at the offer now floated by the UK of exemptions for energy intensive industries in “problem” countries such as Spain, in order to entice the Spanish to agree to a second round of Kyoto:

“The manufacturing sector or particular energy-intensive industries could be exempted from a carbon tax or permit scheme. However, this would increase the cost to the economy as a whole by requiring a greater emission reduction effort in other sectors. It also would greatly diminish the incentive to improve production technologies in the exempted industries, develop substitute low-emission products and generally shift to more sustainable consumption patterns. Moreover, as the BTU tax debate demonstrated, exempting heavy industry would undermine broader support for the tax or permit scheme.”

The paper notes three possible objections to a scheme of border tax adjustments – a “policy”, “practicality” and “technical legal” argument – though it responds to each of them unsatisfactorily in a largely off-hand manner. In fact, it simply devotes a paragraph – of conclusive statements, not analysis – to challenging each claim, which is certainly far less effort than expended in opening the paper by cheerleading for BTAs.

In short, this document seems to be a slim reed upon which to base much of anything in the Kyoto agenda, let alone the idea of beginning a CO2 trade war.

### *A Brief History and Assessment of “Green” Protectionism*

That the document which the EU’s HLG cites to support its desired agenda is at best weak is not the same as saying that the agenda stands no chance of becoming reality.



Back when the prospect of such a trade war was first acknowledged several years ago, one industry study group gloomily portrayed the coming debate:

“The business community cannot count on any challenge in the WTO against trade measures [such as EU-imposed border tax adjustment if the EU goes to a carbon tax on its own industries] designed to promote compliance with Kyoto being upheld by a Dispute Panel or the Appellate Body. The Shrimp-Turtle decision and the revised treatment of inputs in the Uruguay Round's agreement on subsidies have opened the door to such measures. And it is clear that there are some groups and governments seemingly prepared to test the system at some future point. Such a challenge would be significant not only for business, but also for the functioning and international standing of the WTO.”<sup>7</sup>

The group's pessimism is not unreasonable. It is true that “[t]he WTO allows members to restrict imports to protect human health, and animal plant and safety, but it obliges members, when challenged, to demonstrate that such restrictions are based on science.”<sup>8</sup> It is this latter condition that has gotten Europe in [trouble](#) over its prohibition of genetically modified foods, which is in fact quite similar to the HLG's idea.

Further, prior to its decision in “Shrimp-Turtle” (discussed, *infra*), the WTO Appellate Body had clearly cited the impermissibility of trade measures based on *process* standards, *e.g.*, how a state regulates the way that a product is obtained or manufactured as opposed to its taxation.<sup>9</sup> This made its subsequent, “Shrimp-Turtle” expansion of the environmental allowance and significant loosening of the “process” restriction, at the urging of the U.S. no less, such a stark departure. It is this decision upon which the EU would base potential climate-based trade barriers such as those suggested by the HLG.

Were such a battle to come about it would mark a new low in recent trade-and-environment relations. The question presented is whether one still-aberrant decision by the World Trade Organization's Appellate Body is followed, thereby becoming precedential, or is rejected. That decision, in short, is that protectionism is not protectionism so long as it is in the name of the environment.

#### *Is “green” protectionism not protectionism? The “Shrimp-Turtle” case*

In September 2002, environmental pressure group Friends of the Earth-Europe (FoE-E) fired the first shot to force a WTO-Kyoto conflict by recommending the EU apply penalties against energy intensive U.S. products in retaliation for the U.S. not going

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<sup>7</sup> United States Council for International Business, Background Paper “WTO Rules and Procedures and Their Implication for the Kyoto Protocol”, November 2002, at <http://www.ucsib.org/index.asp?DocumentID=2356>. This assessment confuses the UNFCCC and Kyoto and the respective level of U.S. acceptance, in another passage relating to the conflict and possible remedies, but is otherwise substantively sound despite seemingly preferring U.S. acquiescence in Kyoto as a means of avoiding this conflict.

<sup>8</sup> Alan Oxley, “The WTO Doha Development Round: The Threat to International Business of the Spread of Environmental Trade Sanctions”, The Australian Study Centre (2002), at p. 9.

<sup>9</sup> GATT Report of the Panel *United States -- Restrictions on Imports of Tuna* 1991 and GATT Report of the Panel *United States -- Restrictions on Imports of Tuna* 1994 (“Tuna-Dolphin” cases).



along with Kyoto.<sup>10</sup> This followed earlier rumblings by activist group Greenpeace International, prior to the Doha WTO ministerial negotiations, that countries should use trade talks to coerce the U.S. into ratifying Kyoto, or pursue sanctions in response.<sup>11</sup> When the EU published the initial list of products against which it proposed exercising this authority, energy intensive products – though not specifically identified as such – accounted for roughly one-quarter of the dollar amount.<sup>12</sup>

A WTO member state erecting such retaliatory border adjustments expressly on the basis of “unfair energy (or carbon) tax competition”<sup>13</sup> or, alternatively, pursuing an “eco-dumping” complaint would force the pro-growth WTO to address anti-growth multilateral environmental agreements (MEAs) such as Kyoto. It is not clear whether the WTO, confronted with this conflict, would remain true to its mission of expanding economic growth. This is despite that the WTO’s provisions predate such agreements, which would indicate that these assumptions were incorporated into the later MEAs.

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<sup>10</sup> “Friends of the Earth Europe today called on EU Trade Commissioner Lamy and EU governments to target US exported genetically modified (GM) foods and energy intensive products in retaliation for the US violation of World Trade Organisation (WTO) rules on Foreign Sales Corporations [Following an EC request, the WTO has found that the US tax treatment of Foreign Sales Corporations constitutes a prohibited export subsidy. On 30 August, the WTO has authorised the EU to take countermeasures on US products worth US \$ 4,043 million. The EU must formally notify the WTO of the relevant detailed list of products until November 2002. Countermeasures may be taken anytime after final WTO authorisation has been granted.]. This call follows the European Commission’s decision to publish...an initial list of US products that will be targeted for countermeasures. Following the WTO’s authorisation to the EU to impose countermeasures on US imported goods, worth US\$ 4,043, the Commission’s brand-new list includes a wide range of products, including agricultural goods, textiles, iron and steel. The European Commission has asked European business to send their comments and views on which products 100% additional duties should be raised.

Commenting Alexandra Wandel of Friends of the Earth said: “We call on Commissioner Lamy and European governments to consider European consumer concerns and the protection of our global environment when targeting US products. Genetically modified food and animal feed products as well as energy intensive products seems to be the obvious choice to make a move towards fairer and more sustainable transatlantic trade...EU governments should also consider targeting specifically high energy intensive products. The U.S. rejection of the Kyoto Protocol is unfair and puts European business at a disadvantage. With Bush’s increasing rejection of international agreements that are essential to protect our environment, Europe should have every right to penalize U.S. goods for the pollution they cause.” FoE-E stopped short of threatening legal action under WTO rules as they did in the same release regarding European legislation addressing genetically modified food identification. Friends of the Earth Europe, Press Release dated September 16, 2002, available at [http://www.foeeurope.org/press/AW\\_16\\_09\\_02\\_GMOsynergy.htm](http://www.foeeurope.org/press/AW_16_09_02_GMOsynergy.htm).

<sup>11</sup> “WTO Member States should say before arriving in Doha that they will not discuss the possibility of a new round of trade liberalization if the US does not agree to ratify the Kyoto Protocol. If the US continues to refuse to ratify the Kyoto Protocol, WTO Members States who support Kyoto should also consider bringing that country before a WTO Dispute Panel, because the US position is providing the equivalent to a hidden subsidy for their domestic industry, inconsistent with WTO rules.” Greenpeace International, *Greenpeace Recommendations to the Conference*, a paper prepared for the Doha Ministerial and available at <http://www.greenpeace.org/politics/wto/Doha/html/greeningD.html>, p.1.

<sup>12</sup> See list submitted by EC to the WTO, WTO document WT/DS108/26.

<sup>13</sup> It seems likely that border adjustments offer less promise for being upheld than a determination that the U.S.’s failure to institute Kyoto-style policies constitutes a discriminatory unfair trade barrier. This, if for no other reason than the EU, and most of its member countries, will fail to meet their various Kyoto commitments.

Such a complaint would also trigger a landmark battle over the freedom of states to refuse to adopt or pay for the economic policies of others, without incurring penalty for discriminatory trade.

The WTO in the past has ruled against measures imposed by member states on environmental or public health bases – most notably, the EU's bans on hormone-treated beef<sup>14</sup> and then GMOs – absent a risk assessment-based, scientific justification for the measure. That is, the WTO affirmed that its member states may not merely restrict imports absent a credible non-economic basis, while creating a potential loophole particularly given that the WTO will not likely put science on trial.

As a result of the beef-hormone ruling the EU has argued, beginning with the Doha Round, that the relationship between WTO rules and MEAs should be based on several principles, notably that multilateral environment policy “should be made **within multilateral environmental fora and not in the WTO**,” and that MEAs and the WTO should be considered “equal bodies of international law.”<sup>15</sup> It additionally argues that WTO rules “should not be interpreted in ‘clinical isolation’ from other bodies of international law and without considering other complementary bodies of international law, including MEAs.”<sup>16</sup>

Despite the foreseeable nature of these disputes given Kyoto's agenda, its selective inclusion of major nations, and the Senate having voted against the U.S. joining such a pact before the Kyoto talks, that treaty did not build in such a trade mechanism.

The EU argument of the necessity of deferring to MEAs – or any fear that EU nations might have about imposing climate-based barriers in the absence of a trade mechanism in Kyoto – should nonetheless be greatly tempered by the signal the WTO sent when its Appellate Body (AB) came down in favor of trade restrictions based on environmental protection, in the 1996 “shrimp-turtle” actions, DS58 (brought by India, Pakistan, Malaysia and Thailand), and DS61 (brought by Philippines).<sup>17</sup>

The AB's report affirming such protections acknowledged that the panel originally hearing the matter interpreted the WTO so as to find the measures inconsistent with WTO's open-trade rules and “render[ing] most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.”<sup>18</sup>

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<sup>14</sup> See beef-hormone disputes, DS26, DS389, DS48, rulings thereon found at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm#1996](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996).

<sup>15</sup> “EU Proposal on Trade, Environment Receives Cool Reception at WTO Meeting”, found at <http://subscript.bna.com/SAMPLES/wto.nsf/125731d8816a84d385256297005f336a/0102099e4ad425ff85256b8800145611?OpenDocument> March 26, 2002. (emphasis added)

<sup>16</sup> *Id.*

<sup>17</sup> WTO Appellate Body Report *United States – Import Prohibition of Certain Shrimp and Shrimp Products* 1998.

<sup>18</sup> Opinion found at [http://docsonline.wto.org/GEN\\_viewerwindow.asp?D:DDFDOCUMENTS/T/WT/DS/58ABRW.DOC.HTM](http://docsonline.wto.org/GEN_viewerwindow.asp?D:DDFDOCUMENTS/T/WT/DS/58ABRW.DOC.HTM), Doc. 01-5166.

The United States Trade Representative summarizes the issue and years of deliberation as follows, in language that mirrors the EU's climate argument:

“For more than a decade, the United States has required that U.S. shrimp fishermen employ (Turtle Excluder Devices, or TEDs). Over a dozen countries around the globe also require that their shrimp trawlers employ TEDs. Experience has shown that the use of TEDs, combined with other elements of an integrated sea turtle conservation program, can stop the decline in sea turtle populations and will, over time, lead to their recovery.

The U.S. law at issue -- Section 609 of Public Law 101-162 -- restricts imports of shrimp harvested with fishing equipment, such as shrimp trawl nets not equipped with TEDs, that results in incidental sea turtle mortality. It thereby avoids further endangerment of sea turtles.

In October 1996, India, Malaysia, Thailand and Pakistan challenged the U.S. law under WTO dispute settlement procedures, claiming that it was inappropriate for the United States to prescribe their national conservation policies. In April 1998, a panel found that the U.S. measure was inconsistent with Article XI of the General Agreement on Tariffs and Trade (GATT), which provides that WTO Members shall not maintain import restrictions. The United States had maintained that Section 609 fell within the exception under Article XX(g) of the GATT that permits import restrictions relating to the conservation of an exhaustible natural resource. The United States appealed the panel findings to the WTO Appellate Body.

In October 1998, the Appellate Body reversed the findings of the dispute settlement panel. It agreed with the United States that the U.S. law is covered by the GATT exception for measures relating to the conservation of exhaustible natural resources, but found that the United States had implemented the law in a way that resulted in unfair discrimination between exporting nations.<sup>19</sup> **The Appellate Body also agreed with the United States that the GATT and all other WTO agreements must be read in light of the preamble to the WTO Agreement<sup>20</sup>, which endorses sustainable development and environmental protection.** The Appellate Body confirmed that WTO members may adopt

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<sup>19</sup> This alludes to the finding that the US restriction forced fishermen in the exporting countries to use a specific technology (a process-based regulation) to achieve that goal and would have precluded all imports from those countries even if only some fishermen were found not to be using the devices.

<sup>20</sup> The Marrakech Agreement Establishing the WTO states in pertinent part, “The *Parties* to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,” found at [http://www.wto.org/english/docs\\_e/legal\\_e/04-wto\\_e.htm](http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm).

environmental conservation measures such as the U.S. law so long as they are administered in an even-handed manner and do not amount to disguised protectionism.” (emphasis added)<sup>21</sup>

Compare the WTO Preamble language underpinning Shrimp-Turtle with, *e.g.*, the language in Kyoto’s parent-treaty the Rio pact: “Parties have a right to, and should promote sustainable development” (Art. 3.4).

Again according to WTO expert Oxley, who also served as a panelist on the related GATT tuna/dolphin case, this opinion represents AB acceptance that “the measures were legitimate and important environmental objectives which were justified because they related to national measures to conserve exhaustible natural resources.”<sup>22</sup> Though the AB avoided addressing whether the U.S. (or EU) was entitled to assert extra-territorial reach when invoking the WTO’s terms:

“[t]he US was clear about this. It was banning shrimp imports in order to force other countries...[to act] in accordance with the requirements that the US imposed on American shrimp boats...[Therefore], the AB has opened the possibility that WTO members may impose production and processing methods in the jurisdiction of other countries. This has far reaching implications. Until this point, the vast majority of WTO members would have refused to accept there was any right to assert jurisdiction under Article XX in the territory of another member.”<sup>23</sup>

The U.S. did modify its implementation of Section 609 to remove any discriminatory application pursuant to the Appellate Body’s June 2001 report. The AB’s qualification notwithstanding, consider the magnitude of elevating “preamble” language to the level of such controlling authority, regarding no less than such a malleable concept as “sustainable development”.

Simply substitute “climate change” and related responses for this ideal, and it is not difficult to imagine the EU successfully seeking effective imposition of Kyoto on the U.S. Couple the Shrimp-Turtle precedent with serial U.S. “admissions” of anthropogenic climate change and it is not hard to imagine the case ushering in a generation of disputes over protectionism under the guise of measures designed to combat “climate change”.<sup>24</sup>

Oxley offers the following prediction regarding Shrimp-Turtle’s implications, specifically as regard Kyoto:

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<sup>21</sup> “USTR on WTO Decision Supporting Shrimp-Turtle Law”, 22 October 2001, found at <http://usinfo.state.gov/topical/econ/wto/01102201.htm>; pleadings, further background and opinions available at [www.ustr.gov](http://www.ustr.gov).

<sup>22</sup> Oxley at 13.

<sup>23</sup> *Id.*

<sup>24</sup> See Bierman, Frank and Rainer Brohm for an exploration of the broader relevant legal precedent arguing in favor of the defensibility under world trade law of European carbon-based trade barriers.

“If the EU secured the principle that the trade provisions of MEAs were legitimate instruments which the WTO should sanctify, it could then set about creating new MEAs to lay down its preferred environmental standards. It could argue that actions taken by countries to protect the environment warranted trade restrictions to enforce them and that, as a matter of principle, the WTO should respect such restrictions. There is already a major new multilateral environment agreement which one should expect the EU to seek to legitimize in this way. It is the Kyoto Protocol...It is hard to believe that the EU, disadvantaged by self-imposed carbon taxes, would not invoke a right to restrict trade on environmental grounds to protect itself against the competitive advantage of industries in the United States, and other countries, not so burdened by high energy costs. There will be very strong pressure from European business on the EU to invoke a right to restrict trade on environmental grounds to protect itself against the competitive advantage of business in the United States and other countries which are free of the cost burden of higher energy charges, but which are imposed in Europe to reduce emissions of carbon dioxide...The acceptance, therefore, by the trade ministers at Doha of the EU’s demand to include the Environment in the negotiating round is a significant breakthrough, by the EU, in a long term campaign to secure new rights to use trade sanctions to secure environmental objectives. The EU might argue its motive is to protect the environment, but the other side of the same coin is that it is an instrument which would facilitate the protection of industry and agriculture from international competition.”<sup>25</sup>

Subsequent arguments made in trade negotiations are also noteworthy now that the EU is considering the HLG suggestion to pursue the Shrimp-Turtle reasoning and impose its climate agenda on the U.S. and/or developing nations such as China and India.

The EU posits that, even barring some formal recognition of MEA primacy over WTO rules, if conflicts arise between parties regarding specific trade obligations set out under an MEA the parties involved should make every effort to solve the issue *through the MEA dispute settlement*,<sup>26</sup> which Kyoto does not possess.

If such resolution does not occur and a dispute is brought to the WTO – as would be necessary in a dispute relating to GHG emissions – the EU urges that the WTO panel “should take due account of the MEA when addressing the case, as has been consistently confirmed by successive panels.”<sup>27</sup> That is, though the forum is the (more longstanding) WTO, pursuant to its terms a conflicting MEA should be granted at minimum equivalence with the open-trade pact.

When the seemingly inevitable carbon- or climate-centric border adjustment, claim for sanction or other retaliatory action arises, it will doubtless be accompanied by

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<sup>25</sup> Oxley at 11-12.

<sup>26</sup> See Oxley, pp. 7-9.

<sup>27</sup> “EU Proposal on Trade, Environment Receives Cool Reception at WTO Meeting”, found at <http://subscript.bna.com/SAMPLES/wto.nsf/125731d8816a84d385256297005f336a/0102099e4ad425ff85256b8800145611?OpenDocument> March 26, 2002.

claims of scientific certainty, *etc.* As stated, it is not likely that the WTO will assume competence to try differing assessments of the threat of anthropogenic climate change, but will either claim “consensus” exists or, as was unsuccessfully tried with GMOs, adopt some *de jure* or *de facto* “precautionary” approach.

With Kyoto having no trade mechanism, this direction of the WTO bodes ill for major economic powers such as China, India, Brazil, South Korea, Australia and of course the U.S. who remain free of the energy-reduction path the EU has set for others.

*What a CO2 Trade War would mean.*

Already, through its U.S.-advocated “Shrimp-Turtle” decision the WTO is on record accepting such an argument as the EU’s HLG recommends, advocated by some as one path to “harmonize” the otherwise incompatible pro-trade and anti-growth pacts.<sup>28</sup>

Were the Shrimp-Turtle logic that *protection isn’t protectionism when it’s “green”* adopted as binding precedent, it would provide near *carte blanche* to circumvent longstanding and hard-fought trade liberalizations (of which the U.S. is generally fond and of which Europe is not generally such a fan).

However, the EU is certain to confront internal opposition in addition to those industry representatives cited by Euractiv. In November, likely UK Labour leader and currently Chancellor of the Exchequer Gordon Brown [likened](#) opponents of free trade to the [Luddites](#) who opposed technical progress, avowing that “[t]he ideologies that support protectionism offer no positive or credible alternative of how all the world can prosper and are little more than the modern equivalent of Luddism.”

In short, this idea will prompt an internal EU battle which must be resolved before taking on the rest of the WTO and, indeed, the existence of the WTO itself.

### **Postponing “Post-2012”**

Post-Soviet economic collapse combined with a 1990 baseline ensured that fewer than half of Kyoto’s 35 Parties would need to actually lower emissions under a Kyoto promise of “reducing” GHG emissions below 1990 levels. With 7 of the EU-15 also parlaying their original promise into one of no reduction or an emissions *increase*, as part of the EU’s “Burden Sharing” reshuffle, Kyoto did not appear to pose as major a challenge as was heralded.

Yet as described above it is quite possible that, even collectively, Europe will attain no actual emissions reductions by 2010 compared with 1990 levels, but will be reduced to claiming “cuts” found solely in the grace of buying ERUs and helpful accounting measures such as revising their baseline upward. Europe is not alone.

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<sup>28</sup> See, *e.g.*, “After Doha and Johannesburg: Dispute over Multilateral Environmental Agreements (MEAs) and Trade Rules: What Next? FoEE commentary on the EC position, November 2002”, [http://www.foeeurope.org/publications/MEA\\_paper\\_Nov\\_2002.doc](http://www.foeeurope.org/publications/MEA_paper_Nov_2002.doc).



Canada, [Japan](#) and New Zealand [all project](#) emissions being massively above their promised levels.

Despite several nations regularly predicting emission downturns beginning the next year – as indicated, above, proven wrong with equal regularity by the next year’s numbers – it is not foreseeable that ongoing emissions increases among Kyoto’s Parties will reverse any time soon. As such, any second round of Kyoto confronts a problem.

That agreement would presumably require deeper promises among the presently covered Parties, over some “post-2012” timeframe. Therefore, in order to perpetuate the present design Kyoto requires an influx of *new* covered or “Annex I” Parties, on terms allowing them to supply Kyoto’s existing covered Parties with fairly massive quantities of credits or ERUs. What with express and continued reluctance to join by those very countries that might somehow qualify to do this if their ceiling or quota were forgiving enough (China, India, Brazil *et al.*), this appears unlikely.

So, in the absence of new suppliers of ERUs joining, even were a second Kyoto round to a) avoid deepening existing promises, and b) waive the sole remaining Marrakech penalty – a 30% premium for each ton over which a country exceeds its “first” Kyoto quota – a “post-2012” Kyoto appears unrealistic.

It is for these reasons, and not the longstanding reluctance of the U.S. (like 155 other countries) to agree to Kyoto’s cuts that talks seeking an expanded post-2012 agreement are stuck in the neutral gear. Yet as the Nairobi talks loomed it is precisely the U.S. which the UNFCCC and some environmentalist NGOs blamed for the stalemate and, implicitly, Kyoto’s failure. (In June 2006, the UK also [hinted at](#) U.S. responsibility for Europe’s Kyoto quandary.) They suggested that “post-2012” talks, which must be concluded in 2008, be extended to 2010 in order to accommodate the next U.S. president who, they assert, will certainly be more amenable to signing up to Kyoto.

Specifically, the UNFCCC’s chair Michael Zammit Cutajar [indicated](#) that this argument might prevail. This was seconded enthusiastically by some greens, such as Matthias Duwe of the Belgium-based Climate Action Network Europe, who hopefully avowed that “a new administration will have a different policy on the matter.”

This optimism confronts history and facts that are not so supportive, including that it was *two* U.S. presidents refused to seek ratification of Kyoto (President Bush is singled out because, unlike his predecessor, he has not disguised his dislike for Kyoto with sympathetic rhetoric). In fact, such claims appear less grounded in fact than aimed at deflecting attention from the failure of Kyoto’s Parties to actually reduce emissions.

All along the goal of Europe and the UNFCCC has been to convince the U.S. to ratify Kyoto. The net effect of the U.S. joining up would be to further increase the price of scarce ERUs, which already cost Europe much more than politicians promised would be their price limit. Alternately the goal is, as Commissioner Wallström envisioned, “trying to create a level playing field for big businesses throughout the world”.

Regardless of the outcome U.S. involvement would produce, attaining their membership is a more difficult task than simply electing a new president, as [some reportage](#) indicates to be the conventional wisdom.

Readers should recall that the idea of entering, or ratifying, Kyoto was [unanimously rejected](#) by the U.S. Senate back in 1997, and is something that was never once suggested by President Clinton.

Regardless, the common belief among Kyoto's backers is that because "[p]rospective presidential candidates, including John McCain, R-AZ., and Hillary Rodham Clinton, D-N.Y., say federal action is needed to rein in emissions of carbon dioxide and other industrial, automotive and agricultural gases blamed by scientists for global warming", they would agree to Kyoto, and presumably in a more severe, post-2012 form.

This conclusion is grounded in the fact that these early leading candidates for 2008 support federal [legislation](#). That proposal, which seeks to cap GHG emissions at their 2000 levels, is actually far weaker than Kyoto. Further scrutiny confirms that both candidates are actually quite careful to *never* endorse the idea of joining Kyoto. There is in fact no reason to suspect that they are interested in entering a "post-2012" pact, whether or not it requires even more severe cuts than the existing Kyoto, against which McCain voted in 1997 the only time it has been debated in the Senate.

A more realistic [suggestion](#) was made by Japan – the country that, logically, faces the greatest pressure to ensure Kyoto's persistence. This is that any second commitment period must drop the rationing scheme in favor of the "[energy intensity](#)" target promoted and adopted by the U.S. Canada's Environment Minister affirmed this as their path, also.

### *Bringing the "Waiting for Godot" Mindset back to Earth*

Over the years since President George W. Bush reaffirmed U.S. resistance to Kyoto, numerous stories in the EU press have revealed a tendency to cheer on any GHG measure proposed in the U.S., regardless if it is far-weaker than Kyoto and which would be pilloried if Bush proposed it instead. The reason is quite simple, and it is because all such proposals are viewed as being slaps at Bush's Kyoto stance.

This mindset reminds us that now, until January 20, 2009 when a new U.S. president is inaugurated and after, plans such as that which Japan now posits stand solid chances of supplanting Kyoto's regime. So long as it is not the U.S. advocating the position, that is. Yet it is important that Japan, of all countries, suggests this successor to Kyoto's rationing.

Europe and others will be hard-pressed to simply dismiss the idea. In fact, it is more likely to soon become apparent that the majority of the world has already moved beyond the ideal of Kyoto's rationing – acknowledged as [infeasible](#) in unlikely quarters – in the form of the [Asia-Pacific Clean Development Partnership](#).



## ANNEX 1

## TOTAL CO2 EMISSIONS, AND % CHANGE (EIA FIGURES)

<http://www.eia.doe.gov/pub/international/iealf/tableh1co2.xls> July 2006

	1990	1997	2000	2004	1990-2004	1997-2004	2000-04
UK	598.48	560.67	551.02	579.68	-3%	+3.4%	+5.2%
DE	980.01*	876.49	847.08	862.23	-12%	-1.5%	+1.8%
FR	368.64	381.93	399.79	405.66	+10%	+6.2%	+1.5%
GR	80.45	90.27	100.28	106.13	+32%	+18%	+5.8%
LU	10.72	8.61	8.94	12.32	+15%	+43%	+38%
PT	43.71	51.96	62.94	63.43	+45%	+22%	+1%
ES	224.51	262.61	314.44	361.9	+61%	+38%	+15%
BE	124	140.75	143.86	147.64	+19%	+5%	+2.6%
SW	53.78	60.27	55.15	59.07	+10%	-2%	+7.1%
FN	53.02	53.28	50.46	61.48	+16%	+15%	+22%
DK	56.58	73.9	54.01	55.55	-1.8%	-25%	+2.9%
IT	413.38	419.8	443.95	484.98	+17%	+16%	+9.2%
IR	25.78	34.34	40	42.45	+65%	+27%	+6.1%
NE	206.23	237.04	248.69	266.99	+30%	+13%	+7.4%
AT	54.84	63.17	63.42	69.78	+27%	+11%	+10%
Total	3,294.13	3,315.09	3,384.03	3,579.29	+8.7%	+8%	+5.8%
EU-15 Country Average					+22%	+12.6%	+9.04%
US	5,013.45	5,547.9	5,815.5	5,912.21	+18%	+6.6%	+1.7%