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# The EU and Strategies for New Climate Treaty Negotiations

## Abstract

The two latest rounds of the negotiations based on the United Nations Framework Convention on Climate Change (UNFCCC), in Copenhagen 2009 and Cancun 2010, demonstrate the complexities and difficulties as well as the failures of concluding a treaty with the aim of reducing global green house gas emissions and stabilising the increase in global temperature. A stalemate persists in the negotiations, especially between the United States and the Basic group – Brazil, South Africa, India and China – on the one hand, and between the EU and the United States, on the other. The United States does not seem to be prepared to accept a binding obligation unless the Basic group accepts such obligations, while at the same time the Basic group continues to claim that the developed countries should make emission cuts based on historical responsibility. Against the complexities and all the odds, the EU is firmly committed to negotiating a comprehensive agreement with substantive emission cuts, within the UN framework, for the period from 1 January, 2013. In the light of the present stalemate, this policy analysis addresses the position of the EU in the climate treaty negotiations. Drawing insights from international law and relations, some lessons from past negotiations relating to climate and protection of the ozone layer are gleaned, and various options are mapped out, within and outside the UN framework, in order to suggest strategies for the future negotiations of a climate treaty. The EU has already demonstrated its “leading by doing” position against climate change by promoting and defending the Kyoto Protocol, and it could demonstrate more proactive leadership by establishing a comprehensive climate treaty.

## Introduction

This policy analysis focuses on the situation after COP 15-16 and COP/MOP 5-6.<sup>1</sup> The aim is to evaluate the role of the European Union (EU) in the COP 17 and COP/MOP 7 and to recommend policy guidelines in support of a new comprehensive climate treaty. The concurrent aim is to explore and suggest alternative options, within and outside the UN system, if the COP and COP/MOP should fail to take necessary decisions dealing with climate change. The policy recommendations, deduced from the analysis, are geared towards not only the COP 17

and COP/MOP 7 (in December 2011, in Durban, South Africa) but also the post-COP 17 context.

The EU has been actively involved in the climate negotiations since 1992 when the UNFCCC was established, which is a framework of legal principles determining responsibilities of developed and developing countries. The principles include common but differentiated responsibilities and respective capabilities, aiming at stabilising the climate and preventing “dangerous interference” with the climate

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<sup>1</sup> COP is the Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) and COP/MOP is the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol. Not all the parties of the UNFCCC are parties to the Kyoto Protocol.

system. These principles were partly implemented by the Kyoto Protocol<sup>2</sup>, according to which the industrialised countries committed themselves to reducing their overall emissions below the 1990 levels in the first commitment period (2008-12). An agreement on setting the targets of reductions of greenhouse gas emissions is essential in the post-2012 Kyoto Protocol era, as the IPCC suggests that stabilisation of global greenhouse gas concentration is necessary for the protection of the earth's ecosystem.<sup>3</sup>

Climate change and environmental protection have been acknowledged by the Lisbon Treaty. Article 191 in the Treaty of the Functioning of the European Union now declares that the Union shall promote measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.<sup>4</sup> In this analysis, however, these treaty changes will not be scrutinised. The focus is rather placed on the EU's commitment to conclude a climate treaty, with clear targets of substantive emission cuts.

The mapping of options for the negotiations and suggestion of strategic policy guidelines for the EU should be a central theme of the climate policy analysis. This policy analysis is grounded on the two latest rounds of COP and COP/MOP negotiations which have been authorised to take decisions, leading ultimately to a climate treaty either to replace or to enhance the Kyoto Protocol. The outcomes of the two rounds, known as the 2009 Copenhagen Climate Accord (COP 15)<sup>5</sup> and the 2010 Cancun Agreements (COP 16),<sup>6</sup> fell short of their goals,<sup>7</sup> despite the EU's standing commitment to a treaty.

The reason for choosing the EU's perspective on the climate negotiations is that, unlike other states or groups of states, the EU and its Member States at the COP 15-16 and COP/MOP 5-6 expressed their determination to conclude a climate treaty with binding reductions in greenhouse gas emissions.<sup>8</sup> Such a determination by the EU for a climate treaty negotiation has to be seen in its historical context. When the Kyoto Protocol was adopted, the EU 15 Member States agreed to allocate the emissions targets under a scheme known as "bubble" whereby they accepted different individual targets for each Member State in order to meet the overall target as a group.<sup>9</sup> It should be noted that the Kyoto Protocol's obligations were not adequately taken into account during the process of the EU's Eastern enlargement in 2004, despite the fact that the Kyoto Protocol and the Marrakesh Accord<sup>10</sup> were concluded years earlier. Nevertheless, the EU climate change legislation imposed binding emission reduction obligations for the Member States, including certain industries.<sup>11</sup>

The EU's determination to conclude a treaty may seem a difficult objective in the post-COP 16 and COP/MOP 6 context, but such an objective is considered an appropriate subject for a policy analysis of the difficulties of the negotiations and the options for achieving a treaty. In this policy analysis, the existing difficulties and available options of the negotiations are viewed in the light of the "law-making under multilateral environmental agreements".<sup>12</sup> Essentially, this means that if the EU is to achieve an agreement, within or outside the COP and COP/MOP, such an agreement must meet essential legal

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<sup>2</sup> [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php).

<sup>3</sup> The international community should take stringent measures to reach the goal of 1.5 degrees Celsius based on newer scientific information (<http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2>). Paragraph 2 of the Copenhagen Accord recognises the IPCC findings, as it reads "We agree that deep cuts in global emissions are required according to science, and as documented by the IPCC Fourth Assessment Report with a view to reduce global emissions so as to hold the increase in global temperature below 2 degrees Celsius, and take action to meet this objective consistent with science and on the basis of equity", <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf#page=3>.

<sup>4</sup> Lisbon Treaty was signed by the EU Member States on 13 December 2007 and entered into force on 1 December 2009.

<sup>5</sup> [http://unfccc.int/meetings/cop\\_15/copenhagen\\_accord/items/5262.php](http://unfccc.int/meetings/cop_15/copenhagen_accord/items/5262.php).

<sup>6</sup> <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2>.

<sup>7</sup> *Climate Pragmatism: Innovation, Resilience and No Regrets*, Hartwell Paper: A New Approach on Global Climate Policy, 2011: [http://thebreakthrough.org/blog/Climate\\_Pragmatism\\_web.pdf](http://thebreakthrough.org/blog/Climate_Pragmatism_web.pdf).

<sup>8</sup> [http://unfccc.int/files/meetings/application/pdf/europeanunioncphaccord\\_app1.pdf](http://unfccc.int/files/meetings/application/pdf/europeanunioncphaccord_app1.pdf).

The EU and its Member States "committed to an independent quantified economy wide emission reduction target of 20% by the year 2020, compared to 1990 levels", which 'could be increased to 30%':

[http://unfccc.int/meetings/cop\\_15/copenhagen\\_accord/items/5276.php](http://unfccc.int/meetings/cop_15/copenhagen_accord/items/5276.php).

<sup>9</sup> The target distributed among themselves is 8%: [http://unfccc.int/kyoto\\_protocol/items/3145.php](http://unfccc.int/kyoto_protocol/items/3145.php).

<sup>10</sup> The Marrakesh Accord, COP 7, 2002: <http://unfccc.int/resource/docs/cop7/13a01.pdf#page=54>.

<sup>11</sup> [http://www.europarl.europa.eu/climatechange/doc/EU\\_Legislation\\_on\\_climate\\_change.pdf](http://www.europarl.europa.eu/climatechange/doc/EU_Legislation_on_climate_change.pdf).

<sup>12</sup> Jutta Brunnée "COPing with Consent: Law-Making Under Multilateral Environmental Agreements", *Leiden Journal of International Law* 15, 2002, pp.1-52.

criteria in order to be considered a treaty. According to the Vienna Convention of the Law of Treaties (VCLT)<sup>13</sup>, the criteria of a treaty are the following:

- A binding instrument, which means that the contracting parties intend to create legal rights and duties;
- Concluded by states or international organisations with treaty-making power;
- Governed by international law; and
- The agreement is in writing (although in some cases oral agreements can be binding).

Analyses of the two recent climate negotiations, based on the above criteria of a treaty,<sup>14</sup> suggest that the Copenhagen Accord (COP 15) failed in part to meet the first criterion owing to the lack of binding obligations. Since the Copenhagen Accord is negotiated by states, it meets the second criterion. With regard to the third, the Accord is in a grey area, since the parties to the Accord downgraded the consensus process of the COP to “take note”. The Accord is in written form, and thus it meets the fourth criterion. As formal and consensus-based decisions of the COP 16 and COP/MOP 6, the Cancun Agreements provide some legitimacy to the agendas of the Accord. Such decisions are not legally binding, however. Currently, there is no legally binding successor or complementary agreement to the Kyoto Protocol.

In view of the aforementioned shortcomings of the COP and COP/MOP decisions and their negotiating process, it is relevant to assess certain issues, especially whether the EU is in a position to lead the negotiations and, if so, how the EU could influence the process and reach its objective of concluding a treaty. Given the complex nature of the COP and COP/MOP, crucial questions to be examined are:

- What are the options for the EU when concluding a comprehensive climate treaty, given the differences between the United States and the Basic group (Brazil, South Africa, India and China) on the one hand, and between the EU and the United States, on the other?
- Could and should the EU conclude separate but integrated agreements with various groups of states within the COP and COP/MOP, rather than opting for a single global climate treaty?

- If the COP and COP/MOP negotiations were to fail, could the EU benefit from its position in the UN system to press for the adoption of a legally binding climate resolution by the Security Council or the General Assembly?
- Outside the UN framework, are there any legal options for mitigating climate change under national or international laws and, if so, would the national legislations, private contracts and environmental contracts serve as alternatives to a treaty?

Drawing insights from international law and relations, this policy analysis focuses on the future negotiations, exploring viable strategies for concluding a climate treaty. Consisting of seven sections, the policy analysis is presented in the following order. First, lessons are drawn from past cooperation and negotiations between the Western European countries and the United States concerning the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol – to which India and China became parties along with other developing countries – also known as the most successful environmental treaty regimes. How these lessons can be of use in the present context of climate negotiations is described in section “Lessons”.

In the following sections, answers to the aforementioned questions are explored, and options for the EU and other likeminded parties willing to negotiate a climate treaty mapped out. The fact that different parties have presented voluntary national plans for emission cuts<sup>15</sup> provides a basis for further negotiations within the COP. Thus, in-depth negotiation on measurement, reporting and verification (MRV) is considered a useful option for the EU, enhancing these national plans by negotiating necessary emission limits, at least on a voluntary basis (section “Options for a treaty”). Given the difficulties of the consensus-based decision-making criterion under the COP and COP/MOP, the idea of separate but integrated agreements is introduced. The idea of such agreements is based on the UNFCCC principle of the respective capabilities of the parties. Such agreements ought to be concluded by a relatively smaller group of states, within and outside the COP and/or COP/MOP, which may help to ease the current deadlock in the negotiations. These agreements may serve as alternatives to a single treaty (section “One treaty or several”).

<sup>13</sup> VCLT ratified at Vienna on 23 May 1969; entered into force on 27 January 1980, *United Nations, Treaty Series* 1155: <http://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

<sup>14</sup> [http://www.clipore.se/download/18.4bb0052912fd16044aa80001336/The+Climate+Report+2011-Katak\\_Malla.pdf](http://www.clipore.se/download/18.4bb0052912fd16044aa80001336/The+Climate+Report+2011-Katak_Malla.pdf).

<sup>15</sup> [http://unfccc.int/meetings/cop\\_15/copenhagen\\_accord/items/5276.php](http://unfccc.int/meetings/cop_15/copenhagen_accord/items/5276.php).

In case the COP and COP/MOP negotiations fail, the possibility of a climate resolution under the UN system is explored and presented as yet another option, suggesting how the EU could benefit from its position in the UN to urge the adoption of a binding climate resolution (section “Pressuring the UN system”). If the UN system fails to pass such a resolution, the ultimate alternatives of a climate treaty are identified and suggested. These alternatives include national legislations (public law), contracts (private law) and environmental contracts, applying both public international law and private international law. These options could also serve as complementary to a new climate treaty, since actual implementation of such a treaty would require actions at national levels (section “Alternatives to a treaty”). Finally, some generic conclusions are drawn.

## Lessons

Negotiation of a new climate treaty in the existing situation seems an uphill battle for the EU, especially in view of the underlying differences between the United States and the Basic group, on the one hand, and between the EU and the United States, on the other. The EU’s aim is not impossible, however, when we review the negotiations of some environmental treaties, some of which are worth mentioning in the present context. What follows is a review of how the United States used its leadership mantle for the negotiations of some environmental treaties and finally lost its leadership in the climate negotiations. It will be demonstrated how the EU has emerged as a leading actor and how therefore the EU could lead the future climate negotiations and get others to follow.

Although the situation under the present COP negotiations is somewhat different from the negotiations for the protection of the earth’s ozone layer, past experience can be useful for the EU. It must be acknowledged that the cooperation between the United States and the

Western European countries has been instrumental in the negotiations of the Vienna Convention for the Protection of the Ozone Layer<sup>16</sup> and the Montreal Protocol on Substances that Deplete the Ozone Layer.<sup>17</sup> The Vienna Convention and the Montreal Protocol are intended to protect the earth’s ozone layer from emissions of destructive chemicals. The Montreal Protocol prohibits some of the greenhouse gases that contribute to global warming.<sup>18</sup>

The reason for looking at past experiences is that the situation with the current climate negotiations resembles the situation during negotiations of the Vienna Convention and Montreal Protocol. Just as with the current disagreement between various groups of states over setting limits for greenhouse gas reductions, the initial difficulties concerning the Montreal Protocol negotiations arose between two groups of states, Norway and Sweden, on the one side, and the UK and Germany, on the other, at the same time involving the developing countries. The two Scandinavian states were demanding a reduction of sulphur dioxide emissions, which was opposed by the latter states. The negotiation was eventually successful when the United States intervened between the two groups.<sup>19</sup> This led to the conclusion of the Montreal Protocol with binding obligations prohibiting the production and use of substances such as chlorofluorocarbons.<sup>20</sup> There were certainly other reasons for the success of the negotiations,<sup>21</sup> but cooperation between the United States and the Western European states helped in setting targets and establishing the obligations of the developed and developing countries concerning ozone-depleting substances.<sup>22</sup> It must be said, however, that the United States was constantly struggling with balancing international leadership on the issue and protecting its own domestic interests.

The balance that the United States was able to maintain in the 1980s seems to have been lost in recent times. In

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<sup>16</sup> Vienna Convention for the Protection of the Ozone Layer 1985: <http://www.unep.org/ozone/pdfs/viennaconvention2002.pdf>.

<sup>17</sup> Montreal Protocol on Substances that Deplete the Ozone Layer 1987: <http://www.unep.org/ozone/pdfs/montreal-protocol2000.pdf>.

<sup>18</sup> <http://www.guardian.co.uk/environment/cif-green/2009/sep/11/co2-other-cause-climate-change?INTCMP=SRCH>.

<sup>19</sup> Philip Sand suggests that “the United States stepped up global efforts to protect the environment, promoted a cautious approach, and played a major role in bringing China and India into the fold of the 1987 Montreal Protocol concerning ozone layer depletion”, see Philip Sand, *Lawless World*, (Chapter 4, “Global Warming: Throwing Precaution to the Wind”), Penguin, 2006.

<sup>20</sup> <http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf>.

<sup>21</sup> For example, the US chemical industries found substitutes for substances containing chlorofluorocarbons.

<sup>22</sup> Richard Elliot Benedick, *Ozone Diplomacy*, Harvard University Press, 1991; see also Benedick, “Diplomacy for the Environment”, *Environmental Diplomacy Conference Report*, AICGS, Johns Hopkins University, 1998: <http://www.aicgs.org/documents/environmentaldiplomacy.pdf>.

retrospect the United States suffered a loss of reputation and a critical turning point was its withdrawal from the Kyoto Protocol.<sup>23</sup> This is an example of how the United States failed to command respect in international circles by not taking up the leadership mantle. At around the same time, Russia ratified the Kyoto Protocol, thus making the treaty legally binding, and to a certain extent Russia gained some respect as a result, which served its interests in several ways. Russia's subsequent lack of compliance regarding emission cuts, however, offsets any gains it might have realised from the ratification of the Kyoto Protocol.<sup>24</sup>

Since the late 1990s the EU seems to have arrived at a position from which to lead the climate negotiations, being primarily the promoter as well as the defender of the Kyoto Protocol. The participation of the United States, at the COP 15-16, could be seen as an attempt to regain the leadership, but it remains to be seen how the future negotiations will develop and how the United States or the EU will lead the negotiations at COP 17 and afterwards. In any case, the United States and the EU need to work together in order for the climate negotiations to be successful. In recent times, the United States' (military) attention to climate change suggests a clear shift from its earlier position.<sup>25</sup> This is an opportunity for the EU as well as for the United States to use a new strategic narrative in order to enhance the process of international climate negotiations, arguing for global climate and environmental security. The EU could facilitate the climate negotiations based on the credibility capital from the Kyoto Protocol.<sup>26</sup> The following recommendations can be made for the EU in the light of past lessons:

- The EU should utilise its credible position in the COP and COP/MOP and take a lead in the climate negotiations as did the United States regarding the Vienna Convention and Montreal Protocol on the

ozone layer; and the EU should also initiate formal and informal interactions or discussions at various levels with the United States, the Basic group and other developing countries (discussed in section "Options for a treaty").

- Another lesson learned from the ozone layer treaty negotiations is that the proposed Climate Fund of the COP 15-16 (discussed in section "One treaty or several") can be developed and managed in a similar manner to the Ozone Fund established under the Montreal Protocol, involving and assisting developing countries as a compliance mechanism. The Ozone Fund was agreed at fair cost and a reasonable grace period for the developing countries. The negotiations should be focused on how the Basic countries could be guaranteed as beneficiaries of the Climate Fund, as well as the other developing and least developed countries. In a similar approach to the grace period under the Montreal Protocol, the Basic group could be offered a (greenhouse gas emissions) grace period in the short term, the other developing countries in the medium term, and the least developed countries in the long term.
- The 1991 Amendment of the Montreal Protocol concerning the parties' performance of their obligations is subject to the five-member Implementation Committee hearing the case with a view to securing compliance. Therefore, an important lesson from the Vienna Convention and the Montreal Protocol – and also from the Kyoto Protocol itself – is that emphasis should be given to compliance and implementation (or fulfilment of voluntary commitments) and not an abstract focus on the enforcement of binding obligations.<sup>27</sup>
- Last but not least, the MRV should be established and enhanced concerning the implementation of the binding obligations or voluntary undertakings (discussed in section "Options for a treaty"). It should

<sup>23</sup> "Until 1990s the United States was at the forefront of international efforts to promote global rules for environmental protection. No country took its international environmental obligations more seriously. What changed?", see Philip Sand, *Lawless World*, 2006, p.71.

<sup>24</sup> Russia is supposed to host the Joint Implementation projects, under the Kyoto Protocol. It is because of the complicated domestic legal process of getting approval in Russia, the country failed to attract the investors in such projects.

<sup>25</sup> A National Strategic Narrative issued under the pseudonym of "Mr. Y, written by two senior members of the United States Joint Chiefs of Staff in a personal capacity. The United States Army seems to have endorsed the scientific findings of the IPCC concerning climate change, see also John Norris, "The Y Article: The Pentagon's Secret Plan to Slash its Own Budget", *Foreign Policy*, Friday, 15 April 2011: [http://www.foreignpolicy.com/articles/2011/04/13/the\\_y\\_article](http://www.foreignpolicy.com/articles/2011/04/13/the_y_article).

<sup>26</sup> The United States and China (as a single largest investor in a number of African countries) may have been perceived by some as alternative leaders in the aftermath of the COP15-16, see, Christer Karlsson, Charles Parker, Matthias Hjerpe and Björn-Ola Linner, "Looking for Leaders: Perceptions of Climate Change Leadership among Climate Change Negotiations Participants", *Global Environmental Politics* 11, 2011, pp. 89-106.

<sup>27</sup> Any enforcement of obligations is a "consequence" but not a "pre-condition for a rule of law", Benito Muller, Wouter Geldhof and Tom Ruys, *Unilateral Declarations: The Missing Link in the Bali Action Plan*, *ECBI Policy Report*, 2010, p.17.

be noted that the uniform reporting requirement of the Montreal Protocol and scientific consensus led to the success of the Protocol. This means that those aspiring to strict emission cuts or voluntary emission reductions can show that they have fulfilled their commitments.

Despite the aforementioned lessons taken from the negotiations of the Vienna Convention and Montreal Protocol, some important caveats must be mentioned regarding the limitations of those lessons in the context of climate negotiations. The Vienna Convention and Montreal Protocol relate to negotiations about ozone-depleting substances. These are specific substances, whose causes and effects were recognised. Although all human activities have generalised effects on climate, none of them are connected by “clear and convincing evidence”, and, where there is evidence, the negotiations between states have been very complicated. Some of the issues related to climate change, however, such as aerosols (discussed in section “One treaty or several”), could be negotiated in the light of the Vienna Convention and Montreal Protocol. The negotiations of the Kyoto Protocol itself give an added value to the past lessons for the present climate negotiations. In some ways, these experiences have already been used by the EU in the COP and COP/MOP negotiations.

### Options for a treaty

*What are the options for the EU when concluding a comprehensive climate treaty, given the differences between the United States and the Basic group – Brazil, South Africa, India and China – on the one hand, and between the EU and the United States, on the other?*

Some options for the negotiations of a climate treaty are mapped below vis-à-vis the EU’s commitment and its position in the COP and COP/MOP, whereby the opposing views, interests and positions of other states in the negotiations are taken into account. The need to recognise the changing international relation of states (or a changing international reality) is argued, since it will reveal new options for future negotiations. Mutual understanding by the parties concerning voluntary commitments and binding obligations is a necessity,

however. As a compromise between the adverse positions of states concerning emission cuts, a detailed negotiation on the MRV is suggested at the end of this section.

The EU has made a clear-cut commitment to conclude a comprehensive climate agreement in the COP and COP/MOP. According to their letter of submission to the UNFCCC Secretariat concerning the COP 15 decision, the EU and its Member States are “committed to continue negotiating with the other Parties with a view to concluding as soon as possible within the UN framework a legally binding international agreement for the period starting 1 January 2013”.<sup>28</sup> Conversely, the United States, in its letter of submission to the UNFCCC Secretariat, and also in a press release concerning the COP 16 decisions, has expressed its intention to implement the COP’s decisions on a voluntary basis.<sup>29</sup> This suggests that the United States is not ready for a new climate treaty.

The Basic group and the United States are opposing the binding obligations of emission cuts, but for different reasons. The United States is not prepared for such obligations unless the Basic group is. There Basic countries come together for the first time in COP 15, as a loose group, acting together only when it gives bargaining strengths in the negotiations. This is not one “negotiating group” like the EU, or the G77. However, there are some reasons to consider the Basic countries as one group, as they have issued a couple of joint statements for some common issues of the negotiations. The earlier stance, that the developed countries should make emission cuts based on historical responsibility, remains, and the Basic group’s individual letters to the UNFCCC Secretariat demonstrate their aim of voluntary mitigation actions, e.g. intention to be carbon-efficient and less carbon emission per unit of GDP.<sup>30</sup> Their ability to scale down their emissions remains to be seen, however, since the quantity of their greenhouse gas emissions is increasing on an alarming scale. There are other developing countries, the least developed countries and small island countries whose level of greenhouse gas emission is relatively lower than that of the others. The impact of climate change is predicted to be more severe for these countries than their developed counterparts. At the same time, the least developed and the small island

<sup>28</sup> EU statement of submission to the UNFCCC Secretariat concerning COP 15 decision: [http://unfccc.int/meetings/cop\\_15/copenhagen\\_accord/items/5276.php](http://unfccc.int/meetings/cop_15/copenhagen_accord/items/5276.php).

<sup>29</sup> Press Statement, Hillary Rodham Clinton, Secretary of State, Washington DC, December 11, 2010.

<sup>30</sup> Joint Statement by BASIC Group (Brazil, South Africa, India and China), January 24, 2010: <http://www.chinafaqs.org/library/joint-statement-basic-group-brazil-south-africa-india-and-china-january-24-2010>.

countries have very little or no influence in determining the outcome of the COP negotiations. These group of states could determine the outcome if the UN General Assembly were to introduce a binding climate resolution (discussed in section “Pressuring the UN system”).

One of the reasons for the current deadlock of the negotiations is that the quantity of emissions varies not only according to the industrial and non-industrial condition of states, but also to the developed countries themselves, the United States and the EU. The United States produces 29 tons of carbon dioxide emissions per person compared with 3.1 tons in China and 1.8 tons in India.<sup>31</sup> Given this situation, the United States is unlikely to negotiate a comprehensive treaty because of its domestic politics. The Basic group members do not seem to be willing to take on their obligations unless the United States does so. In reality, the Basic group and the United States are either makers or breakers of a new climate treaty. Given such a reality, and the increasing need for a comprehensive climate treaty, the EU is certainly on the right side of the negotiations. The EU’s position is also backed by scientific facts and the knowledge of the IPCC,<sup>32</sup> as well as by the moral high ground of the UNFCCC’s recognition of “climate change and its adverse effects as a common concern of humankind”.<sup>33</sup> A noteworthy strength of the EU is that there is a common voice among the EU Member States, especially in the aspiration towards a legally binding climate treaty. As a single unit, the EU seems to be meeting the obligations of emission reduction targets under the Kyoto Protocol.<sup>34</sup>

The EU could succeed in fulfilling its commitment to a climate treaty, but it requires an acknowledgement of and strategies for the changing position of states in the COP and COP/MOP. The current positions of states (or groups of states) in the COP differ in comparison with their initial positions in 1992 when the UNFCCC was negotiated. The initial negotiations were based on conditions whether countries are developed or developing, which in turn depends on the nature of their industrial base, i.e. the North-South divide. The classification of individual

countries is largely valid. However, in recent years there has been another divergence between countries in the Basic group and the other developing countries as well as the least developed countries. The Basic group countries are not regarded as industrial countries, even though their emissions are increasing rapidly and they are industrialised compared with the least developed countries. Amongst the small island countries, there are qualitative and quantitative differences in needs and the degree of exposure to threats from climate change, although all small island countries are generally considered more vulnerable to climate change than others. Arguably, these groupings of states have altered – but not supplanted – the traditional North-South agenda on climate change, and this may provide an alternative ground for the climate negotiations. Since the EU is increasingly becoming a “Global Actor in the South”,<sup>35</sup> it must recognise the changing international relations, or emerging groups of states, and set strategies to ease the deadlocked negotiations, for which the EU:

- Needs to explore the possibilities of alternative agreements to a single climate treaty, dealing with relevant issues independently but in an integrated manner.
- Should use its leverage and credibility capital to initiate serious discussions, formal and informal, and at all necessary levels, separately with the United States and the Basic group, other developing countries and least developed countries.

Essentially, the EU needs to set strategies for bridging the gap between binding obligations and voluntary emission cuts. This is crucial, since the central issue of the negotiations is how to stabilise the increase in global temperatures at a maximum level of 2 degrees Celsius, if not 1.5 degrees, with or without binding obligations. Therefore, there is need for a compromise between states who are advocating sanction-based emission cuts and those who are willing to adopt self-enforcing mechanisms of voluntary undertakings.

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<sup>31</sup> Richard Wilkinson and Kate Pickett, *The Spirit Level. Why Equality is Better for Everyone*, Penguin Books, 2009, p. 222. See also <http://www.carbonfootprintofnations.com/content/ranking/>.

<sup>32</sup> Paragraph 2 of the Copenhagen Accord recognises the IPCC findings, and reads “We agree that deep cuts in global emissions are required according to science, and as documented by the IPCC Fourth Assessment Report with a view to reduce global emissions so as to hold the increase in global temperature below 2 degrees Celsius, and take action to meet this objective consistent with science and on the basis of equity”.

<sup>33</sup> Preamble of the UNFCCC; UNDocDistr GA/AC.237/18 (Part II) Add.1, 15, 15 May, 1992.

<sup>34</sup> [http://ec.europa.eu/clima/policies/brief/eu/index\\_en.htm](http://ec.europa.eu/clima/policies/brief/eu/index_en.htm).

<sup>35</sup> Björn Hettne, Fredrick Söderbaum and Patrik Stålgren, *The EU as a Global Actor in the South*, SIEPS 2008:8.

From the point of view of those who are in favour of binding obligations – and the EU is one of them – it is necessary to realise that in environmental treaties it is futile to try to force a party into compliance with binding obligations, because sanctions are rarely used and are likely to be ineffective when they are used.<sup>36</sup> The use of sanctions under the UN has proved costly for both the sanctioning and sanctioned states, and it more often raises questions of legitimacy. The Kyoto Protocol’s compliance mechanisms is fairly far-reaching as far as treaties could ensure<sup>37</sup>, the Compliance Committee has suspended trade on a number of instances when countries have not had their registers in order. Still, the issue of “legally binding” consequences of non-compliance is not yet resolved.<sup>38</sup>

From the point of view of those who insist on voluntary obligations – especially the United States and the Basic group – alternatives to binding obligations (or self-enforcing mechanisms) must be offered. So, how can one guarantee transparency in fulfilling the voluntary emission cuts in the absence of binding obligations? Thus, as a compromise between sanction-based emission cuts and self-enforcing mechanisms, the EU should consider:

- In-depth negotiations on the MRV vis-à-vis the voluntary undertakings (or national plans) offered by states concerning reduction in greenhouse gas emissions.
- Enhance coordination and exchange information between the existing institutions that are directly or indirectly related to climate management.<sup>39</sup>
- Empower NGOs so that they can pursue global climate as public interest,<sup>40</sup> including climate litigation, which could be one alternative option for combating climate change.

These recommendations are made along the lines of the UNFCCC, under which the Parties are obliged,

to formulate, implement, publish and regularly update national, and where appropriate, regional programmes, containing measures to mitigate climate change by addressing anthropogenic emissions by sources and the removal by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adoption to climate change.<sup>41</sup>

### One treaty or several

*Could and should the EU conclude separate but integrated agreements with various groups of states within the COP and COP/MOP, rather than opting for a single global climate treaty?*

The COP and COP/MOP are the two tracks of negotiations, with ongoing negotiations on areas such as adaptation, mitigation, technology development and transfer, capacity building and financing. Reaching decisions with consensus among all COP and COP/MOP have been difficult, and therefore experts have suggested a change in the decision-making with the use of majority voting.<sup>42</sup> A change in the decision-making process seems unlikely, since it would require consensus. It is, however, possible that a consensus within a small group of states — or a “coalition of the willing”— may be a simpler alternative to resolve the deadlock of the COP negotiations. Thus, it is not inconceivable that the EU would consider negotiating separate but integrated climate agreements with the United States,<sup>43</sup> the Basic group and other countries on a bilateral or multilateral basis.

<sup>36</sup> Abram Chayes and Antonia Handler Chayes, *The New Sovereignty*, Harvard University Press, 1995, p.187.

<sup>37</sup> Article 18 of the Kyoto Protocol refers to compliance mechanisms.

<sup>38</sup> [http://www.ciel.org/Climate/bonn\\_cm\\_summary.html](http://www.ciel.org/Climate/bonn_cm_summary.html). When a party to the Kyoto Protocol is not in compliance with its obligations by the end of the first commitment period (2012), the Enforcement Branch may determine that the party must reduce its emissions in the second commitment period with an additional 30 per cent emission cuts (as penalty). The ability of the party to sell credits under emissions trading could be suspended if the party fails to make the additional cuts. Although it has not happened, there is a possibility that such a non-compliant party could withdraw from the Kyoto Protocol to avoid the consequences of breaches of obligations.

<sup>39</sup> For example, the World Meteorological Organization (WMO), the Food and Agriculture Organization (FAO), the International Maritime Organization (IMO), the International Seabed Authority (ISA), the International Civil Aviation Organizations (ICAO), the existing international river basins, and the Commission on Sustainable Development and others.

<sup>40</sup> The Federal Court of Canada in the *Friends of the Earth vs. The Gov't of Canada case* held that Friends of the Earth met the requirements for representing the public interest: [http://www.mcmillan.ca/Files/KyotoCompliance\\_1108.pdf](http://www.mcmillan.ca/Files/KyotoCompliance_1108.pdf), and see also <http://ecosanity.org/blogsanity/friends-earth-vs-govt-canada>; Steinar Andersen and Lars H. Gulbrandsen, “The Role of Green NGOs in Promoting Climate Compliance”: <http://www.fni.no/doc&pdf/rapp0403.pdf>.

<sup>41</sup> Article 4 of the UNFCCC.

<sup>42</sup> Meinhard Doelle, “The Legacy of the Climate Talk in Copenhagen: Hopenhagen or Brokenhagen”, *Carbon and Climate Law Review* 1, 2010, pp.86-100.

<sup>43</sup> For example, the green technology innovation, development and transfer-related agreement could be negotiated with the United States. In 2011, the United States Department of Energy (DOE) has, through North West Energy Innovations based in Oregon, invested US\$2m in a wave energy project using technology developed by IRL in New Zealand: <http://www.irl.cri.nz/newsroom/media-release/us-government-invests-new-zealand-green-energy-technology>.

Some of the issues relating to the climate change could be subject to negotiations at foreign ministry levels, outside the COP and COP/MOP. Others may take place within the World Trade Organization (WTO) and still others may be negotiated by G20. The list of such separate but integrated negotiations maybe long but some specifics to be (briefly) addressed are:

- Climate finance
- Green energy pacts
- Aerosols agreement
- Public and private partnership for forest management
- WTO and agricultural negotiations.

### Climate finance

The Green Climate Fund, proposed under the COP 15 and 16, aims to make an investment of \$100 billion a year in aid from developed to developing countries, starting in 2020.<sup>44</sup> This can be understood as a form of “climate finance”. It is known, however, that “the best way to protect the global economy in the long term is to act swiftly to reduce emissions in the near term”.<sup>45</sup> The proposed Fund is a form of economic assistance to the developing countries for mitigation of and adoption to climate change. Although the details of the implementation of the Fund remain to be developed, the experience of the Ozone Fund, helping the parties to fulfil their obligatory emission cuts, is worth repeating. The EU could utilise its position in the G20 for the “mobilisation of sources of financing, including public and private, bilateral and multilateral, as well as innovative sources”.<sup>46</sup>

### Green energy pacts

The increasing use of carbon energy has become unsustainable, as it is causing climate change, and also leading to armed conflict in some situations. The Organization of Petroleum Exporting Countries (OPEC) was established to coordinate petroleum policies and to provide technical as well as economic aid to its member states. The OPEC essentially deals with carbon-based energy. Therefore, the EU should consider viable alternatives, and one of them is the creation of “green energy pacts”, adopting and implementing a new policy by linking energy with climate.<sup>47</sup> The IPCC Special Report suggests that there is no lack of renewable resources, but the difficulties come from the public policies of states.<sup>48</sup> Based on the European Commission’s “climate and energy package”, a model of the green energy pact can be developed for different regions of the world.<sup>49</sup>

### Aerosols agreement

The emission of aerosols, or particles dispersed in gas and smoke as well as fog, can have impacts upon local air, clouds and atmosphere.<sup>50</sup> Aerosols are either emitted as particles in the atmosphere (primary aerosols), or formed as secondary products of atmospheric reactions (secondary aerosols). A separate agreement on these specific emissions could be negotiated on the basis of the negotiations of the Vienna Convention and the Montreal Protocol.<sup>51</sup> An agreement on aerosol labelling was reached within the UN Sub-Committee of Experts on Globally Harmonized System of Classification and Labelling of Chemicals (December 2010).<sup>52</sup> Within the EU, there are

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<sup>44</sup> The Cancun Agreements-based guidance for the Green Climate Fund includes principles for prioritising and governing this aid, emphasising both mitigation and adaptation. The Fund is to be administered by the World Bank for a three-year probationary period with the long-term manager to be agreed upon thereafter. Details are awaited on how the Fund can be used as a functioning funding institution. The Transitional Committee will make detailed recommendations for COP approval in Durban in 2011.

<sup>45</sup> <http://www.guardian.co.uk/environment/2011/feb/16/economic-impact-climate-change>.

<sup>46</sup> The G20 Communiqué, February 2011, in its paragraph 8 recognised the report made by the UN High-Level Advisory Group on Climate Change Financing, and welcomed the decision at the Cancun Climate Conference, establishing the Green Climate Fund, Communiqué-Paris, February 18-19, 2011 (PDF 189KB): [http://www.g20.org/Documents2011/02/COMMUNIQUE-G20\\_MGM%2018-19\\_February\\_2011.pdf](http://www.g20.org/Documents2011/02/COMMUNIQUE-G20_MGM%2018-19_February_2011.pdf).

<sup>47</sup> [http://www.demosservices.home.pl/www/files/PP\\_wrzesien\\_2011\\_PSwieboda.pdf](http://www.demosservices.home.pl/www/files/PP_wrzesien_2011_PSwieboda.pdf).

<sup>48</sup> *IPCC Special Report on Renewable Energy Sources and Climate Change Mitigation*, the report suggests that 80% of the world’s energy supply could be available from renewable sources including biogas, wind and solar power. The technologies needed to use renewal energy sources are still more expensive than fossil fuels, according to the report, but at the same time it emphasises that renewables will play a greater role than either nuclear power or CCS by 2050: [http://www.ipcc.ch/news\\_and\\_events/docs/ipcc33/SRREN\\_FD\\_SPM\\_final.pdf](http://www.ipcc.ch/news_and_events/docs/ipcc33/SRREN_FD_SPM_final.pdf).

<sup>49</sup> The “climate and energy package” was agreed by the European Parliament and Council in December 2008 and became law in June 2009: [http://ec.europa.eu/clima/policies/package/index\\_en.htm](http://ec.europa.eu/clima/policies/package/index_en.htm).

<sup>50</sup> <http://www.eoearth.org/article/Aerosols>.

<sup>51</sup> This requires regulations of emissions from nitrous oxide (N<sub>2</sub>O from the production of nitric acid, atopic acid, glyoxal and glyoxylic acid), emissions and tone-per-kilometre data from aviation activities and emissions from capturing, transport and geological storage of CO<sub>2</sub>.

<sup>52</sup> [http://www.gisac.it/file/166\\_20032009\\_UN-SCEGHS-16-inf22e.pdf](http://www.gisac.it/file/166_20032009_UN-SCEGHS-16-inf22e.pdf).

regulations, directives and decision on classification, aerosol labelling and packaging of substances.<sup>53</sup> There is a need for harmonisation between various types of regulations on aerosol substances in a global context, in order to manage aerosol industry worldwide and inform consumers individually. The European aerosol products will need to be re-labelled when such a harmonised agreement is reached.

### Public-private partnerships for forest management

Based on the respective capabilities of the parties, a separate but integrated climate treaty is necessary concerning forestry, water resource management and sustainable urban planning. The formation of public-private partnership mechanisms for the REDD and REDD-plus<sup>54</sup> is particularly necessary under the Green Climate Fund, which aims to assist the developing countries in meeting the costs of adapting to climate change and pursuing low carbon growth. Experts have suggested that private investment could be attracted, depending on the project.<sup>55</sup> The EU should therefore consider such projects as a matter of separate agreement with the developing countries.

### WTO and agricultural negotiations

A satisfactory agricultural agreement for all parties is difficult but necessary, not only for the livelihood of farmers in developing countries but also for combating climate change. The EU may be firmly committed to ensuring a balanced outcome for all parties to agricultural agreements under the WTO but safeguarding the interests of European producers and consumers, on the one hand, and assisting the developing countries in combating climate change, on the other, is a difficult balancing act.<sup>56</sup> Thus, the EU should consider concluding separate agricultural agreements with the Basic group, other developing, and least developed countries. This option is based on the UNFCCC principle of the respective capabilities of the parties.

### Pressuring the UN system

*If the COP and COP/MOP negotiations were to fail, could the EU benefit from its position in the UN system to press for the adoption of a legally binding climate resolution by the Security Council or the General Assembly?*

Any option relating to this question has to be considered in terms of the formal relationship between the EU and the UN. According to the *GA resolution on the participation of the European Union in the work of the United Nations* (adopted on 3 May, 2011), the EU has the right to represent and speak at the UN on behalf of its Member States. Although the right is largely symbolic, it allows the EU to address UN meetings through its own officials, but does not give the EU voting rights at the UN.<sup>57</sup> The EU also has a right to submit proposals to the UN, including the Security Council and the General Assembly.

Although it has not been widely acknowledged yet, the EU could benefit from its position in the UN system by proposing a climate resolution, first in the Security Council, and subsequently, if and when required, in the UN General Assembly. France and the UK, who are both permanent members of the UN Security Council, seem to be more favourably inclined towards a climate treaty than other permanent members, and thus could provide the necessary support for such a resolution. The Security Council is the only organ of the UN which is empowered to adopt binding resolutions, and the decisions of the Security Council are made by an affirmative vote of nine members of the Security Council including the concurring votes of the five permanent members.<sup>58</sup> Under such a voting system, a climate resolution by the UN Security Council may seem difficult, but it is not impossible. It is noteworthy that the stances of the five permanent members of the Security Council have evolved considerably towards a consensus on the climate change issue, as they associate themselves with the COP 15 and 16 decisions. The converging positions of these states suggest that

<sup>53</sup> Hazardous Waste Directive, (HWD, Council Directive 91/689/EC); Revised European Waste Catalogue, 2002 (EWC 2002) Commission Decision 2000/532/EC; European Regulation 1272/2008, on classification, labelling and packaging of substances and mixtures (CLP Regulation) 16 December, 2008.

<sup>54</sup> The COP 16 has also established a process to review land use and forestry management. This will require appropriate national legislations for Reducing Emission from Deforestation and Forest Degradation (REDD) and REDD-plus, which include conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.

<sup>55</sup> Richard Anderson: <http://www.bbc.co.uk/news/business-13348919>.

<sup>56</sup> Mark Brady, Sören Höjgård, Eva Kaspersson and Ewa Rabinowicz, *The CAP and Future Challenges*, European Policy Analysis, SIEPS 11, 2009.

<sup>57</sup> <http://www.un.org/News/Press/docs//2011/ga11079.doc.htm>.

<sup>58</sup> If one of the permanent members of the Security Council (i.e. China, France, the Russian Federation, and the United Kingdom of Great Britain and Northern Ireland, the United States of America) casts a negative vote, the draft resolution being voted on is not passed. Security Council resolutions are customarily adopted by a recorded vote, i.e. a vote which clearly identifies the stand that a Council member took on the issue under discussion.

there is a chance for the EU to make use of its position in the UN system. Moreover, states that are aspiring to permanent membership have also become more active in the COP process, such as Brazil, South Africa and India. Although the Basic group does not represent the whole of the developing world, the emerging position of the group on the world stage (particularly Brazil and India) opens up a new possibility for the EU in the UN system. As a permanent member of the UN Security Council, as well as one of the Basic group countries, China has emerged as an important world power, somewhat parallel to the United States; and the EU could use this power equation in the UN in order to fulfil its commitment to a climate treaty and adopt a climate resolution.

Indeed, the UN Security Council held its first ever debate, on 20 July, 2011, about the impact of climate change.<sup>59</sup> This was in response to an initiative by the German representative to the UN, Peter Wittig, who also presided at the meeting. The Acting Head of the Delegation of the EU to the UN also took part in the discussion, expressing a common view in favour of the initiative and the need for further actions against climate change. Some of the UN members disagreed with the initiative, stating that a climate debate in the Security Council is an encroachment on the UNFCCC process, and supersedes the right to discuss such issues at the General Assembly, the Economic and Social Council and the United Nations Environment Programme.<sup>60</sup> China's representative pointed out that the Security Council lacks "means and resources to address climate change". In the view of the Russian representative, the climate change issue is within the scope of the UNFCCC and it "was not right" for the Security Council to consider the issue. The United States recognised, however, that "the Council needs to be prepared for the full range of crises that may be deepened

or widened by climate change". Most delegates supported the Council's focus on climate change, recognising it as the "greatest security threat of our time".<sup>61</sup>

The debate as a whole suggests that there are options for a climate resolution within the UN framework. If the UN Security Council fails to pass such a resolution, the EU could submit a resolution in the UN General Assembly, which is arguably the more representative body in the UN, to establish the legitimacy of a climate resolution. This can be done by using the same procedures of the *UNGA Resolution 377 (V) Uniting for Peace*.<sup>62</sup> In the UN General Assembly, the EU would be required to use its political, diplomatic and legal capabilities in order to help adopt the resolutions with an absolute majority, highlighting interdependence and collective actions.

Despite the lack of its representative credential in the current political world, the UN Security Council is the only global body that can pass binding resolutions. Legally binding obligations establish certainty, and set the predictability and measurability of state actions, or non-actions, concerning the issue at stake.<sup>63</sup> A binding climate resolution backed by the UN Security Council could be crucial, because judicial decisions and treaty-based obligations are applicable to the parties involved in legal cases or the parties to a given treaty, and seldom apply to non-parties or third parties. A binding resolution could be a basis for the obligation of the entire international community to mitigate climate change in line with the UNFCCC principles. Above all, such a resolution may open the doors to judicial remedy against climate harm (including restitution, compensation and satisfaction), as well as establishing a nexus between litigations and climate negotiations, and eventually the burden of litigation in its turn could result in climate treaty negotiations.

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<sup>59</sup> <http://www.un.org/News/Press/docs/2011/sc10332.doc.htm>.

<sup>60</sup> One of them, for example, is Venezuela.

<sup>61</sup> [http://www.peacewomen.org/security\\_council\\_monitor/debate-watch/all-debates/34/open-debate-on-implications-of-climate-change-on-international-peace-and-security](http://www.peacewomen.org/security_council_monitor/debate-watch/all-debates/34/open-debate-on-implications-of-climate-change-on-international-peace-and-security).

<sup>62</sup> UNGA Resolution 377 (V) Uniting For Peace Resolution, 1950: "Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefore. Such emergency special session shall be called if requested by the Security Council on the vote of any seven members, or by a majority of the Members of the United Nations".

<sup>63</sup> Geir Ulfstein ed., in collaboration with Thilo Marauhn and Andreas Zimmermann, *Making Treaties Work, Human Rights, Environment and Arms Control*, Cambridge University Press, 2007.

## Alternatives to a treaty

*Outside the UN framework, are there any legal options for mitigating climate change under national or international laws, and, if so, would the national legislations, private contracts and environmental contracts serve as alternatives to a treaty?*

Options for mitigating climate change need to be considered under national as well as international law. This consideration is important, since some of the obligations to mitigate climate change fall within the purview of national (public law or legislation) law, and others fall within the framework of private (contract) law. Within the United States some of the federal states have been regulating carbon emissions along the lines of the Kyoto Protocol,<sup>64</sup> while at the same time the United States federal government continues to oppose the Kyoto Protocol. This situation points to the need for an alternative model which could involve sub-state entities, with private enterprises that are engaged in the carbon energy sector participating as alternative parties. The EU's Emissions Trading System (ETS) is already a functioning alternative outside the UN framework. Some emerging alternative options to be considered are:

- National legislations
- Private contracts
- A mixed model of public and private international law, also known as environmental contracts

### National legislations

National legislations by states could serve as alternatives to a global climate treaty.<sup>65</sup> Environmental legislations are increasingly being used in Sweden, as well as in other EU countries. This could be a model for other states to

follow.<sup>66</sup> The UK's coalition government has agreed a legally binding "green deal", committing to two decades of drastic cuts up to 2027, targeting emission cuts of 80 per cent by 2050 compared with the 1990 levels. Stimulating new industries and green technologies, the green deal also aims at securing 40 per cent energy from wind, wave and tide sources by 2030. All three technologies, if developed in Britain, could be major currency earners.<sup>67</sup> The Australian government has introduced a system of carbon pricing and tax on carbon, aiming to introduce an emissions-trading scheme as early as 2015.<sup>68</sup> Australia's recent plan to tax carbon emission by polluters is another model. Various legislations were introduced in the US Congress in early 2011 to address greenhouse gas emissions,<sup>69</sup> but it remains to be seen whether or not the legislations will become law.

Carbon emission rations and taxation on carbon emissions using "per-capita-based emission cuts", correlated to individuals' income earned above the poverty line, is yet another option.<sup>70</sup> Based on the "polluter pays" principle, a carbon tax may be imposed on fuel and transport that generate emissions. Such a tax would apply to individuals who live above the poverty threshold. The per capita-based emission cuts would have to be seen in the context of people in different circumstances and living conditions as well as in the context of their counterparts in richer or poorer parts of the world. Those individuals who live below the poverty line are supposed to be excluded entirely from liability,<sup>71</sup> irrespective of the industrial or non-industrial status of the state where they live. It is relevant that the egalitarian policy advocates have proposed a "system of individual carbon rations" with a "carbon bank",<sup>72</sup> under which the "total permissible level of emissions can be divided, by the population, to give an

<sup>64</sup> Some of the States regulating carbon emissions are: Arizona, California, Connecticut, Maine, Maryland, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington.

<sup>65</sup> The Preamble of the UNFCCC recognises that States should enact effective environmental legislations.

<sup>66</sup> China to cap energy use in national low-carbon plan, <http://www.guardian.co.uk/environment/2011/aug/04/china-cap-energy-plan>.

<sup>67</sup> <http://www.guardian.co.uk/environment/2011/may/14/historic-climate-change-deal-agreed-chris-huhne>.

<sup>68</sup> Reuters, [guardian.co.uk](http://www.guardian.co.uk), Sunday 10 July, 2011, 13.09 BST, <http://www.guardian.co.uk/environment/2011/jul/10/australia-unveils-carbon-tax-emissions-trading?INTCMP=SRCH>.

<sup>69</sup> <http://energy.nationaljournal.com/2011/02/what-should-congress-do-with-e.php>.

<sup>70</sup> For example, India's plan submitted to the UNFCCC for reducing emission intensity is based on its gross domestic product (GDP) of 20 to 25 per cent by 2020 in comparison with the 2005 levels. China has promised the UNFCCC to lower carbon dioxide emissions per unit of GDP by 40 to 45 per cent by 2020 compared with the 2005 levels.

<sup>71</sup> It is often asked how a developing country such as India, with 1.8 tons of carbon emission per capita annually, can be expected to have binding obligations to cut carbon emission in comparison with an industrially advanced country such as the United States, producing 29 tons per person, and China, which produces 3.1 tons.

<sup>72</sup> Under the "tradable carbon quota" system, high consumers would be compensating low consumers, and income would be redistributed from rich to poor. In 2006 the then Minister for the Environment in Britain, David Miliband, proposed such a system and a small-scale trial was begun in Manchester in 2007. To safeguard the poor it may be necessary to prevent people selling unused parts of their ration until the end of the period it covers, so only allowances already saved could be traded, see Richard Wilkinson and Kate Pickett, *The Spirit Level, Why Equality is Better for Everyone*, Penguin Books, 2009, p. 222.

equal share, or quota, of allowable emissions per head”.<sup>73</sup> This egalitarian policy suggests subsidising necessities, progressively taxing luxuries and using electronic cards to cover payment for fuel, power and air travel.<sup>74</sup> The implementation of a carbon rations system may help to determine more accurately the sources of pollution, given that there are states with varying amounts of greenhouse gas emissions and per capita income.<sup>75</sup>

Applying carbon rationing and taxation sector-wise, e.g. the chemical, energy and waste sectors, we can expect that companies will take action to substitute for or eliminate chemicals depending on the likelihood that a particular chemical is causing environmental harm. A combined system of carbon rationing and per capita-based emission cuts may also help to overcome the differences between rich and poor countries with regard to poverty alleviation as a Millennium Development Goal (MDG). The use of per capita-based emission cuts, however, will affect the current EU law that has already been implemented in the emission trading mechanism under the global “emission cap” system. Those aspects which are likely to be affected need to be taken into account in these negotiations.<sup>76</sup>

### Private contracts

Private contracts based on national law that establish corporate responsibility could serve as another option for a climate agreement; for example, dealing with carbon footprints of the countries producing goods and the countries consuming them. The carbon footprints issue has not yet been addressed by the WTO rules, but according to the Kyoto Protocol carbon footprints are calculated for the countries producing goods, but not those consuming them. Once the carbon cost of imports is added to each importing country, especially the developed ones, their carbon emissions increase, although countries may claim to reduce their emissions in terms of their

domestic manufacturing and energy consumption.<sup>77</sup> In addition to carbon footprints, carbon capture and storage (CCS)<sup>78</sup> could be arranged through mutual contracts, whereby companies from the developed countries and the Basic group could work together, since the EU is to set up a network of CCS demonstration plants by 2015 to test their viability by around 2020.

As the EU has been playing a leading role in the emission cuts under the Kyoto Protocol, the EU Members are expected to create conditions for these contracts to take place and function.<sup>79</sup> Emission trading under the Kyoto Protocol is a market-based mechanism, which is also “placed in civil law context”.<sup>80</sup> The implementation of private contracts between companies, at the national level, “can result in liabilities of either a civil or criminal nature or in certain instances both, under common law or under statute”.<sup>81</sup> This kind of contract would establish a bottom-up mechanism, as described in the following:

Decentralized, municipal and local-level initiatives involving businesses, public authorities and civil society have accepted the responsibilities arising from the need for compliance with the 2°C guard rail and are translating them into action via numerous formal and informal initiatives. The resulting climate coalitions and functioning municipal, scientific, educational, and technological and business partnerships must be supported, networked and expanded.<sup>82</sup>

### Environmental contracts

There is a growing realisation that environmental contracts, establishing the responsibilities of citizens, businesses and states, can be used to address environmental impacts. The environmental protection-related contractual obligations could be used as an alternative to binding international climate regulations. The environmental contract could also be used to simplify the existing international legal

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> With per capita unit as a measure, states would be expected to negotiate a binding treaty based on common but differentiated responsibility; see also C Ordás Criado and JM Grether, Convergence in per capita CO<sub>2</sub> emissions: a robust distributional approach, *CEPE Working Paper* 70, 2010.

<sup>76</sup> [http://www.clipore.se/download/18.4bb0052912fd16044aa80001336/The+Climate+Report+2011-Katak\\_Malla.pdf](http://www.clipore.se/download/18.4bb0052912fd16044aa80001336/The+Climate+Report+2011-Katak_Malla.pdf).

<sup>77</sup> Duncan Clark, “China’s increasing carbon emissions blamed on manufacturing for West, New research shows extent of ‘offshore’ emissions as Chinese manufacturing for US accounts for 6% of total”: <http://www.guardian.co.uk/environment/2009/feb/23/china-carbon-emissions>.

<sup>78</sup> David Langlet, “Safe Return to the Underground?—The Role of International Law in Subsurface Storage of Carbon Dioxide”, *Review of European Community and International Environmental Law*, 18:3, 2009, pp. 286-303.

<sup>79</sup> For example, *Energy-intensive companies should be exempt from carbon floor price*: <http://www.guardian.co.uk/environment/2011/aug/05/cbi-carbon-floor-price>.

<sup>80</sup> Christina Olsen-Lundh, *Att ransonera utsläppsutrymme: En miljörettslig studie om utsläppshandel enligt Kyotoprotokollet och EU ETS*, Iustus förlag, Publications of the Department of Law, 2010.

<sup>81</sup> “Climate Policy Post-Copenhagen at Three Level Strategies for Success”, *WBGU German Advisory Council on Global Change Policy Paper*, 6, 2010.

<sup>82</sup> Ibid., p.6.

initiatives, combating climate change. A new emerging model of private and public international law is relevant in this regard. In such a model, the parties of the contract are private companies or individuals, but the subject matter of the contract is public international law, e.g. combating pollution of internationally shared watercourses. The Rhine contract<sup>83</sup> is a model example that can be used for a climate-related environmental contract, which in its essence, is as follows.

The German Association of Chemical Industries (VCI) concluded the Rhine Contract with Rotterdam to improve the Rhine water quality by reducing mud levels. The VCI ensured that certain categories of substances, listed in three Annexes and including chromium, cadmium, nickel, quicksilver, and copper, would be reduced by the set limit of the contract by no later than 2010. Under the terms of this contract, claims for new parameters had to be waived until a competent authority was created to determine binding procedures to dredge the harbour. If a reduction was not forthcoming in a timely fashion, Rotterdam could withdraw from the contract after a three-month grace period, after which existing claims would be received. The 1991 Rhine Contract aimed at improving both water quality and reducing the mud in the Rhine, falling within the ambit of both private and public international law.<sup>84</sup>

The rationale of proposing an environmental contract is to engage companies (in the United States) that are inclined towards the EU's ETS, but remain outside it because the federal government of the United States is outside the Kyoto Protocol. Within the EU, there is a need for negotiation of an agreement not covered by the ETS, i.e. regarding transport, housing, agriculture and waste. In its current form, the ETS is intended to provide private companies with incentives to eliminate greenhouse gases, mainly carbon dioxide, and improve their products and practices with respect to climate and energy. Depending on the situation and the consent of parties, the issues relating to carbon footprints, carbon leakage<sup>85</sup> under the CDM and

carbon trade<sup>86</sup>, ETS and CCS could be dealt with under either the private contract or the environmental contract. A question arises, however, as to how this model may be further extended, whereby the companies within the EU, through mutual contracts, linking emissions trading schemes, work together with companies in the United States, under an enhanced mechanism of the ETS. Some policy-makers have argued for the end of reliance on the ETS, suggesting that, "priority should be given to other policy options, such as regulations, taxation, subsidies which are able to deliver the scale and speed of emission reductions that are necessary to avoid catastrophic climate change".<sup>87</sup> The EU may wish to:

- Encourage other countries to pass national legislations and/or regulate private contracts;
- Help create conditions for environmental contracts to take place and function, using a mixed model of public international law and private international law.

There are good reasons why the EU could and should consider these two recommendations. One important reason is the EU's commitment to deal with climate change, and its experience of coordinating national legal mechanisms among its Member States. This experience can be used as a model outside the EU for the harmonisation of national legislations (public law), contracts (private law) and environmental contracts (a mixture of public and private international law). Above all, the EU's official development aid for the developing countries can be used to advantage for the cause of climate management.

## Conclusions

The EU has been a leading actor in the climate negotiations since the 1992 UNFCCC and has succeeded in mustering sufficient backing for the implementation of the Kyoto Protocol, especially at the time when the United States declared the Protocol dead in the water. The EU has already shown that emission reduction targets

<sup>83</sup> Documents and Reports of the International Conference on Environmental Contracts and Conventions, J.M. Van Dunné, ed., *Environmental Contracts and Covenants: New Instruments for a Realistic Environmental Policy*, Rotterdam, 1992.

<sup>84</sup> Alfred Rest, "New Legal Instruments for Environmental Prevention, Control and Restoration in Public International Law", *Environmental Policy and Law* 23, 1993, pp. 260-272.

<sup>85</sup> [http://ec.europa.eu/clima/policies/ets/leakage/index\\_en.htm](http://ec.europa.eu/clima/policies/ets/leakage/index_en.htm): Some experts have argued for the establishment of a new World Climate Organisation, linking emission market by creating exchange rate, as well as a new agreement, on carbon tariff under WTO, along with sanctions against free riders, see Jakob Rutqvist, Daniel Engström and Martin Ådahl, *A Bretton Woods for the Climate*, FORES, 2010; Johan Gars, *Moving Ahead*, FORES Study 3, 2011.

<sup>86</sup> According to critiques the current mode of operation of the CDM has become a basis for the polluting industries to buy cheap carbon credits from the developing countries (pollution havens) to meet the emissions commitments of the developed countries, in some cases resulting in serious impacts on local communities.

<sup>87</sup> As suggested by Friends of the Earth in its Europe assessment, 2010: [http://ec.europa.eu/clima/consultations/0005/registered/9825553393-31\\_friends\\_of\\_the\\_earth\\_europe\\_en.pdf](http://ec.europa.eu/clima/consultations/0005/registered/9825553393-31_friends_of_the_earth_europe_en.pdf).

can be achieved, and demonstrated its “leading by doing” position against climate change. COP/MOP negotiations are under way for an agreement governing emission reductions after 2012, when the first commitment period of the Kyoto Protocol expires. Despite the difficulties of the current economic crisis, the EU should be prepared to make a unilateral declaration for the extension of the Kyoto Protocol in the second commitment period, even if the other parties fail to reach a consensus. The EU’s target of a comprehensive, fair and science-based agreement is amply justified by its exemplary stance against climate change.

The climate negotiations remain difficult and therefore there is a need for more proactive leadership by the EU. The negotiations will depend on the degree to which the EU strategically prioritises its engagements and addresses the climate change issue with different groups of states. To that end, the EU should calibrate a more coherent (common) foreign policy and increase its interactions with China and the United States. The EU could form

a coalition of an international network of countries for a sustained attempt to build momentum, moving towards the substantial emission reduction targets. The EU should consider having separate discussions with the Basic group and other developing countries, as well as the least developed countries. The reason behind this recommendation is that all these groups of states have different degrees of exposure to and threats from climate change. Even amongst the island countries, there are qualitative and quantitative differences in terms of needs and the degree of exposure to threats from climate change, although all small island countries are generally considered more vulnerable to climate change than others. This should not be about dividing the South-South cooperation, but rather working with each state or group according to their needs and respective capabilities, ultimately finding solutions that will stabilise the climate. In this regard, the EU could and should use its political leadership, diplomatic skills and experienced jurists to establish a workable global climate treaty regime.

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