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# BRIDGING THE TRANSATLANTIC DIVIDE: LEGAL ASPECTS OF A LINK BETWEEN REGIONAL CARBON MARKETS IN EUROPE AND THE UNITED STATES

by Michael A. Mehling\*

## INTRODUCTION

European Union (“EU”) Directive 2003/87/EC establishes a scheme for greenhouse gas (“GHG”) emission allowance trading (“EU ETS”) within the European Community (“EC”). Under Article 25(1) of this directive, the European Commission has a mandate to negotiate and conclude agreements with third countries establishing a link to national or regional GHG emissions trading schemes.<sup>1</sup> Aside from increased market liquidity and, by consequence, reduced compliance costs, such a link promises to lessen competitive distortions between the participating states, counteract the threat of leakage, and potentially improve the prospects for a truly global carbon market.<sup>2</sup> With various regional trading schemes currently under development in the United States,<sup>3</sup> the concept of linking emissions-trading markets attracts attention on both sides of the Atlantic. Accordingly, the European Council of Environment Ministers, which essentially decides on the adoption of environmental legislation in the EU, recently expressed “its commitment to developing a strong global carbon market by linking the EU ETS with other emissions trading schemes at national or regional level.”<sup>4</sup> Meanwhile, an Executive Order adopted by the Governor of California explicitly calls for the development of a “program that permits trading with the European Union (. . .) and other jurisdictions.”<sup>5</sup>

Indeed, the subject of linkages between GHG emissions trading has become a widely discussed issue in climate negotiations and among climate experts. In his review of the economic costs of climate change, for instance, the acclaimed economist Sir Nicholas Stern considered linking national, regional, and sectoral carbon markets as an international priority and a valuable opportunity to define a global price for carbon.<sup>6</sup> Unsurprisingly, several studies have addressed this issue by outlining conceptual issues and assessing the mutual compatibility of trading schemes,<sup>7</sup> although few have specifically addressed the legal challenges raised by such a market link. As a survey of existing scholarship reveals, a great majority of the conceptual challenges identified thus far are largely political in nature and rarely involve legal considerations. While essential for the operation of

a trading link, for instance, the mutual recognition of allowances has been ultimately declared a “political issue,” and monitoring, reporting, and verification requirements mainly considered vital for their effect on confidence in the market.<sup>8</sup> In the end, relatively few design elements need to be compatible for a link to become legally viable,<sup>9</sup> with a high degree of harmonization between connected markets arguably desirable for political and economic reasons, but not essential as a matter of law.

When considering a market link between emissions trading schemes, questions of law are likely to emerge in two respects: *first*, during the process of implementation, which invariably necessitates recourse to recognized sources of law and legal procedures, and, *second*, during actual operation of the market link, where the latter may conflict with substantive norms and principles of international, regional, or domestic law. Questions pertaining to the operation of a future trading link cannot be

addressed in a comprehensive manner at this stage, given the current uncertainties about its ultimate design.<sup>10</sup> Drawing on the example of a link between the current market in the EU and evolving markets in different regions of the United States, this article will provide an overview of legal challenges apparent in the preparatory process, focusing on the legal nature of a linking arrangement and the procedural constraints imposed on its adoption.

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## LEGAL NATURE OF A LINKING AGREEMENT

As one scholar succinctly described it, “[t]wo national emissions trading schemes are linked if one country’s allowance can be used, directly or indirectly, by a participant in the other country’s scheme for compliance purposes.”<sup>11</sup> In other words, separate trading schemes can be considered linked if allowances can flow between the respective schemes. As a result of such a link

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between trading programs in the United States and the EU, for instance, participants in the North American market could buy allowances in the EU ETS for compliance with their domestic reduction targets, and vice versa. However, a trading link does not necessarily have to operate in both directions. Rather, one jurisdiction may choose to create a unilateral link to other markets, especially if the latter allow any legal or natural person to own allowances with the option of having these retired or cancelled. To this end, the jurisdiction in question could simply decide to recognize allowances purchased and cancelled in a foreign trading scheme for compliance purposes at home.<sup>12</sup> Although a trading link could also be construed to encompass the transfer of credits through an overarching framework, such as the Clean Development Mechanism (“CDM”) set out under the Kyoto Protocol,<sup>13</sup> this article will disregard such indirect approaches to focus on arrangements suitable for the establishment of a direct bridge between the EU ETS and regional trading schemes in the United States.

While a unilateral link between trading schemes can be established through a simple legislative amendment specifying the conditions for recognition of foreign allowances, a bi- or multilateral link will typically require negotiations between the legislators of all affected trading schemes, resulting in some form of mutual understanding. Conventionally, this understanding could be reached by way of: (1) a purely political arrangement; (2) a binding international treaty; or (3) mutual recognition of allowances by way of reciprocal rules in the domestic law of participating jurisdictions. Another approach could involve transboundary contracts entered individually or collectively under private law, although this option is unlikely to offer the certainty and political acceptance needed for a comprehensive market link.

#### POLITICAL ARRANGEMENTS

A political solution based on informal consultations has the benefit of obviating lengthy negotiation and ratification procedures. Aside from mere declarations of intent, for instance through joint statements at political summits, a more formal way of documenting a convergence of will can lie in the conclusion of a Memorandum of Understanding, documenting a desired line of action, but lacking the binding power of a legal commitment. Adding to the less cumbersome procedure, such informal arrangements are also easier to modify and adapt than binding treaties. However, given the economic ramifications of a trading link and the importance of certainty and transparency for smooth market operation, pressure from stakeholders in the market will likely prompt legislators to opt for a more reliable, legally binding solution.

#### BINDING INTERNATIONAL TREATIES

Article 25(1) of Directive 2003/87/EC has chosen to follow this latter path by referring to the procedure in Article 300 of the Treaty Establishing the European Community (“EC Treaty”),<sup>14</sup> which specifies the adoption of international treaties by the European Community. A treaty is one of the recognized sources of international law.<sup>15</sup> Its binding force follows from the customary maxim of *pacta sunt servanda*,<sup>16</sup> which ultimately reflects state sovereignty limited through voluntary consent.<sup>17</sup> The violation of duties under a treaty counts as a breach of international law, incurring state responsibility and the possibility of sanctions, often defined in the treaty itself as part of a negotiated compliance mechanism. While offering a high degree of certainty, the adoption of an international treaty entails a lengthy and often contentious ratification process. Likewise, subsequent amendments to the treaty or a withdrawal from it are again subject to sophisticated rules of international law.<sup>18</sup> Nonetheless, due to the formal nature and the transparency they offer, international treaties are likely to be the instrument of choice for a future linking agreement. Still, it bears restating that such treaties can only be concluded by formal subjects of international law, a limitation of major relevance for any transatlantic linking agreement between regional trading markets.

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#### RECIPROCAL COMMITMENTS

Rather than approving an international arrangement with binding force, different trading markets could also enter a political commitment to adopt reciprocal legislation within their respective jurisdictions, thereby

ensuring the mutual recognition of emission allowances. Such an arrangement would ultimately entail an adaptation of the respective registry systems and thus derive its authority from domestic law, although it would result from formal or informal negotiations and preparatory meetings between states. Relative to an international treaty, of course, such a construction would not have the capacity to bind participating jurisdictions, allowing for unilateral amendment or termination of the trading link without prior consent of other parties. In certain situations, this aggregate solution might be the only available means to connect separate markets while offering the legal certainty and transparency of formal law. In that instance, unilateral digression is unlikely for as long as participants retain the common interest in an operational trading link.

#### CONTRACTUAL ARRANGEMENTS

A final vehicle for the implementation of a linking arrangement is private law, that is, the law governing the mutual relations between natural and legal persons, notably the law of contracts and torts as it is called in the common law, or the law of obligations as it is called in civil legal systems. Different

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*The concept of linking emissions-trading markets attracts attention on both sides of the Atlantic.*

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approaches are conceivable under private law, although these will all involve some form of contract, either to establish a longer contractual relationship or purely negotiated *in casu* to govern individual transactions. Whether a formal link has been created or not, transactions leading to a transfer of allowances will generally involve a contract specifying the terms of a particular transaction, such as the price and volume of allowances, the delivery date, a *force majeure* clause, and default or liability provisions.<sup>19</sup> Even in the absence of a formal link, market participants could use private law to create a bridge between otherwise separate trading systems by establishing a system for the conversion of permits. An example of this would be a system of private brokers leveraging arbitration opportunities. Such arrangements are legally viable due to the fact that many trading schemes, including the ETS, impose no restrictions on account ownership, allowing virtually anyone to open an account and thereby enter the market. Moreover, there is a vital difference between trade in allowances, which is theoretically open to everyone, and actual transfer, which is usually limited to market participants.<sup>20</sup> In the voluntary sector, private transactions across trading schemes have already occurred.<sup>21</sup>

Unlike public international law and the rules adopted by the EC, private law is not a body of norms adopted across national frontiers. Instead, it differs from state to state, often with vast differences between historically separate regulatory traditions such as the common law, which is based largely on judicial precedent, and civil law, which is based largely on codified rules. Of course, the United Nations Convention on Con-

tracts for the International Sale of Goods<sup>22</sup> has gone some way to establish a uniform law of sales, but its application to emissions allowances — the legal nature of which, while not entirely clear, rules out classification as a good or service<sup>23</sup> — is questionable.<sup>24</sup>

In the absence of a harmonized normative framework, the contractual arrangements for a trading link will thus be governed either by the private law of a particular state as specified in the contract, the most likely case, or by the private law of the state determined by way of international private law. This latter set of rules, also known as conflict of laws, merely helps regulate transboundary relations between private law subjects by determining which of the competing legal systems is applicable. The choice of law in contractual relationships is typically selected based upon either the place where the transaction physically occurred (*lex loci actus*) or the doctrine of the proper law, which is the law with the closest connection to the facts of the case. Altogether, this allows for great flexibility in the development of a trading link based on private law, although the scope of application will tend to remain limited to individual transactions or trading on a smaller scale. As mentioned earlier, market partici-

pants are likely to insist on a transparent, legally binding framework for transactions between their respective trading schemes, favoring the predictability of formal legislation over a contractual solution based on private law.

## PROCEDURAL CONSIDERATIONS OF A LINKING ARRANGEMENT

As stated in the preceding section, the use of different linking arrangements can trigger differing formal procedures. While a political solution and contractual arrangements will generally pose no major challenges in this regard, both international treaties and domestic legislation mandating the mutual recognition of foreign allowances may only be adopted in accordance with sophisticated provisions of legislative procedures and the institutional distribution of powers. With a view to the express reference contained in Article 25(1) of Directive 2003/87/EC, this section will begin with an assessment of the procedural framework for international agreements linking the EU ETS with other emissions trading schemes.

### PROCEDURAL ISSUES UNDER EUROPEAN COMMUNITY LAW

First and foremost, the mandate set out in Article 25(1) of Directive 2003/87/EC limits participation in a linking agreement to “third countries listed in Annex B to the Kyoto Protocol which have ratified the Protocol,” a limitation which, for the time being, precludes an international treaty with the United States because it has withdrawn from the Protocol. Thus, the usefulness of the Directive in guiding a transatlantic linking

arrangement is limited and the foregoing restriction will have to be repealed by way of a legislative amendment. A review process that may result in an amendment is scheduled to conclude by June 2007. In this connection, the European Commission recently indicated its intention to link with trading schemes currently under development in the United States.<sup>25</sup>

Although a transatlantic market link based on Article 25(1) of Directive 2003/87/EC may be ruled out for now, the procedure mandated therein may still serve as a likely model for future arrangements. Given that Directive 2003/87/EC is only derived legislation, without prejudice to the powers conferred on the EC under its constitutive treaty, it is conceivable that the Council would move forward without observing the constraints imposed by the foregoing mandate. Article 25(1) does not even specify the legislative procedure itself, but instead refers to Article 300 of the EC Treaty, a general provision setting out the process for adoption of international agreements with third states or international organizations. A sophisticated procedure, Article 300 involves several stages and participation by the European Commission, the Council, and the Parliament.

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## A trading link to the EU ETS would not violate the Commerce Clause of the U.S. Constitution.

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Essentially, the Commission is charged with negotiating international agreements, while the Council approves their subsequent adoption. Before opening negotiations, the Commission requires authorization by the Council to conduct negotiations on behalf of the EC, usually through a Council decision based on a draft by the Commission which occasionally sets out confidential negotiating guidelines. Upon approval of an agreed text, the Commission proposes a decision on its conclusion by the Council, which may sign or reject the agreement.<sup>26</sup> As in the domestic sphere, ratification is a separate act, again occurring through a decision adopted subsequently by the Council on the initiative of the Commission.

Directive 2003/87/EC was adopted on the basis of Article 175(1) and in application of the procedure set out in Article 251 of the EC Treaty, which merely requires a qualified majority in the Council. Pursuant to Article 300(2) of the EC Treaty, a linking agreement may likewise be adopted with a qualified majority. It is uncertain whether the European Parliament will merely need to be consulted or has the capacity to reject a trading link, given that the respective agreement might be understood as “establishing a specific institutional framework by organi[z]ing cooperation procedures.” Requiring approval — rather than a mere opinion — by the European Parliament could have significant implications for the prospects of a linking agreement, because the Parliament has traditionally been more reserved than the Commission and the Council in deploying market instruments.

On a more general level, it merits noting that the EC is unique in that Member States delegate a significant part of their treaty negotiation powers to the Community level. Reflecting the legal and political realities of the EC as a supranational entity composed of sovereign states, treaty practice has become increasingly dominated by “mixed agreements,” that is, agreements to which both the EC and its Member States are party as a result of shared competences.<sup>27</sup> In accordance with the doctrines of attributed powers and the parallelism between internal and external competences, the adoption of a linking agreement pursuant to Article 300 of the EC Treaty will require consideration of its subject matter to determine the allocation of powers between the Community and the Member States.

In the case of environmental agreements, the Community derives its competence from Article 175(1) of the EC Treaty, which sets out a general mandate for action on environmental protection. It holds this power concurrently with the Member States, which retain authority to regulate the environment until the EC has acted. Additionally, the Treaty allows Member States to adopt more stringent environmental measures under Article 176, and generally leaves the enforcement of EC law to their domestic authorities.

When the EC adopts common rules internally to regulate an environmental issue, Member States are generally precluded from entering into international agreements that affect such rules or alter their scope.<sup>28</sup> Article 176 of the EC Treaty allows Member States to introduce more stringent measures,<sup>29</sup> however, and Article 174(4) clarifies that:

Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300.

The previous subparagraph shall be without prejudice to Member States’ competence to negotiate in international bodies and to conclude international agreements.

Ultimately, clarifying the division of competences within the EC is a difficult task, with boundaries constantly evolving.<sup>30</sup> Depending on their substance and the competencies touched upon, environmental agreements entered into by the EC may — but do not have to — be adopted as mixed agreements.<sup>31</sup> In effect, it may be in the interest of both the Community and its Member States, and possibly also of third states, to opt for an agreement concluded by the Community only, notably to speed up the adoption process. At the same time, where competence for the subject matter of an agreement is shared between the Community and the Member States, actual implementation will usually require the participation of both. Past experience shows the Member States insisting upon mixity even in instances when it is not required by law.<sup>32</sup>

In fact, it is perhaps no coincidence that nearly all treaties on environmental protection have been concluded as mixed agreements,<sup>33</sup> including the Framework Convention on Climate Change and the Kyoto Protocol. With Directive 2003/87/EC leaving ample discretion to the Member States in its implementation, there is a certain probability that the latter would insist on active participation in the negotiations preceding a linking agreement, prompting recourse to a mixed agreement as the most suitable instrument. Legal challenges can arise as a result, specifically regarding the allocation of responsibilities under the agreement between the Community and the Member States. Unless their respective duties are separately specified, both the Community and the Member States will be responsible for observance of all commitments entered under the agreement. Likewise, if only part of the Member States chooses to ratify a mixed agreement alongside the Community, the entirety of Member States will nonetheless be bound by its provisions, a departure from the usual notion that each party is only responsible for the performance of its own obligations.<sup>34</sup> Altogether, this adds to the complexity of a linking agreement, and it is more than questionable whether the vehicle of choice should be an international treaty concluded simultaneously by the Community and its Member States.

#### PROCEDURAL ISSUES UNDER UNITED STATES LAW

In the United States, federalism can raise similar concerns with regard to the admissibility of a regional linking agreement between individual states, or groups of states, and the EU ETS. Described by a commentator as altogether “terse” in this regard,<sup>35</sup> the U.S. Constitution contains only four articles pertaining to treaty powers. Of these, Article I is the most relevant

for a potential market link, given that its Section 10 prohibits any state from entering into a “treaty, alliance, or confederation” or from entering “without the Consent of Congress. . . into any Agreement or Compact. . . with a foreign Power.”<sup>36</sup> In essence, this provision denies States international legal personality, limiting their ability to participate in diplomatic relations and altogether barring them from the conclusion of an international treaty.<sup>37</sup> Regarding international treaties, the scope of this restriction is wide, covering all binding international arrangements “regardless of title, designation, or form.”<sup>38</sup> Clearly, then, the States could not enter into a linking agreement with the European Community under the terms set out by Article 25(1) of Directive 2003/87/EC if such an arrangement were to be designed as a formal treaty.

While U.S. States may be precluded from entering into a treaty with the EC, they are empowered to adopt a binding “compact” or “agreement” with the consent of Congress, resulting in the question of how these differ from formal treaties. However, to date no agreement between a State and foreign power has been successfully challenged due to the lack of authority of the State.<sup>39</sup> Therefore, there appears to exist a potential avenue for a link between regional trading schemes in the United States and the EU ETS.

Article I, Section 10 of the U.S. Constitution makes the conclusion of such an agreement conditional on approval by Congress. However, even in the absence of Congressional endorsement, individual States may, under certain circumstances, enter into an agreement with foreign powers.<sup>40</sup> As the United States Supreme Court has notably declared, a compact with a foreign power requires Congressional approval only if it tends “to the increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States.”<sup>41</sup> Consent to an agreement is thus only required if the agreement tends to give the state elements of international sovereignty, interferes with the full and free exercise of federal authority, or deals locally with a matter on which there is or might be national policy.<sup>42</sup> As the Restatement Third of the Foreign Relations Law of the United States comments, “agreements involving local transborder issues, such as agreements to curb a source of pollution. . . have been considered not to require Congressional consent.”<sup>43</sup> Accordingly, it appears possible, albeit not certain, that a linking agreement could be adopted without federal endorsement by way of a state compact or agreement. Still, Congress can always supersede such state arrangements by legislation.

Should the preceding options prove unfeasible, U.S. States

can always resort to amending their internal legislation with a view to including rules on the mutual recognition of foreign allowances. Because neither party is legally bound to maintain its law, reciprocal legislation adopted concurrently by two or more jurisdictions does not constitute a treaty, nor an agreement requiring Congressional consent.<sup>44</sup> Affording means of circumnavigating the constraints of international and constitutional law, such reciprocal recognition could be based on an informal understanding setting out the substantive provisions required to create an operational trading link. Any institutional responsibilities could be assigned to a private body established and funded by the respective participants, obviating the need for recourse to international law. Operating through a Memorandum of Understanding at the preparatory stage, the Northeastern States participating in the Regional Greenhouse Gas Initiative (“RGGI”) have already evidenced the feasibility of an informal arrangement to decide certain features of their future trading scheme. More importantly, States have concluded past reciprocal arrangements with foreign powers also to overcome procedural

constraints.<sup>45</sup> Likewise, the EC has in the past resorted to informal understandings as a vehicle for the settlement of contentious transatlantic issues.<sup>46</sup> Accordingly, States could amend the legislation implementing their regional trading scheme, while the EC could adopt a directive amending Directive 2003/87/EC.

In all foregoing cases, a transatlantic market link would not appear to contravene the supremacy of federal law because, to date, the federal government has not adopted legislation precluding state law in the area of GHG emissions trad-

ing. Likewise, a trading link to the EU ETS would not violate the Commerce Clause of the U.S. Constitution. Contained in Article I, Section eight, Clause three, the Commerce Clause empowers Congress to “regulate Commerce with foreign Nations, and among the several States.”

As the concept of commerce can also be applied to environmental markets,<sup>47</sup> the Commerce Clause has raised doubts about the legality of RGGI provisions constraining energy imports from outside in order to prevent leakages.<sup>48</sup> As long as the United States fails to regulate international trade in GHGs, however, this clause will remain dormant and merely prohibit states from passing legislation that improperly burdens transboundary commerce. Regarding the latter, the U.S. Constitution does “not prohibit every state law or regulation that has some effect on interstate or foreign commerce.”<sup>49</sup> The Supreme Court has summarized the applicable jurisprudence as follows:

Where the Statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on

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*The European Commission recently indicated its intention to link with trading schemes currently under development in the United States.*

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interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefit. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.<sup>50</sup>

The creation of a market link facilitates commerce. But even if a linking arrangement were, in any way, to be considered burdensome on domestic or international commerce, it appears likely that its environmental and economic benefits could outweigh such effects under the foregoing proportionality assessment.

## CONCLUSION

The goal of this article was to examine the possible legal ramifications resulting from a linking arrangement between regional trading schemes in Europe and the United States. While many legal issues have yet to emerge as such a link begins to operate in practice, this initial analysis allows for an important conclusion: even on the austere level of constitutional doctrines and legislative procedures, a range of legal options is available for the implementation of a future trading link. Arising obstacles may be avoided through careful selection of the legal instrument embodying the market link. Admittedly, some issues will prove

challenging to resolve, such as the creation of a global market involving various participants, of which only some are party to an overarching regime based on a common currency. Even in such a situation, conceptual solutions have already been proposed to bridge regime boundaries, such as the creation of a clearinghouse or gateway facilitating the transfer of otherwise incompatible units.<sup>51</sup>

As they have evolved to date, carbon markets have proven to be complex entities, embedded in sophisticated networks of contingent interests, traditionally diverse approaches to governance, and distinct regulatory constraints. Reconciling the inevitable differences between two or more trading schemes is not solely a task for lawyers or the law, but a matter of bringing together divergent preferences and expectations. In essence, the establishment of a link between different trading schemes will mainly call for political deliberation, mutual concession, and, to some extent, the willingness to tolerate remaining differences. For lawyers, the challenge will be to translate the negotiated consensus into legally viable arrangements, observing applicable rules of domestic, regional and international law. The rest remains a matter of political agreement. One might argue with another scholar that, wherever an economic incentive exists to bridge different systems, “money will cross the divide.”<sup>52</sup> And in the end, Stuart Eizenstat, who helped negotiate the Kyoto Protocol on behalf of the United States, may have stated it best by observing: “The market is pulling the law along.”<sup>53</sup>



## Endnotes: Bridging the Transatlantic Divide

<sup>1</sup> See Council Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and Amending Council Directive 96/61, 2003 O.J. (L275) 32-46, Art. 25(1):

Agreements should be concluded with third countries listed in Annex B to the Kyoto Protocol which have ratified the Protocol to provide for the mutual recognition of allowances between the Community scheme and other greenhouse gas emissions trading schemes in accordance with the rules set out in Article 300 of the Treaty.

<sup>2</sup> NIELS ANGER ET AL., LINKING THE EU EMISSIONS TRADING SCHEME UNDER ALTERNATIVE CLIMATE POLICY STRINGENCIES: AN ECONOMIC IMPACT ASSESSMENT 19 (2006), available at [http://www.wupperinst.org/uploads/tx\\_wibeitrag/linking-EU-ETS.pdf](http://www.wupperinst.org/uploads/tx_wibeitrag/linking-EU-ETS.pdf) (last visited Feb. 11, 2007).

<sup>3</sup> In the U.S. Northeast and Mid-Atlantic, a group of seven states — Connecticut, Delaware, Maine, New Hampshire, New Jersey, New York and Vermont — has agreed to establish a Regional Greenhouse Gas Initiative (“RGGI”) by January 1, 2009, with the aim of constraining emissions from the electricity sector, see Regional Greenhouse Gas Initiative Memorandum of Understanding (Dec. 20, 2005), available at [http://www.rggi.org/docs/mou\\_12\\_20\\_05.pdf](http://www.rggi.org/docs/mou_12_20_05.pdf) (last visited on Feb. 11, 2007); Regional Greenhouse Gas Initiative Model Rule (Aug. 15, 2006), available at [http://www.rggi.org/docs/model\\_rule\\_8\\_15\\_06.pdf](http://www.rggi.org/docs/model_rule_8_15_06.pdf) (last visited on Feb. 11, 2007) [hereinafter RGGI Model Rule].

<sup>4</sup> European Council of Environment Ministers, Council Conclusions of the 2773rd Environment Council Meeting, Brussels ¶ 4 (Dec. 18, 2006), available at [http://www.consilium.europa.eu/cms3\\_applications/applications/newsroom/LoadDocument.asp?directory=en/envir/&filename=92249.pdf](http://www.consilium.europa.eu/cms3_applications/applications/newsroom/LoadDocument.asp?directory=en/envir/&filename=92249.pdf) (last visited on Feb. 11, 2007).

<sup>5</sup> See Exec. Order No. S-20-06, ¶ 5 (Oct. 17, 2006) by the Governor of the State of California, available at <http://gov.ca.gov/index.php?executive-order/4484/> (last visited on Feb. 15, 2007).

<sup>6</sup> NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW 479-481 (Cambridge University Press 2006), available at [http://www.hm-treasury.gov.uk/independent\\_reviews/stern\\_review\\_economics\\_climate\\_change/stern\\_review\\_report.cfm](http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/stern_review_report.cfm) (last visited Feb. 11, 2007).

<sup>7</sup> A recent count revealed more than 15 studies and published reports addressing the issue (individual citations on file with author).

<sup>8</sup> See Organisation for Economic Co-operation and Development, *Linking Non-EU Domestic Emissions Trading Schemes with the EU Emissions Trading Scheme*, COM/ENV/EPOC/IEA/SLT(2004)6 (Jun. 2004) (prepared by William Blyth & Martina Bosi), available at <http://www.oecd.org/dataoecd/38/7/32181382.pdf> (last visited Feb. 15, 2007).

<sup>9</sup> See Pew Center, *Linking U.S. and International Climate Change Strategies 5* (Apr. 2002) (prepared by Daniel Bodansky), available at [http://www.pewclimate.org/global-warming-in-depth/all\\_working\\_papers/wp\\_linking.cfm](http://www.pewclimate.org/global-warming-in-depth/all_working_papers/wp_linking.cfm) (last visited Feb. 15, 2007) (identifying the tradable commodity and the registries used to track transfers of this commodity between trading schemes as crucial aspects in a trading link).

<sup>10</sup> CHRISTIAN EGENHOFER ET AL., THE EU EMISSIONS TRADING SCHEME: TAKING STOCK AND LOOKING AHEAD 12 (Jul. 2006), available at [http://shop.ceps.be/download.php?item\\_id=1360](http://shop.ceps.be/download.php?item_id=1360) (last visited Feb. 15, 2007) (correctly affirming that “it is difficult to provide an assessment of the feasibility of such linking as those schemes which could be linked are still in development, with yet uncertain design options”).

<sup>11</sup> Organisation for Economic Co-operation and Development, *Harmonisation between National and International Tradable Permit Schemes* (Mar. 2003) (prepared by Erik Haites), available at <http://www.oecd.org/dataoecd/11/63/2957623.pdf> (last visited Feb. 15, 2007).

## ENDNOTES: BRIDGING THE TRANSATLANTIC DIVIDE

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<sup>12</sup> See RGGI Model Rule, *supra* note 3, at section XX-10.3.

<sup>13</sup> See Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 12, Dec. 10, 1997, 37 I.L.M. 22 (1998), available at <http://unfccc.int/resource/docs/convkp/kpeng.html> (last visited Feb. 15, 2007) [hereinafter Kyoto Protocol].

<sup>14</sup> Treaty Establishing the European Community, as amended by the Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Amsterdam, Neth., Oct. 2, 1997, in force May 1, 1999, 37 I.L.M. 56 (1997), available at [http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C\\_2002325EN.003301.html](http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html) (last visited Feb. 10, 2007) [hereinafter EC Treaty].

<sup>15</sup> See Statute of the International Court of Justice, San Francisco, U.S., June 26, 1945, in force Oct. 24, 1945, 39 AJIL Supp. 215 (1945), art. 38 (1) (listing “international custom, as evidence of a general practice accepted as law” and “the general principles of law recognized by civilized nations”)

<sup>16</sup> “Agreements are to be observed.”

<sup>17</sup> See *S.S. Wimbledon*, (Fr., Italy, Japan, & U.K. v. Ger.), 1923 P.C.I.J. (Ser. A) No. 1, at 2.

<sup>18</sup> See Vienna Convention on the Law of Treaties Vienna, Austria, art. 2 (1) May 22, 1969, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331 (1969), (focusing on the customary rules of treaty law) [hereinafter VCLT].

<sup>19</sup> See International Emissions Trading Association, *The Emission Allowance Single Trade Agreement*, version V. 3.0 (July 18, 2006), available at <http://www.ieta.org/ieta/www/pages/getfile.php?docID=1744> (last visited on Feb. 11, 2007).

<sup>20</sup> See Rutger d.W. Wijnen, *Emissions Trading under Article 17*, in LEGAL ASPECTS OF IMPLEMENTING THE KYOTO PROTOCOL MECHANISMS: MAKING KYOTO

WORK 403, 410 (David Freestone & Charlotte Streck, eds. 2005).

<sup>21</sup> See Andreas Arvanitakis, Editorial, *Point Carbon*, CARBON MKT. MONITOR, Sept. 6, 2006, at 2 (describing a swap deal between two private companies, Shell and Elsam, that bridged the domestic trading schemes in the United Kingdom and Denmark in 2002).

<sup>22</sup> United Nations Convention on Contracts for the International Sale of Goods, Vienna, Austria, Apr. 11, 1980, in force Jan. 1, 1988, 52 Federal Register 6262, 6264-6280 (Mar. 2, 1987) [hereinafter CISG].

<sup>23</sup> See Matthieu Wemaere & Charlotte Streck, *Legal Ownership and Nature of Kyoto Units and EU Allowances*, in LEGAL ASPECTS OF IMPLEMENTING THE KYOTO PROTOCOL MECHANISMS: MAKING KYOTO WORK 35, 47 (David Freestone & Charlotte Streck, eds., 2005).

<sup>24</sup> As the CISG itself specifies at Article 2(d), it does not apply to sales “of stocks, shares, investment securities, negotiable instruments or money.” This exception takes into consideration that such transactions are governed by their own rules and laws, which are often compulsory, a reasoning that equally applies to transactions in emissions allowances. See PETER SCHLECHTRIEM, UNIFORM SALES LAW — THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 29 (Manz, 1986).

<sup>25</sup> See COM 2006(676) final, EUROPEAN COMMISSION, BUILDING A GLOBAL CARBON MARKET — REPORT PURSUANT TO ARTICLE 30 OF DIRECTIVE 15 (2006).

<sup>26</sup> See Dominik Thieme, *European Community External Relations in the Field of the Environment*, 10 EUR. ENV. L. REV. 252, 255 (2001) (providing a detailed description of the negotiating process).

<sup>27</sup> DOMINIC MCGOLDRICK, INTERNATIONAL RELATIONS LAW OF THE EUROPEAN UNION 79 (Longman 1997); Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, 1987 ECR 3719, ¶ 8 (recognizing the existence of mixed agreements).

<sup>28</sup> See Case C-22/70, *Commission v. Council* (ERTA/AETR), 1971 ECR 263, ¶ 13 *et seq.*

<sup>29</sup> IAIN MACLEOD, IAN D. HENDRY & STEPHEN HYETT, THE EXTERNAL RELATIONS



OF THE EUROPEAN COMMUNITIES 327 (Oxford University Press 1996).

<sup>30</sup> Tom Delreux, *The European Union in International Environmental Negotiations: A Legal Perspective on the Internal Decision-making Process*, 6 INT'L ENVTL. AGREEMENTS 231, 236 (2006).

<sup>31</sup> Rafael Leal-Arcas, *The European Community and Mixed Agreements*, 6 EUR. FOREIGN AFF. REV. 483, 494 (2001).

<sup>32</sup> Leal-Arcas, *id.* at 513.

<sup>33</sup> See Thieme, *supra* note 26, at 254.

<sup>34</sup> Lena Granvik, *Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness*, in INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 255, 269 (Martti Koskenniemi, ed., 1998).

<sup>35</sup> Robert E. Dalton, *United States*, in NATIONAL TREATY LAW AND PRACTICE 765 (Duncan B. Hollis, Merritt R. Blakeslee, and L. Benjamin Ederington, eds., 2005).

<sup>36</sup> U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation . . .”); U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power”).

<sup>37</sup> LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 149-150 (2d ed., Clarendon Press 1996).

<sup>38</sup> Dalton, *supra* note 35, at 766.

<sup>39</sup> See HENKIN, *supra* note 37, at 152 (cautioning that “[i]t might be sufficient to invalidate an agreement if the state were indiscreet enough to call it a treaty, or to conclude it with all the formalities associated with treaties”).

<sup>40</sup> See generally, Leslie W. Dunbar, *Interstate Compacts and Congressional Consent*, 36 VA. L. REV. 753-763 (1950).

<sup>41</sup> Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

<sup>42</sup> HENKIN, *supra* note 37, at 155.

<sup>43</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, Comment f (1987).

<sup>44</sup> HENKIN, *supra* note 43, at 155.

<sup>45</sup> See Robertson v. General Electric Co., 32 F.2d 495 (4th Cir. 1929), *cert.*

*denied*, 280 U.S. 571 (1929) (using reciprocal legislation as a substitute for a treaty with Germany to which the Senate failed to consent, with Germany, in turn, also adopting legislation); see also Gloria F. DeHart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 FAM. L.Q. 89-115 (1994) (noting that almost all states have promulgated “parallel uniform policy declarations” on child support enforcement, under which the state will give effect to child support order of a foreign jurisdiction if the foreign country has one and gives effect to support orders of the state); Nolan Act, ch. 26, 415 Stat. 1313 (1921).

<sup>46</sup> The Council may adopt such instruments and in some cases the Council Presidency or the Commission may sign the instrument, without the need of national ratifications by each Member State, see Stefaan Smis & Kim van der Borgh, *The EU-US Compromise on the Helms-Burton and D’Amato Acts*, 93 AM. J. OF INT’L L. 227-236 (1999) (describing the Understanding with Respect to Disciplines for the Strengthening of Investment Protection, Transatlantic Partnership on Political Co-operation, Understanding on Conflicting Requirements).

<sup>47</sup> See Philadelphia v. New Jersey, 437 U.S. 617, 626-627 (1978) (striking down state rules prohibiting the importation of waste generated out of state).

<sup>48</sup> Harriott D. Bolster, *The Commerce Clause Meets Environmental Protection: The Compensatory Tax Doctrine as a Defense of Potential Regional Carbon Dioxide Regulation*, 47 B.C. L. REV. 737-772 (2006).

<sup>49</sup> HENKIN, *supra* note 37, at 158.

<sup>50</sup> Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

<sup>51</sup> See Bodansky, *supra* note 9, at 3; WOLFGANG STERK, MARCEL BRAUN, CONSTANZE HAUG, KATARINA KORYTAROVA & ANJA SCHOLTEN, WUPPERTAL INSTITUTE, READY TO LINK UP? IMPLICATIONS OF DESIGN DIFFERENCES FOR LINKING EMISSIONS TRADING SCHEMES, 63-65 (May 2006), available at [http://www.wuppertal.org/uploads/tx\\_wibeitrag/11-Sterk.pdf](http://www.wuppertal.org/uploads/tx_wibeitrag/11-Sterk.pdf) (last visited Feb. 11, 2007).

<sup>52</sup> Arvanitakis, *supra* note 21, at 2.

<sup>53</sup> Amb. Stuart E. Eizenstad, formerly Under Secretary of State for Economic, Business and Agricultural Affairs, United States State Department, at a conference on Jan. 18, 2007, *North America and the Carbon Markets*, Washington, D.C., U.S.