

The Fate of Kyoto Protocol and the CDM (Clean Development Mechanism) Measure

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Abstract

The third sessions of the UNFCCC, which took place in Kyoto in December 1997, lead to the birth of Kyoto Protocol. This landmark treaty was an attempt to correct climate externalities by imposing GHG-emission reduction standards upon current generations, thereby combating global climate change. The year 2012 marked the cessation of the first commitment period and witnessed the Kyoto Protocol treaty on the brink of fading into irrelevance. In light of this, the leitmotif of this paper is to ascertain the fate of Kyoto Protocol.

The paper is divided into seven sections. The first section provides an introduction of the topic and the second section attempts to recite the tale of Kyoto Protocol. The third section attempts to trace the evolution of the Kyoto Protocol from being an instance of 'hopelessness' to a 'diversion' doomed for 'death'. The fourth section attempts to critically analyse the causes of death of the Kyoto Protocol. The fifth section discusses the fate of CDM. The sixth section attempts to analyse the probable shift from 'hard agreement' (The Kyoto Protocol) to 'soft agreement' (The Paris Agreement). The last section concludes the paper with certain overarching observations.

Keywords: *Kyoto Protocol, Commitment period, Green-house gas*

I. Introduction

"The Tragedy of Kyoto... UNITED STATES: Nations, countrymen, hear me for my cause, and be silent,

If there be any in this assembly, any dear friend of Kyoto's, to him I say, that my love to Kyoto was no less than his.

If then that friend demand why Canada rose against Kyoto, this is my answer:

– Not that it loved Kyoto less, but that it loved the United States more.

Here comes Kyoto's body, mourned by the rich: which though they had no hand in his death, shall receive the benefit of his dying."

Had the tragedy of Kyoto Protocol been a play, it would have resembled Julius Caesar and thus, the above excerpt seems to be most apt. With dagger in their hand, it was Kyoto's supporters who administered the final death-blow. While New Zealand, Russia and Japan denied taking further Protocol targets, Canada and the US backed out from any binding obligations which caused the potential effectiveness of the Protocol to succumb to the pressures of international politics. However, multiple other factors contributed to the demise of Kyoto Protocol, which this paper shall attempt to unravel. In light of this, the leitmotif of this paper is to discover the fate of Kyoto protocol and CDM measures.

The 2007 G-8 Summit confirmed the fate of Kyoto, leading to one commentator likening it to the dead parrot in the famous Monty Python sketch: "This Kyoto process is no more. It has ceased to be. It's expired and gone to meet its maker. It's rung down the curtain and joined the choir invisible". This was not the first time Kyoto had been likened to a dead parrot, nailed to its perch in an attempt to sell it to an unsuspecting public, but this refusal to turn off the life support and sign the death certificate marked the death of a vision once hopefully embraced by the climate community.

II. The Tale of Kyoto Protocol

The 3rd sessions of the UNFCCC lead to the birth of Kyoto Protocol. As an impress-worthy step towards global climate revolution, this landmark treaty was an attempt to correct climate externalities by imposing GHG-emission reduction standards upon current generations, thereby combating global climate change. The goal of the Kyoto Protocol, established by the Berlin Mandate, was to successfully negotiate binding emissions targets and timetables for Annex I Parties. The conflicting provisions proposed on a myriad of controversial issues reflected the pervasive division between developed and developing countries over augmenting developing countries' obligations. The Protocol provided that all the European countries and the industrialized nations, forming part of Annex-I countries, would commit to reducing GHG emissions by a substantial average of 5% from the 1990 levels over the 2008-2012 period. The first Kyoto commitment period did not require the Annex-2 countries to limit their GHG emissions.

US Senator Chuck Hagel had made the following remark during floor debate regarding Kyoto Protocol and its ratification:

"The credibility of the United States is not enhanced when the administration negotiates a treaty that has no hope of ratification in the U.S. Senate."

The US chose not to ratify and abide by the Protocol, because of which the Kyoto Protocol could garner only limited participation, which made the effectiveness of the Protocol vulnerable to the pressures of international politics. The non-ratification of Kyoto by the US, according to Woody Allen, made Kyoto an instance of 'hopeless' affair. In his words:

"More than any other time in history, mankind faces a crossroads. One path leads to despair and utter hopelessness. The other leads to total extinction. Let us pray we have the wisdom to choose correctly."

²³⁶Kyoto protocol may suffer fate of Julius Caesar at Durban climate talks, John Vidal, available at <https://www.theguardian.com/environment/blog/2011/nov/29/kyoto-protocol-julius-caesar-durban>, last seen on 23/12/2017.

²³⁷The Summit Designed to Breathe New Life into the Kyoto Process Has Seen it Expire, Dominic Lawson, available at <http://www.independent.ie/world-news/g8-scales-new-heights-at-summit-of-stupidity-26296126.html>, last seen on 27/12/2017.

²³⁸Id.

²³⁹Alexis Manning, An Economic Analysis of the Kyoto Protocol, 3 The Park Place Economist 79.

²⁴⁰Andrew Schatz, A Tale Of Three Signatories: Learning From The European Union, Japanese, And Canadian Kyoto Experiences In Crafting A Superior United States Climate Change Regime, U. Of Pitt. L. Rev. 597 (2008).

²⁴¹Deborah E. Cooper, The Kyoto Protocol and China: Global Warming's Sleeping Giant, The Geo. Int'l Env'tl. L. Rev. 413 (1999).

III. The Life Journey of Kyoto- The Up's And The Down's

- a. The Copenhagen Climate Summit (2009) and the Cancun Conference (2010)

The year 2012 saw the expiration of the first-commitment period and witnessed the Kyoto Protocol on the brink of fading into irrelevance. The fate of Kyoto beyond 2012 was supposed to be decided by 2009 in order to avoid an overlap between the first and second commitment period. However, the Copenhagen Climate Summit (2009) and the Cancun Conference (2010) failed in yielding an answer to the major issues confronting the future of Kyoto and the fate of the second-commitment period.

- b. The Durban Platform On Climate Change (2011)

Emphasizing on the need to decide on the fate of the second-commitment period of Kyoto Protocol, Bill McKibben observed that:

“We are in the last minute of the last quarter of the biggest game humanity has ever faced. It is imperative that the issue is addressed and settled”.

The Durban Platform on Climate Change (2011) succeeded in addressing the crunch issue of the legal architecture of post-2012 period. After a series of complex negotiations, a compromise was made where the decision to extend Kyoto through a second-commitment period was taken. It was decided that a new track of negotiations would commence to discuss about an ambitious and inclusive global climate regime which would be implemented after 2020. The main agenda of the Durban Platform was to discuss the fate of Kyoto Protocol and the meeting was organized in a place called indaba, which is a Zulu expression meaning “the place where to take important decisions”.

The US (one of the major GHG emitter) had opted not to ratify and abide by the Protocol, as a result of which Kyoto was able to garner limited participation. The need to drag the US to the negotiation table and compel it to contribute to international mitigation efforts was felt. The Durban Conference launched a new set of negotiations in this regard, for the purposes of which ‘the Ad Hoc Working Group on Long-term Cooperative Action’ was established which was to function in parallel with ‘the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol’ to decide on the quantum and nature of commitments for post-2012 period.

The Durban Platform succeeded in finalizing an agreement emphasizing on the continuity of the Kyoto in furtherance of “the pledge and review approach in the international climate regime”. Also, the US agreed to participate in a legally-binding instrument only if “it would provide for perfect symmetry of obligations of both industrialized and developing countries”.

²⁴²Why Paris Climate Conference Is a Throwback to 1997 Kyoto Debate, Nicolas Loris, available at <http://dailysignal.com/2015/12/01/why-paris-climate-conference-is-a-throwback-to-1997-kyoto-debate/>, last seen on 31/12/2017.

²⁴³Annalisa Savaresi, Marginal Progress & Challenges Ahead, *Env'tl. Pol'y & L.* 18 (2013).

²⁴⁴Derald J. Hay, Post-Kyoto Stress Disorder: How the United States Can Influence International Climate Change Policy, 15 *Mo. Env'tl. L. & Pol'y Rev.* 493 (2007).

²⁴⁵What Will Become Of The Kyoto Climate Treaty?, available at <http://www.npr.org/2011/11/29/142907053/as-kyoto-protocol-ends-an-uncertain-climate-future>, last seen on 08/01/2018.

²⁴⁶Sandrine Maljean Dubois & Matthieu Wemaere, After Durban, what Legal Form for the Future International Climate Regime?, 3 *CCLR.* 187 (2012).

²⁴⁷Nikhil R Ullal, A Successor for the Kyoto Protocol Challenges and Options, *New Zealand J. Of Env'tl. L.* 122 (2013).

c. Doha Climate Change Conference (2012)

In the Durban Conference, the decision to commence fresh talks within the “Durban platform for enhanced action” was taken. It was agreed that the leitmotif of the talks would be to develop “a Protocol, another legal instrument or an agreed outcome with legal force applicable to all Parties” by the year 2015, which would be enforced from 2020 along with the Kyoto Protocol. It was also concluded that the second-commitment period would continue “the length of which was to be decided in Doha”.

However, the expression ‘another legal instrument’ became a source of ambiguity and confusion as the terms “legal” and “instrument” were generic and vague. The solution to this ambiguity was resolved in the Doha Conference. To substantiate on the ambiguities perpetrated by the proceeds of the Durban Conference, COP 18 was held in Doha in the year 2012 where the “timetable” for a future regime was concluded. As per the envisaged timetable, the agreement was supposed to be adopted by the year 2015 and enforced from the year 2020 by all countries. Further, it was decided that the second-commitment period of the Kyoto Protocol would be launched from 2013 to 2020.

d. Lima Call For Climate Action (2014) and the Paris Agreement (2015)

The COP 20 was held in Lima in the year 2014. The meeting concluded with the adoption of the ‘Lima Call for Climate Action’- “a document inviting all Parties (countries) to communicate their intended contributions to post-2020 climate action well before the Paris conference”. The ‘Lima Call’ was instrumental in facilitating the shift from a ‘legally-binding environmental treaty’ [The Kyoto Protocol] towards a ‘soft agreement’ [The Paris Agreement]. The ‘Lima Call’ contained the elements of the Paris Agreement, which was made available by 2015 and made collaborations with various nations.

IV. The ‘Causes of Death’ Unravelled

Ralph Emerson wrote that:

“Fate is a name for facts under the fire of thought, for causes which are unpenetrated. Whatever limits us we call fate”.

The Kyoto Protocol is widely viewed as a failure. Multiple factors contributed to the fate of Kyoto, which marked the death of a vision once hopefully embraced by the climate community. The Kyoto Protocol was a poorly drafted document, reflecting the hastiness of the final drafting process and the political disagreements among the negotiating parties. The Kyoto process, as embracer of unambiguous targets, identified winners and losers at far too early a stage, in the belief that the problem was so important and so urgent that not a moment could be spared for the building of a consensus from the bottom up.

²⁴⁸Annalisa Savaresi, Durban Platform - Last Steps on the Way to Paris, *Envtl. Pol’y & L.* 259 (2015).

²⁴⁹Supra note 15, at 189.

²⁵⁰Supra note 16, at 101.

²⁵¹The Durban Platform for Enhanced Action and the Future of the Climate Regime, *Int’l & Comp. L. Q.* 503 (2012).

²⁵²Annalisa Savaresi, Ad Hoc WG on the Durban Platform, 13 *Envtl. Pol’y & L.* 492 (2014).

²⁵³Id.

²⁵⁴Supra note 15, at 190.

²⁵⁵Id, at 190.

²⁵⁶Supra note 30, at 160.

²⁵⁷Supra note 33, at 104.

The causes of failure of Kyoto illustrates that the Protocol was doomed, all along the way, to encounter the fate it confronted. In this regard, Schatz observed:

“The forensic pathology suggests two causes of death: the more widely-acknowledged ‘horizontal’ failure to secure accession of the largest emitter, the United States, and commitments from the two largest emerging emitters in China and India; and the less-widely acknowledged ‘vertical’ failure to secure action by those who have acceded.”

The “horizontal failure” of the Kyoto Protocol was characterized by non-ratification by the US which contributed to the weakening of the Kyoto’s productivity and paved the way for its demise. The reason of non-ratification of Kyoto can be effectively deduced from Bush’s statement, when he opined that “the Kyoto Protocol was an unfair and ineffective means of addressing global climate change concerns” . Neither did the Protocol serve any domestic interest nor did it further any benefits to the US What was failure enough was that while the failure of Australia to ratify the Protocol was a minor blow to an international compact, that of the US was the most major blow as far as the coverage of the Protocol was considered as the US was the largest carbon-emitter in the year 1990. Further, non-ratification by the India and China (both of which are embarked upon rapid industrialisation which, thanks to their resource endowments and energy security concerns, will inevitably involve massive coal utilisation and therefore potential GHG emissions) also contributed to the weakening of the Kyoto’s productivity and paved the way for its demise.

The “vertical failure” of the Kyoto was recognised by the UN leading to the 2004 Secretary-General’s High Level Panel on UN reform urging member-states “to reflect on the gap between the promise of the Kyoto Protocol and its performance as the gap furthered by reason of lack of delivery also apparent on adaptation, which was largely ignored in both the Intergovernmental Panel on Climate Change (IPCC) and in policy measures, /despite the /inevitability of the need for some adaptation.” The Kyoto Protocol failed to garner commitments from acceding member-nations and thus, held little hope of functioning as a framework for achieving long-term global emission-reduction goals. In this respect, the Kyoto Protocol is criticised for absence of any substantive obligations on developing nations and the differentiated commitments of developed countries.

V. Clean Development Mechanism and the Post-Kyoto World

The Clean Development Mechanism, envisaged under Article 12 of the Kyoto Protocol, was introduced as an innovative market mechanism enabling the Annex-1 countries to “use the certified emission reductions accruing from project activities undertaken in Annex-2 countries to contribute to compliance with part of their quantified emission limitation and reduction commitments”. The CDM illustrates a tale of success and has contributed to smooth embrace

²⁵⁸Id, at 106.

²⁵⁹Jason Schwartz, “Whose Woods These Are I Think I Know”: How Kyoto May Change Who Controls Biodiversity, 14 N.Y.U. Env’tl. L. J. 480 (2006).

²⁶⁰Civilization’s Quotations: Life’s Ideal, available at https://books.google.com/books?id=zNQGk_fDYUIC, last seen on 07/01/2018.

²⁶¹Bharat H. Desai, Institutionalizing the Kyoto Climate Accord, Env’tl. Pol’y & L. (1999).

²⁶²Greg Kahn, The Fate of the Kyoto Protocol Under the Bush Administration, Berkeley J. Of Int’l L. 567 (2003).

²⁶³Id.

²⁶⁴Aynsley Kellow, Lessons Not Learned in Environmental Governance: International Climate Policy Beyond Kyoto, 11 Asia Pac. J. Of Env’tl. L. 101 (2008).

of the Kyoto Protocol. In addition to providing a flexibility mechanism, CDM has led to the development of a global carbon-market and has facilitated deployment of financial resources into cost-efficient clean energy and sustainable development initiatives. Emphasizing on the innumerable benefits of CDM, Kang and Paik wrote that:

“Saving earth is truly an international matter. And, among three choices in Flexibility Mechanism, CDM best represents the ideal shape of international law.”

However, all is not well and good. CDM is embedded with multiple weaknesses and flaws which puts its “procedural effectiveness” and its “environmental credibility” at risk. Reflecting on the same, Dr. Streck and Chagas wrote:

“Despite the encouraging response [enjoyed by CDM], it is clear now that the CDM architecture is burdened by structural flaws which must be dealt with if the mechanism is to achieve its full potential. The CDM’s environmental integrity and procedural efficiency have both been under criticism from stakeholders and analysts: the former for overlooking broader sustainable development objectives; the latter for a flawed governance architecture lacking basic due process requirements”

The weakness of CDM exists primarily because it follows two distant logics: “the logic of international law and cooperation among sovereign states” and “the logic of international financial and commodity markets that react to promises of return on capital” . The unbalance between these logics leads to two types of adversities: firstly, lack of CER’s supply which undermines the need of Annex-2 countries for investments and secondly, enhanced GHG-emissions because of consistent supply of CER’s.

However, despite the above weaknesses, it can’t be denied that the basic framework, principles and design of the CDM are sound and well-founded, and that it commands the unmatched potential to structure a global carbon market. Given that the whole world can benefit from a strengthened and healthy CDM in the post-Kyoto regime, it is imperative that the mechanism embrace reform and revision in order to qualify as a secure investment framework.

For CDM to achieve a significant presence in the post-Kyoto regime; there is a need to strike a balance between supply of CER’s and its environment integrity. Such a balance can be achieved if the CDM is evolved into a mechanism that has garnered participation of all the major emitters, including the US Further, expansion of the scope of CDM in terms of sectors covered and incentives provided [to induce significant participation] would facilitate attainment of such a balance. Furthermore, to reap benefits of CDM and facilitate development of a liquid, investment-friendly and operational market, its procedures need to be more clear and efficient while its application must be made “efficient, transparent and fair”. Additionally, what will serve well for the purposes of the world would be if the environmental issues borne by CDM “be addressed through stringent accounting at the project and sectoral level, the establishment of a CER buffer, as well as revised project design and eligibility criteria” .

²⁶⁵Text of a Letter from the President to Senators Hagel, Helms, Craig, and Roberts, available at <https://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010314.html>, last seen on 18/01/2018.

²⁶⁶Supra note 30, at 160.

²⁶⁷Supra note 33, at 104.

²⁶⁸Id, at 106.

²⁶⁹Id, at 101.

²⁷⁰Supra note 21, at. 557.

²⁷¹Article 6, The Kyoto protocol.

Subject to introduction of certain significant reforms, undoubtedly the world stands to benefit from CDM, which is “a more environmentally effective system” . As Nguyen, Duong, Greiner and Mehling put it: “Ideally, a reformed CDM would allow for more active and meaningful participation by developing countries in the global efforts to mitigate climate change, while still upholding the principle of differentiated responsibilities.” In this regard, Wilder and Curnow also wrote that “even if the Kyoto Protocol does fall apart, it is hoped that - at the very least - Parties will recognise the importance of maintaining the CDM as a central means of global climate change abatement” .

VI. Confronting the Inevitable Fate

While the Kyoto Protocol was an instance of a ‘binding treaty’ aimed at reduction of carbon-emission, the Paris Agreement can be characterized as a ‘soft agreement’. The probable shift from a ‘legally-binding environmental treaty’ towards a ‘soft agreement’ calling upon the parties to communicate their intended contributions to post-2020 climate presents both risks and opportunities. Appreciating the shift towards the Paris Agreement, Giovanni La Via had remarked that “the outcome may represent the lowest common denominator but it is important to keep the process going in order to reach a global agreement.” However, the outcome may be applauded as a significant step to get all parties on board, yet the agreement neither resulted in a stronger draft text nor did it envisage an ambitious and binding treaty nor did it strengthen the climate action. Thus, it is argued that the adoption of the ‘soft agreement’ by reasons of harsh reality of world politics contributed to weakening the fabric of climate community rules.

As far as the fate of CDM is concerned, the whole world can benefit from a strengthened and healthy CDM in the post-Kyoto regime as it commands the unmatched potential to structure a global carbon market.

VII. Conclusion

“[T]here is no durable treaty which is not founded on reciprocal advantage, and indeed a treaty which does not satisfy this condition is no treaty at all, and is apt to contain the seeds of its own dissolution. Thus the great secret of negotiation is to bring out prominently the common advantage to both parties of any proposal, and so to link these advantages that they may appear equally balanced to both parties.”

- Francois de Callieres (1716)

Drawing from the words of Francois de Callieres, it won't be an overstatement to imply that the Kyoto Protocol sowed the seeds of the fate it encountered. Despite being an innovative legal instrument, the Kyoto Protocol could garner only limited participation as the US chose not to ratify and abide by the Protocol. The Protocol became a victim to multiple political roadblocks as it, being a widely celebrated global experiment catered to the needs of the humanity instead

²⁷²Nam Hoon Kang & Min Jung Paik, Clean Development Mechanism Preferred: Flexibility Mechanism in Kyoto Protocol, 6 The Asian Bus. L. 44 (2010).

²⁷³Dr. Charlotte Streck & Thiago B. Chagas, The Future of the CDM in a Post-Kyoto World, 1 CCLR. 62 (2007).

²⁷⁴Id, at 61.

²⁷⁵Supra note 41, at 53.

²⁷⁶Supra note 42, at 53.

²⁷⁷Id.

²⁷⁸Marie Blevin, The Clean Development Mechanism And The Poverty Issue. 777 (2011).

of facilitating the interests of major emitters. However, the stint of 'humanity' played by Kyoto proved to be a non-viable means of acknowledging climate issues. As a hopeful vision once embraced by the Climate community, the Kyoto today is regarded as a 'futile diversion'. In this regard, Christopher C Joyner opined:

"Perhaps the worst thing about Kyoto is not that it has struggled to deliver any change in GHG-emissions over that achieved fortuitously, or that which would have been driven by environmentally-concerned domestic constituencies, but that it has been a futile diversion that for a decade has obscured progress being made in more promising directions."

It therefore remains undisputable that equated and held to be a 'diversion', mistakes in the structure and process of the Kyoto contributed to the fate of the Kyoto Protocol. Richard Schmalensee of MIT wrote that "the 'diversion' of Kyoto Protocol had a narrow scope (committing only developed countries), but a high ambition for that small set of nations." As opposed to this, it is argued that the Kyoto Protocol was only the start. Even though the Protocol failed to achieve what it sought, it cannot be doubted that this was a step towards a goal which all stakeholders strive to achieve. As David Victor put it:

"An imperfect agreement is better than none. We cannot wait any longer to take this crucial first step to solving the most important environmental issue facing the world today."

Thus, this paper concludes that the Kyoto protocol was ill-fated from the very start. What began as an instance of 'hopelessness', cultivated into a 'diversion' doomed for 'death'. Despite being an imperfect agreement destined for doom, Kyoto made its presence felt and, have created a momentum and mind-set that is now well in train. The Kyoto Protocol was just a toddler step towards a less carbon-intensive world. With cessation of the life-form of Kyoto Protocol, the World waits to be a spectator to an enterprising second revolution for climate sustainability. Drawing from the experiences learnt from the Kyoto Protocol, it will be a revolution spurred on not just by environmental concerns but by other forces as well-including the development and diffusion of new technologies, the emergence of economically viable alternative energy sources, and the relentless drive in business for new efficiencies and new sources of income and growth.

²⁷⁹Supra note 42, at 63.

²⁸⁰Michael Wara, Measuring the Clean Development Mechanism's Performance and Potential, UCLA L. Rev. 1803 (2008).

²⁸¹Nhan T Nguyen, Minh Ha-Duong, Sandra Greiner & Michael Mehling, Improving the Clean Development Mechanism Post-2012: A Developing Country Perspective, 1 CCLR. 85 (2010).

²⁸²Martijn Wilder & Paul Curnow, The Clean Development Mechanism, 24 UNSW L. J. 582 (2001).

²⁸³Supra note 26, at 1.

²⁸⁴Id, at 19.

²⁸⁵Id, at 30.

²⁸⁶Sean Cumberlege, Multilateral Environmental Agreements: From Montreal To Kyoto - A Theoretical Approach To An Improved Climate Change Regime, 37 Denv. J. Int'l L. & Pol'y. 303 (2008).

²⁸⁷Stephen J. DeCanio & Catherine S. Norman, An Economic Framework for Coordinating Climate Policy with the Montreal Protocol, Sustainable Dev. L. & Pol'y. 44 (2007).

²⁸⁸Christopher C Joyner, Burning International Bridges, Fuelling Global Discontent: The United States And Rejection Of The Kyoto Protocol, 34 (2002).

²⁸⁹Supra note 26, at 22.

²⁹⁰David G. Victor, The Collapse Of The Kyoto Protocol And The Struggle To Slow Global Warming 178 (2001).

²⁹¹Steven Freeland, The Kyoto Protocol: An Agreement Without A Future?, 24 UNSW L. J. 532 (2001).

²⁹²Supra note 54, at 305.

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