

I N S I D E T H E M I N D S

The Impact of International Climate Change Policies

*Leading Lawyers on Counseling Clients,
Navigating Recent and Upcoming Developments,
and Recognizing the Economic Impact
of Climate Change Policy*



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Looking to the UN Climate
Change Convention in
Copenhagen: Upcoming
Developments in the Climate
Change Policy Arena

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Background

The current major international climate change issues involve planning for and work leading up to the United Nations Climate Change Convention, in Copenhagen, set for December 7–18, 2009. This is the fifteenth Conference of the Parties under the United Nations' Climate Change Convention (COP15).

Discussion leading up to the conference has been focused on, among other things, emissions reductions and the extent to which developed and developing countries can agree on reduction targets for greenhouse gas emissions (GHGs). Some developed countries (e.g., the European Union) have set targets for 2020 of 20 percent of 1990 levels, but others are awaiting commitments from the developing countries (e.g., Canada and Japan, and of course, the United States) prior to making commitments themselves. To date, international consensus has been hard to come by, and discussions at the Bonn Climate Change Talks in June 2009, the Group of Eight (G-8) meetings in L'Aquila, Italy, in July 2009, and most recently, the Asia-Pacific Economic Cooperation forum in Shanghai in November 2009, have been no exception.

On November 14th and 15th, new goals were identified by the Danish prime minister for the Copenhagen summit: text with “precise language” should be produced committing developed countries to reductions of emissions thought to be warming the planet, with provisions on adapting to warmer temperatures, on financing such adaptation, and combating climate change in poor countries. Pledges for financing early action would be included.

The major players in the international discussion include the United Nations, delegates from the 182 countries taking part in the discussions, various intergovernmental organizations, as well as non-governmental organizations. The key players will continue to be the heads of government for the G-8 (Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States), along with the five leading developing countries (Brazil, China, India, Mexico, and South Africa).

Judicial and Related Developments

Organizations will continue to use the U.S. judicial system where applicable. For example, a recent and interesting development arose in the context of a case filed in the U.S. District Court for the Northern District of California (in San Francisco) by Friends of the Earth, Greenpeace, and the cities of Oakland, Santa Monica, Arcata, California, and Boulder, Colorado, against the Export-Import Bank of the United States and the Overseas Private Investment Corp., where the environmental groups claimed the federal agencies violated environmental law by supporting “far-flung” projects without considering their climate change impacts in the United States. The projects the groups complained about included, for example, an oil pipeline between Chad and Cameroon, and a coal-fired power plant in China. The environmental groups claimed the federal National Environmental Policy Act and related environmental review was necessary because the projects’ emissions would have climate change impacts in the United States. The case, *Friends of the Earth v. Watson*, No. 3:02-cv-04106-JSW (N.D. Cal. Feb. 6, 2009), was settled and dismissed on February 6, 2009, with the agencies agreeing to disclose the GHG emissions of the projects they propose to support, to cut their projects’ overall emissions by 20 percent over the next decade, and to spend \$500 million to promote renewable energy projects, among other things.

The desire for transparency and the resulting call for Fortune 500 company disclosure of climate risk also continues as a key issue in this area (e.g., from the perspective of investors and citizen/public interest groups).

Impacts of International Climate Change Policies on U.S. Policy

The key impact of current international climate change policies that we see here in the United States is on federal climate change legislation, as well as the Obama administration’s formulation and implementation of its international policy.

Also, many states and regions within the United States are exercising leadership in coming up with or being part of regional climate change efforts (e.g., the Regional Greenhouse Gas Initiative, made up of Northeastern and mid-Atlantic U.S. states, and the Western Climate

Initiative, a collaboration of seven U.S. governors and four Canadian premiers), as well as state-specific efforts (e.g., California's AB 32, the Global Warming Solutions Act). California's program, for example, includes mandatory reporting rules and mitigation measures. The California Climate Change Scoping Plan, approved by the California Air Resources Board in December 2008, has already provided guidance to other states and to federal programs under the Obama administration to reduce greenhouse gas emissions. As part of California's program, California (like the European Union) may allow business to trade carbon offsets (i.e., the notion of turning carbon emissions into tradable credits) as part of a California Air Resources Board-enacted cap-and-trade system.

The U.S. House of Representatives narrowly passed the American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) on June 26, 2009. The bill was introduced by House Energy and Commerce Committee Chairman Henry Waxman and House Energy and Environment Subcommittee Chairman Edward Markey. The provisions of the bill focus on reducing global warming pollution and targets electric utility plants, petroleum refineries, large manufacturing plants, and other facilities that fall within the category of large emitters. Tradable federal permits, called "allowances," would be a feature of the law, and "offsets" would be available so that a covered entity could increase its emissions above their allowances if they can obtain "offsetting" reductions at lower cost from other sources. The U.S. Senate is working on companion legislation and is expected to complete committee markups in early 2010.

In addition, the U.S. Environmental Protection Agency, responding to the U.S. Supreme Court's ruling in *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007), issued a proposed endangerment finding that, once finalized, would give the agency the authority to regulate GHGs under the Clean Air Act. Given its focus on more traditional industrial emissions and a permit-based system, the Clean Air Act is widely viewed as a less-than-optimum method of regulating GHGs. As a result, a legislative solution is favored. The Environmental Protection Agency's finding, however, has helped push the dialogue in Congress forward.

Monitoring Climate Change Programs

“Global rules” in the area of climate change run the gamut from the above-discussed COP15 process, to regional-based systems, to state and local systems. Enforcement and/or monitoring on an international level are often problematic. The Kyoto Protocol created monitoring through the clean development mechanism and joint implementation project, but neither has been particularly well funded. Protocols may need to be established through something like the International Organization for Standardization. See Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, Dec. 10, 1998, 37 I.L.M. 22.

Indeed, at the present time there is no real international enforcement regime with respect to climate change. Most commentators agree that enforcement will need to be built into domestic regimes. The United Nations could play some oversight role in monitoring and consideration of possible sanctions. Non-governmental organizations will also play a role both in advocating policy change/implementation and through resort to domestic courts and/or international tribunals.

Industries and Countries Concerned with Climate Change

China is now the largest emitter of GHGs, the United States is second, and India will soon be third. Some predict that by 2100, developing countries will comprise 70 percent of global emissions. Against this backdrop, China, India, and other developing countries seek to continue their economic growth, and have argued that they should be allowed to “catch up” before being subject to the same levels of GHG reduction as developed countries. These issues will play out further leading up to and following the Copenhagen conference.

Countries like India, which argue they have among the “lowest emissions per capita,” have to date rejected the concept of binding limits on carbon emissions. Doing so would limit economic growth at a time of continuing economic challenge. Potential “border measures,” or carbon tariffs on exports, is also a subject of grave concern to developing countries and trading partners.

Industries concerned with climate change include mining companies (in the context of continued reliance on coal), electric utilities and other power generators, petroleum refiners and similar oil and gas companies, large manufacturing plants, and on the other side of the energy ledger, the renewable energy sector. Development of an overall carbon management structure and attendant protocols will be a key part of ongoing international climate change policy.

Working with Clients in Climate Change Cases: Key Questions

Case development in climate change cases is driven by many of the same elements as any other case or matter. A threshold question involves whether and to what extent treaties, rules, statutes, regulation, and/or agency guidance might apply. A further question involves the need to know and understand the business and operations the company or regulated entity is involved in, so that compliance with applicable statutes/regulations may be evaluated, and so the business objective can be identified and a strategy built around that objective.

Overall, the information learned will be used to assess compliance; identify areas where compliance issues may need to be addressed; evaluate operational or manufacturing issues and potential changes to consider; employ management review and potentially implement change; initiate and/or continue a dialogue with the regulators, stakeholders, and other interested parties; and advocate/defend the client's position, where necessary.

Basic Components of Climate Change Cases

Certain of the large climate change-related cases were brought by states or citizen groups seeking or challenging government action. For example, in *Massachusetts v. EPA*, the Supreme Court overturned the Environmental Protection Agency's finding that carbon dioxide and other GHGs did not meet the definition of a "pollutant" under the Clean Air Act. Additional litigation has involved challenges to Clean Air Act or similar permits (by interested parties and/or by the permittee), where GHGs may be involved. On a local level, there is likely to be (and

already have been) a number of challenges to development plans where GHGs may not have been accounted for or where inadequate mitigation measures are claimed.

As mentioned above, certain high-profile citizen groups sued in U.S. District Court in California to ensure that money lent to advance international development and projects appropriately takes into account GHG emissions and promotes renewable energy. Common law tort will also be relied upon by litigants. A recent example is the federal district court case of *Native Village of Kivalina v. ExxonMobil Corp.*, No. 08-1138, Complaint (N.D. Cal. filed Feb. 26, 2008) where a native Alaskan group alleged injury to their community from climate change impacts caused by GHG emissions of certain large petroleum companies and electric power producers. That case however was recently dismissed, based on a lack of subject matter jurisdiction.

Updating International Climate Change Policy: Key Players

COP15 and meetings leading up to it are the key current drivers for international climate change policy. The United Nations remains involved and dedicated to providing information on climate change policy status and developments.

Specific non-governmental roles on the international stage are somewhat limited. The United States, and especially certain states such as California, is helping to shape and drive the dialogue, however. Therefore there are and will continue to be opportunities to be involved at the state and local level. In addition, and as noted above, discussions regarding how to transfer affordable, low-carbon technology from the developed world to the developing countries where emissions continue to rise will be a continuing focus of diplomatic meetings before and after the Copenhagen summit.

Key Impacts of Climate Change Policy

International climate change policy is important to business in a number of ways. First, necessary and mandated reductions to GHG emissions may require design and similar changes to manufacturing and related processes.

Product life cycle analysis may also need to be conducted in this same context. In essence, businesses and companies will need to engage in wide-scale carbon management review and evaluation to ensure they remain competitive and profitable going forward.

For municipalities and developers, any planned development, as well as infrastructure additions/improvements, will need to consider climate change requirements and mitigation measures. For example, California and other states have passed specific legislation requiring consideration of GHG emissions in development planning and implementation. See, e.g., California Sustainable Communities and Climate Protection Act, SB 375.

Looking to the Future

Notwithstanding the lack of legal agreement imposing hard caps on GHG emissions, the Copenhagen meetings and resulting commitments will help shape climate change policy in the months to come. In the meantime, businesses and advisors will also need to stay informed of developments in the U.S. Congress, the states, and on the local level.

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