# Kyoto, Costs, and Compliance: A Public Interest Lawyer's View of COP6

## By Glenn Wiser, Staff Attorney, Center for International Environmental Law

March 1, 2001

### I. Demise of the Protocol?

THE HAGUE, Friday, November 24. We had barely finished handing out our last "Emergency Message to Ministers" when a man I had never met stormed toward me and said I had just wrecked the Kyoto Protocol.

It was the morning of the last full day of negotiations for the Climate Change Convention's Sixth Conference of the Parties (COP6). Delegates from 177 countries had been struggling at The Hague for nearly two weeks with the final rules to implement the Kyoto Protocol, the treaty that sets binding targets for industrialized countries to begin reducing their levels of heat-trapping greenhouse gasses. Despite a grueling schedule ordered by the Conference's President, Jan Pronk, a final deal was not yet within reach.

My day had started at a strategy session of the Climate Action Network (CAN). CAN is a coordinating body for over 280 environmental organizations throughout the world working to promote action to limit human-induced climate change to ecologically sustainable levels. As I concluded my report on the status of negotiations to create a compliance system for the Protocol, a German colleague's mobile phone rang. She interrupted to say that the French government was making a renewed effort to convince the rest of the European Union to endorse a "price cap" mechanism—a mechanism that could allow countries to comply with their Kyoto targets by paying a discounted fee instead of accomplishing actual emissions reductions. The two of us rushed out of the room to mobilize our people.

After touching bases with the other European members of our team, I ducked into the press room where I knew I could find a computer available. I typed and printed the one-page "Emergency Message to Ministers" flyer. Rejoining my NGO colleagues, I began working the halls outside the EU offices. We talked with all the EU delegations with whom we had direct contacts, including working-level experts and a few heads of delegations and ministers. Then we approached delegations and ministers whom we did not know, as well as several members of the European Commission delegation.

We handed a flyer to each official and explained its message. CAN had long supported a "compliance fund" as part of the Kyoto Protocol compliance system. The compliance fund would allow countries that exceeded their emissions targets at the end of the five-year budget period to pay a fee based on the amount of their "overage." The fund would use the fees to purchase allowances through the Kyoto emissions trading mechanisms or, if allowances were unavailable on the market, to invest directly in projects that would accomplish emissions reductions equal or greater than the overage. The key for the environmental groups was that the collected fees had to be high enough to ensure that (1) all the needed reductions were realized, and (2) the fund provided no incentive for countries to delay implementing their Kyoto obligations during the budget period.

During the negotiations running up to The Hague, we had been successful in convincing several countries to endorse the compliance fund idea, so that it was now included in the official compliance negotiating text. The European Union supported payments to the compliance fund as a mandatory consequence when a country exceeded its emissions target. The developing countries, negotiating as the Group of 77 and China, advocated the fund as part of a system of financial penalties. The United States and Canada, on the other hand, were interested in a "voluntary fund" that could be available at the end of the budget period for countries with overage that wanted to avoid a formal finding of non-compliance. Accordingly, the fund appeared in the compliance negotiating text in two places: as an obligatory consequence of non-compliance, and as a voluntary option for countries as they "trued up" their emissions ledgers at the end of the budget period. CAN and my organization, the Center for International Environmental Law (CIEL), had supported both as complementary compliance tools.

While the working-level experts on the EU delegations knew about the compliance fund, most ministers were at best vaguely familiar with it, recognizing it only as something the green groups wanted. They were far more concerned with high profile questions like the role of land-use change and forestry activities in the Protocol ("sinks"), or whether there should be a limit on the extent to which a country could meet its target by purchasing emissions reductions overseas ("supplementarity"). Now, we would have just a few moments to convince them that another issue had implications for the Protocol's integrity that were potentially as far reaching.

We called on the ministers to reject both the voluntary and obligatory forms of the fund. We explained that it had become apparent to us that inclusion in the compliance text of either of these mechanisms could be used as a "stealth measure" for renegotiating the meaning of the Protocol's reduction targets. Our intelligence had revealed that some members of the US delegation hoped to use the "voluntary fund" as a way to introduce a "price cap" into the compliance rules. And parts of the French delegation were trying—at that very moment in the Council meeting—to convince the rest of the EU to reconsider its earlier rejection of a price cap as part of the mandatory compliance fund.[1]

A price-capped compliance fund would mean that an unlimited amount of allowances would be available to countries at a fixed cost at the close of the budget period. If the price of those allowances was preset at, say, $25 a ton, then every participating country would know that its costs for meeting its target during the budget period need not exceed that amount. A government might not require its companies to expend more than $25 a ton to meet their individual emissions allocations. The price cap could thus serve to change the Kyoto compliance rule from an absolute obligation to meet one's target to instead making a pre-determined "level of effort" toward reductions—in this case, an effort of $25 per ton.

Some governments and companies might prefer that approach. But it would not ensure that the full measure of emissions reductions were achieved, and it was *not* what the community of nations agreed to in Kyoto. Moreover, it was extremely unlikely that the Conference of the Parties would be willing or able to consider such an alternative adequately here at The Hague.

[1] At the time of COP6, the French held the EU presidency, and thus were responsible for setting much of the EU agenda as well as speaking on the EU's behalf during the formal negotiating sessions.

We suspected the US strategy was more subtle: Avoid direct discussion of the price cap at COP6. Instead, preserve a "placeholder" in the compliance negotiating text for a "voluntary fund," the "modalities" of which would be decided at a later time.[2] Without the distraction of the price cap question, push hard for the most lenient deal possible on issues such as "sinks," supplementarity, and the implementing rules for the three emissions trading mechanisms. Resolve these issues at COP6 so that developing countries and the EU would begin ratifying the Protocol. Then, after those key blocs had accepted the treaty, re-open negotiations on the voluntary fund by insisting that ratification by the US Senate would be possible only if a price cap was part of the deal.

Many of the EU delegates were interested to hear our information. They communicated it to their colleagues in the Council meeting. Shortly, we learned that EU member states had confirmed to the French presidency that they would reject the price cap and voluntary fund.

A few minutes later, I was backed against a wall outside the EU offices, wondering who this Frenchman was wearing a pink badge[3] and yelling that I had destroyed the Protocol's last chance for ratification. Exasperated, he said, "I hope you're satisfied," and walked away. One of my NGO colleagues identified him as the lead proponent for the price cap from the International Research Center on the Environment and Development (CIRED), a French think tank allied closely with the government. As I was well aware, CIRED and a US group, Resources for the Future (RFF), had been collaborating for some time to develop the price cap proposal and sell it to their respective governments.

## II. Advocates Do Not Own Their Ideas

Tuesday, three days earlier, CAN had announced at a press briefing that environmental groups were declaring war on the price cap and voluntary fund. As lead attorney on Kyoto compliance issues for CAN and CIEL, I explained that we were demanding negotiators delete those provisions from the compliance text. A reporter asked, "Where did this fund idea come from, anyway?"

"That's an interesting question," I replied. "A couple years ago, two attorneys from CIEL named Glenn Wiser and Don Goldberg developed the compliance fund as a tool for facilitating and enforcing compliance with the Protocol.[4] The Climate Action Network subsequently adopted the fund as part of its official position on compliance, in part because it provided an alternative to

[2] *See* UNFCCC, *Procedures and Mechanisms Relating to Compliance Under the Kyoto Protocol*, annex II, ¶ 84(b), FCCC/SB/2000/CRP.15/Rev.1 (Nov. 18, 2000). Throughout the negotiations leading up to COP6, the intention of Parties was to develop the compliance text, finalize it at COP6, and include it as an annex to a decision on compliance adopted by the Conference of the Parties.

[3] Participants at the climate negotiating sessions often identify each other by the color of the security badges they must wear at all times. Members of government delegations wear pink badges. Intergovernmental organizations wear blue. Nongovernmental organization members wear green. The press wears orange. Members of the Convention's secretariat wear white.

[4] *See* Glenn Wiser & Donald Goldberg, *The Compliance Fund: A New Tool for Achieving Compliance Under the Kyoto Protocol* (CIEL, June 1999); Glenn Wiser & Donald Goldberg, *Restoring the Balance: Using Remedial Measures to Avoid and Cure Non-Compliance Under the Kyoto Protocol* (CIEL, June 2000). Both of these publications are available in .pdf format at <www.ciel.org/pubccp html>.

'borrowing.'" ("Borrowing" is the idea that a country which exceeds its emissions target can avoid or remedy a finding of non-compliance by applying parts of its future budget to the present one.) We believed the compliance fund could reliably accomplish all of its emissions reductions so long as the price for fund allowances was a "dynamic" one, based upon the market price of emissions trades during the budget period and increased by a fixed "multiplier" to account for delay, project risk, and other factors.

Meanwhile, Resources for the Future, the US NGO, began advocating its "level of effort" rule for the Protocol. The idea complemented their earlier proposal to regulate the domestic consumption of fossil fuels through an auction-and-trade permit system with a "price cap" safety valve. While some members of the US environmental community had been intrigued by the domestic proposal,[5] most groups were far more skeptical of the international one, fearing it could seriously undermine the meaning and purpose of the Kyoto targets.

Nevertheless, several officials at the US State Department thought the price cap could help win Senate approval of the Protocol. They began exploring its feasibility with RFF, who by then was collaborating with CIRED to develop a transatlantic approach that could accommodate the distinct political situations in the US and the EU. As authors of the original compliance fund idea and CAN's most prominent spokespersons for Kyoto compliance matters, we were invited by the State Department proponents to join them in promoting the price cap. RFF lobbied CAN for support in a sales pitch made to all the major groups at our office in Washington, DC.

Ultimately, we remained unconvinced. We saw no indication that the price cap would really help US ratification, given the hostility the Senate had expressed towards the Protocol. In light of all the other loopholes we believed the Administration was advocating, we felt a price cap would be nothing more than "piling on."

I was troubled for an additional reason. A price cap at the international level would likely mean that the US Clean Air Act eventually included some form of price cap provision for our domestic regulation of carbon dioxide. Despite persistent efforts by industry to convince Congress and the courts to rule otherwise, US environmental regulation is generally based upon fixed standards and targets—cost is typically not a consideration when evaluating whether a source has complied with its obligations. A price cap could usher in a new approach to environmental regulation that might place cost considerations above performance. Environmentalists had resisted that since the 1970s, and I did not want to see it happen now.

## III. NGO Negotiators

By the time the first week of COP6 ended, the price cap question was still unresolved. I had spent my days and nights coordinating and revising the CAN compliance position and, with my NGO partners, advocating a strong compliance system to the delegates. But we had made no headway convincing the US to consent to a clarification of the "voluntary fund" language that would preclude it being used as a price cap. By Sunday of week two, Jennifer Morgan, director

[5] The domestic proposal has been significantly developed by the Corporation for Enterprise Development and Americans for Equitable Climate Solutions in the form of the "Sky Trust" initiative. More information is available at the CFED website, <www.cfed.org>.

of the World Wildlife Fund's climate change campaign, and I agreed we were running out of time. Soon, negotiations would move to the ministerial level, out of public view. I was torn. The voluntary fund language served as a placeholder not only for the price cap but also for CIEL's compliance fund proposal. To demand that it be deleted would amount to renouncing a significant part of our work of the last year and a half. But I could see no alternative. After consulting with the other groups, we agreed I would try one last time to work out a deal with the US delegation. Failing that, we would demand that the voluntary fund placeholder be stricken from the text.

Monday morning, I met with a senior adviser to Undersecretary of State Frank Loy, the lead US negotiator, and with a US delegate for the State Department's compliance team. I reiterated that the only way the environmental groups could refrain from publicly condemning the fund was if the text contained some assurance that the price would never be less than the market price of allowances during the budget period. They responded that the state of play in the negotiations was very tricky and it would be difficult to get that change approved. Could we wait 48 hours? I answered we needed to make a decision by the end of the day, because if no agreement could be had, we would go public on Tuesday. They said they would see what they could do.

Having heard nothing, I called the State Department people Monday evening. They asked again if we could hold off. I said we could not, to which they replied, "Do what you have to do."

We blasted the US position at our press conference Tuesday morning. Over the next two days, CAN took every opportunity to expose and condemn the voluntary fund. The US group Environmental Defense, never a fan of the compliance fund, was especially vigorous in denouncing the US for advocating another "loophole" in the treaty. Along with the European members of our CAN compliance team, we urged our contacts on the EU delegations to veto the price cap.

By Thursday, I was confident our efforts were having effect. An article I wrote entitled, "Voluntary Fund?" appeared in that morning's *Eco*, the CAN daily that is among the most widely read publications at the climate negotiating sessions.[6] It ripped the price cap as the "ugly little secret lurking in the compliance text." A rather tense exchange with the US compliance delegate—in which I was told we had no right to try to influence the negotiations because only governments could negotiate—confirmed for me that the US was feeling some of our heat. Key European delegations privately advised us they would oppose the fund. And those "Umbrella Group" countries that had never been inclined toward the fund—including New Zealand, Australia, and Japan—were only too happy to hear we no longer supported it.[7]

The last gasp occurred at the EU Council meeting on Friday morning, when the member states repeated to the French that they would reject the price cap. Until then, I had never understood why the US compliance delegate repeatedly said, "If the EU gets their compliance fund, we want our fund." I now suspected the delegate was referring to the deal outlined by CIRED and RFF,

[6] *See* "Voluntary Fund?," *Eco*, Nov. 23, 2000 at 2, *available at* <www.climatenetwork.org/eco/10.1100 fund html>.

[7] The Umbrella Group is an informal negotiating bloc of non-EU countries that have emissions targets under the Protocol, including Japan, the United States, Canada, Australia, Norway, Iceland, New Zealand, the Russian Federation and Ukraine.

in which a price-capped compliance fund would be available to the EU as a "consequence" of non-compliance in exchange for the US getting a price-capped "voluntary fund" to avoid non-compliance.

Leaving the EU office area, I sensed my work at The Hague was nearly over. We had apparently succeeded in derailing the price cap along with our compliance fund. The final COP6 negotiations were being conducted at the ministerial level behind closed doors. Everything hung in the balance, and one person among the thousands attending COP6 had vowed to hold me responsible if the talks failed.

I sat down for a cup of coffee with Jennifer Morgan and briefed her on what had happened. After I told her about the French delegate, she said, "Glenn, when they tell you that, you know you did the right thing."

## IV. Afterword

When I passed the conference center early Saturday morning on my way to the airport, I was unaware that the talks were collapsing over the US and EU's inability to come to agreement on the sinks and supplementarity questions. No formal decisions on any substantive issues were taken at COP6. There was no decision on compliance. While it is unclear whether the draft compliance text will continue to serve as the basis for any future negotiations, we do know it was never altered to preclude a price cap. Here at CIEL, we still support our original compliance fund proposal. The uncertainties of a new US Administration, the fast-approaching commencement of the first budget period, and an increasing sense of urgency in the face of advancing climate change mean that the price cap question is not yet resolved.