

The Post-Kyoto International Framework: A WTO/GATT-Model

Shinya Murase*

1. Introduction: Scientific Knowledge and International Law

Multilateral environmental agreements have adopted certain methods for incorporating scientific knowledge into their treaty regimes: One of the methods is a combination of a framework convention and a protocol/annex. Multilateral treaty-making is normally an intricate and time-consuming process starting from negotiation, going through the stages of drafting, adopting and signing the text, before reaching ratification and the final entry into force. By contrast, protocols and annexes can be worked out within a relatively short period of time with the so-called “opt-out” (contract-out) procedures that enable quick and flexible amendments. Thus, while a framework convention, as a basis of the regime-building, contains broad guiding principles and general commitments, the protocol/annex that provides for concrete implementation of the necessary measures is designed to incorporate ever-increasing scientific knowledge into the regime by speedy adaptation to the ever-changing situations¹.

It is generally viewed that this method of combination has worked very well in cases such as the ozone layer regime set up under the combination of the Vienna Convention and the Montreal Protocol followed by successive revision of protocols and annexes. In the context of climate change, however, the relationship between the UN Framework Convention and the Kyoto Protocol has not been the best, with different types of regulations adopted in each instrument. Furthermore, even if the relationship between the two was properly integrated, new protocols would have to be worked out as treaties, requiring a great deal of time and energy for the negotiation to be completed. What we need is a more flexible mechanism that can meet the changing conditions of the international community.

* Professor of International Law, Sophia University Faculty of Law, Tokyo. Lead author, IPCC 4th Assessment Report, WG-III, Chap.13.

¹ Shinya Murase, “Perspectives from International Economic Law on Transnational Environmental Issues”, *Recueil des cours*, Hague Academy of International Law, vol. 253, 1995, pp. 317-318.

It is for this reason that I would like to propose the GATT-model approach for the post-Kyoto framework on climate change. I believe that this approach offers a long-lasting and sustainable mechanism which is required for tackling climate change issues.

2. Problems of the Kyoto Protocol

Before going into the discussion of the future framework, I would like to summarize the problems of the current Kyoto Protocol so that we will not repeat the same mistakes in elaborating the post-Kyoto instrument.

There are a number of problems in Kyoto Protocol: First, on participation, the Protocol has failed to engage an adequate complement of countries (developing countries and US). It was a mistake that the Protocol, following the Berlin mandate, has adopted the absolute division between the developed and developing countries for legal commitment. In this context, the principle of “common but differentiated responsibility” has been abused. The principle should be interpreted that all nations bear the responsibility as the common basis of commitment while the degree of responsibility may be differentiated depending on the degree of development of each country.

Second, it was another mistake that the Protocol has provided for the absolute numerical national caps as binding commitments (for industrialized countries). This system may be accepted by former socialist countries or those States under the wartime control, but it is contrary to the system of market economy, going beyond the government reach. It is particularly difficult to implement the rigid obligations of the Protocol domestically in a country like Japan that has been trying to reduce the degree of government interference in economic activities through deregulation.

Third, the Protocol has wrongly provided for the numerical quantification of such commitment for individual nations, such as 6% for Japan, 7% for US and 8% for Europe, etc, which were set quite arbitrarily without any objective foundations. These targets were politically agreed on in a top-down, deductive manner rather than accumulating objective figures, sector by sector, in a bottom-up or inductive manner. The result was that those percentages were unfair for Japan, unfeasible for US and quite advantageous for Europe, if considered together with the so-called “EU bubbles” and the base year of 1990.

Fourth, the Kyoto Protocol is concerned primarily with short-term

achievements, while the global warming is something that should be tackled for long term of fifty or one hundred years. The Protocol's basic approach is to set a timeframe of five years, and assess the result of achievement by individual nations at the end of each commitment period, which is to be reflected for the level of commitment to be allocated at the following period. This kind of mechanism may work well in some quarters domestically, but it is rather difficult to imagine that it will work as effective machinery in the international community. There is no legal link established between the first and second commitment periods in the Kyoto Protocol².

There are some other problems that should be noted, such as the Protocol's non-compliance procedure³, but for lack of time, I have to skip them as they are the problems outside the scope of my presentation today.

3. A Proposal for the Future Framework: A WTO/GATT Model

Based on these problems of the Kyoto Protocol, I would like to present my proposal for a future framework. I would first like to make clear my basic presumptions underlining my proposal.

First, on a legal form of the future instrument, that is, a question whether it

² Thus, IPCC Fourth Assessment Report (WG-III, Chapter 13) stated that "A number of limitations and gaps in existing agreements are cited in the literature, namely: The lack of an explicit long-term goal means countries do not have clear direction for national and international policy; The targets are inadequately stringent", IPCC, *Climate Change 2007: Mitigation of Climate Change*, Cambridge University Press, 2007, para.13.3.1, p.768.

³ ".....it is pointed out that introducing adversarial elements (such as sanction) into the system are highly undesirable in view of the fact that the Kyoto Protocol currently covers only one third of the total GHG emissions of the world (Murase, 2005). There are two schools of thought regarding the appropriate response to non-compliance contemplated under the Kyoto Protocol (see Murase, 2002b). One view advocates 'soft' compliance-management, which favours primarily facilitative and promotional approaches by rendering assistance to non-compliant States; those holding this view often refer to 'the non-compliance procedure' used under the Montreal Protocol. The other view takes a 'hard' enforcement approach in order to coerce compliance by imposing penalties or sanctions on non-compliant parties. Financial penalties and economic or trade sanctions have been proposed along these lines", IPCC, *op. cit.*, *supra* note 2, para. 13.3.3.7, p. 787. (Murase, 2005: Shinya Murase, "Trade and the environment: With particular reference to climate change issues", *Manchester Journal of International Economic Law*, 2(2), pp.18-38; Murase, 2002b: Shinya Murase, "Conflict of international regimes: Trade and the environment", Institute of International Public Law and International Relations of Thessaloniki, *Thesaurus Acroasium*, XXXI, pp. 297-340).

can take the soft-law form of non-binding, voluntary pledges or the hard-law instrument containing binding commitments. My answer is the latter. I do not think that, after having had the Kyoto Protocol, the international community would approve the non-binding instrument or a framework convention. It should be noted, however, that the binding character can take other forms than the Kyoto Protocol type of rigid obligations, and the GATT-model instrument, as I explain later, can offer certain flexibility in the obligatory regime.

Second question is whether we should envisage a future instrument as a continuation of the Kyoto Protocol with a few minor changes or we should elaborate a new instrument completely separated from Kyoto. My answer is the latter. I do not think that the Kyoto Protocol will sustain after 2012. This relates to my next proposition.

Third, on participation in the future instrument. I believe that the future instrument should be elaborated so that all the major emitters, 15 or 20 countries including US, EU, China, Russia, Japan and India, become parties to it⁴. This probably means a departure from the UN framework (in which all States are supposed to participate) in building an international regime.

Fourth, the future instrument should contain the following elements: it should be a flexible mechanism while at the same time a binding instrument. It should be a mechanism which lasts for a long time of 50 or 100 years, ensuring a sustainable forum

⁴ “Some have argued that an international agreement needs to include at least the major emitters to be effective, since the largest 15 countries produce as much as 80 % of global GHG emissions (Baumert, et al., 2005a; Schmidt et al., 2006...). A similar approach has been taken by authors comparing climate change agreements to other multilateral instruments, including disarmament treaties and Antarctic Treaty (see Murase, 2002a). In these analyses, the authors assert that success can only be achieved if the major stakeholders act. Thus, for example, a nuclear disarmament treaty would be meaningless if it was not ratified by those States with nuclear weapons, even if it was ratified by the 180 non-nuclear States. By analogy, a climate change treaty is meaningful only if commitments are adopted and implemented by major emitters – noting that the benefits of participation accrue to all countries, including those not taking part in the agreement. Murase (2002a) suggests that a future regime after 2012 thus needs to include key countries or groups such as the USA, EU, Japan, China, India, Korea, Mexico, Brazil, Indonesia, South Africa and Nigeria”. IPCC, *op.cit. supra* note 2, para. 13.3.3.2, p.774. (Baumert, et al., 2005a: K. Baumert, T. Herzog and J. Pershing, “Navigating the numbers: *Greenhouse gases and international climate change agreements*, World Resources Institute; Schmidt, et al., 2006: J. Schmidt, N. Helme, J. Lee, M. Houdashelt and N. Höhne, “Sector-based approach to the post-2012 climate change policy architecture”, *Climate Policy*; Murase, 2002a: “Implementation of international environmental law: Its international and domestic aspects: Case of the Kyoto Protocol”, *Jurisuto*, 1232, pp. 71-78).

for continuous negotiations among States. Finally, the future framework should, in my view, take the bottom-up approach rather than the top-down approach, and in this sense, the sector based approach is the most appropriate method to be incorporated for the reasons given by other speakers at this symposium.

I believe that these presumptions can be satisfied by the GATT-model approach to the climate change regime building⁵, which I will demonstrate.

The GATT has been very successful for the past 60 years in realizing free trade, through lowering tariffs and non-tariff barriers. The GATT is a framework that combines bilateralism with multilateralism. Under its request-offer system, country A requests country B, for example, to lower tariffs for automobiles, offering the latter in return to lower its tariffs for steel products. If the agreement is reached bilaterally between the two countries, the results are extended to all the other contracting parties on a Most-favored-Nation basis. Countries continue negotiations until the target is reached.

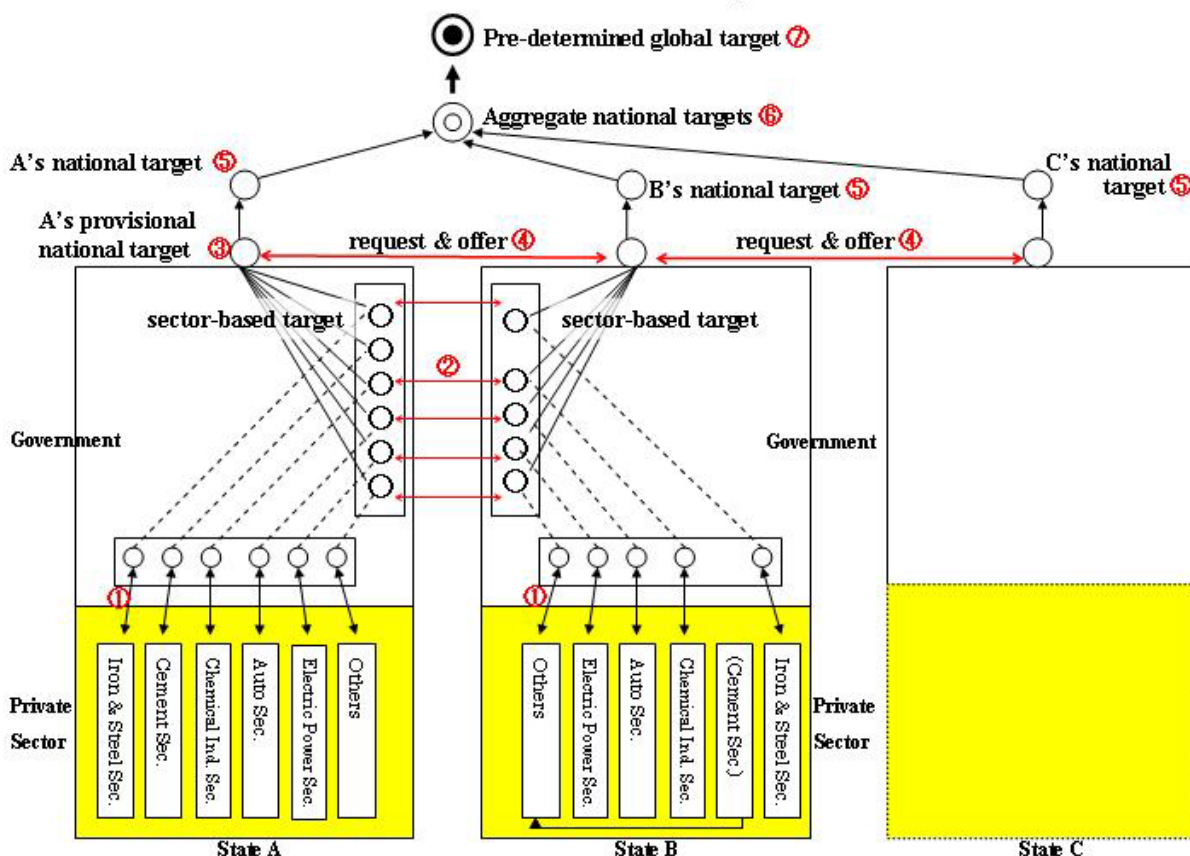
Thus, the Kennedy Round negotiations in the 1960s, for example, started with the goal of reducing 50 % of the tariffs for all the industrial products, ended with the result of some 36% average reduction, which was nonetheless a great success. In the course of such intergovernmental negotiations, the representatives from the related industrial sectors, such as the automobile and steel industries and those on the consumer side, are no doubt involved substantially. Thus, this is essentially a bottom-up, sector-based approach.

This is in my view the model scheme that can be used for the reduction of GHG emissions. The result of the negotiations would be binding on States, but in a different form from the absolute national caps embodied in the Kyoto Protocol. The process is continuous and flexible, which lasts in principle until the set global goal is achieved. For developing countries, we can always consider the possibility of granting preferential treatment, another important GATT experience, which should be subject to individual scrutiny rather than the unqualified, sweeping system of generalized scheme applicable to all developing countries.

Figure 1 below shows how this GATT-model approach can be used for climate change negotiations.

⁵ “Flexible binding targets: Murase, 2005: A framework for reaching emission targets modeled after the WTO/GATT scheme for tariff and non-tariff barriers; targets negotiated through rounds of negotiations”. IPCC, *op. cit.*, *supra* note 2, para. 13.3.3., Table 13.2, p. 771. (Murase, 2005: *op. cit.*, *supra* note 3.)

Fig.1. Conceptual Framework for the GATT-Model Negotiations on Climate Change



The Figure shows how the national emission reduction targets are accumulated in a bottom-up manner. First, each sector (for example, Automobile Association) of State A decides on its reduction target based on energy intensity (energy conservation efficiency) criteria, and negotiates with the relevant branch of the government (METI), which in turn may request the sector (Automobile Association) to make higher commitments (1 of the Figure). The METI then conducts consultation with its counterparts of State B and other major countries over each sector's appropriate level of reduction based on energy-intensity (2). (Note that the size of State B's cement industry is supposed to be so small that the emission from its sector is included in "Others").

The sum total of the sector-based targets thus accumulated constitutes State A's provisional national target (3). The government of State A conducts negotiations with that of State B on the "request and offer" procedure (4) with a view to agreeing on

A's national target () and that of B's. Both States conduct similar negotiations with other countries. The sum total of all the national targets constitute the aggregate national targets (). If there is a difference between the pre-determined global target⁶ (, for example, 50% reduction in 2050) and the actual aggregate national targets (), then, States are under obligation to continue the good-faith negotiations from the beginning until reaching the global target.

Thus, if for example the global target is set internationally as "50 % by 2050" with the base year being 2000, then, States are expected to conduct four rounds of negotiations with medium-term targets (for example, 8% by 2020, 12% by 2030, 14% by 2040 and 16% by 2050). It is important to note that each State is placed under international law with the "obligation to conduct good-faith negotiations", the concept employed by the International Court of Justice in a number of judgments. The point of my proposal is, as I mentioned earlier, to place emphasis on the continuous efforts by States toward reaching the final global target rather than setting the target itself.

The sector-based round negotiation procedure may appear to be complicated. Actually, however, it is quite simple. The GATT has been conducting similar negotiations for more than 60 years for tariff reduction, in the course of which necessary techniques and know-how has been sufficiently shared by trade experts.

The proposed method, in my view, will satisfy the required elements for a future framework such as binding character, flexibility, continuous and long-lasting procedure, bottom-up and sector-based approach, etc. Naturally, one may question whether some of the major emitter countries, particularly China and India, will be willing to join in such a regime. It will be necessary to incorporate certain incentive measures or credits for those developed countries that have attained high energy efficiency (such as exemption from international environmental taxes and reduction from the fees for adaptation facilities) and for the developing countries that have made serious efforts to reduce emissions to grant preferential treatment in transfer of eco-technologies and financial assistance. On the other hand, it may be considered to introduce some sort of disincentive measures (sanctions) for those countries that would not join the regime (free riders).

⁶ Whatever method and procedure the international community may decide to take for the post-Kyoto climate negotiations; it seems indispensable to predetermine internationally the global target before initiating the very negotiations. This is the determination of the "level that would prevent dangerous anthropogenic interference with the climate system" (Article 2 of the UNFCCC), the theme for the Session A of this meeting.

4. Conclusion

Politicians and experts in this country and in other countries as well appear to be racing for higher targets. I am afraid that current debates on the numerical targets are wholly inappropriate, however attractive they may sound. Rather than setting unrealistic targets that are not feasible, what is more important at this stage, I believe, is to agree on the *procedure* for setting adequate targets. It is hoped that the G-8 Summit meeting at Hokkaido-Toyako will make a positive start in establishing the most appropriate procedures to deal with the climate change issues.