Climate Regulation Series -- Charting a Course for Sustainable, Viable Regulatory Frameworks

By Kenneth Markowitz, *Akin Gump Strauss Hauer & Feld LLP,* on 05 October 2007, 14:48 PM

September brought unprecedented attention to the issue of climate change in the United States, as world leaders from government, business, and science participated in a series of high-level meetings and initiatives. The delegates debated courses of action and prospective regulatory frameworks, both international and domestic, to mitigate the release of greenhouse gases into the environment and ease adaptation to the impacts of climate change.

United Nations Secretary-General Ban Ki-moon and US President George W. Bush each hosted meetings designed to build momentum, elicit key issues, and jockey for position as the world prepares to negotiate a successor to the Kyoto Protocol, which expires in 2012. Formal negotiations for a new international regime to govern climate change are anticipated to begin this December in Bali, Indonesia.

Discussions at the United Nations climate summit focused on mitigation, adaptation, technology, and financing, and the Chair's statement resulting from the meeting conveyed a strong "express[ion of] the political will of world leaders at the highest level to tackle the challenge of climate change through concerted action."

Following the United Nations meeting, President Bush hosted a "Major Economies Meeting on Energy Security and Climate Change" in Washington, where representatives from developing nations, such as China, India, and Brazil, joined representatives from developed nations, the European Union, and United Nations. Together, these major emitter countries discussed long-term emissions reduction goals, low-carbon power generation, vehicle and fuel technology, forestry and agriculture, energy efficiency, and financing mechanisms.

Although all major emitter countries, including the US, now agree that negotiations for a post-2012 agreement should come under the UN Framework Convention on Climate Change, significant disparity remains with regard to setting mandatory reduction targets. Europe supports a strong mandatory system; the Bush Administration, along with many developing nations, such as China and India, favors a voluntary program. Rather than a wholly international system, President Bush advocates a "voluntary" plan that allows individual nations to set their own domestic policies in order to "create incentives for companies and consumers to invest in new low-emission sources." Market-based systems appear to remain central to any future international climate change agreement, but implementation, in the near term, likely will remain domestic or regional in scope.

Experts voiced concern about the term "commitments" replacing the stronger term "targets" used previously, particularly in the context of developing countries. Use of non-binding commitments or "aspirational goals" was evidenced in the outcome statement of the Asian-Pacific Economic Cooperation (APEC) meeting on September 8 and 9. Despite the weakened language, delegates issued a declaration on climate change that captures "the global objective of stabilizing greenhouse gas concentrations" and calls for carbon reduction and energy efficiency projects in the region.

Despite these differences, and regardless of the form of a final post-Kyoto agreement, many common themes have emerged. For example, countries agree that rapidly advancing the development and trade of new technologies that reduce, replace, or capture greenhouse gas emissions is critical to mitigation of climate change. Countries also recognize that in order to have any hope for success, significant financing mechanisms are necessary to balance the often-competing demands of the developed and developing worlds.

President Bush, borrowing from the successful playbook of the Montreal Protocol, proposed a new international clean technology fund. Much of the Montreal Protocol's success in eliminating ozone depleting substances is attributed to the creation of the Multilateral Fund, which finances investments in new technology for developing nations. The Fund was critical in gaining support from developing nations for the Protocol, and may serve as a model to address post-2012 concerns in emerging economies.

During September momentum continued to build for a multi-sector, federal cap and trade program in the United States. The International Carbon Investors and Services (made up of primarily large multinational investment banks) advocated on Capitol Hill for the development of "robust, well-functioning global emissions markets" through "accurate and rigorous caps" and "long-term regulatory frameworks" that work effectively to reduce GHG emissions.

While the major emitter countries were meeting at the State Department, the International Emissions Trading Association (IETA), a leading association of major participants in European and other emissions trading markets, was holding its annual meeting a few blocks away. IETA members emphasized to US colleagues the importance of effective monitoring, reporting and verification programs in promoting "fair, open, efficient, accountable, and consistent" markets.

Cap and trade programs alone will not deliver the carbon reductions necessary to heed the warnings of our best science. Serious creativity at the national and international levels is necessary to design other regulatory approaches -- subsidies, taxes, trade and other incentives -- to change consumer behavior, drive technological innovation, and maximize carbon reductions from sectors such as transportation and real estate which lie beyond the practical reaches of cap and trade.

In the midst of all this activity, Andrew Cuomo, the New York State Attorney General, issued subpoenas to five power companies regarding disclosure to shareholders of the potential impact of climate regulation on their businesses. These information requests have triggered a flurry of activity throughout publicly traded companies as they seek to clarify regulatory disclosure requirements and potential exposure to shareholder litigation.

We will have to wait until Bali to see whether any of these discussions actually lead to "action, action, action, action," as California Governor Arnold Schwarzenegger called for at the UN meeting. But for now, there is strong evidence that political will is mounting to take the courageous steps necessary to respond as a global community to the monumental challenges posed by climate change through the implementation of well-designed regulatory approaches at the international and national levels.

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