

R E S P O N S E

Ratifying Kyoto Via Local Actors: Accomplishments and Limitations of Local Cap-and-Trade Programs

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The authors of the current piece¹ argue that “the Mayors Climate Protection Agreement illustrates that the notion of an exclusive, national authority to deal with issues deemed ‘foreign’ cannot succeed.”² The argument is that while “rulemakers try to classify a set of problems as categorically national or local, the world in which they are operating belies the boundaries imposed.”³ They see groups such as the U.S. Conference of Mayors and the National Governors’ Association playing a natural role in addressing issues that, like climate change, have ramifications simultaneously at the local, national, and international levels. Noting that these groups operating in this capacity are technically translocal nongovernmental organizations of local government officials, the authors helpfully dub them TOGAs.

The authors convincingly argue that TOGAs are of increasing importance across the spectrum of political issues. But it is worth noting that more traditional organizations of local actors are already addressing the specific issue highlighted by the authors—global climate change—through regional greenhouse gas (GHG) cap-and-trade systems. These regional systems have sprung up across the United States and across the world. TOGAs, in turn, have the opportunity to play a critical role in bridging these distinct local efforts to address a fundamentally global challenge.

The authors also identify specific legal doctrines—such as federal preemption—as impediments to the efforts of TOGAs because these doctrines privilege uniform national laws over patchworks of local laws. Consistent with this theory, regional cap-and-trade systems are indeed imperfect

because of their limited geographical scope, a challenge highlighted with climate change due to the lack of nexus between regulating GHG emissions at the local level and local impacts from climate change. But the pursuit of a comprehensive national GHG regime, even if it preempts local systems to some extent, does not by any means eliminate critical opportunities for local actors, coordinated by TOGAs, to play a key role in contributing to climate change solutions.

I. Regional GHG Cap-and-Trade Regimes

Despite climate change being a global issue warranting a national, if not a global, response, in the United States, state, local, tribal, and regional governments have led the charge to reduce GHG emissions. These efforts have taken numerous forms, including efforts by California to reduce GHG emissions from cars and light-duty trucks, low carbon fuel standards, controls on stationary sources, and even consumer energy efficiency standards for appliances and light bulbs.

Perhaps most prevalent among such efforts has been the establishment of state and regional market-based cap-and-trade systems. Cap-and-trade regimes function by placing a quantitative cap on emissions of a pollutant from a given category of sources. The overall cap is broken into smaller quantities of the pollutant, termed allowances, that a source must possess if it plans to emit the pollutant. Thus, the number of allowances held by a source determines how much pollutant it can emit. The cap administrator usually either (i) distributes these allowances for free to existing sources, or (ii) sells the allowances at an auction. Following this initial distribution, sources may buy or sell these allowances as their anticipated emissions change. Cap-and-trade systems often also allow covered sources to purchase offsets instead of allowances. Offsets are certified reductions in emissions from sources not subject to the cap-and-trade regime. These

1. Judith Resnik et al., *Kyoto at the Local Level: Federalism and Translocal Organizations of Government Actors (TOGAs)*, 40 ELR (ENVTL. L. & POL’Y ANN. REV.) 10768 (Aug. 2010) (a longer version of this Article was originally published at 50 ARIZ. L. REV. 709 (2008)).

2. *Id.* at 10775.

3. *Id.*

offsets can substantially reduce the cost of compliance with a cap, because sources outside the cap can often reduce their emissions more cheaply than sources subject to the cap.

The largest GHG cap-and-trade system is the European Union Greenhouse Gas Emission Trading System (EU ETS). The system currently covers 27 nations and 11,000 stationary sources that emit large quantities of carbon dioxide (CO₂).⁴ The system was adopted in response to the Kyoto Protocol, which called for signatory nations to cut their emissions of GHGs by 8% from 1990 levels by the year 2012. The European Council has expanded on this commitment by agreeing to reduce emissions 20% by the year 2020.⁵ In the period from 2005 to 2007, the system was first introduced with a trial phase designed to create a working allowance market; this market has been employed, since 2008, to achieve emissions reductions.⁶ EU ETS allows participant nations the ability to determine how to make the initial distribution of allowances to the regulated sources, but, beginning in 2013, will shift to a more centralized design.⁷

In the United States, in the absence of a national cap-and-trade program, states and local governments have stepped in to fill the void. The largest functioning GHG cap-and-trade regime in the U.S. is the Regional Greenhouse Gas Initiative (RGGI), which covers ten northeastern U.S. states. RGGI, which began in 2009, only covers large generators of electricity, and like EU ETS, only covers CO₂ emissions. As in EU ETS, the individual states have the right to distribute allowances as they see fit: in 2009 Delaware auctioned off 50% of these allowances, while New Jersey and Rhode Island auctioned off 99%. Unlike EU ETS, RGGI seeks to stabilize rather than reduce emissions, aiming to keep them at 2009 levels though 2014.⁸

In addition to the functioning regimes, there are several proposed cap-and-trade programs in the United States at various stages of completion. The most sophisticated program is the Western Climate Initiative (WCI), begun by seven U.S. states and four Canadian provinces. Ambitious design recommendations were released in September of 2008.⁹ The WCI would apply to most sources that emit 25,000 met-

ric tons or more of CO₂ annually.¹⁰ And unlike EU ETS or RGGI, the WCI would apply to a full slate of GHGs, including methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.¹¹ WCI seeks a 15% reduction from 2005 GHG emission levels by 2020.¹² This dramatic program has proven difficult to implement, however: Arizona has recently dropped out of the cap-and-trade regime, and only California is on track to begin the program on schedule in 2012.¹³

At the same time, six Midwestern states and one Canadian province are parties to another nascent cap-and-trade system, titled the Midwestern Greenhouse Gas Reduction Accord (MGGRA). And in Florida, the legislature passed HB 7135, authorizing the state to promulgate rules for a cap-and-trade system that would require ratification by the legislature.¹⁴ In total, 24 U.S. states are either participating in, or parties to, some kind of proposal for a GHG cap-and-trade system.

Finally, it is worth mentioning that two Australian states, New South Wales and the Australian Capital Territory, have established a different system of GHG control for electricity generators, labeled the Greenhouse Gas Reduction Scheme (GGAS), which seeks to reduce GHG emissions from the electricity sector.¹⁵ The GGAS is not a cap-and-trade system, but instead requires the electric sector to reduce GHG emissions by a set amount.¹⁶

These efforts to create regional cap-and-trade systems are pursuing many of the goals that the authors would assign to TOGAs. Yet, these existing efforts should not diminish the potential role for TOGAs. Given that climate change is a global challenge and even a vigorous regional system by itself will have little impact on both local and global climate change impacts, TOGAs can play a necessary coordinating role by which distinct local and regional efforts can be effectively amassed to realize a de facto impact beyond any specific geographic limits of a distinct system. At the same time, this role for TOGAs would preserve the abilities of local and regional systems to adapt to local politics, policies, and industries, while enabling such efforts to take on national import through the TOGA coordinating function.

4. EUROPEAN ENVIRONMENT AGENCY, GREENHOUSE GAS EMISSION TRENDS AND PROJECTIONS IN EUROPE 2007: TRACKING PROGRESS TOWARDS KYOTO TARGETS (2007), available at http://www.eea.europa.eu/publications/eea_report_2007_5/Greenhouse_gas_emission_trends_and_projections_in_Europe_2007.pdf.

5. PEW CENTER ON GLOBAL CLIMATE CHANGE, THE EUROPEAN UNION'S EMISSIONS TRADING PROGRAM IN PERSPECTIVE (May 2008), available at <http://www.pewclimate.org/docUploads/EU-ETS-In-Perspective-Report.pdf>.

6. EUROPEAN COMMISSION, EU ACTION AGAINST CLIMATE CHANGE: THE EU EMISSIONS TRADING SCHEME (2008), available at http://ec.europa.eu/environment/climat/pdf/brochures/ets_en.pdf.

7. *Id.* at 12.

8. REGIONAL GREENHOUSE GAS INITIATIVE, OVERVIEW OF RGGI CO₂ BUDGET TRADING PROGRAM (Oct. 2007), available at http://rggi.org/docs/program_summary_10_07.pdf.

9. DESIGN RECOMMENDATIONS FOR THE WCI CAP-AND-TRADE PROGRAM, available at <http://www.westernclimateinitiative.org/the-wci-cap-and-trade-program/design-recommendations>.

10. *Id.* §3.1.

11. *Id.* §1.1.

12. Western Climate Initiative, Frequently Asked Questions, <http://www.westernclimateinitiative.org/the-wci-cap-and-trade-program/faq> (last visited June 7, 2010).

13. Cassandra Sweet, *Arizona Quits Western Cap-And-Trade Market; Utah Mulls Similar Move*, DOW JONES NEWSWIRES, Feb. 12, 2010, <http://www.nasdaq.com/asp/stock-market-news-story.aspx?storyid=201002122005dowjonesdjonline000608&title=arizona-quits-western-cap-and-trade-market-utah-mulls-similar-move>.

14. GOVERNOR'S ACTION TEAM ON ENERGY & CLIMATE CHANGE, FLORIDA'S ENERGY & CLIMATE CHANGE ACTION PLAN, Oct. 15, 2008, 4-1-4-10, available at http://www.dep.state.fl.us/climatechange/files/action_plan/chap4_cap_trade.pdf.

15. INTRODUCTION TO THE GREENHOUSE GAS REDUCTION SCHEME (Sept. 2008), available at <http://greenhousegas.nsw.gov.au/documents/Intro-GGAS.pdf>.

16. *Id.*

II. Limitations of Regional Cap-and-Trade Regimes and Opportunities for TOGAs

The authors of the current piece argue “that federal preemption is often neither required nor appropriate,” arguing that “[a]bsent a clear statement from Congress directing preemption, the judiciary ought to be reluctant to preempt local majoritarian activities undertaken by TOGAs.”¹⁷ This argument may be misplaced because it is unclear that TOGAs’ activities are in danger of preemption. As the authors note, one of the characteristics of TOGAs is that their organizations are voluntary, and their actions are nonbinding. Thus, there would presumably be little occasion to find their actions preempted.

Furthermore, when traditional local governments have undertaken mandatory GHG control systems, the U.S. federal government has deliberately minimized preemption of such systems. Thus, when the U.S. House of Representatives passed a comprehensive cap-and-trade bill, no state command-and-control efforts aimed at reducing GHGs were preempted. Regarding cap-and-trade systems, the American Clean Energy and Security Act (ACESA) would only have preempted state cap-and-trade systems through 2017.¹⁸ And it did not explicitly preempt *regional* cap-and-trade systems at all, which would leave substantial uncertainty about the fate of regimes like RGGI and the WCI. Recently, the Kerry-Lieberman proposed American Power Act departed from the House bill by preempting certain state (but arguably not regional) cap-and-trade systems, but preserving other state and local GHG control authority and compensating those states who have developed cap-and-trade systems to date.¹⁹

Thus, in the specific arena of climate change, it does not seem that local law faces an undue risk of exhaustive preemption. On the other hand, these local cap-and-trade regimes do face challenges. But these challenges are not the result of legal doctrines. Instead, these challenges arise from the inherent difficulty of coordinating voluntary action between independent sovereigns. Thus, the authors’ focus on the role that TOGAs can play in addressing climate change seems particularly relevant in this context.

Smaller, regional GHG systems have several disadvantages compared to larger, more comprehensive systems. First, larger systems allow sources to find the most economically efficient GHG reductions first;²⁰ indeed, a global market could reduce the costs of compliance as much as 20-80%.²¹

17. Resnik, Civin, & Frueh, *supra* note 1, at 10773.

18. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong., §861 (as passed by the House of Representatives, June 26, 2009).

19. American Power Act §§788(e), 806.

20. ROSS GARNAUT, *THE GARNAUT CLIMATE CHANGE REVIEW* 228 (2008).

21. NICHOLAS STERN, *KEY ELEMENTS OF A GLOBAL DEAL ON CLIMATE CHANGE* 6 (London School of Economics, May 2008), available at <http://www.lse.ac.uk/collections/granthamInstitute/publications/Key%20Elements%20of%20a%20Global%20Deal%20-Final%20version%201300%2030-4.pdf>.

Second, a broader trading system would be more liquid, predictable, and less distorted due to the larger number of buyers and sellers. Third, regional systems generally push emissions out of the system into non-regulated regions, a phenomenon known as “carbon leakage.” A local cap could even increase global GHG emissions if the activities that emit GHGs move to areas that are less energy efficient.

Given the advantages of a larger system, it would seem important to coordinate regional cap-and-trade regimes. But this too presents seemingly insurmountable problems. One of the most pressing is the difficulty of reconciling regimes that call for different magnitudes of emission reductions. Integrating regional systems would create incentives for states and provinces to set artificially high caps. Setting a high cap would mean that a region’s industries would have little to no cost of compliance compared to other more stringent zones; worse, these industries could export their excess allowances to industries in a region where they are in higher demand due to a more stringent cap. This would allow a jurisdiction with less stringent caps to subsidize its own industries under the guise of environmental legislation. Of course, few regions would be willing to integrate with a region employing such a cynical gambit. But at the margin, it will always be in a jurisdiction’s narrow economic interest to join its regime with broader and stricter regimes, while maintaining a laxer cap at home.

Many of the other unique characteristics of each regime would make them difficult to integrate. For instance, while the operative cap-and-trade systems currently apply only to CO₂, most new proposals include other GHGs. In these circumstances, industries emitting partially covered GHG emissions would likely end up in regions where their emissions were not covered. Similarly, there is wide variation in the types of entities covered by different systems, in the methods of allowance distribution, and in the oversight over offsets prescribed by each system. Each of these differences would make it difficult to join the separate systems into a coherent whole.

Thus, the limitations of regional GHG regimes are largely a product of the lack of central authority over any possible coordination. In this respect, TOGAs, despite being voluntary actors, can be presented the opportunity to play this coordinating role needed to address the fundamental flaws described above in distinct and discrete local and regional systems. The challenges of approaching a global challenge with local solutions is formidable if not futile by itself given the lack of ability of any one municipality, state, Indian tribe, or even region to contribute significantly to reducing climate change impacts locally, nationally, or globally. TOGAs, by pooling such distinct and discrete efforts together, may offer the needed promise for the ad hoc solution to offer significant action consistent with Kyoto within the United States.