

‘DOCKING STATIONS:’ DESIGNING A MORE WELCOMING ARCHITECTURE FOR A POST-2012 FRAMEWORK TO COMBAT CLIMATE CHANGE

ANNIE PETSONK*

INTRODUCTION

Different actions by countries with different circumstances will need different docking stations of support. So what tools will you create within the climate change regime to deliver on adaptation and mitigation? How will you use those tools to develop a self-financing climate compact?

—*Yvo de Boer, Executive Secretary, United Nations Framework Convention on Climate Change, Statement at the high-level segment of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol, Poznan, Poland, 11 December 2008.*¹

The nations of the world are all in this global boat together. It is not a boat of which only half will sink while the other half stays afloat. Unless we all pull our oars in the same direction and plug the large leaks as well as the small leaks, our ship will flounder and surely sink.

—*U.S. Senator Robert C. Byrd, statement during floor debate on S. Res. 98, the “Byrd-Hagel Resolution,” Cong. Rec. S8115, 25 July 1997.*

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* *International Counsel, Environmental Defense Fund, 1875 Connecticut Ave., NW, S. 600, Washington, DC 20009 USA.* Email: apetsonk@edf.org. The author gratefully acknowledges input and comments from Jos Cozijnsen, Daniel J. Dudek, Jennifer Haverkamp, Nathaniel Keohane, Gernot Wagner, James Wang. Any errors or omissions are solely the responsibility of the author.

1. Yvo de Boer, Executive Sec’y, United Nations Framework Convention on Climate Change, Fourteenth Session of the Conference of the Parties (COP 14) and the Fourth Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol (COP/MOP 4), (Dec. 11, 2008), http://unfccc.int/files/press/news_room/statements/application/pdf/cop_14_hls_statement_de_boer.pdf.

The credibility of the United States is not enhanced when the administration negotiates a treaty that has no hope of ratification in the U.S. Senate.

—*U.S. Senator Chuck Hagel, statement during floor debate on S. Res. 98. , the “Byrd-Hagel Resolution,” Cong. Rec. S8115, 25 July 1997.*

In 2009, efforts to address global climate change are underway in a wide range of forums. Parties to the United Nations Framework Convention on Climate Change (UNFCCC) and its Kyoto Protocol aim to adopt, in Copenhagen, Denmark in December 2009, a new instrument to replace Kyoto, whose legally binding emissions caps expire in 2012. The G-8 Summit to be held in Maddalena, Italy, in July 2009; discussions in the Major Economies Forum (MEF) process; and heads of state discussions initiated by UN Secretary General Ban-Ki Moon are all expected to address climate change. In 2008, the European Union adopted a climate & energy package that aims to reduce EU emissions 20% below 1990 levels by 2020, and in January 2009 the European Commission released proposals for the design of a new instrument at Copenhagen. Legislation to cap U.S. greenhouse gas emissions will be considered in the U.S. Congress in 2009. The United States Environmental Protection Agency (EPA) is also expected to begin exercising its authority, recently reaffirmed by the Supreme Court,² to regulate carbon dioxide under the U.S. Clean Air Act, 42 U.S.C. sec. 7521(a)(1). And efforts are underway among U.S. states, working in partnership with other states and provinces around the world.

One point is consistently emerging from all of these discussions. To keep open options for realizing the objective of the UNFCCC, namely stabilization of atmospheric concentrations of greenhouse gases at a level and in a timeframe so as to avert dangerous climate change,³ efforts to slow, stop and reverse the increase in greenhouse

2. *See Massachusetts v. EPA*, 549 U.S. 497 (2007).

3. *See United Nations Framework Convention on Climate Change art. 2, done May 9, 1992, 1771 U.N.T.S. 107, S. TREATY DOC. NO. 102-38, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> [hereinafter UNFCCC]. Numerous commentators consider limiting warming to not more than 2° C from pre-industrial levels to be a central measure of success in achieving the UNFCCC objective. NATHANIEL KEOHANE & PETER GOLDMARK, ENVTL. DEF. FUND, WHAT WILL IT COST TO PROTECT OURSELVES FROM GLOBAL WARMING? 2 (2007). *See generally* AVOIDING DANGEROUS CLIMATE CHANGE (Hans Joachim Schellnhuber et al. eds.,*

gases must move as rapidly as possible in all major emitting nations, including industrialized nations, emerging economic powers, and developing countries. It is the thesis of this paper that the chances for realizing the objective of the UNFCCC can be improved significantly if governments construct cap-and-trade markets for global warming pollution, and if they include, in both the national legislation and any new international climate accord creating these cap-trade markets, what I call ‘*docking stations*’⁴ – i.e., provisions that welcome, rather than ward off, the participation of major emitting nations.

To some readers, such a thesis may sound obvious, or even trivial, on first reading. Of course all major emitting nations should be encouraged to join global efforts to cut emissions. Some recent scholarship, pointing to the lack of broad participation in emissions caps, has suggested that, rather than trying to expand emissions cap-and-trade markets to include new nations, it would be preferable instead to cut “political deals . . . that favor relatively climate-friendly technologies.”⁵ Putting aside, for the moment, the problems associated with government picking technology winners, it is the thesis of this paper that insufficient evidence has been given to the role that key provisions, embedded in the UNFCCC and the Kyoto Protocol, have played in discouraging broader participation in carbon markets. It is evident that the dominant policy trend at the opening of 2009 is the development of cap-and-trade programs in the United States⁶ and around the world, with the goal of placing legally binding limits on the emissions of global warming pollution, and creating carbon markets that drive innovation in low-carbon technologies, job

2006). Others, however, urge much more stringent limits. See e.g., James Hansen, et al., *Target Atmospheric CO₂: Where Should Humanity Aim?*, 2 OPEN ATMOSPHERIC SCI. J. 217 (2008).

4. The author first used the phrase “docking stations” in a short paper published under the Environmental Defense Fund’s logo in August 2008. See Env’tl. Def. Fund, *Spurring Swift Action to cut Emissions: How “Docking Stations” Can Help*, Aug. 20, 2008, available at http://www.edf.org/documents/8304_DockingStationfinal_Ghana.pdf, for an early discussion of docking stations.

5. See Thomas Heller, *Climate Change: Designing an Effective Response*, in GLOBAL WARMING: LOOKING BEYOND KYOTO 115, 140 (Ernesto Zedillo ed., 2008).

6. “But to truly transform our economy, protect our security, and save our planet from the ravages of climate change, we need to ultimately make clean, renewable energy the profitable kind of energy. So I ask this Congress to send me legislation that places a market-based cap on carbon pollution and drives the production of more renewable energy in America.” Barack Obama, President of the United States of America, Address to Joint Session of Congress (Feb. 24, 2009) (text available at http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress/).

creation, and economic growth.⁷ This article asserts that rather than ‘abandon[ing] the quest to build inclusive trading markets,’⁸ nations should replace the roadblocks to participation embedded in existing agreements with ‘docking stations’ that invite new nations to join carbon markets and that facilitate their efforts to do so.

Part I of this article introduces the concept of ‘docking stations,’ and places the concept in historical context with a perspective on the absence of welcoming provisions in the current UNFCCC-Kyoto Protocol architecture. Given the very high level of concern in the U.S. Congress regarding the broad participation of nations in international agreements and frameworks to address climate change, Part I also considers how the advice given by the United States Senate to date under the Advice & Consent clause of the U.S. Constitution weighs in favor of including ‘docking stations’ in any new agreement struck at Copenhagen, as well as in domestic cap-and-trade legislation in the United States. Part II of this article examines analogues to docking stations in other international instruments, and proposes substantively and procedurally how docking stations might be emplaced in new international climate architecture and in U.S. legislation.

I. INTRODUCTION TO ‘DOCKING STATIONS’

A. Definition of a Docking Station

The challenge international environmental treaty drafters face is how to formulate environmental protection frameworks in which sovereign nations will *want* to participate.⁹ The race to avert catastrophic climate change is a race to cap and cut global warming pollution in the narrow time window – roughly the next decade – that scientists indicate is the crucial period for reversing the increase in global emissions, if the worst consequences of human-induced global warming are to be averted.¹⁰ It is also a race to deliver more and

7. See, e.g., John D. Podesta, Ctr. for Am. Progress, Sanderstølen Conference on Energy Policy, Role of the U.S. in the World Order (Feb. 4, 2009) (text available at http://www.americanprogress.org/issues/2009/02/pdf/podesta_norway.pdf); see Gordon Brown, Prime Minister of the U.K., Davos World Economic Forum, Building the Global Low Carbon Recovery (Jan. 30, 2009), <http://www.number10.gov.uk/Page18201>.

8. See Heller, *supra* note 5, at 140.

9. For this insight, the author is indebted to John Kobayashi, formerly of Holme Roberts & Owen LLP, in whose memory this article is dedicated.

10. See, e.g., KEOHANE ET AL., *supra* note 3, at 2. See generally AVOIDING DANGEROUS CLIMATE CHANGE, *supra* note 3. But see Michel G.J. den Elzen & Detlef P. van Vuuren,

cleaner energy to the world's poor, spur innovation in low-carbon technologies and processes, drive down the costs of climate policy, and generate maximum economic benefits for the transition to a global low-carbon economy. To date, carbon markets offer the greatest potential for attracting the voluntary participation of sovereigns in frameworks for confronting this daunting array of challenges.

While many policy inquiries have begun to consider what policy architecture frameworks may be useful in meeting the challenge of climate change,¹¹ few have examined the need for such frameworks to *welcome* new participants in the effort to cap and cut global warming pollution. Few, if any, have examined, substantively and procedurally, *how* provisions to welcome new participants might be included in these frameworks.

In the context of carbon markets, one way of conceptualizing these welcoming provisions is to think of them as “docking stations,” places in the carbon market infrastructure that invite new participants to “dock in” to the market – that encourage nations to adopt emissions caps, that provide substantive and procedural assistance to nations that wish to do so, and that make it easy for them to connect with carbon markets.¹² This function is similar to “docking stations” in the international space station that allow nations’ space exploration vehicles to “dock in” to that architecture, or “plug and play” hardware and software that allow users to “dock in” to computer networks including the World Wide Web.

Peaking Profiles for Achieving Long-Term Temperature Targets with More Likelihood at Lower Costs, 104 (Proceedings of the Nat'l Acad. Sci. No. 46, 17931-17936, Nov. 13, 2007), available at www.pnas.org/cgi/doi/10.1073/pnas.0701598104.

11. See, e.g., Henry D. Jacoby et al., *Sharing the Burden of GHG Reductions*, MIT JOINT PROGRAM ON THE SCI. & POL'Y OF GLOBAL CHANGE REP. 167 (2008), available at http://globalchange.mit.edu/files/document/MITJPSPGC_Rpt167.pdf. See generally ARCHITECTURES FOR AGREEMENT: ADDRESSING GLOBAL CLIMATE CHANGE IN THE POST-KYOTO WORLD, (Joseph Aldy & Robert Stavins eds., Cambridge Univ. Press 2007) (examining the merits of six alternative international architectures for climate policy); Heller, *supra* note 5 (providing one proposal for post-2012 architecture among many).

12. For early uses of the term “docking station” in this context, see Env'tl. Def. Fund, *supra* note 4, and European Peoples' Party Political Bureau, *Combatting Climate Change: Our Responsibility for Future Generations*, (adopted Feb. 7, 2008), available at http://www.epp.eu/dbimages/pdf/EN-DOC-CLIMATE-CHANGE%20_FINAL-%20EN.pdf.

B. The Need for Docking Stations

Given the urgency of the climate challenge and the need to enroll as many major emitting nations as rapidly as possible in the global effort to cap and cut emissions, the need for docking stations may sound self-evident. But somewhat surprisingly, the first experiments with carbon markets, namely the 1997 Kyoto Protocol on Climate Change and its parent agreement, the 1992 UN Framework Convention on Climate Change, do not include docking stations. In fact, as explained below, key provisions in these agreements erect significant procedural and substantive hurdles that make it nearly impossible for new nations to join the international effort to cap and cut emissions, or that significantly discourage new nations from even trying to do so.¹³

In 1992 the UNFCCC divided nations into two distinct groups for purposes of addressing reductions in national greenhouse gas emissions: wealthier industrialized nations, primarily those who were at the time members of the Organization for Economic Cooperation and Development (OECD), plus the Russian Federation and Ukraine, listed in Annex I of the UNFCCC; and “non-Annex I Parties,” consisting of all others.¹⁴ While all Parties to the UNFCCC accepted a binding obligation to prepare reports on their greenhouse gas emissions and emission reduction measures,¹⁵ and all acknowledged that “the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions,”¹⁶ only the Annex I Parties accepted an obligation under the treaty to “aim” to return their emissions to 1990 levels by the year 2000.¹⁷ However

13. See *infra* notes 15-40 and accompanying text. See also Simone Schiele, *Simplifying the Procedures Governing the Accession of a Party to Annex B to the Kyoto Protocol*, 2 CARBON & CLIMATE L. REV. 418 (2008).

14. UNFCCC, *supra* note 3, Annex I. A second UNFCCC Annex, Annex II, lists a subset of industrialized nations which are expected to contribute financially to assist developing countries in reducing their emissions and in adapting to climate change. *Id.* Annex II.

15. *Id.* art. 4.1(a)-(b).

16. *Id.* pmb. ¶ 6.

17. *Id.* art. 4.2(b).

hortatory that obligation may have been,¹⁸ the UNFCCC placed no comparable obligation on developing nations.

While the UNFCCC bifurcated nations into two groups, and provided that nations could be added to Annex I through a cumbersome procedure amending that Annex,¹⁹ it also included an often-overlooked provision that made it relatively easy for nations to move from the non-Annex I Party group into the Annex I Party group. Article 4.2(g) of the UNFCCC provides:

Any Party not included in Annex I may, in its instrument of ratification, acceptance, approval or accession, or at any time thereafter, notify the Depositary that it intends to be bound by subparagraphs (a) and (b) above. The Depositary shall inform the other signatories and Parties of any such notification.²⁰

Although Article 4.2(g) of the UNFCCC facilitated relatively fluid movement from non-Annex I to Annex I Party status, the 1995 Berlin Mandate and the 1997 Kyoto Protocol on Climate Change deepened the UNFCCC split between industrialized and developing nations, and erected procedural hurdles that made it extremely difficult for new nations to adopt emissions caps.²¹ The Berlin Mandate launched a negotiation process aimed at setting, “for developed country/other Parties included in Annex I” of the UNFCCC, “quantified limitation and reduction objectives within specified time-frames, such as 2005, 2010 and 2020, for their anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol.”²² But, notably, the Berlin Mandate specified that this process would “[n]ot introduce any new commitments for Parties not included in Annex I”²³ So, while the UNFCCC in Article 3.1 specifically stated that “the developed country Parties should take the lead in combating climate change and the adverse effects thereof,”²⁴ and the Berlin

18. In the U.S. view, the obligation to “aim” to return emissions to 1990 levels by 2000 was hortatory, not binding, enabling the treaty to sail through the U.S. ratification process with the unanimous consent of the U.S. Senate. For more on the Resolution of Advice and Consent to the Ratification of the United Nations Framework Convention on Climate Change, see S. Exec. Rep. No. 102-55 (1992).

19. UNFCCC, *supra* note 3, art. 16.

20. *Id.* art. 4.2(g).

21. *See infra* notes 22-40 and accompanying text.

22. *See* Conference of the Parties to the United Nations Framework Convention on Climate Change, Berlin, F.R.G., Mar. 28-Apr. 7, 1995, *Addendum*, Decision 1/CP.1, § II(2)(b), FCCC/CP/1995/7/Add.1 (June 6, 1995) [hereinafter Berlin Mandate].

23. *Id.*

24. UNFCCC, *supra* note 3, art. 3.1.

Mandate sought to strengthen that lead through the adoption of emissions targets for developed countries, the Berlin Mandate did not require developing countries to follow the developed countries' lead. It expressly exempted them from doing so.²⁵

Had the Berlin Mandate and the resulting Kyoto Protocol on Climate Change simply exempted developing countries from emissions caps, that would have created one array of problems. But in the run-up to the Kyoto talks in December 1997, developing countries argued that the "no new commitments" language of the Berlin Mandate also precluded any article in the new Kyoto accord that would allow nations voluntarily to cap emissions in order to join the carbon market.²⁶ In late 1997 U.S. negotiators sought to introduce into the draft text of the Protocol a proposed "Article 10" that would have allowed developing nations voluntarily to adopt emissions caps.²⁷ The proposal was blocked by Saudi Arabia, China and India.²⁸

As if the demise of the proposed Article 10 were not enough, other provisions of the Protocol as adopted made it even more difficult for nations that voluntarily wished to cap emissions to join Kyoto's carbon market. Annex B of the Kyoto Protocol consists of a list of industrialized nations and their quantified emission limitation and reduction commitments.²⁹ These are generally calculated by taking the percentage listed for each Party in Annex B and multiplying that by the emissions of the Party in the year 1990, and multiplying that by the number five, which is the number of years covered by the Kyoto Protocol's commitments, i.e., 2008-2012.³⁰ However, Parties undergoing the transition to a market economy may select a base year or years other than 1990, and many did so.³¹

Membership in Annex B of the Kyoto Protocol is limited to Parties included in Annex I of the UNFCCC.³² Consequently, a new nation wishing to establish a commitment for itself under the Kyoto

25. Berlin Mandate, *supra* note 22.

26. Leonie Haimson, *A History of Climate Change Negotiations*, GRISTR MAG., Feb. 2004, <http://www.climate-talks.net/2004-ENVRE130/PDF/20020731-Grist-History-of-Climate.pdf>.

27. *See, e.g.*, José Domingos Gonzalez Miguez, *Brazil in Kyoto*, ECON. & ENERGY, May-June 1998, <http://ecen.com/eee8/kioto98.htm>.

28. Haimson, *supra* note 26.

29. Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol Annex B, *adopted* Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

30. *Id.* arts. 3.1, 3.7. Emissions and removals associated with the Party's forest lands are addressed under Articles 3.3, 3.4 and 3.7.

31. *Id.* art. 3.5, Annex B.

32. *See id.* art. 3.1; *see also* Schiele, *supra* note 13.

Protocol must first become a Party included in Annex I of the UNFCCC, either by obtaining an amendment to Annex I of the UNFCCC (which must then be ratified by the UNFCCC Parties in order to enter into force), or by making a notification under Article 4(2)(g) of the UNFCCC.³³ Then, once the new nation has become a Party included in Annex I of the UNFCCC, it must establish 1990 or another year or years as the base year(s) for its greenhouse gas emissions, and adopt a quantified emission limitation and reduction commitment calculated in relation to that baseline.³⁴ Its establishment of that commitment must be enshrined in an amendment of Annex B of the Kyoto Protocol, which in turn requires either a consensus of the Kyoto Protocol Parties or, (if consensus to amend was not forthcoming, approval by a “three-fourths majority vote of all the Parties present and voting at the meeting,” not just the Parties included in Annex B.³⁵ Finally, the amendment of Annex B will only take effect for those Kyoto Protocol Parties that have ratified the amendment.³⁶ All in all, not a way to welcome new entrants!

C. A Case Study on the Need for Docking Stations: Kazakhstan’s Experience

The procedural roadblocks that hamper participation of new countries in the existing international climate treaty framework are illustrated vividly by the case of Kazakhstan. The Republic of Kazakhstan, a non-Annex I nation, has been trying for over a decade to join the Kyoto Protocol with caps on its emissions. At the Fourth Conference of the Parties to the UN Framework Convention on Climate Change (COP-4) in Buenos Aires in November 1998, the government of Kazakhstan formally expressed interest in adopting greenhouse gas emissions reductions commitments under the Kyoto Protocol, and in utilizing the Protocol’s market mechanisms, in particular emissions trading, to provide new sources of capital for environmental protection.³⁷ On April 24, 1999, the Government of Kazakhstan, through a *note verbale*, notified the Secretariat of the

33. *See supra* notes 20-21; *see also* Kyoto Protocol, *supra* note 29, art. 1.

34. Kyoto Protocol, *supra* note 29, arts. 3.1, 3.5, Annex B.

35. *Id.* arts. 20, 21.

36. *See id.* arts. 1(7), 20(4), 21(4); UNFCCC, *supra* note 3, art. 4(2)(g); *see also* Schiele, *supra* note 13.

37. Schiele, *supra* note 13, at 421.

UNFCCC of its wish to join Annex I of the UNFCCC.³⁸ On May 3, 1999, the Secretariat communicated to the UNFCCC Parties the text of Kazakhstan's *note verbale*.³⁹ While the Parties to the UNFCCC had, in some cases, by decision changed the listing of Parties in Annex I,⁴⁰ "the President of COP 5 conducted informal consultations on the proposal but was unable to achieve consensus" for accepting Kazakhstan's proposal to join Annex I of the UNFCCC.⁴¹

The next year, on March 23, 2000, "Kazakhstan by a *note verbale* . . . and in accordance with Article 4.2(g) [of the UNFCCC] notified the Depositary of the Convention that it intends to be bound by the provisions of Article 4.2(a) and (b) of the Convention" – the provisions that obligate Parties to return emissions levels to 1990 by 2000.⁴² On June 13, 2000, Kazakhstan sent notification to the Depositary of its intention to undertake voluntary quantitative commitments in accordance with Article 4.2(g).⁴³

By virtue of the notification and in accordance with Article 1, paragraph 7 of the Kyoto Protocol, Kazakhstan became a Party included in Annex I of the Framework Convention on Climate Change, for purposes of participation in the Kyoto Protocol.⁴⁴ Becoming a 'Party included in Annex I' was a necessary procedural step under Kyoto, even though by the time Kazakhstan did so, the core Annex I hortatory obligation under the UNFCCC, namely to aim to return national emissions to 1990 levels by 2000, was effectively moot. Consequently, the requirement that a nation become a 'Party included in Annex I' in order to participate in the Kyoto Protocol's cap and trade mechanism became a mere formality

38. UNFCCC, *Proposals to Amend the Lists in Annexes I and II of the Convention*, http://unfccc.int/essential_background/convention/background/proposal_to_amend_the_lists_in_annexes_1_and_2/items/3048.php (last visited Apr. 7, 2009) [hereinafter *Proposals to Amend the Lists*]; see also Schiele, *supra* note 13 (citing Note from the Permanent Mission of the Republic of Kazakhstan to the United Nations in N.Y., U.N. Doc. FCCCC/CP/1999/2 (Apr. 1999)).

39. *Id.*

40. See, e.g., Berlin Mandate, *supra* note 22, Decision 1/CP.1, § II(2)(b).

41. See UNFCCC, *Issues in the Negotiating Process: Proposals to Amend the Lists in Annexes I and II of the Convention* (June 4, 2002), <http://unfccc.int/cop6/issues/110.html> [hereinafter *Issues in the Negotiating Process*].

42. *Id.*; see also Conference of the Parties to the United Nations Framework Convention on Climate Change, Marrakesh, Oct. 29-Nov. 10, 2001, *Report of the Conference of the Parties on its seventh session*, U.N. Doc. FCCC/CP/2001/13/ADD.4, at 42 (Jan 21, 2002); and see Schiele, *supra* note 13, at 421.

43. *Proposals to Amend the Lists*, *supra* note 38.

44. *Issues in the Negotiating Process*, *supra* note 41.

– yet one more obstacle to the participation of new countries. In 2006 at COP 12 in Nairobi the 1992 base year for Kazakhstan was adopted by Conclusion.⁴⁵ By letter dated November 3, 2008, Kazakhstan proposed a voluntary reduction commitment of 100% level of the base year emissions each year within the 2008-2012 period, based on its most recent GHG Inventory (2006).⁴⁶ However, for Kazakhstan’s voluntary reduction commitment to result in an “Annex B” commitment within the Kyoto Protocol, such that Kazakhstan could have the possibility of undertaking emissions trading with other Annex I Parties, Kazakhstan may still have to seek an amendment to the Kyoto Protocol, possibly including a $\frac{3}{4}$ majority vote to adopt the amendment; furthermore, the amendment will only enter into force for those nations that choose to ratify it, a process that could take many more years.⁴⁷

So, a full decade after it initiated the process of trying to join the Kyoto Protocol with a cap on emissions, Kazakhstan still has no clear timetable for joining the Kyoto Protocol’s cap and trade market, and therefore cannot gain access to significant financing for low-carbon development. The case of Kazakhstan illustrates sharply that many of the UNFCCC-Kyoto Protocol roadblocks to participation serve no clear environmental or practical purpose. Instead they simply operate as legal barriers to the participation of new nations in a central goal of climate policy – namely, to engage as many nations as possible to cap and cut greenhouse gas emissions as quickly and efficiently as possible, and in so doing, spur as much innovation in low carbon technologies and practices as possible, worldwide.

D. A Historical Perspective on the Failure to Include Docking Stations in the Kyoto Protocol

Article II, section 2 of the U.S. Constitution provides that “The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators

45. Conference of the Parties to the United Nations Framework Convention on Climate Change, Nairobi, Nov. 6-17, 2006, *Information on the base year of the Republic of Kazakhstan*, FCCC/CP/2006/L.2 (Nov. 13, 2006), available at <http://unfccc.int/resource/docs/2006/cop12/eng/102.pdf>.

46. Conference of the Parties to the United Nations Framework Convention on Climate Change, Poznan, Pol., Dec. 1-12, 2008, *Information on Voluntary Quantitative Commitments for Kazakhstan for the Period of 2008-2012*, FCCC/CP/2008/5 (Nov. 25, 2008), available at <http://unfccc.int/resource/docs/2008/cop14/eng/05.pdf>.

47. See *infra* notes 30-40 and accompanying text.

present concur”⁴⁸ In the summer of 1997, during intense international negotiations on what was to become the Kyoto Protocol on Climate Change, the U.S. Senate advised President Clinton not to sign any climate protocol that failed to cap emissions of developing as well as industrialized nations.⁴⁹ The Senate’s resolution, adopted by a vote of 95-0, stated:

Resolved, That it is the sense of the Senate that—

(1) the United States should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992, at negotiations in Kyoto in December 1997, or thereafter, which would—

(A) mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or

(B) would result in serious harm to the economy of the United States; and

(2) any such protocol or other agreement which would require the advice and consent of the Senate to ratification should be accompanied by a detailed explanation of any legislation or regulatory actions that may be required to implement the protocol or other agreement and should also be accompanied by an analysis of the detailed financial costs and other impacts on the economy of the United States which would be incurred by the implementation of the protocol or other agreement.⁵⁰

When the December 1997 Kyoto Protocol imposed legally binding emissions caps only on industrialized nations, and – in accordance with the Berlin Mandate - exempted developing countries from such caps, the resulting architecture virtually guaranteed that the U.S. Senate would never give its consent to U.S. ratification of the Protocol. But the failure to include docking stations in the Protocol, and instead the inclusion of articles that raise formidable hurdles to the participation of new nations in Kyoto’s emissions caps, means that any new treaty drafted on the design template of Kyoto is highly unlikely to succeed either as a means of protecting the climate, or as a pathway for Congressional assent to a new international accord.

48. U.S. CONST. art. II, § 2.

49. S. Res. 98, 105th Cong. 143 CONG. REC. 8138 (1997) (enacted).

50. *Id.*

It is worth noting that in its bifurcation of industrialized versus developing nations, the Kyoto Protocol departed sharply from the preceding quarter century of environmental treaty-making. For example, the species protection obligations of the 1972 Washington Convention on International Trade in Endangered Species of Fauna and Flora (CITES) apply to all Parties, regardless of their level of development.⁵¹ Similarly, the strictures of the 1990 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal apply equally to developing and industrialized nations.⁵² Another example is the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which offers a slightly different model.

It too applies its control measures, i.e. those to freeze and phase out the production and consumption of ozone-depleting chemicals, in equal stringency to industrialized and developing countries.⁵³ But it gives developing countries (defined as those with less than 0.3 kg/capita annual consumption of ozone-depleting substances (ODS)) a ten-year grace period to bring their measures into compliance.⁵⁴ Moreover, the ten-year grace period only allows developing countries to delay their compliance – it does not allow them to grow their baselines over the ten-year period of the delay.⁵⁵ The Montreal Protocol's equal application of measures to developing and industrialized countries was crucial to gaining its acceptance in

51. See Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27.2 U.S.T. 1087, 993 U.N.T.S. 243, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14537-English.pdf> [hereinafter CITES].

52. See Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 4, Mar. 22, 1989, 1673 U.N.T.S. 57 [hereinafter Basel Convention].

53. Montreal Protocol on Substances that Deplete the Ozone Layer arts. 2, 3, Sept. 16, 1987, 1522 U.N.T.S. 3 [hereinafter Montreal Protocol].

54. The Montreal Protocol provides:

Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it, or any time thereafter within ten years of the date of entry into force of the Protocol shall, in order to meet its basic domestic needs, be entitled to delay its compliance with the control measures set out in paragraphs 1 to 4 of Article 2 by ten years after that specified in those paragraphs. However, such Party shall not exceed an annual calculated level of consumption of 0.3 kilograms per capita. Any such Party shall be entitled to use either the average of its annual calculated level of consumption for the period 1995 to 1997 inclusive or a calculated level of consumption of 0.3 kilograms per capita, whichever is the lower, as the basis for its compliance with the control measures.

Id. art. 5.

55. See *id.*

parliaments and congresses in the latter grouping. Without such provisions, it is possible that the ODS-producing industries in industrialized countries would have urged their legislators to oppose ratification of the Protocol, on the ground that giving developing country industries a “free pass” to produce as much ODS as they wished would have vitiated the Protocol’s effectiveness and handed the developing country industries an unfair competitive advantage. In fact, the Protocol’s entry-into-force provisions, which provide that the Protocol did not enter into force until 11 nations representing 2/3 of global consumption of ODS had ratified it,⁵⁶ and its ban on trade in ODS with non-Parties (which also applied to developing country exporters of ODS),⁵⁷ were put in place to ensure that there would be strong market pressure on major non-party developing country producers to participate in the Protocol.⁵⁸

To the extent that prior treaty practice serves as a cautionary tale for the fate of a new Copenhagen agreement in the U.S. Congress, the lesson is crystal clear: *If the nations of the world are to agree on effective frameworks that engage the United States in the effort to avert dangerous climate change, the Copenhagen accord must do better at welcoming new nations to dock into the global effort to cap and cut greenhouse gas emissions.*

56. Article 16, paragraph 1 of the Montreal Protocol provides:

1. This Protocol shall enter into force on 1 January 1989, provided that at least eleven instruments of ratification, acceptance, approval of the Protocol or accession thereto have been deposited by States or regional economic integration organizations representing at least two-thirds of 1986 estimated global consumption of the controlled substances, and the provisions of paragraph 1 of Article 17 of the Convention have been fulfilled. In the event that these conditions have not been fulfilled by that date, the Protocol shall enter into force on the ninetieth day following the date on which the conditions have been fulfilled.

Id. art. 16(1).

57. Article 4 of the Protocol provides, in part,
Control of Trade with Non-Parties.

1. Within one year of the entry into force of this Protocol, each Party shall ban the import of controlled substances from any State not party to this Protocol.

2. Beginning on 1 January 1993, no Party operating under paragraph 1 of Article 5 may export any controlled substance to any State not party to this Protocol.

Id. art. 4.

58. See Carol Annette Petsonk, *The Role of The United Nations Environment Programme (UNEP) in the Development of International Environmental Law*, 5 AM. U. J. INT’L L. & POL’Y 351, 370 (1990).

II. 'DOCKING STATIONS:' DESIGNING A MORE WELCOMING ARCHITECTURE FOR A POST-2012 FRAMEWORK TO COMBAT CLIMATE CHANGE

The concept which is embodied in the Byrd-Hagel resolution is that developing country parties should join the developed world in making new specific scheduled commitments to limit or reduce greenhouse gas emissions within the same compliance period. Now, does this mean that the Senate is insisting on commitments to identical levels of emissions among all the parties? Certainly not. The emissions limitations goals, to be fair, should be based on a country's level of development. The purpose is not to choke off Mexico's development or China's development. The purpose is to start addressing the greenhouse gas problem in the only meaningful way we can, that is, through globally and through binding commitments up front. The timeframe could be 5 years, 7 years, 10 years or whatever. The initial commitment to action, starting upon signature in Kyoto, could be relatively modest, pacing upwards depending upon various factors, with a specific goal to be achieved within a fixed time period. There are plenty of tools to encourage the developing world to make meaningful commitments.

-Senator Robert C. Byrd, floor debate on S. Res. 98, the Byrd-Hagel Resolution, 25 July 1997.

Carbon markets, carefully designed, constitute one very important set of tools to encourage meaningful commitments by major developing country emitters. Part II of this paper provides substantive and procedural recommendations for how docking stations might be included in a Copenhagen agreement and in U.S. cap-and-trade legislation. It then briefly surveys docking stations in other international market-based agreements, and concludes with thoughts on docking stations and the Advice & Consent clause of the U.S. Constitution.

A. Substantive and Procedural Aspects of Docking Stations in Post-2012 International Climate Change Frameworks

To create docking stations in a new Copenhagen climate agreement, what minimum substantive and procedural elements would be needed to ensure the environmental integrity of the agreement as well as the rapid participation of new nations? Substantively, docking stations need to welcome new nations into the system of benefits and obligations created by the new agreement. As will be discussed more fully below, the agreement will need to create

docking stations that welcome new nations – especially major-emitting economies – into cap and trade markets, offering those nations benefits beyond what they can expect from Kyoto’s current Clean Development Mechanism (CDM) provided that those nations accept the responsibilities of measuring, monitoring, reporting, capping, and enforcing reductions in national greenhouse gas emissions. A docking station should also be included enabling nations to access assistance for adapting to climate change. Procedurally, docking stations need to establish rapid and transparent processes by which new nations can join the agreement. These procedures should be perceived as fair by those nations utilizing them, by those nations already participating in carbon markets. The following sections address the substantive aspects of docking stations, followed by the procedural aspects of those docking stations.⁵⁹

1. Three substantive types of Docking Stations

At least three substantive types of docking stations can be envisioned for inclusion in the Copenhagen agreement: a *national* docking station, a *sectoral* docking station, and an *adaptation* docking station.⁶⁰ A *national* docking station would be a provision in the new agreement that would welcome the participation, in the new agreement’s carbon market, of any nation willing to cap its total national emissions, or a great majority of its national emissions, for at least two consecutive five-year periods, or preferably three consecutive five-year periods.⁶¹ The cap would be set using the same

59. These recommendations remain regardless whether the international negotiations proceed in both the Ad Hoc Working Group on the Dialogue on Long-Term Cooperative Action (AWG/LCA) under the UN Framework Convention on Climate Change (UNFCCC), and in the Ad Hoc Working Group on the Kyoto Protocol (AWG/KP), which groups may be merged in a future round of negotiations.

60. For proposals suggesting some aspects of docking stations consonant to some extent with this section, see, e.g., U.S. CLIMATE ACTION PARTNERSHIP, A BLUEPRINT FOR LEGISLATIVE ACTION 9 (2009), available at http://www.us-cap.org/pdf/USCAP_Blueprint.pdf [hereinafter BLUEPRINT]; Commission Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/87/EC so as to Improve and Extend the Greenhouse Gas Emission Allowance Trading System of the Community, at 10, COM (2008) 16 final (Jan. 23, 2008).

61. The choice of five years for a commitment period is to some extent arbitrary. The same approach would work with at least two successive seven-year periods, for example. What is crucial is to ensure that (a) commitment periods are of sufficient duration so as to be effective in addressing national or sectoral emissions; (b) that successive commitment periods extend far enough into the future to send a clear signal to market actors that mandatory limitations on emissions will govern their activities over the duration of capital stock planning horizons; and (c) multi-year commitment periods offer governments tools for enforcement based on the

general approach as that in Article 3.1 of the Kyoto Protocol, namely the cap would be established as a multi-year emissions budget, in relation to a historical base year or years with known emissions.⁶² Nations could be given flexibility to select their base year(s), as was done for nations undergoing the transition to a market economy in the Kyoto Protocol.⁶³ If a nation's cap covered less than its entire national emissions profile, its cap would need to be paired with complementary measures to address its uncapped sectors.⁶⁴

In exchange for shouldering the responsibilities associated with measuring, monitoring, reporting, implementing, and enforcing a cap on its total emissions, each nation utilizing this docking station would be afforded full access to the emissions cap and trade market created by the new agreement. That is, the nation's emissions allowances would be afforded full recognition in the cap and trade market, enabling the nation to leapfrog the burdensome project-by-project approach of the CDM.⁶⁵

settled expectations of market participants that they will, in fact, be held accountable for meeting emissions limits. *See supra* note 53 and accompanying text.

62. Although nations utilizing this docking station will surely take into account projections of their future emissions when selecting their base year and cap level, the legal mechanism for the docking station would require that caps be calculated as a mathematical product of one or more historical base years' emissions, as is currently done under Kyoto's Article 3.1, and not established as a function of a Business-as-Usual (BaU) projection of national emissions. That is because, as Kyoto's Clean Development Mechanism has demonstrated, basing a target on a calculation of BaU necessarily gives rise to a perverse incentive to inflate BaU, and leads to dueling projections of BaU that then must be continually revised in light of actual experience. More fundamentally, if the goal of a Copenhagen agreement is to drive global emissions downward, and if emissions in the developing world are rising rapidly on BaU, then it is not possible to achieve the global emissions-decline goal if the CDM is the only mechanism for engaging the developing world, even if industrialized countries' emissions caps are set at zero. The CDM simply transfers reductions-below-BaU from developing to industrialized countries, and allows the latter's emissions to increase by the amount of the transfer. *See* Kyoto Protocol Article 3.12. Therefore, as long as developing countries' emissions are rising rapidly, the CDM does not drive global emissions downward. *See, e.g.,* Kyle Meng, *Creating a Cleaner CDM*, CARBON FIN., Sept. 2007, at 16-17. It is vital that these problems not be imported into a Copenhagen agreement.

63. *See supra* notes 33, 35 and accompanying text.

64. In the case of large-emitting nations proposing to dock in gradually, beginning with caps on total emissions of some but not all of their political sub-units, Parties might wish to consider allowing phased dock-in, provided the initial sub-national caps cover a substantial majority of national emissions, and taking into account the possibility of intra-national leakage.

65. For a discussion of some of the problems of the CDM, see U.S. GAO, *International Climate Change Programs: Lessons Learned from the European Union's Emissions Trading Scheme and the Kyoto Protocol's Clean Development Mechanism* (GAO-09-151 Nov. 2008), available at <http://www.gao.gov/new.items/d09151.pdf>.

Nations accessing the carbon market via this docking station would need to demonstrate their commitment to enforcing national legislation to meet their emissions limits. Some form of “seller liability” provisions, in which end-of-commitment-period emissions in excess of a national cap are subtracted automatically from a successive commitment period, with an atmospheric penalty, as is the case under the Marrakesh Accords implementing the Kyoto Protocol, would need to be included in the national legislation.⁶⁶

To encourage new nations, including fast-developing nations, to move swiftly to utilize the national docking station and cap their total emissions, this docking station might offer several incentives.

First, it might afford the docking nation access to a portion of its carbon emissions budget on an “early action” basis, such that, upon initiating the procedure to dock in via this docking station (see below), new nations might be afforded the ability to forward-sell or forward-pledge portions of their emissions budgets as a means of financing low carbon emissions budgets.

Second, the docking nations might be offered the opportunity to establish a multi-year emissions budget set above a nation’s current emissions but within economic and environmental constraints. Through this mechanism, the docking station could offer nations access carbon finance immediately and far more efficiently than existing and proposed mechanisms. The growth increment – the portion of the emissions budget in excess of the nation’s actual emissions – would provide a pool of emissions allowances that could be leveraged in carbon markets to deliver immediately available financing for low-carbon development. The “early action” and “growth budget” approaches are precisely the approaches the

66. While these may not be explicitly mentioned in the design of this docking station, it is also possible that some nations may multilaterally or unilaterally adopt further enforcement provisions such as “buyer liability” provisions, in which allowances purchased from non-complying nations would be automatically discounted. See Robert O. Keohane & Kal Raustiala, *Toward a Post-Kyoto Climate Change Architecture: A Political Analysis* (Discussion Paper 08-01, Harvard Project on Int’l Climate Agreements, July 2008), available at <http://belfercenter.ksg.harvard.edu/files/Keohane%20and%20Raustiala%20HPICA1.pdf>; see also OECD Env’t Directorate & Int’l Energy Agency, *An assessment of liability rules for international GHG emissions trading: Information paper*, at 6, COM/ENV/EPOC/IEA/SLT (2000), available at <http://www.iea.org/textbase/papers/2000/ghget.pdf>. An additional enforcement mechanism that nations might adopt multilaterally or unilaterally is the so-called “border carbon adjustment,” i.e., a requirement that carbon-intensive products imported into nations complying with caps on emissions from nations without emissions caps, or where enforcement of national caps has not occurred, be accompanied by emissions allowances sufficient to cover the emissions incurred when the product was produced in the uncapped country. See, e.g., Podesta, *supra* note 7, at 5.

European Union has decided to take in extending the European Union Emissions Trading Scheme (EU-ETS) for the period 2013-2020. The EU is creating a “solidarity mechanism” to help less affluent EU member states with the transition to a low-carbon economy: they will receive an increased amount of emissions permits to auction, i.e. 12 % more than their actual share in overall EU GHG emissions, which will give them an opportunity of generating substantial revenues from selling allowances.⁶⁷

Third, the national docking station might offer new nations technical assistance and capacity building, to facilitate their rapid, transparent and effective participation in carbon markets, including their utilization of carbon market finance for low-carbon development.

A *sectoral* docking station would be appropriate for nations adopting binding targets on total emissions from particular sectors, including the forest sector. Under this approach, developing nations that wish to dock in to a docking station one or more particular sectors, would commit to undertake a national program for at least two consecutive five-year periods, or preferably three consecutive five-year periods, limiting emissions in those sectors.⁶⁸ Key elements of the sectoral docking station would include requirements that the targets be legally binding, *i.e.*, domestically enforceable; that they cover a substantial portion (probably 50%) of the nation’s emissions; that they be paired with complementary measures to address uncapped sectors; that they cover total emissions, not so-called “intensity targets” or limits on emissions per unit of economic output; that they address in-country leakage between capped and uncapped sectors; and that they be accompanied by a national commitment to domestic enforcement. In exchange for shouldering the responsibilities associated with measuring, monitoring, reporting, implementing, and enforcing caps on total emissions of large-emitting sectors, and adopting complementary measures addressing emissions in uncapped sectors, each nation utilizing this docking station would

67. See Press Release, Council of the European Union, Council adopts climate-energy legislative package, 8434/09 (Apr. 6, 2009), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/107136.pdf. See also Gernot Wagner, Nathaniel Keohane, Annie Petsonk, & James Wang, *Docking into a Global Carbon Market: Clean Investment Budgets to Finance Low-Carbon Economic Development*, in *THE ECONOMICS AND POLITICS OF CLIMATE CHANGE* (forthcoming 2009).

68. See *supra* note 61 and accompanying text.

be afforded full privileges in the cap and trade market with regard to emissions from the capped sector.

One sectoral example that merits particular attention is that of Reducing Emissions from Deforestation in Developing Countries (REDD). Creating a REDD Docking Station would enable any nation that reduces total national emissions from deforestation below a historical average set of base years to trade reductions below that historical base period.⁶⁹ Given the urgency of addressing REDD, new nations that move swiftly to utilize the sectoral docking station might be granted access to their forest carbon emissions budget on an “early action” basis, whereby, upon initiating the docking procedure (see below), new nations might be afforded the ability to forward-sell or forward-pledge portions of their REDD emissions budgets as a means of financing low carbon emissions budgets. President Lula of Brazil has recently proposed that Brazil reduce emissions from deforestation 70% over the next decade, as measured from a historical baseline of the previous ten-year average.⁷⁰ While Brazil has not proposed that such reductions be creditable in carbon markets, the proposal helps illustrate elements of how such a docking station could be constructed.

The Parties to the Copenhagen agreement might wish to create a special type of docking station, an *adaptation* docking station for very low-emitting nations that wish to access adaptation funding. A variety of options for generating adaptation funds needs to be explored post-haste. These options are beyond the scope of the current article. However, a few basic elements of this docking station should be mentioned here. Nations wishing to utilize the adaptation docking station would need to demonstrate minimum levels of transparency for tracking funds, to ensure that funds are used for adaptation projects as stated. The adaptation docking station might reasonably offer nations technical assistance to enable them to include, whenever possible, mitigation components in their adaptation activities, to ensure that adaptation programs do not actually make the climate crisis worse, and to enable emission reductions to finance as much adaptation activity as possible.

69. See Márcio Santilli et al., *Tropical Deforestation and the Kyoto Protocol*, 71 CLIMATIC CHANGE 267, 269-71 (2005) (setting forth the first proposal for this type of approach).

70. See Joshua Partlow, *Brazil's Decision on Deforestation Draws Praise*, WASH. POST FOREIGN SERVICE, Dec. 6, 2008, at A09.

2. Prohibition on some kinds of docking stations.

To maintain the integrity of the docking station framework, it would be essential to prohibit docking for certain nations in certain circumstances. First, docking stations should not be opened for any high-emission nation, whether an industrialized economy or an emerging economy, to dock into the carbon market solely by earning credits for projects that reduce emissions below business-as-usual, by reducing the greenhouse “intensity” of its economy (emissions per unit of economic output), or by committing to use particular technologies or policies, without adopting a cap on a significant share of its *total national emissions*. The world has run out of time for these alternatives. Atmospheric modeling indicates that if nations are serious about averting more than 2 degrees of warming, there is no ambit for such crediting beyond roughly 2017, at least as concerns major emitting nations, whether in the form of CDM under the Kyoto Protocol, intensity targets, or otherwise.⁷¹

Second, no nation should be permitted to dock into the carbon market created by the new agreement if it has adopted a cost-containment provision whereby, if the price of traded allowances reaches a specified level in its market, it simply begins printing new, cap-busting allowances for sale at the specified price. That would vitiate the integrity of the nation’s cap and by extension, the global framework. Third, anti-circumvention clauses should be utilized. To maintain the integrity of the global framework, nations that allow their domestic systems to link to nations whose programs would be prohibited from docking into the international framework should also be prohibited from docking in.

To enable nations to dock into cap-and-trade markets rapidly without undermining the environmental integrity of those markets, certain core elements must be included, while elements that are antithetical to the environmental and/or economic integrity of the market must be barred.⁷²

71. See *Climate Change—International Issues, Engaging Developing Countries: Hearing Before the Subcomm. On Energy & Air Quality of the H. Comm. On Energy & Commerce, 110th Cong. 6, 11-12 (2007)* (statement of Annie Petsonk, Int’l Counsel, Envtl. Def.), available at http://energycommerce.house.gov/cmte_mtgs/110-eaq-hrg.032707.Petsonk-testimony.pdf [hereinafter Petsonk Testimony].

72. See *infra* tbl 1.

Table 1. Essential elements common to market-based docking stations. ⁷³		
Element	Essential	Antithetical
Cap on total or sectoral emissions	Successive multi-year emissions budgets, expressed as multiple of historical base years; budgets extending for at least three 5-year budget periods. Cf. KP Article 3.1.	No intensity or technology targets, no cap-busting safety valves, no emissions budgets based on projections of Business-as-Usual. If sectoral, cap must cover total emissions of a substantial share of national emissions.
Measurement, reporting and verification	Annual emissions reporting (see KP Articles 5, 7 and 8), incl. from deforestation	Conflicts of interest among rule-writing, measurement, and reporting agencies must be barred
Transparent transaction tracking	Allowances must be uniquely vintaged; all transfers recorded in publicly accessible registries.	No discrimination among types of allowances – a ton is a ton.
Fungibility among allowances	Allowance transfers get added to recipient's budget and subtracted from transferor's. See Kyoto Protocol Articles 3.10, and 3.11, and 3.12.	For nations that dock in to the carbon market on the basis of forward-transfers of future emissions allowances, there must be a mechanism for accounting for (subtracting) these allowances from their national emissions budget.
No crediting of reductions below BaU in large emitting uncapped countries	Caps in major emitting nations must cover majority of national emissions	No crediting project-based reductions in major economies unless (a) en route to a national cap, or (b) limited to a small share of the economy
Accountability – legally binding cap	National commitment to enforce cap via national legislation. “Seller liability” essential; “buyer liability” possible. Border carbon adjustments to address national leakage may be utilized.	For major emitting nations voluntary sectoral “no-lose” targets should not be eligible for docking in to carbon markets.
Durability and consistency	Government should establish multi-year emissions caps that cover several (three?) multi-year periods, with periodic scientific reviews	No arbitrary changes to caps or rules, except as provided for in advance through rules.
Independent rating agencies & market oversight authority	There is no KP antecedent	Conflicts of interest among rating entities must be barred

73. This table is based on work of Daniel J. Dudek as exemplified in a report prepared for the 1998 Trans-Atlantic Dialogue on Market Mechanisms (a project of the German Marshall Fund of the United States, the Pew Center on Global Climate Change, and the Env'tl. Def. Fund). See generally ANNIE PETSONK, DANIEL J. DUDEK & JOSEPH GOFFMAN, ENVTL. DEF. FUND, MARKET MECHANISMS & GLOBAL CLIMATE CHANGE: AN ANALYSIS OF POLICY INSTRUMENTS (1998), available at http://www.pewclimate.org/global-warming-in-depth/all_reports/market_mechanisms.

B. Procedural aspects of docking stations

1. Outline of procedures.

To create the docking stations, UNFCCC Parties negotiating a new Copenhagen Agreement could include in that accord the following legal elements. First, the Parties might include a set of provisions common to all docking stations. These would reaffirm each docking country's commitment to Article 2 of the UNFCCC. Next, the Parties might develop provisions specifying the rights and obligations associated with each of the three types of docking stations discussed above. Articles establishing the national docking station would specify that any nation or group of nations⁷⁴ may dock into the Copenhagen Agreement's carbon market at any time within a specified period following the Protocol's adoption, provided that the nation submits to the Agreements Depositary of national legislation enacting legally binding caps covering a specified percentage of its total anthropogenic greenhouse gas emissions for a specified period of years, and limiting its net anthropogenic emissions during those years to a level calculated by multiplying its emissions during a historical base year or years selected by it, by a specified percentage, and by the number of years covered by its commitment. These articles would also specify a minimum number of years to be covered by this multi-year commitment, with the commitment spanning at least two consecutive multi-year emissions budget periods.⁷⁵

74. The Kyoto Protocol allows nations to take commitments jointly, a useful provision that encourages nations to work together to meet what might be more ambitious emissions limits than would otherwise be possible if each nation were required to act alone. Kyoto Protocol, *supra* note 29, art. 4. The Montreal Protocol on the Ozone Layer includes similar "industrial rationalization" provisions encouraging joint efforts to phase out ozone-depleting substances faster, and more cost-effectively, than if each nation acted alone. Montreal Protocol, *supra* note 53, arts. 1(8), 2.

75. For example, the articles could specify that in order to dock in via the national docking station, a nation would need to enact national legislation capping A% of its national anthropogenic greenhouse gas emissions, such caps taking effect in the years B through C, and limiting its national net anthropogenic emissions to the product of (B-C) times D% in years E-F, and such caps further taking effect in years (B+[B-C]) through (C+[B-C]), and limiting its national net anthropogenic emissions to the product of (B-C) times G% of its national emissions in years E-F. In this example: A is the percentage of national emissions to be covered by the cap. Parties might negotiate an agreement that in order to use this docking station, A must be greater than or equal to a majority share of national emissions, e.g. 70%. B is the first year of operation of the docking Party's commitment. For industrialized countries, the Parties might negotiate that B would be equal to not more than two or three years after the date of adoption of the Copenhagen accord. For emerging economies, the Parties might negotiate that B would be not more than five years later than industrialized countries' first year of operation. C is the last year of operation of the first commitment period of the docking Party's

For the Sectoral Docking Station, including the REDD Docking Station, similar approaches to the national docking station could readily be constructed. For the Adaptation Docking Station, rather than defining commitment obligations in terms of emissions limitations, nations docking into the agreement for assistance on adaptation would need to deposit with the secretariat indicia of commitments to transparency.

2. Docking stations in other international market-based frameworks.

Legal precedent for docking into markets can be found in a range of international and domestic market-based frameworks. The three major market-oriented environmental treaties⁷⁶ – the Montreal Protocol on the Ozone Layer, the Basel Convention on Transboundary Movement of Hazardous Wastes, and the Convention on International Trade in Endangered Species (CITES) – all have accession provisions that can be thought of generically as docking stations, providing a much more flexible means of expanding their participation than the cumbersome provisions of the UNFCCC-Kyoto Protocol framework.⁷⁷ For example, to join the Montreal Protocol on the Ozone Layer, a nation need only ratify the Protocol

commitment. The selection of C determines the length of the multi-year emissions budget period over which the commitment applies. If the Kyoto Protocol's design template were followed, C would be equal to B + 5. D is the percentage limit applied to the commitment period. Under the Kyoto Protocol, some nations adopted "D" set at less than 100% of their base period emissions, while others, e.g. Australia, adopted "D" set at greater than 100% of their base period emissions. The selection of "D" by each nation, and its acceptance by other nations, provides a core means of differentiating the common responsibility to limit emissions, and a means of welcoming new nations into the agreement. E-F represent the emissions base year or years against which emissions limitations are calculated. While many nations in the Kyoto Protocol chose 1990 as their single emissions base year, nations undergoing the transition to a market economy were permitted, in Kyoto, to select different historical base years, including an average of historical base years, provided that the years they selected were in fact historical. The selection of E-F provides another core means of differentiating the common responsibility to limit emissions and a further means of welcoming new nations into the agreement. For reasons described above, however, it is vital that E-F be historical rather than future years. The same basic formula can be used to define a second multi-year commitment period. In the example above, G represents the percentage limit applied to the second commitment period, and again serves as a means of differentiating commitments in future years.

76. The treaties can be considered in some respects as being market-based in that they each create limited permits to trade in particular environmentally sensitive products – ozone-depleting substances, hazardous wastes, and endangered species, respectively. *See generally* Annie Petsonk, *The Role of the United Nations Environment Programme (UNEP) in the Development of International Environmental Law*, 5 AM U. J. INT'L L. & POL'Y 351 (1990).

77. *See infra* notes 13-46 and accompanying text.

and immediately apply all of the obligations to which existing members are subject.⁷⁸ The same is true of the Basel Convention on the Transboundary Movement of Hazardous Wastes and CITES.⁷⁹

Like the problems of ozone layer protection, hazardous waste control, and species protection, global warming is a problem whose solution set is enhanced by broader participation, particularly of major emitters.⁸⁰ Moreover, because global warming is accelerating rapidly, such that there is a strong incentive for nations to find ways to encourage one another to move extremely swiftly to join frameworks for controlling greenhouse gas emissions, docking stations with not just incentives, but expedited procedures for new participants, are worth considering. One important place to look for analogies in international law is the set of legal mechanisms by which nations can “dock into” or accede to an international market-based framework is the accession provisions of the World Trade Organization (WTO).⁸¹

78. The Montreal Protocol, *supra* note 53, provides in Article 16(3) and Article 17: Article 16(3). After the entry into force of this Protocol, any State or regional economic integration organization shall become a Party to it on the ninetieth day following the date of deposit of its instrument of ratification, acceptance, approval or accession.

Article 17. Parties Joining after Entry into Force. Subject to Article 5 [developing countries' 10-year grace period], any State or regional economic integration organization which becomes a Party to this Protocol after the date of its entry into force, shall fulfil forthwith the sum of the obligations under Article 2 [phase-out of ozone-depleting substances], as well as under Article 4 [restrictions on trade in ODS with non-Parties], that apply at that date to the States and regional economic integration organizations that became Parties on the date the Protocol entered into force.

79. Basel Convention, *supra* note 52, art. 22; CITES, *supra* note 51, arts. XX, XXI.

80. Arguably, adding new nations to these treaties does not disturb or dilute the interests of nations that are already Parties to the treaties. The case of climate change is fundamentally different. Because there is a limited amount of “space” in the atmosphere for greenhouse gas emissions consistent with averting dangerous climate change, all nations have an interest in the terms upon which any one country participates in an international climate framework, and all nations can be affected if any major emitting nation or bloc refuses to take on emission reduction obligations. Hence, all Parties have strong interests in reviewing closely the terms upon which new nations may join; and all Parties have strong interests in imposing consequences on those who refuse to participate.

81. Article XII, entitled “Accession.”, reads:

1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.

2. Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.

Generally, accession to the WTO is a fairly cumbersome process under which, once a nation submits a letter of intent to accede to the WTO, a Working Party is established to work with any incoming nation over a period of years to assist the nation in preparing its trade laws and policies to meet the requirements of WTO participation, and the precise terms are negotiated among all the other WTO members in a lengthy series of bilateral accession deals. That is, any nation may become a member (“accede to”) the WTO, but two-thirds of all WTO members must agree on the terms.⁸² However, in December 2002, as part of its development agenda, the WTO General Council approved new guidelines streamlining WTO accession procedures for least-developed countries (LDCs).⁸³ “The simplified and accelerated accession procedures aim to assist in integrating LDCs into the global economy, which was identified as a principal objective at the WTO Ministerial Conference in November 2001. . . . The guidelines, which will come into effect immediately, focus on the areas of market access, WTO rules, process and trade-related technical assistance and capacity building. They exempt LDCs from making excessive concessions or commitments with regard to market access, grant transitional periods and arrangements with regard to WTO rules, and provide for support and technical assistance both with regard to the accession process and general integration into the multilateral trading system.”⁸⁴

The guidelines merit close examination: they contain a number of parallels to the kinds of provisions that may be useful if nations are to create docking stations in a new international framework to be adopted in Copenhagen in 2009 or in national legislation to welcome new nations, including and especially developing nations, into the collective effort to cap and cut greenhouse gas emissions. Among other provisions, the guidelines offer transitional periods/transitional arrangements to enable acceding nations to effectively implement commitments and obligations, taking into account individual

Marrakesh Agreement Establishing the World Trade Organization art. XII, Apr. 15, 1994, 1867 U.N.T.S. 154.

82. See WTO, Membership, Alliances and Bureaucracy, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm.

83. Sub-Comm. on Least Developed Countries, *Communication to the General Council: Accession of Least Developed Countries*, WT/COMTD/LDC/12 (Dec. 5 2002).

84. ‘Development’ Round In The Balance At WTO General Council, TNC Meetings, BRIDGES WKLY. TRADE NEWS DIG., Dec. 12, 2002, at 1, 2, available at <http://ictsd.net/i/news/bridgesweekly/7068/>.

development, financial and trade needs; and Action Plans for compliance with WTO rules, supported by technical assistance and capacity building measures for the acceding nations.⁸⁵ The available literature seems to indicate pluses and minuses for the procedures overall.⁸⁶ A 'lessons learned' compendium might be useful for the trade and environmental community to undertake together.⁸⁷

3. The usefulness of Notice of Intent and Working Party procedures

In the meantime, looking over docking stations in both the multilateral environmental agreements and the WTO, two useful procedural elements that might be considered for inclusion in a Copenhagen agreement are notices of intent to join the new agreement, and the convening of working parties to assist new nations in joining. Specifically, articles could be included in the Copenhagen agreement requiring that any notice of intent to dock into the Copenhagen agreements carbon market, from any nation or group of nations, be accompanied by (a) an Action Plan for compliance with the requirements of the agreement associated with that Docking station, or (b) a request to convene a Working Party to assist the nation or group of nations with preparation of the Action Plan. The implementation of the Action Plans could be supported by Technical

85. *See supra* note 67 and accompanying text.

86. *See, e.g.,* Samnang Chea & Hach Sok, *Cambodia's Accession to the WTO: 'Fast Track' Accession by a Least Developed Country*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES 120* (World Trade Organization ed., Cambridge Univ. Press 2005) available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case8_e.htm (indicating that WTO conditions of membership may be too onerous for Cambodia with too little reward, but that on the other hand WTO membership would force Cambodia to institute important reforms).

87. In fact, those interested in designing cap-and-trade components of a climate treaty framework in order to attract the participation of new nations might do well to consider a range of elements of the WTO framework as analogies. The WTO has been able to attract the participation of a wide range of nations precisely because it is a system of reciprocal obligations and privileges, in which nation agree to subject themselves to WTO disciplines in order to gain the benefits of market access. An analogous framework can be considered in the climate context, where nations adopt the disciplines of emissions caps, monitoring, verification, and enforcement, in order to gain the benefits of carbon market access. A full exploration of this subject, however, is beyond the scope of this article. *See generally* Annie Petsonk, *The Kyoto Protocol and the WTO: Integrating Greenhouse Gas Emissions Allowance Trading Into the Global Marketplace*, 10 *DUKE ENVTL. L. & POL'Y F.* 185 (1999); *see also* Petsonk Testimony, *supra* note 71.

Assistance and Capacity Building measures for the acceding nation or nations.

Upon the request of an acceding nation or nations, Copenhagen Parties could coordinate their various efforts with each other and with relevant multilateral, regional and bilateral development partners to guide the new nation through the accession and implementation process. The provisions could specify that effective and broad-based technical cooperation and capacity building measures shall be provided, on a priority basis, to cover all stages of the accession process, i.e. from the preparation of documentation to the setting up of the legislative infrastructure and enforcement mechanisms, to enable the acceding nations to benefit from and comply with their rights and obligations under the Copenhagen accord. Provisions could also recognize that UNFCCC Parties could facilitate the accession process by holding bilateral talks with the acceding nations if so requested. In addition, the Parties could decide to make use of the offices of the UNFCCC Secretariat available to assist acceding nations and Chairpersons of Accession Working Parties.

Such provisions could enable new nations to begin to trade in carbon markets even while their national emissions monitoring and measurement systems are being finalized, as long as certain restrictions (e.g. requiring nations to hold the bulk of their emissions allowances in reserve for the future) are included. This type of approach could be crucial in welcoming new nations to dock into the Copenhagen accord rapidly, even while they are finalizing their national infrastructure for implementing their emission reduction commitments. Such early participation could invite concomitantly rapid investment in low-carbon energy technologies particularly in fast-growing emerging economies, where waiting to allow trading until their national infrastructure is complete risks locking in another five or ten years of carbon-intensive economic development. This participation would represent a fundamentally different approach, welcoming new nations, rather than erecting the kinds of participation hurdles that have so hampered new participation in the Kyoto Protocol framework.

Crucially, Working Parties could be tasked, among other responsibilities, with evaluating the extent to which the accession targets proposed by a new nation or group of nations would assist the Parties in meeting the overall objective of the UNFCCC. The Working Parties would need to communicate closely with new nations, with one another, and with the Intergovernmental Panel on

Climate Change (IPCC) and other scientific authorities, to ensure that accessions did not oversubscribe the available atmospheric space consistent with the goal of averting dangerous climate change.

Effectively, however, such a procedure would establish a first-come, first-served approach to the remaining atmospheric space, putting a significant premium on early action by new nations to dock into the Copenhagen carbon market as soon as possible. In fact, such an approach could be utilized whether under the auspices of the UNFCCC or a smaller grouping of nations, although which nations might be included in that grouping is a matter of considerable debate.⁸⁸

4. The possible relevance of trade-with-non-Parties provisions

Docking stations, whether in a multilateral context or in the context of national legislation enabling bilateral congressional-executive agreements, must still confront the question of enforcement, namely whether to close the docking station for nations that fail to comply with its terms. While those who fail to comply or otherwise refuse to participate in an environmental treaty or other collective arrangement to achieve a public good are sometimes called “free riders” (because as non-compliers or non-participants they are able to enjoy, for free, the benefits of the collective arrangement even without subscribing to them), in some instances nations that refuse to join in collective efforts to protect the environment are not “free riders,” but rather “lone rangers” – they have the ability, acting individually or collectively, to prevent all participants from sharing the benefits of treaty participation. In such cases, where an outlier has the potential, through its actions, to deprive all others of the benefit of the arrangement, nations have a collective interest in establishing very stringent consequences for “lone rangers”.

88. See, e.g., Todd Stern & William Antholis, *A Changing Climate: The Road Ahead for the United States*, WASH. Q., Winter 2007-08, at 175, 180 (calling for the creation of an E8); Todd Stern, *Global Warming Requires Global Leadership* (June 1, 2007), http://www.americanprogress.org/issues/2007/06/G8_global_warming.html (“[An E8 would be] a small group of leaders from the United States, the European Union, Japan, Russia, China, India, Brazil and South Africa with the aim of short-circuiting bureaucratic logjams and producing concrete results. An E8 would propel leaders to get personally involved in creating an ecological board of directors that would operate outside the bureaucracy and politics of large UN conventions.”). But compare David Weisbach, *Responsibility for Climate Change, By the Numbers*, 18-22 (AEI Ctr. for Regulatory and Mkt. Studies, Working Paper No. 09-04, 2009) for a different analysis of leading emitters and responsibilities.

Recognizing this need to exert participation and compliance pressure on potential “lone rangers,” environmental agreements have developed provisions on trade with non-Parties that can be used to close the docking stations into which participants would otherwise connect. For example, CITES restricts trade among Parties in species and specimens of species that are endangered, especially those for which the trade itself contributes to the endangerment, and it allows its Parties to treat as non-Parties, and therefore prohibit trade in endangered species, with Parties that fail to comply.⁸⁹ Similarly, the Montreal Protocol bans trade with non-Parties, and its Compliance Committee has issued determinations that non-complying Parties should be treated as non-Parties, thereby terminating their ability to dock into the market for trade in ozone-depleting substances.⁹⁰

Interestingly, these trade with non-Party provisions also open an implicit or explicit docking station for nations that are not formally members of the treaties to dock into the treaties if they comply with the basic requirements of the treaties. For example, Article X of CITES, “Trade with States not Party to the Convention,” essentially allows non-Parties to “dock into” the highly regulated permissible trade in endangered species and specimens provided that the non-Parties are in compliance with the requirements of the Treaty.⁹¹ The Basel Convention allows trade in hazardous wastes with non-Parties provided that the trade proceeds under a bilateral or multilateral agreement that is notified to the Parties and that does not derogate from the environmentally sound management of hazardous wastes as provided for in the Convention.⁹² And the Montreal Protocol’s ban on trade in ODS with non-Parties does not apply if the non-Party is in compliance with the affirmative obligations to phase out ODS and has provided data to demonstrate that compliance.⁹³ While the trade-with-non-Parties provision is not a “docking station” for non-Parties, it does provide a starting point for consideration of whether provisions allowing non-Parties to dock into a Copenhagen accord might provide a useful transition mechanism to welcome new entrants even before the formal requirements for accession have been completed.

89. CITES, *supra* note 51, art. X.

90. Montreal Protocol, *supra* note 53, art. 8.

91. *See* CITES, *supra* note 51, art. X.

92. Basel Convention, *supra* note 52, art. 11.

93. *See* Montreal Protocol, *supra* note 53, art. 4(8).

III. 'DOCKING STATIONS' IN U.S. CLIMATE LEGISLATION

The bulk of this article has been devoted to an examination of how docking stations might assist, substantively and procedurally, in welcoming new nations into a Copenhagen multilateral climate accord. However, given the timing and the interplay between domestic U.S. climate legislation and the international climate treaty framework, it is also worth considering whether docking stations might usefully be applied in the context of national climate legislation in the United States.⁹⁴

When the U.S. Congress enacts cap and trade legislation, Congress – which has the constitutional authority to regulate commerce with foreign nations,⁹⁵ including commerce in emissions allowances – can set the terms on which other nations can dock into the U.S. carbon market. Congress can do so directly, without need for a treaty, by simply specifying the terms on which carbon market access will be granted, and providing for agreements or arrangements that meet the terms that Congress specifies.⁹⁶ The President may, if he chooses, negotiate treaties and other agreements that meet these standards. If he chooses, he may submit the treaties to the Senate for its advice and consent by two-thirds majority. But once Congress has enacted, and the President has signed, legislation specifying the requirements other nations must meet if they wish to access the U.S. carbon market, and authorizing the President to enter into agreements and arrangements that meet these standards, then bilateral agreements and arrangements negotiated by the President that meet the standards specified by Congress can be sufficient without further action by the Congress to make them effective.⁹⁷

94. See Fred Krupp, President, Env'tl. Def. Fund, Remarks at the Conference on Climate and Energy Policy: From Poznan to Copenhagen via Washington (Nov. 10, 2008), <http://www.edf.org/article.cfm?contentID=8800> (“[I]n almost any political configuration, and certainly given the anticipated composition of the Senate and the House in the next Congress, America will have to make progress on domestic legislation in order to be able to participate effectively in the negotiation – and implementation – of a new international framework. The old strategy of negotiating the international agreement first, and then going to Congress for the implementing legislation, won’t work.”).

95. See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . .”).

96. See Petsonk Testimony, *supra* note 71, at 14-16; BLUEPRINT, *supra* note 51.

97. In his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson stated: Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may

Such an approach has several advantages. First, it enables the Congress to give the Executive Branch clear direction about the requirements that other nations must meet to obtain access to the U.S. carbon market. Second, if the President decides to negotiate greenhouse gas emissions targets with a small group of major emitting nations, as has been proposed, and if Congress establishes docking stations in national legislation by specifying the terms upon which this group of nations could gain access to the U.S. carbon market, then negotiations conducted by the Executive Branch could enable these nations to dock into the U.S. carbon market via a set of bilateral agreements or even a single plurilateral agreement, without further action by the Congress.⁹⁸

Third, such an approach strengthens the hand of the Executive Branch in seeking commitments from other nations to cap and reduce their greenhouse gas emissions. Professor Ken Dam has pointed out

challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. 2 In these circumstances, [343 U.S. 579, 636] and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government [343 U.S. 579, 637] as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring).

98. The agreements would, of course, need to be notified to Congress under the Case Act, 1 U.S.C. § 112b(a). Such an approach would enable U.S. climate legislation to achieve most of the objectives outlined in proposals for enactment of “Climate Protection Authority,” without necessitating a separate and potentially difficult vote in the Senate on the question of whether the Senate should relinquish its constitutional authority to give consent to treaties by a 67-vote supermajority. See William J. Antholis & Nigel Purvis, *The Case for a Climate Protection Authority* (Brookings Inst., Apr. 10, 2009), available at http://www.brookings.edu/opinions/2009/0127_climate_change_antholis_purvis.aspx. See also Nigel Purvis, *Trading Approaches on Climate: The Case for “Climate Protection Authority*, (Resources for the Future, Summer 2008), available at http://www.rff.org/Documents/Resources/RFF-Resources-169_TradingApproachesOnClimate.pdf.

that Cordell Hull, President Franklin Roosevelt's Secretary of State from 1933 to 1945, realized nearly sixty years ago that unilateral market-opening measures are "not in the political cards in most countries and certainly not in the U.S. Congress. One could not expect to get something for nothing . . . [r]eciprocity was the key."⁹⁹ By enacting strong caps on the total greenhouse gas emissions of America's major emitting sectors, creating an emissions cap-and-trade market, and establishing docking stations in U.S. legislation that afford other major emitting nations carbon market access if follow suit, the U.S. Congress can play a true leadership role, and enable the President and the Executive Branch to play a true leadership role in the global battle against climate change.¹⁰⁰

CONCLUSION

The goal of this article has been to identify docking stations as a new method of welcoming the voluntary participation of sovereign nations in the effort to avert globally catastrophic climate change. The article reviewed the existing climate treaty framework and the obstacles to participation of new nations that provisions in the existing framework raise. The article then proposed three substantive types of docking stations – national, sectoral, and adaptation. It outlined the procedural steps that nations could take to create these docking stations in a Copenhagen accord and in U.S. climate legislation. It examined analogies in several international agreements,

99. See Kenneth W. Dam, *Cordell Hull, the Reciprocal Trade Agreement Act, and the WTO: An Essay on the Concept of Rights in International Trade*, 1 N.Y.U. J. L. & BUS 709, 712 (2004-2005). As Professor Dam notes, historically, Congress has exercised its Commerce Clause powers in a variety of ways to establish requirements for market access in other areas, sometimes in ways that intersect with the President's negotiation of international agreements, and sometimes without such intersection. *Id.* at 726. For example, the United States has accorded "most favored nation" trading status to its trading partners by means of bilateral treaties of friendship, commerce, and navigation; bilateral executive agreements involving reciprocal recognition of trade privileges, disciplines and benefits; multilateral agreements, including the General Agreement on Tariffs and Trade (GATT) and the agreements adopted under the auspices of the World Trade Organization; and by means of congressional enactments legislatively extending MFN treatment to trading partners. See the Reciprocal Trade Agreements Act, 19 U.S.C. § 1351 (2009); Trade Act of 1974, 19 U.S.C. § 2136 (2009).

100. A legislative proposal released on March 31, 2009, by the chairman of the House Energy & Commerce Committee and the chairman of that committee's Energy & Environment Sub-Committee, offers one set of possible options by which Congress could specify the requirements that other nations would have to meet if they wish to gain access to the U.S. carbon market. See American Clean Energy and Security Act (ACEA) §§ 754(a)(2), 743 (text and summary available at http://energycommerce.house.gov/index.php?option=com_content&task=view&id=1560&Itemid=1).

and noted possibilities for including docking stations for non-Parties. Through this exploration, the article has sought to create new avenues for broader participation in efforts to confront the signal environmental challenge of the 21st century.