



Sustainable Development Law on Climate Change

Learning Course, UNCSD, 14th session

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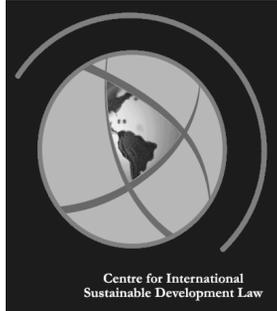
Québec 

CISDL: Intro I



- **An Independent Legal Research Centre, whose partners include McGill University Faculty of Law (Montreal, Canada) & Cambridge University Law Faculty (UK).**
- **Mission: To promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.**

CISDL: Intro II



CISDL Programming:

- **Dialogues: Conferences** (*Sustainable Justice 2002: Implementing International Sustainable Development Law*, Montreal); Legal Experts Panels (WSSD, UN CBD, WTO, UNCCD); Academic Workshops (McGill, Yale, Oxford).
- **Research: Six Research Programmes** at the areas of intersection between social, economic and environmental law, led by Lead Counsel.
- **Publications:** *Sustainable Development Law: Principles, Practices & Prospects* (Oxford University Press, 2004); *Sustainable Justice* (Martinus Nijhoff, 2004) and *Sustainable Developments in World Trade Law* (Kluwer Law International, 2005).
- **Partnerships:** *International Law for Sustainable Development* side event at the 2002 WSSD, and CISDL-IDLO-ILA ILSD Partnership.

Sustainable Development Law on Climate Change

Part I: Foundations of International Law on Sustainable Development



1. The Foundations

- **What is sustainable development?**
- **Why is it important for developing countries?**
- **How did the concept originate?**
 - **in policy**
 - **in domestic and international law**

1. The Foundations

International Events and Policy Declarations:

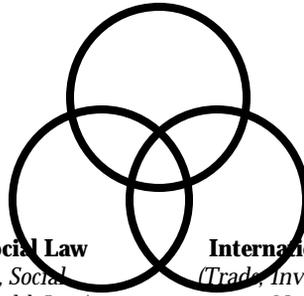
- 1972 UNCHE, Stockholm, Sweden (mainly enviro)
- 1987 Our Common Future (Brundtland Report)
- 1992 UNCED, Rio de Janeiro, Brazil
 - the Rio Declaration
 - Agenda 21
- 1997 UNGASS, New York
- UN Regional Commissions
- 2002 World Summit on Sustainable Development, Johannesburg, South Africa
 - Johannesburg Declaration, JPOI
 - Partnerships

1. The Foundations

**Sustainable
Development Law**

**Law at the area of
intersection between
three fields, broader
purpose: “development
that can last.”**

International Environmental Law
(atmosphere, water, biodiversity)



International Social Law
*(Human Rights, Social
Development, Health Law)*

International Economic Law
*(Trade, Investment, Competition,
Natural Resources)*

Sustainable Development Law on Climate Change

Part II: Principles of International Law on Sustainable Development



2. Principles of Sustainable Development

1992 Rio Declaration (27 Principles, 'Soft Law')

General

- Principle 1: Human beings are centre of sustainable development...
- Principle 2: Sovereign rights re: natural resources, and responsibility re: damage...

Substantive:

- Principle 3: Right to development, equitable for present and future generations.
- Principle 4: Environmental protection integral part of development process...
- Principle 5: Cooperate to eradicate poverty, decrease disparities in standards of living, and meet needs of majority.
- Principle 6: Special priority to needs of least developed, most environmentally vulnerable...
- Principle 7: Global partnership to conserve, protect & restore health and integrity of the Earth's ecosystem, with common but differentiated responsibilities.
- Principle 8: Reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.
- Principle 12: No arbitrary or unjustifiable discrimination or a disguised restriction on international trade, avoid unilateral actions, decide by international consensus.
- Principle 13: National and international liability and compensation.
- Principle 14: Discourage or prevent relocation and transfer of activities/substances of severe environmental degradation or harmful to human health.

2. Principles of Sustainable Development Law

1992 Rio Declaration, cont.

Substantive, cont.

- Principle 15: Precautionary approach, lack of full scientific certainty not used as a reason for postponing measures to prevent degradation.
- Principle 16: Internalization of environmental costs, use of economic instruments, so that polluter should, in principle, bear the cost of pollution.
- Principles 23 – 26: Protection of oppressed peoples natural resources, protection for the environment in times of armed conflict, peace needed for SD.

Procedural

- Principle 9: Build capacity, scientific and technological knowledge, and transfer technology...
- Principle 10: Participation, awareness & access to information, access to judicial and administrative proceedings, including redress and remedy.
- Principle 11: Effective environmental legislation. Environmental standards, management objectives and priorities reflect context.
- Principle 17: Environmental impact assessment.
- Principle 18: Obligation to immediately notify others of disasters or emergencies, and int'l commitment to help afflicted States.
- Principle 19: Prior and timely notification and relevant information, consultation with others at early stage and in good faith.
- Principle 20 – 22: Involvement of women, youth, indigenous peoples
- Principle 27: Commitment to cooperate in good faith, to partnership and to further development of international law in the field of sustainable development.

2. Principles of Sustainable Development Law

Significant ICJ Decisions

- 1893 *Pacific Fur Seal Arbitration* (United States / Canada)
- 1907 *Trail Smelter Arbitration* (United States / Canada)
- 1974 *Nuclear Tests Cases* ICJ (Australia and NZ / France)
- 1993 *Maritime Delimitation* ICJ (Denmark / Norway)
- 1996 *Legality of Use of Nuclear Weapons* ICJ (Advisory Op)
- 1997 *Gabcikovo - Nagymaros*, ICJ (Hungary / Slovakia)

Relevant ITLOS Cases

- 1999 *Southern Bluefin Tuna Prov. Measures* (Australia and NZ / Japan)
- 2001 *MOX Plant Order* (Ireland / England)
- 2003 *Johor Land Reclamation Prov. Measures* (Malaysia / Singapore)

Relevant WTO Cases

- 2001 *Chile - Swordfish Case* (WTO & ITLOS)
- 1991 *US - Tuna Dolphin Case*
- 1996 *US - Reformulated Gas Case*
- 1998 *US - Shrimp Turtle I Case*
- 2003 *US - Shrimp Turtle II Case* (Compliance)
- 1990 *Thai-Cigarettes Case*
- 1998 *EU - Beef Hormones Case*
- 2000 *EU - Asbestos Case*

2. Principles of Sustainable Development Law

Three Tracks of Important International Treaties:

- I: 1972 - 92 CITES, Basel Hazardous Wastes, Vienna Ozone & Montreal Protocol
- II: 1992 - 2004 UN CBD and Cartagena Protocol, UN FCCC and Kyoto Protocol, UN CCD (desertification), Stockholm POPs & Rotterdam PICs.
- 1947 - 2004 GATT/WTO and regional agreements (EU, NAFTA, Mercosur, CAN, SADC, FTAA)
- 1947 - 2004 UN Human Rights Covenants & Instruments (1966 ICCPR & ICESCR), ILO Conventions.

More than 300 Other Relevant International Accords:

- 1972 - 2002 ITLOS, Regional Fisheries and Seas Conventions
- 1968 /02 African Nature Conservation Treaty
- 1985 ASEAN Convention
- 1998 Aarhus Convention
- 1998 Espoo Convention, etc.

2. Principles of Sustainable Development Law

ILA New Delhi 2002 Declaration of Principles of International Law Relating to Sustainable Development

- 1. The duty of States to ensure sustainable use of natural resources
 - extension of 'good neighbour' principle with regards to common resources, reflected in many treaties.
- 2. The principle of equity (inter and intra-generational equity) and the eradication of poverty
 - central to treaties such as climate change, and biodiversity, seeks to ensure that benefits of development are shared.

2. Principles of Sustainable Development Law

- 3. The principle of common but differentiated responsibilities
 - recognition of historical burdens and differences of technology, finances, with regard to common challenges, related to 'special & differential treatment' in trade treaties
- 4. The principle of the precautionary approach to human health, natural resources and ecosystems
 - transfers the burden of addressing scientific uncertainty onto the proponent (e.g. for projects and new technologies).

2. Principles of Sustainable Development Law

- 5. The principle of public participation, access to information and to justice
 - most international treaties make provision for public participation, transparency is required under trade law, access to information and legal remedies are recognized in many human rights and environmental laws.
- 6. The principle of good governance
 - definition and scope still emerging, relates to rule of law, predictable decision-making, multi-stakeholder processes (consultation) and independence of decision-making bodies, also anti-corruption measures.

2. Principles of Sustainable Development Law

- 7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives
 - development planning & laws should integrate / accommodate / reconcile social, economic & environmental priorities.
 - in treaties, different degrees of integration can be observed (ranging from nearly separate, to parallel but interrelated, to partially integrated, to fully integrated).

3. Sustainable Development & Climate Change

References to Sustainable Development

-Art. 2, one objective is to “enable economic development to proceed in a sustainable manner.”

-Art. 3(4), “The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

-Art 3(5), The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

3. Sustainable Development & Climate Change

1. Sustainable use of natural resources

-Preamble references to the duty to develop sustainably and the duty not to cause harm to cause environmental transboundary harm

-Art. 4(1)(d), Reference to the “sustainable management” of carbon sinks and reservoirs

2. Equity

-Preamble, recalling the “protection of global climate for present and future generations of mankind”

-Preamble, “Affirming that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty,”

-Art. 3(1), “The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

3. Sustainable Development & Climate Change

3. Common but differentiated responsibilities

-Preamble, "Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs,"

-Preamble, " Acknowledging 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,"

-Art. 3(2), "The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration."

3. Sustainable Development & Climate Change

3. Common but differentiated responsibilities

-Art. 4(5), "The developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and knowhow to other Parties(...)"

-Art. 4(6), " In the implementation of their commitments under paragraph 2 above, a certain degree of flexibility shall be allowed by the Conference of the Parties to the Parties included in Annex I undergoing the process of transition to a market economy (...)"

-Art. 4(7), "The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties."

3. Sustainable Development & Climate Change

4. Precautionary approach to human health, natural resources and ecosystems

-Preamble, "Noting that there are many uncertainties in predictions of climate change, particularly with regard to the timing, magnitude and regional patterns thereof,"

-Art. 3(3), "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost."

-Reflected in research commitments in article 5 and the creation of a subsidiary scientific body

2. Principles of Sustainable Development Law

5. The principle of public participation, access to information and to justice

-Access to information and public awareness measures in article 6

-CDM and JI mechanisms have access to information and public participation measures throughout the life of a project

-however, access to justice is limited

6. The principle of good governance

-informs the Climate Change regime on the whole, but is not specifically alluded to

3. Sustainable Development & Climate Change

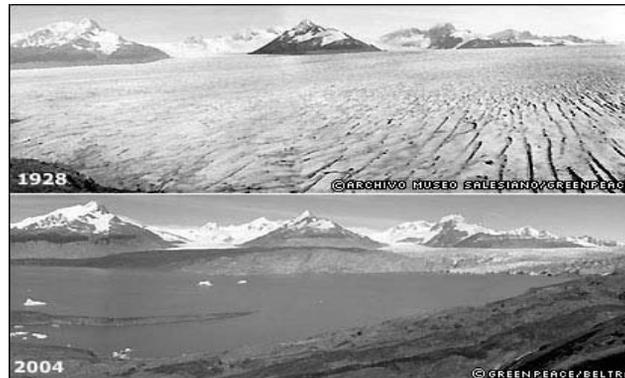
7. Integration

-Preamble, “Affirming that responses to climate change should be coordinated with social and economic development in an integrated manner with a view to avoiding adverse impacts on the latter, taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty,”

-Art. 4(1)(f), “Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change;

Sustainable Development Law and Climate Change

Part III: The Climate Change Regime



International Climate Change Law

- United Nations Framework Convention on Climate Change (1992)
- Kyoto Protocol (1997)
 - Joint Implementation
 - Clean Development Mechanism
 - International Emissions Trading
- Decisions of the COP/MOP (annual)
 - Marrakesh Accords (2001)
 - Milan (2003)

International Climate Change Law

- United Nations Framework Convention on Climate Change (1992) (189 Parties)
- Kyoto Protocol (1997) (163 Parties)
 - Joint Implementation
 - Clean Development Mechanism
 - International Emissions Trading
- Decisions of the COP/MOP (annual)
 - Marrakesh Accords (2001)
 - Milan (2003)

UNFCCC Art. 4 Commitments

- Art 4(1),(2): lots of monitoring, reporting, cooperation and policy to reduce emissions
- Art 4(3): “new and additional financial resources” “technology transfer”
- No binding targets or caps on emissions

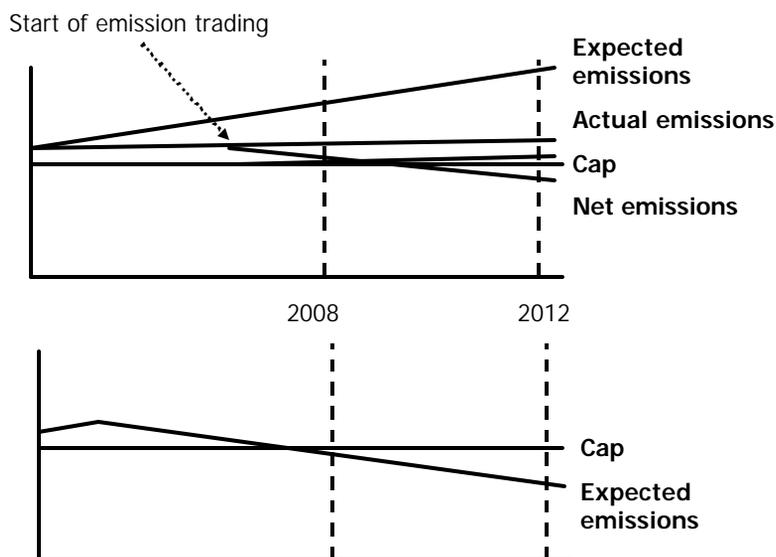
Kyoto Protocol

- Art. 3(1): reduce overall emissions by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.
- Target for developed countries and countries with economies in transition (listed in Annex I in UNFCCC)
 - Reflects common but differentiated responsibilities
- Individual targets for each country set out in Annex B to the Kyoto Protocol
- Art. 4: Parties can fulfill their commitments jointly (EU)

Kyoto Protocol: Cap-and-trade

- Cap set on Annex I countries emissions
 - Amount of emissions this represents is “quantified” as “quantified emission limitation and reduction commitment” QELRC
- Annex I Parties issue emission rights called “Assigned Amount Units” (AAUs) equal to their QELRC
- At the end of the 2008-2012 period, net emissions must be below the cap.
- Annex I Parties are to reduce emissions domestically, but this can be “supplemented” by emissions trading
- Emission “credits” can be bought to offset actual emissions, and emission “rights” can be bought to increase the amount a country can emit.

Kyoto Protocol: Cap-and-trade



Why emissions trading works

- Atmosphere is one big “aerial ocean”
 - Emission reductions help mitigate climate change irrespective of where they occur
- It is cheaper to reduce emissions in some countries rather than others

“Flexible Mechanisms”

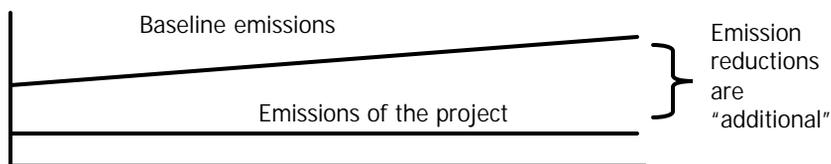
- Article 6: Joint Implementation
 - Projects located in Annex I countries that reduce emissions
 - Projects generate “emission credits”: Emission Reduction Units (ERUs)
- Article 12: Clean Development Mechanism
 - Projects located in non-Annex I countries that reduce emissions
 - Projects generate “emission credits”: Certified Emission Reductions (CERs)
- Article 17: Emissions Trading
 - Only Annex I countries (and authorized private/public entities in Annex I countries)
 - Enables trading of AAUs, ERUs, CERs, and RMUs

Clean Development Mechanism (CDM)

- Purpose:
 - Assist non-Annex I countries achieve sustainable development and contribute to the overall objectives of the UNFCCC
 - Assist Annex I Parties (cost effectively) meet their QELRC's

CDM: How it works

- Projects must:
 - Be located in non-Annex I country
 - Reduce or sequester (sinks) greenhouse gas emissions below the baseline
 - Baseline is project specific, and represents the "business as usual" scenario without the project
- Emission reductions must be "additional"
 - Environmental vs. financial additionality/barrier analysis
 - Government policy and additionality



CDM: How it works

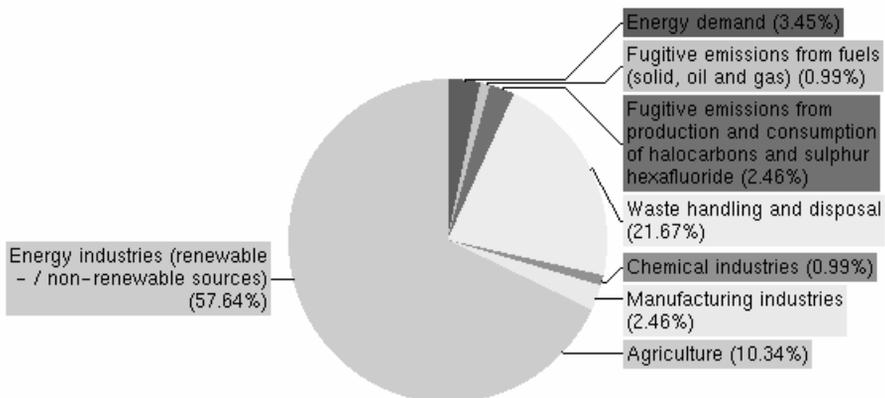
- Project must be approved by the Designated National Authority of the host country and Annex I Party:
 - Voluntary participation (both)
 - Contributes to sustainable development (Host Country only. Host Country to determine what SD is for them)
- Validated by independent "auditor"
 - Projects must have allowed time for and taken into account stakeholder comments
- Registered by CDM Executive Board
- Verification of CERs by independent "auditor"
- CDM EB issues CERs into (Annex I) registries
- CERs can then be used for compliance or traded under Article 17

Types of CDM Projects

- Renewable energy projects initially expected to dominate
- However, not all greenhouse gases are equal
 - CO₂: 1
 - CH₄: 23
 - N₂O: 296
 - HFCs: 120-12,000
 - SF₆: 22,300
- Not all projects have the same contribution to a host countries sustainable development

Types of CDM projects: Numbers of registered projects

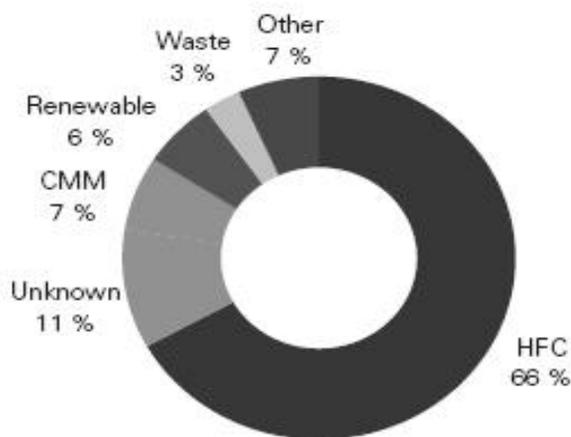
Distribution of registered project activities by scope



<http://cdm.unfccc.int> (c)02.05.2006 11:33

Number of Credits Traded

(Point Carbon, CDM & JI)



EU Emissions Trading Scheme

- EU joint commitments (under Art. 4 of KP)
- Transposed some of the international obligations under the KP onto national entities
- Cap and trade system similar to Kyoto
- Power producers issued emission “allowances”
 - Allowances can be traded
- Actual emissions must equal the number of allowances they hold
 - 1st phase: 2005-2007
 - 2nd phase: 2008-2012
 - Commitments to future phases (irrespective of Kyoto)

EU Linking Directive

- Key driver of the carbon market
- Allows certain CERs and ERUs to be able to be used for compliance within the EU ETS
- Restrictions:
 - “sinks” credits banned in 1st phase. 2nd phase?
 - When approving hydro projects over 20 MW, Member States are to ensure the project “respects” relevant international criteria and guidelines, including those contained in the World Commission on Dams November 2000 Report “Dams and Development — A New Framework for Decision-Making”

Exclusion of Sinks

- Afforestation and reforestation activities are eligible CDM projects, but there are issues...
- Permanence risk
 - Risk of sinks being destroyed
 - Resolved by accounting rules: "tCERs" and "iCERs"
 - Credits are re-verified every 5 years
 - Must be replaced by "permanent" credits
- Biodiversity, invasive species
 - Resolved in project approval
- Disincentive to reducing fossil fuel emissions
 - Economic analysis indicates the opposite may be true
- Justified??
 - Currently under review

Review of what we have covered so far

- Kyoto Protocol set binding caps on developed countries
- Created "flexible mechanisms" to help meet these caps
 - CDM promotes investment in projects that promote sustainable development
- EU ETS passes some Kyoto obligations onto the private sector in the EU
- EU Linking directive enables EU private sector buy certain types of CERs and ERUs to meet their obligations
- The result...

The Carbon Market

- Started with the World Bank's Prototype Carbon Fund in 2000 with \$180 million
- Point Carbon estimates:
 - 2004: 94 Mt CO₂e worth €377 million
 - 2005: 799 Mt CO₂e worth €9,400 million
 - EU ETS: 262 Mt CO₂e worth €5.4 billion
 - CDM: 397 Mt CO₂e worth €1.9 billion
 - JI: 28 Mt CO₂e worth €96 million
- World Bank now has 8+ carbon funds with approx \$1.3 billion in funds

Scenario: things to keep in mind

- Group 1:
 - Which principles of sustainable development are assessed? How?
 - Should certain types of projects be rejected outright, or can their contribution to sustainable development be "improved"? How?
- Group 2:
 - Is the fund only buying CERs?
 - How can the objectives of the fund be reflected in their CER purchase contract?
 - Do the projects meet the criteria to be eligible as a CDM project (e.g. additionality)?
- Group 3:
 - Why is Europe Energy buying the CERs?
 - Can all the CERs meet these objectives?
 - Do the projects meet the criteria to be eligible as a CDM project (e.g. additionality)?
 - Does the Linking Directive affect which projects are attractive?

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Part IV: The Prospects



The Prospects: What we have learnt

- CDM
 - High transaction costs
 - Slow approval, but it is improving
 - Market can be used to promote sustainable development
 - Industrial gas exception?
- EU ETS
 - Driving the carbon market
 - Negative affect on forestry projects

The Prospects: Moving beyond 2012

- Action must be taken
 - Up to 70% reduction of 1990 emissions by 2050
- COP 11 in Montreal 2005
 - Kyoto Parties agreed to start talking about post 2012 commitments
- Who is included and how
 - U.S. participation is key
 - How China, India and Brazil are treated
- What is included
 - Deforestation accounts for 20-25% of emissions
 - Slowing (or stopping) deforestation is important
- Does the CDM have a future?
 - Project based vs. programmatic CDM?

Thank you to the Quebec
Government.

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Questions?

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