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Climate Change and Emissions Trading

UNITED KINGDOM REPORT

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This paper starts with some general remarks concerning the UK situation, and then provides answers to the listed questions, as far as possible. From a personal perspective, being required to examine the regulations and policy documents (which I have tried to resist to date) as preparatory work for the meeting has been a valuable learning experience, though I do not claim to be an expert in this area.

UK - Some General Remarks.

1. General climate change targets

Under the burden sharing agreement concerning Kyoto the UK agreed to reduce greenhouse gases by 12.5% from 1990 levels in the period 2009-2012. In 2000 the Government announced a policy of moving towards a more challenging domestic goal of a 20% reduction in Co2 by 2010, and its implementation of the ETS requirements, including the setting of the overall cap, have been made with this latter goal in mind, causing considerable controversy in industry. The 2003 Energy White Paper (following the report on Energy by the Royal Commission on Environmental Pollution) announced a further goal of a 60% reduction in CO2 by 2050. Achieving such targets will, of course, require measures extending far beyond emissions from industry - domestic energy use and transport are key sectors.

2. Emissions trading

With the growth over the last twenty years of tougher conventional regulatory regimes in the environmental field, there has been a considerable amount of discussion, largely led by economists and the deregulation community as to the greater efficiency of market led trading schemes. Conventional environmental lawyers and the regulatory community were until recently pretty sceptical (in part arguing that these ideas were led by US thinkers as a reaction to a far less flexible regulatory system with heavy legal transaction costs which was not duplicated in Europe). CO2 reductions from industry (partly because they created no local pollution issues) did, however, offer a less controversial area for introducing n emissions trading regime, and in 2002 the Government introduced a voluntary emissions trading scheme for industry encouraged by some incentive payments for those taking part. This has given the Government a lee-way start in paving the way for implementing the EU ETS scheme, though there have been considerable complexities in overlapping the two schemes (at present the Government is seeking an exemption from the Commission during the first phase for industries participating in the UK voluntary scheme). There is, though, some doubt as to

whether the scheme has really achieved much more than would have already have happened under conventional regulation and business as usual.

3. Role of the Environmental Regulator in emissions trading

From a policy perspective, an important development has been the growing role of the Environment Agency (the main body in England and Wales responsible for traditional environmental regulation of industry) in the implementation of the EU emissions trading scheme in the UK. Until 5 years ago the Agency had largely been deliberately excluded by Government from the development of alternative regulatory approaches (including the implementation of the UK voluntary emissions scheme) and lacked the expertise or indeed interest to do so. However, it made a policy decision a few years ago (I was on the Agency Board at the time) that it could not ignore these developments or afford to be excluded. It has largely been successful in this goal, and is now fully locked into the implementation of the ETS (granting initial permits, approving conditions, enforcement of the permits, and operation of the national registry) though has agreed to the use of third party verifiers. At the same time it has published important reports on modern environmental regulation where it welcomes the use of emission trading in other areas as a complimentary instrument to traditional regulation via permits and licencing (see further on Q 9 as to other areas of use of emissions trading).

The significance of these institutional developments is that it has, to some extent, taken the sting out of the tail of those who argue that emissions trading is an alternative to regulation. Emissions trading in this context can be viewed as one of a possible suite of regulatory instruments, and the central involvement of the Environment Agency now provides some protection and public assurance that the overall need for securing environmental outcomes is not sacrificed on free market dogma.

4. Legal dispute with the Commission over the National Allocation Plan

As mentioned in the answers to the questions, the setting of the cap under the UK NAP caused a considerable degree of heat amongst UK industry. The UK submitted plan was approved by the Commission last summer, though the Government apparently said at the time that the figures were provisional and might have to be revised in the light year new energy forecasts. In October the Government did indeed proposed revised figures (a cap increase of 3%) but the Commission argued that legally it was now of time under the Directive , mainly out of concerns that this would open the floodgates to revisions from other Member States and devalue the price of carbon.

At present there is a stand-off with the Government stating that it will initiate legal proceedings against the Commission. In the meantime, in March of this year, the Government announced that it would make its initial allocations on the basis of the original plan submitted to the Commission (with any excess burden falling on the electricity industry rather than manufacturing industry), but without prejudice to its legal position. The saga has proved damaging to the Government's credibility of putting climate change as a top priority in the context of the UK's chairmanship of G8 and the Presidency of the Council in July.

5. Legal and Public Interest in emissions trading

As some of the answers to the questions indicate, the detailed implementation of the emissions trading scheme remains to date largely of interest amongst those directly concerned and their legal advisers. Over and above the basic implementing regulations, there is mass of complicated government discussion documents, technical advice, etc. which to date, has scarcely been the subject of substantive critique by more general environmental lawyers, both as to principle and to detail. Climate change as a general issue is high on the list of general public concern (though the environment is hardly featuring in the current general election campaign), but interest in and understanding of the details of the ETS is minimal .The position in the United Kingdom is made more complicated because (a) before the EC Regulation was agreed, the United Kingdom had already a voluntary emissions trading for greenhouse gases together with a series of voluntary agreements with selected industries and (b) over and above the UK agreed target reduction under the EU Kyoto burden sharing agreement (12.5% greenhouse gases for the period 2008-2012), the UK government made a further commitment of 20% national total reduction in CO2 by 2010.

UK - Answers to Questions

.1.- Council Decision 2002/358 introduced, among others, a compulsory burden sharing for EC Member States as regards the commitments under the Kyoto Protocol (annex II). Was there any legal discussion in your country as regards the method of calculation of this burden sharing, and its fairness; was there any participation of the public as regards the opportunity to accept the political burden sharing of 1997 and its legal fixation of 2002?.

There was no formal public consultation process, but a fair degree of political discussion concerning the original burden sharing agreement. Industry and other groups appeared to largely accept the 12.5% allocation (a cynic would say that this was largely because at the time it was thought the UK would fairly easily meet this target, given the fairly recent collapse of the coal industry as a major source of power generation). A 1999 report of the Parliamentary Committee for Trade and Industry, for example, reported that,

"Witnesses were strongly supportive of the need for the UK to meet the emissions reductions target resulting from the Kyoto Conference [*The Committee defined this to mean the 12.5 burden sharing reduction*] and recognised the probability of more stringent targets being set beyond 2010......The Minister for Energy and Industry told us in oral evidence that he was pleasantly surprised that industry now fully accepted the need for climate change to be tackled, including by curbs on industrial greenhouse gas emissions. He suggested "the overall shape is in position; now it is a case of working through the detail". "

In 2000 another Parliamentary committee (Environment, Transport, and Regional Affairs) examined the UK Climate Change Programme, and one of the issues it raised was the precise legal nature of the original burden sharing agreement and was critical of the Government saying at the time it was "legally binding":

"One important point about the 'burden sharing' targets is that although the Government routinely refers to the UK's target as 'legally binding', it is not clear that this is the case. Further, it is not apparent what sanctions could be applied in the event of a Member State failing to meet its target. **We urge the UK to press for improved clarity of the status of the 'burden sharing' agreement within the EU."**

The Government responded by saying that when it came to ratification of Kyoto by the Community the burden sharing agreement would have to be converted into a legally binding instrument.

The Parliamentary Scrutiny Committee on proposed Community legislation maintained regular public reports on the various Community proposals concerning greenhouse gases and providing contemporary views of Government's concerns. On the proposed Decision for a monitoring mechanism (COM (03) 51) it noted that that the Government had concerns over legal questions as to whether the decision would restrict the independent right of the UK to participate in the Kyoto protocol trading mechanisms on the international stage : "..the Government does not, for example, want the UK's eligibility to trade to be linked to whether the other 14 Member States are complying with their Kyoto obligations as this could impinge on the UK's ability to meet its target in a time and effective manner".

2. Directive 2003/87 (OJ L 275/203 p. 32) introduces a system of how emission rights shall be allocated and how they can be traded.

a) Was there any legal discussion of the major elements of this directive in your country? Was the basic approach – i.e. tradable emission allowances – easily accepted? Were frictions discussed in relation to BAT-approaches, voluntary commitments, or emission charges/taxes schemes**? The basic concept of emissions trading for CO2 was largely accepted as a regulatory tool, particularly as the UK had already implemented a voluntary CO2 emissions trading regime some years before. Looking at the responses to the Government's initial consultation document, nearly every respondent (mostly industry) said that allocations should be based on historical trends, though a number said that new entrants should be based on BAT. As far as I can see, only the UK Environmental Law Association argued that allocations should generally be based on BAT, and raised the potential overlap between IPPC and ETS in this context. In addition to a voluntary trading scheme, the UK Government has also imposed a climate change levy on certain industries but with an 80% rebate for industries that had made Climate Change Agreements with the Government. A lot of the technical discussion has been concerned with the overlaps of these schemes but essentially at present, the Government is seeking from the Commission a temporary exemption for installations covered by these schemes for the first phase.**

b) Have there been considerations in your country whether there was an EC competence in this matter; whether Article 175(1) was the right legal basis, instead of Article 175(2)**? Not as far as I am aware**

c) Were there any considerations in your country to recur to Article 176 and to include other sources of climate gases into the emission trading system than those listed in Directive 2003/87? Has there been any thinking, whether Article 24 of Directive 2003/87 is not compatible with Article 176? What do *you* think of this argument? **Again, nothing explicit on either question. My own view is that the conditions in Art 24 concerning the extension of the scheme 'trump' the general provisions in Art 176, or rather they cannot be unilaterally invoked in such a way as to jeopardize the provisions of Art 24. However, the PPC Regulations 2000 (implementing the IPPC Directive into the UK) give a very general power to the Secretary of State to introducing national emission limits, quotas and trading schemes for any emissions of any description and from any source (not just PPC processes). I cannot see that the wording of Art 24 would inhibit the introduction of a national (internal) trading scheme for other pollutants and other processes providing these did not jeopardize obligations under other EC environmental directives.**

d) When and by what legal act (if at all) was the Directive transposed into national law? Was it transposed in due time? What kind of public attention was given to the performance of the country in the transposition of the Directive? **Main instrument was the Greenhouse Gas Emissions Trading Scheme Regulations 2003, coming into force on 31st December 2003 just on time. The Regulations were made under the general powers given by the European Communities Act 1972 to implement Community laws. When these powers are used, the regulations may not go beyond the scope of the Directive. There has been considerable interest**

among main industry bodies, a mass of technical and highly complex discussion documents from the Government, but little general public interest on the details.

.3. - According to Article 9 of the Directive national allocation plans have to be established.

a) Do they have to be *national* or could they also be regional? Compatibility with Article 175/176 (interference with rights of the regions)? Are there *regional* plans in your country? Please provide exact dates of the approval/publication of the plan or plans

Implementation of the emission trading scheme is a devolved matter within the UK, but, acting in accordance with the Directive, a single national plan was developed by the UK Government with participation and agreement by the devolved administrations for Scotland, Wales and Northern Ireland. There are no regional plans as such, though it is clear that allocation decisions are affected by regional characteristics.

b) Was the public informed of the draft national allocation plans (NAC)? Was there a possibility to comment or to rectify the original data? Or was the content of the plan discussed with affected industries only? Was there a publication of the plan in draft form?

The UK implementing regulations do not impose any legal requirement on Government to publish drafts or consult on the NAP (this is in contrast to some other areas of environmental law). It simply requires the plan and its subsequent amendments to be published.

In practice the UK made an early public consultation on allocation methodologies in August 2003, which included a lot of fundamental issues. and summaries of the responses were published on the Government web-site. They were dominated by industry, with 4 responses from national environmental NGOs and one from a lawyer's group, the UK Environmental Law Association - the only body that appears to raise purely legal issues. Interestingly, responses from various government departments and agencies are listed but their contents not summarized as being 'confidential' - old habits die hard.

The draft plan was published in 2004 (4 months before final submission to the Commission) for consultation. As is standard practice, the draft was available on the web-site but also sent to a selected number of named consultees – this was dominated by industry bodies, and addition included a number of finance houses, law firms, universities, and just one environmental NGO (Friends of the Earth). The stated purpose of the consultation paper was "to inform *businesses* involved in the EU ETS“ (our emphasis) and to seek views on various issues. A seminar was held on the draft, and in April 2004 the Government Department received a consultants report analysing responses to the draft (this is also publicly available). Some 231 responses were received, with estimation that over 50% of operators to be covered had responded.

The plan as submitted to the Commission was also published for public consultation over a two month period. The Government at this stage decided to

hold back on the politically controversial decision as to allocations as to actual installations.

c) What allocation criteria were followed in your country? Or does the plan just mirror political power play? What kind of empirical information was used in order to draft the plan? Was it really accurate/updated?

The overall context is that the Government still has a target, over and above its Kyoto burden (12.5%) of achieving a 20% reduction of total CO2 by 2010, and that it intends to set overall caps under the ETS which are consistent with that. Its approach to allocation was a two stage one - first to allocate amounts to broad sectors and activities (which for various methodological reasons did not, in the way they were divided, quite match those lists covered in the ETS Directive). This would be followed by distributing the allowances in each sector to actual installations.

A commitment to a 20% reduction implies setting a tough cap, but despite calls from the Environment Agency and other environmental bodies to do so, the Government chickened out of tough political decisions in the first phase (2005-2007), and made a cap of 736 million tonnes CO2 and allocations essentially based on business as usual, based on historical trends for sectors and government energy projections, and bearing in mind the impact of existing climate change policies. There is a slight saving though (1.5 Mtc) and the burden of this will largely fall on generating stations on the grounds of their low abatement costs and limited exposure to competition. Nevertheless, this caused concern with the Energy Intensive Users Group arguing in March 2004 that they would make UK electricity uncompetitive.

Manufacturing industry also complained and in the light of new energy forecasts, the UK in October revised its National Allocation Plan by upping to initial allocation by another 20 million tonnes of CO2 (a dispute still ongoing with the Commission who said this was not now legally possible). The revised allocations have given more leeway to manufacturing industry at the expence of the generating industry. The Government has indicated that if it not allowed under EU law to up the initial allowance, the generating sector will bear the extra 20 million tonnes. The result is that the electricity industry in general in the first phases faces a 17.5% reduction from 2003, while overall manufacturing industry can increase by 10%, leading to a 7.5% reduction overall. The really difficult distributional decisions, however, have been left to the second phase, if the Government is still intent on reaching a 20% reduction by 2010.

d) What happens if the Commission exceeds the three months attributed to it under Article 9(3)? What is the situation in your country in similar legislative cases?

According to the UK implementing regulations, the Secretary of State's decisions upon the allocation of allowances to each installation must be ***"based on the national allocation plan for the relevant phases as accepted by the European Commission under Article 9 of the Directive" (reg. 19(2)).*** **This implies that the emissions trading regime could not come into effect before "acceptance" by the Commission of the NAP. Oddly, though, Article 9 of the Directive does not refer**

explicitly to a power of the Commission to accept – simply the power of the Commission to reject within 3 months or the power to accept amendments following rejection of part of the plan. I think a UK court would read this to mean that if the Commission made no decision to reject all or part of the plan within 3 months, they had implicitly accepted the plan, and that in those circumstances the Secretary of State could legitimately make allocations under the UK regulations.

(e) Would Article 10 allow Member States to recur to Article 176 EC Treaty? If so, did your state allocate lower percentages?

I suspect not given the clear wording. The UK Government long had a policy of allocating initial allowances for free (though some environmental NGO queried this), but there was some debate as to whether new entrants should also be allowed for free.

In the event the Government decided in the NAP to allocate in Phase I 92.3% of its total quantity to existing installations for free, with 7.7% kept back in reserve for allocation for free to new entrants. Any part of the reserve that turned out to be surplus will be auctioned. The NAP does not state explicitly what will happen in Phase 2

(f) What is the weight of Clean Development Mechanisms as compared with pure „reductions" in emissions? **The current published information from the Government refers to the Linking Directive of April 2004, and the fact that companies will be able to use carbon credits from international CDM projects (from 2005) and from Joint Implementation from 2008 within the EU ETS, with some exceptions for the first phase. The information refers to the fact that Member States can limit the number of such credits in the ETS scheme, but we have not been able to find any information on the current UK policy on this issue.**

.4.- Article 11(1) provides that before 1 October 2004 Member States shall decide on the total number of allowances and their repartition on each installation, "taking due account of comments from the public".

a) Did the public have the opportunity to make comments? How did this procedure develop? Was the draft decision published? Was it transparent**? Questions concerning the basic principles concerning allocation were contained in the original consultation documents. Allocation to actual installations is still on-going (delayed because of the Government's decision last October to up the original NAP cap by 3%) , and the proposals will be made public. But the Government indicates that at this stage, given that the basic principles have been agreed they expect comments to be concerned mainly with factual errors.**

What distributional choices were involved in the repartition on the single installations?

See the answer to 3(c) above. Essentially based on allocations divided to sectors, and then distributed according to historical trends and future energy projections. Manufacturing industry has been given allocations for the first phase that essentially allow business as usual, with the main restrictive burden falling on the electricity generating sector.

5. Trading

(a) How is trading supervised in your country?

Initial permits are granted by the Environment Agency (and equivalent regulatory bodies in Scotland and Northern Ireland) and the registry is operated by the Environment Agency. Reports are subject to third party verifiers. It appears that future trading where this is considered to be an investment (i.e. a contract at a price agreed for future delivery) will be subject to control by the Financial Services Authority under the Financial Services and Markets Act 2000. The Environment Ministry issued outline advice on this in January 2005, but stated that how the Financial Services and Markets Act will apply to the trading of emission allowances is 'ultimately a matter for the courts' .

(b) Is trading also possible for other bodies than installations, such as a fund, a charity, a millionaire who has an interest in preventing climate change**? Yes, anyone is entitled to enter on the register and open an account.**

(c) To which extent is transparency for the public ensured? (Knowledge of trading transactions, etc)

See further below where details of who is register, dates of permits and submission of reports available publicly. Further information can be made to the Environment Agency on request and subject to provisions of Environmental Information regulations (implementing the Information Directive). Government will publish an annual list of companies liable to civil penalties for not having sufficient allocations in line with Directive. Details of individual trading of allocations do not appear to be publicly available.

(d) How as „allowance" been *translated* in your country? Does your national linguistic version of the term „allowance" convey the idea of a „right" (subjective/objective) to pollute? (Like the Spanish does)

The regulations use the term 'allowance' which is explicitly given the meaning in Art 3 of the Directive. The most extensive legal discussion to date (and there has been little) marks the distinction between a property right and a permit or licence. rather than being focussed on rights to pollute as such. Generally, for example, permits/licences can be altered or quashed without compensation, whereas subsequent expropriation of property would require compensation. The view at present of some of the leading lawyers involved is that allowances are more in the nature of property rights.

(e) What is the legal nature of the „trading"? Is there any doctrinal controversy about the possibility of „trading" on „rights"? (provided the question to „d" was positive) **There does appear to be any fundamental doctrinal disputes over the legal nature of trading in allowances as yet, though some complexities as to the application of other areas of law (see next answer)**

(f) Has there been much discussion about other areas of law that might be relevant to this dogmatic issues (eg.property rights, tax law, administrative law, etc**.)**

In January of this year the Environment Ministry issued a short paper outlining some of the relevant areas of law that might be applicable to trading. It noted for example that where trading was considered in law to be a form of investment as opposed to a commercial transaction (e.g. trading on delivery in the future), then it might be subject to control by the Financial Services Authority, although this will really require a court decision. It also noted that emission allowance and related derivatives were not covered by the present Investment Services Directive (93/22/EEC), though some derivative contracts would be likely to covered when the Markets in Financial Instruments Directive (2004/39/EC) was implemented in 2006.

Customs and Excise have advise that the trading of allowances is subject to VAT at standard rate, but where this is to a business in another member state, the purchaser and not the seller will be liable.

There has also been considerable discussion over the question of insolvency. Amendments were made to the emissions trading regulations in 2005 to require the surrender of any outstanding allowances up to the date of insolvency.

As to administrative law, the Regulations themselves provide for the right of appeal to the Environment Ministry against the Environment Agency in respect permit decisions (conditions etc.) (with equivalent provisions in the devolved regions). The rules provide for fairly formal procedures, with the possibility of hearings and the potential for third party involvement. In respect of civil penalties, which are imposed by the Environment Ministry, the regulations provide for an appeal to the Ministry by way of reconsideration. In respect of actual allocations to installations by the Emission Trading Scheme (ETS) unit within the Environment Ministry, the regulations provide no express appeal rights, but the Environment Ministry have introduced an administrative appeal to the Ministry themselves, and noted that, the appointed appeals officer "will be somebody who has not been involved in the original decisions on allocation and will work separately from the EU ETS team. The appeals officer will not discuss appeals with the EU ETS team"

In addition to these rights, in principle any decision by the government or other public body in connection with ETS would be challengeable in the courts by way of judicial review, both by the industries concerned and by third parties.

6. Arts. 14 – 16 provide guidance for monitoring, verification and penalties.

a) How is monitoring and verification organised in your country?

The initial permit (which entitles entry in the scheme) is granted by the Environment Agency in England and Wales (the main regulator for IPPC, waste, and water), and equivalent regulators in Scotland and Northern Ireland. Reports to be submitted to the regulator (as required under the permit) must be verified by a third party verifier. The Environment Agency has default powers to step in and determine the annual reportable emissions where the operator cannot comply with conditions concerning verification etc. Under the implementing regulations the Environment Agency (and its equivalent bodies) have a specific duty to take such action as is needed to ensure that the monitoring and reporting conditions are complied with.

The Registry though formally established by the Environment Ministry is to be operated by the Environment Agency. The software for a computerized registry was approved by the Commission in November 2004, and a pilot scheme run by the Environment Agency with around 30 participants ran for a month last January.

The involvement of the Environment Agency represents something a political battle. 5 years ago when emissions trading began to be developed by the UK Government, the Agency knew little about the issue and had little in-house expertise. Indeed officials in Dept of Trade and Industry sometimes publicly warned against having the Agency involved ('this is the market place, not regulation'). The Board of the Agency advised officers that they should at least not ignore the developments, and as a result a major effort was made, with the result that the Agency now has key responsibilities in the operation of the scheme. It has, though, argued strongly against becoming a verifier itself (mainly because of uncertainly as to who would pay for this), unlike, say, the EPA in the US which is the verifier for SO2 trading schemes.

b) What about the penalties that were fixed according to Article 16? Are they effective, proportionate and dissuasive? Are they of criminal, administrative or civil law nature? Are they comparable to national sanctions in similar, comparable cases? Is there any fear that penalties might be too divergent from one country to the other?

Failure to comply with the 'basic' rules (need for permit, failure to comply with conditions, making false statements etc) is a criminal offence. Under UK law, most of the offences do not require any proof of intention/recklessness, and companies as well as individuals can be found guilty. The implementing regulations give the courts the power to impose the maximum financial penalties (in the higher criminal courts, unlimited fines). The Environment Agency (and its equivalent bodies) would be the main enforcement body.

The implementing regulations also transpose the requirements for civil penalties (Art 16.3) for excess emissions - EUR 100 after 2008, EUR 40 before then. I have no idea when this figure will have a deterrent effect. since so much seems to depend on the current value of tradable allowances and cost of abatement. The UK regulations have also extended the civil penalties to cases where an operator on surrender or revocation of a permit understates the reportable emissions. Interest in payable on penalties not paid within a month, and recoverable as a civil debt.

This use of civil penalties is unusual in UK environmental law (though more familiar in financial, tax law etc.) though it is something I have recently been urging the Government to employ as additional and more flexible tool than simply reliance on criminal enforcement. The present Government is sympathetic to their greater use, and therefore the need to introduce them in connection with Greenhouse Gas emissions has wider resonance in the UK. At the moment though the Government is reluctant to see the Environment Agency handle them completely - the regulations require the Environment Agency (or its equivalent) to notify the Government Department where liability to a civil penalty arises, and it is then up to the Government Department to impose and recover them. I would expect before too long this power will be delegated back to the Environment Agency (and its equivalent bodies in the devolved regions).

(c) How is transparency of monitoring and verification results ensured?

The UK implementing regulations do not provide for public registers of permits, monitoring and reporting results, etc. According to the Environment Agency's published guidelines on implementation, it will make public (a) the names of operators (b) the dates of monitoring and reporting plans and (c) dates of approval or refusal of such plans. It then states that any third party requests for access to information supplied with the application or in accordance with permit conditions (which would include monitoring information etc.) will be considered as and when requests are made and in accordance with the national regulations that implement the Environmental Information Directive. The national implementing regulations also provide that, in accordance with Art 16(2) the Secretary of State will publish annually a list of names of operators who are subject to a civil penalty.

.7. The emission allowance scheme and traditional BAT approach under the IPPC Directive 96/61 somewhat conflict with each other.

(a) Is there a discussion in your country on whether there are vested rights and permits of industry disallowing to turn them into allowances which must finally be purchased.

Not as far as I am aware. The Emissions Trading Regulations expressly amended the IPPC regulations in accordance with Art 26 of the Directive by providing that where emission allowances involved, the IPPC regulator cannot impose emission limits or technical requirements in respect of those emissions unless it considers that they are needed to ensure that "no significant local pollution is caused" (this doesn't seem to be applicable in the case of CO2). Friends of the Earth and the UK Environmental Law Association have raised concerns over this, but from an environmental perspective rather than any loss of vested rights to industry. The reason for lack of concern on this issue from industry is because IPPC has not to date been focussed on CO2 emissions as such. The leading current legal book on the IPPC regulations published 2003 (written by two Environment Agency lawyers) notes rather tentatively, *"As such schemes develop, it will be interesting to observe how far the dual aims of emissions trading and site specific regulation can be reconciled"*

(b) Inversely, Article 26 provides that permits under Directive 96/61 shall not contain emission limit values for greenhouse gases, when the installation participates in emission trading. Is there any discussion in your country, whether this is a departure from the concept of "best available technology"? May countries not provide for this derogation (under Article 176 EC)?

As mentioned above, concern was raised by Friends of the Earth and UK Environmental Law Association on this point, (and also in relation to the initial methodology of allocation and whether this should be based on BAT) but it has not been widely discussed.

.8. Directive 2004/101 (OJ 338/2004 p. 18) provides a framework for joint implementation („JI“) (see Art. 6 Kyoto Protocol) and the clean development mechanism („CDM“)(see. Art. 12 Kyoto Protocol).

a) Is there a discussion in your country about whether JI and CDM will be used?

What will be the organisational devices in your country ensuring the requirements of a fair use of JI and CDM, and in particular its additionality, truthfulness and transparency?

Government documents refer to the fact that under the Linking Directive, companies will be able to use carbon credits from JI and CDM, but I can find little detailed discussion as to policy on overall limits, and transparency. As mentioned in 1, Government has raised concerns in 2003 as to the extent to which the Community scheme would inhibit Member States from participating in JI and CDM on the international stage.

.9. Could or should emission trading be introduced in other sectors (water, waste)?

Both the Environment Agency and the UK Government favour the use of trading in appropriate areas. In April of this year, local authorities will be able to trade allowances for municipal waste reductions (include to achieve overall Landfill reductions targets) the first such scheme in the world (according to the Agency web-site). In the regulation of packaging there is effectively a trading scheme operating. There are plans to extend to water abstraction licensing and maybe long range transport of NOx and SO_2 from power stations. The PPC Regulations of 2000 give an express general power to the Secretary of State to set quotas for total amounts of emissions of any description, allocations of quotas, and may make a scheme for trading. The Environment Agency views emissions trading as one form of regulatory tool appropriate for some but not all situations. It notes, for example, that it is likely to be ill suited for small businesses.

10. To which extent emissions trading has been discussed so far in your national legal literature?

Very little in depth, and the UK contribution to the JEEPL remains one of the most substantive. Large law firms are clearly involved in advising. I have received a number of articles on emission trading to the Journal of Environmental Law but most have been very descriptive, and we await to publish something substantive. It is difficult to explain really why this is the case. Obviously in relation to CO_2 this is new legislation and we have no substantive court input, or indeed legal challenges as yet. It is also unfamiliar to most traditional environmental lawyers, and because we are dealing with a global gas with no direct local impacts there are no local cause celebres.

11.- Besides emissions trading and national plans, does your national legislation create other kinds of devices, such as a specific permit for releasing greenhouse gases emissions? If this is the case, what is the relation between the plan, the trading mechanism and the permit? What body/level of Administration is responsible for performing the respective duties and responsibilities?

The UK IPPC regulations have been amended to expression exclude CO_2 which is subject to emissions trading, unless significant local pollution is caused. The previous voluntary CO_2 emissions trading scheme and the Climate Change agreements (again voluntary agreements but with tax rebate inducements) were developed by Government outside formal legal frameworks. Otherwise, I do not think there any other formal regulatory instruments concerning CO_2 emissions.