

Legal aspects of linking emissions trading schemes



Ashley Stafford
Senior Associate

Environmental Economic Research Hub, ANU
CEEM, UNSW
Climate Strategies

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Legal nature of carbon can impact on link

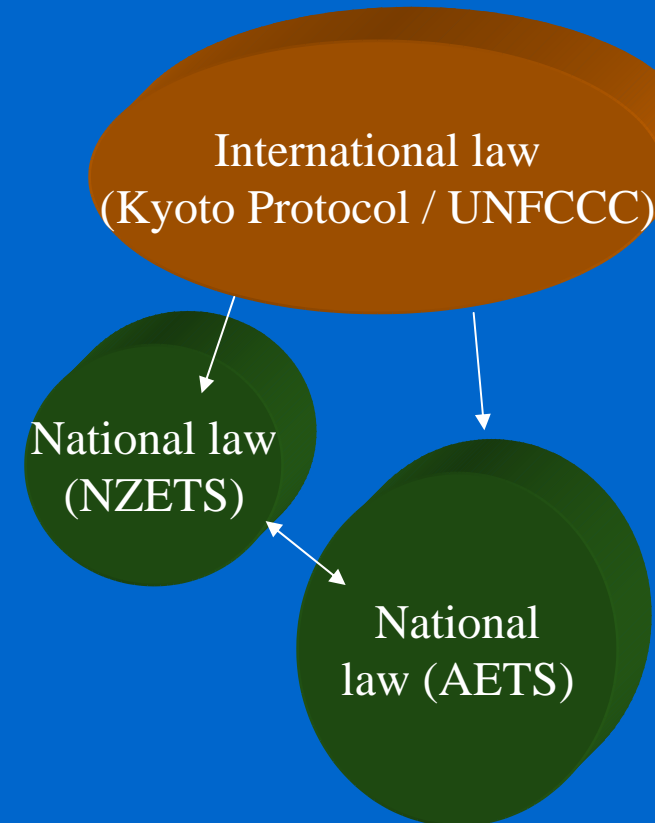
- Few commodities are so intangible
- Underlying nature of the carbon: allowance, offset or offset generated from allowance
- Different statutory rights attaching to carbon
 - Statutory entitlement to emit greenhouse gases?
 - Exemption from prohibition on emitting greenhouse gases?
 - Entitlement to reduce calculated physical emissions?
 - Certificate reflecting component of capped emissions (part of a broader obligation)?
- Property? Real or personal? Chose in action? Statutory right? Statutory instrument? State resource? Encumbrances or other interests? Characteristics of property right anyway?
- Different property or tax treatments, or environmental standards, across exporting and importing jurisdiction could impact on flow of carbon or promote “forum shopping” for dispute resolution

Legal capacity to recognise carbon across different jurisdictions

- How domestic law is capable of recognising actions in other jurisdictions
- Power to recognise or enforce requirements of link actively or passively
 - Enact laws that pertain to activities undertaken in another country
 - Enact laws that directly recognise or interact with laws of another country
 - If prerequisites to the link can be enforced in the home jurisdiction, can link unilaterally or without direct interaction (e.g. confirm surrender before “imported” carbon recognised)
- Some legal systems may require “connection” with importing jurisdiction to legislate for link → academic and judicial debate surrounding nexus given that importing jurisdiction is also part of atmosphere

Legal considerations when linking international schemes to national schemes

- International laws act on nations (not individual or corporate persons or domestic law)
- Limited capacity for domestic law to influence international law in absence of consensus
 - Despite this, for linked markets domestic implementation can have impact on operation of linked markets and international implementation can impact on local markets
- Dual nature of international carbon units
 - “Exist” in international and domestic law
 - Countries judged by international law, but in Australia international law mechanisms only operate as provided by domestic law
- Often legal capacity for nations to directly recognise international carbon credits in domestic law
 - Nonetheless some schemes may “convert” to domestic instrument, some may “tag” or “shadow”



Australian context

- The external affairs power
- *Victoria v Commonwealth* (Industrial Relations Act Case) (1996) 187 CLR 416
 - Law must be reasonably capable of being considered as appropriate and adapted to implementing a treaty to which Australia is a party
 - *Deficiency in implementation of a supporting Convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention.*
- Little doubt Commonwealth would have power to link, even under UNFCCC
- UNFCCC - All parties (Art 4(1)(b)): *Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change*
- UNFCCC - Developed countries (Art2(a)): *Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs*

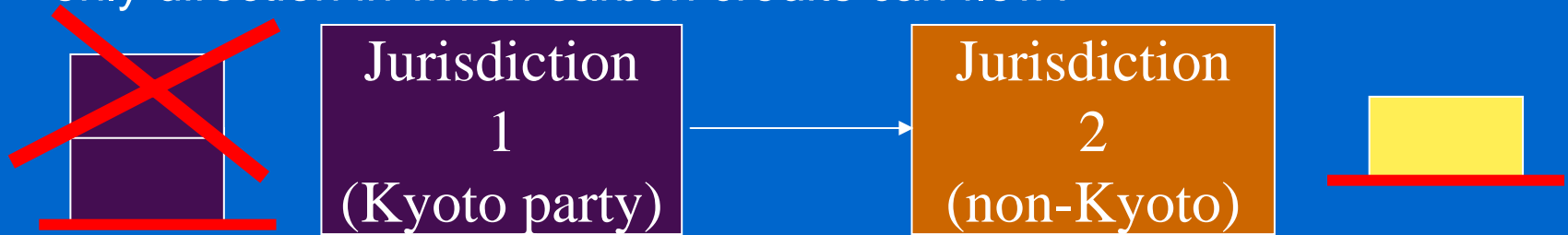
Maintaining the link between schemes

- Small changes in design can impact on linkage
→ sovereign nations still have control over own domestic laws
- Formal or informal measures to maintain link
- Legislative response to change
- May be cause for “involuntary” legislative response if unilateral link

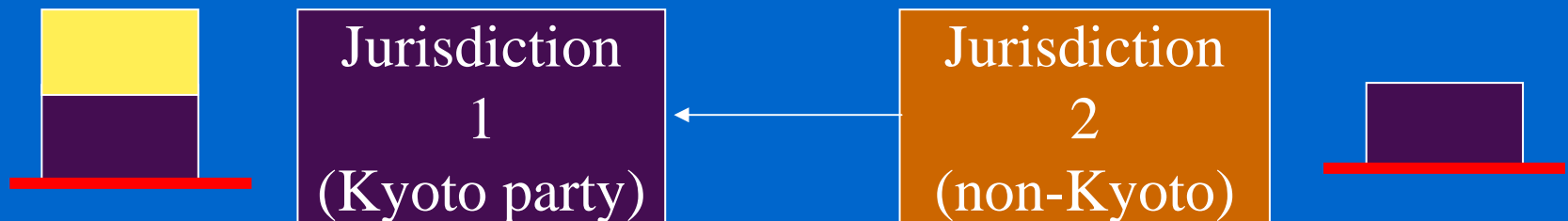


Consistency with international emissions trading obligations

- Supplementarity to comply with the Kyoto Protocol
- Linking outside of the Kyoto Protocol framework
 - Not recognised for Kyoto Protocol compliance
- Does this mean that link from Kyoto Protocol party to non-party is the only direction in which carbon credits can flow?



- Not if Kyoto protocol party issues from existing allowances rather than creating new offsets, but tightens target



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