

## **KYOTO PROTOCOL TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE**

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### ***The Legal Framework***

International response to the warnings of the scientific community about the contribution of anthropogenic emissions of greenhouse gases (GHG) to climate change led to the negotiation of the United Nations Framework Convention on Climate Change (UNFCCC) in record time. In less than seventeen months more than 140 States agreed on a multilateral framework with the objective to stabilize “greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system” (article 2). The Convention, which was opened for signature at the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, includes a set of generally formulated commitments for States on how to achieve the objective (article 4). The notion that these commitments would not be specific enough to effectively address the impact of anthropogenic emissions on climate change was already present during the negotiation of the Convention. It was agreed *ab initio* that the adequacy of commitments of developed countries, the Annex I Parties, would be reviewed based on the best available scientific information at the first session of the Conference of the Parties (COP) to the Convention after its entry into force (article 4 (2) (d)). The first meeting of the COP, which took place in Berlin in 1995, found that commitments of Annex I Parties were “not adequate” and adopted the Berlin Mandate which outlined a detailed process and timeline to negotiate more concrete obligations and timeframes for the reduction of GHG emissions by Annex I Parties. Participation in the negotiations of a new legal instrument to be carried out within the Ad Hoc Group on the Berlin Mandate was made open to all Parties of the Convention.

### ***The Negotiation Process***

The Ad Hoc Working Group managed to finalize its work for adoption at the third meeting of the COP in Kyoto on 11 December 1997 (FCCC/CP/1997/7/Add.1, Decision 1/CP.3), yet this was not an easy task. Preoccupations similar to those voiced during the negotiations of the Convention were put forward by different countries and groups of countries. The United States, which in principle accepted the goal of stabilizing emissions, was opposed to any reduction of emissions. On the other hand, European States were in favour of a limitation of emissions of up to 15 per cent but would not agree to it unless the United States committed to the same goal. Developing countries demanded strict commitments for developed countries, while at the same time manifesting their intransigence to accept any commitments on their own. The demands of States belonging to the latter group of countries were also not homogenous; for example, Small Island States, oil exporting countries and charcoal consuming countries all voiced their respective geographic and economic concerns. Final agreement was reached on the goal to reduce overall emissions from Annex I Parties by at least 5 per cent below the 1990 levels within

the commitment period from 2008 to 2012 (article 3 (1)). This goal not only exceeds the commitments agreed to in the Convention, which aim at stabilizing Annex I Party emissions at their 1990 levels (article 4 (2) (b)), but, given that most of the Organisation for Economic Cooperation and Development countries listed in annex I had substantially further increased their emissions since then, it also suggests potentially significant economic implications for these countries. Following the instructions of the Berlin Mandate, the Kyoto Protocol introduces no new commitments for developing countries, but reaffirms the existing commitments under article 4, paragraph 1, of the Convention for these non-Annex I Parties.

### ***The Kyoto Protocol and the Marrakesh Accords***

The Kyoto Protocol introduces innovative market-based mechanisms that are available to Annex I Parties to help them meet the new rigorous commitments. These mechanisms enable parties to achieve compliance through climate friendly investments in other countries and through emission trading. Yet, the mechanisms outlined in the Protocol required further specification of their operational rules, guidelines and procedures. Many of the 84 States which had signed the Protocol and declared their intention to ratify were reluctant to actually do so before they had a clearer picture of the Protocol's detailed implementation procedures. The Conference of Parties (COP) of the Convention therefore started negotiating the terms of implementation of the Protocol that had been left open for further specification. Due to the large stakes at play once the Protocol would enter into force, negotiations hit major roadblocks and came to a near breakdown in December 2000. Yet, when in addition the largest GHG emitter declared its withdrawal from the process, this galvanized the determination of the supporters of the Protocol and negotiations of implementation procedures were successfully resumed in the following year and concluded at the seventh session of the COP with the adoption of the Marrakesh Accords in November 2001. The Marrakesh Accords consist of thirty-nine decisions by the COP and provided the much needed framework of modalities and implementation rules that led to the subsequent ratification of the Protocol. The Protocol entered into force on 16 February 2005; on the ninetieth day after "at least 55 Parties to the Convention, incorporating Annex I Parties which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 from that group" deposited their instruments of ratification, acceptance, approval or accession (article 25 (1)).

### ***Implementation of Commitments***

Articles 2 and 3 of the Protocol outline the measures to be implemented by Annex I Parties in achieving their quantified emission limitation and reduction commitments (QELRC). These include the implementation and regular review of national policies aiming at, for example, energy efficiency, protection and enhancement of sinks and the promotion of sustainable forms of agriculture in the light of climate change. The individual and combined effectiveness of these policies is to be enhanced through cooperation and information exchange between parties. Furthermore, these policies are to be implemented in such a way as to minimize adverse effects on developing and particularly vulnerable countries. Emission limitation commitments of parties concern six greenhouse gases (GHG), which are listed in annex A to the Protocol. Each of these GHG is assigned a carbon dioxide equivalent value. Annex I Parties are to report periodically on their emissions and removals in a transparent and verifiable manner, and are to ensure that their aggregate anthropogenic carbon dioxide equivalent emissions do not exceed their assigned

amounts, which are calculated based on QELRCs for the first commitment period from 2008 to 2012 listed in annex B of the Protocol. They can do so individually or jointly.

Article 4 of the Protocol outlines the procedures for joint fulfilment of commitments. If the parties agree on joint implementation, they shall notify the Secretariat of the Convention of the terms of their agreement. They are deemed to have met their commitments if the aggregate group emissions do not exceed the total of the assigned amounts based on the participating parties' QELRCs of annex B. This mechanism gives the participating parties the flexibility to agree within the group where emission reductions and sequestration should take place, allowing for cost considerations to be taken into account by de-linking emission reduction commitments from what is set out in annex B. The member States of the European Community benefit from this mechanism and have established the so-called European "bubble".

### ***Market Based Mechanisms***

Three market based mechanisms included in the Protocol aim at helping Annex I Parties to achieve their emission reduction targets in the most cost-effective and efficient way. They introduce flexibility and facilitate compliance of parties with their respective emission reduction commitments.

- (1) *Joint Implementation (JI – article 6)*: Joint implementation was already envisaged in article 4, paragraph 2 (a), of the Convention and has been operationalized by the Protocol and its rules of implementation. This mechanism leads to the transfer of emission reduction units (ERU) between Annex I Parties. ERUs are transferred from the country where a project aimed at reducing emissions by sources or enhancing removals by sinks takes place to the country which buys these ERUs. Acquisition of ERUs cannot be used as a substitution for domestic action and can only be supplemental. Private sector entities may be authorized by Annex I Parties to participate, under their authority, in the generation, transfer or acquisition of ERUs.
- (2) *Clean Development Mechanism (CDM – article 12)*: The CDM supports Annex I Parties in achieving their commitments through the financing of emission reduction projects in non-Annex I Parties. In addition, these projects serve the promotion of sustainable development as well as the transfer of technology and know-how. Annex I Parties obtain certified emission reductions (CER) in return for their investments. Private and public entities are authorized to participate in CDM activities. The functioning of the mechanism and certifications are supervised by the Executive Board. A share of the proceeds from the generation of CERs is forwarded to the Adaptation Fund. This fund assists developing countries that are particularly vulnerable to climate change in meeting the costs of adaptation.
- (3) *Emission Trading (article 17)*: The third market-based mechanism introduced with the Protocol allows Annex I Parties to engage in emission trading for the purpose of fulfilling their commitments. Emission trading is supplemental to domestic actions aimed at achieving emission limitation and reduction.

### ***Compliance Mechanisms and Dispute Settlement***

Article 18 of the Protocol envisages the establishment of a compliance mechanism. The elaboration of its rules and procedures has been left to the Meeting of the Parties, and the core of these provisions is found in the Marrakesh Accords. The parties' reporting

requirements under the Protocol and Convention serve as the basis for assessing whether a party is in compliance or not. The mechanism reflects the collective nature of the regime put in place. Since the achievement of the greatest possible degree of compliance is in the interest of all parties, the mechanism places strong emphasis on pro-activity and on facilitating party compliance with commitments. The nature of the mechanism is one of dispute avoidance; reasons for non-compliance are addressed in order to put a non-complying party back on the compliance-path. Two branches are set up under an overall Compliance Committee; the Facilitative Branch provides advice and assistance to parties on implementing the Protocol, and if needed facilitates financial and technical assistance to parties (articles IV and XIV – Procedures and mechanisms relating to compliance under the Kyoto Protocol, Decision 27/CMP.1). The Enforcement Branch determines whether a party is in non-compliance with its commitments and has the possibility to impose consequences accordingly; these range from the simple declaration of non-compliance, over the suspension of eligibility of the non-complying party in the participation of the market-based Kyoto mechanisms, to a pro-rated increase in the debited assigned amounts for the next commitment period (articles V and XV). In case of a dispute arising from the implementation of the Protocol, article 14 of the Convention on the settlement of disputes via traditional means of negotiation, conciliation and submission to the International Court of Justice or to international arbitration shall apply.

#### ***Limitations of the Protocol and Outlook for the Future***

It was clear from the start that the impact of the Kyoto Protocol on anthropogenic emission reductions and their effect on global climate change would be limited in scope; not only because the legal reach of its emission reduction commitments is temporary, with a deadline of 2012, but also because it was agreed not to introduce any new commitments for parties not included in annex I of the Convention in application of the principle of common but differentiated responsibilities (article 10). Some of the non-Annex I Parties are rapidly industrializing countries and are likely to catch up in terms of emissions with developed countries during the current commitment period. In addition, not all countries which are considered primarily responsible for historic and current emission levels participate in the Protocol, thus further limiting the instrument's potential impact with respect to the mitigation of climate change. At the first meeting of the COP serving as the meeting of the Parties to the Protocol (COP/CMP), this limitation was addressed with the launch of a two-track process: (1) An Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) was established to negotiate new commitments for the next commitment period starting after 2012. Results are to be adopted at the earliest possible in order to avoid a gap between the end of the first commitment period under the Kyoto Protocol and subsequent commitment periods. (2) A dialogue on long-term cooperative action to address climate change by enhancing the implementation of the Convention was launched. The outcome of the dialogue was presented at the thirteenth meeting of the COP, which took place in Bali in December 2007.

A new round of negotiations was opened under the Action Plan adopted at the Bali COP in 2007. An additional subsidiary body under the Convention was established with the mandate to develop a programme for effective and sustained implementation of the Convention in time for adoption at the fifteenth COP meeting, scheduled to be held in Copenhagen from 30 November to 11 December 2009. This Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) focuses its negotiations around five elements: the development of a shared vision for long-term cooperative action,

adaptation, mitigation, technology and financial resources. In addition to considering commitments of developed country parties, the Working Group considers appropriate mitigation measures in developing country parties including the reduction of emissions from deforestation and forest degradation, and the conservation of sinks.

The Fourth Assessment Report of the Intergovernmental Panel for Climate Change, which was discussed at the Bali meeting, predicts that with “current climate change mitigation policies and related sustainable development practices, global GHG emissions will continue to grow”. At the same time, it warns that “anthropogenic warming and sea level rise would continue for centuries even if GHG emissions were to be reduced sufficiently for GHG concentrations to stabilise, due to the time scales associated with climate processes and feedbacks”, while “unmitigated climate change would, in the long term, be likely to exceed the capacity of natural and human systems to adapt”. Thus, an agreement on new, even more stringent commitments for the Protocol’s next commitment period after 2012, including a strategy on how to enhance adaptation activities and improve adaptive capacity of particularly vulnerable countries will be of vital importance. The pledge of the G8 leaders to “achieve at least 50 per cent reduction of global emissions by 2050”, which they pronounced at their summit in Hokkaido in July 2008, is a signal in that direction and indicates the scale of actions and measures that will need to be agreed upon.

## **Related Materials**

### ***A. Legal Instruments***

United Nations Framework Convention on Climate Change, New York, 9 May 1992, United Nations, *Treaty Series*, vol. 1771, p. 107.

### ***B. Documents***

Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007. Addendum. Part Two: Action taken by the Conference of the Parties at its thirteenth session (Bali Action Plan) (FCCC/CP/2007/6/Add.1).

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### **C. Doctrine**

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