

Temporary extension of the Kyoto Protocol and relationship with the flexible mechanisms

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Introduction

Since the UNFCCC Conference held in Copenhagen in December 2009, there has been some talk of a 'potential transition period' in which the first commitment period of the Kyoto Protocol is temporarily extended for 2 or 3 years in order to give additional time for a second formal commitment period to be agreed between the parties to the Kyoto Protocol.

This briefing note examines, from a legal perspective, the alternative ways of achieving this temporary extension (other than by way of formal amendment to the Kyoto Protocol) and evaluates the pros and cons of such methods. In particular, this notes looks at provisional application of an amendment, a 'gentleman's agreement', a CMP decision and unilateral declarations.

Additionally, and assuming an extension (other than by formal amendment), this note looks at whether such an extension would cause compatibility issues in relation to the flexible mechanisms under the Kyoto Protocol.

Temporary extension of the Kyoto Protocol

It should be noted at the outset that a formal amendment to the Kyoto Protocol to provide for stronger commitments over a longer time period would be the most desirable path as:

- It is the method of amendment provided for by the Kyoto Protocol;
- it would provide a legal basis for the prolongation of existing commitments or the introduction of stronger commitments; and
- it would provide a legal basis for the continued existence of the flexibility mechanisms and institutional framework of the Kyoto Protocol.

Where an amendment to strengthen commitments is agreed by the relevant parties, such an amendment could be applied provisionally, pending formal entry into force of the agreement. It should be noted, however, that all relevant amendment procedures, other than ratification, would have to be complied with first (i.e. relevant timeframes met and relevant voting thresholds passed).

Another option would consist of the conclusion of a *new successor agreement* which would (provisionally) enter into force after the end of the first commitment period. The Parties to such successor agreement would not necessarily have to be exactly the same as those of the Kyoto Protocol. In addition, this method could be used to incorporate the Kyoto Protocol flexible mechanisms and institutions in a new normative instrument.

Provisional application of a treaty is a legal technique which has, amongst others, been used in the Energy Charter and some arms control treaties, including the 1992 Chemical Weapons Convention and the Comprehensive Nuclear-Test-Ban Treaty (CTBT).

Article 25 of the Vienna Convention on the Law of Treaties provides concerning provisional application:

“1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States have in some other manner so agreed.

2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.”

It should be stressed, however, that although “provisional application” may bridge the two instruments (either the Kyoto Protocol and its amendment or the Kyoto Protocol and its successor treaty), this presupposes that States first agree on the content of either an amendment to the Kyoto Protocol or the new treaty instrument itself. ***In other words, provisional application would only seem to make sense if political agreement on further commitments is established first.***

Although States are free to amend the Kyoto Protocol (in accordance with its amendment clause) or to conclude a new treaty (either to prolong the existing commitments or to install stronger commitments), the conclusion of a ‘*Gentleman’s Agreement*’ would appear to make little sense in the present context. Indeed, as the label illustrates, this is not a legally binding instrument. Hence it would offer no solution in terms of substantive obligations (emission reduction targets). Neither could it ensure the continuing of the flexible mechanisms or the Kyoto Protocol’s institutional framework.

Furthermore, in accordance with the provisions of the Kyoto Protocol, the *CMP* is not competent to amend the Protocol or to decide on the continued application after the end of the first commitment period. If the *CMP* (or the *COP*) were to adopt such a decision, the resulting normative framework would rest on a very dubious legal basis (which is no problem as long as there is the political will to continue, but which will lead dispute resolution issues if a disagreement arises).

If, however, the *CMP* were to take a decision by unanimity (and not just by consensus), it could be argued that such a decision is the equivalent of an agreement for a new treaty in disguise, rather than simply a traditional *CMP* decision. This would, nonetheless, seem to be an unlikely scenario (if sufficient votes exist; amendment is again the logical option to ensure compatibility with the flexible mechanisms and institutional framework) and in our view is still a weak argument on which to base the creation of further legally binding commitments for the relevant States.

The issuing of *Unilateral Declarations* could prolong the binding nature of the commitments entered into by the State(s) concerned: a State could either declare that it considers itself to continue to be

bound by the existing emission reduction target, but it could also spell out stronger commitments of course.

Unilateral Declarations have been used e.g. in the Strategic Arms Limitation Talks (SALT) between the United States and the then Soviet Union to bridge the gap between the end of the first round (SALT I) and the start of the second round (SALT II). The first round had led to an *Interim Agreement on Certain Measures with Respect to the Limitation of Strategic Arms* ('Interim Agreement') which stated that parties intended to replace it as soon as possible with a more comprehensive agreement. As the expiry date of the Interim Agreement, which had a term of 5 years, came nearer, it became apparent that the SALT II negotiations on this more comprehensive agreement would not be concluded until after that date. Therefore, the gap was bridged by two unilateral declarations, one by the US and one by the Soviet Union on 23 and 26 September 1977 respectively.¹

As long as the unilateral declaration is cast in 'legally binding' terms (this is a matter of examining the wording & context), it could effectively create internationally binding obligations on the part of the State issuing the unilateral declaration. However, unilateral declarations cannot as such establish a link with the Kyoto Protocol's flexible mechanisms or ensure their continued functioning.

According to the *stand-still principle* in (international) environmental law (whereby states are enjoined from passing legislation which violates international law), it might be suggested that Parties to the Kyoto Protocol are bound to respect their engagements under the first commitment period, even after it has finished. The problem herewith, however, is that this reasoning (1) depends on the question of whether or not the stand-still principle is indeed a binding principle of customary international law being answered in the affirmative (which is far from clear); and (2) does not solve the institutional issue (continued application of the flexible mechanisms, review mechanisms etc).

The Flexible Mechanisms

The *Kyoto Protocol flexible mechanisms* are Joint Implementation (Art. 6), the Clean Development Mechanism (Art. 12) and international emissions trading (Art. 17). Articles 6, 12 and 17 thereby provide that these mechanisms may be used by States for meeting their commitments under Article 3 - their quantified emission (reduction) obligations. In the absence of a new commitment period following the period 2008-2012, it would seem logical that the flexible mechanisms could no longer be used post 2012. In other words, in the absence of a binding commitment period, the flexible mechanisms would no longer have a legal basis and could therefore no longer be used after the end of the first commitment period. This is explicitly stated with regards to Joint Implementation since such projects could no longer generate offsets (countries would no longer have AAUs from which the JI credits (ERUs) are drawn². The same reasoning applies *a fortiori* to international emission trading.

¹ See about Unilateral Declarations: B. MÜLLER, W. GELDHOF, T. RUYS, "Unilateral Declarations: the missing link in the Bali Action Plan", *European Capacity Building Initiative*, www.EuroCapacity.org, www.OxfordClimatePolicy.org, www.ggs.kuleuven.be, www.ugent.be/re/publiekrecht/nl/instituten/milieu-energierecht, May 2010.

² Climate Focus, Domestic Offsets under Article 24a, 22 February 2010, http://climatefocus.com/news/Article_24a_EU_ETS_Roundtable_Background_Paper_v1.0_22Feb10.pdf, 10.

However, this reasoning seems not to apply to the Clean Development Mechanism. Articles 12(2) and 12(3) of the Kyoto Protocol states:

“Article 12

1. [...]

2. The purpose of the clean development mechanism shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.

3. Under the clean development mechanism:

(a) Parties not included in Annex I will benefit from project activities resulting in certified emission reductions; and

(b) Parties included in Annex I may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3, as determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol.”

It is clear that helping Annex I Parties meet their emission reduction targets under Article 3 of the Kyoto Protocol is one of the objectives of the CDM, but this does not mean that the CDM can not exist legally without such emission reduction targets. Indeed, the objective of a legal instrument should not be confused with its conditions for existence. Moreover, helping Annex I Parties to comply with their targets is not the only objective of the CDM: *“contributing to the ultimate objective of the Convention”* is another objective of the CDM. This ultimate objective of the Convention is:

“(...) to achieve (...) stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system” (Article 2 UNFCCC).

It is beyond doubt that this objective is in no way dependent on any commitment period under the Kyoto Protocol. Therefore, while the ultimate objective of the UNFCCC remains in force, and irrespective of the existence of a second commitment period (be it through an amendment to the Kyoto Protocol or a successor agreement), it follows that the CDM is one of a number of ways of achieving that ultimate objective.

In this regard, reference should also be made to the European Union, which has adopted legislation that, even in a scenario where no global agreement is reached, presupposes the possibility of erecting new CDM projects after 2012.

It can be concluded that in the absence of a binding commitment period after 2012, the flexible mechanisms Joint Implementation and International Emission Trading can no longer be used. However, the Clean Development Mechanism has no necessary link with a binding commitment period and can legally exist without one.