

# **Legal Features of the International Climate Change Regime: from Kyoto to Bali**

## **Climate Change and the Bali Conference**

### Introduction

In December 2007 the 13<sup>th</sup> session of the Conference of the Parties (further: COP13) to the United Nations Framework Convention (further: UNFCCC) and the third session of the Conference of the Parties serving as the meeting of the Parties (further: COP/MOP) to the Kyoto Protocol (further: KP) was held in Bali. These meetings got intensive attention by public as they were regarded as decisive for the further evolution of the international regime addressing climate change.

Let me remind you of the international legal framework addressing climate change.

The UNFCCC, which was adopted and opened for signature at the United Nations Conference on Environment and Development (held in Rio de Janeiro in 1992), contains, inter alia, general principles and institutional arrangements. Its Article 2 sets out the objective of the international climate regime. It reads as follows:

“The ultimate objective of this Convention and any related legal instruments that this Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilizing greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”

It should also be underlined that UNFCCC contained commitments – from a legal point it may be discussed whether they are politically or legally binding – for the “industrialized countries”, in the climate change regime they are known as Annex I countries, to reduce their emissions of CO<sub>2</sub> equivalent to their 1990 levels. By doing so they would demonstrate that they take the lead in combating climate change.

The Kyoto Protocol, which was adopted in 1997, was based on the so-called “Berlin mandate” adopted by COP1, held in Berlin in 1995. The Berlin mandate established a (negotiating) process as the CP.1 after having reviewed Article 4 (a) and (b), of UNFCCC concluded that these subparagraphs were not adequate.<sup>1</sup> It stated, inter alia, will “not introduce any new commitments for Parties not included in Annex I, but reaffirm existing commitments in Article 4.1 and continue to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4.3, 4.5 and 4.7”.<sup>2</sup>

Why is there a need to move now?

The Kyoto Protocol established in Article 3 paragraph 1 a commitment period from 1 January 2008 to 31 December 2012 to reduce or limit CO<sub>2</sub> emissions. The commitments for Annex I Parties are set out for each of them in Annex B, ranging from reduction commitments of 8 % to a limited increase of emissions by 10 %. Thus, if there is the need for any further commitments to be agreed before the expiry of the first commitment period set out in the KP.

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<sup>1</sup> See preamble of Decision 1/CP.1.

<sup>2</sup> Decision 1/CP.1, paragraph 2 (b).

Article 3 paragraph 9 takes this already into account. It reads: “Commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex B to this Protocol, which shall be adopted in accordance with Article 21, paragraph 7. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall initiate the consideration of such commitments at least seven years before the end of the first commitment period referred to in paragraph 1 above.”

The Kyoto Protocol took much longer to enter into force than had been expected. That was due to the fact that the Kyoto Protocol only contained very general rules e.g. concerning the mechanisms (joint implementation, clean development mechanisms and emissions trading), a compliance mechanism and financial mechanisms. Only at CP.7 in 2001 agreement could be reached on controversial questions, inter alia, on the specific rules for the operation of the mechanisms, the functioning of the compliance mechanism, financial issues. These compromises reached in Marrakesh, the Kyoto Protocol became “rectifiable” for Annex I Parties, as they knew then the conditions under which they would have to implement their commitments, i.e. the reduction and/or limitation of their emissions. The Kyoto Protocol only entered into force in 2005 after the Russian Federation ratified it in 2004.

At the first COP/MOP, held in 2005 in Montreal, the future of the Kyoto Protocol became the essential issue. A number of different tracks were discussed and set up:

- The Convention dialogue was established to discuss the future of the Convention. Ideas and suggestions were to be collected on how the objective of the Convention is to be achieved by the international community. The decision establishing the dialogue acknowledged that “the global nature of climate change calls for the widest possible cooperation and participation in an effective and appropriate international response”<sup>3</sup> and stated that “the dialogue will take the form of an open and non-binding exchange of views, information and ideas in support of enhanced implementation of the Convention, and will not open any negotiations leading to new commitments.”<sup>4</sup>

- the Ad Hoc Working Group on Further Commitments for Annex I Parties under Kyoto Protocol was established in accordance with Article 3.9 (as mentioned above).

Two other issues were raised:

Article 9 review: Article 9 provides that a first review of the Kyoto Protocol in the light of the best available scientific information and assessments on climate change and its impacts, as well as relevant technical, social and economic information shall take place at the second session of the COP/MOP.

The so-called “Russian proposal”: the Russian Federation presented orally a proposal at COP/MOP1 that in the future a simplified procedure should be established for joining Annex B.

The first review under Article 9 was held at COP/MOP2 in Nairobi 2006. No substantive discussion took place. Neither was there a substantive discussion of the Russian proposal, but it was agreed that during the meeting of the subsidiary bodies in spring 2007 in Bonn the Russian Federation would make a presentation about its proposal.

The presentation in Bonn made it clear that the Russian proposal consisted of two parts:

The first part addresses simplified procedures to join Annex B of the Protocol. According to the provisions of the KP any amendment of Annex B needs to be adopted by consensus, or, as a last resort, by a three-fourths majority of the parties present and voting, as well as the written consent of the party concerned. Moreover, the amendment enters into force ninety days after three-fourths of the parties to the Protocol have deposited their instruments of

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<sup>3</sup> Decision 1/CP.11, Dialogue on long-term cooperative action to address climate change by enhancing implementation of the Convention, UN Doc. FCCC/CP/2005/5/Add.1

<sup>4</sup> Recital 7 and paragraph 2.

ratification. This may in practice lead to a number of legal questions, such as a “fragmentation of commitments” between parties.

The second part deals with options to recognise contributions towards achieving the ultimate objective of the Convention by way of voluntary commitments. The Russian proposal suggests that if countries take commitments based on the implementation of national policies and measures. A party should be rewarded if it reaches its voluntary commitments, but will not be “punished” – as Annex I parties – if they do not. Such “possible types of benefits”, could be the following:

emissions trading;  
technology transfer options;  
finance mechanisms (such as insurances); and  
other types.<sup>5</sup>

IPCC reports predict an increase in global temperatures. The fourth assessment report predicts that measures have to be taken within the next years in order to slow down the increase of temperatures. The question is how much temperature increase is “acceptable” to the global eco-system without threatening the objective which is set out in Article 2 UNFCCC.

#### The Bali Sessions and the future negotiations

A post-2012 arrangement has to address four main building blocks:

Mitigation (measures against climate change)  
Adaptation (measures to adapt to climate change)  
Technology transfer  
Financial resources.

At the Bali meetings an institutional set-out for the future negotiations has been agreed as well as a time-table.

--- The Bali Action Plan addresses the further process under the Convention. The process is to be conducted in an Ad Hoc Working Group on Long-term Cooperative action under the Convention (AWG). The decision sets out those issues which should be discussed by this new AWG. Paragraph 1 list as items:

shared vision for a long-term action: i.e. how is the objective of the Convention to be reached taking into account the provisions and principles of the Convention, in particular the principle of common, but shared responsibilities:

enhanced national/international action on mitigation;  
enhanced action on adaptation  
enhanced action on technology development and transfer to support action on mitigation and adaptation  
enhanced action on the provision of financial resources and investment to support action on mitigation and adaptation and technology cooperation.

--- The Ad Hoc Working Group on Further Commitments for Annex I Parties under the KP is to discuss as the title already states the future commitments of Annex I Parties. These discussions focus on the question of mitigation measures of Annex I Parties, i.e. what should they do to reduce emissions.

--- Second Review of the Kyoto Protocol under Article 9 of the Kyoto Protocol  
Article 9 reads as follows:

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<sup>5</sup> Presentation of the Russian Federation at the Workshop on the Russian Proposal, 11 May 2007, Slide 10, available at [http://unfccc.int/files/meetings/workshops/other\\_meetings/application/pdf/russian\\_presentation.pdf](http://unfccc.int/files/meetings/workshops/other_meetings/application/pdf/russian_presentation.pdf).

“1. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall periodically review this Protocol in the light of the best available scientific information and assessments on climate change and its impacts, as well as relevant technical, social and economic information. Such reviews shall be coordinated with pertinent reviews under the Convention, in particular those required by Article 4, paragraph 2(d), and Article 7, paragraph 2(a), of the Convention. Based on these reviews, the Conference of the Parties serving as the meeting of the Parties to this Protocol shall take appropriate action.

2. The first review shall take place at the second session of the Conference of the Parties serving as the meeting of the Parties to this Protocol. Further reviews shall take place at regular intervals and in a timely manner.”

It was agreed in Bali that the second review will address specific issues, such as:

extending the share of proceeds to assist in meeting the costs of adoption to joint implementation and emissions trading;

relevant procedural elements for inscribing commitments for Annex I Parties in Annex B;

privileges and immunities for individuals serving on constituted bodies established under KP

scope, effectiveness and functioning of the flexibility mechanisms, including ways and means to enhance an equitable regional distribution of CDM projects;

minimization of adverse effects, including the effects of climate change, effects of international trade, and social, environmental and economic impacts on other Parties.

- On the Russian proposal it was agreed that elements of this proposal should be introduced during the second review of the KP pursuant to Article 9 and in the Ad Hoc Working Group on Long-term Cooperative Action under the Convention.

In Bali it was agreed that the post-2012 arrangement concerning climate change is to be agreed at COP15 and COP/MOP5, which is to be held in Copenhagen. It will be for COP14 and COP/MOP4 in Poznan/Poland to evaluate the progress made in the various fora and to propose the work-programme until December 2009.