

A window on International Law

Gabriele Porretto

The first anniversary of the entry into force of the Kyoto Protocol and the 2005 United Nations Climate Change Conference in Montreal

The Bollettino has already published contributions on the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC). The current issue includes an article by Danilo Angelini, focussing on some normative and operational aspects of the Protocol as well as on the position of the United States and Japan. This short note is an overview of some legal issues arising from the implementation of the Protocol one year after its entry into force, also in the light of the outcome of the United Nations Climate Change Conference held in Montreal in December 2005.

It is well known that the international political and legal response to climate change began in 1992 with the adoption of the UNFCCC. Five years later, in December 1997, the Kyoto Protocol was concluded by States parties to the UNFCCC. The 1992 framework Convention sets out a system of intergovernmental cooperation on action (a) to stabilise atmospheric concentrations of greenhouses gasses and (b) to avoid “dangerous anthropogenic interference” with the climate system. In order to achieve the goals set out in the UNFCCC, the Kyoto Protocol introduces a more concrete form of action, committing developed States and States making the transition to a market economy to achieve specific gas emission reduction targets. The entry into force of the Protocol was conditioned to its ratification by no less than 55 signatory States, producing no less than 55% of greenhouses gasses emissions of industrialised States. This condition was realised only more than seven years after signature, on 16 February 2005.

Under article 3 of the Protocol, States parties to Annex 1 to the UNFCCC (developed States or States undergoing the process of transition to a market economy) have an obligation to reduce, between 2008 and 2012, their overall emissions of six designated greenhouse gasses by at least 5% below the 1990 levels, with specific targets varying from State to State. More insights on the emission reduction commitments can be found in Angelini’s contribution.

One of the main features of the international cooperation framework in the field of climate change is the principle of “common but differentiated responsibilities”, according to which, “in view of the different contributions to global environmental degradation ..., the developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressure their societies place on the global environment and of the technologies and financial resources they command”. This means that developing States are concerned more with their economic growth, social development and poverty eradication. They therefore have lighter obligations than developed States, often limited to a simple inventory of their gas emission capacity. Furthermore, it must be noted that China, India and Brazil were granted exceptions which are surprising in light of their capacity of emitting greenhouse gasses. As to Russia, its ratification allowed the entry into force of the Protocol and this explains the reason why it could benefit of remarkable concessions by the other States parties at the time of ratifying.

However, it must be noted that the effectiveness of such obligations has not yet been tested. Indeed, according to art 3.9 of the Protocol, the Conference of the Parties were to initiate the consideration of commitments for the period after 2012 at least seven years before the end of the first commitment period, i.e. no later than 2005. Therefore, States were supposed to have, by 2005, demonstrable progress in achieving their respective commitments according to the Protocol. This time-frame was decided in 1997, when States could not anticipate that more than seven year would be necessary to bring the Protocol into force. As a result, it would be difficult to assess whether as of today emission reduction commitments bring more benefits or disadvantages.

The Montreal Meeting of the Conference of the Parties to the UNFCCC and to the Kyoto Protocol (December 2005)¹ was the occasion to discuss not only future commitments for developed States for the period after 2012, but also and more generally the issue of adaptation to climate change. For the supporters of multilateral efforts to address climate change some form of success in Montreal was clearly imperative, not only to improve the Protocol operation, but also to send a positive signal around the world about the future of the climate change regime beyond the end of the first commitment period (2012)². The Conference was very productive, leading to the adoption of more than forty decisions to strengthen global efforts to fight climate change.

One of the main points of discussion was the balancing between the interests of developing States and those of industrialised States. It suffices to think that according to developing States, the process under Article 3.9 of the Protocol for future emission reduction commitments only applies to States which have already agreed to reduction commitments for period one³. Against this background, the Conference was successful in strengthening cooperative action, for instance through the so-called “Clean Development Mechanism” (CDM), a system through which developed States can invest in sustainable development project in developing States. The CDM is not only a way to improve the quality of life for the peoples of developing States, but also allows industrialised States to earn emission allowances.

Another major achievement of the Montreal Conference was the agreement on a compliance regime for the Protocol, i.e. on a mechanism to ensure States parties’ accountability in meeting their emission reduction targets. Technically, this happened through the formal adoption of the so-called Marrakesh Accords of 2001, setting out a compliance committee articulated in two bodies: a plenary bureau and a facilitative and enforcement branch. Significantly, when addressing situations of non-compliance with the Protocol’s obligations, the facilitative and enforcement branch must take into account the principle of common but differentiated responsibilities.

Summing up, the Montreal Conference succeeded in adopting a workable strategy to pursue multilateral action on climate change issues, within the broader system of the UNFCCC. Indeed, the biggest challenge was not only to keep developing State involved in further steps for the implementation of the Protocol, but also to pursue cooperation with States such as the USA or Australia, which, though not parties to the Protocol, are still parties to the UNFCCC. The latter States, as well as other major emitters, generally adverse the prospect of new commitments. It has correctly been stated that the Conference confirmed a dual track approach in the regime of international law of the environment⁴. The first track is represented by the Protocol process and industrialised States parties to this instrument have engaged to pursue negotiation in view of the second commitment period. A working group was established and is due to convene in May 2006 to discuss future commitments for industrialised States for the period after 2012. On the other side, there is the UNFCCC system, which is mostly based on informal discussion rather than actual negotiation⁵. In Montreal, States parties to the framework Convention resolved to engage in a dialogue on long-term cooperative action to address climate change by enhancing implementation of the Convention, and underlined 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”. As a consequence, also States non parties to the Protocol are still committed to multilateral action in the field of climate change.

1 See the Conference’s website: http://unfccc.int/meetings/cop_11/items/3394.php.

2See United Nations Press Release, “United Nations Climate Change Conference agrees on future critical steps to tackle climate change”, 10 December 2005

(http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/press051210_cop11.pdf)

3See Kevin R. Gray, “Eleventh Meeting of the Conference of the Parties to the United Nations Framework Convention on Climate Change/First Meeting of the Parties to the Kyoto Protocol”, ASIL Insight, 3 April 2006 (<http://www.asil.org/insights/2006/04/insights060403.html>).

4Ibidem.

5Ibidem.

Dr Gabriele Porretto,

Research Associate and Sparke Helmore Lecturer,

ANU Faculty of Law

Email: Gabriele.Porretto@anu.edu.au