

Provisional Application – An Overview

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Introduction

1. The continued failure of the parties to agree a second commitment period for the Kyoto Protocol is a cause for concern. Further delay in any agreement for a second commitment period could mean that there will be a gap between commitment periods where the relevant parties are not bound by any emission reduction commitments.
2. A key problem is that of legislative procedure and timing: a formal amendment to the Protocol, whilst the most desirable course of action, would in all probability, not come into effect until after the expiry of the first commitment period.
3. A number of parties have begun to investigate options for addressing a potential gap between commitment periods and the UNFCCC Secretariat has recently produced a note on this issue.¹
4. A variety of methods has been suggested for avoiding the legal and political implications of such a gap, one of which is the legal technique of ‘provisionally applying’ amendments to the Kyoto Protocol pending their formal entry into force. These amendments would set out legally-binding mitigation targets for Annex I Parties.
5. This briefing paper looks at the concept of provisional application under international law and focusing on its legal basis and how it could be brought about and setting out examples where treaties have been provisionally applied in the past. Domestic concerns arising from provisional application are not considered as they will be the subject of a future LRI Briefing Paper.

Background

6. The Kyoto Protocol’s first commitment period began on 1 January 2008 and is due to expire on 31 December 2012. In order for the Parties to be bound by a subsequent commitment period, a formal amendment to the Protocol would be the most desirable path since it is the method of amendment prescribed by the treaty².
7. If a gap between commitment periods is to be avoided, any formal amendment to the Protocol must enter into force on or before 1 January 2013. However, no such amendment has been agreed to date, and the process for amendments to come into force can be lengthy.
8. The following conditions would have to be met for an amendment to come into force:

¹ FCCC/KP/AWG/2010/10, 20 July 2010.

² Articles 20 and 21 of the Kyoto Protocol.

- a) The Conference of Parties serving as the Meeting of the Parties to the Kyoto Protocol (“CMP”) would need to adopt the relevant amendments at its sixth or seventh session (i.e. Cancun in December 2010 or South Africa in December 2011); and
 - b) The UN Depository must receive instruments of acceptance of the amendments from 143 of the Parties to the Protocol by 3 October 2012 at the latest.³
9. Even if the CMP was to adopt the amendments at CMP6 or CMP7, this would leave limited time for domestic ratification procedures (eg, presenting the amendments to national legislatures) in the countries which are a party to the Kyoto Protocol. Such procedures could result in a delay between the adoption of a decision to amend the Kyoto Protocol and the entry into force of such amendments.
10. Amendments to the Kyoto Protocol enter into force (for those parties that have accepted them) on the “*ninetieth day after the date of receipt by the Depository of an instrument of acceptance by at least three fourths of the parties to the Kyoto Protocol*”.⁴ Therefore, if 143 countries have not deposited their instruments of acceptance by 3 October 2012, there will be a gap between commitment periods. The gap will correspond to the length of time between 3 October 2012 and the date the 143rd Kyoto party deposits its instrument of acceptance of the amendments with the UN Depository.
11. In the absence of a formal amendment to the Protocol entering into force within the required timeframe, several potential options have been suggested in the Secretariat’s note as ways to avoid any gap between commitment periods. This paper focuses on the concept of provisional application.

Provisional application of treaties

12. Provisional application of a treaty is a technique which can be used to create legal rights and obligations, which emanate from an agreed treaty, under international law pending that treaty’s formal entry into force. In effect, until that time, the treaty is applied as if it were already in force.
13. It is intended to be used as an interim (or provisional) measure to ensure obligations under international law become legally binding while parties are going through the formal domestic ratification procedures.
14. One commentator has summarised the reasons for provisional application as follows:

*“In general, the technique of provisional application is utilised when there is some urgency to implement a treaty or certain of its provisions before the treaty is ratified and enters into force for the party or parties concerned. The procedure may also be used where the negotiators are certain that the treaty will obtain the required domestic approval for ratification; to achieve legal continuity between successive treaty regimes; to attain consistency of obligations among the parties when amending or modifying a treaty; to circumvent political or other obstacles to the entry into force of a treaty; or in the context of preparatory institutional arrangements for new international organisations.”*⁵

The legal basis of provisional application

³ Based on 190 Parties as at 20 July 2010.

⁴ Article 20(4), Kyoto Protocol.

⁵ Andrew Michie, “The Provisional Application of Arms Control Treaties”, *Journal of Conflict and Security Law*/2005/Issue 3, November/Articles/The Provisional Application of Arms Control Treaties - C&S Law 2005 10 (345)

15. The provisional application of treaties finds its legal basis in the Vienna Convention on the Law of Treaties 1969 ("VCLT"). Article 25 of the VCLT states:
- "1. A treaty or 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 agreed.*
- 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or 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."*
16. Although there has been some resistance to the concept of provisional application by States on the basis that it circumvents national legislatures' right to approve international treaties, the International Law Commission has concluded that *"there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis."*⁶
17. Although Article 25 of the VCLT refers specifically to *"a treaty or part of a treaty"*, there is no reason why amendments to a treaty could not similarly be provisionally applied. The simplest legal solution, therefore, (save for formal amendment) would be to 'provisionally apply' the necessary amendments to the Kyoto Protocol and its annexes such that it provides for a second commitment period pending the amendments' formal entry into force.
18. Although provisional application is a legally-binding technique, its operation is dependent upon the Parties agreeing to be bound. The individual States can choose whether they wish to be bound by the provisional application and political agreement on use of the technique is therefore paramount.

Ensuring the provisional application of a second commitment period

19. There are two ways the Parties could decide to provisionally apply amendments to the Kyoto Protocol relating to a second commitment period based on Article 25(1) of the VCLT:
- a) The text of the amendments could explicitly state that they are to be applied provisionally pending their formal entry into force; and
- b) The COP decision adopting the amendments could explicitly state that the amendments are to be applied provisionally pending their formal entry into force.

Examples of treaties which have been provisionally applied

20. The most well known of the treaties that have been provisionally applied in the past is the General Agreement on Tariffs and Trade ("GATT"). The GATT only entered into force on 1 January 1948 through a Protocol of Provisional Application signed on 30 October 1947. This was done to make the agreement applicable, whilst awaiting the ratification of the International Trade Organisation ("ITO") Charter, which would have made the GATT obligations permanent. However, the ITO Charter never got past the US Congress and the GATT continued to be applied pursuant to this Protocol of Provisional Application from 1 January 1948 to 1 January 1995 when the World Trade Organisation Agreement entered into

⁶ Report of the International Law Commission on the Work of its Eighteenth session, YILC 1966, Vol. II, at 210.

force. In the intervening period, many countries joined the GATT, each concluding a Protocol of Accession with similar effect as the Protocol of Provisional Application.

21. Numerous international agreements have also been applied on a provisional basis (such as the 1994 United Nations International Tropical Timber Agreement⁷) and provide useful examples of ways in which provisional application can be tailored to achieve specific goals in terms of timing, scope and effect. For example, a treaty could contain a fixed date for the provisional application to enter into force, a specific date of termination of the provisional application or certain criteria which must be met in order for provisional application to come into play.⁸
22. However, in the majority of cases, the treaty itself has explicitly provided for the use of provisional application. Although Article 25(1)(b) of the VCLT provides for provisional application to be used where the negotiating parties are in agreement, there are very few precedents for this.⁹

⁷ United National International Tropical Timber Agreement 1994, 1 January 1997, 1955 U.N.T.S. 81; 33 I.L.M. 1014.

⁸ Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 28 July 1994, 1836 U.N.T.S. 3; 33 ILM 1309; The International Coffee Agreement 2001, 28 September 2000, 2161 U.N.T.S. 308; 33 I.L.M. 1309; The Treaty on Open Skies of the Organisation for Security and Co-operation in Europe, 24 March 1992.

⁹ For example, the Resolution (document ECE/HLM.1/2) that adopted the Convention on Long-range Transboundary Air Pollution (1302 U.N.T.S. 217) provides that the signatories to the Convention “undertake to carry out the obligations arising from the Convention to the maximum extent possible pending its entry into force”.