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The European Union and quantified emission limitation and reduction commitments under the Kyoto Protocol

Simone Schiele
University of Augsburg, Nördlingen, Germany

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Abstract

Purpose – This paper aims to clarify the scope and content of the obligations and responsibilities which the European Community (EC) and the European Union (EU) Member States assumed under the Kyoto Protocol, including an examination of the procedures and mechanisms relating to compliance.

Design/methodology/approach – The paper explores the participation of the EU as a "Regional Economic Integration Organization" in the Kyoto Protocol and explores the implications of possible non-compliance with its obligations.

Findings – While there is uncertainty, the text of the Kyoto Protocol as well as its negotiating history suggest that the EC entered into an emissions-reduction commitment of 8 per cent additional to the obligations of EU Member States which redistributed their targets under a burden-sharing agreement.

Originality/value – The paper challenges the prevalent opinion that the EC and the Member States of the EU share a common emission-reduction target of 8 per cent under the Kyoto Protocol.

Keywords Global warming, European Union, Environmental management, Environmental regulations

Paper type Research paper

Introduction

The United Nations Framework Convention on Climate Change (Convention) aims to stabilize "greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". To this end, the Kyoto Protocol (Protocol) to the Convention was signed in 1997 and entered into force in 2005. It defines quantified emission limitation and reduction commitments (QELRCs) of greenhouse gases (GHG) regulated in Annex A to the Protocol for Parties listed in Annex B to the Protocol. These QELRCs have to be achieved within the first commitment period from 2008 to 2012, see Article 3, paragraph 1 of the Protocol. The European Community (EC) is listed in Annex B to the Protocol as a party with the obligation to reduce its emissions by 8 per cent in comparison with the emission levels of 1990.

The latest studies show that by 2006 the European Union (EU) Member States had reduced their emissions by 2.7 per cent and that with additional policies a total reduction of only 6 per cent could be achieved by 2012 (UN, 2008f). The remaining 2 per cent will have to be generated by using carbon sinks and the Kyoto Mechanisms (EEA, 2008). These figures show that it cannot be assumed any more, as it had been during the negotiations for the compliance regime under the Protocol (Werksman, 2005), that the 8 per cent target will be fulfilled as a matter of course, and possible consequences of missing the target become an issue. However, it seems not even clear to which targets the EC and the EU Member States committed themselves, as the following paragraphs show.

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The participation of the EU in the Protocol

The participation of the EU in the Protocol and therefore also in the undertaking of QELRCs is determined from an EU internal view by the law of the EU and from an external view by international law. Therefore, in order to understand and explain the commitments of the EU under the Protocol, the underlying legal framework has to be explained.

The Vienna Convention on the Law of Treaties states in its Article 6 that "the capacity of an international organization to conclude treaties is governed by the rules of that Organization". Under international law, the EU as an economic and political union of Member States so far does not enjoy legal personality (Hobe, 2009). The EU consists of three pillars, the European Community, Common Foreign and Security Policy and Police and Judicial Co-operation in Criminal Matters. The first pillar, the European Community, does enjoy legal personality (Tomuschat, 2002). In the case of the climate regime, the provision which gives legal personality to the EC is Article 281 of the Treaty establishing the EC.

The power of the EC to act on an external level depends on its internal competencies, "in foro interno, in foro externo" (Macrory and Hession, 1996). Internally, the EC has to be authorized to adopt measures by its founding treaties (Macrory and Hession, 1996). There are only very few areas, in which the EC enjoys exclusive competencies *vis-à-vis* its Member States, like the common commercial policy. The detailed definition of the legal basis for the EC competence concerning climate change is not straightforward as the subjects of international agreements like the Convention and the Protocol are not delimited according to the competencies of the European treaties and involve several separate issues (Tomuschat, 2002). However, it is unchallenged that the EC enjoys at least a potential or concurrent competency in the field of climate change which was mainly based on Article 130(s), paragraph 1, in conjunction with Article 130(r) of the Treaty establishing the EC and is therefore entitled to take part in the international agreements concerned as a party from an internal perspective (Macrory and Hession, 1996).

Concurrent competence of the EC implies that Member States remain entitled to act in the respective field insofar as the EC has not done this (Dahl, 2000). This leads to certain problems on the international level, as neither the EC nor the Member States are able to negotiate, adopt and implement an international agreement fully. Therefore, concurrent competencies within the EU concerning an international agreement generally lead to the conclusion of so-called "mixed agreements" (Neframi, 2002). Member states prefer to be present on the international scene besides the EC in order to preserve their competencies in the field concerned and, from a broader view, to underline their sovereignty (Macrory and Hession, 1996). In mixed agreements, the EC and its Member States form a "single Contracting Party", which "guarantees the implementation of all provisions of mixed agreements" (Neframi, 2002).

Under international law, different ways for the participation of the EC in international agreements have been developed. Adoption and ratification by either the EC or by a "Regional Economic Integration Organization (REIO)" can be allowed if an agreement contains a specific provision which provides for this participation (Rodenhoff, 2008). So far, the EC is the only REIO participating in a multilateral environmental agreement (Rodenhoff, 2008). The UNFCCC, in Article 22, paragraph 1, and the Kyoto Protocol in Article 24, paragraph 1, both contain a clause opening the agreements for the participation of REIOs. Therefore, the EC is also under international law entitled to participate in the Protocol as a party.

As discussed above, under EU law neither the EC nor its Member States individually have the exclusive competence to fulfil their obligations under the Protocol. However, the division of competencies of the EC and its Member States is a matter of community internal law and therefore it could be assumed that this division has no implications on the broader international level, neither for third parties nor as a justification for not fulfilling obligations under the Protocol, see Articles 34 and 27 of the Vienna Convention on the Law of Treaties. It may be argued that the ratification of a multilateral agreement, to which the EC in addition to its Member States is a party, by a party that is not a member of the EC, should be seen as an acceptance of the EU internal competence sharing concerning the area of the agreement by the ratifying party (Rodenhoff, 2008). So, the question remains, whether the EC and its Member States are bound by all obligations under the respective agreement or whether they are only responsible for those parts of the agreement which fall into their respective competencies (Neframi, 2002). To clarify this problem, some multilateral agreements, which allow for the participation of REIOs, contain so-called "separation clauses" (Rodenhoff, 2008). These clauses declare, on the level of international law, which rights and obligations of an REIO and its Member States assume in case of shared competencies concerning a specific agreement (Neframi, 2002). Both, the Convention (Article 22, paragraphs 2 and 3) and the Protocol (Article 24, paragraphs 2 and 3) follow the formulation of the Ozone Convention, which was used repeatedly in different international environmental agreements (Rodenhoff, 2008). The provision concerned states that the EC as an REIO and its Member States "shall decide on their respective responsibilities for the performance of their obligations under this Protocol" and not "exercise rights under this Protocol concurrently". However, the declaration of competence provided by the EC is rather general (UN, 2002). It confirms the competence of the EC to participate in the Protocol as a party and states the following:

> The European Community declares that its quantified emission reduction commitment under the Protocol will be fulfilled through action by the Community and its Member States within the respective competence of each and that it has already adopted legal instruments, binding on its Member States, covering matters governed by the Protocol.

The declaration fails to attribute responsibility for the different obligations under the Protocol to either the EC or the Member States. For a third party, the distribution of competencies remains unclear. Therefore, it would be inconsistent with the principle of "bona fide" (or "pacta sunt servanda"), to hold the division of competencies under EC law against a third party (Rodenhoff, 2008). So, the EC and its Member States remain both bound to the whole agreement and thus jointly responsible for its fulfilment (Neframi, 2002).

Burden-sharing under Article 4 of the Protocol

QELRCs were already a long, debated issue at the European level when the EC and its Member States proposed common commitments during the negotiations for the Protocol (Ringius, 1999; Depledge, 2000). Whereas, the EC advocated uniform targets at the international level (Depledge, 2000), it did not succeed internally to convince its Member States to commit themselves to a uniform reduction rate. The so-called cohesion countries – Greece, Ireland, Portugal, and Spain – insisted on less-stringent commitments to avoid possible restraints to their economic development (Ringius, 1999). So, from an internal view, the EU could only take the lead in the negotiations for a protocol with an ambitious target if an internal burden-sharing agreement was reached.

Therefore, the EC proposed in its "Draft Protocol Structure" to transfer the general idea of meeting objectives "individually or jointly" from article 2(b) of the Convention to the Protocol (UN, 1996a).

After an internal differentiation of targets was agreed with commitments from −25 per cent for Austria, Denmark, and Germany to +40 per cent for Portugal (Council of the European Union, 1997), the EC proposed its common reduction target of 15 per cent during the sixth session of the *Ad hoc* Group on the Berlin Mandate (AGBM), the negotiating body for the Protocol (Yamin, 2000). It also presented its internal burden-sharing agreement, which was highly criticized (Yamin, 2000). Parties were concerned about an REIO's compliance with the legally binding targets of the Protocol (Depledge, 2000). This debate prompted Japan and Australia to generally question the participation of REIOs (Yamin, 2000) and the latter put forwarded a textual proposal for the treatment of commitments of REIOs under the Protocol (UN, 1997b). Its main purpose was to achieve clarity and transparency about the actual commitments of the REIO and its Member States and the respective responsibilities for these targets in case of failure. The Australian proposal suggested that the REIO can be solely responsible for its commitment if the REIO and its Member States are parties to the Protocol, and the REIO has sufficient competency, following its internal agreements, to fulfil its emission-reduction commitment. In this case, the commitments of the REIO and its Member States should be listed under the Protocol. However, the member states would not be individually responsible for their targets (UN, 1997b). If the REIO does not have sufficient competencies to be responsible for its own target, only the targets of member states would be listed. In that case, the member states would be individually responsible for them (UN, 1997b). This proposal was included in the negotiating text of the chairman, prepared for AGBM 7 (UN, 1997a).

The EC itself presented at that time only standard formulations concerning REIOs, originating from the Convention, and its joint 15 per cent reduction target (UN, 1997b). The Consolidated Negotiating Text of the Chairman for AGBM 8 drew upon these standard formulations and enriched them with ideas from the Australian proposal (UN, 1997c). At AGBM 8, the EC finally submitted its own specific text (UN, 1997d):

> (i) Any Parties included in [Annex I to the Convention/Annex Q], that have agreed that they shall jointly fulfil their obligations respecting quantified limitation and reduction objectives shall be deemed to have met those obligations provided that their total combined level of emission reductions meets the levels as set out in [paragraph [2]/Annex [Y]] for those Parties.
>
> (ii) Such agreement will become operative only if all Parties to it have notified the secretariat of the terms of the agreement which shall remain operative for the duration of the Protocol or until a decision to amend or rescind the agreement is notified to the secretariat by all Parties to the agreement.
>
> (iii) The Parties to any such agreement shall notify the Secretariat of the terms of the agreement on the date of deposit of their instrument of ratification, acceptance, approval, or accession, or subsequently, in any event 5 years before the expiry of the period mentioned in [paragraph2/Annex Y]. The secretariat shall in turn inform the other Parties of the terms of the agreement or any decision to amend or rescind it.
>
> (iv) In the event of failure by the Parties to such an agreement to achieve their total combined level of emission reductions, the Parties to such an agreement shall be responsible for their levels of emissions according to the notifications made in accordance with this Article.

(v) If Parties acting jointly do so in the framework of and together with a regional economic integration organization which is itself a Party to the Protocol, each Member State of that regional economic integration organization individually and together with the regional economic integration organization acting in accordance with Article [x], shall, in the event of failure to achieve the total combined level of emission reductions, be responsible for its level of emissions as notified in accordance with this article.

It became clear that the main concern of the EC was to be allowed on the international level to redistribute its target among its Member States internally, see paragraphs (i) to (iii). Furthermore, the EC tried to align the provisions concerning burden sharing with the requirements of its participation alongside its Member States under a mixed agreement, demonstrated in paragraph (v). This paragraph institutes joint and several liabilities of the EC and its Member States for the obligations of the Member States under the Protocol which act under a common burden-sharing agreement.

The proposed text does not include an additional target for the EC on top of the commitments of the Member States, which will be discussed later in this paper. There are no provisions concerning a possible target of the EC or its failure to achieve this target included in the paper proposed. Therefore, it can be concluded that the EC did not plan for an EC-wide, separate and additional target, but only assumed that its Member States would share their commitments under a joint target.

The proposal of the EC was included in the "revised text under negotiation" (UN, 1997e), which was the basis for negotiations at COP 3 (at which the Protocol was adopted). Different proposals on the same issue required informal consultations (Depledge, 2000). As a first step, parties agreed upon paragraphs (i), (iv), and (v) of the EC proposal (UN, 1997f). The compromise text concerning the duration of the agreement, alterations in the compositions of the REIO, restrictions on the redistribution of targets, and the requirement of approval of the agreement by the COP/MOP was reached two days later (UN, 1997g). Article 4, paragraph 6, of the Protocol was thus taken, with editorial amendments, from the original proposal of the EC.

The QELRC of the EC in Annex B to the Protocol

During the final round of negotiations on a protocol to the Convention, the most critical issue debated was the QELRCs. Owing to its internal agreement, the EC only negotiated targets as an entity (Depledge, 2000). Following what was said above about the problem of concurrent competencies within the EC, the naming of the EC with a quantified emission-reduction commitment in Annex B of the Protocol would have been sufficient, as its status of a virtual legal entity together with its Member States would have led to a joint responsibility for this target.

However, when at the first time during the negotiations, a list of parties appeared in Annex B of a negotiating text, the EC as well as its Member States were listed (UN, 1997f). This approach was retained during the rest of the negotiations, and the EC-wide target was just repeated for the individual member states (UN, 1997g). Annex B now contains this list of countries where the EC is named alongside its Member States; each of them and the EC with a QELRC of -8 per cent. A reason might have been the scepticism of other parties concerning issues of compliance and the clear attribution of REIO targets to its Member States. The problem is that there is no text in the Protocol, not even a footnote, which elaborates upon the commitments of the EC and the Member States and clarifies whether the targets of the Member States are only repetitive of the

joint EC target or constitute additional commitments of the Member States alongside the joint EC target.

Therefore, two readings of Annex B exist: one view is that the target of the EC in Annex B only reflects aggregate QELRCs of the EU Member States under Article 4, paragraph 1 of the Protocol, and therefore is only to be seen as a summary of declaratory nature and not as an additional target. This reading is in line with the position of the EU during the negotiations of the Protocol. However, a reading of the actual text of the Protocol and especially its Annex B does not support this view. Listing the target of the EC separately in Annex B leads to an textual argument for the EC having an additional emissions reduction target of 8 per cent. The history of Article 4 and of the targets in Annex B suggest that the EC only aimed at a joint target, but this was never introduced into the actual text of the Protocol or its Annex B. So, Annex B establishes an additional target for the EC besides individual targets for its Member States.

The burden-sharing agreement of the EC

As Article 4 was successfully introduced into the Protocol, the EC planned to participate as a party alongside its Member States in an agreement under Article 4: the representative of Luxembourg, speaking on behalf of the EC and its Member States, declared that the EC and its Member States would implement their respective commitments under Article 3, paragraph 1, of the Protocol, in accordance with the provisions of Article 4 of the Protocol (UN, 1998). The EC as well as the 15 Member States notified the secretariat of the Convention of their intention to fulfil their commitments jointly (UN, 2002). This notification by the EC would not have been necessary, if its target was only declaratory.

Annex II of the agreement lists the quantified emission-reduction commitment of the EC under Annex B of the Protocol (− 8 per cent) and the new, redistributed commitments of the member states (UN, 2002). Even though the listing of the EC target supports the view that the EC committed itself to an QELRC additional to the targets of its Member States, the redistribution of targets among the member states as listed in Annex II of the agreement only amounts to a common reduction of the member states of 8 per cent and does not account for the EC-wide target of additional 8 per cent (Council of the European Union, 1998). Furthermore, the list of internally redistributed commitments does not contain a target of the EC, which aims at the stabilization of GHGs (0 per cent reduction). Whereas, the introductory note by the secretariat talks about "respective emission levels", other sections of the agreement suggest that the EC, when concluding this agreement, acted on the assumption that there is only an EC-wide target of 8 per cent, which has to be fulfilled jointly by the member states (UN, 2002).

Consequences of non-compliance under the Protocol

As mentioned in the introductory paragraph, the EC and the EU Member States are in danger of missing the joint 8 per cent QELRC. In case, the EC committed itself to an additional target of further 8 per cent without being aware and without implementing this target, it is clear that the EC will not be in compliance with its obligations under the Protocol. Therefore, the possible consequences of non-compliance under the Protocol shall be discussed here.

Under the Protocol, the parties face a review and compliance system unprecedented in international environmental law (Aguilar *et al.*, 2005). A team of experts reviews the

obligatory submissions by parties concerning their annual emissions with respect to their obligations under the Protocol (Ulfstein and Werksman, 2005). These "expert review teams" are entitled to raise "questions of implementation", as are Parties (Decision 27/CMP.1). The determination whether a party is in compliance with its QUELRC under Article 3, paragraph 1 of the Protocol falls within the mandate of the Enforcement Branch (EB) of the Compliance Committee (Decision 27/CMP.1). If the EB finds that the emissions of a party exceed its assigned amount for the first commitment period, the QELRC for the next commitment period will be increased by the difference. On top of that, the party faces a mandatory additional reduction obligation of 0.3 times the excess emissions in this next commitment period and will be suspended from selling GHG allowances under the Protocol market mechanisms (Decision 27/CMP.1).

In case of non-compliance of the EC not only the general provisions regarding compliance, but also Article 4 of the Protocol on joint implementation, which is described above, applies. Article 4, paragraph 6 covers the case under discussion, in which the EC as a REIO is itself a party to the Protocol:

> If Parties acting jointly do so in the framework of, and together with, a regional economic integration organization which is itself a Party to this Protocol, each member State of that regional economic integration organization individually, and together with the regional economic integration organization acting in accordance with Article 24 shall, in the event of failure to achieve the total combined level of emission reductions, be responsible for its level of emissions as notified in accordance with this article.

Whereas, the consequences of non-compliance under Article 4, paragraph 6, of the Protocol are explained uniformly within the literature, the explanations mirror the discussion from above: they do not agree on the QELRC of the EC. One view is that the EC committed itself as a party to an emissions-reduction target of 8 per cent. Along this line, Ott (1998) explains Article 4 as follows:

> Under this bubble, as long as the EC achieves its overall reduction target of 8 percent, the Community as well as all of its member states will be deemed to be in compliance. Should the EC fail to achieve its own target, both the Community and those members that have not achieved their targets under the agreement will be held responsible.

Beyerlin (2000) talks even more specifically about the joint fulfilment of the collective obligations accepted by the regional economic integration organization.

Another view is that the agreement only reflects aggregate QELRCs of the EU Member States under Article 4, paragraph 1 of the Protocol, which are summarized as an EU-wide QELRC. Accordingly, Yamin and Depledge (2004) state that the EC:

> [. . .] shall be responsible together with each of its member states, as well as each individual member state also being responsible for the failure to achieve its level of emissions.

Grubb describes the situation as follows: "In [the event of failure to achieve the collective commitment], each country is responsible for its level of emissions set out in the agreement"; and for the EU, "the European Community [. . .], as a Party to the Protocol, would share responsibility with its member states, in a situation of 'joint and several' liability" (Grubb *et al.*, 1999). From these different views, it becomes clear that there is no agreement on the correct reading of the EC's QELRC.

Recent developments under the Protocol

For the calculation of its assigned amount of emissions for the first commitment period under Article 3, paragraphs 7 and 8, of the Protocol, the EC submitted its initial report to the secretariat (EEA, 2006). The initial report also seems to assume that the EC enjoys only an emissions-reduction commitment of 8 per cent, which it shares with its Member States:

> In deciding to fulfil their respective commitments jointly in accordance with Article 4 of the Kyoto Protocol, the Community and the Member States are jointly responsible, under paragraph 6 of that Article and in accordance with Article 24, paragraph 2 of the Protocol, for the fulfilment by the Community of its quantified emission reduction commitment under Article 3, paragraph 1 of the Protocol (EEA, 2006).

Or later in the text: "the adopted percentage contributions under the burden-sharing agreement no longer exactly match EC's 92 per cent commitment" (EEA, 2006).

In accordance with Article 8 of the Protocol, a review of the initial report was conducted by a team of experts. They share the view of the EC without dissenting comments:

> [. . .] the EC has also defined its emission target and base year as the aggregate of those of its 15 member States (UN, 2008e).

This may be due to the fact that the Article 8 reviews are technical reviews, but not legal technical reviews. And in this case, it likely reflects a common understanding of the EC and EU targets which is not based on negotiated text.

However, a look at the UNFCCC secretariat web page reveals a different picture: the 8 per cent target of the EC is listed alongside the Member States' individual targets, with only the latter as agreed under the agreement concluded according to Article 4 of the Protocol (UNFCCC Secretariat, 2009). So, it becomes apparent that the question whether the EC has a separate emission-reduction target alongside its Member States, has not arisen in the international public arena, yet.

Furthermore, the Compliance Committee under the Protocol began its work with its first meeting in March 2006 (UN, 2006). From the work of the Compliance Committee and especially its EB up to this date, it may be possible to anticipate its general approach to any possible question of implementation raised concerning the emissions-limitation commitment of the EC. It becomes apparent from this examination that the EB has so far applied a very text-centred approach for its decisions.

One of the first issues the EB encountered was an apparent gap in the text regulating the eligibility of parties to participate in the Kyoto Mechanisms. The decisions of the parties (Decisions 3/CMP.1, 9/CMP.1, 11/CMP.1 and 27/CMP.1) make it clear that a party which is the subject of a question of implementation, about which the EB took a decision not to proceed, would become eligible to use the mechanisms. Otherwise, Parties are not eligible to use the mechanisms until 16 months from the submission of their initial report (Decisions 3/CMP.1, 9/CMP.1, 11/CMP.1 and 27/CMP.1). This would lead to an unequal treatment of parties, as it would mean that parties, concerning whose submissions no questions of implementation were raised, may be eligible for participating in the Kyoto mechanisms later, for which there does not appear to be a clear policy rationale. However, it is not clear from the relevant texts whether the EB may have the mandate or perhaps even an obligation to decide to confer eligibility earlier than the 16-month period in those cases in which no question of implementation was raised. A joint reading of existing

provisions in conjunction with the application of the implied powers doctrine (ICJ, 1949) may have provided a basis for a decision of the EB (UN, 2007a) and yet it considered but did not take such a decision (UN, 2007b). The branch decided to stay within its explicit mandate as provided in Decision 27/CMP.1, Section V, paragraph 4 and therefore within the textual provisions.

The EB was also seized with a question of implementation concerning the national registry of Canada (UN, 2008a). The EB ultimately decided that Canada had been in non-compliance for a certain time, but the question of implementation was resolved before it came to the branch, and therefore the branch would not proceed with the question of implementation (UN, 2008b). Canada questioned the mandate of the EB to make the statement that Canada was in non-compliance without completing the full procedure (UN, 2008c). The EB did not address the question raised by Canada directly. Instead, as neither the "Procedures and mechanisms relating to compliance under the Kyoto Protocol" (Decision 27/CMP.1) nor the "Rules of procedure of the Compliance Committee of the Kyoto Protocol" (Decision 4/CMP.2) provide a mandate for further steps of the EB once it decided not to proceed with a question of implementation, the EB decided not to engage further in this dispute (UN, 2008d). Accordingly, the submission of Canada in which it questioned the mandate of the EB was treated in the annual report of the Compliance Committee to the Conference of the Parties serving as a Meeting of the Parties to the Protocol (CMP) like a "comment [. . .] in writing on a final decision" (Decision 4/CMP.2).

Both cases show that the approach of the EB so far has been to strongly rely on explicit textual bases for its proceedings and decisions[1]. This suggests that if the EB were to address a question of implementation related to the EC target, it will focus on the actual text of the Protocol and its Annex B. As noted above, the Protocol text provides for an additional QELRC of the EC amounting to 8 per cent, and neither the Article 4 agreement nor any decision of the parties provides a clear basis for any other reading. It follows that the EC is at risk of an adverse decision. It should also be noted that the EB has no discretion with respect to consequences, and, if it found the EC in non-compliance, would have to impose a "penalty" of 1.3 times the excess emissions of the EC as described above (Decision 27/CMP.1). If there was ever a case to be made for the Compliance Committee to depart from a strict textual approach, this might be it. On the other hand, to do so would likely involve setting a legally and politically questionable and potentially very problematic precedent. This could in the long-term weaken the compliance mechanism of the Protocol, which cannot be the interest of the EC. Therefore, the EC should aim at a clarification of its obligations, before the Compliance Committee will be seized with its case.

Conclusions

Since the beginning of the negotiations on QELRCs under the Protocol, the EC aimed at a common reduction commitment for its Member States under a joint EC target, which could be differentiated internally. This seems to be due to two factors: on the one hand, internal arguments made an internal burden-sharing agreement necessary in order to achieve an ambitious target on the international level. On the other hand, the EC was in a special situation due to its internal structure of shared competencies with its Member States and therefore it was clear from a European point of view that emission-reduction commitments could only be fulfilled by the EC together with its Member States. Additionally, the EC faced criticisms of other parties which were concerned about transparency, clarity,

and enforceability of a common emissions-reduction commitment of the EC. So, the task of the EC was threefold: first, it had to internally agree on a common target and a pattern of sharing this target. Second, it had to make sure its special internal distribution of competencies is treated accordingly at the international level. Owing to the unclear division of competencies between the EC and its Member States concerning a complex agreement like the Protocol and the resulting vagueness, the EC was forced to be as clear and as transparent as possible about its commitments and the commitments of its Member States in order to meet other parties' scepticism.

From what was said before, it looks as if this very difficult situation led to the naming of the member states alongside the EC in Annex B and the resulting additional reduction obligation of the EC of 8 per cent. The EC clearly did not intend this result and actually may not recognize the issue. If the situation is not rectified, the EC might face compliance procedures at the end of the first commitment period if it only prepares for achieving a common 8 per cent target. Either an expert review team or a party could trigger such procedures, as noted above. The text-centred approach of the Compliance Committee is very likely to lead to an adverse decision for the EC. The "punishment" of the EC would be the reduction of its assigned amount for the second commitment period by 8 per cent of its emissions multiplied with the factor 1.3 plus the amount to which the EU-wide emissions exceeded 16 per cent in the first commitment period. Most Parties would likely feel that this result would be inconsistent with the original intent behind the Kyoto Protocol and the Marrakesh Accords, and so it seems likely that the CMP might offer some relief to the EC in case of an appeal by the EC. However, it should also be noted that the Marrakesh Accords themselves stipulate that decisions of the Compliance Committee can only be appealed to the CMP based on the claim that the party concerned was denied due process (Annex to Decision 4/CMP.2). Therefore, invoking due process arguments may also lead to a questionable precedent and impair the functioning of the compliance mechanism. Moreover, since any decision of the CMP would then have to be taken by consensus[2] it is possible that parties could use the issue to exert considerable pressure on the EC and EU Member States in the context of negotiations. Given this analysis, it would seem advisable for the EC to take pro-active steps in the CMP to remedy the situation before it is put in a difficult position. The EC should therefore seek a clarification of its obligations under the Protocol from the Parties. Accordingly, the EC may pursue an amendment of Annex B according to Article 21, paragraph 7 and Article 20 of the Protocol. As Article 4 of the Protocol provides for joint implementation, the Member States of the EU can share an internally agreed target among themselves without the participation of the EC. Owing to the internal competence structure of the EU, and the conclusion of the Protocol as a mixed agreement as showed above, the EC will be bound to the commitment of its Member States as far as it falls within its sphere of competence, without it being listed in Annex B. This effect is reinforced by the declaration of competence the EC submitted with its instrument of ratification (UN, 2002). This solution would lead to more clarity concerning the commitments of the EC and its Member States under the Protocol and not require time-consuming changes on different aspects of the climate regime. The EC would be able to avoid facing the compliance procedure under the Protocol and continue to play an ambitious role in the climate regime.

Another line of argumentation could be that the EC consistently acted in the understanding that there is only one shared target, which is reflected in its attitude during

the negotiations, its proposed text and more recently in the implementation process. This understanding was apparently not questioned by other Parties, even through the adoption of Article 4, paragraph 6, which was proposed by the EC. So, the EC could try to invoke good faith arguments. As the separate target of the EC is explicit and unqualified in the Protocol text, this may not be easy. However, this argument may lead to a compromise that would allow the EC to add by pursuing an amendment a footnote to Annex B which would explain the situation instead of amending the list in Annex B.

The EC should also wish to consider proposing a different textual approach to the EC target in the context of negotiations on a post-2012 agreement in order to avoid the extension of an even greater risk into a new agreement.

Notes

1. In a very recent decision, the EB further underlined the text-based approach. It concluded that: "Pursuant to Article 31 of the 1969 Vienna Convention on the Law of Treaties and customary international law, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In addressing the questions of implementation before it, the enforcement branch followed this general rule and was not persuaded that it is necessary to follow another method of interpretation." (UN, 2009).
2. Annex to Decision 4/CMP.2, Section XI, paragraph 3 provides for a three-fourths majority vote. However, in absence of an agreement on the Rules of Procedure of the Conference of the Parties concerning voting, all decisions under the COP and the CMP were taken by consensus, see Baumert (2006, p. 392). See also UN (1996b): "[T]he draft rules of procedure are at present being applied by the COP and its subsidiary bodies, with the exception of draft rule 42: 'Voting'." All succeeding annotations of COP and CMP agendas reiterate the applicability of the rules of procedure. Therefore, it can be assumed that the CMP would only adopt a decision by consensus.

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About the author

Simone Schiele is a Doctoral Candidate in Law at the University of Augsburg in Germany. As a research fellow and an intern she has played a supporting role in both UN and EU fora. Her research is focused on the legal aspects of multilateral environmental agreements, especially climate change, and is supported by a scholarship from the Evangelisches Studienwerk Villigst, Schwerte, Germany. Simone Schiele can be contacted at: simoneschiele@gmx.de