

QELROs in Paris

HOW TO CREATE ROOM FOR LEGALLY BINDING (MITIGATION) OBLIGATIONS IN THE 2015 CLIMATE AGREEMENT

Legal Note

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From the very beginning of the current negotiations of a new multilateral agreement, indeed even before,⁴ there have been worries that the outcome will not leave room for Kyoto-Protocol-style international legally binding emission targets – that is for the so called [Quantified Emission Limitation and Reduction Obligations](#) (QELROs).

This ecbi Discussion Note considers the legal options for creating such a space for QELROs in the Paris Agreement. In particular, it explores the legal feasibility of having an annex – say ‘Annex Q’ for QELRO – to a Treaty/Protocol (which as such would have to be ratified/enter into force) where Parties could inscribe targets which would automatically become legally binding. In other words, there would be no need for some additional amendment ratification process (as in the case of the Kyoto Protocol), although possibly with the precondition of a COP decision expressing consent to ensure environmental integrity.

As a preliminary remark, it is observed that, from a legal perspective, it is perfectly possible for treaties to contain general rights and obligations, which can be rendered more specific/concrete pursuant to subsequent decisions of a ‘Conference of Parties’. In the context of international environmental law (and elsewhere), such practice is rather rare, since Parties usually wish to retain ultimate control over the specific obligations resting upon them, rather than having a COP decide by (qualified) majority on the obligations to be imposed. One notable exception, for instance, is the Montreal Protocol on Substances that Deplete the Ozone Layer.⁵ Article 2(9) of the latter Convention provides that the COP can adjust the ozone depleting potentials and the reductions of production or consumption of the controlled substances, thus amending (read: strengthening) the obligations imposed on the various States Parties. The provision states that the

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⁴ Benito Müller, [Plan C: The role of the Kyoto Protocol in a legally binding outcome](#), Oxford Energy and Environment Brief, September 2011.

⁵ See <http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf>.

COP should strive to reach agreement by consensus, but can, as a last resort, take decisions binding on all Parties by a two-thirds majority vote of the Parties present and voting.

More important for present purposes, however, is that it is perfectly possible for a treaty to lay the groundwork for obligations which are subsequently specified by means of a register where Parties inscribe concrete targets. This follows, on the one hand, from the fundamental principle that treaties are binding on the Parties and must be implemented in good faith (*'pacta sunt servanda'*) and on the other, that parties can delegate the power to take legally binding decisions to treaty bodies.

In addition, unilateral statements and declarations can also create binding obligations if (1) they are public or generally known, and (2) they reflect the intention of the State to be bound.⁶ The International Court of Justice has indeed made clear the fact that unilateral statements and declarations constitute a source of international law, subject to certain preconditions.⁷ The International Law Commission has clarified these conditions in its 2006 set of [Guiding Principles](#).

In light of the foregoing, nothing prevents States from concluding a framework treaty which envisages concrete obligations of individual States being specified in a separate annex, and which moreover provides that the obligations can be amended (strengthened) over time (without the need to go through a cumbersome amendment procedure for the treaty itself ...). The Convention provides for such a simplified amendment process to Annexes in Article 16 paras. 2-4.

Thus nothing prevents States from concluding a new treaty which foresees that individual States will communicate specific QELROs (to be included in a separate register) which will be considered binding upon the States concerned. It would, for instance, be possible to stipulate that States can unilaterally assume higher targets, but cannot unilaterally lower their obligations. Amendments of the individual State commitments could be linked to a prior COP approval (to safeguard environmental integrity), but this is not necessary – everything depends on the wording eventually chosen.

In the margin, it is worth recalling the 2009 Copenhagen Accord. The latter 'Accord' indeed foresaw that States would unilaterally communicate individual commitments to be included in one of two Appendixes added to the Accord. Nonetheless, both the text (and context) of the Copenhagen Accord, as well as the wording of most of the individual commitments (framed in conditional terms or explicitly stressing the 'non-legally binding nature'),⁸ made clear that the various commitments were of a political nature, and were not to be regarded as legally binding. In contrast, for the proposal mentioned to be effective, it would be imperative that the legally binding nature of the commitments was clearly stipulated (and not contradicted by the individual State concerned when notifying its QELRO).

Given the option of engaging in the post-2020 regime through legally binding Annex Q contributions, the agreement could then simply *encourage developed country and other Parties with appropriate national circumstances to inscribe their contributions in Annex Q*, thus avoiding the problematic ex ante specification of country listings.⁹

⁶ For further information, see B. Müller, W. Geldhof and T. Ruys, '[Unilateral declarations: the missing legal link in the Bali action plan](#)', May 2010.

⁷ See in particular the [Nuclear Tests judgment](#) of 1974.

⁸ See [Appendix I - Quantified economy-wide emissions targets for 2020](#), and [Appendix II - Nationally appropriate mitigation actions of developing country Parties](#).

⁹ For more about the problematic nature of such listings, see Benito Müller, [Avoiding Firewall Fundamentalism](#), OCP blog, 6 May 2014.