

American Bar Association Renewable Energy Tele-Conference

New York / Berlin 13 April 2005

Renewables and the Kyoto Process

Dr. Norbert Wimmer, Attorney-at-Law



The Kyoto Protocol (KP)

The EU-Emissions Trading System (ETS) and Renewables

Jl- and CDM-Projects – Realization and Current Obstacles –

Potential Sponsors

Selected Legal Aspects

The Kyoto Protocol (1)

- Concluded 1997
- At present ratified by 146 countries (out of 152 signatory states), representing 61,6 % of the industrialized countries' emissions of Greenhouse Gases (GHG)
- Defining compulsory reduction goals for 39 industrialized countries ("Annex B-Parties") (emissions 5 % below level of emissions in 1990)
- Entered into force on 16 February 2005 (i.e. 90 days after ratification by Russia), providing binding reduction goals for period 2008 through 2012
- Ongoing political process: Next steps include
 - Preparatory Meeting of Governmental Experts in Bonn (May 2005) and
 - 1st Meeting of the KP-Parties ("MOP") in Montreal in Nov/Dec 2005. Purposes are to define legal proceedings for the confirmation of CDM/JI projects and start negotiations on reduction goals for 2013 and thereafter.

Basic Concepts:

- **Emissions Trading (ET)**

Exchange/Trading of emission rights in order to reduce emissions the least expensive way – both at the interstate level and between private parties

- **Joint Implementation Projects (JI) (“Art 6 Projects”)**

Projects leading to emission reductions in Annex B-countries, leading to a shift of allowances from one Annex B-country to another

- **Clean Development Mechanism Projects (CDM) (“Art 12 Projects”)**

Projects leading to emission reductions in countries other than listed in Annex B, generating credits for additional emission allowances

The EU Emissions Trading System (ETS)

- System of “Cap and Trade”, but also “Add” emission rights derived from CDM projects according to the Linking Directive (Oct 2004), subject to its implementation into national legislation of the EU Member States (MS)
- Cap: MS grant limited number of emission “allowances” to installations (some 12,000 installations EU-wide); such allowances will be subject to devaluation, thus creating need for action
- First ETS Period started on 1 January 2005; first allowances (for 2005 emissions of GHG) to be surrendered in early 2006
- ETS will become more effective in the 2nd Period 2008 – 2012 only; MS are obliged to reduce their GHG emissions by 8% EU-wide through 2012.

- Renewable projects as such do not require or result in any emission allowances. However, such projects may reduce emissions and free allowances of an installation for trade.
- JI Projects and CDM Projects may generate “additional” allowances for the investor and the investor state, unless such project has been publicly funded by MS (no “double rewards”).

If JI Project leads to an emission reduction of an installation for which emission allowances have been granted by an EU MS, such allowances must be deleted from the public register of allowances of the respective host country, before credits for the project can be granted to the investor.

- Currently under discussion: Recognition of allowances derived from Domestic Projects (projects in which host country and investor country are identical)

- Renewables, i.e.: windfarms, solar, geothermal, hydropower plants
 - Example for JI: Windpark Peak Murgash in Bulgaria with 7 windmills of 9.1 MW in total; calculated CO₂-reduction of 61,000 t CO₂ in 5 years
 - Example for CDM: Jepirachi Windfarm in Colombia; 15 windmills of 19.5 MW in total; calculated CO₂-reductions: 278,000 t CO₂ in 5 years
 - Example for CDM Small Scale: “Solar Kitchens” in India: energy for 15 kitchens in schools and hospitals to be provided by solar energy; calculated CO₂-reductions: about 3,000 t CO₂ in 5 years

- Others, e.g. projects replacing existing industrial plants by more energy efficient or less GHG emitting plants; projects reducing the emission of methane gas (e.g. methane capture from waste management)

Realisation of JI- and CDM-Projects (1)

1st Step: Preparing a Project Design Document (PDD) containing:

- Detailed description of the project, incl. demonstration of the “Additionality” of the project (term t.b.d. at the 1st MOP)
 - i.e. not just a “state of the art” replacement of used / written-off industrial plant or a modernization required by current environmental legislation anyway; e.g. renewables project would not be lucrative enough without later revenues from the sale of ERUs/CERs
- Reference Scenario: “Baseline” of GHG emissions without the project (incl. definition of methodology, description of project boundaries and potential leakages): e.g. use of coal / gas energy plant instead of renewables; definition of Crediting Period
- Monitoring plan
- CDM Small Scale Projects – incl. Renewables Projects up to 15 MW – require less documentation / verification

Realisation of JI- and CDM-Projects (2)

2nd Step: Validation of Emissions Reduction by an Independent Entity (IE)

- IE must be acknowledged by host and investor state
- PDD (incl. methodology) must be published and is subject to public comment / objections; IE must consider such comments in its report
- CDM Executive Board to observe the entire process and to register the project; JI-Supervisory Committee still to be constituted

3rd Step: Realization of the project in accordance with the monitoring plan

- Permanent documentation of the emissions required

4th Step: Certification of Successful Completion by a different IE

- CDM Executive Board / JI-Supervisory Committee to issue certificates ("CER"s / "ERU"s) upon such certification

- Definition of Additionality-Criterion still lacking; uncertain to what extent the registration of an ongoing project by the CDM Executive Board provides legal protection in this respect
- Methodologies of Baseline Definition under ongoing discussion
- Formal Procedures for evaluation and certification of emission reductions need further definition (some basics have been defined in the Marrakech Accords)
- Administrative body for JI-Projects still to be established; CDM Executive Board to be confirmed (potentially reshaped ?) during the 1. MOP in Nov / Dec 2005
- Cumulation of Technical, Political and Economic Risks: uncertainty in further development of KP system (2013 onwards), devaluation of EU MS allowances etc.

- National and multi-national funds to sponsor projects and acquire CERs/ERUs, such as
 - World Bank: Prototype Carbon Fund (PCF)
 - EIB: Climate Change Financing Facility
 - Netherlands: ERUPT / CERUPT Funds
 - Germany: KfW-Klimaschutzfonds (PPP structure)
 - further ambitious fund projects in EU MS such as Italy, Austria, Belgium, Denmark, Spain
- EU MS or other countries with difficulties to comply with KP goals
- Companies subject to the EU ETS
- Private Investors (e.g. Spanish Funds Project)
- Others, e.g. NGOs

- Standard Forms for Purchase of Allowances or ERUs / CERs provided i.a. by IETA (International Emissions Trading Association)
 - National legislation may allow for acquisition of allowances in good faith on the basis of respective national Public Registers (intricate conflicts of laws issues need to be resolved).
 - Forwards being traded at various stock markets, including Chicago Climate Exchange and EEX in Leipzig / Germany
- Project Contracts: issues to deal with include
 - Appropriate Risk Matrix as well as clear attribution of mutual responsibilities for the entire process (incl. filing of documents with competent agencies, handling of the formal proceedings to obtain credits, including interstate agreement on transfer of emission rights)
- CERs/ERUs and/or revenues generated out of such credits may be used as collateral for lenders

The Speaker



Dr. Norbert Wimmer is an equity partner in the firm's Berlin office and heading the office's Regulated Industries / Public Affairs department. He is a member of the firm's EIPF (Energy, Infrastructure and Project Finance) and Environmental Practice Groups.

Norbert Wimmer has considerable working experience with German and European public institutions such as KfW Kreditanstalt für Wiederaufbau, various German Federal Ministries, whom he currently advises on major German PFI/PPP projects. He also assists private investors in obtaining approvals or permits required for their respective projects. In terms of industry experience, he has a focus in the transport industry (aviation, highways) as well as in the utilities sector, including various PPP projects.

Contact:

Dr. Norbert Wimmer

White & Case, Berlin Office

phone: 011 49 30 880 911 0

email: nwimmer@whitecase.com

As to renewables, he currently acts as an advisor to the developer and operator of the largest solar energy plant worldwide to date, he advises with regard to new solar energy projects (in Germany and in Spain) and advises the lenders on a major offshore windfarm project in the North Sea.

White & Case: 34 Offices in KP Signatory States

WHITE & CASE

AMERICAS

Los Angeles
Mexiko City
Miami
New York
Palo Alto
San Francisco
São Paulo
Washington, D.C.

AMERICA
860 Lawyers

EMEA
860 Lawyers

ASIA
180 Lawyers

ASIA

Bangkok
Beijing
Ho Chi Minh City
Hong Kong
Mumbai
Shanghai
Singapore
Tokyo

EUROPE, MIDDLE EAST, AFRICA

Almaty
Ankara
Berlin
Bratislava
Brussels
Budapest
Dresden
Düsseldorf
Frankfurt
Hamburg
Helsinki
Istanbul
Johannesburg
London
Milan
Moscow
Paris
Prague
Riyadh
Rome
Stockholm
Warsaw



BOLD PRINT: 27 offices in states that have ratified KP,
italics: 7 offices in signatory states that have not ratified.