COMPLIANCE COMMITTEE CC/13/2013/4
11 September 2013

Possible implications for the work of the Compliance Committee in the second commitment period arising from decision 1/CMP.8 and from the provisions of the annex to decision 27/CMP.1 related to the first commitment period

Note by the secretariat

I. Background

1. By decision 1/CMP.8, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) adopted an amendment to the Kyoto Protocol (Doha Amendment). The Amendment establishes the second commitment period under the Protocol and defines a number of commitment-period specific rules. The cover decision, through which the Amendment was adopted, further defines modalities for the second commitment period and sets out a number of general provisions related to the legal nature of the Amendment pending its entry into force.

2. At the same session, the CMP adopted decision 2/CMP.8 to introduce a number of changes to the accounting and reporting rules set out in decisions adopted at the first session of the CMP (CMP.1). Through this decision, the CMP also requested the Subsidiary Body for Scientific and Technological Advice (SBSTA) to continue to assess and address the implications of the implementation of decisions 2/CMP.7 to 4/CMP.7, as well as those of decision 1/CMP.8, on the relevant decisions adopted for the first commitment period, with the aim of finalizing its consideration and proposing for consideration and adoption at CMP.9 any changes to such decisions.

3. At its twelfth meeting in March 2013, the plenary of the Compliance Committee considered an update provided by the secretariat on the outcomes of CMP.8. It discussed a number of issues which could have implications for the work of the Committee in the second commitment period. Some of these arise from the Doha Amendment and the text of decision 1/CMP.8. The Committee also noted that there are several provisions in the annex to decision 27/CMP.1 with direct references to the first commitment period. It agreed that the wording of these might need to be considered from the point of view of their application in the second commitment period.

4. In view of the above, the plenary of the Compliance Committee requested the secretariat to prepare a background note for its next meeting addressing any possible implications for its work related to the second commitment period concerning:

(a) The timing of the entry into force of the Doha Amendment;

(b) The requirements contained in decision 1/CMP.8 with regard to eligibility to transfer and acquire assigned amount units, certified emission reductions, emission reduction units and removal units; and

(c) The provisions of the annex to decision 27/CMP.1, in particular those which refer to the first commitment period.

5. This note has been prepared in response to the above request.

II. Implications arising from the timing of the entry into force of the Doha Amendment

A. Legally-binding effect

6. In accordance with Article 20, paragraph 4, of the Kyoto Protocol, an amendment to the Protocol shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three fourths of the Parties to the Protocol. Furthermore, Article 21, paragraph 7, stipulates that amendments to Annexes A and B of the Protocol shall be adopted and enter into force in accordance with the procedure set out in Article 20.

7. Based on the current number of Parties to the Protocol, a total of 144 instruments of acceptance are required for the entry into force of the Doha Amendment. As of 10 September 2013, three instruments of acceptance had been received by the Depositary. It is as yet not possible to determine when the number of instruments of acceptance that will enable the entry into force of the Doha Amendment will be received.

8. It is also worth noting that when the Amendment enters into force, it will do so only for those Parties that have accepted it. For the purposes of the compliance mechanism under the Protocol, the acceptance of the Doha Amendment by Annex I Parties with commitments inscribed in the third column of Annex B in the Amendment could be of special importance, as it is their compliance that the Committee will be tasked with assessing.

9. Through paragraph 5 of decision 1/CMP.8 the CMP recognized that Parties may provisionally apply the Amendment pending its entry into force in accordance with Articles 20 and 21 of the Kyoto Protocol, and decided that they will provide notification of any such provisional application to the Depositary.

10. Provisional application under Article 25 of the Vienna Convention on the Law of Treaties could result in legally-binding effect of the relevant obligations. However, due to the opt-in arrangements set out in paragraph 5 of decision 1/CMP.8, the Amendment would only be applicable to the Parties that declared their intention to provisionally apply it. So far, no such declarations have been received by the Depositary.

11. Through paragraph 6 of decision 1/CMP.8, the CMP decided that Parties which do not provisionally apply the amendment in accordance with paragraph 5 of decision 1/CMP.8 will implement their commitments and other responsibilities in relation to the second commitment period, in a manner consistent with their national legislation or domestic processes, as of 1 January 2013 and pending the entry into force of the amendment in accordance with Articles 20 and 21 of the Kyoto Protocol. This provision, uses the term “will”, which indicates a strong collective intent and political commitment of Parties to implement their obligations under the Amendment pending its entry into force. However, given its deference to national legislation and domestic processes, the provision does not create a legally-binding effect like that of the entry into force or of formal provisional application.

B. Relevant timing of obligations

12. The compliance procedures and mechanisms under the Protocol were set up to determine and to address cases of non-compliance with its provisions (Article 18 of the Protocol). In

accordance with Section I of the "Procedures and mechanisms relating to compliance under the Kyoto Protocol",[1] they are aimed at facilitating, promoting and enforcing compliance with the commitments under the Protocol.

13. Compliance by Annex I Parties with their commitments under Article 3 of the Protocol is determined on the basis of information for the final year of a commitment period as reported by these Parties and reviewed by expert review teams. In the case of the second commitment period which ends in 2020,[2] such assessment is expected to take place sometime in 2023. Therefore, for the purposes of assessing compliance with the commitments under Article 3, paragraph 1 bis, of the Amendment the issue of the legally-binding nature of the commitments would become relevant in ten years time.

14. However, the Protocol and implementing decisions adopted by the CMP (e.g., decisions 15/CMP.1, 22/CMP.1, 27/CMP.1, and 2/CMP.8) set out a number of other obligations for Parties. While most of these, in particular those under Articles 5, 7 and 8 of the Protocol, are general obligations, they define reporting and methodological requirements and the guidelines for the review of compliance with these requirements and are therefore linked to and conditioned upon Article 3 commitments.

15. Issues of non-conformity with such general obligations could arise sometime in 2016, when the review of reports to facilitate the calculation of assigned amount pursuant to Article 3, paragraphs 7bis, 8 and 8bis, of the Doha Amendment for the second commitment period is expected to be completed.[3]

16. Given the above, the plenary may wish to defer its consideration of the issue of whether the Committee can review compliance with such general obligations pending the entry into force of the actual commitment contained in the Amendment until more information is available on the trends in the deposit of instruments of acceptance and the possible timing of the entry into force of the Doha Amendment.

III. Implications arising from requirements contained in decision 1/CMP.8 with regard to eligibility to transfer and acquire assigned amount units, certified emission reductions, emission reduction units and removal units

17. Paragraph 15 (a) of decision 1/CMP.8 reads (emphasis added):

> *15. Decides, with respect to joint implementation under Article 6 and emissions trading under Article 17 of the Kyoto Protocol, that:*
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> *(a) As of 1 January 2013, only a Party with a commitment inscribed in the third column of Annex B as contained in annex I to this decision* ***whose eligibility has been established in accordance with the provisions of paragraph 3 of the annex to decision 11/CMP.1 in the first commitment period, shall be eligible*** *to transfer and acquire CERs, AAUs, emission reduction units (ERUs) and removal units (RMUs) valid for the second commitment period under Article 17 of the Kyoto Protocol,* ***subject to the provisions of paragraph 3(b) of the annex to decision 11/CMP.1****.*

[1] Subsequent references to the procedures and mechanisms, as well as to sections, refer to the annex to decision 27/CMP.1.

[2] Decision 1/CMP.8, paragraph 4.

[3] Decision 2/CMP.8, paragraph 2. These reports are due on 15 April 2015, and the results of the review of these reports are expected to be available in early 2016.

18. The provision creates a concept of eligibility to transfer and acquire units which straddles two commitment periods.

19. The provision indicates that the CMP did not deem it necessary for Parties' eligibility to be established anew on the basis of their initial report for the second commitment period, particularly taking into account that such report will not have been reviewed until early 2016. The provision of paragraph 15 of decision 1/CMP.8 enables such Parties to continue trade in Kyoto Protocol units as long as they have not been suspended by the enforcement branch.

20. In this regard, it is worth noting that the CMP made a clear distinction between Parties whose eligibility has already been established and those whose initial and subsequent annual reports have not undergone review and compliance assessment in the first commitment period (see also decision 1/CMP.8, paragraph 16).

21. A question, however, has been raised as to whether the provision of paragraph 15, by linking eligibility in one commitment period to that in another, created a concept of continuous eligibility. In other words, if a Party is suspended for non-compliance with the first commitment period commitments, would its eligibility to trade second commitment period units continue to be suspended until the matter related to the first commitment period is resolved? Or would such eligibility be treated on commitment period by commitment period basis whereby suspension caused by failure to comply with obligations in the first commitment period would apply only to transfer of units valid for the first commitment period?

IV. Implications of the provisions of the annex to decision 27/CMP.1, in particular those which refer to the first commitment period

A. General changes of references to Article 3, paragraph 1

22. A number of provisions in the annex to decision 27/CMP.1 refer to commitments under or compliance with Article 3, paragraph 1, of the Kyoto Protocol.[4]

23. The plenary may wish to consider whether to recommend that the CMP clarify that for the purposes of the second commitment period, the appropriate references in the annex to decision 27/CMP.1 to Article 3, paragraph 1, should be read as referring to Article 3, paragraph 1bis, of the Kyoto Protocol.

B. Section IV, paragraph 6 (b) and (c)

24. Section IV, paragraph 6, addresses the mandate of the facilitative branch to promote compliance and provide for early warning of potential non-compliance by providing facilitation for compliance, with, inter alia, (b) commitments under Article 5, paragraphs 1 and 2, of the Protocol, prior to the beginning of the first commitment period, and (c) commitments under Article 7, paragraphs 1 and 4, prior to the beginning of the first commitment period.

25. The provisions are aimed at assisting Parties with the establishment of their national systems and registries and their preparation for the first reporting cycle under the Protocol. No

[4] Section IV, paragraphs 4 and 6 (a), Section V, paragraphs 4 (a) and 6, Section XI, paragraph 1, Section XII, Section XV, paragraph 5 (chapeau) and 5 (a).

actions have been initiated under these provisions prior to the beginning of the first commitment period.

26. Given that national systems, registries and reporting have been operational for most Annex I Parties for a number of years now, and given that the second commitment period has already begun, the provision would not become operational, even if the reference is changed from the first to the second commitment period.

27. At the same time, there are at least four Annex I Parties which did not have commitments in the first commitment period but which have such commitment inscribed in the third column of Annex B as contained in the Doha Amendment and for whom such commitments could enter into force if the conditions set out in Article 20 of the Protocol are met.

28. The plenary may wish to consider whether it wishes to recommend that the CMP address potential needs of such Parties for any assistance from the Compliance Committee, in particular, from the facilitative branch.

C. Section XV, paragraph 5 (a)

29. Section XV, paragraph 5 (a), sets out one of the possible consequences which the enforcement branch can apply when it determines that a Party's emissions exceeded its assigned amount and led to non-compliance with its commitments under Article 3, paragraph 1, in the first commitment period. In accordance with the provision, a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions is deducted from the Party's assigned amount for the second commitment period.

30. The paragraph has two potential issues in relation to its application in the second commitment period.

31. Firstly, because deduction is foreseen from the assigned amount for the second commitment period, the consequence set out in paragraph 5 (a) as is would not be applicable for non-compliance with the qualified emission limitation and reduction commitment at the end of the second commitment period. The reference would have to be either changed to "the subsequent" or "the third" commitment period, or another consequence would need to replace it. Otherwise, only consequences in subparagraphs (b) and (c) would be applicable.

32. Secondly, if the consequence set out in paragraph 5 (a) is made applicable to non-compliance situations at the end of the second commitment period, the CMP might wish to consider whether the rate of deduction of 1.3 times the amount in tonnes of excess emissions remains relevant or another rate should be established.

33. The plenary might wish to consider whether and how to bring this matter to the attention of the CMP.

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