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Consideration of further commitments for Annex I Parties under the Kyoto Protocol

Legal considerations relating to a possible gap between the first and subsequent commitment periods

Note by the secretariat*

Summary

This note provides information on the gap that may arise in relation to the entry into force of amendments to the Kyoto Protocol pursuant to its Article 3, paragraph 9, identifies legal options aimed at ensuring that there is no gap between the first and subsequent commitment periods and identifies and describes the legal consequences and implications of a such a gap.

* This document was submitted after the due date owing to the short interval between the twelfth and thirteenth sessions of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol.

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I. Introduction

A. Mandate

1. The Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP), at its twelfth session, requested the secretariat to prepare, for consideration by the AWG-KP at its thirteenth session, a paper that:

(a) Identifies and explores all the legal options available, including proposals by Parties, inter alia as contained in document FCCC/KP/AWG/2010/6/Add.1, aiming at ensuring that there is no gap between the first and subsequent commitment periods;

(b) Identifies the legal consequences and implications of a possible gap between the first and subsequent commitment periods.¹

B. Scope of the note

2. This document has been prepared in response to the mandate described in paragraph 1 above and is limited to a legal analysis of the issues identified in that mandate. It consists of an introduction and three substantive chapters.

3. Consideration of a gap between the first and subsequent commitment periods resulting from conditions other than those described in chapter II is beyond the scope of this paper.

C. Possible action by the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol

4. The AWG-KP may wish to consider information contained in this document with a view to identifying next steps in the conduct of an analysis of the legal aspects of the entry into force of proposed amendments to the Kyoto Protocol pursuant to its Article 3, paragraph 9, to avoid a gap between the end of the first commitment period and the beginning of the subsequent commitment period.

II. A possible gap between the first and subsequent commitment periods

5. Under Article 21, paragraph 7, of the Kyoto Protocol, amendments to Annex B are to be adopted and enter into force in accordance with the procedure set out in Article 20.² Amendments to the Kyoto Protocol and amendments to Annex B enter into force for those Parties having accepted them 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 Kyoto Protocol.³

¹ FCCC/KP/AWG/2010/7, paragraph 32.

² Article 20 also outlines the procedure for the adoption and entry into force of amendments to the Kyoto Protocol.

³ Article 20, paragraph 4, of the Kyoto Protocol.

6. The first commitment period of the Kyoto Protocol began on 1 January 2008 and will end on 31 December 2012. For a subsequent commitment period to begin on 1 January 2013, amendments to the Kyoto Protocol pursuant to its Article 3, paragraph 9, must enter into force on or before that date. To fulfil this condition:

(a) The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) will need to adopt these amendments at its sixth or seventh session;

(b) The Depository must receive instruments of acceptance from three fourths of the Parties to the Kyoto Protocol by 3 October 2012. Based on the current number of Parties to the Kyoto Protocol,⁴ 143 instruments of acceptance of the amendments will be needed to achieve this requirement.

7. If amendments to the Kyoto Protocol are adopted at the sixth session of the CMP, there will be less than two years for the amendments to enter into force. If amendments are adopted at the seventh session, there will be less than a year for the amendments to enter into force. Domestic ratification processes are likely to involve presenting the amendments adopted by the CMP to national legislative bodies, a process that may involve a considerable amount of time. Such procedures could result in a delay between the adoption of a decision to amend the Kyoto Protocol, including its Annex B, and the entry into force of such amendments. Without the use of any of the options identified in chapter III, a delay in the entry into force beyond 1 January 2013 would result in a gap between the end of the first commitment period and the beginning of the subsequent commitment period.

III. Legal options available to ensure that there is no gap between the first and subsequent commitment periods

A. Amendment to Articles 20 and 21 of the Kyoto Protocol

8. As noted in paragraph 5 above, amendments to the Kyoto Protocol and its Annex B require an 'opt-in' procedure⁵ for entry into force. However, alternative procedures are found in other treaties, which may allow for an expedited entry into force of amendments, for example:

(a) An 'opt-out' or tacit acceptance procedure whereby an amendment would enter into force after a certain period has elapsed following its adoption, except for those Parties that have notified the depositary that they cannot accept the amendment;⁶

(b) An opt-in procedure that would require a lower number of deposits of instruments of acceptance for the amendment to enter into force;⁷

⁴ As at 20 July 2010, there were 190 Parties to the Kyoto Protocol.

⁵ That is, a State is not bound by the amendment unless it undertakes a ratification procedure and deposits an instrument of acceptance with the Depository.

⁶ For example, Article 22, para. 3, of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998, 24 February 2004; 2244 U.N.T.S. 337; 38 I.L.M.1.

⁷ For example, Article XVII of the Convention on International Trade in Endangered Species of Wild Flora and Fauna 1973, 1 July 1975; 993 U.N.T.S. 243; 12 I.L.M. 1085.

(c) A hybrid procedure, which combines the opt-out or tacit acceptance procedure and an opt-in procedure by allowing the Party to elect one of the two procedures when it deposits its instrument of acceptance with the depositary;⁸

(d) An adjustment procedure, which allows adjustments to be made to annexes to an agreement through decisions taken by a convention or protocol body and become binding for Parties on a date specified in the relevant convention or protocol or decision.⁹

9. An opt-out procedure or adjustment procedure would not require a formal ratification procedure at the international level, but Parties would still need to ensure that their domestic legislation gives full effect to the amendment or adjustments. Different amendment procedures may be applied to different kinds of provisions in a treaty. For example, an opt-out or tacit acceptance procedure could be applied to annexes, while an opt-in procedure could be reserved for treaty text.

10. In order to apply any of the above options, amendments to Articles 20 and 21 of the Kyoto Protocol would be required to change the entry into force procedure for amendments to Annex B and for related and consequential amendments to the Kyoto Protocol. In view of this, and given that such amendments would be subject to the existing entry into force provisions in Article 20, this option would not assist in avoiding a gap between the end of the first commitment period and the beginning of the subsequent commitment period, but would be more relevant for subsequent commitment periods. Furthermore, because amendments adopted under Article 20 would only apply to those Parties that have deposited their instruments of acceptance to the amendment, amending the entry into force provisions of the Kyoto Protocol could result in a situation where the new entry into force procedures would apply to some Parties and not to others.

11. With respect to amendments to Annex B, several changes to the amendment procedure have been proposed.¹⁰ Specific proposals regarding the procedures to amend Annex B include:

(a) An amendment to Article 21 of the Kyoto Protocol to allow for changes to Annex B to be adopted in accordance with Article 21, paragraphs 3 and 4, provided that they have the written consent of the Party concerned. Such amendments would enter into force for all Parties six months after the date of the communication by the Depositary, except for those Parties that have notified the Depositary in writing, within that period, of their non-acceptance of the amendment.¹¹

(b) An amendment to Article 21 of the Kyoto Protocol to allow for changes to Annex B to be adopted by consensus, with the written consent of the Party concerned, and enter into force for all Parties six months after the date of the communication by the Depositary to such Parties of the adoption of the amendment to the annex.¹²

⁸ For example, Article 22 of the Stockholm Convention on Persistent Organic Pollutants, 2001, 17 May 2004, 2256 U.N.T.S. 119; 40 I.L.M. 532.

⁹ An example of this procedure is found in Article 2, paragraph 9, of the Montreal Protocol on Substances that Deplete the Ozone Layer (1522 U.N.T.S.3; 26 I.L.M.1541), where Parties may adopt adjustments by consensus or two-thirds majority vote with the power to bind all Parties. A similar approach is found in Article 13, paragraph 6, of the Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone (2319 U.N.T.S. 80).

¹⁰ For example, see documents FCCC/KP/AWG/2009/MISC.6 and FCCC/KP/AWG/2010/6/Add.1.

¹¹ FCCC/KP/AWG/2009/MISC.6, page 10.

¹² FCCC/KP/AWG/2010/6/Add.1, Section M, "Article 21".

(c) An amendment to Article 9 of the Kyoto Protocol to allow for amendments to Annex B to be adopted by the CMP by a four-fifths majority vote, if all efforts to reach agreement by consensus have been exhausted. Such amendments would enter into force six months after the adoption, unless the CMP decides otherwise, together with the adoption of the amendment.¹³

12. A proposal has also been made to link the application of commitments for a subsequent commitment period under Article 3, paragraph 1, of the Kyoto Protocol to the date of the entry into force of a new agreement under the Convention.¹⁴

13. Variations on these options would be possible, for example with respect to the voting majority, the need to obtain written consent from the Party concerned or a hybrid option that allows Parties to nominate the use of the current ratification procedure or an opt-out procedure.¹⁵ In addition, procedural amendments could be adopted in anticipation of substantive amendments, for example simplified procedural amendments could be adopted at CMP 6, with the expectation that they enter into force in time to apply to any substantive amendments adopted at CMP 7. Furthermore, there may be an interaction between the voting majority required, the written consent of the Party concerned and the type of entry into force procedure in order to ensure a balance between expedited entry into force and preserving a State's sovereignty to decide to be bound by an amendment.

14. In relation to amendments to the Kyoto Protocol, consequential amendments may be required. For example, Article 3, paragraph 1, and Article 3, paragraph 7, contain the operative provisions that apply the commitments contained in Annex B. Thus any approach that seeks to 'streamline' the entry into force of amendments to Annex B will also need to address the entry into force of related or consequential amendments to the Kyoto Protocol. The same range of procedural options for the entry into force of such consequential amendments to the Kyoto Protocol discussed in the preceding paragraphs would apply.

B. Provisional application of an amendment to the Kyoto Protocol

15. The 1969 Vienna Convention on the Law of Treaties¹⁶ (VCLT) provides for provisional application of a treaty in its Article 25, which reads as follows:

1. A treaty or a 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 so agreed;
2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a 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.

¹³ FCCC/KP/AWG/2010/6/Add.1, Section L, "Optional: Majority Voting and quick entering into force". But note that when read with paragraph 3 of the same section the written consent of the Party concerned is required for the adoption of amendments to Annex B.

¹⁴ FCCC/KP/AWG/2010/6/Add.1, Section C, "Article 3, paragraph 1 ter". This proposal contemplates the adoption of a new agreement under the Convention.

¹⁵ FCCC/KP/AWG/2009/MISC.6, page 9.

¹⁶ Vienna Convention on the Law of Treaties 1969, 27 January 1980, 1155 U.N.T.S. 331; 8 I.L.M. 679.

16. Provisional application has been used, *inter alia*, to prevent legal gaps between successive treaty regimes, for example in commodity agreements such as the 1994 United Nations International Tropical Timber Agreement.¹⁷

17. Numerous international agreements have been applied on a provisional basis, providing precedent for flexibility in designing methods of provisional application with respect to timing, scope, and effect of provisional application. For example, the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea provides a precedent for a treaty to set a fixed date for provisional application to enter into effect;¹⁸ while the International Coffee Agreement provides for provisional entry into force if the formal criteria for entry into force have not been met within a given period.¹⁹ Other provisions on provisional application provide for a date of termination of provision application.²⁰ Although Article 25, paragraph 1(b), of the VCLT contemplates negotiating states providing for provisional application in a manner other than inclusion in a treaty itself, most of the precedents provide for provisional application in the treaty itself or in a separate protocol to the treaty. There are few examples of provisional application being applied by way of a decision of a governing body.²¹

18. With respect to the legal effect of provisional application, the International Law Commission concluded that “there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis”.²²

19. Provisional application may give rise to concerns regarding compatibility with domestic legal systems. For example, there may be restrictions in domestic law that preclude the use of provisional application where there would be an inconsistency or conflict with existing domestic law or a domestic legal system could preclude the use of provisional application.

20. The concern about the compatibility of provisional application with domestic legal systems has been addressed in other instruments by the inclusion of specific qualifications. For example, provisional application has been qualified as follows “Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations”.²³

21. In the context of the AWG-KP, a proposal has been made to include in the CMP decision which adopts the amendments to Annex B and consequential amendments a provision

¹⁷ United Nations International Tropical Timber Agreement 1994, 1 January 1997, 1955 U.N.T.S. 81; 33 I.L.M. 1014.

¹⁸ The 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.

¹⁹ The International Coffee Agreement 2001, 28 September 2000, 2161 U.N.T.S. 308; 33 I.L.M. 1309.

²⁰ For example, see the Treaty on Open Skies of the Organization for Security and Co-operation in Europe, 24 March 1992, which provides for a date for termination of provisional application.

²¹ 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”.

²² Report of the International Law Commission on the Work of its Eighteenth session”, YILC 1966, Vol. II, at 210.

²³ See Energy Charter Treaty art. 45(1), Dec. 17, 1994, 2080 U.N.T.S. 95; 34 I.L.M. 360, 409.

to apply those amendments on a provisional basis until the entry into force of the amendments for each Party.²⁴

22. While the legal effect of provisional application is binding, its operation is still dependent on States consenting to be bound. So the act of agreeing to provisional application is essentially one of a voluntary nature. In addition, any qualifications included in a provisional application provision to accommodate domestic legal systems may give rise to uncertainty regarding the application of a treaty within a State. Therefore, provisional application may not alleviate uncertainty with respect to the timing of a subsequent commitment period or the application of the amendments within a State.

C. Extending the first commitment period

23. Article 3, paragraph 1, of the Protocol establishes the core commitment of Parties included in Annex I (Annex I Parties). It indicates the scale of reductions in carbon dioxide equivalent (CO₂ eq) emissions of greenhouse gases listed in Annex A to be achieved by these Parties in the first commitment period. This scale is defined in terms of aggregate CO₂ eq emissions of these gases not exceeding Parties' assigned amounts, calculated pursuant to their quantified emission limitation or reduction commitment (QELRO)²⁵ inscribed in Annex B. Article 3, paragraph 9, provides that commitments for subsequent periods for Annex I Parties shall be established in amendments to Annex B, which shall be adopted in accordance with the provisions of Article 21, paragraph 7.

24. There are various options which could be used to extend the first commitment period. For example, the same QELROs to be applied to an extended first commitment period (e.g. until 2014) or the same QELROs to be applied in a specific time period immediately following the first commitment period (e.g. from 2013 to 2014) in order to bridge any gap and provide for continuity to assist Parties in meeting their QELROs for the subsequent commitment period.

25. An extension to the first commitment period would require an amendment to Annex B and related provisions of the Protocol. As explained in paragraph 7 above, treaty-level amendments can take time to enter into force. Therefore an amendment to extend the first commitment period would involve the same issues relating to delay.

26. An amendment to extend the first commitment period could, however, be provisionally applied. The provisional application clause could be included either in the amendment to the Kyoto Protocol itself or in a CMP decision adopting such amendments in accordance with Articles 20 and 21 of the Kyoto Protocol.

27. As noted in paragraph 3 above, the scope of this paper is limited to a ratification gap, that is, a delay between the adoption of amendments with respect to the subsequent commitment period and their entry into force. In this context, an extension of the first commitment period may be a means to address concerns raised regarding the compatibility of domestic law with provisional application of new QELROs for the subsequent commitment

²⁴ FCCC/KP/AWG/2010/6/Add.1, page 2.

²⁵ The AWG-KP, at its resumed sixth session, agreed that further commitments for Annex I Parties should, for the next commitment period, principally take the form of quantified emission limitation or reduction objectives (QELROs). Article 3, paragraph 1, of the Kyoto Protocol uses the term quantified emission limitation and reduction commitments. This paper assumes that both terms refer to the same concept and uses the term QELRO throughout.

period, in that the application of the same QELROs, albeit over a longer time frame, may be more easily accommodated in existing domestic law. That said, domestic legal procedures may still need to be followed in such a case.

28. Any revisions to CMP decisions would depend on whether, and how, Parties decide to extend the first commitment period. If the first commitment period were to be extended, Parties would have to consider whether a new calculation for QELROs or assigned amount would be required. Further, an extension may delay the timeline of the true-up and the time at which the enforcement branch of the Compliance Committee could entertain questions of implementation with respect to Annex I Parties for non-compliance with their QELROs under Article 3, paragraph 1.²⁶

29. Alternatively, the CMP could decide to extend the first commitment period by way of a decision acting in accordance with Article 13, paragraph 4, of the Kyoto Protocol (as distinguished from a decision under Article 20 or 21). However, such a decision would not be legally binding, rather, it would be a political commitment to extend the commitment period. Such a CMP decision could also provide political guidance on matters such as the QELROs for such an extension, the length of the extension period, reporting obligations and impacts on the mechanisms under Articles 6, 12 and 17 of the Kyoto Protocol.

IV. Legal consequences and implications of a possible gap between the first and subsequent commitment periods

A. Introduction

30. The Kyoto Protocol is an agreement that provides a framework of institutions and commitments over an indefinite period, despite the fact that QELROs for Annex I Parties are established commitment period by commitment period. Thus, not all institutions and obligations are necessarily affected by a gap.

31. In addition, based on relevant provisions of the Kyoto Protocol and decisions of the CMP, the following activities relating to the first commitment period are envisaged to occur after 31 December 2012:

(a) The acquisition and transfer of emission reduction units (ERUs), certified emission reductions (CERs), assigned amount units (AAUs) and removal units (RMUs)²⁷ under Articles 6, 12 and 17 of the Protocol for the purpose of fulfilling commitments under Article 3, paragraph 1, of the Kyoto Protocol relating to the first commitment period until one hundred days after the date set by the CMP for the completion of the expert review process under Article 8 of the Kyoto Protocol, otherwise known as the true-up period;²⁸

(b) The submission by Annex I Parties with a commitment inscribed in Annex B of annual reports covering the final year of the commitment period and the reports upon the expiration of the true-up period;²⁹

²⁶ This is because an assessment cannot take place until all reports from the first commitment period have been reviewed.

²⁷ Hereinafter collectively referred to as "Kyoto Protocol units".

²⁸ Decision 27/CMP.1, annex, section XIII.

²⁹ Decision 13/CMP.1, annex, paragraph 49, and decision 15/CMP.1, annex, paragraph 20.

(c) The review of the annual report covering the final year of the commitment period and the conduct of a compliance assessment;³⁰

(d) The consideration by the enforcement branch of the Compliance Committee of any questions of implementation arising from the review described in paragraph 31 (c) above.³¹

32. The discussion in the succeeding sections distinguishes between processes and institutions that will continue beyond 2012 because of the activities relating to the true-up period, and those that will continue for purposes that do not relate to the first commitment period.

33. The legal consequences and implications discussed below assume that any amendments to be adopted by the CMP would be of the nature set out in the documentation to facilitate negotiations among Parties³² and that none of the options listed in chapter III are applied to address a possible gap between the first and the subsequent commitment periods.

B. Commitments under the Kyoto Protocol

1. Quantified emission limitation and reduction commitments of Annex I Parties

34. Article 3, paragraph 1, of the Kyoto Protocol provides that Annex I Parties shall, individually or jointly, ensure that their aggregate CO₂ eq emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their QELROs inscribed in Annex B and in accordance with the provisions of Article 3. Assigned amounts for the first commitment period are calculated pursuant to Article 3, paragraph 7.

35. If provisions relating to a subsequent commitment period are not in force by 1 January 2013, no QELROs at the international level would apply to Annex I Parties after 31 December 2012 for their CO₂ eq emissions after that date. In addition, since the assigned amount defined in Article 3, paragraph 7, of the Kyoto Protocol only relates to the first commitment period, an Annex I Party will be considered not to have an assigned amount during the gap period. The absence of QELROs and assigned amounts will have other consequences that are discussed below.

2. Maintenance of a national system

36. Article 5, paragraph 1, of the Kyoto Protocol requires each Annex I Party to have a national system for the estimation of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol. The obligation to maintain a national system is not linked to the existence of a commitment period. However, one of the objectives of a national system is to assist Parties included in Annex I in meeting their commitments under Articles 3 and 7.³³ Since there are no commitments under Article 3 during the gap period, it is doubtful whether there is an obligation to maintain a national system under the Kyoto Protocol during a gap. Although Annex I Parties would still be required to prepare an inventory under Article 12, paragraph 1(a), of the Convention, a national system is not a formal requirement under the Convention. Thus, no question of implementation relating to compliance with the methodological and reporting requirements under Article 5, paragraphs 1 and 2, of the

³⁰ Decision 13/CMP.1, annex, paragraph 14, and decision 22/CMP.1, annex, paragraphs 89 to 91.

³¹ Decision 27/CMP.1, annex, section V, paragraph 4 (a).

³² FCCC/KP/AWG/2010/6/Add.1.

³³ Decision 19/CMP.1, annex, paragraph 5 (b).

Protocol could be raised by expert review teams in relation to any reports covering the gap period.

3. Maintenance of a national registry

37. Each Annex I Party is required to establish and maintain a national registry to ensure the accurate accounting of the issuance, holding, transfer, acquisition, cancellation and retirement of Kyoto Protocol units and the carry-over of ERUs, CERs and AAUs.³⁴ It is unclear whether the obligation to maintain a national registry would continue after the completion of the compliance assessment and any compliance procedures, if the gap persists. However, maintaining a national registry beyond this period may be necessary in order to hold Kyoto Protocol units that need to be carried over to the subsequent commitment period.³⁵ That said, it would also be necessary to take into account paragraph 36 of the annex to decision 13/CMP.1, which concerns the cancellation of ERUs, CERs and AAUs that have not been carried over after the additional period for fulfilling commitments has ended.

4. Articles 10 and 11

38. Article 10 of the Kyoto Protocol seeks to advance existing commitments under Article 4, paragraph 1, of the Convention. The commitments in Article 10 of the Kyoto Protocol would remain in force even if there is a gap, as these provisions do not refer to commitment periods or any conditions relating to commitments under Article 3. The same can be said about the financial commitments of developed country Parties and Parties included in Annex II to the Convention, as set out in Article 11 of the Kyoto Protocol.

5. Reporting

39. Article 7, paragraph 1, of the Kyoto Protocol requires each Annex I Party to incorporate supplementary information in its annual inventory for the purpose of ensuring compliance with Article 3. If the commitments under Article 3 are not in effect due to a gap, it could be argued that the Annex I Parties are not required to submit supplementary information under Article 7, paragraph 1, of the Kyoto Protocol for the period covering the gap and are entitled to submit annual reports on the basis of the UNFCCC reporting guidelines.³⁶ However, Parties may choose to report supplementary information on a voluntary basis for the period pertaining to a gap.

40. Article 7, paragraph 2, of the Kyoto Protocol requires Annex I Parties to incorporate supplementary information in the national communications submitted under Article 12 of the Convention. The purpose of such supplementary information is to demonstrate compliance with that Party's commitments under the Kyoto Protocol. Since Article 7, paragraph 2, in contrast to Article 7, paragraph 1, speaks more broadly of commitments under the Kyoto Protocol, it could be argued that a gap would not affect the obligation of Parties to provide the supplementary information in their national communications.

³⁴ Decision 13/CMP.1, annex, paragraph 17.

³⁵ Decision 13/CMP.1, annex, paragraph 15.

³⁶ "Guidelines for the preparation of national communications by Parties included in Annex I to the Convention, Part I: UNFCCC reporting guidelines on annual inventories", contained in document FCCC/SBSTA/2006/9.

6. Review under Article 8

41. The conduct of reviews under Article 8 of the Kyoto Protocol and the guidelines adopted thereunder would depend on whether reports under Article 7 of the Kyoto Protocol are required to be submitted for the period covering the gap. If a report under Article 7, paragraph 1, is not required, then the provisions for expert review under Article 8 would not apply. If Annex I Parties continue to be under obligation to report information covering the period of a possible gap under Article 7, paragraph 2, any information submitted under this provision would be reviewed under Article 8 of the Kyoto Protocol. If reports under Article 7 covering the gap period have to be submitted, complications may arise during the review, as there may be disagreement between the Party and the expert review team about what supplementary information needs to be reported on and reviewed.

C. Emissions trading and the project-based mechanisms

1. Joint implementation

42. Decisions taken by the Conference of the Parties (COP) and the CMP relating to the institutional framework of joint implementation (JI), in particular the Joint Implementation Supervisory Committee, are not expressly conditioned on the existence of a commitment period.³⁷ Article 6, paragraph 1, of the Kyoto Protocol provides that any Annex I Party may transfer to, or acquire from, any other such Party ERUs for the purpose of meeting its commitment under Article 3.

43. Since the absence of commitments under Article 3 could frustrate the purpose of JI, one view could be that a gap would cause the suspension of activities relating to JI that do not relate to the first commitment period.

44. An alternative interpretation is that the absence of commitments under Article 3 would only prevent ERUs from being transferred or acquired during the gap. Following this interpretation, the fact that there would be no transfers or acquisitions of ERUs during the gap period would not necessarily prevent projects from continuing or being undertaken – the generation of ERUs being distinct from their transfer and acquisition. However, it is unclear on what basis ERUs could be issued by a host Party.

2. The clean development mechanism

45. As a general rule, neither the text of the Kyoto Protocol, nor the subsequent decisions of the COP³⁸ and the CMP³⁹ explicitly link the clean development mechanism (CDM) to the first commitment period of the Kyoto Protocol.

46. Article 12, paragraph 2, of the Kyoto Protocol provides that the purpose of the CDM shall be to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3. A key question in determining the legal consequences and implications of a gap for the CDM is the characterization of this stated purpose.

³⁷ Decisions 16/CP.7, 9/CMP.1, 10/CMP.1, 2/CMP.2 and 3/CMP.5.

³⁸ Decisions 21/CP.8, 18/CP.9 and 12/CP.10.

³⁹ Decisions 1/CMP.1, 3/CMP.1, 4/CMP.1, 5/CMP.1, 1/CMP.2, 2/CMP.3, 9/CMP.3, 2/CMP.4 and 2/CMP.5.

47. If the fulfilment of the purpose set out in Article 12, paragraph 2, is considered to be a mandatory condition, then the absence of QELROs because of a gap would frustrate the purpose of the CDM and argue against its continuation beyond the true-up period. Under this interpretation, no new CDM project activities could be validated or registered, emission reductions or removals that occurred after the first commitment period could not be verified, and corresponding CERs could not be issued.

48. If it is sufficient for CDM project activities to meet some but not all of the elements of its stated purpose, it could be argued that the absence of QELROs during the gap period would not prevent the continuation of the CDM. Under this interpretation, new CDM project activities could be validated and registered, emission reductions or removals that occurred after the first commitment period could be verified, and corresponding CERs could be issued.

49. If the interpretation described in paragraph 48 above were accepted, the CMP would need to clarify which modalities and procedures for afforestation and reforestation project activities under the CDM would apply after 31 December 2012, since the modalities and procedures contained in the annexes to decisions 5/CMP.1 and 6/CMP.1 apply only to the first commitment period.⁴⁰

3. Emissions trading

50. Article 17 of the Kyoto Protocol provides that Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3, and that any such trading is to be supplemental to domestic actions for the purpose of meeting QELROs under that Article. Provisions on emissions trading do not tie this mechanism to a commitment period.

51. In the absence of commitments under Article 3 it is unclear whether Parties included in Annex B could participate in emissions trading during a gap, save for transactions relating to the true-up period. Transfers between registries also appear unlikely, since the modalities for the accounting of assigned amounts only provide rules for Kyoto Protocol units and transactions that are linked to particular commitment periods.⁴¹

D. Compliance

52. The operation of the procedures and mechanisms relating to compliance adopted under Article 18 of the Kyoto Protocol and contained in the annex to decision 27/CMP.1 is not conditional on the existence of a commitment period. This decision provides that the objective of the procedures and mechanisms relating to compliance is to facilitate, promote and enforce compliance with commitments under the Kyoto Protocol.⁴² An examination of the mandates of the two branches of the Compliance Committee (the facilitative branch and the enforcement branch) indicates that the commitments referred to are not confined to those set out in Article 3 of the Kyoto Protocol. Thus, one argument could be that the procedures and mechanisms relating to compliance remain in operation during the gap period.

53. On the other hand, the ability of the branches of the Compliance Committee to exercise parts of their mandate in relation to the gap will depend on whether the particular commitments

⁴⁰ Decision 5/CMP.1, paragraph 2, and decision 6/CMP.1, paragraph 2.

⁴¹ Decision 13/CMP.1, annex, chapter II.

⁴² Decision 27/CMP.1, annex, section I.

are considered to be in force during the gap. For instance, the enforcement branch could not determine that an Annex I Party is not in compliance with its methodological and reporting requirements under Article 5, paragraphs 1 and 2, and Article 7, paragraphs 1 and 4, of the Kyoto Protocol if there is no obligation to maintain a national system or a national registry during the gap period.⁴³

54. Certain consequences applied by the enforcement branch of the Compliance Committee in relation to the first commitment period may be of questionable efficacy in the event of a gap. For example, if an Annex I Party is declared in non-compliance with its commitments under Article 3, paragraph 1, of the Kyoto Protocol for the first commitment period, deductions to that Party's assigned amount in the subsequent commitment period could not be effected until the subsequent commitment period actually begins.⁴⁴ Moreover, the time for any non-complying Party to meet its QELRO in the subsequent commitment period could be considerably shortened by the delay in the start of this period, thereby jeopardizing that Party's efforts to bring itself into compliance.

E. Adaptation Fund

55. Given that decisions by the COP⁴⁵ and the CMP⁴⁶ do not explicitly reference commitment period(s) of the Kyoto Protocol or its Annex B, and funding has been made available for initial operational expenses, a gap will not affect the existence of the Adaptation Fund per se. However, long-term financing of the Fund may be affected by a decline in the issuance of CERs during an ensuing gap period. This, however, should not affect the ability of Parties to make voluntary contributions to the Fund.

⁴³ Decision 27/CMP.1, annex, section V, paragraph 4 (b).

⁴⁴ Decision 27/CMP.1, annex, section XV, paragraph 5 (a).

⁴⁵ Decision 10/CP.7.

⁴⁶ Decisions 28/CMP.1, 5/CMP.2, 1/CMP.3 and 1/CMP.4.