

27 February 2009

ENGLISH ONLY

UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

**AD HOC WORKING GROUP ON FURTHER COMMITMENTS
FOR ANNEX I PARTIES UNDER THE KYOTO PROTOCOL**

Seventh session

Bonn, 29 March to 8 April 2009

Item 5 (g) of the provisional agenda

Other issues arising from the implementation of the work programme of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol

Legal matters arising from the mandate of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol

**Views on the legal implications arising from the work of the
Ad Hoc Working Group on Further Commitments for
Annex I Parties under the Kyoto Protocol pursuant
to Article 3, paragraph 9, of the
Kyoto Protocol**

Submissions from Parties

1. The Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP), at its fourth session, invited Parties to submit to the secretariat, by 15 February 2009, their views on legal implications arising from the work of the AWG-KP pursuant to Article 3, paragraph 9, of the Kyoto Protocol (FCCC/KP/AWG/2007/5, paragraph 23 (a)).
2. The secretariat has received four such submissions. In accordance with the procedure for miscellaneous documents, these submissions are attached and reproduced* in the language in which they were received and without formal editing.

* These submissions have been electronically imported in order to make them available on electronic systems, including the World Wide Web. The secretariat has made every effort to ensure the correct reproduction of the texts as submitted.

CONTENTS

	<i>Page</i>
1. BELARUS (Submission received 16 February 2009)	3
2. CZECH REPUBLIC ON BEHALF OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES* (Submission received 6 February 2009).....	5
3. JAPAN (Submission received 17 February 2009)	7
4. NEW ZEALAND (Submission received 16 February 2009)	8

* This submission is supported by Albania, Bosnia and Herzegovina, Croatia, Montenegro, and The former Yugoslav Republic of Macedonia.

The Ministry of Natural Resources and Environmental Protection
of the Republic of Belarus

**Submission on legal implications arising from the work of
the Ad Hoc Working Group on Further Commitments
for Annex I Parties under the Kyoto Protocol**

in accordance with document FCCC/KP/AWG/2007/5 para 23 (a) and
FCCC/KP/AWG/2008/L.19 para 10
of the Ad Hoc Working Group on Further Commitments
for Annex I Parties under the Kyoto Protocol

Introduction

The Republic of Belarus welcomes the proposal of Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) to provide its views on the legal implications arising from the work of AWG-KP pursuant to Article 3, paragraph 9, of the Kyoto Protocol, as contained in documents FCCC/KP/AWG/2007/5, paragraph 23 (a) and FCCC/KP/AWG/2008/L.19 paragraph 10, and to exchange views on this matter.

**Legal implications arising from the work of AWG-KP pursuant to
Article 3, paragraph 9, of the Kyoto Protocol**

The Republic of Belarus considers that the actions on improvement of legal framework of UNFCCC and the Kyoto Protocol should be directed to integrity and coordination of both international agreements and to absolute and effective implementation of its basic provisions. In parallel, it is necessary to provide more flexible framework for possibility to introduce corrections (amendments), also when voluntary commitments are assumed by countries.

Particularly, such commitments for subsequent periods for the Annex I Parties pursuant to Article 3, paragraph 9, of the Kyoto Protocol are set in accordance with provisions of Article 21, paragraph 7 and Article 20 of the Kyoto Protocol. Analysis of these provisions and the known precedent of their practical application in connection to adoption of the “Belarusian amendment” shows, first of all, unreasonably long procedure of entry of such amendment into force, secondly, legal uncertainty of such amendment in respect of Parties which have not ratified it. It is necessary to have in view that based on provision of Vienna

Convention (para4, Article 39) the amendment agreement does not bind Parties to the main agreement if they have not adopted the amendment. The Party that has adopted the amendment is considered to be a participant of the amended agreement and in parallel participant of the former agreement concerning those Parties who have not adopted the amendment. The stated rule acts also with regard to the country, which has become a Party to the agreement after entry into force of an amendment to this agreement concerning any Party to the agreement who is not bound by the amendment. Generally speaking, adoption of amendments and conclusion of agreement on modification of multiparty agreements among determined participants leads to inequivalent content of the Convention text with regard to all Parties, due to the fact that amended agreement will act only in relations among Parties which have ratified it; as to the Parties, which have not ratified it, the initial version of the agreement will be applied.

We suppose that when the new post-Kyoto agreement is prepared, the experience obtained should be taken into account, as well as all possible legal implications and uncertainties.

Conclusion

According to the above opinion of the Republic of Belarus, the main legal implication resulting from implementation of Article 3, paragraph 9, of the Kyoto Protocol is the need of discussion on and elaboration of more thorough procedure and mechanism of introduction of amendments into the subsequent international climate change agreement.

PAPER NO. 2: CZECH REPUBLIC ON BEHALF OF THE EUROPEAN COMMUNITY
AND ITS MEMBER STATES

**This submission is supported by Albania, Bosnia and Herzegovina, Croatia,
the Former Yugoslav Republic of Macedonia and Montenegro**

**Subject: Legal implications arising from the work of the AWG-KP
(AWG-KP)
Views on the legal implications arising from the work of the
AWG-KP pursuant to Article 3, paragraph 9, of the Kyoto
Protocol**

Mandate of the AWG-KP

1. The Mandate of the AWG-KP derives from Article 3(9) of the Kyoto Protocol and decision 1/CMP.1, as subsequently interpreted by the Parties, most importantly in the conclusions agreed on the wide-ranging work plan at the second session of the AWG in Nairobi in November 2006 (FCCC/KP/AWG/2006/4). The EU considers that the broad-ranging work plan has already been agreed, and stands unless the Parties, by consensus, decide otherwise. Some Parties have recently suggested that the mandate may be limited only to amending Annex B, as this amendment alone is mentioned in Article 3(9). In this context, it should be noted that it is not possible to give legal effect to amendments of Annex B or under Article 3(9) without other wider amendments (for example, to Article 3). In any event, Articles 20 and 21 of the Protocol provide the mandate needed to permit the tabling of amendments to the Protocol and its annexes, should they become desirable as a result of the work of the AWG-KP or for any other reason. The EU notes that in light of the ongoing negotiations in the context of the Bali Action Plan and the legal form of the agreed outcome to be reached at COP15, there may be legal implications for how the results of the work of AWG-KP are taken forward by CMP5.

Amendments to the Kyoto Protocol

2. There are a number of amendments to the Kyoto Protocol which are necessary to give effect to a second commitment period. These changes are:

- (i) in Article 3(1) the duration of and the overall emissions reduction aim for the second commitment period have to be added ;
- (ii) in Article 3(2) the 2005 deadline needs to be updated in accordance with the new commitment period, or additional wording for the period after 2005 be added;
- (iii) Article 3(7) has to be updated or additional wording added in accordance with the new commitment period;
- (iv) Article 3(9) has to be amended to remain applicable in relation to forthcoming commitment periods. The reference to the 7 years before the end of the first commitment period will need to be updated and a reference to the second commitment period inserted;
- (v) new commitments will need to be inscribed in Annex B.

3. Similarly, amendments will have to or could be made for policy reasons in order to include new or additional policy elements in the Kyoto Protocol.

4. In addition, the work of the AWG-KP could also result in other amendments to the Kyoto Protocol in order to improve its functioning, such as

- simplification of certain procedures (such as those relating to amendments of Annex B to the Protocol);
- inclusion of a specific article affording immunities to individuals serving as members on bodies constituted under the Protocol;
- changes to improve clarity and avoid ambiguity.

PAPER NO. 3: JAPAN

AWG-KP Submission

Legal implications arising from the work of the AWG-KP pursuant to Article 3, paragraph 9, of the Kyoto Protocol

1. It should be noted that legal issues on establishing the framework beyond 2012 are inseparable from the agreed outcome to be adopted at the COP15 in Copenhagen and that legal issues to be considered will depend on the substance of that agreed outcome. This submission presents our basic concept of legal issues.

2. Parties should, as a shared vision, adopt a long-term goal of achieving at least 50% reduction of global emissions of greenhouse gases by 2050 in the UNFCCC negotiations with a reference to scientific knowledge of the IPCC. Toward realizing this goal, the peaking-out of the global greenhouse gas emissions in the next 10 to 20 years should be pursued, and all Parties should share the vision on how to pave the way to reduce global emissions by 2050, including measures to realize a low-carbon society and promotion of development of innovative technologies.

3. This will require all Parties to take effective mitigation actions under an enlightened sense of solidarity, while developed country Parties should lead the global efforts for emission reductions by fulfilling the significant reductions. At the same time, it is necessary to share the understanding that developing country Parties, especially major developing country Parties that increase their emissions rapidly, will be required to fulfill international obligations to take mitigation actions, in accordance with their common but differentiated responsibilities and respective capabilities.

4. From this viewpoint, our preferable option on the framework beyond 2012 is to adopt a new protocol which will include obligations of both developed and developing country Parties and ensure fairness and effectiveness. This framework should be established as a result of joint discussions of both the AWG-KP, which considers further commitments of Annex I Parties, and the AWG-LCA, which considers commitments or actions by developed country Parties and actions by developing country Parties. Another option would be to amend the Kyoto Protocol, provided that it can cover all the necessary elements.

5. In such a protocol, the long-term goal of reducing at least 50% of global greenhouse gas emissions by 2050, as Japan insists, should be stipulated as a non-binding shared vision by Parties.

6. Major elements which Japan believes should be included in the next framework are mentioned in the AWG-LCA submission submitted on 6th February. It is assumed that there will be further legal implications through joint discussions of the AWG-KP and the AWG-LCA.

PAPER NO. 4: NEW ZEALAND

**A SUBMISSION TO THE AD HOC WORKING GROUP ON FURTHER
COMMITMENTS FOR ANNEX I PARTIES UNDER THE KYOTO PROTOCOL**

LEGAL ISSUES

15 February 2009

1 New Zealand welcomes the opportunity to provide input to the Ad Hoc Working Group on Further Commitments for Annex 1 Parties under the Kyoto Protocol (AWG-KP) in relation to the “legal implications arising from the work of the AWG-KP pursuant to Article 3, paragraph 9 of the Kyoto Protocol”.¹

2 This submission summarises New Zealand’s preliminary views on the form of a post-2012 legal framework and how the legal agenda should be progressed over 2009. In addition, it proposes views on amendments to the Kyoto Protocol or a future legal framework for the second commitment period (CP2) for legal issues. As positions develop, New Zealand may make further proposals, including for legal text, in a range of policy and legal areas.

Post 2012 Legal Framework:

3 New Zealand considers that negotiations from both the AWG-KP and the Ad Hoc Working Group on Cooperative Long Term Action (AWG-LCA) should feed into an integrated post-2012 instrument within the United Nations Framework Convention on Climate Change (UNFCCC) framework. This instrument must be legally binding, and cover commitments and actions for both developed and developing countries as mandated under the Bali Action Plan. While this could take the form of an amended Kyoto Protocol, there are good arguments for developing an entirely new Protocol. In either case, the advantages of a unified instrument include common Parties and entry into force provisions, internally consistent interpretation of mechanisms and terms, and coherency between provision of funding/technology transfer and the modalities for their use.

4 New Zealand further notes that it will be important to have the most comprehensive outcome possible for Copenhagen. The detail of the rules and mechanisms for achieving the Convention’s objectives need to be clearly elaborated before CP2 commitments can be made.

Legal Working Groups

5 In line with New Zealand’s desire to see an integrated AWG-LCA and AWG-KP outcome for the post-2012 framework, New Zealand considers that any legal working group established to look at rules and mechanisms in the AWG-KP must work closely with an equivalent AWG-LCA legal group. Such working groups must also be mandated to look at legal issues and text arising from specific policy proposals arising in the AWG-KP and AWG-LCA negotiations. While New Zealand would not want to see policy discussions cut short by premature detail on legal text, we consider that there is merit in having broad discussion of legal elements to be included in the post 2012 framework at an early stage.

¹ FCCC/KP/AWG/2007/5, para 23(a).

Specific Elements for any Future Legal Framework

Definitions

6 New Zealand considers that the terminology of the Kyoto Protocol or any future legal framework will require updating in light of the Bali Action Plan. In particular, New Zealand considers that developing countries will need to be included in any post-2012 framework. Depending on the form this framework takes, this may require revision of the term “Party included in Annex 1”. These changes will require consequential amendments throughout the text.

References to Commitment Periods

7 Should the Kyoto Protocol be extended post 2012, the inscription of new commitments for subsequent periods will require consequential amendments to the Kyoto Protocol to allow it to function meaningfully. For example, Article 3 paragraphs (1),(7) and (8), specifically refer to the first commitment period only and will need amendment to apply to the second commitment period.

Inscription of Commitments

8 New Zealand considers it important that any post-2012 framework has simplified and straightforward procedures for allowing new Parties to take on new commitments and/or nationally appropriate mitigation actions during any commitment period in order to avoid unnecessary delays around ratification procedures by Parties. Overly complicated or slow procedures can discourage Parties from taking on new commitments or actions and, consistent with the Convention’s ultimate objective, these procedures should be simplified.

9 New Zealand notes that Article 13 of the *Gothenburg Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone* differentiates between general amendments to annexes containing commitments, and adjustments necessary for Parties to “add its name, together with emission levels, emission ceilings and percentage emission reductions” in its annex II. This provides a useful precedent for having a simplified procedure for allowing Parties to make commitments in addition to the standard ratification procedure for general amendments.

10 It should be noted however that the *Gothenburg Protocol* uses a simple adjustment procedure. For the post 2012 framework, New Zealand supports further consideration of an adjustment model with an opt-out clause. This model is already used in Article 21 paragraph 5 of the Kyoto Protocol, and is also consistent with the process for amendments to Annexes in Article 16 of the Convention, as used in Decision 4/CP.3 to amend Annex 1 to include Croatia, the Czech Republic, Liechtenstein, Monaco, Slovakia and Slovenia.

11 New Zealand could also support further consideration of a hybrid model which allows Parties to nominate to use either the current ratification method or the adjustment with opt-out clause model. New Zealand considers that these procedures strike the appropriate balance between facilitation of new commitments, and Parties’ sovereignty.

12 If the Kyoto Protocol forms the basis of the post-2012 framework, Article 21 will also require amendment. In that event, New Zealand proposes that Article 21, paragraph 7 is amended to read:

7. Amendments to Annex A to this Protocol shall be adopted and enter into force in accordance with the procedure set out in Article 20.

13 New Zealand further proposes the inclusion of a new paragraphs 8 and 9 in Article 21, to read:

8. Amendments necessary for the inscription of additional Parties and their commitments in [Annex B] to this Protocol shall be adopted in accordance with paragraphs 3 and 4 above, provided that they have the written consent of the Party concerned. Such amendments shall enter into force for all Parties to this Protocol 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 to [Annex B]. The amendment to [Annex B] shall enter into force for Parties which withdraw their notification of non-acceptance on the ninetieth day after the date on which withdrawal of such notification has been received by the Depositary.

9. All other amendments to [Annex B] to this Protocol shall be adopted and enter into force in accordance with the procedure set out in Article 20, provided that any amendment to the figure entered for a Party's QELRO in [Annex B] to this Protocol shall be adopted only with the written consent of the Party concerned.

14 These changes will require a consequential amendment to Article 3, paragraph 9 so that it refers to Article 21, paragraph 9 as inserted above.

Entry into Force Provisions

15 New Zealand considers that if the Kyoto Protocol is to be extended post-2012, there will need to be appropriate entry into force provisions which link activation of the second commitment period with the entry into force of an agreement under the AWG-LCA negotiating track which encompasses all major emitters. This is an important means of ensuring the environmental integrity of the overall climate change framework, and further ensures reciprocity of action thereby encouraging Parties to make new commitments.

Immunities Provisions

16 New Zealand considers that legally binding immunities provisions are required for individuals serving on constituted bodies and Article 8 Expert Review Teams (ERTs) established under the Kyoto Protocol, and that this should be an essential element of any post-2012 legal framework. In this context we consider that "constituted bodies" includes the Executive Board of the Clean Development Mechanism, the Joint Implementation Supervisory Committee, the Compliance Committee, and the Adaptation Fund Board.

17 New Zealand further considers that the term "individuals" must include members and alternate members of the Constituted Bodies, and Experts selected for Article 8 Review Teams.

18 Immunities provisions will ensure that individuals serving on constituted bodies and ERTs are able to carry out their functions effectively, free from interference from national courts. As a minimum, New Zealand would therefore expect individuals serving on constituted bodies and ERTs to be accorded immunity from legal process and personal arrest or detention in respect of words spoken or written and all acts performed by them in their official capacity,

and that such immunity should continue after they have ceased to carry out these roles. Further immunities may also be appropriate and these should be determined in line with the functions of constituted boards and ERTs, and the definition of “individual”.

19 Consideration should also be given to how nationals of the State Party in question will be treated in the framework, as depending on the immunities accorded, it may not be appropriate for them to receive the full extent of immunities accorded to foreign nationals. New Zealand would further support the inclusion of a waiver provision where granting the immunity would impede the course of justice, and the immunity can be waived without prejudice to the interests of the UNFCCC.

Gases Covered by a Post-2012 Legal Framework

20 New Zealand notes that Annex A of the Kyoto Protocol contains the general terms ‘hydrofluorocarbons’ (HFCs) and ‘perfluorocarbons’ (PFCs). As Parties move towards a new commitment period, and consequently the negotiation of new commitments, it is increasingly important to have certainty of obligations as to what those commitments will entail. Information as to which gases are included in any future agreement has consequences for Parties’ commitments. For example, under the current Kyoto Protocol provisions this has implications for Parties’ Article 3 commitments and monitoring and reporting obligations in Article 5.

21 New Zealand therefore proposes that any post-2012 legal framework does not use general terms to describe groups of gases, and in particular that it itemizes the different HFCs and PFCs for which Parties need to account. New Zealand notes that this approach would be consistent with that taken by the *Montreal Protocol on Substances that Deplete the Ozone Layer*, and would also enable greater transparency and accessibility of the framework’s provisions.

22 Should further HFCs and PFCs be discovered following this entry into force of the post-2012 framework, then normal procedures for amendments would apply. In the case of the Kyoto Protocol, these would continue to be governed by Article 21, paragraph 7.
