

Procedure for amendments to the Kyoto Protocol

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Introduction

This briefing paper sets out:

- the procedure that needs to be followed in order to amend the Kyoto Protocol and its annexes;
- the specific articles and annexes that will need to be amended in the event a second commitment period is agreed; and
- suggested drafting, based on previous country submissions, for such amendments.

Executive Summary

Summary of procedure

1. Below we set out an overview of the procedure for making amendments to the Kyoto Protocol.

I. Kyoto Protocol Party's proposed amendment is communicated to other Parties via Secretariat

↓ **6 months**

II. Ordinary COP meeting at which amendment is proposed and may be adopted

↓

III. Adopted amendment communicated to the Depositary and circulated to Parties for acceptance

↓

IV. Parties lodge instrument of acceptance of proposed amendment to the Depositary

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V. Proposed amendment enters into force:

*(i) for those Parties who have accepted it, **90 days** after the day of receipt by the Depositary of acceptances from at least 75% of Kyoto Protocol Parties*

(ii) for any other Party, 90 days after the date on which that Party deposits its acceptance with the Depositary

2. The process for creating a new annex or amending an existing annex to the Kyoto Protocol is virtually identical to the above process except in relation to step V (entry into force) which

differs depending on whether the proposed annex or amendment to an annex also involves an amendment to the Kyoto Protocol. If it does (which it would in the case of amendments to Annex B commitments), entry into force of the annex or amended annex occurs at the time that the related amendment to the Kyoto Protocol enters into force.

3. It is very difficult to estimate timeframes between the various steps in this process because the Kyoto Protocol is silent on timeframes for most steps. In fact, except by the "6 month rule", the Kyoto Protocol does not oblige any Party to undertake a particular action by a particular time. Under the 6 month rule, an amendment proposed by a Kyoto Protocol Party (amendments can only be proposed by a Party to the Kyoto Protocol) must be communicated to the other Parties via the Secretariat at least 6 months before the meeting of the Conference of the Parties (COP) serving as a meeting of the Parties to the Kyoto Protocol (CMP) at which the amendment is proposed for adoption. If it is not communicated at least 6 months before the date of the CMP, it cannot be considered at the CMP.
4. The area in which delays are least likely to occur is between steps II and III, assuming that an amendment is adopted at the CMP in which the amendment is proposed. Step III is an administrative step and should take approximately 4 - 6 weeks from the date the amendment is adopted. However, the same is not true of other steps:
 - (a) Step II - unless an agreement in relation to an amendment is reached at the COP/CMP (which requires at least a 75% majority of Parties to the Kyoto Protocol), the amendment will not be adopted and the process starts again.
 - (b) Step IV - V - if an amendment is adopted at a CMP, it will not enter into force until a sufficient number of acceptances have been received by the Depository (that is, 75% of the Parties to the Kyoto Protocol). Belarus' 2006 amendment to Annex B of the Kyoto Protocol (the only amendment that we are aware of which has been adopted in relation to the Kyoto Protocol) illustrates the sort of delay which can be experienced at this step. In that case, on 17 April 2006 the Secretariat notified all parties of Belarus' proposed amendment, the amendment was adopted at the COP/CMP between 6 - 17 November 2006, but the amendment has not yet entered into force because only 22 acceptances have been received by the Depository (despite sufficient support being received at the CMP to enable it to be adopted).

Key sections of the Kyoto Protocol that will require amendment

5. The key sections of the Kyoto Protocol which need to be amended so as to impose second and subsequent commitment periods are¹:
 - (c) Annex B – either replaced with a new annex or the table in the existing annex needs to be amended to include additional columns and data for the subsequent commitment period or each period, whichever is agreed.
 - (d) Article 3, at paragraphs 1, 7, and 9 – consequential amendments to replace or add words to amend the current references to a commitment period of 2008 – 2012 to include one or more further periods from 2013 onwards.

¹ Examples of text to amend Annex B commitments which were proposed at COP/MOP 15 in Copenhagen in December 2009 are included as annexes to this paper and are discussed further in the "Detailed Briefing Notes" section of this paper at paragraph 20.

Procedure for amending the Kyoto Protocol

Step I – Communication of proposed amendment

6. Only parties to the Kyoto Protocol are able to propose an amendment to the Kyoto Protocol or annex to the Kyoto Protocol (Article 20(2) and Article 21(2)).
7. The text of the proposed amendment to the Kyoto Protocol or annex to the Kyoto Protocol must be communicated to the Parties via the secretariat at least 6 months before the meeting at which the amendment is proposed for adoption. The Secretariat is also required to communicate the proposed amendment to the signatories of the United Nations Framework Convention on Climate Change (Convention) and, for information only, to the Depository² (Article 20(2) and Article 21(3)).
8. These provisions are commonly referred to as “the 6 month rule”. The 6 month rule is strictly adhered to even when text may be developed through the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) process.³

Step II – Meeting to propose and adopt amendments

9. If Step I has occurred, proposals for amendment must occur at an ordinary (not an extraordinary) “session” of the COP. A “session” of the COP comprises a series of “meetings” (e.g. the meetings held between 7 and 18 December 2009 in Copenhagen constituted a “session” of the COP/CMP). The application of the 6 month rule was considered by the United Nations Office of Legal Affairs (UNOLA) and it confirmed that if a COP session commenced on 1 December, then an amendment proposal submitted on 2 June could only validly be considered at a meeting on or after 2 December and not on 1 December.⁴
10. Article 21(4) provides a means by which amendments to the Kyoto Protocol can be adopted even if a consensus cannot be reached. If the Parties have made every effort to reach agreement on the proposal for an amendment to the Kyoto Protocol (or annex), the amendment may be adopted, at “last resort” by a 75% majority vote of the Parties present and voting (affirmative or negative) at the meeting. This ensures that an amendment cannot be vetoed by a single Party or small group of Parties.
11. Article 21(7) provides that any amendments to Annex B can only be adopted with the written consent of the Party concerned, that is, a Party on whom obligations will be imposed under the amended Annex B. In a note from the Chair of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP)⁵ dated 26 February 2009 (Chair’s Note), which considered the possible elements for amendments of Annex B commitments to be adopted at COP15/CMP5, the Chair noted that “it would be advisable for each of the Parties concerned to provide their written consent well in advance of CMP 5 and

² The Depository under the Convention and therefore the Kyoto Protocol is the Secretary General of the United Nations residing in New York, but in practice, by virtue of Article 98 of the UN Charter, the Treaty Section of the UNOLA performs the depositary functions on behalf of the Secretary-General in respect of multilateral treaties for which he acts as a depositary.

³ See submission by G77 & China for the timetable for the AWG-KP work plan in which it identified that the AWG-KP would adopt Annex B and related amendments at AWG7 (May 09) and COP/MOP would adopt the same Annex B and related amendments at CMP4 (Dec 09): FCCC/KP/AWG/2007/MISC.3 at page 3.

⁴ Yamin and Depledge, *The International Climate Change Regime: A Guide to Rules Institutions and Procedures*, Cambridge University Press, 2004: footnote p 547

⁵ FCCC/KP/AWG/2009/3

prior to the adoption of the proposed amendments to Annex B” so as to be sure that adoption would actually occur at CMP 5.

Step III – Adopted amendment circulated for acceptance

12. The adopted amendment is communicated by the Secretariat to the Depository and prepared for circulation to the Parties for their acceptance. This is an administrative step which should not be the cause of any undue delays.

Step IV – Parties lodge instrument of acceptance of proposed amendment with Depository

13. As noted in the Executive Summary of this paper, adoption at a COP/CMP does not necessarily lead to formal acceptance by parties. This step in the process preserves the sovereign rights of each Party not to accept new commitments (even if that same party has adopted the amendment at a COP/CMP). Whilst this ensures that Parties are able to fully participate in the policy-making process whether or not they choose to accept or reject an amendment, this step does allow parties to hold up the entry into force of the amendments.
14. The potential for delay at this step is illustrated not only by Belarus’ 2006 amendment, but also by the entry into force of the Kyoto Protocol itself. The Chair’s Note also picked up on this issue⁶, stating that in order for an amendment to Annex B to enter into force, “as at 25 February 2009, 138 [Kyoto Protocol] Parties would need to deposit instruments of acceptance” and that “any delay in entry into force may result in a gap between the end of the first commitment period and the beginning of the second commitment period”.

Step V – Proposed amendment enters into force

15. Entry into force occurs:
 - (e) in relation to those Parties who have accepted the amendment (where an amendment has not been adopted by consensus), 90 days from the date of deposit of acceptance with the Depository by at least three fourths of the Parties to the Kyoto Protocol; and
 - (f) for all other Parties, 90 days from the date that Party deposits its acceptance with the Depository (if ever).
16. In accordance with the principles of international law, the amendments only apply to those Party’s who have accepted the amendments.

Sections and annexes of Kyoto Protocol which will require amendment

17. There are a number of ways in which the Kyoto Protocol and Annex B could be amended to impose commitments on Annex I Parties in subsequent commitment periods. In fact, 9 of the 12 amendments proposed by Parties for adoption at COP15/CMP5 included amendments relating to Annex B and further commitments. We have provided a excerpts of the text of two of those proposed amendments as examples in Annex C and D to this paper and have included a link to all documents in the footnote below.⁷ Not all of the 9 proposed amendments were confined to amending Annex B but included proposed amendments to other sections of the Kyoto Protocol. The two examples we have included use text which

⁶ FCCC/KP/AWG/2009/3 at paragraph 32, page 10

⁷ <http://unfccc.int/documentation/items/4899.php>

seeks to make little other change to the Kyoto Protocol except that which is necessary to achieve the goal of meeting the obligation in Article 3(9) to establish further commitment periods.

18. Amendments to the text of the Kyoto Protocol may occur in a number of ways - by deleting and substituting particular words in a paragraph; deleting and replacing whole paragraphs or blocks of text; inserting new paragraphs; and so on. The form that the amendment takes will depend on a number of factors. The Chair's Note considered these issues and highlighted that care and caution needs to be exercised before determining how the text is to be amended so as to avoid unintended consequences, stating that:

"The form of the amendment may depend, among other factors, on the nature of the amendment, whether the amendment is intended to replace existing text upon entry into force, and the extent to which the continued existence and reference to earlier text will be necessary for the effective implementation of the Kyoto Protocol. As regards the last factor, it may be noted that although the first commitment period comes to an end in 2012, end of commitment period accounting as well as compliance assessment will not be finalized until 2015. CMP decisions that address these two issues derive their legal force from the provisions of the Protocol relating to the first commitment period. In such cases Parties will need to determine whether replacing existing text would be the best way forward."

19. In other words, any amendments to impose further commitment periods should not be drafted in a way that reduces or interferes with the effectiveness of the Kyoto Protocol as it relates to first commitment period obligations.

20. Annex B could be amended, amongst other ways, by:

- (a) replacing the existing Annex B with a table that sets out the agreed quantified emission limitation or reduction commitments (QELRC). This table could include not only new QELRC but also any new Party who wishes to make such commitments; or
- (b) amending the existing Annex B to include additional columns for QELRC in subsequent periods and any new Party who wishes to make such commitments. In this option, the existing 2008-2012 commitments would be retained in the first column (which would identify in the header the relevant period). New Party's could be identified with an appropriate footnote to make it clear that the new Party did not have any commitments in the first period. This option would ensure that the legal basis for existing commitments and obligations would be preserved for the 2013-2015 period even after the amendment enters into force (which is not the case with option 1). The table set out in Annex C provides an example of what this option might look like.

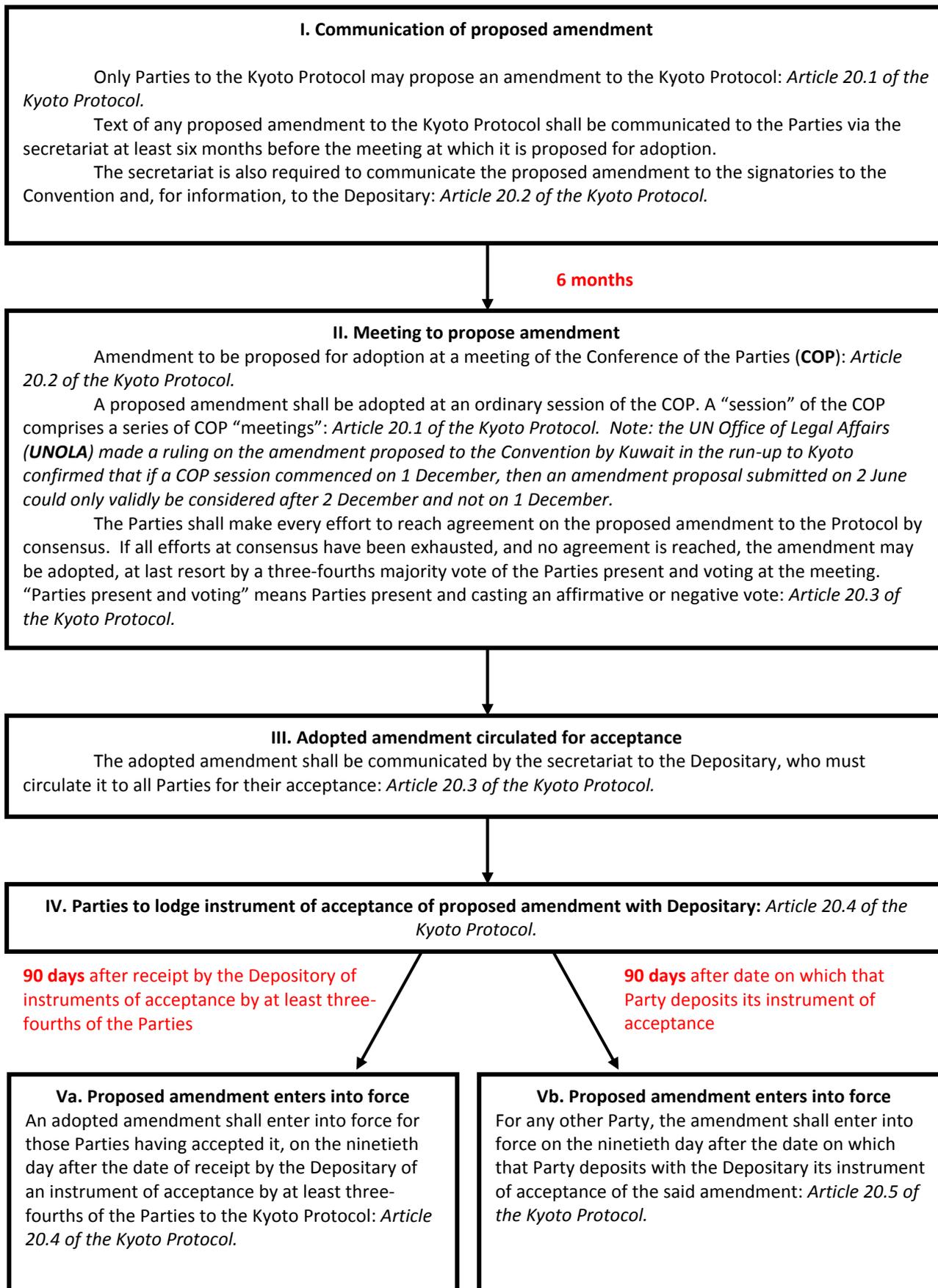
21. After establishing a subsequent commitment period in Annex B, consequential amendments are required in to "maintain the link" between the obligation imposed under Article 3(1) and the QELRC included in Annex B for subsequent periods. This could be achieved by:

- (a) amending certain text in Article 3(1) to change references to the first commitment period to make them references to the second commitment period; or
- (b) keep Article 3(1) as drafted and insert a new paragraph 1 bis which repeats the bulk of the text of Article 3(1) but refers to the second commitment period.

Examples of these options are available at page 7 of the Chair's Note and in Annex C and D to this Paper.

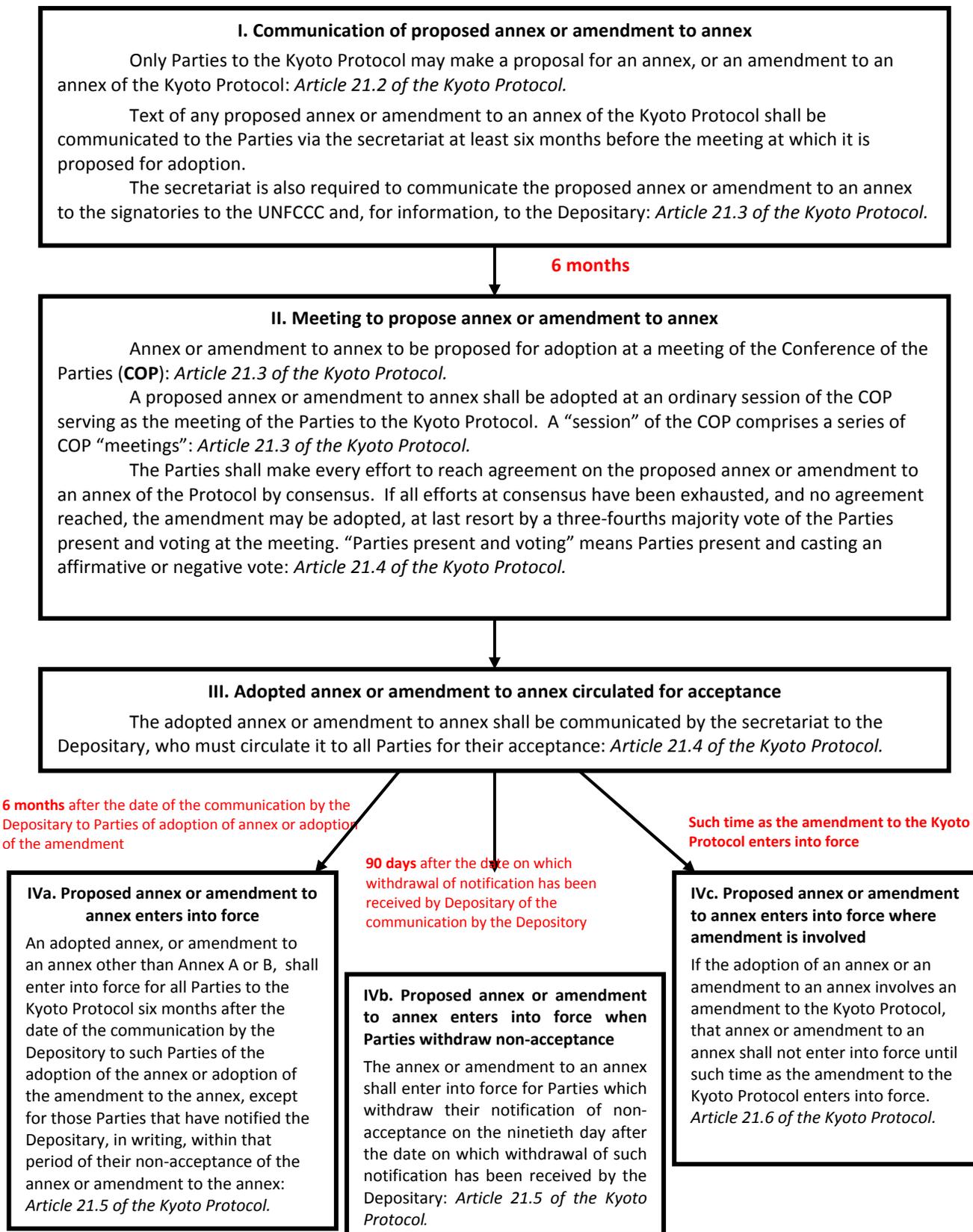
22. Article 3(7) includes information in relation to a Party's assigned amount units which will need to be amended to reflect the QELRC for subsequent periods. These amendments will depend on how Annex B is amended (e.g. if it refers to "second commitment period" then this language will need to be repeated in this paragraph). Examples of possible draft text for Article 3(7) are included at pages 7-8 of the Chair's Note and in Annex C and D to this paper.
23. Article 3(9) provides for the manner in which further commitments are to be adopted by the Parties. Again, the words used to amend this section will depend on how the amendment to Annex B is crafted. Examples of possible draft text for Article 3(9) are included at page 9 of the Chair's Note and in Annex C and D to this paper.

Annex A: Detailed flowchart of amendment process for Kyoto Protocol



Annex B - Detailed flow-chart of amendment process for annexes to Kyoto Protocol

Note: Amendments to Annexes A and B to the Kyoto Protocol shall enter into force in accordance with Article 20, provided that any amendment to Annex B shall be adopted only with the written consent of the Party concerned; Article 21.7 of the Kyoto Protocol.



Annex C: Colombian proposal for amendments to Kyoto Protocol - FCCC/KP/CMP/2009/8⁸***AMMENDMENT : ARTICLE 3 Paragraph 1***

The following paragraph shall be inserted after paragraph 1 of Article 3 of the Protocol:

1 bis. The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission reduction commitments inscribed in Annex [...] and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 45 per cent in the commitment period 2013 – 2020 and at least 57 per cent by 2028.

1 ter. On the basis of the aggregate emission reduction specified in paragraph 1 bis., the Parties determined the individual quantified emission reductions commitments of Annex I Parties inscribed in Annex [...] for the second and third commitment periods, by applying the principle of historical responsibility, from 1850 to 2005;

⁸ This is an excerpt only used for illustrative purposes - the full text of the proposed amendment can be found at <http://unfccc.int/resource/docs/2009/cmp5/eng/08.pdf>

AMMENDMENT : ARTICLE 3**Article 3, paragraph 3**

Add paragraph 3 [bis]

The net changes in greenhouse gas emissions by sources and removals by sinks resulting from direct human-induced land-use change and forestry activities, limited to afforestation, reforestation and deforestation since 1990, measurable as verifiable changes in carbon stocks in each commitment period, shall be used to meet the commitments under this article of each Party included in Annex I, but shall not exceed 2% of the accountable reductions for compliance purposes of each Party. The greenhouse gas emissions by sources and removals by sinks associated with those activities shall be reported in a transparent and verifiable manner and reviewed in accordance with Articles 7 and 8.

Article 3, paragraph 7

The following paragraph shall be inserted after paragraph 7 of Article 3 of the Protocol:

7 bis. For the subsequent commitment periods up to 2050, the assigned amount for each Party included in Annex I shall be equal to the percentage to be inscribed in Annex [...] of its aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A in 1990, or the base year or period determined in accordance with paragraph 5 above, multiplied by the length of said commitment period, taking into account the need to ensure that Parties included in Annex B meet their aggregate emission reduction commitments as specified in paragraph 1 bis above.

ARTICLE 3. Paragraph 9

9 bis. Commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex [...] to this Protocol, which shall be adopted in accordance with the provisions of Article 21, paragraph 7. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall finalize consideration of such commitments one year after the mid-term review under the relevant provisions of Article 3, paragraph X.

Annex [...]

Party	Quantified emission limitation or reduction commitment (2008-2012) (percentage of base year or period)	Quantified emission reduction commitment (2013-2020) (percentage of base year or period) ¹	Quantified emission reduction commitment (2021-2028) (percentage of base year or period)
Australia	108	[89]	[]
Austria	92	[71]	[]
Belarus*	92	[83]	[]
Belgium	92	[64]	[]
Bulgaria*	92	[84]	[]
Canada	94	[77]	[]
Croatia*	95	[86]	[]
Czech Republic*	92	[74]	[]
Denmark	92	[74]	[]
Estonia*	92	[84]	[]
European Community	92	[72]	[]
Finland	92	[80]	[]
France	92	[70]	[]
Germany	92	[69]	[]
Greece	92	[84]	[]
Hungary*	94	[79]	[]
Iceland	110	[91]	[]
Ireland	92	[81]	[]
Italy	92	[80]	[]
Japan	94	[81]	[]
Latvia*	92	[85]	[]
Liechtenstein	92	[72]	[]
Lithuania*	92	[85]	[]
Luxembourg	92	[73]	[]
Monaco	92	[72]	[]
Netherlands	92	[78]	[]
New Zealand	100	[84]	[]
Norway	101	[82]	[]
Poland*	94	[76]	[]
Portugal	92	[83]	[]
Romania*	92	[83]	[]
Russian Federation*	100	[85]	[]
Slovakia*	92	[78]	[]
Slovenia*	92	[81]	[]
Spain	92	[80]	[]
Sweden	92	[69]	[]
Switzerland	92	[76]	[]

¹ Values included in Annex [...] do not include reductions from flexibility mechanisms or LULUCF

Annex D: PNG proposal for amendments to Kyoto Protocol – FCCC/KP/CMP/2009/13⁹**Article 3***Replace paragraph 1:*

“1. The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions by sources and removals by sinks of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall anthropogenic carbon dioxide equivalent emissions by sources and removals by sinks of such gases by at least XX per cent below 1990 levels in the commitment period 2013 to 20XX.”

Replace paragraph 3:

“3. Any Party included in Annex I should apply as reference level for the Agriculture, Forestry and Other Use sector the average value of the annual anthropogenic carbon dioxide equivalent emissions by sources and removals by sinks of the greenhouse gases listed in Annex A in the period 20XX – 20XX, for the purposes of the calculation referred to in paragraph 7 below. Taking into account national circumstances, any Party included in Annex I may apply different values providing relevant elements in support of such a deviance.”

*Deletion of current paragraph 4**Replace paragraph 7:*

“7. In the second quantified emission limitation and reduction commitment period, from 2013 to 20XX, the assigned amount for each Party included in Annex I shall be equal to the percentage inscribed for it in Annex B of its aggregate anthropogenic carbon dioxide equivalent emissions by sources and removals by sinks of the greenhouse gases listed in Annex A in 1990, or the base year or period determined in accordance with paragraph 5 and 3 above, multiplied by X.”

Replace paragraph 13:

“13. If the aggregate anthropogenic carbon dioxide equivalent emissions by sources and removals by sinks of a Party included in Annex I in a commitment period are less than its assigned amount under this Article, this difference shall, on request of that Party, be added to the assigned amount for that Party for subsequent commitment periods.”

⁹ This is an excerpt only used for illustrative purposes - the full text of the proposed amendment can be found at <http://unfccc.int/resource/docs/2009/cmp5/eng/13.pdf>