

FACT SHEET

Legal options to avoid a gap and legal implications of a possible gap

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In Bonn, June 2010, the AWGKP requested the Secretariat's legal service to prepare a paper on:

- 1) the legal options available to avoid a gap between the first and second commitment periods; and
- 2) the legal implications and consequences of a gap between commitment periods.

The paper published by the Secretariat is FCCC/KP/2010/10. This Fact Sheet provides a summary of what are, in our opinion, the key issues arising out of the Secretariat's July 2010 paper on legal options of a gap between commitment periods of the Kyoto Protocol. It is not intended to be a comprehensive analysis and the Secretariat's paper should be referred to for full analysis.

Summary

Nothing in the KP binds parties to agree to a second commitment period (2CP). Instead they are obliged to make efforts to reach agreements on a 2CP. A 2CP becomes binding if at least $\frac{3}{4}$ of the parties agree on and vote for a commitment period – but only consenting countries would be bound by it. If the votes are not there, no 2CP will be established.

IMPLICATIONS: The Kyoto Protocol itself (including the CMP, the authority of its decisions, and the secretariat) would continue to exist in the case of a gap between commitment periods. It is the first commitment period (2008-2012) and any obligations to reduce GHGs that comes to an end. If there is a gap, there will be no MRV requirements on Parties' emissions reductions for so long as the gap exists. Of the Kyoto institutions, only Joint Implementation and the International Emissions Trading will cease to have a legal basis. The CDM, compliance mechanism, adaptation fund would continue to exist.

OPTIONS TO AVOID: The most feasible way to avoid a gap is to formally amend the Kyoto Protocol, or adopt a replacement treaty. Both options can (assuming political consensus) be provisionally applied (i.e. apply immediately) before formal entry into force.

The options available to avoid a gap between the first and subsequent commitment period

Formal amendment or successor protocol

Formal amendment is a method provided for in the Kyoto Protocol. It would provide a legal basis for prolonging or strengthening commitments, and it would provide a legal basis for the continued existence of the mechanisms and institutions provided for in the Protocol. A successor protocol would enter into force after the end of the first commitment period.

Provisional application

Formal amendments and a successor protocol could be combined with provisional application (as per Art. 25 Vienna Convention on the Law of Treaties). Provisional application is a legal technique whereby the amendments or new treaty would 'provisionally apply' pending their formal entry into force. This maintains continuity between successive treaty regimes, consistency of parties' obligations during amendments, allows some Parties to circumvent obstacles prohibiting entry into force, and can enable preparation of institutional arrangements. Provisional application could therefore bridge the gap between the adoption of an amendment/treaty and its formal entry into force. The use of provisional

application would only be relevant in the case of political support for the amendment or treaty in the first place. Furthermore, negotiators must be certain the amendments/protocol will obtain domestic approval for ratification.

Other options include:

Gentleman's Agreement, CMP decision, and unilateral declarations (whereby a State declares that it considers itself to continue to be bound by existing emissions targets, or could spell out stronger targets). These options are possible but politically unfeasible and/or create problems with their compatibility with the operation of KP mechanisms or institutions. For further information, see LRI Briefing Paper on Legal Consequences of a Gap Between Commitment Periods¹.

Legal implications and consequences of a gap between commitment periods

The Kyoto Protocol itself will continue to exist. The Kyoto Protocol does not cease to exist on 31 December 2012. It is the first commitment period (2008-2012) that comes to an end. It would require a special procedure to terminate/suspend the Kyoto Protocol itself (see Art 42(2) VCLT) so unless these arise, the Protocol will remain in existence. The CMP will continue to exist and will continue to be able to make decisions in respect of the implementation of the Protocol.

Joint Implementation projects will no longer be able to generate offsets because countries would no longer have Assigned Amounts (AAUs) from which the JI credits (ERUs) are drawn. The same reasoning applies in principle to *International Emissions Trading*. (See FCCC/KP/2010/10 Part C.1)

Clean Development Mechanisms can exist independent of a binding commitment period. The purpose of CDM extends beyond commitments under Art.3 (see Art 12.). In fact, the European Union has adopted legislation that presupposes the possibility of erecting new CDM projects after 2012. (See FCCC/KP/2010/10 Part C.2)

The Adaptation Fund and Board was established by a COP decision and is steered by the CMP. So it is a hybrid fund falling under the provisions of the UNFCCC Art 11, and the KP Art 11 and 12(8). The Adaptation Fund is financed by the share of proceeds from CDM project activities (amounting to 2% of CERs issued for a CDM project), and by other sources of funding, implying that it is not fully dependent on the CDM and the issues of CERs to function. As noted above, the CDM would continue to exist in the event that a gap exists between commitment periods. The Adaptation Fund and its Board would exist until explicit decisions by the COP and CMP are taken. (See FCCC/KP/2010/10 Part E)

The compliance mechanism. There seem to be no legal issues regarding the existence of the Compliance Mechanism and the Compliance Committee in the event there is a gap between commitment periods. While parties will have no obligations with regard to quantified emissions limitation or reduction commitments, they will still have other obligations, such as MRV and National Inventories, which need compliance review. Also, if a Party is found in non-compliance, deductions from that Party's assigned amount in the subsequent commitment period would not be effected until the subsequent commitment period actually begins. (See FCCC/KP/2010/10 Part D)

MRV. In the case of a gap, there will be no MRV requirements on Parties' emissions reductions so long as the gap exists. (See FCCC/KP/2010/10 Part B.5) Any post 2012 agreement would have to address how emissions from the 'gap period' are treated.

The secretariat will continue to exist, though its function in relation to quantified emission limitation or reduction commitments and the commitment period, would likely be suspended without prejudice to other functions and tasks of the secretariat. *SBSTA and SBI* would, like the secretariat, continue to function.

¹ [http://www.legalresponseinitiative.org/download/BP22E%20-%20Briefing%20Paper%20-%20Consequences%20of%20a%20gap%20between%20commitment%20periods%20\(19%20July%202010\).pdf](http://www.legalresponseinitiative.org/download/BP22E%20-%20Briefing%20Paper%20-%20Consequences%20of%20a%20gap%20between%20commitment%20periods%20(19%20July%202010).pdf)