

## **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”.<sup>1</sup>

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

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<sup>1</sup> FCCC/KP/AWG/2007/5, para 23(a).

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.

### **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.