



JOINT IMPLEMENTATION: LEGAL ISSUES IN A POST- 2012 PERIOD

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Emission Reduction Units (ERUs) relating to emission reductions achieved before 2013 can be issued, transferred and acquired after the end of the first commitment period on 31 December 2012.

ERUs related to emission reductions after 2012 can be generated, issued and transferred in the same manner as pre-2013 ERUs (“late crediting”) up until the end of the so called true-up period in 2015, as long as they are based on Assigned Amount Units (AAUs) from the first commitment period.

To end the ‘gap’ debate, CMP as the decision-making body of the Kyoto Protocol is advised to confirm the details of the JI continuation during the Mexico conference at the end of 2010.

1. INTRODUCTION

As we head towards the end of the first commitment period of the Kyoto Protocol many doubts start to mount over the continuation of the Protocol’s project-based mechanisms after 2012. The absence of any agreement among countries as to the existence (and entry into force) of a second commitment period threatens to create a gap in international regulations which could stop the functioning of the Kyoto Protocol’s flexible mechanisms and discourage investors from funding existing projects, let alone new ones. Similarly, governments are left alone with their strategic planning on domestic and international mitigation action; entire regulatory frameworks are held in limbo.

While questions of a similar nature arise regarding the survival of both the Clean Development Mechanism (CDM) and Joint Implementation (JI), it was argued that from a legal and technical standpoint the uncertainty regarding JI is deemed slightly more worrying due to its intrinsic connection with emission targets and assigned amounts under the Protocol (referred to also as Article 3.1 commitment). This brief gives an overview of legal issues arising for the continuation of JI after 2012 and provides possible legal interpretations to these, assuming the existence of a gap-period between the first and a second commitment period under the Protocol. It concludes with some recommendations where clarification by the Conference of the Parties serving as the meeting of the parties (CMP) would bring much needed certainty.

2. JI AFTER 2012

There is general agreement among international legal practitioners that there is nothing in the text of the Kyoto Protocol and subsequent CMP decisions which indicates an end-point to the life of JI and its institutional set-up. In the relevant Marrakesh Decision (Decision 9 CMP 1), the JI governing body, the Joint Implementation Supervisory Committee (JISC), is explicitly called upon to assume certain tasks after the expiration of the first commitment period (sec 8). Echoing the common understanding, In a

recently released paper (Gap Analysis), the UNFCCC Secretariat confirmed the non-limited nature of the JISC and the operations of JI by stating that “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.”¹

3. EMISSION REDUCTIONS GENERATED BEFORE 2013 BUT ISSUED AFTER 2012

Another point of certainty relates to the right of countries to acquire and transfer first commitment period (CP1) ERUs (ERUs issued in relation to emissions reductions achieved between 1 January 2008 and 31 December 2012) after 2012 up until the end of the true-up period (expected to fall somewhere in mid 2015). This assurance stems from the annex of decision 27/CMP.1, which states that, provided the eligibility requirements to participate in the Kyoto Mechanisms are met, Annex I countries may continue to transfer and acquire Kyoto units from the preceding commitment period until the end of the true-up period.²

The possibility of issuing ERUs that relate to emissions reductions achieved between 1 January 2008 and 31 December 2012, up until the end of the true-up period is also made clear by the CMP, at the least in respect to JI emission removals projects (i.e., projects related to land use and forestry activities, also referred to as LULUCF). Decision 13 CMP 1 stipulates that, for those Annex I countries accounting for LULUCF activities under articles 3.3 and 3.4 of the Kyoto Protocol on a commitment period basis, issuance of RMUs (and, hence, also the conversion of RMUs into ERUs) can only take place after the end of the relevant commitment period.

Considering the points mentioned above, it seems logical to conclude that issuance of ERUs in the true up period for emission reductions achieved before 31 December 2012 (i.e., projects other than LULUCF projects) before the end of the true-up period is also possible. The stance of the Secretariat seems to be same in this respect, although it observes that, for JI track 2, the CMP may need to establish a deadline for requesting the issuance of CP1 ERUs.³

In conclusion: it appears non-contentious that ERUs relating to emissions reductions achieved between 1 January 2008 and 31 December 2012, can be transferred, acquired and/or issued up until the end of the true-up period. If such ERUs are not used for compliance with the first commitment period emission targets, they can either be carried-over for use in a potential second commitment period or they can be cancelled.

4. EMISSION REDUCTIONS GENERATED POST 2012

However, there is less consensus regarding the question whether post 2012 emission reductions (gap period ERUs) from either existing or from new projects can qualify for ERU issuance from the CP1 AAU contingent.

The UNFCCC Secretariat, in a commentary issued on their website⁴, stated that “ERUs may be used by Annex I Parties in complying with their emission targets for the first commitment period, as long as they have been issued for emission reductions or removals taking place up to the end of 2012”.

¹ FCCC/KP/AWG/2010/10 for 13th session of AWG-KP, under 42.

² Annex to decision 27/CMP.1, under XIII.

³ See <http://ji.unfccc.int/FAQ/index.html>.

⁴ “Frequently Asked Questions (FAQ)” concerning JI, <http://ji.unfccc.int/FAQ/index.html>.

The JISC, for its part, in the peculiar context of baseline setting and monitoring, found that “[a project’s] crediting period can extend beyond 2012 subject to the approval by the host Party”; however, it added that “[the] status of emission reductions or enhancements of net removals generated by JI projects after the end of the first commitment period may be determined by any relevant agreement under the UNFCCC.”

Both remarks seem to suggest that in the absence of any decision or clarification from state Parties or their principal decision-making organ, CMP, emission reductions generated after 2012 cannot qualify for ERUs from the CP1 AAU contingent.

The value of both statements, though, is limited. The Secretariat (whose interpretations have no legal authority per se) does not give any details or reasons for its far-reaching interpretation, while the finding of the JISC remains open: it does not negate post 2012 ERUs, rather it submits their future function to further determination the contracting parties—itself an accurate statement on the decision-making powers in international institutions and the temporality of past agreements.

A better, and more fitting, authority for the present case is the above mentioned legal memorandum—the Gap Analysis—in which the Secretariat argues the different options and legal positions. Among the unambiguous findings of this memorandum is that the JI mechanism, for the purposes of its continuity, has the end of the true-up period as relevant milestone, not the 31 December 2012. “[One needs to distinguish] 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.” Only where activities do no longer relate to the true-up period and, hence, the first commitment period, i.e. as of some point in 2015, the fate of JI becomes unclear. Until then, JI continues as an operating mechanism generating emission reduction units.

This interpretation is further backed by the following: The wording in section XIII of CMP Decision 27/1 echoes the wording in Article 6 (1) Kyoto Protocol: “For the purpose of fulfilling commitment under Article 3, paragraph 1, of the Protocol, a Party may continue to acquire and other Parties may transfer to such Party, emission reduction units...”,⁵ and Article 6 is commonly understood to entail not just the trade with ERUs but the establishment and operation of JI projects. As long as these projects operate under, and in relation to, the first commitment period, the generation of credits after 2012 and before the end of the true-up period remains admissible (“late crediting”).

5. RECOMMENDATIONS TO CMP

In order to remove any uncertainty to which the ‘gap’ discussions may have given rise and in order to give reassurance to national authorities, international institutions and JI project developers and investors, the CMP would be well advised to clarify the legal situation as early as possible, i.e. at the Mexico conference at the end of 2010, by confirming:

- that the JI mechanism continues to exist after 2012;
- that new projects can be determined (registered) after 2012; and

⁵ FCCC/KP/AWG/2010/10 for 13th session of AWG-KP, under 32.

- that provided the host and investor countries issue an extension of a letter of approval, an existing project may continue to operate and to generate ERUs after 2012 against the AAU contingent of the first commitment period.

To guarantee a maximum of legal authority, the confirmation could be given the form of a formal CMP Decision. However, as the confirmation is a reiteration of the legal status quo rather than ‘new law’, a CMP Decision is not required from a legal perspective. It would suffice if CMP made the confirmation as part of its conclusions.

6. CONTACT DETAILS

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