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Revision of the annexes to the 1999 Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone

Report of the ad hoc group of legal experts

Summary

By its decision 2011/1, the Executive Body for the Convention on Long-range Transboundary Air Pollution requested the ad hoc group of legal experts to conduct a review of the consolidated documents regarding negotiations to amend the Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (Gothenburg Protocol), and to provide a report to the thirtieth session of the Executive Body (ECE/EB.AIR/109/Add.1, decision 2011/1, para. 4).

This report contains the results of this review, and provides an analysis on a document-by-document basis, addressing proposed amendments to the main text of the Gothenburg Protocol, annexes I through IX, and proposed new annexes X and XI.

Contents

	<i>Paragraphs</i>	<i>Page</i>
Introduction.....	1–6	3
I. Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (ECE/EB.AIR/2012/1).....	7–57	3
II. Annex I (ECE/EB.AIR/2012/3).....	58–62	11
III. Annex II (ECE/EB.AIR/2012/4).....	63–76	12
IV. Annex III (ECE/EB.AIR/2012/5).....	77	14
V. Annex IV (ECE/EB.AIR/2012/6).....	78–82	14
VI. Annex V (ECE/EB.AIR/2012/7).....	83–87	14
VII. Annex VI (ECE/EB.AIR/2012/8).....	88–93	15
VIII. Annex VII (ECE/EB.AIR/2012/9).....	94	16
IX. Annex VIII (ECE/EB.AIR/2012/10).....	95–96	16
X. Annex IX (ECE/EB.AIR/2012/11).....	97–105	16
XI. Annex X (ECE/EB.AIR/2012/12).....	106–109	17
XII. Annex XI (ECE/EB.AIR/2012/13).....	110–111	18
Annex		
Input from Parties regarding the definition of “new stationary source”.....		19

Introduction

1. In its decision 2011/1, the Executive Body for the Convention on Long-range Transboundary Air Pollution requested the ad hoc group of legal experts (the Legal Group) to conduct a review of the consolidated documents concerning revisions to the Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (Gothenburg Protocol) and to provide a report to the thirtieth session of the Executive Body.

2. This report will therefore consider negotiating documents ECE/EB.AIR/2012/1 (concerning the main body of the Protocol) and ECE/EB.AIR/2012/3–13 (concerning annexes I–XI).

3. In general, the task of the Legal Group was complicated by the fact that the negotiating documents do not always accurately reflect the difference between the current state of play in the negotiating documents and the original text of the Protocol. This is particularly evident when considering the annexes, where the negotiating documents show new text as “original” text and omit parts of the original text entirely. Parties should bear this in mind when considering the acceptability of the proposed amendments.

4. Given these difficulties in identifying the precise amendments to the annexes, in those annexes where the amendments are extensive, Parties may wish to consider whether the entire annex should be replaced rather than amended. Whilst this may make it more difficult to track the precise obligations for those Parties that have not accepted the amendments, it would remove some of the complexity inherent in the current amendment process. If each annex is replaced in its entirety, the tables should be numbered using Arabic numerals (1, 2, 3, etc.) to avoid confusion with the annexes to the original Protocol. If, however, the Parties decide to amend rather than replace each annex, the tables should be numbered using Roman numerals (I, II, III, etc.) as in the original.

5. As a general point applicable to the body of the Protocol and to its annexes, it is noted that, in line with legal drafting practice and in order both to ensure transparency and minimize unnecessary amendments to the text, the Legal Group recommended avoiding renumbering of articles, paragraphs and subparagraphs. Where, for example, a new paragraph is inserted between existing paragraphs 2 and 3, the new paragraph would be paragraph 2 bis, and not paragraph 3 with subsequent renumbering of all the other paragraphs. This was accepted by the Executive Body at its twenty-ninth session, and it should be further noted that the Legal Group has prepared the draft decisions adopting the amendments on this basis.

6. The changes recommended to be made or described in this report are reflected in the draft decision document prepared by the Legal Group, but are not shown in the negotiating texts. The Legal Group will, when relevant paragraphs are discussed at the thirtieth session of the Executive Body, endeavour to bring such changes to the attention of the plenary.

I. Gothenburg Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (ECE/EB.AIR/2012/1)

Preamble

7. The Legal Group wishes to draw the attention of the Parties to a proposed amendment to preambular paragraph 22 of the original Gothenburg Protocol. The proposal is to replace the words “and ammonia” with the words “and reduced nitrogen compounds”.

This is not shown as an amendment in document ECE/EB.AIR/2012/1, and was not discussed by the Parties at the twenty-ninth session of the Executive Body.

8. Also in preambular paragraph 22, the Legal Group suggests rephrasing the text to read “not increase emissions of reactive nitrogen including nitrous oxide and nitrate levels in ecosystems, which could aggravate other nitrogen-related problems”. In the original version of this paragraph, it was clear that the things that should not be increased should not be increased because they could aggravate other nitrogen-related problems. In the amended text, the formulation suggests that only the increase in the nitrate levels could aggravate other nitrogen-related problems.

Article 1 of the Protocol — Definitions

9. In defining terms used in the Protocol, the general proposition, as with any legal text, is that terms should be defined if they have a specific meaning that warrants clarification by means of a definition; if used more than once, the definition should appear in the definitions section (i.e., article 1); if a term is only used once, consideration should be given to placing the definition at the place where the term is used; and terms that are not used at all should not be defined.

10. The following specific issues (set out under headings 1–4 below) arise concerning the definitions in the negotiating text.

1. Definition of “stationary source”

11. In the definition of “stationary source”, it is proposed to replace the words “nitrogen oxides, volatile organic compounds or ammonia” with the words “nitrogen oxides, ammonia, volatile organic compounds or particulate matter”. The need to include nitrogen oxides and volatile organic compounds within the amendment results from moving the word “ammonia” in the amended text. If the word “ammonia” remains after “volatile organic compounds” as at present, it would be possible to use the simpler formulation, “the words ‘or ammonia’ shall be replaced by the words ‘, ammonia or particulate matter’”.

12. If there is no policy need to move the word “ammonia”, the Legal Group recommends using the simpler formulation.

2. Use of “the Protocol”/“this Protocol”/“the present Protocol”

13. In the Gothenburg Protocol, when there is a reference to the Protocol itself, it is almost invariably referred to as “the present Protocol”. This is also consistent with the usage in other CLRTAP protocols. In many of the proposed amendments, however, references to the Protocol do not use consistent terminology — the terms “the Protocol” (nine times) or “this Protocol” (four times) have been proposed instead. The term “this Protocol” appears only once in the current Protocol, in the preamble. The term “the Protocol” is used four times in the current Protocol, but in each case appears to be used to avoid repeating “the present Protocol” within the same sentence or paragraph. An analysis of the use of the terms leads to the conclusion that all three terms are intended to have the same meaning in the draft amended version of the Protocol, including its annexes, and are meant to cover the original Protocol including any subsequent amendments. Article 1, paragraph 16 (definition of new stationary sources), article 3, paragraph 12 (on the commencement of negotiation of new obligations), and article 10, paragraph 2 (c) (review of Protocol obligations), are specific cases which will be dealt with later in this report.

14. With a view to avoiding confusion and misinterpretation, the Legal Group recommends using the same term throughout the Protocol and its annexes. This would require, in the proposed amendments, replacing the references to “this Protocol” and “the

Protocol” with references to “the present Protocol”. The Legal Group does not recommend making changes to the existing wording of the Protocol where no other amendment is being made. Thus, it would not be necessary to change the single preambular reference to “this Protocol”, which we do not believe would cause confusion. It would not be necessary to change the current Protocol references to “the Protocol” when they are the second reference to the Protocol in the same sentence.

3. Definition of “new stationary source”

15. This issue is still under discussion at the policy and technical levels and will need to be considered by the Legal Group at the thirtieth session of the Executive Body. The contributions received in relation to the questions agreed at the twenty-ninth session in respect of the definition of “new stationary source” are set out in the annex to this report.

4. Definition of “countries with economies in transition”

16. The original Protocol does not contain a definition of “countries with economies in transition” that is applicable to the Protocol and all of its annexes. A definition is, however, set out in paragraph 3 of annex VII as follows:

For the purpose of the present annex, a “country with an economy in transition” means a Party that has made with its instrument of ratification, acceptance, approval or accession a declaration that it wishes to be treated as a country with an economy in transition for the purposes of paragraphs 1 and/or 2 of this annex.

17. The draft amendments propose inserting a definition of “countries with economies in transition” in article 1 as follows:

“Countries with economies in transition” are countries as listed in Executive Body decision 2006/13 or, if the Executive Body modifies the list in a subsequent decision, the latest such decision.

18. At the twenty-ninth session of the Executive Body, the Legal Group drew the attention of the Parties to the fact that decision 2006/13 addresses the issue of which Parties are eligible to receive financial support to attend meetings. Not all Parties were convinced that this is an appropriate basis for the definition. The following solutions would be legally possible:

(a) Incorporate the current definition from paragraph 3 of annex VII into article 1 of the Protocol. This would enable *all* Parties to unilaterally declare on ratification that they are countries with economies in transition for the purpose of the entire Protocol; however, just using the current definition from annex VII would mean that the criteria under which a Party may declare itself as an economy in transition would not be set out in the text;

(b) At the time of adoption of the amendments to the Protocol, the Executive Body could take a decision setting out which countries are countries with economies in transition. That decision could be referred to instead of decision 2006/13 and would be specifically about which countries are countries with economies in transition rather than which countries are eligible for financial support. As suggested by Parties at the twenty-ninth session of the Executive Body, any such determination should be on the basis of objective criteria, which ideally should also be set out in the decision;

(c) A definition in article 1 of the Protocol could also combine the setting of criteria with the current approach in paragraph 3 of annex VII of allowing countries to declare whether they wish to be treated as countries with economies in transition. Such a definition could read as follows:

A “country with an economy in transition” is a country with an economy that is changing from a centrally planned economy to a free market and which may undergo economic liberalization where market forces set prices rather than a central planning organization, and where trade barriers are removed, Government-owned enterprises and resources are privatized, and a financial sector is created to facilitate macroeconomic stabilization and the movement of private capital. A Party having some or all of these characteristics, may identify itself, for the purposes of this Protocol, as a country with an economy in transition by submitting a declaration to that effect, at the time of ratification, acceptance, approval or accession. Such a declaration may be withdrawn by the Party in question when it no longer wishes to be identified in this manner.

19. Option (c) above would have the benefit of setting both a clear definition and objective criteria in the Protocol, without reliance on a specific list of countries that could have political implications both to determine and to amend. Option (b) would have the benefit of applicability to all protocols to Convention without the need to include a specific definition in each protocol.

Article 2 — Objective

20. A new paragraph on particulate matter is proposed for insertion before the current paragraph on ozone. In addition, new paragraphs (d) on ammonia and (e) on the acceptable level of pollutants to protect materials are also proposed. If there is no policy reason to insert the paragraph on particulate matter before the paragraph on ozone, for reasons of clarity the Legal Group suggests inserting three new paragraphs: (d) on particulate matter; (e) on ammonia; and (f) on the acceptable level of pollutants to protect materials.

21. The proposed paragraph 2 of article 2 seems to contain a typographical error in omitting the words “, and the” before the word “environment”.

22. In the same paragraph, the text refers to “benefits for health, environment”. The terms “human health” and “health” are both used in the Protocol to cover slightly different intentions (as best described in preambular paragraphs 20 and 21). Clarification is therefore needed on whether the intention in this paragraph is to refer to “health” or to “human health”.

Article 3 — Basic obligations

23. At the twenty-ninth session of the Executive Body, the Legal Group raised the question of how best to refer to guidance within the Protocol. In the Protocol on Persistent Organic Pollutants (Protocol on POPs), and in some places within the Gothenburg Protocol, guidance is referred to in a generic way as “guidance adopted by the Executive Body”. This formulation allows for easy amendment of guidance documents without needing consequential amendments to the text of the Protocol to update references to the name or number of a particular guidance document. As an alternative, the precise name and number of a guidance document could be referred to, which would arguably increase transparency, but any amendments to the name or number of the document would require an amendment to the Protocol (which would have to be ratified by two thirds of the Parties to the Protocol before it would enter into force and have effect).

24. The Executive Body decided that it would be preferable to keep references to guidance documents generic. All references to guidance documents in the draft decision adopting the amendments have therefore been amended accordingly to refer to “guidance adopted by the Executive Body”. In addition, any references to “guidance to be adopted by

the Executive Body” have been updated to use the present tense for reasons of consistency. The Executive Body may, however, wish to take a decision that all guidance documents be available and transparently listed on the CLRTAP website.

25. In article 3, paragraph 10 (b), it has been proposed that the words “sulphur and/or volatile organic compounds” be replaced by the words “sulphur, volatile organic compounds and particulate matter”. By using “and” instead of “and/or” as in the original text, this obligation is moving from an obligation that is either cumulative (i.e., all of the substances) or in the alternative (one or more of the substances) to an obligation that can only be cumulative. Is this the policy intention? If not, the Legal Group suggests retaining the use of “and/or”.

26. Also at the twenty-ninth session, a request was made for the Legal Group to consider whether article 3, paragraph 11, should use the word “shall” or the word “will”. In respect of legally binding instruments, the normal practice would be to use the word ‘shall’ for a mandatory obligation and ‘may’ for a softer obligation which leaves a measure of discretion to the Parties. The word ‘will’ is not normally used in Multilateral Environmental Agreements.

27. Article 3, paragraph 12, provides that the Parties to the Protocol shall, no later than one year after completion of the first review provided for in article 10, paragraph 2, commence negotiations on further obligations to reduce emissions. The Protocol as amended will be a single legal instrument. Given that the first review provided for in article 10, paragraph 2, has already happened, article 3, paragraph 12, will not in its current form trigger a new obligation to commence negotiations on further obligations to reduce emissions after the amendments enter into force. Article 3, paragraph 12, may therefore be deemed “spent” and may either remain within the text or be deleted; either option would lead to the same result. The Legal Group therefore recommends that no amendment be made to this article.

28. If, however, Parties wish to include an obligation to commence further negotiations, an amendment to article 3, paragraph 12, is required. The absence of an obligation to commence negotiations on further obligations to reduce emissions would not prevent such an exercise from taking place in the future on the basis of amendments proposed by a Party in accordance with the amendment procedure set out in article 13.

Article 7 — Reporting

29. The proposal to amend article 7, paragraph 3, appears to change the nature of the obligation as set out in the original Protocol. The original article paragraph 3 obliges the Cooperative Programme for Monitoring and Evaluation of the Long-range Transmission of Air Pollutants in Europe (EMEP) to provide information to the Executive Body on certain issues. The reformulation removes the obligation from EMEP and instead places an obligation on the Executive Body to receive information from its subsidiary bodies.

30. As it is unnecessary to oblige the Executive Body to receive information, but may be necessary to require the subsidiary bodies to provide information, either article 7, paragraph 3 should be deleted and this task in the workplan of the relevant subsidiary bodies; or the amended article 7, paragraph 3 should be reformulated to require the relevant subsidiary bodies to provide information to the Executive Body.

31. In this regard, the policy intention is unclear and may need to be clarified. Is the intention to include the Working Group on Strategies and Review (a policy body) as one of the bodies that must provide the specified information to the Executive Body, in addition to the EMEP Steering Body and the Working Group on Effects (technical/scientific bodies)?

If so, is it reasonable to oblige the Working Group on Strategies and Review to provide this information, which appears to be more of a scientific/technical nature?

Article 8 — Research, development and monitoring

32. In article 8, paragraph (d), it was previously proposed to split the paragraph into two parts (i) and (ii). For clarity in legal drafting, a new paragraph (d bis) should be inserted. This is reflected in the draft decision.

Article 10 — Reviews by the Parties at sessions of the Executive Body

33. As noted above, as the first review by Parties of the obligations under the Protocol provided for in article 10, paragraph 2 (c), has already concluded, this process will not restart once the amendments to the Protocol enter into force — rather the ongoing process of reviews will continue.

34. If Parties intend a parallel process of reviews to start once the amendments enter into force, or if they intend to restart the review process so that a new “first” review is carried out rather than the ongoing process continuing, an amendment is needed to the text.

36. Article 10, paragraph 3, refers to “this amendment”. This language may be clear if there is only ever one amendment to the Protocol, but would not be clear if there are subsequent amendments. If the intention of this paragraph is to specifically refer to the Protocol as amended in 2012, the Legal Group suggests either replacing the words “this amendment” with the words “the amendment contained in decision 2012/2”, or alternatively a reference to a fixed future date.

Article 13 — amendments and adjustments

37. The proposed amendments to article 13, paragraph 1, would fundamentally alter the way in which the adjustment procedure works at present. Under the original Protocol, adjustments were limited to very specific circumstances, namely for a Party to the Convention that does not already have emission levels, ceilings and percentage emission reductions in annex II to add its name to that annex, along with the relevant levels, ceilings and percentage reductions.

38. The proposed amendments would additionally enable any Party to adjust the figures contained in annex II for particulate matter, not only in respect of itself, but also in respect of other Parties. This fundamental change of approach needs careful policy consideration. In particular, consideration needs to be given to the desirability or otherwise of (a) enabling any Party to “adjust” the obligations it has signed up to as part of multilateral negotiations; and (b) allowing Parties to “adjust” the obligations of others.

39. If the text were amended to read “Any Party may propose an adjustment of its emission levels, base year and emission ceiling for particulate matter.”, the issue identified in point (b) of paragraph 38 above would not arise. This amendment was discussed and accepted by all Parties at the forty-ninth session of the Working Group on Strategies and Review, but is not reflected in the negotiating text.

40. If the proposed amendments to article 13, paragraph 1, remain, a definition of “adjustment” may be required given the changes to the scope of the procedure.

Article 18 bis — Termination of Protocols

41. The Legal Group has conducted an exercise to determine whether all of the obligations of the four earlier protocols proposed for termination would be covered by the amended Protocol, or whether any of the obligations would be lost if the earlier protocols were to be terminated, as set out below.

1. 1985 Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent

42. If all the Parties to the 1985 Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30 per cent (First Sulphur Protocol) became Parties to the Gothenburg Protocol, as proposed to be amended, terminating the First Sulphur Protocol would have no significant effect on Party obligations as all obligations would appear to be adequately covered by the Gothenburg Protocol and the proposed amendments thereto.

43. Parties may, however, wish to consider whether it would be necessary to include a specific instruction within the workplan of the EMEP Steering Body for that Body to provide annually to the Executive Body information/calculations on transboundary fluxes of sulphur within the geographical scope of EMEP.

2. 1988 Protocol concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes

44. Some obligations of some Parties may be lost if the 1988 Protocol concerning the Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes (Protocol on NO_x) were to be terminated.

45. Under the amended Gothenburg Protocol, a Party must “create favourable conditions to facilitate the exchange” rather than actually “facilitate the exchange of technology” as required by article 3 of the Protocol on NO_x. Most of the activities that Parties are required to promote under this article are adequately covered by the Gothenburg Protocol, with the exception of the “commercial exchange of available technology”.

46. Under article 6 of the Protocol on NO_x, the Parties shall give high priority to research and monitoring related to the development and application of an approach based on critical loads to determine, on a scientific basis, necessary reductions in emissions of nitrogen oxides. The Protocol on NO_x lists actions the Parties shall, in particular, undertake, through national research programmes, in the workplan of the Executive Body and through cooperative programmes within the framework of the Convention. Parties will need to evaluate whether these activities have been adequately undertaken or whether they should be ongoing and, if so, whether additional provision needs to be made, either in the amended Gothenburg Protocol or by a decision of the Executive Body.

47. Some Parties to the Protocol on NO_x that are not yet Parties to the Gothenburg Protocol have 2010 targets for the Gothenburg Protocol that are higher than those under the Protocol on NO_x, which means that removing the Protocol on NO_x obligations would work to the benefit of those Parties. In addition, some Parties have less stringent targets for the Gothenburg Protocol than for the Protocol on NO_x.

48. The Protocol on NO_x obliges Parties to apply national emission standards to new mobile sources in all major source categories. These categories have not been listed per sector in a mandatory way, but instead focus on those categories that contribute at least 10 per cent of the total national emissions of NO_x in a given year. Annex VIII to the amended Gothenburg Protocol is mandatory and lists mobile sources in specific sectors to which specific emission limit values (ELVs) apply, regardless of their emission contribution. If these sources do not contain all sectors which contribute at least 10 per cent

of the total national emissions, that obligation would be lost upon termination of the Protocol on NO_x.

49. As regards the obligation in article 4 for unleaded fuel, it should be noted that this obligation would be covered under the Heavy Metals Protocol and not the Gothenburg Protocol. Becoming a Party to the Gothenburg Protocol alone would not therefore be sufficient to ensure continuation of the obligation for those Parties to the Protocol on NO_x that are not Parties to the Heavy Metals Protocol.

3. 1991 Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes

50. Some obligations of some Parties may be lost if the 1991 Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes (Protocol on VOCs) were to be terminated.

51. With respect to the obligation to control and reduce emissions in article 2, paragraph 2, of the Protocol on VOCs, it is likely that the obligations in an amended Gothenburg Protocol would be at least as stringent as existing obligations for nearly all Parties. The analysis on this question is inconclusive, however, due to the lack of data. Article 2, paragraph 2, allows Parties to elect one of three options for emissions reduction commitments, but four Parties did not indicate their election upon signature of the Protocol on VOCs. Moreover, base year emissions data were not available for two Parties and data for another Party was not clearly indicated as related to its identified tropospheric ozone management area. Keeping in mind these uncertainties, for at least 20 of the 24 Parties to the Protocol on VOCs a commitment in an amended Gothenburg Protocol to maintain or reduce reported 2005 VOC emissions would also satisfy obligations under the Protocol on VOCs. It is possible that a similar conclusion could be reached for at least three of the other four Parties after further analysis. However, for at least one Party, termination of the obligation under the Protocol on VOCs could result in a relaxation of that Party's obligations.

52. Neither the current, nor the amended Gothenburg Protocol contains a provision to promote the use of products that are low in or do not contain VOCs as set out in article 2, paragraph 3, of the Protocol on VOCs. The same goes for the obligation of labelling products specifying their VOC content and for the obligation to apply techniques to reduce the volatility of petrol.

53. In carrying out their obligations under article 2, paragraph 4, of the Protocol on VOCs, Parties are invited to give the highest priority to the reduction and control of emissions of substances with the greatest photochemical ozone creation potential, taking into consideration the information contained in annex IV. Although phrased as an "invitation" and not as an obligation, there is no similar requirement in the current or amended Gothenburg Protocol.

54. In implementing the Protocol on VOCs, and in particular any product substitution measures, Parties are required to take appropriate steps to ensure that toxic and carcinogenic VOCs, and those that harm the stratospheric ozone layer, are not substituted for other VOCs. Again, this obligation does not seem to be covered directly by the current or amended Gothenburg Protocol.

55. Many of the requirements of article 5 of the Protocol on VOCs (research and monitoring) are covered by the Gothenburg Protocol. However, consideration would need to be given as to whether additional action is required in respect of (a) improving estimates of the performance and costs of technologies for control of emissions of VOCs and recording of the development of improved and new technologies; (b) improving

understanding of the chemical processes involved in the creation of photochemical oxidants; and (c) identifying possible measures to reduce emissions of methane.

56. As regards reporting, there would seem to be some discrepancies that may need to be addressed, although this seems to mainly concern tropospheric ozone management areas, which are not a feature of the Gothenburg Protocol.

4. 1994 Protocol on Further Reduction of Sulphur Emissions

57. Some obligations of some Parties will be lost if the 1994 Protocol on Further Reduction of Sulphur Emissions (Second Sulphur Protocol) were to be terminated, namely:

(a) The obligation of one Party under article 2, paragraph 3, to reduce emissions in relation to a "SOMA" (sulphur oxides management areas) in addition to reductions in national emissions. Under the proposed amended Gothenburg Protocol, emission reductions in a pollutant emissions management area (PEMA) would be an alternative to, rather than additional to, national reductions;

(b) The obligation under article 3, paragraph 1, to exchange information on technologies to reduce sulphur emissions. Under the proposed amended Gothenburg Protocol, Parties would only have an obligation to create favourable conditions to facilitate such an exchange, with no time limit as to when those conditions would have to be created. In addition, there would be no obligation to promote the commercial exchange of available technology (art. 3, para. 1 (a), of the Second Sulphur Protocol);

(c) The obligation under article 4, paragraph 2 (a), to "collect and maintain information on actual levels of sulphur emissions," unless this is covered by the obligation to develop and maintain inventories and projections for the emission of sulphur dioxide (see art. 3, para. 12 of the proposed amended Gothenburg Protocol). Note that Parties under the proposed amended Gothenburg Protocol would be required to collect and maintain information on ambient concentrations and depositions of sulphur, oxidized sulphur and other acidifying compounds and their effects;

(d) Parties outside the area of EMEP would no longer be required to report their national annual sulphur emission levels, but would only be required to make such information available if requested to do so by the Executive Body;

(e) In addition, under the proposed amended Gothenburg Protocol, the guidance that Parties would be required to take into account when implementing effective measures to reduce sulphur emissions would be guidance adopted by the Executive Body, which would be contained in guidance documents separate from the Gothenburg Protocol, as opposed to being incorporated into the Gothenburg Protocol through either text in the main body or an annex.

II. Annex I (ECE/EB.AIR/2012/3)

58. The amendments to paragraph 1 of annex I suggest including a reference to the website where the *Manual on Methodologies and Criteria for Modelling and Mapping Critical Loads and Levels and Air Pollution Effects, Risks and Trends* can be found. The Legal Group strongly recommends omitting the reference to the website. Such a reference is not appropriate for a legal text. In addition, references to websites can quickly become out of date. Not only does such a reference therefore risk being misleading, but it would also require an amendment to the Protocol in future if the reference needed to be updated. The Legal Group suggests that the Executive Body decide that either the manual itself or, at the very minimum, a link to the manual, be available and transparently listed on the Convention website.

59. In the final sentence of paragraph 1, there is a proposal to add the words “by the Executive Body to the Convention”. The words “to the Convention” should be deleted, as “the Executive Body” is already defined in article 1, paragraph 3, of the Protocol.

60. In paragraph 7, the word “(semi-)” appears twice in the text, on both occasions in parenthesis. If the parenthesis are not indicative of a particular meaning that would not be the normal meaning of the word they could perhaps be deleted.

61. In paragraph 11, in the first line, the word “(PM)” appears after the words “particulate matter”. Given that this is included in the definition of particulate matter in article 1 of the Protocol, the words “particulate matter” and the parenthesis around “(PM)” at the beginning of paragraph 11 could be deleted. Similarly, the words “(particles with aerodynamic diameter less than 2.5 µm)” could be deleted, as they are also included in the definition in article 1.

62. The order of paragraphs 12 and 13 should be switched to ensure consistency with the rest of annex I, where, in respect of countries outside the geographical scope of EMEP, the paragraph concerning Canada appears before the paragraph concerning the United States of America.

III. Annex II (ECE/EB.AIR/2012/4)

63. Given the extent of amendments to annex II, the Legal Group recommends replacing this annex in its entirety.

64. The Legal Group’s analysis of document ECE/EB.AIR/2012/4 is incomplete, as the document was not available in sufficient time to allow a thorough analysis. The comments within this section of the report therefore represent the initial views of the Legal Group and further consideration will be required.

65. The proposed title of the amended annex II is “Emission ceilings for 2010 and emission reduction obligations for 2020 and beyond”. consideration should be given to a more generic title, such as “Emission ceilings and emission reduction obligations” to facilitate future amendments.

66. Annex II refers throughout to obligations for “2010 and beyond”. As the obligation in article 3 of the Protocol requires Parties to reduce and to maintain the reduction, the continuation of the obligation beyond 2010 can be implied from the obligation itself. Consideration could therefore be given to deleting the words “and beyond” where they appear after “2010” in annex II.

68. The reference in paragraph 2 and in the heading to table 1 to “those Parties that ratified the Gothenburg Protocol” is problematic, *inter alia*, as it does not provide an indication of timing. The words “prior to 2010” should therefore be added at the end of paragraph 2 and at the end of the heading to table 1.

69. There is a typographical error in the final sentence of paragraph 3, where the words “in the” should be replaced by the words “as a”.

70. In the first sentence of paragraph 4 of annex II, it is indicated that the emission levels for 2005 are “based on” the emissions officially reported to EMEP in 2012. This suggests that the reported emissions have been adjusted in some way. If this is not the case, consideration should be given to deleting the words “based on”.

71. As drafted, the final sentence of paragraph 4 indicates that “2005 data can be adapted by the Parties when better information becomes available in later years”. The intent of this sentence and the mechanism that would be used for such an adaptation are unclear.

Does it imply use of the amendment procedure or the adjustment procedure, or something else entirely, or does it refer to an informal “adaptation” that would not result in any changes to the Protocol? If the latter, the sentence could be deleted in its entirety.

72. As regards paragraph 5, the Legal Group notes that, if the situation envisaged in paragraph 5 had occurred, presumably the numbers referred to in paragraph 5 would already be available and could be included within the tables either as part of the current amendment process or provided by a Party on ratification. In addition, the Implementation Committee may not be the correct body to receive information on the proposed three-year average. The intention of presenting this information to the Implementation Committee is unclear, as is the standard by which it would evaluate such information. .

73. In row 25 of table 1, there is a typographical error in the year of ratification for the United States of America.

74. Footnote d/ to table 1 may no longer be appropriate and may need to be either amended or deleted — in particular the latter part of the sentence referring to adjustment of the figures in accordance with article 13, paragraph 1, of the Protocol.

75. In addition, during discussions on annex II at the twenty-ninth session of the Executive Body, questions were raised regarding what would happen to the ceilings set out in the original - Protocol for 2010 once reduction percentages were set for 2020. If 2010 ceilings are specifically retained or if they are not explicitly deleted in the amended Protocol, those ceilings will continue to apply for the period up to 2020 regardless of the point in time at which the amendments to the Protocol enter into force. It is not currently clear from the proposed wording of the amendments to annex II whether the intention is that the 2010 ceilings are to be applied in parallel to the 2020 percentages. Given that article 3 requires that Parties “reduce and maintain” emissions, if the intention is for the 2010 ceiling to cease for a Party once the 2020 percentage has become effective for that Party (i.e., after the amendments have entered into force and from 2020 onwards), consideration should be given to including specific wording in annex II to this effect.

76. If such language were to be included, it would make it clear that (a) if the amendments enter into force before 2020, the 2010 ceilings would apply up to 2020, after which point the 2010 ceilings would cease to apply and the 2020 percentages would be applicable; and (b) if the amendments enter into force after 2020, the 2010 ceilings would continue to apply up until the amendments enter into force, at which point the 2010 ceilings would cease to apply and the 2020 percentages would be applicable. It should, however, be noted that, regardless of how the 2010 ceilings are dealt with in the amendments to the Protocol, they can only cease completely to apply once all Parties to the original Protocol ratify the amendments.

IV. Annex III (ECE/EB.AIR/2012/5)

77. The Legal Group has no comments on the document prepared by the secretariat regarding annex III (ECE/EB.AIR/2012/5).

V. Annex IV (ECE/EB.AIR/2012/6)

78. Given the extent of the amendments to annex IV, the Legal Group recommends replacing this annex in its entirety.

79. In paragraph 5 of annex IV, the numbering system used departs from the normal practice in the annexes to the Protocol, and the more usual system of numbering should be retained.

80. Paragraph 5.1 of annex IV refers to the competent authority granting derogations from the obligation to comply with certain ELVs. At no point in the Protocol is there a requirement to appoint a competent authority or assign functions to that authority. The ability of an undefined competent authority to grant derogations therefore has a tenuous legal basis. A possible solution could be to replace the words “competent authority” with the word “Party”. Alternatively, a reference could be made to the “national competent authorities”, which would be consistent with article 1, paragraph 16. However, neither of these options would resolve the question of the legal basis for the derogation.

81. In a similar vein, paragraph 5.3 of annex IV refers to “permits”, which, although referred to in some of the other amended annexes do not seem to have a basis elsewhere in the Protocol.

82. There is a typographical error in paragraph 9: the word “produces” should be replaced by the word “produce”.

VI. Annex V (ECE/EB.AIR/2012/7)

83. Given the extent of amendments to annex V, the Legal Group recommends replacing this annex in its entirety.

84. In paragraph 5 of annex V, the numbering system used departs from the normal practice in the annexes to the Protocol and the more usual system of numbering should be retained. In any event the same solution should be applied in respect of the numbering of paragraphs in annex V as the Parties decide to apply in respect of annex IV.

85. As in annex IV, there are references to a “competent authority” in paragraph 5 of annex V, along with the ability of that competent authority to grant derogations. The Legal Group recommends that the same solution be applied as is adopted in respect of annex IV.

86. Also as in annex IV, paragraph 5.3 of annex V refers to “permits”, which, although referred to in some of the other amended annexes does not seem to have a basis elsewhere in the Protocol.

87. In footnote b/ to table 4, the word “applies” appears to be missing before the words “for diesel engines”. The Legal Group therefore proposes replacing the words “may be” with the word “applies”. In addition, two of the notes to table 4 appear in square brackets. The Legal Group presumes that both of these footnotes should be deleted.

VII. Annex VI (ECE/EB.AIR/2012/8)

88. In paragraph 3 of annex VI, in many instances the original text of annex VI to the Protocol has been changed to substitute the word “process” or “processes” for the words “activity” or “activities”. However, the substitution is not universal across all subparagraphs and in some places the word “activity” or “activities” remains. In addition, amendments to the original text of paragraph 3 have been made merely to change the order of subparagraphs. The Legal Group questions whether there is a defined need to change these words and the order of the subparagraphs. If not, the Legal Group recommends not amending these subparagraphs to simplify the amendment process and reduce the number of amendments.

89. In addition, a large number of amendments to paragraph 3 have been identified by the Legal Group that are not shown as amendments in the negotiating text. In particular, some paragraphs have been moved and renumbered in the negotiating text. Given that the Executive Body decided not to amend simply to renumber, the Legal Group would recommend leaving these paragraphs where they appear in the current annex VI;

90. As in annexes IV and V, there are references to a “competent authority” (paragraph 6; footnote b/ to table 5; footnote a/ to table 13; and footnote a/ to table 14), along with the ability of that competent authority to grant derogations. As in respect of annexes IV and V, the Legal Group recommends that the same solution be applied as is adopted in respect of annexes IV and V.

91. For reasons of consistency with previous paragraphs, the Legal Group suggests that paragraph 14 of annex VI should refer to “Coating activities (coil coating)” rather than just to “Coil coating”.

93. It is not entirely clear from the negotiating text whether appendix II to annex VI remains unamended or is proposed for deletion in its entirety.

VIII. Annex VII (ECE/EB.AIR/2012/9)

94. The Legal Group has no comments on the document prepared by the secretariat regarding annex VII (ECE/EB.AIR/2012/9).

IX. Annex VIII (ECE/EB.AIR/2012/10)

95. Given the extent of amendments to annex VIII, the Legal Group recommends replacing this annex in its entirety.

96. The Legal Group has no additional comments on the document prepared by the secretariat regarding annex VIII (ECE/EB.AIR/2012/10).

X. Annex IX (ECE/EB.AIR/2012/11)

97. Document ECE/EB.AIR/2012/11 has not previously been considered by the Parties. The Legal Group will therefore need to further consider annex IX in detail at the thirtieth session of the Executive Body, once Parties have had chance to consider the proposals set out in that document.

98. Paragraph 1 of annex IX refers to timescales set out in annex VII. There are two issues with this language:

(a) There are no timescales in annex VII that are linked to ammonia, annex IX or article 3, paragraph 8, of the Protocol;

(b) The wording is unclear as to whether the reference to the timescale refers back to annex IX or to the obligations of the Parties under article 3, paragraph 8.

If a timescale in respect of ammonia were to be included in annex VII, the issue of timescales should be dealt with in a separate sentence in paragraph 1 of annex IX.

99. The terminology used in paragraph 4 of annex IX suggests a change of approach to that set out in paragraph 8 of the current annex IX. In the current annex IX, the terminology used suggests that farms must actually have a certain number of livestock (“farms of 2,000 fattening pigs or 750 sows or 40,000 poultry”). The proposed amendment to annex IX,

however, uses terminology that is suggestive of a move towards potential capacity to hold a certain number of livestock, rather than the actual number of livestock held (“farms with more than 2,000 places for fattening pigs or 750 places for sows or 40,000 places for poultry”). It is not clear whether this change of approach is intentional.

100. Paragraph 6 of annex IX refers to a “Framework Code for Good Agricultural Practice for Reducing Ammonia Emissions, adopted by the Executive Body at its nineteenth session (EB.AIR/WG.5/2001/7) and any amendment thereto”. The Framework Code was considered by the Working Group on Strategies and Review at its thirty-third session, but does not appear to have been officially adopted by the Executive Body. An alternative formulation should therefore be found, particularly given the decision of the Executive Body to use generic references in the Protocol text. A possible solution would be to delete the words “adopted by the Executive Body at its nineteenth session (EB.AIR/WG.5/2001/7)”.

101. Paragraph 8 of annex IX introduces a prohibition on the use of ammonium carbonate fertilizers. For reasons of transparency and legal certainty, any such “prohibitions” should preferably be set out clearly in the text of the Protocol, rather than appearing only in an annex.

102. The intention of annex IX, read in conjunction with article 3, paragraph 8, appears to be that Part A is mandatory and Part B recommendatory. Article 3, paragraph 8 (a) sets out a concrete obligation (“each Party shall apply”). However, article 3, paragraph 8 (b) also appears to establish a concrete obligation on Parties to do something, but leaves flexibility in the way in which it is achieved (“each Party shall apply, where it considers appropriate”). The Legal Group therefore suggests deleting the word “(Recommendatory)” after Part B in annex IX.

103. In addition, the Legal Group recommends that the wording of paragraph 20 be amended to ensure consistency with the wording of article 3, paragraph 8 (b) by replacing the words “considers them applicable for the control of ammonia emissions” in paragraph 20 with the words “considers them appropriate for preventing and reducing ammonia emissions”.

104. In this regard, the text of Part B has multiple different qualifiers (if feasible/if technically or economically feasible/if applicable/etc.), often with slight differences in the wording. It is not clear whether the intent is to differentiate among the measures listed — i.e., some are suggested more strongly than others — or whether all are considered equally important and are to be evaluated by Parties according to the same standards. If the latter, consistent wording would be preferable.

105. In paragraph 21, the symbol “N” is used instead of the word “nitrogen”. For consistency, as the word “nitrogen” is used throughout the rest of annex IX, “N” should be replaced by “nitrogen”.

XI. Annex X (ECE/EB.AIR/2012/12)

106. Using either “dust” or “total suspended particles” in the title of annex X would create legal uncertainty, as those terms are applicable only to one part of the annex. Instead, the appropriate title for annex X is “Limit values for emissions of particulate matter from stationary sources”, as the annex is actually about emissions of “particulate matter”, which are measured differently by different Parties.

107. In paragraphs 6 and 16 of annex X, the numbering system used departs from the normal practice in the annexes to the Protocol and the more usual system of numbering

should be retained. In any event the same solution should be applied as the Parties decide to apply in respect of the other annexes where this issue has been identified.

108. As in annexes IV, V and VI, there are references to a “competent authority” (paragraphs 6.1 and 6.4), along with the ability of that competent authority to grant derogations. The same solution should be applied as is adopted in respect of annexes IV, V and VI.

109. In a similar vein, as in annex IV, paragraph 6.3 refers to “permits”, which, although referred to in some of the other amended annexes do not seem to have a basis elsewhere in the Protocol.

XII. Annex XI (ECE/EB.AIR/2012/13)

110. The Legal Group notes concerns regarding the adoption of a set of definitions at the beginning of annex XI that are, in some cases, inconsistent with the definitions elsewhere in the Protocol. For example, the proposed definition of VOC in paragraph 3 (d) is different from that for VOCs in annex VI. Similarly, the proposed definition of “organic solvent” is different in the two annexes. The definition of “organic compound” seems to be basically the same, but is worded slightly differently. Using different definitions in the same legal instrument in relation to the same substance or issue risks creating legal uncertainty with regard to the precise obligations of Parties. The Legal Group therefore recommends that Parties consider whether the definitions should be consistent; and if there is a particular defined reason to use inconsistent definitions, whether there should be a more explicit differentiation.

111. The Legal Group also recommends that definitions be listed in alphabetical order to increase transparency and usability.

Annex

Input from Parties regarding the definition of “new stationary source”

1. At the twenty-ninth session of the Executive Body, a small group of legal and technical experts developed a list of four questions that need to be answered to determine the policy position on the definition of “new stationary source” in the context of the Gothenburg Protocol and to enable the Legal Group to draft text that meets the policy needs. The questions were as follows:

(1) Should the definition be written in such a way that the category of “new stationary source” would be updated by choosing a new point in time for defining what a new stationary source is? The definition in the original Protocol provides that a “new stationary source” is one that is constructed or substantially modified after 2006. If the definition is not amended, all stationary sources constructed or substantially modified after 2006 will be “new” stationary sources, which will mean retrofitting of some sources to ensure that best available technology (BAT) requirements are met;

(2) Do we want a fixed date for defining new stationary sources, which would remain the same with future amendments to ELVs? This would mean that, once the fixed date is reached, as with the original Protocol everything after that date would be a “new” source, meaning that the issue would need to be considered again when future amendments are made unless different categories of “new” sources were to be provided for in the annexes (in which case, there would be no need to change the current definition). Alternatively, do we want a date which would move with each future amendment to ELVs? This would mean that the group of existing stationary sources would continuously enlarge and care would need to be taken to ensure that the ELVs for a source do not become less stringent due to a move from the “new” to the “existing” category;

(3) Would we want to include now the possibility of introducing an additional category of stationary sources — possibly with more stringent ELVs — at the time of future amendments?

(4) Would we want a definition which merely works for the current amendments or, if possible, one that could also withstand future amendments?

2. Four responses were received from Parties to the Convention (Belarus, Canada, United States of America and the European Union (EU)) and are set out below. These responses are set out below as received from those Parties and will require further discussion at the thirtieth session of the Executive Body.

Belarus

3. “From my point of view, the definition of “new stationary source” in the text of the revised protocol should apply to the sources introduced into service within one year (five years) after the entry of the amended Protocol enters into force, ie with 2016 (2019), the protocol if entered into force in 2014. At the same sources that is constructed or substantially modified from 2006 to 2014, should be for countries that are Parties to the existing protocol to move into the category of “existing stationary sources,” with notes on the text of the amendment protocol (another definition) that they are a must for the Parties to the existing protocol to implement the BAT and comply with the ELVs.

4. Regarding the first part of the question: It seems to us a fixed date would reduce flexibility and a fixed date would be good if all countries simultaneously would be ratified the protocol. Otherwise, it turns out that the country for economic or political reasons can not ratify the protocol in 2014, it generally does not ratify, because then they will have less time for "new" sources. Therefore, we are principally against fixed date, because of its fixation does not lead us to the ratification of the protocol. By the second part of the question, I partially answered in the first paragraph. I think it necessary to consolidate the position of the sources of transitioning to group "existing" phrase similar to the following: for installations put into operation from 1 January 2006 until the date entry into force for the Party of existing protocol (1999), subject to the provisions of the protocol (obligation) the 1999 Protocol.

5. It seems obvious now that we cover the most significant sources in terms of emissions, and so after a while we will amend the protocol to include a category percentage of emissions from that at the moment is small. During this period of time (up to the following amendments) will appear more available technologies in terms of cost and emission reduction.

6. Sure would like to see the definition (definitions) that would work in the case of subsequent amendments. Then it becomes obvious that a fixed date, it's not a clean solution."

Canada

7. "Yes, we agree that the definition should be amended to avoid immediately having to retrofit to meet ELVs for 'new sources. We feel the definition should be worded in such a way that designation as a new stationary source is tied to the date of entry into force for a Party.

8. We would also support a definition of 'new stationary source' that could allow for some flexibility by sector, in terms of entry into force. Implementation of Canada's regulations with the domestic equivalent of ELVs could potentially be staggered, although the content is expected to be finalized (i.e., the numbers) in 2013. Our domestic timelines for 'new' and 'existing' could easily differ from those in (or implied by) Gothenburg Protocol, which could make ratifying earlier than a time when our regs are all in force tricky. The only way we could ratify sooner and ensure compliance would be if our ELVs for 'new' under the GP were no more stringent than the ELVs for 'existing' under our domestic regulation – which would be a bit perverse. For example, suppose Canada ratifies in 2013. Under the proposed draft wording of Article 1.20 in EB.AIR/2011/8 16dec2011, this would mean any facility constructed after 2014 would be bound by ELVs for 'new'. But if Canada's regulations for a particular industrial sector define a 'new' facility as one constructed after 2015, such facilities would be 'existing' under our domestic regulations, but 'new' under the GP. This could be addressed with a language such as "unless otherwise specified" in both 1.2 and Annex VII. "

9. We would support the second approach, with a date for amended ELVs that moves with each future amendment. When an ELV is amended, an *additional* category of existing sources could be created such that a stationary source that was constructed as 'new' before the amendment must maintain the ELVs it was bound to at the time of construction, avoiding the perverse effect of the source falling into an existing category that is less stringent. This intermediary 'existing' category would have an ELV that is identical to the pre-amendment 'new' ELV. "

10. Yes, in the context of the situation described above (see Canada's answer to question 2 above). We also agree with other comments made to date, that any new suggestions

should be straightforward and presented in good time so as not to slow down negotiations in the spring.”

11. We would support finding a definition that can work for future amendments.”

United States of America

12. “Yes, the definition should be changed to avoid a situation in which sources constructed or substantially modified after 2006 would have to immediately retrofit to meet new ELVs for “new” sources. This could be done by identifying a new point in time for defining a “new stationary source,” but there are other options as well – for example, explicitly continuing in application the ELVs that applied to a new source at the time of its construction.

13. We believe the second approach is preferable to avoid having the same issue repeat in the future. We also think the date should be flexible (tied to the entry into force of the amendments for a party) to allow for parties that join later to have the same grace period from their date of joining as those who join earlier.

14. If the definition is sufficiently flexible, it could allow for this. We agree with those who have indicated that new suggestions now should be simple enough and presented far enough in advance so as not to hinder the negotiations.

15. A definition that would work for future amendments to ELVs would be ideal, recognizing of course that the views of parties may change over time.”

European Union

16. “This revision is a major change of the GP requirements for stationary sources changing both the name, scope and ELVs for the source categories. It will therefore be very complex to identify which categories would remain exactly the same and for which only the ELVs is changed and for which also the scope is changed. Since the protocol has been revised to a significant degree it would be an advantage for the Parties to have a new starting point in time for new stationary sources, such as the entry into force of the current amendments to the protocol. This is likely also to help non-parties acceding the amended Protocol. Furthermore, the acceptance by the EU of the option 2 ELVs was also in the understanding that a new starting point in time would be defined for ‘new stationary source’.

17. The Gothenburg protocol provides considerable flexibility for existing stationary sources as compared to new stationary sources - both in the applied emission limit values and in the scope (“as far it is technically and economically feasible”). This additional flexibility makes a large difference in requirements between new and existing stationary sources.

18. The first option is preferred. It would avoid that recently built (i.e. new) stationary sources are re-defined to existing stationary sources every time an amendment for that source category enters into force. On the other hand, should a future amendment tighten the ELVs for new stationary sources additional sub-classes of ‘new sources’ could be included in the annexes. We view this option ensures to a large degree the integrity of the protocol.

19. The second option (which we believe is captured in the current negotiation text) would entail some odd effects, such as relaxing requirements for recently built sources as they become existing stationary sources once the amendment enters into force. This would weaken the integrity of the protocol to a significant degree.

20. Although the amended annexes cover all major source categories new ones may be added with ELV for existing and new stationary sources through amendments. In addition, such amendments may also introduce new pollutants, e.g. specific VOCs or PM fractions. This could be relevant for the inclusion of ELVs for black carbon for already listed and/or new categories. It would therefore be an advantage if the amendment of the main text in this round could cover also future amendments of the annexes which are introducing new source categories and/or new pollutants. We view that wherever new sub-classes would need to be defined for source categories and ELVs already covered by the Protocol, this would not necessarily need an amendment of the definition in Article 1, but could be accommodated for in the Annexes ("new stationary sources built before/after date XXX")

21. The amended annexes are likely to cover all major source categories. It would be preferable to have an amendment of the definition in the main text that would also be suitable for future amendments, at least of ELVs for already tabled source categories.

22. At the same time we wish to point to a related problem to the definition with the negotiating text annex VII Timescales that would allow Countries with Economies in Transition an additional 5 year to implement the ELVs for new stationary sources. The current negotiating text indicates that the ELV for new stationary sources would only start applying five years after the entry into force for that party. A future amendment updating the ELVs that redefine the start time for "new" stationary sources (see Q2 option 2) creates a void (with no ELV at all) for these new sources in the period between 1 to 5 year after that amendment comes into force for that party.

23. The following text (building on current negotiation text) could be considered to capture our preferred options.

["New stationary source" means any stationary source of which the construction or substantial modification is commenced after the expiry of one year from the date of entry into force **for a Party** of: ~~the later of~~ **[(a) the present Protocol as amended by decision X/2012]; or (b) an a later amendment to the present Protocol that introduces a new source category or specific pollutant, with respect to that stationary source, introduces new limit values** in annexes IV to VI or X. It shall be a matter for the competent national authorities to decide whether a modification is substantial or not, taking into account such factors as the environmental benefits of the modification]"