# COMMENTS FROM CROATIA ON THE FINAL DECISION (CC-2009-1-8/Croatia/EB)

**REPUBLIC OF CROATIA**
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Class: 018-04/09-02/8
Reg. No.: 531-13-1-2-09-27
Zagreb, 28 December 2009

Mr. Feng Gao
Secretary to the Compliance Committee
Climate Change Secretariat
United Nations Framework Convention on Climate Change
D-53153 Bonn
GERMANY

Subject: Submission of comments related to the Final Decision

Dear Mr. Gao,

Please find enclosed Croatia's comments relating to the Final decision, in accordance with rule 22 (2) of the Rules of procedure of the Compliance Committee of the Kyoto Protocol contained in the annex to decision 4/CMP.2.

Yours sincerely,

State Secretary

Dr. Nikola Ružinski

**REPUBLIC OF CROATIA**

**MINISTRY OF ENVIRONMENTAL PROTECTION,**

**PHYSICAL PLANNING AND CONSTRUCTION**

**COMPLIANCE COMMITTEE**

**Secretariat**

**Enforcement Branch**

# COMMENTS OF CROATIA

on

**Final decision CC-2009-1-8/Croatia/EB**

Zagreb, 24 December 2009

In accordance with section VIII, paragraph 8 of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1 and rule 22, paragraph 2, of the Rules of procedure of the Compliance Committee contained in the annex to decision 4/CMP.2 as amended by decision 4/CMP.4, the Republic of Croatia hereby provides its comments on the final decision CC-2009-1-8/Croatia/EB of the enforcement branch of the Compliance Committee adopted on 26 November 2009, as follows hereinafter.

Croatia hereby expresses a profound disappointment and disbelief with regard to the final decision CC-2009-1-8/Croatia/EB (the final decision) upholding the preliminary finding CC-2009-1-6/Croatia/EB in its entirety. Croatia believes that the respective final decision is groundless, inequitable, as well as unbalanced, and, as it currently stands, extremely damaging for Croatia, particularly bearing in mind that the enforcement branch of the Compliance Committee (EBCC) assumed the standpoint of not being competent to consider any of the arguments in favour of Croatia that are crucial for resolving this matter, especially the violation of the equal treatment principle.

Since the EBCC's final decision omitted to elaborate in detail crucial arguments provided by Croatia, Croatia hereby once again refers to the Statement of position of Croatia CC-2009-1-7/Croatia/EB of 12 November 2009. The comments hereof shall be read together with and in furtherance of the Statement of position of Croatia CC-2009-1-7/Croatia/EB, enclosed hereto as an annex.

COMMENTS

1. In deciding the Croatian case, the EBCC on the account of alleged non-competency, disregarded all arguments provided by Croatia, thus adopting an inappropriate and inequitable decision.

2. The final decision is not in line with Article 31, paragraphs 1 and 2 of the Vienna Convention on the Law of Treaties which calls for a treaty to be interpreted in good faith and in the light of its object and purpose, and that for the purpose of interpretation, both the annex and the preamble of the treaty should be taken into consideration.

Contrary to the above, when interpreting provisions of the Kyoto Protocol, the EBCC failed to take into consideration the preamble of the Kyoto Protocol, which recalls the United Nations Framework Convention on Climate Change (the Convention), in particular with respect of pursuing its ultimate objective (Article 2) and guiding principles (Article 3) striving for 'equitable approach in accordance with common but differentiated responsibilities and respective capabilities', as well as the Berlin Mandate. Accordingly, pursuant to the preamble of the Kyoto Protocol and international legal standards, the EBCC was under an obligation to interpret the Kyoto Protocol as an extension of the Convention and in light of its objective and purpose, as opposed to treating it as an entirely separate treaty. Had the EBCC followed this course of action, an equitable decision would be one that would respect Croatia's particular circumstances and capabilities as previously recognized under the Convention pursuant to decision 7/CP.12.

Hence, the EBCC's restrictive interpretation clearly contradicts the fact that the Kyoto Protocol was adopted in furtherance of and based on the Berlin Mandate, as laid out in decision 1/CP.1 of the Conference of the Parties, following the review of Article 4, paragraphs 2(a) and (b,) of the Convention and the subsequent conclusion that the aforementioned paragraphs were inadequate. Indeed, the Berlin Mandate opted for strengthening the commitments of the Parties under Article 4, paragraph 2(a) and (b) in order to ensure effective achievement of the Convention's goals. This initiative resulted in the adoption of the Kyoto Protocol. As the Kyoto Protocol derived from Article

4, paragraph 2 of the Convention, it should obviously be read in light of the Convention's objective and purpose. It is important to note here that Croatia was granted flexibility for the implementation of its commitments under, no other but, Article 4, paragraph 2, of the Convention and consequently its amendments or elaborations.

In calling for a treaty to be interpreted in good faith and in light of its object and purpose, the Vienna Convention on the Law of Treaties therefore fully endorses and favours a teleological interpretation of treaties over a grammatical one. A position Croatia strongly advocates and calls for to be fully respected and adhered to.

3. The final decision is not in line with Article 31, paragraph 3, subparagraph (b), of the Vienna Convention on the Law of Treaties, which stipulates that any subsequent practice in the application of the treaty shall be taken into account regarding its interpretation.

Contrary to the above, the EBCC failed to take into consideration the flexibility allowed under the Convention for application of the Kyoto Protocol in the comparable cases of Bulgaria, Hungary, Poland, Romania, Slovenia and Iceland. In these cases, flexibility was allowed without ever requiring confirmation of the Conference of the Parties serving as meeting of the Parties to the Protocol (CMP) or any other additional confirmation, hence setting transparent and consistent practice (precedents) for recognition of flexibility to Croatia under decision 7/CP.12 with respect of the Kyoto protocol, as already done in all aforementioned cases. This fact alone represents a clear violation of the equal treatment principle.

4. The final decision is not in line with Article 32 of the Vienna Convention on the Law of Treaties, which stipulates that when the interpretation of the treaty *"a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable"*, supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion should be taken into account.

As pointed out by Croatia during the entire procedure before the Compliance Committee, EBCC's final decision of non-compliance denying flexibility to Croatia under decision 7/CP.12 is obviously absurd and unreasonable from several different aspects:

(a) Denying previously approved flexibility for Croatia's particularities would setback the country's economy by forty years, to energy demands in 1974. It should be recalled here that in 1990 only 27% of consumed electricity was generated in fossil-fuelled power plants on Croatian territory.

(b) Full consideration should have been taken that decision 7/CP.12 was adopted in 2006 when the Kyoto Protocol was already in force, therefore at the point when Croatia was no longer in position of intervening into text of the Kyoto protocol, and that this decision was a crucial precondition set by Croatia with regard to its ratification, so as to ensure Croatia's compliance with the Kyoto Protocol.

(c) If the decision 7/CP.12 is not to be applied to Croatia during the first commitment period, then it brings into question the whole purpose of several years of negotiations, as well as the ultimate unanimous decision 7/CP.12 taken at COP 12 in Nairobi, Kenya. Denying the applicability of the decision 7/CP.12 would prevent Croatia enjoying the envisaged flexibilities prescribed therein, to enable full compliance and in turn, would give rise to a critical economic situation to Croatia.

(d) The consequence of ignoring decision 7/CP.12 is that Croatia was and still is in non-compliance of the greenhouse gases emissions target under both the Convention and the Kyoto Protocol from 2005

onwards. This is the exact reason why flexibility was requested by and subsequently granted to Croatia pursuant to decision 7/CP.12.

The EBCC failed to take into consideration the consequences for Croatia arising from the dissolution of former Yugoslavia which were explicitly recognized under decision 7/CP.12 of the Conference of the Parties (COP) whereby, pursuant to Article 4, paragraph 6, of the Convention, Croatia was allowed to add 3.5 Mt CO2 equivalent to its 1990 level of greenhouse gas emissions not controlled by the Montreal Protocol, for the purpose of establishing the level of emissions for the base year for implementation of its commitments under Article 4, paragraph 2, of the Convention.

The EBCC further failed to take into consideration that Croatia and the Parties to the Convention were well aware of Croatia's historical circumstances and its inability of meeting the 2012 Kyoto Protocol target and duly acknowledged this fact by adopting COP decision 7/CP.12. In doing so the parties to the Convention ensured that Croatia would have a fair chance of meeting the required target, which otherwise would undisputedly prove impossible for Croatia to achieve.

The EBCC failed to take into account that decision 7/CP.12 was a vital precondition for Croatia to ratify the Kyoto Protocol.

The EBCC failed to take into consideration the official List of Annex I Parties to the Convention, published on the Convention's official internet site, whereby Croatia is recognized as a "** *Party for which there is a specific COP and/or CMP decision*" – the relevant decisions being decision 4/CP.3, decision 10/CP.11 and decision 7/CP.12.

Together these substantial omissions on the part of the EBCC have rendered its final decision unreasonable and without grounds, especially when taking into account Croatia's historical circumstances and particularities leading to Croatia's ratification of the Kyoto Protocol.

5. The final decision is not in line with Article 7, paragraph 1, of the Kyoto Protocol, which prescribes obligations for each Party included in Annex I to provide its annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol, in accordance with relevant decisions of the Conference of the Parties (including decision 7/CP.12).

6. The final decision is not in line with Article 8, paragraph 1 of the Kyoto Protocol, which prescribes that any information submitted under Article 7 by each Party included in Annex I shall be reviewed by expert review teams pursuant to the relevant decisions of the Conference of the Parties (including decision 7/CP.12).

7. The final decision is not in line with paragraph 7(a) of the annex to decision 13/CMP.1, which prescribes that part one of the report referred to in paragraph 6 shall, among other, contain complete inventories of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for all years from 1990, or another approved base year or period under Article 3, paragraph 5, to the most recent year available, prepared in accordance with Article 5, paragraph 2, and relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), taking into account any relevant decisions of the Conference of the Parties (including decision 7/CP.12).

8. The final decision is not in line with section II, paragraph 11, of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1, which obligates the

Compliance Committee to take into account Article 4, paragraph 6, of the Convention and any degree of flexibility allowed to the Parties included in Annex I undergoing the process of transition to a market economy (including decision 7/CP.12).

9. The EBCC omitted to apply its authority under decision 27/CMP.1, annex, section V, paragraph 5, to adjust inventories and correct the compilation and accounting database for the accounting of assigned amounts in the event of a disagreement between an expert review team (ERT) and the party concerned. Since the ERT disregarded its obligation under Article 8, paragraph 1 of the Kyoto Protocol to perform an expert review of Croatia's inventory data pursuant to the relevant decisions of the Conference of the Parties (decisions 9/CP.2 and 7/CP.12), the EBCC should have exercised its authority under decision 27/CMP.1, annex, section V, paragraph 5, by applying the respective flexibility allowed to Croatia and adjusting the ERT disputed data. Furthermore it should be taken into account that the application of COP decisions on flexibility falls outside the ERT mandate, as explicitly stated in paragraph 159 of the Report of the review of the initial report of Croatia FCCC/IRR/2008/HRV.

10. The final decision is not in line with section VIII, paragraph 6, of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1, which stipulates that any information considered by the relevant branch shall be made available to the party concerned and that branch shall indicate to the party which parts of this information it has considered, and consequently that the party shall be given an opportunity to comment in writing on such information.

At the Eighth meeting of the EBCC held on 23 and 24 November 2009 in Bonn, Germany, as well as on several previous occasions, the EBCC made reference to the EU delegation's remark expressed at COP 12 held in Nairobi, Kenya, that Croatia could not apply decision 7/CP.12 for the purposes of its compliance with the Kyoto Protocol target. However, it is important to point out here, that the EU delegation voted in favour of decision 7/CP.12, which was adopted by acclamation, and only afterwards made an oral remark which does not create a legal precedent. As the EU delegation remark from COP 12 was undisputedly an important element in initiating the EBCC procedure against Croatia, as well as in its final outcome, the EBCC was under a clear obligation to provide an explanation of the EU delegation's remark and its implications for Croatia's case, both in its preliminary finding and in its final decision. Furthermore, the EBCC was obliged to provide Croatia with an opportunity to respond to the EBCC's standpoint in writing. Omission by the EBCC to this end represents a clear procedural violation on the part of the EBCC.

11. The final decision is not in line with rule 4 of the Rules of procedure of the Compliance Committee contained in the annex to decision 4/CMP.2 as amended by decision 4/CMP.4, which prescribes that each member and alternate member shall serve in its individual capacity and act in an independent and impartial manner and avoid any real or apparent conflicts of interest.

Contrary to the above, it should be stressed that Mr. Tuomas Kuokkanen, alternate EBCC member, who participated in the consideration and elaboration of the upheld preliminary finding with respect to Croatia, was also a member of the EU delegation at COP 12 in Nairobi which had expressed its reservation regarding the application of flexibility under decision 7/CP.12 for Croatia to the Kyoto Protocol. The involvement by Mr. Kuokkanen is an evident conflict of interest in which rule 4 of the Rules of Procedure of the Compliance Committee is entirely applicable.

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The Croatia hereby kindly requests translation of these comments with annex to Spanish language pursuant to section VIII, paragraph 9, of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1.

The arguments set out above and in the course of the entire process shall be further elaborated in Croatia's appeal against the final decision CC-2009-1-8/Croatia/EB of the enforcement branch of the Compliance Committee, adopted on 26 November 2009 pursuant to section XI of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1.

The final decision shall stand pending the CMP decision on appeal.

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