



## **List of issues for the enforcement branch stocktaking exercise**

### **Background note**

#### **I. Introduction**

1. A stocktaking exercise is scheduled as part of the eighteenth meeting of the branch that will take place from 7 to 8 and 10 February 2012. Below is an annotated version of the list of possible issues for consideration at the stocktaking exercise.<sup>1</sup> Annotations have been prepared by the secretariat in consultation with the chairperson and vice-chairperson based on a request of the branch at its seventeenth meeting. The branch may wish to recall that at the same meeting, it also agreed that at its stocktaking priority should be given to issues relating to the structure of its decisions.

#### **II. List of issues**

##### **A. Decision-making**

##### **1. Structure of decisions**

###### **(a) Headings/sections of decisions and what should be addressed under each heading/section**

2. The headings of preliminary findings and final decisions adopted by the branch are based, in part, on the list that is provided in rule 22, paragraph 1, of the “Rules of procedure of the Compliance Committee of the Kyoto Protocol”<sup>2</sup> which is in turn derived from section IX, paragraphs 5 and 9, of the “Procedures and mechanisms relating to compliance under the Kyoto Protocol.”<sup>3</sup>

3. There have been discussions within the branch on what information is to be included under the heading entitled “background” as well as the heading entitled “conclusions and reasons”, with some members and alternate members noting that all factual information belongs under the section entitled “background.”

4. The branch may wish to recall that at its sixth meeting, it agreed that it would continue to follow its established practice with respect to the structure and sequence of its decisions.<sup>4</sup> At its eighteenth meeting, the branch may wish to discuss whether it is time to revisit this

---

<sup>1</sup> The list that was agreed to by the enforcement branch at its seventeenth meeting (see the annex to the report on the seventeenth meeting of the enforcement branch, CC/EB/17/2011/2) is annexed to this note.

<sup>2</sup> This and subsequent references to rules, as well as to rules of procedure, refer to those contained in the annex to decision 4/CMP.2, as amended by decision 4/CMP.4.

<sup>3</sup> This and subsequent references to sections, as well as references to the procedures and mechanisms, refer to the annex to decision 27/CMP.1.

<sup>4</sup> Paragraph 9, report on the sixth meeting of the enforcement branch, CC/EB/6/2008/3.



agreement and to explore what measures it can take to ensure that its decisions have a structure that allows readers to better understand its decisions.

**(b) Structure of the final decision, in particular the revision of preliminary findings**

5. Final decisions adopted to date contain a statement indicating that the preliminary finding, which is annexed to the final decision, shall be deemed to form an integral part of the final decision.
6. During relevant discussions at previous meetings, a member has observed that the structure described in paragraph 5 above may inhibit the branch from revising the preliminary finding, since annexing the preliminary finding to the final decision implies that the preliminary finding is taken as a final document in and of itself, rather than a work in progress.
7. The branch may wish to reflect on how the structure of its final decisions can facilitate any revisions as a result, for instance, of grounds provided by a Party in any further written submission.

**2. Content of decisions**

**(a) Reasoning of decisions, in particular the clarity of the reasoning for outsiders**

8. It has been observed that the reasoning behind decisions taken by the branch, especially in relation to its preliminary findings, is not sufficiently clear, and that assumptions that have led the branch to certain conclusions could be better expressed.<sup>5</sup>

**(b) Specific issues**

**i. Formulation of a question of implementation at the time of the preliminary examination**

9. Section VII, paragraph 4, provides that after the preliminary examination of questions of implementation, the Party concerned shall, through the secretariat, be notified in writing of the decision and, in the event of a decision to proceed, be provided with a statement identifying the question of implementation, the information on which the question is based and the branch that will consider the question.

---

<sup>5</sup> For instance, in its further written submission, Romania alleged that “[i]n line with general international law . . . [the mandate of the enforcement branch, as contained in section VIII, paragraph 7, and rule 22, paragraph 1 (g)] requires *de minimis* a reasoned explanation of the considerations that led the EB to reject Romania’s legal submissions, such that will allow Romania (and indeed other Parties to the Kyoto Protocol) to understand the precise reasoning that has led to the conclusions reached” (CC-2011-1-7/Romania/EB, paragraph 12). In Romania’s view, the statement in paragraph 19 of the preliminary finding (CC-2011-1-6/Romania/EB) that “[w]ith respect to the legal arguments the branch noted that they failed to take into account the specificities of the legal regime governing the procedures and mechanisms relating to compliance under the Kyoto Protocol” did not meet the requirement for the branch to give the reasons for its decisions (Id., paragraphs 10 to 12).



10. In keeping with this provision, the decisions on preliminary examination adopted by the branch to date have included a paragraph which defines the question of implementation (QoI). The definition of the QoI is agreed upon by the branch in the process of drafting the decision on preliminary examination, on the basis of the QoI as identified in the relevant report of an expert review team (ERT).

11. The branch has noted instances when the ERT has not been entirely clear in its definition of the QoI. There have also been occasions when the branch believed that it would have been possible to define more than one QoI, although only one question had been identified in an ERT report. In those instances, there have been discussions on the extent to which the branch should be guided by the manner in which the ERT has defined, or appeared to have defined, the QoI, and the extent to which it should attempt to rephrase the statement of the QoI. It is to be noted, in this regard, that the first opportunity that normally arises for the branch to discuss with one or more members of the ERT the latter's basis for raising a QoI is at the meeting where the branch considers whether to adopt a preliminary finding or a decision not to proceed further (see paragraph 22 below).

12. The branch may wish to reflect on its process for defining QoIs, including instances in which it may choose to rephrase the definition or description provided by an ERT in the relevant report.

**ii. Finding on non-compliance at the time of finalization of an expert review team report**

13. Section V, paragraph 4, provides that the enforcement branch shall be responsible for determining whether a Party is not in compliance with:

- (a) Its quantified emission limitation or reduction commitments under Article 3, paragraph 1, of the Kyoto Protocol;
- (b) The methodological and reporting requirements under Article 5, paragraphs 1 and 2, and Article 7, paragraphs 1 and 4, of the Protocol; and
- (c) The eligibility requirements under Articles 6, 12 and 17 of the Protocol.

14. All preliminary findings and decisions not to proceed further adopted by the enforcement branch to date have included a statement in which the branch concludes that on the basis of information submitted and presented, the unresolved problems described in the preliminary finding resulted in non-compliance with the relevant guidelines at the time of the finalization of the ERT report.

15. In a document entitled "further written submission of Canada" (CC-2008-1-7/Canada/EB),<sup>6</sup> Canada argued that a statement with regard to its non-compliance with the

---

<sup>6</sup> The title is in quotations since, in the view of the chairperson and the vice-chairperson of the branch, a further written submission could not be made by Canada after the adoption of the decision not to proceed further which



guidelines and modalities relating to national registries at the time of the publication of the report of the review of its annual submission submitted in 2008 lay outside the mandate of the enforcement branch. Pointing to section V, paragraph 4, Canada alleged that any statement on non-compliance should relate only to conditions at the time that the branch adopts the relevant decision (see paragraphs 6 to 10 of Canada's submission).

16. The branch may wish to revisit its rationale for including a statement that there was non-compliance at the time of the finalization of an ERT report in its preliminary findings.

**iii. Effect of suspension from eligibility to participate in the mechanisms under Article 6 of the Kyoto Protocol**

17. In the instances when a final decision adopted by the branch has confirmed a preliminary finding of non-compliance with one of the eligibility requirements relating to participation in the mechanisms, the final decision has included a paragraph indicating that the consequences set out in the relevant subparagraph of the preliminary finding in relation to such suspension shall be applied taking into account the guidelines adopted under Articles 6, 12 and 17 of the Protocol.

18. There are six eligibility requirements in paragraph 21 of the "Guidelines for the implementation of Article 6 of the Kyoto Protocol" (annex to decision 9/CMP.1; hereinafter referred to as the 'JI guidelines') that must be met in order for a Party included in Annex I with a commitment inscribed in Annex B to transfer and/or acquire emission reduction units. The JI guidelines provide for an alternative verification procedure for situations when a Party meets the following three requirements:

- (a) It is a Party to the Kyoto Protocol;
- (b) Its assigned amount pursuant to Article 3, paragraphs 7 and 8, has been calculated and recorded in accordance with decision 13/CMP.1; and
- (c) It has in place a national registry in accordance with Article 7, paragraph 4, and the requirements in the guidelines decided thereunder.<sup>7</sup>

This procedure is commonly known as 'JI track II'. A national system, as required by paragraph 21 (c) of the JI guidelines,<sup>8</sup> is not required for participation in JI track II.<sup>9</sup>

---

concluded proceedings with respect to the related question of implementation (see the [information note](#) dated 1 August 2008 (Ref. CC-2008/1/Canada/EB)).

<sup>7</sup> Paragraph 24, JI guidelines, in relation to paragraph 21 thereof.

<sup>8</sup> The requirement, also found in paragraph 31 (c) of the annex to decision 3/CMP.1 and paragraph 3 (c) of the annex to decision 11/CMP.1, is to have in place "a national system for the estimation of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, in accordance with Article 5, paragraph 1, and the requirements and guidelines decided thereunder." The "Guidelines for national systems for the estimation of anthropogenic greenhouse gas emissions by sources and removals by sinks under Article 5, paragraph 1, of the Kyoto Protocol" are contained in the annex to decision 19/CMP.1, which defines a national system as including "all institutional, legal and procedural arrangements made within a Party included in Annex I for estimating anthropogenic emissions by sources and removals by sinks of all greenhouse



19. If the eligibility requirement that is not met by the Party concerned relates to its national system, the chairperson reads out the following text after announcing the adoption of a final decision:

In light of the adoption by the enforcement branch of this final decision, the consequences of which take effect forthwith, as of (*indicate the date and time*) the eligibility [of the Party concerned] to participate in the mechanisms under Articles 6, 12 and 17 of the Kyoto Protocol is suspended in accordance with the relevant provisions under those Articles. This means that [the Party concerned] is not considered to meet the eligibility requirements under Articles 6, 12 and 17 but may issue and transfer emission reduction units for joint implementation projects implemented under the verification procedure under the Joint Implementation Supervisory Committee for which it is the host Party.

20. The branch may wish to consider whether, in cases where a Party concerned is found in non-compliance with the guidelines for national systems, it may wish to use more specific language relating to the consequences of non-suspension in its decisions.

### **3. Decision-making process**

#### **(a) Recourse to expert advice**

21. Section VIII, paragraph 5, provides that each branch may seek expert advice. Rule 21 further provides that if the branch decides to seek expert advice, it shall:

- (a) Define the question on which expert opinion is sought;
- (b) Identify the experts to be consulted; and
- (c) Lay down the procedures to be followed.

22. Neither the procedures and mechanisms nor the rules of procedure define when expert advice is to be sought, leaving this decision to the sound discretion of the branch. The enforcement branch has consistently sought expert advice at meetings where it has conducted the hearing and elaborated and adopted a preliminary finding or decision not to proceed further. In those occasions, it has invited representatives of the ERTs that produced the report that had identified a question of implementation, as well as other experts from the secretariat's roster of experts, who have recognized expertise on the technical aspects of the question of implementation. The branch has sought to achieve gender and geographical balance in developing its list of experts in those instances.

---

gases not controlled by the Montreal Protocol, and for reporting and archiving inventory information" (paragraph 2).

<sup>9</sup> See also the informal note for the enforcement branch entitled "JI Track II and suspension in accordance with the provisions of Article 6" that was circulated to the members and alternate members of the enforcement branch on 8 April 2008.



23. In addition, the branch also decided to seek expert advice in relation to its consideration of a request for reinstatement<sup>10</sup> as well as in connection with the review and assessment of the plan submitted by a Party concerned under section XV, paragraph 2.<sup>11</sup>

24. The branch may wish to discuss general guidelines on when expert advice is to be sought, in particular, in relation to the stages of its consideration of a question of implementation where expert advice has not always been resorted to, noting the need to balance flexibility with the interest to provide potential invitees with as much advance notice as possible to ensure their attendance.

**(b) Types of documents to be provided by the secretariat to the branch during the consideration of a question of implementation**

25. In the consideration of each of the QoIs that have been allocated to the enforcement branch, background material in addition to the relevant ERT report has been provided to members and alternate members of the branch, the invited experts and the Party concerned. Standard background information includes the list of potential problems and further questions from the ERT formulated in the course of the review (otherwise known as the ‘Saturday paper’), relevant correspondence between the ERT and the Party concerned in relation to the Saturday paper, the draft ERT report that is sent to the Party concerned for comment prior to its publication, the comments by such Party on the draft report, and any responses by the ERT. Additional technical information relevant to the particular question of implementation has also been provided, as necessary. The choice of which material to include has generally been left to the secretariat to determine.

26. The branch may wish to note that this question had been raised at its first stocktaking exercise (see CC/EB/6/2008/2) and that no decision was taken on this question at that time. The branch may, at this instance, wish to consider whether it requires all of the documents provided by the secretariat, or whether a more streamlined list of documents ought to be provided to the branch.

**4. Manner of drafting decisions**

**(a) Establishment of drafting committee**

27. In decisions adopted by the branch to date at its face-to-face meetings, the initial elaboration of the decision has in most instances been the responsibility of either an informal drafting group convened by the chairperson or of the chairperson.

28. The branch may wish to discuss future arrangements for the drafting of its decisions, taking into account any agreement on changes to the structure and the content of its decisions.

<sup>10</sup> See “Expert advice: Bulgaria”, CC-2010-1-16/Bulgaria/EB.

<sup>11</sup> See “Decision on the review and assessment of the plan submitted under paragraph 2 of section XV”, CC-2011-1-11/Romania/EB.



**(b) Templates for decisions**

29. After five years of operation and since the adoption of its first decision in January 2008, the enforcement branch has developed a common understanding on the structure of its decisions. As part of the preparation for each of the meetings where a decision is expected to be adopted by the branch, the secretariat, under the guidance of the chairperson and vice-chairperson, develops an outline of the decision that may be taken by the branch, focusing on the factual and procedural sections of the decision.

30. The branch may wish to provide feedback, based on its discussions on the structure of its decisions (see section 1 above), on the usefulness of the templates for its decision-making, including additional guidance on what other elements could be added to the templates, if they are found to be useful.

**5. Mode of adopting decisions**

**(a) Use of electronic means of decision-making**

31. Rule 11, paragraph 2, provides the Committee with the opportunity to elaborate and take decisions in a written procedure using electronic means, where possible.<sup>12</sup> Electronic means have been used by the branch in relation to the following decisions:

- (a) The election of its chairperson and vice-chairperson (in 2008 and in 2010); and
- (b) The adoption of the following types of decisions:
  - Decision on preliminary examination;
  - Decision on expert advice;
  - Decision under paragraph 2 of section X (reinstatement);
  - Decision to defer review and assessment of the plan submitted by a Party under paragraph 2 of section XV; and
  - Decision to postpone a meeting.<sup>13</sup>

<sup>12</sup> Upon the adoption by the plenary of the rules of procedure at its third meeting, one member “strongly argued against introducing specific provisions into the rules of procedure on using electronic means for decision-making at this stage, stressing that at the present stage of the work of the Compliance Committee electronic means should be used for conduct of business rather than legally meaningful acts”, Report on the third meeting of the plenary of the Compliance Committee, CC/3/2006/7, paragraph 4. The plenary nevertheless agreed to forward these rules to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), which adopted them at its second session (see decision 4/CMP.2).

<sup>13</sup> Ukraine had submitted a request for the branch to defer the consideration of its further written submission and the elaboration and adoption of a final decision with respect to Ukraine, in view of the fact that the in-country review of the annual submission of Ukraine submitted in 2011 was scheduled for the same week and the individuals that would have to attend the fifteenth meeting on behalf of Ukraine would also need to participate in the in-country review. A vote by electronic means was launched in relation to Ukraine’s request. The required majorities were not achieved; therefore the decision to defer was not adopted, and the fifteenth meeting of the branch held as originally scheduled, i.e., from 11 to 12 October 2011.



32. Drafts of the decisions that were adopted entirely by electronic means were prepared by the chairperson and vice-chairperson, with the assistance of the secretariat. These decisions were circulated to members and alternate members, who were provided an opportunity to comment on the content of these draft decisions. The drafts were thereafter revised by the chairperson and vice-chairperson, and the revised drafts circulated by the secretariat for an electronic vote.

33. In addition, in instances when quorum was not achieved at meetings where, based on information previously received by the secretariat, quorum had been expected, decisions could only be adopted by the branch after receipt of additional votes by electronic means. In particular, the branch adopted the following decisions through a combination of consensus among those who were present at the meeting and additional electronic votes:

- (a) The final decision with respect to Croatia (CC-2009-1-11/Croatia/EB);
- (b) The decision on the review and assessment of the plan submitted by Romania under paragraph 2 of section XV (CC-2011-1-11/Romania/EB);
- (c) The preliminary finding with respect to Lithuania (CC-2011-3-5/Lithuania/EB);
- (d) The decision on the review and assessment of the plan submitted by Croatia under paragraph 2 of section XV (CC-2009-1-11/Croatia/EB);
- (e) The final decision with respect to Lithuania (CC-2011-3-8/Lithuania/EB); and
- (f) The decision on the review and assessment of the plan submitted by Ukraine under paragraph 2 of section XV (CC-2011-2-11/Ukraine/EB).

34. The branch may wish to review its use of the provisions of the rules of procedure on voting by electronic means and determine whether there should be any adjustments to and/or clarifications on its practice.

**(b) Absence of a quorum**

35. Section VI, paragraph 8, provides that the adoption of decisions by the Committee shall require a quorum of at least three-fourths of the members to be present. In the case of the enforcement branch, the adoption of a decision shall, in addition, require a majority of members from Parties included in Annex I present and voting, as well as a majority of members from Parties not included in Annex I present and voting (section VI, paragraph 9).

36. Since its first meeting, the enforcement branch has failed to reach quorum to adopt decisions at the following meetings:

- (a) At its eighth meeting held from 23 to 24 November 2009;
- (b) At its sixteenth meeting held from 14 to 18 November 2011; and



- (c) At its seventeenth meeting held from 20 to 21 December 2011.

37. It is to be noted that the secretariat does not organize meetings of the Compliance Committee unless information provided to it by members and alternate members indicates that quorum will be achieved. Failure to reach quorum at the meetings listed above was due to last-minute cancellations of members and alternate members who had previously confirmed their availability for the relevant meeting. In addition, the opening of a few of the meetings of the branch has had to be delayed to wait for persons whose attendance would allow the branch to achieve quorum, and the branch has on occasion been under pressure to complete its work in advance of the scheduled end of its meeting due to the risk of losing quorum at a meeting.

38. The branch may wish to take a decision on how to address this issue.

## **B. Meetings**

### **1. Length and frequency of meetings**

39. In planning for meetings of the enforcement branch, the secretariat has worked on the following assumptions with regard to the time required to complete particular stages of the branch's consideration of a question of implementation:

- (a) Three days are required for a hearing and the elaboration and adoption of a preliminary finding/decision not to proceed further;
- (b) Two days are required for the adoption of final decision; and
- (c) One day is required to review and assess a plan and/or to consider a request for reinstatement.

40. The branch may wish to provide feedback on these assumptions, in particular, if the branch believes that more or less time is required for any of these steps. Such feedback is particularly useful for planning meetings in which more than one question of implementation relating to more than one Party is to be considered, including during instances when a last-minute request by a Party needs to be accommodated into a meeting schedule.<sup>14</sup>

---

<sup>14</sup> For example, at its fourteenth meeting, which was held from 22 to 27 August 2011, two questions of implementation were considered, i.e., with respect to Ukraine (advice from experts, hearing and adoption of a preliminary finding) and Romania (consideration of Romania's further written submission and the elaboration and adoption of a final decision). At its sixteenth meeting, held from 14 to 18 November 2011, the branch considered questions of implementation with respect to Romania (review and assessment of the plan submitted by Romania pursuant to the final decision of the branch), Lithuania (advice from experts, hearing and adoption of a preliminary finding) and Croatia (review and assessment of the plan submitted pursuant to the final decision of the branch). Finally, at its seventeenth meeting, held from 20 to 21 December 2011, two questions of implementation were considered, i.e., with respect to Lithuania (consideration of Lithuania's further written submission and the elaboration and adoption of a final decision) and Ukraine (review and assessment of the plan submitted pursuant to the final decision of the enforcement branch).



**2. Flexibility in scheduling in case of conflict with certain official, religious and UN holidays or other UNFCCC meetings**

41. At its first stocktaking meeting, the branch discussed whether a practice, working arrangement or appropriate rules of procedure should be developed for adapting the time frames set out in the procedures and mechanisms where there may be a concern about obtaining a quorum because of a holiday or other scheduling conflict, “taking into account the reasonable expectations of and possible need to consult a Party concerned”.<sup>15</sup> No decision was taken on this matter at that meeting.

42. As indicated in paragraph 36 above, there have been three occasions when the branch did not achieve quorum at its meetings. The branch will note that these meetings were scheduled very close to the sessions of the CMP<sup>16</sup> or to the holidays. In addition, due to the impossibility of reaching quorum at an earlier date, the enforcement branch adopted its preliminary finding with respect to Ukraine on 25 August 2011, although the deadline for the adoption of such a decision was on 11 August 2011.<sup>17</sup>

43. Noting the delay in the adoption of the preliminary finding with respect to Ukraine and the need for transparency in future cases of inability to comply with the time frames set out in the procedures and mechanisms, the branch agreed to develop working arrangements on time frames.<sup>18</sup> These working arrangements, which were subsequently adopted by the plenary, recall that the enforcement branch is required to make every possible effort to adopt decisions within the time frames provided for in the procedures and mechanisms and the rules of procedure. The plenary agreed that any decision to delay may only be taken as a last resort, for overriding reasons, and that it should result in the shortest possible delay.<sup>19</sup>

44. The branch may wish to have a discussion on this matter in light of the recently adopted working arrangements described in paragraph 43 above and determine whether it wishes to consider any further working arrangements or develop practices to complement the existing working arrangements.

---

<sup>15</sup> See CC/EB/6/2008/2.

<sup>16</sup> The fifth session of the CMP took place from 7 to 19 December 2009. The seventh session of the CMP took place from 28 November to 11 December 2011.

<sup>17</sup> Paragraph 17, report on the fourteenth meeting of the enforcement branch, CC/EB/14/2011/2.

<sup>18</sup> Paragraph 12, report on the fifteenth meeting of the enforcement branch, CC/EB/15/2011/2.

<sup>19</sup> Paragraph 17, annual report of the Compliance Committee to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, FCCC/KP/CMP/2011/5.



**Annex**

**List of possible issues to be addressed during the stocktaking exercise**

1. Decision-making

(a) Structure of decisions

- Headings/sections of decisions and what should be addressed under each heading/section
- Structure of the final decision, in particular the revision of preliminary findings

(b) Content of decisions

- Reasoning of decisions, in particular the clarity of the reasoning for outsiders
- Specific issues:
  - Formulation of a question of implementation at the time of the preliminary examination
  - Finding on non-compliance at the time of finalization of an expert review team report
  - Effect of suspension from eligibility to participate in the mechanisms under Article 6 of the Kyoto Protocol

(c) Decision-making process

- Recourse to expert advice
- Types of documents to be provided by the secretariat to the branch during the consideration of a question of implementation

(d) Manner of drafting decisions

- Establishment of drafting committee
- Templates for decisions

(e) Mode of adopting decisions

- Use of electronic means of decision-making
- Absence of a quorum

2. Meetings

- Length and frequency of meetings
- Flexibility in scheduling in case of conflict with certain official, religious and UN holidays or other UNFCCC meetings

-----