

## **FINAL DECISION**

*Party concerned: Croatia*

In accordance with the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1 and adopted under Article 18 of the Kyoto Protocol and the Rules of procedure of the Compliance Committee,<sup>1</sup> the enforcement branch adopts the following final decision:

### **BACKGROUND**

1. On 13 October 2009, the enforcement branch adopted a preliminary finding of non-compliance with respect to Croatia (CC-2009-1-6/Croatia/EB). On 12 November 2009, the enforcement branch received a further written submission from Croatia in accordance with paragraph 7 of section IX,<sup>2</sup> paragraph 1 (e) of section X and rule 17 of the Rules of procedure (CC-2009-1-8/Croatia/EB). The enforcement branch considered this further written submission in elaborating a final decision at its eighth meeting held in Bonn from 23 to 24 November 2009.

2. In accordance with paragraph 1 (d) of rule 22 of the Rules of procedure, the enforcement branch confirms that the Party concerned had an opportunity to comment in writing on all information considered.

### **CONCLUSIONS AND REASONS**

3. After full consideration of the further written submission from Croatia, the enforcement branch concludes that there are not sufficient grounds provided in the submission to alter the preliminary finding of this branch. In this respect, the branch notes that:

- (a) Pursuant to Article 31 of the 1969 Vienna Convention on the Law of Treaties and customary international law, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In addressing the questions of implementation before it, the enforcement branch followed this general rule and was not persuaded that it is necessary to follow another method of interpretation.
- (b) Article 3, paragraph 5, of the Kyoto Protocol limits the flexibility available to Parties included in Annex I undergoing the process of transition to a market

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<sup>1</sup> All references to the Rules of procedure in this document refer to the rules contained in the annex to decision 4/CMP.2 as amended by decision 4/CMP.4.

<sup>2</sup> All section references in this document refer to the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1.

economy (EIT Parties) for the implementation of their commitments under Article 3 of the Kyoto Protocol to the use of an historical base year or period other than 1990. The first sentence of Article 3, paragraph 5, of the Kyoto Protocol explicitly determines the historical base year or period for the four EIT Parties identified in decision 9/CP.2. The second and third sentences of Article 3, paragraph 5, of the Kyoto Protocol provide for other EIT Parties to use an historical base year or period other than 1990 in certain circumstances, subject to notification to and acceptance by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP).

- (c) The application of decision 7/CP.12 under the Kyoto Protocol does not follow from any of the provisions of the Kyoto Protocol or from CMP decisions. Since the COP and the CMP are two distinct decision-making bodies, the fact that all Parties to the Kyoto Protocol are also Parties to the United Nations Framework Convention on Climate Change does not provide a sufficient basis for establishing the application of COP decisions under the Kyoto Protocol.<sup>1</sup>
- (d) In its preliminary finding, the enforcement branch has explicitly recognized the different degrees of flexibility available to EIT Parties under the Convention and the Kyoto Protocol and the respective roles of decisions 9/CP.2 and 7/CP.12 in this context. Decisions 9/CP.2 and 7/CP.12 have ongoing relevance with respect to the implementation of commitments of Parties included in Annex I under Article 4, paragraph 2, of the Convention.
- (e) The issue of whether and, if so, how decision 11/CP.4, allowing Slovenia to use 1986 as a base year, and decision 14/CP.7, addressing the impact of single projects in the commitment period, apply under the Kyoto Protocol is not before the enforcement branch. The enforcement branch considers questions of implementation received by the Compliance Committee in accordance with paragraph 1 of section VI and allocated to the enforcement branch in accordance with paragraph 1 of section VII. Whether the guidelines for review under Article 8 of the Kyoto Protocol (decision 22/CMP.1) and their application secure equal treatment of Parties is not an issue that is within the mandate of the enforcement branch.

4. The specific circumstances of Croatia arising from the dissolution of the former Yugoslavia cannot be addressed by action that is within the mandate of the enforcement branch, and for this reason the enforcement branch reiterates that Croatia may wish to bring them to the attention of the CMP for its consideration.

## DECISION

5. The branch confirms, in accordance with paragraph 8 of section IX, paragraph 1 (f) of section X, and rule 22 of the Rules of procedure, the preliminary finding annexed hereto, which shall be deemed to form an integral part of this final decision.

6. The consequences set out in paragraph 23 of the preliminary finding shall take effect forthwith, and the consequences set out in paragraph 23 (c) of the preliminary finding shall be

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<sup>1</sup> In this context, the enforcement branch took note of paragraphs 132 – 135 of document FCCC/SBI/2006/28.

applied taking into account the guidelines adopted under Articles 6, 12 and 17 of the Protocol.

*Members and alternate members participating in the consideration and elaboration of the final decision:* René LEFEBER, Mary Jane MACE, Stephan MICHEL, Bernard NAMANYA, Ainun NISHAT, Sebastian OBERTHÜR, Ilhomjon RAJABOV, Gladys Kenabetsho RAMOTHWA, Oleg SHAMANOV, Mohamed SHAREEF.

*Members voting for:* Johanna G. Susanna DE WET, Raúl ESTRADA-OYUELA, René LEFEBER, Stephan MICHEL, Bernard NAMANYA, Sebastian OBERTHÜR, Ilhomjon RAJABOV, Mohamed SHAREEF, SU Wei.

*Members abstaining:* Oleg SHAMANOV.

This decision was adopted in Bonn on 26 November 2009.

## **PRELIMINARY FINDING**

*Party concerned: Croatia*

In accordance with the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1 and adopted under Article 18 of the Kyoto Protocol and the Rules of procedure of the Compliance Committee,<sup>1</sup> the enforcement branch adopts the following preliminary finding:

### **BACKGROUND**

1. On 26 August 2009, the secretariat received two questions of implementation indicated in the report of the expert review team regarding the review of the initial report of Croatia and contained in document FCCC/IRR/2008/HRV. In accordance with paragraph 1 of section VI<sup>2</sup> and paragraph 2 of rule 10 of the Rules of procedure, the questions of implementation were deemed received by the Compliance Committee on 27 August 2009.
2. The bureau of the Compliance Committee allocated these questions of implementation to the enforcement branch on 28 August 2009, under paragraph 1 of section VII, in accordance with paragraphs 4(b) and (c) of section V and paragraph 1 of rule 19 of the Rules of procedure.
3. On 28 August 2009, the secretariat notified the members and alternate members of the enforcement branch of the questions of implementation, in accordance with paragraph 2 of rule 19 of the Rules of procedure, and of their allocation to the enforcement branch.
4. On 8 September 2009, the enforcement branch decided, in accordance with paragraph 2 of section VII and paragraph 1(a) of section X, to proceed with the questions of implementation (CC-2009-1-2/Croatia/EB).
5. The first question of implementation relates to Croatia's calculation of its assigned amount and its compliance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts under Article 7, paragraph 4, of the Kyoto Protocol (decision 13/CMP.1; hereinafter referred to as "the modalities for the accounting of assigned amounts"). In particular, the expert review team considered that the addition of 3.5 million tonnes (Mt) carbon dioxide equivalent (CO<sub>2</sub> eq) by Croatia to its base year level

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<sup>1</sup> All references to the Rules of procedure in this document refer to the rules contained in the annex to decision 4/CMP.2 as amended by decision 4/CMP.4.

<sup>2</sup> All section references in this document refer to the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1.

following decision 7/CP.12 is not in accordance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts.<sup>1</sup>

6. This question of implementation is related to the eligibility requirements referred to in paragraph 31(b) of the annex to decision 3/CMP.1, paragraph 21(b) of the annex to decision 9/CMP.1 and paragraph 2(b) of the annex to decision 11/CMP.1. Consequently, the expedited procedures as contained in section X apply.

7. The second question of implementation relates to Croatia's calculation of its commitment period reserve and its compliance with the modalities for the accounting of assigned amounts. On the second question of implementation the expert review team considered that the calculation of Croatia's commitment period reserve, based on the calculation of its assigned amount following decision 7/CP.12, is not in accordance with paragraph 6 of the annex to decision 11/CMP.1.<sup>2</sup> Paragraph 8(a) of the annex to decision 13/CMP.1 requires each Party to calculate its commitment period reserve in accordance with decision 11/CMP.1.

8. Both questions of implementation referred to in paragraphs 5 and 7 above relate to the same issue, namely whether Croatia's calculation of its assigned amount is in compliance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts. The resolution of the second question of implementation follows from the resolution of the first. Consequently, both questions of implementation are considered jointly in the expedited procedures referred to in paragraph 6 above.

9. On 24 September 2009, the enforcement branch agreed to invite three experts drawn from the UNFCCC roster of experts to provide advice to the branch (CC-2009-1-3/Croatia/EB). All three of these experts belonged to the expert review team that reviewed Croatia's initial report.

10. On 25 September 2009, the enforcement branch received a request for a hearing from Croatia (CC-2009-1-4/Croatia/EB). On 9 October 2009, the enforcement branch received a written submission under paragraph 1(b) of section X (CC-2009-1-5/Croatia/EB) in accordance with paragraph 1 of section IX, paragraph 1(b) of section X, and rule 17 of the Rules of procedure.

11. As requested by Croatia on 25 September 2009, a hearing was held on 11 October 2009 in accordance with paragraph 2 of section IX and paragraph 1(c) of section X. The hearing formed part of the meeting of the enforcement branch that was held from 11 to 13 October 2009 to consider the adoption of a preliminary finding or a decision not to proceed further. During the hearing, Croatia made a presentation. The enforcement branch received advice from one of the three invited experts during the meeting.

12. In its deliberations, the enforcement branch considered the review report, the written submission of Croatia contained in document CC-2009-1-5/Croatia/EB, information presented by Croatia during the hearing and advice from an expert invited by the branch. No

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<sup>1</sup> See paragraph 157 and section II.C of the report of the expert review team contained in document FCCC/IRR/2008/HRV.

<sup>2</sup> See paragraph 158 and section II.D of the report of the expert review team contained in document FCCC/IRR/2008/HRV.

competent intergovernmental or non-governmental organization provided any information under paragraph 4 of section VIII.

## CONCLUSIONS AND REASONS

13. In its written submission and at the hearing, Croatia argued that, following decision 7/CP.12, it is allowed to add 3.5 Mt CO<sub>2</sub> eq 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 3 of the Kyoto Protocol. It made reference to several provisions of the United Nations Framework Convention on Climate Change and its Kyoto Protocol relating to flexibility for Parties included in Annex I undergoing the process of transition to a market economy, including Article 4, paragraph 6, of the Convention and Article 3, paragraph 5, of the Kyoto Protocol. It also referred to relevant decisions of the Conference of the Parties (COP) and the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP).

14. The enforcement branch notes that under the Convention:

- (a) Article 4, paragraph 6, of the Convention together with relevant decisions of the COP, including decision 9/CP.2, provide the basis for the COP to allow a certain degree of flexibility to the Parties included in Annex I undergoing the process of transition to a market economy in the implementation of their commitments under Article 4, paragraph 2, of the Convention, including with regard to the historical level of anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol chosen as a reference;
- (b) Decision 7/CP.12 relating to the level of emissions for the base year of Croatia was adopted under Article 4, paragraph 6, of the Convention.

15. The enforcement branch further notes that, under the Kyoto Protocol, the degree of the flexibility available to Parties included in Annex I undergoing the process of transition to a market economy is different in that:

- (a) Article 3, paragraph 5, of the Kyoto Protocol only addresses flexibility in the use of an historical base year or period other than 1990 for the implementation of commitments under Article 3 of the Kyoto Protocol by a Party included in Annex I undergoing the process of transition to a market economy;
- (b) Article 3, paragraph 6, of the Kyoto Protocol provides that a certain degree of flexibility shall be allowed by the CMP to the Parties included in Annex I undergoing the process of transition to a market economy, but only in the implementation of commitments under the Kyoto Protocol other than those under Article 3;
- (c) Neither paragraph 5 nor paragraph 6 of Article 3 of the Kyoto Protocol provides a basis for allowing the addition of tonnes CO<sub>2</sub> eq to the level of emissions for a base year or period in the implementation of commitments under Article 3 of the Kyoto Protocol.

16. Croatia further argued that decisions 11/CP.4 and 14/CP.7 have made special provision to take account of specific circumstances of other Parties and have been applied under the Kyoto Protocol without requiring confirmation by the CMP.

17. The enforcement branch notes that neither of the COP decisions referred to in paragraph 16 above allowed the addition of tonnes CO<sub>2</sub> eq to the level of emissions for a base year or period.

18. Croatia emphasized that in decision 7/CP.12 the COP has recognized Croatia's specific circumstances with regard to greenhouse gas emissions before and after 1990 and the structure of the electricity generation sector of the former Yugoslavia. In its written submission and at the hearing, Croatia stated that it had gained independence in 1991 in the course of the dissolution of the former Yugoslavia. In 1990, a large part of Croatia's consumed electricity was sourced from plants located in other republics of the former Yugoslavia. Croatia explained that the use of an historical base year or period other than 1990 in accordance with Article 3, paragraph 5, of the Kyoto Protocol does not address Croatia's specific circumstances.

19. The enforcement branch acknowledges that Croatia's specific circumstances, in particular the consequences arising from the dissolution of the former Yugoslavia, have not been addressed by the CMP to date.

20. The enforcement branch recognizes that when decision 7/CP.12 was adopted in 2006, Croatia was not yet a Party to the Kyoto Protocol. Since that time, Croatia has become a Party to the Kyoto Protocol. Croatia may wish to bring its specific circumstances to the attention of the CMP for its consideration.

21. Based on the information submitted and presented as well as the above considerations, the enforcement branch concludes that:

- (a) In the absence of a decision of the CMP on Croatia's specific circumstances, decision 7/CP.12 taken under the Convention does not provide a basis under the Kyoto Protocol for Croatia to add 3.5 Mt CO<sub>2</sub> eq to its level of emissions for the base year for implementation of its commitments under Article 3 of the Kyoto Protocol;
- (b) Accordingly, the addition of 3.5 Mt CO<sub>2</sub> eq by Croatia to the level of emissions for its base year following decision 7/CP.12 is not in compliance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts;
- (c) Further, the calculation of Croatia's commitment period reserve, based on the calculation of its assigned amount following decision 7/CP.12, is not in compliance with paragraph 6 of the annex to decision 11/CMP.1 as required by paragraph 8(a) of the annex to decision 13/CMP.1.

## FINDING AND CONSEQUENCES

22. The enforcement branch determines that Croatia is not in compliance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts under Article 7, paragraph 4, of the Kyoto Protocol (decision 13/CMP.1). Croatia does not have its assigned amount pursuant to Article 3, paragraphs 7 and 8, calculated and recorded in accordance with decision 13/CMP.1 and therefore does not yet meet the eligibility requirements under Articles 6, 12 and 17 of the Kyoto Protocol.

23. In accordance with section XV, the enforcement branch applies the following consequences:

- (a) Croatia is declared to be in non-compliance.
- (b) Croatia shall develop a plan referred to in paragraph 1 of section XV and submit it within three months to the enforcement branch in accordance with paragraph 2 of section XV. The plan should address the calculation of the assigned amount and the commitment period reserve of Croatia in accordance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts contained in decision 13/CMP.1, and any other steps Croatia may wish to take to remedy the non-compliance.
- (c) Croatia is not eligible to participate in the mechanisms under Articles 6, 12 and 17 of the Kyoto Protocol pending the resolution of the questions of implementation.

24. These findings and consequences take effect upon confirmation by a final decision of the enforcement branch.

*Members and alternate members participating in the consideration and elaboration of the preliminary finding:* Joseph Armathé AMOUGOU, Johanna G. Susanna DE WET, Patricia ITURREGUI BYRNE, Kirsten JACOBSEN, Tuomas KUOKKANEN, René LEFEBER, Mary Jane MACE, Stephan MICHEL, Bernard NAMANYA, Ainun NISHAT, Sebastian OBERTHÜR, Gladys Kenabetsho RAMOTHWA, Oleg SHAMANOV, Mohamed SHAREEF.

*Members participating in the adoption of the preliminary finding:* Johanna G. Susanna DE WET, Patricia ITURREGUI BYRNE (alternate member serving as member), René LEFEBER, Mary Jane MACE (alternate member serving as member), Stephan MICHEL, Bernard NAMANYA, Ainun NISHAT (alternate member serving as member), Sebastian OBERTHÜR, Oleg SHAMANOV.

This decision was adopted by consensus in Bangkok on 13 October 2009.