



**Proposed amendments to the rules of procedure: Consideration by the enforcement branch of disagreements whether to apply adjustments to inventories under Article 5, paragraph 2, of the Kyoto Protocol pursuant to section X, paragraph 5, of the “Procedures and mechanisms relating to compliance under the Kyoto Protocol”**

**Note by the chairperson and vice-chairperson of the enforcement branch**

**I. Introduction**

1. At its twenty-third meeting, the enforcement branch agreed to forward the proposed draft amendments to the “Rules of procedure of the Compliance Committee of the Kyoto Protocol”<sup>1</sup> as contained in the Annex to the report on that meeting, to the plenary of the Compliance Committee for consideration at its next meeting, along with an explanatory note to be prepared by the chairperson and vice-chairperson of the branch.<sup>2</sup>
2. This note has been prepared to assist the plenary in determining, whether, in accordance with section III, paragraph 2 (d), of the “Procedures and mechanisms relating to compliance under the Kyoto Protocol,”<sup>3</sup> it should develop any further rules of procedure that may be needed, for adoption by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP). It sets out the rationale for the development of the proposed amendments to the rules of procedure, describes the careful consideration given by the enforcement branch to these proposed amendments,<sup>4</sup> and explains why these amendments are needed and appropriate.<sup>5</sup> Further explanations, as necessary, are provided for specific provisions of the proposed amendments. The consolidated text of the proposed amendments without the accompanying explanations is presented in the Annex to this note.

**II. Background**

3. To date, the enforcement branch has considered one disagreement whether to apply adjustments under Article 5, paragraph 2, of the Kyoto Protocol (disagreements whether to apply adjustments), i.e., with respect to Slovakia.<sup>6</sup> In light of the challenges that arose in that

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<sup>1</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>2</sup> Report on the twenty-third meeting of the enforcement branch, CC/EB/23/2013/3, paragraph 12.

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

<sup>4</sup> In proposing the amendments to the rules of procedure to the CMP at its fourth session, “[t]he plenary stressed that it intends to forward to the CMP any amendments to the rules of procedure for adoption after careful consideration, taking into account any relevant experience gained” (third annual report of the Compliance Committee to the CMP, FCCC/KP/CMP/2008/5, paragraph 35).

<sup>5</sup> See the sixth preambular paragraph of decision 4/CMP.4, in which the CMP emphasized that “it is not necessary to revisit these procedures and mechanisms and rules of procedure on a regular basis, unless needed and appropriate”.

<sup>6</sup> CC-2012-1/Slovakia/EB.



context (see, for instance, paragraph 5 below), the enforcement branch agreed to further discuss its approach to considering disagreements whether to apply adjustments to inventories under Article 5, paragraph 2, of the Kyoto Protocol.<sup>7</sup>

4. The proposed amendments to the rules of procedure as contained in the Annex to this note set out the general approach that the enforcement branch intends to take in considering disagreements whether to apply adjustments. In its consideration of possible amendments to the rules of procedure, the enforcement branch recognized that the proposed amendments should draw as much as possible on existing provisions of the procedures and mechanisms and the rules of procedure. Thus, the approach and the steps outlined in the proposed amendments are for the greater part derived from the relevant provisions of procedures and mechanisms and the rules of procedure, and for a smaller part from the practice of the enforcement branch, specifically taking into account the twelve-week time frame indicated in section X, paragraph 5, which provides that:

[i]n the event of a disagreement whether to apply adjustments to inventories under Article 5, paragraph 2, of the Protocol, or whether to apply a correction to the compilation and accounting database for the accounting of assigned amounts under Article 7, paragraph 4, of the Protocol, the enforcement branch shall decide on the matter within twelve weeks of being informed in writing of such disagreement. In doing so, the enforcement branch may seek expert advice.

5. In considering the questions of implementation with respect to Slovakia and the disagreement whether to apply adjustments, the enforcement branch noted that the expedited procedures as contained in section X, paragraph 1 (applicable to the consideration of the question of implementation), and section X, paragraph 5 (applicable to the disagreement whether to apply adjustments), differ with respect to time frames and procedural specifications. The branch took the approach of applying the expedited procedure contained in section X, paragraph 1, for reasons of procedural efficiency and clarity, including full procedural safeguards of the Party concerned, noting that in this particular case the disagreement whether to apply adjustments appeared to be related to one or more of the questions of implementation.<sup>8</sup> The branch noted that there could be a scenario where a disagreement whether to apply adjustments could arise even though a question of implementation did not arise. In this regard, the branch noted that, apart from the deadline referred to in section X, paragraph 5, and provisions on expert advice, the existing procedures and mechanisms and the rules of procedure do not include provisions on how such disagreements are to be addressed by the branch.

6. At its twenty-second meeting, the enforcement branch discussed draft working arrangements relating to the consideration by the branch of disagreements whether to apply adjustments. The branch agreed that the provisions of the draft working arrangements would be more appropriately adopted as amendments to the rules of procedure.<sup>9</sup>

<sup>7</sup> Report on the twentieth meeting of the enforcement branch, CC/EB/2012/2, paragraph 33.

<sup>8</sup> See paragraph 8 of the decision on preliminary examination (CC-2012-1-2/Slovakia/EB) adopted by the enforcement branch on 1 June 2012. Subsequently, the decision on the matter of the disagreement was adopted on the same date that the preliminary finding was adopted, thus allowing the branch to take a decision less than nine weeks after being informed in writing of the disagreement.

<sup>9</sup> Report on the twenty-second meeting of the enforcement branch, CC/EB/22/2013/3, paragraph 13.



### III. Proposed amendments to the rules of procedure

#### A. Definition of the term “Party involved”

7. Rule 2, paragraph (i), of the rules of procedure defines the term “Party concerned” as “a Party in respect of which a question of implementation is raised.” The term “Party concerned” is also used in the “Good practice guidance and adjustments under Article 5, paragraph 2, of the Kyoto Protocol” (decision 20/CMP.1) to refer to a Party included in Annex I with respect to which an adjustment procedure has been initiated by an expert review team (ERT; see paragraph 5). On the other hand, section V, paragraph 5 (a), provides that the enforcement branch shall determine whether to apply “[a]djustments to inventories under Article 5, paragraph 2, of the Protocol, in the event of a disagreement between an expert review team under Article 8 of the Protocol and the Party involved.”

8. Since the definition in rule 2, paragraph (i), refers to a question of implementation, the enforcement branch proposes the addition of the following definition under rule 2, to clarify how a Party that disagrees with the adjustments calculated and recommended by an ERT should be referred to:

*(i bis) “Party involved” means a Party that disagrees with adjustments to its inventory under Article 5, paragraph 2, of the Kyoto Protocol as calculated and recommended by an expert review team in accordance with the procedures set out in paragraphs 79 and 80 of the “Guidelines for review under Article 8 of the Kyoto Protocol” contained in the annex to decision 22/CMP.1;*

9. Even if a question of implementation has also been raised with respect to the Party involved, a separate decision relating to the disagreement whether to apply adjustments would be adopted by the enforcement branch.<sup>10</sup> The term “Party involved” would only be used with respect to the decision relating to the disagreement, whereas the term “Party concerned” would be used with respect to the decision relating to the question of implementation.

#### B. Additional rules under the procedures for the enforcement branch

10. Part 2 of the rules of procedure contains the procedures for the branches. Procedures for the enforcement branch are found in section 12. Rule 25 pertains to a hearing and the entitlement of a Party concerned to designate one or more persons to represent it during the hearing, and rule 25 bis, which was added to the rules of procedure through decision 4/CMP.4, relates to the plan submitted by a Party concerned in accordance with a final decision of the branch. Hence, rule 25 bis is not relevant in the context of a disagreement whether to apply adjustments.

11. The enforcement branch proposes a new rule 25 ter consisting of eight paragraphs as set out in the Annex. The proposed new rule 25 ter would apply both to a standalone

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<sup>10</sup> See, for example, the decision on a disagreement whether to apply adjustments to inventories under Article 5, paragraph 2, of the Kyoto Protocol (CC-2012-1-6/Slovakia/EB) adopted by the enforcement branch on 14 July 2012. A separate preliminary finding (CC-2012-1-7/Slovakia/EB) was adopted by the enforcement branch on the same date. This preliminary finding was subsequently confirmed in a final decision (CC-2012-1-9/Slovakia/EB) dated 17 August 2012.



disagreement as well as to a disagreement that is contained in an ERT report that also identifies a question of implementation to which the disagreement relates.<sup>11</sup>

**1. Scope of proposed new rule 25 ter and the applicability of related provisions of the procedures and mechanisms and the rules of procedure**

12. Proposed rule 25 ter, paragraph 1, defines the scope of the rule and contains a general reference to other relevant rules and provisions of the procedures and mechanisms, which will apply “mutatis mutandis as appropriate.”

13. In identifying existing provisions of the procedures and mechanisms and the rules of procedure that the enforcement branch could draw on to develop the proposed amendments, section VII, paragraph 4, section IX (paragraphs 1 and 2) and section X (paragraphs 1 (g) and 5), and rules 17 to 20 (paragraph 2 and 3), 21, 22 and 25 (paragraphs 1 and 2) appeared particularly relevant.

14. In its discussions of the proposed amendments, the enforcement branch considered two ways of incorporating relevant provisions of the procedures and mechanisms and the rules of procedure into the text of the proposed amendments, i.e., either cross referencing the relevant provisions and indicating that they will apply, mutatis mutandis,<sup>12</sup> to the new rule, or to incorporate all or some of these provisions, mutatis mutandis, into the text of the proposed amendments. A general approach, rather than a specific cross reference to each relevant provision, has been chosen to ensure simplicity and inclusiveness.

*1. Where there is a disagreement whether to apply adjustments to inventories under Article 5, paragraph 2, of the Kyoto Protocol under section X, paragraph 5, this rule shall apply. In addition, the other relevant rules and other relevant provisions contained in the annex to decision 27/CMP.1 shall be applied mutatis mutandis as appropriate.*

**2. Notification**

15. Section X, paragraph 5, provides that the enforcement branch shall decide on the matter of the disagreement “within twelve weeks of being informed in writing of such disagreement”. The forwarding of the report of the review of the annual submission of a Party (ARR) that contains the disagreement to the Compliance Committee in accordance with section VI is intended to constitute the information in writing that would start the twelve-week period referred to in section X, paragraph 5. Proposed rule 25 ter, paragraph 2, seeks to clarify who the secretariat should notify about the disagreement whether to apply adjustments, what information should be provided, and when such notification should be given. Proposed rule 25 ter, paragraph 2, makes no mention of an allocation by the bureau, since, in accordance with section VII, paragraph 1, only questions of implementation are allocated by the bureau.

<sup>11</sup> If a question of implementation identified in an ERT report also contains a disagreement whether to apply adjustments, the relevant provisions of the procedures and mechanisms and the rules of procedure would apply to the consideration of such a question.

<sup>12</sup> Meaning “with the necessary changes”.



2. *Within seven days of having received, through the secretariat, a report of an expert review team under Article 8 of the Kyoto Protocol in accordance with section VI, paragraph 1 or 3, that includes a disagreement whether to apply adjustments to an inventory under Article 5, paragraph 2, of the Kyoto Protocol, the bureau shall request the secretariat to notify forthwith:*

- (a) *Members and alternate members of the enforcement branch of the disagreement and send them all available materials;*
- (b) *Members and alternate members of the facilitative branch of the disagreement;*
- (c) *The Party involved that the disagreement will be considered by the enforcement branch.*

### **3. Applicable time frames and procedural steps**

16. The only procedural steps that are identified by section X, paragraph 5, in relation to the twelve-week time frame are:

- (a) Informing the enforcement branch in writing of the disagreement whether to apply adjustments;
- (b) Deciding on the matter of the disagreement whether to apply adjustments; and
- (c) The possibility of seeking expert advice.

17. Proposed rule 25 ter, paragraphs 3 to 8, outline the procedural steps and time frames that would apply to the consideration by the enforcement branch of a disagreement whether to apply adjustments. The proposed rule does not contemplate a preliminary examination of the disagreement. A preliminary examination would give the enforcement branch the option of deciding not to proceed with the consideration of the disagreement whether to apply adjustments. Since the responsibility to take a decision on the matter of the disagreement has been given exclusively to the enforcement branch (see paragraph 10 of decision 20/CMP.1 and section X, paragraph 5), deciding not to proceed with the consideration of a disagreement would result in the disagreement remaining unresolved.

18. If the enforcement branch decides to proceed with the consideration of a question of implementation, the procedures and mechanisms require the enforcement branch to first adopt a preliminary finding and to thereafter adopt a final decision. In the case of a disagreement whether to apply adjustments, no preliminary finding is envisaged. The step of adopting a preliminary finding has not been included in the proposed rule for the following reasons:

- (a) Section X, paragraph 5, does not provide for a preliminary finding; and
- (b) The adoption of a preliminary finding would not allow the enforcement branch to decide on the matter of the disagreement within the twelve-week time frame set out in section X, paragraph 5, if effect is given to procedural safeguards of the Party involved, notably reasonable time frames for the written submission of the



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Party involved and the request and preparation for a hearing by the Party involved.

3.<sup>13</sup> *The Party involved may make a written submission within four weeks from the date of receipt of the notification referred to in paragraph 2 (c) above, including rebuttal of information submitted to the enforcement branch.*

4.<sup>14</sup> *If so requested in writing by the Party involved within four weeks from the date of receipt of the notification referred to in paragraph 2 (c) above, the enforcement branch shall hold a hearing, which shall take place within four weeks from the date of receipt of the request or the written submission referred to in paragraph 3 above, whichever is the later. The Party involved may present expert testimony or opinion at the hearing. Such a hearing shall be held in public, unless the enforcement branch decides, of its own accord or at the request of the Party involved, that part or all of the hearing shall take place in private.*

5.<sup>15</sup> *The enforcement branch shall adopt its decision on the disagreement referred to in paragraph 2 above within 11 weeks of the notification referred to in paragraph 2 (c) above or within three weeks of a hearing as referred to in paragraph 4 above, whichever is the shorter.*

6. *The Party involved may, at any time before the adoption of the decision referred to in paragraph 5 above, accept, at the hearing referred to in paragraph 4 above or in writing, the adjustments as calculated and recommended by the expert review team referred to in paragraph 2 above. Such acceptance shall result in the resolution of the disagreement referred to in paragraph 2 above and shall be noted by the enforcement branch in its decision on the matter.*

7. *If the report referred to in paragraph 2 above also indicates a question of implementation that is allocated to the enforcement branch and to which the expedited procedure set out in section X, paragraph 1, applies, the enforcement branch may extend any time frames provided for in this rule to align both procedures. The enforcement branch shall make every effort to minimize any resulting delay and, in any event, shall decide on the disagreement referred to in paragraph 2 above no later than at the time of the adoption of the final decision on the question of implementation in accordance with section X, paragraph 1 (f).*

8.<sup>16</sup> *The period of time stipulated in section IX, paragraph 3, shall apply only if, in the opinion of the enforcement branch, it does not interfere with the adoption of the decision in accordance with paragraph 5 above.*

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<sup>13</sup> This text is based on section IX, paragraph 1. This and subsequent footnotes identifying the provisions of the procedures and mechanisms and rules of procedure on which the text is based are aimed at facilitating the consideration of the text and are not intended for inclusion in any final version of the amendments.

<sup>14</sup> This text is based on section IX, paragraph 2.

<sup>15</sup> This text is based on section X, paragraph 5.

<sup>16</sup> This text is based on section X, paragraph 1(g).



Annex

**Proposed draft text for amendments to the rules of procedure**

**Consideration by the enforcement branch of disagreements whether to apply adjustments to inventories under Article 5, paragraph 2, of the Kyoto Protocol pursuant to section X, paragraph 5, of the “Procedures and mechanisms relating to compliance under the Kyoto Protocol”**

The “Rules of procedure of the Compliance Committee of the Kyoto Protocol” are amended as follows:

A. Amendment to rule 2

In rule 2, after paragraph (i), the following text is inserted:

(i bis) “Party involved” means a Party that disagrees with adjustments to its inventory under Article 5, paragraph 2, of the Kyoto Protocol as calculated and recommended by an expert review team in accordance with the procedures set out in paragraphs 79 and 80 of the “Guidelines for review under Article 8 of the Kyoto Protocol” contained in the annex to decision 22/CMP.1;

B. Amendment to section 12

In section 12, after rule 25 bis, the following text is inserted:

**Rule 25 ter**

1. Where there is a disagreement whether to apply adjustments to inventories under Article 5, paragraph 2, of the Kyoto Protocol under section X, paragraph 5, this rule shall apply. In addition, the other relevant rules and other relevant provisions contained in the annex to decision 27/CMP.1 shall be applied mutatis mutandis as appropriate.
2. Within seven days of having received, through the secretariat, a report of an expert review team under Article 8 of the Kyoto Protocol in accordance with section VI, paragraph 1 or 3, that includes a disagreement whether to apply adjustments to an inventory under Article 5, paragraph 2, of the Kyoto Protocol, the bureau shall request the secretariat to notify forthwith:
  - (a) Members and alternate members of the enforcement branch of the disagreement and send them all available materials;
  - (b) Members and alternate members of the facilitative branch of the disagreement;
  - (c) The Party involved that the disagreement will be considered by the enforcement branch.



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3. The Party involved may make a written submission within four weeks from the date of receipt of the notification referred to in paragraph 2 (c) above, including rebuttal of information submitted to the enforcement branch.
4. If so requested in writing by the Party involved within four weeks from the date of receipt of the notification referred to in paragraph 2 (c) above, the enforcement branch shall hold a hearing, which shall take place within four weeks from the date of receipt of the request or the written submission referred to in paragraph 3 above, whichever is the later. The Party involved may present expert testimony or opinion at the hearing. Such a hearing shall be held in public, unless the enforcement branch decides, of its own accord or at the request of the Party involved, that part or all of the hearing shall take place in private.
5. The enforcement branch shall adopt its decision on the disagreement referred to in paragraph 2 above within 11 weeks of the notification referred to in paragraph 2 (c) above or within three weeks of a hearing as referred to in paragraph 4 above, whichever is the shorter.
6. The Party involved may, at any time before the adoption of the decision referred to in paragraph 5 above, accept, at the hearing referred to in paragraph 4 above or in writing, the adjustments as calculated and recommended by the expert review team referred to in paragraph 2 above. Such acceptance shall result in the resolution of the disagreement referred to in paragraph 2 above and shall be noted by the enforcement branch in its decision on the matter.
7. If the report referred to in paragraph 2 above also indicates a question of implementation that is allocated to the enforcement branch and to which the expedited procedure set out in section X, paragraph 1, applies, the enforcement branch may extend any time frames provided for in this rule to align both procedures. The enforcement branch shall make every effort to minimize any resulting delay and, in any event, shall decide on the disagreement referred to in paragraph 2 above no later than at the time of the adoption of the final decision on the question of implementation in accordance with section X, paragraph 1 (f).
8. The period of time stipulated in section IX, paragraph 3, shall apply only if, in the opinion of the enforcement branch, it does not interfere with the adoption of the decision in accordance with paragraph 5 above.





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**Indicative schedule – consideration by the enforcement branch of disagreements whether to apply adjustments under Article 5, paragraph 2, of the Kyoto Protocol**

### Paragraphs 2 to 8

No.	Steps	Range	Number of weeks
1.	publication of ARR		0
2.	forwarding of ARR to Committee	first business day after STEP 1	
3.	request by the bureau for the secretariat to notify the members and alternate members and alternate members of the enforcement branch, the members and alternate members of the facilitative branch, and the Party involved of the disagreement	seven days from STEP 2	1
4.	notification of the disagreement to the enforcement and facilitative branches and the Party involved	next business day after STEP 3	
	selection of expert(s), questions to experts and procedure to be followed	a reasonable time before the hearing	
5.	written submission by the Party involved	<i>four weeks from date of receipt by Party of the notification referred to in STEP 4</i>	5
6.	request for hearing from the Party involved	<i>four weeks from date of receipt by Party of the notification referred to in STEP 4</i>	5
7.	hearing (meeting dates)	four weeks from date of receipt of the request referred to in STEP 6 or four weeks from date of receipt of the written submission referred to in STEP 5, whichever is later	9
8.	adoption of the decision on the disagreement	three weeks from STEP 7 or eleven weeks from STEP 4, whichever is shorter	12

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