FURTHER WRITTEN SUBMISSION FROM ROMANIA

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Mr. DAN BONDI OGOLLA
Secretary
Compliance Committee
UNFCCC - Secretariat

Dear Mr. Bondi Ogolla,

In respect to our notification for the Compliance Committees' Secretariat, please find enclosed Romania's written submission under Section X, paragraph 1(e) of the annex to decision 27/CMP.1, with regard to the Question of Implementation raised and the preliminary findings adopted by the Compliance Committee through its Enforcement Branch, concerning the annual GHG inventory submission of Romania submitted in 2010.

Alongside the written submission, please took note that version 2 of the 2011 Romanian GHG Inventory has been uploaded within the UNFCCC Secretariat databases, thereby including the improvements appertained to in the present submission.

Yours sincerely,

Laura Popescu

Chargé d'affaires a.i.

GOVERNMENT OF ROMANIA

Further written submission

Ref. CC-2011-1-6/Romania/EB

11 August 2011

Re: Preliminary finding of the Enforcement Branch of the Compliance Committee. Party concerned Romania. 8 July 2011 (Ref. CC-2011-1-6/Romania/EB)

Contents

Contents 3
I. Summary of the written submission 4
II. Factual Statements 4
III. Legal Statements 6
A. Legal arguments raised in the first written submission 6
B. Omission to Give Reasons 7
B.1. Governing Legal Regime 7
B.2. Law and Practice in other MEAs and legal regimes 9
B.3. Due Process, Fair and Equal Treatment, Proportionality 10
IV. Appropriateness of Referral to the Facilitative Branch 12
V. Further Improvements 13
VI. Elements on strengthening the National System 14
VII. Elements on improving the NGHGI 15
A. Improving the accuracy 15
B. Improving the completeness 15
C. Improving the transparency 16
D. Improving the consistency 16
VIII. Conclusions 16

I. Summary of the written submission

a. This further written submission is transmitted by the Government of Romania in accordance with paragraph 1(e) section X of the *Procedures and Mechanisms* and Rule 17 of the Rules of Procedure. This submission states the position of Romania concerning the preliminary finding adopted by the Enforcement Branch of the Compliance Committee (hereinafter "EB") on 8 July 2011, and explains the reasons why Romania considers that the EB should not confirm the preliminary finding made with respect to the Question of Implementation concerning Romania, and decide not to proceed with the Question of Implementation or, alternatively to refer the Questions of Implementation to the Facilitative Branch for consideration.

b. However, this submission shows that in case the EB decides to maintain the conclusions of its preliminary finding, it should clarify and expand its reasons, as the final decision will be the main reference document for Romania to put into practice the requests of the EB.

c. The grounds for Romania's requests are presented below.

II. Factual Statements

1. In paragraph 16 of its preliminary finding the EB states that "Romania acknowledged that it is facing challenges relating to the improvement of its inventory." We would respectfully point out that this is an inaccurate representation of the facts. While Romania acknowledged in its first written submission that "certain technical, institutional and organisational barriers [have led to] data collection activities so far be[ing] less pronounced than in some Annex II countries," [1] and that Romania is committed to the continuous improvement of its inventory, Romania in no place acknowledges, whether in its written submission or oral statements during the hearing, that there have been challenges relating to improvement of the national inventory. We hereby clarify that no such challenges or difficulties exist, or are acknowledged, and that Romania's inventory is consistent with all applicable rules.

2. In paragraph 19 of its preliminary finding, the EB precludes from consideration certain factual arguments raised by Romania on the basis that Romania had not raised these arguments before the finalization of the 2010 ARR. Romania considers this preclusion not warranted by either the Kyoto Protocol, or any other relevant rules.

[1] Written Submission of Romania pursuant to Section X of the Annex to Decision 27/CMP.1 of 30 June 2011, CC-2011-1-5/Romania/EB (hereinafter "first written submission"], para 52.

3. In the first instance, the annex to Decision 27/CMP.1 (hereinafter "Compliance Committee Procedures" or "CCP") requires the EB to base its deliberations of each question of implementation on, inter alia, relevant information provided by the Party concerned (CCP VIII 3 b). This requirement is applied without limitation as to whether the information has previously been presented, before the finalisation of the ARR or otherwise. The sole limitation concerns whether the information is "relevant", which can only be held to exclude information that does not pertain to the question of implementation before the EB.

4. Secondly, The CCP permits the Party concerned to make a written submission to the EB "including rebuttal of the information submitted to the branch" (CCP IX 1). No limitation is specified as to the information which may be used in this rebuttal. Moreover, it is common practice in domestic and international judicial and administrative tribunals that a Party may use information it had not previously presented to rebut submissions made with respect to it.

5. Thirdly, Decision 22/CMP.1 (adopting the guidelines for the ERTs' reviews) prescribes the mechanisms whereby a Party provides comments on any questions raised by the ERT with respect to elements of its national inventory. In no place do the guidelines identify such mechanisms as the only or final opportunity for the Party to provide such comments or to otherwise submit factual arguments relating to questions identified by the ERT.

6. Lastly, precluding a Party from raising factual arguments in its written and oral submissions is contrary to the purposes and intentions of the Compliance Committee Procedures. As further described below, the Parties to the Kyoto Protocol, in adopting the CCP, placed great emphasis on ensuring adequate due process guarantees were observed in the process. The ability of a party to proceedings to introduce relevant factual arguments up until the initial proceedings have been completed is a core principle of due process recognised in domestic and international judicial and administrative systems.

7. Romania thus considers it necessary for the EB to fully consider all factual arguments raised by Romania in its written and oral submissions. Confirming the preliminary finding in the absence of such full consideration would, in the opinion of Romania, constitute a violation of the right to be heard (*audiatur et altera pars*).

8. In addition, while acknowledging the general discretion of the branch to make use of its *ex officio* competences to gather evidence, we consider it necessary for the EB to investigate whenever a Party concerned raises an issue which requires *ex officio* investigation by its very nature, namely when the information concerned can only be gathered from the Secretariat or the ERT itself, and when the issue proves relevant to the proceedings. In the present case, two incidents require *ex officio* investigation. The first concerns the establishment of the ERT. In the first written submission, we have requested that the Secretariat be asked to clarify to what extent it has established the ERT in accordance with Decision 22 CMP.1. Any incompatibility in the ERT's set-up with the applicable rules would translate into an implicit flaw of the final report as adopted by the ERT.

The second incident concerns the hearing on 7 July 2011 when the question arose how the ERT safeguards that the same standards of scrutiny apply to all Annex I countries. The experts heard at the hearing explained that this matter is wholly in the hands of the Secretariat, and, consequently, it is for the EB to safeguard that the Secretariat be heard on the matter. As explained below, the principle of equal standards and treatment of State Parties has relevance for the current proceedings, i.e. for the EB's assessment of whether Romania is in compliance with the applicable rules.

III. Legal Statements

A. Legal arguments raised in the first written submission

9. In its first written submission, Romania raised a number of legal arguments challenging the contentions put forward in the ERT's review and demonstrating that the applicable legal criteria did not warrant a finding of non-compliance by the EB. Specifically, Romania contended that:
    a. The ERT had erred in its application of the correct evaluation criteria. The ERT mistakenly assumed that relevant guidelines for national systems[2] were solely to be understood as fixed, mandatory standards. Romania challenged this assumption by pointing out that these documents were intended as benchmarks rather than fixed standards, and highlighting focus in the relevant guidelines on an iterative process of continuous improvement. Romania further pointed to several areas identified by the ERT where it fell decidedly within the flexibility afforded by the relevant guidelines;
    b. The ERT had failed to apply its margin of appreciation and/or the principle of proportionality, as enshrined in the Kyoto Protocol and the CCP, by not enquiring as to the type and degree of the issues raised. Considering that, for all unresolved problems raised in its reports the ERT must choose whether to issue a recommendation or list a question of implementation and that, in conformity with the underlying principles of compliance, the ERT's decision is to be guided by the cause, type, degree and frequency of the problems and issues raised, Romania noted that the ERT had, in the present instance, seemingly disregarded both its margin of appreciation and the principle of proportionality by not enquiring into the cause, type, degree and frequency of the issues in the first place;
    c. The ERT had applied a standard of review with respect to Romania that was not consistent with the standard it had applied to other Annex I Parties. Romania highlighted a number of instances in which issues similar to those raised with respect to Romania had been identified by the ERT, but where no question of implementation had been identified. Romania pointed out that this discrepancy with respect to the general

[2] Specifically, those contained in the revised 1996 Intergovernmental Panel on Climate Change (IPCC) Guidelines for National Greenhouse Gas Inventories, the 2000 IPCC Good Practice Guidance and Uncertainty Management in National Greenhouse Gas Inventories and the 2003 IPCC Good Practice Guidance for Land Use, Land Use Change and Forestry.

review practice was not consistent with the principle of equal treatment;

B. Omission to Give Reasons

10. The EB rejected the legal arguments put forward by Romania *in toto*, averring 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."

11. In the first instance, Romania considers that in this approach, the EB should take into consideration the fact that it is required to give **reasons** for its decisions (CCP VIII 7 and Rule 22 (1)(g) of the annex to Decision 4/CMP.2). The duty to give reasons is an integral part of the due process guarantees at the heart of the Compliance Committee Procedures.

12. In line with general international law, which as we point out below is applicable to the interpretation of the rules of the Kyoto Protocol, this mandate 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.

B.1. Governing Legal Regime

13. While the EB's omission to give sufficient reasons for the considerations underlying this statement pre-empt the possibility of addressing such considerations discretely, the following establishes that the legal arguments put forward by Romania do in fact take into account the specificities of the legal regime governing the compliance procedures, and that those arguments are in fact fully supported and justified by that very legal regime.

14. A decision of the Enforcement Branch of the Compliance Committee as to the compliance of an Annex I Party with the eligibility requirements under Articles 6, 12 and 17 of the Kyoto Protocol requires an interpretation, inter alia, of the requirements and modalities under Articles 5 (1), 6, 12, 17 and 18 of the Kyoto Protocol, as further defined by relevant decisions of the CMP. Moreover, it is clear that the consequences applicable to a finding of non-compliance, i.e. suspension of eligibility to participate in the mechanisms under Article 6, 12 and 17, have a direct impact upon the legal rights and obligations of the Annex I Party under the Kyoto Protocol, in particular its rights under the aforementioned provisions and its quantified emission reduction commitments under Article 3 (1).[3]

15. The decision of the EB is thus not only based on the interpretation of legal provisions, but entails legal consequences. It is entrusted with interpreting and

[3] C.f. Malgosia Fitzmaurice, 'Non-Compliance Procedures and the Law of Treaties', *in* Tulio Treves et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), p.475 and 478-9.

applying the relevant provisions of the Kyoto Protocol, as elaborated by the decisions of the CMP. Reflecting this legal task, the CCP require its members to have "legal experience" (CCP, V. 3).

16. That general international law continues to apply in the relations between parties to a treaty to the extent that it is not expressly excluded is a well-established principle of international law.[4]

17. It is similarly well-established that, even where special rules (*lex specialis*) provided for under a treaty replace certain general rules of international law as between the parties to that treaty, those general rules will "continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter."[5]

18. Where one or more treaties create a "special" (or "self-contained"[6]) regime, in which violation of a group of primary rules is accompanied by secondary rules concerning breach, general law continues to apply under the same conditions referred to above for special rules generally.[7]

19. Article 31 (3)(c) of the Vienna Convention on the Law of Treaties, which is broadly accepted as reflecting general international law and is thus applicable to the Kyoto Protocol, provides that in interpreting a treaty, one must take into account "any relevant rules of international law applicable in the relations between the parties." According to the International Law Commission, such relevant rules include, inter alia, general principles of law.[8]

20. In consequence, **general international law**, including **customary international law** and **general principles of law**[9], are applicable to the interpretation and application by the EB of the Kyoto Protocol and its implementing decisions.

21. The principles of **due process** and **fair and equal treatment** are widely accepted as general principles of law applicable in both domestic legal systems and in international law.

22. Due process guarantees are evident in almost all modern domestic judicial and administrative adjudication systems.[10] In international law, they are reflected in the

[4] C.f. *Elettronica Sicula S.P.A. (ELSI),* Judgment, I.C.J. Reports 1989, p. 15, para 50.
[5] International Law Commission, 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', *Yearbook of the International Law Commission*, 2006, vol. II, Part Two, para 9.
[6] It is clear from the terms of the ILC Conclusions, as well as judicial dicta and academic commentary that the term "self-contained regime" is a misnomer, as no regime exists in isolation from the general corpus of international law. As in the ILC Conclusions, the term is included here for clarity only.
[7] *Ibid*., paras 12 and 15.
[8] International Law Commission*, supra* note 8, para 18.
[9] Under Article 38 (1) of the Statute of the International Court of Justice, which is widely held to constitute an authoritative list of the sources of international law, general principles of law as recognised by domestic jurisdictions are considered an integral part of the *corpus* of international law.
[10] For a broad survey of minimum standards of due process in domestic administrative systems, see Giancinto della Cananea, 'Minimum Standards of Procedural Justice in Administrative Adjudication', *in* Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (2010).

rules of various international tribunals, and have been recognized by several judges of the International Court of Justice.[11]

23. The principle of equal treatment derives from core principle in both domestic and international law that laws should be applied on an equal and consistent - rather than arbitrary - basis In the words of the International Court of Justice, "[a}rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law ".[12] It is recognised as a key component of due process,[13] and has been recognised in international courts since the early days of international disputes.[14]

24. The principle of **proportionality** is, moreover, a core principle of international law.[15]

B.2. Law and Practice in other MEAs and legal regimes

25. It is broadly accepted that the compliance regime under the Kyoto Protocol is unique in terms of its institutional complexity, character, and the consequences available to it.[16]

26. Nonetheless, recent surveys have noted that the most relevant compliance mechanisms under multilateral environmental agreements have consistently incorporated due process and other procedural guarantees throughout the various stages of their procedures.[17] Moreover, it has been stated that such guarantees ought to be considered inherent to each of the mechanisms.[18]

27. It has similarly become consistent practice to require that decisions taken against non-compliant Parties include conclusions and reasons,[19] and take into

[11] C.f. Military and Paramilitary Activities in and Against Nicaragua (Merits), Judgment. I.C.J. Reports 1986, p. 14, Sep. Op. of President Nagendra Singh, at 153; Military and Paramilitary Activities in and Against Nicaragua (Declaration of Intervention of the Republic of El Salvador), Order of 4 October 1984, Diss. Op. of Judge Schwebel, p. 223; Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Provisional Measures), Order of 14 April1992, 1. C.J. Reports 1992, p. 1 14, Diss. Op. of Judge Bedjaoui, para 5.

[12] *Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15, para 128.

[13] C.f. Denis James Galligan, *Due process and fair procedures: a study of administrative procedures* (1996), p. 35, 55, 60, 120.

[14] C.f. Jay Treaty (Article VII) Arbitration (1974): The Betsy (1797), 4 *Int. Adj.* M.S., 179, p. 185.

[15] C.f. International Law Commission, 'Responsibility of States for Internationally Wrongful Acts', *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), Articles 35 (b), 37 (3), 51; Vienna Convention on the Law of Treaties 1969, Article 60

[16] See, e.g. Enrico Milano, 'The Outcomes of the Procedure and their Legal Effects', *in* Tulio Treves et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), p. 415; Jacob Werksman, 'The Negotiation of a Kyoto Compliance System' *in* Olav Schram Stokke, Jon Hovi and Geir Ulfstein (eds.) *Implementing the Climate Regime: International Compliance* (2005),, p. 19.

[17] Massimilliano Montini, 'Procedural Guarantees in Non-Compliance Mechanisms', *in* Tulio Treves et al. (eds), Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements (2009), pp. 393-4.

[18] *Ibid.*

[19] *Ibid.*, at 402.

account the "cause, type, degree and frequency" of the non-compliance before considering the application of measures.[20]

28. The non-compliance procedure of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters arguably comes closest to that of the Kyoto Protocol, though the powers of its Compliance Committee fall short of those of the EB.[21] Nonetheless, the Aarhus Compliance Committee bases its decisions on clear legal criteria, namely whether the conduct of the Party concerned meets the standard established by the Convention.[22]

29. Moreover, the Aarhus Compliance Committee has indicated that it is prepared to take into account general rules and principles of international law where they are relevant in the context of interpretation and application of the Convention.[23]
30. The foregoing makes it clear that, while no other non-compliance compares to that under the Kyoto Protocol in terms of the character, the principles and safeguards associated with due process, equal treatment and, as further explained below, proportionality haven become a standard feature of compliance regimes. Moreover, other compliance regimes have recognised that it is incumbent upon Compliance Committees to base decisions on clear legal grounds and to take account of relevant principles of international law in interpreting the provisions before them. This makes it all the more incumbent upon the EB, in its function as a body applying legal consequences with significant effects, to ensure it takes the lead in applying adequate and effective due process guarantees and basing its decisions on clear legal criteria and principles, including those of proportionality and equal treatment.

B.3. Due Process, Fair and Equal Treatment, Proportionality

31. The procedural guarantees of the Parties subject to compliance proceedings are also explicitly referred to in Article 18 KP and Decision 27 CMP.1. Article 18 KP has mandated the CMP to approve "appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of [the] Protocol". Consequences of non-compliance need to take into account "the cause, type, degree and frequency of non-compliance".

32. The Decision 27 CMP.1 lays down that the Enforcement Branch, when it determines that a Party is not in compliance with its reporting obligations under Article 5 (1), (2) KP and Article 7 (1), (4) KP, shall apply consequences, "taking

[20] See, e.g., Cartagena Protocol [UNEP, Convention on Biological Diversity, Report of the First Conference of the Parties serving as the Meeting of the Parties to the Protocol on Biosafety, Decision BS-1/7, Section VI (1)]; Aarhus Convention [ECOSOC, ECE, Meeting of the Signatories to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Annex to the Addendum to the Report of the First Meeting of the Parties: Decision 1/7Review of Compliance, UN Doc. ECE/MP.PP/2/Add.8 (2004), para 37].
[21] Under the Aarhus non-compliance procedure, the decision on the application of consequences for non-compliance is the responsibility of the Meeting of the Parties: *Aaarhus NCP*, *ibid.*, Section XII.
[22] Cesare Pites, 'The Non-Compliance Procedure of the Aarhus Convention: Between Environmental and Human Rights Control Mechanisms', 16 *Italian Y.B. Int'l L.* 85 (2006), p. 104.
[23] Finding and Recommendations with regard to Compliance by Hungary, 18 February 2005, Doc. ECE/MP.PP/C.1/2005/2/Add.4, para 18.

into account the cause, type, degree and frequency of the non-compliance of that Party.

33. Romania believes that the EB needs to ensure that it affords a thorough and adequate consideration to all factual and legal arguments put forward and ensure that all rights under the Kyoto Protocol and general international law, including rights to due process, equal treatment and proportionality, are protected and upheld.

34. Due process, in the first instance, means respecting the procedures as they are, i.e. when establishing whether a Party is in compliance or in non-compliance, the Enforcement Branch will adhere to the procedures provided by the Compliance Committee Procedures and delegated provisions. Yet, due process also has the broader meaning of guaranteeing the overall integrity of the proceedings, i.e. that rulings are based on accurate and unbiased information, that they follow rational procedures and are shielded from inappropriate political influence. To that end, the Compliance Committee Procedures lay down that members shall serve in their individual capacities (CPR, II. 6), and from the start of any proceedings, both branches need to ensure that the issue raised is supported by sufficient information, is material or substantial enough to justify proceedings, is based on facts and is in accordance with the Kyoto Protocol (CCP, VII. 2).

35. The crucial importance of due process to proceedings before the EB is highlighted by the central emphasis placed upon this issue by the CP and the CMP in the negotiation of the Marrakesh Accord. Conference documentation,[24] the submissions of several parties [25] and academic commentary on the negotiations[26] makes clear that the inclusion of robust due process guarantees, including those relating to predictability, proportionality and the utilisation of rational procedures, was crucial to the agreement by negotiators to strengthen the consequences that would attach to non-compliance.

36. Adhering to the principles of fair and equal treatment, on one hand, and proportionality, on the other, then, are instrumental in addressing "the cause, type, degree and frequency of non-compliance". While it applies prima facie to the consequences the Committee adopts alone, both principles also have an important effect on the findings of the Committee's decision. This is in particular the case where the finding of non-compliance gives rise to an automatic consequence: eligibility suspension (CCP, XV. 4). Weighing in "the cause, type, degree and frequency", in this, case, is required in the finding itself.

37. It must be noted, in this context, that establishing compliance and non-compliance involves a wide margin of discretion. As consistent ERT practice shows and as confirmed by the experts in the hearing on 7 July 2011, the

[24] C.f. UNFCCC, 'Procedures and Mechanisms relating to Compliance under the Kyoto Protocol: Elements of a Compliance System and Synthesis of Submissions – Note by the Co-chairs of the JWG on Compliance', FCCC/SB/1999/7 (17 September 1999), para 5.
[25] C.f. UNFCCC, 'Procedures and Mechanisms relating to Compliance under the Kyoto Protocol: Submission from Parties – Note by the Secretariat', FCCC/SB/1999/MISC.12 (22 September 2009): Submissions of China (p.16), EU (p.22), Japan (p.29), AOSIS (p. 42) and Switzerland (p. 60).
[26] C.f. Ulfstein & Werksman, *supra* note 3, at 40-41.

identification of potential problems and the raising of questions of implementation is the result of a balancing process in which levels of compliance are weighed against the gradual process achieved and the expectation that outstanding issues will be solved by the State Party concerned in the future.

38. The Compliance Committee will assess whether any judgment made by the ERT in question has exceeded the limits of discretion. These limits themselves are defined by due process rights, on one hand, and the principles of equal treatment and proportionality, on the other.

39. Thus, questioning an ERT finding on the ground that it is not in accordance with the general practice of ERT findings (equal treatment) has its legal basis in Article 18 KP, and it would be misleading to dismiss the claim on the ground that doing otherwise would amount to an excuse for non-compliance. The claim in fact is valid in as much as it concerns the process of establishing what the standards for compliance are in the first place.

IV. Appropriateness of Referral to the Facilitative Branch

40. In paragraph 22 of the preliminary finding, the EB concludes that "as long as there are unresolved problems pertaining to language of a mandatory nature relating to Romania's national system it is not appropriate to consider referral of the question of implementation to the facilitative branch under paragraph 12 of section IX."

41. Romania would firstly like to point out that section IX of the CCP empowers the EB to refer a question of implementation to the FB "at any time".

42. Secondly, Romania reaffirms its position that there exist no unresolved problems pertaining to language of a mandatory nature relating to its national system

43. Thirdly, Romania notes that, even if it could be considered that such problems existed, it would remain wholly appropriate to refer the question of implementation to the FB. The mandate of the FB includes, inter alia, "promoting compliance by Parties with their commitments under the Protocol." Consistent with international practice, the term "commitments" is used throughout the Kyoto Protocol to refer to requirements of a mandatory nature. The mandate of the FB thus includes assisting Parties in resolving problems pertaining to language of a mandatory nature.

44. In addition, the existence of "an unresolved problem pertaining to language of a mandatory nature" is a precondition of an ERT listing a question of implementation with respect to a Party, in the absence of which the ERT must limit itself to noting the problem in its report. (Decision 22/CMP.1, paragraph 8). Once a question of implementation is listed, the Bureau of the Compliance Committee is entrusted with allocating the question of implementation to the appropriate branch (CCP VII 1). The provision for such allocation by the CMP is a clear indication that problems of a mandatory nature were considered to be within the mandates of both the FB and the EB.

45. The practice of the Compliance Committee to-date, where the Enforcement Branch plays such a preeminent role should be reconsidered in the interest of all Parties to the KP.

46. This practice is neither compatible with the letter of the compliance procedures nor with their inherent architecture. The procedures were designed as a two-pronged process in which the two branches would "interact and cooperate in their functioning" (CCP II 7). This is reflected in the fact that, while the functions of the two branches are distinct, both share the fundamental purpose of ensuring compliance by Annex I Parties with their commitments under the KP (CCP IV 4 & CCP V 6). As noted above, their mandates overlap, reflecting the 'carrot and stick' approach built into the procedures, in which it is recognised that compliance operates on a continuum and is multi-dimensional in its underlying causes, and thus flexibility in their respective engagement is key. It is for this reason that the EB can refer a question of implementation to the facilitative branch "at any time" (CCP IX 12).

47. This design of the system - the interactional functioning of facilitative and enforcement functions - is in line with international compliance practice in the field of Multilateral Environmental Agreements, wherein the common approach has been to combine a facilitative with and enforcement approach, with a clear emphasis on operationalizing the latter only where the former has proven ineffective.[27] The practice of the CC under the KP should follow this approach.

48. It is Romania's position that, while it remains fully in compliance with its obligations under Articles 5 (1), 6, 12 and 17 KP, any outstanding issues that the EB considers to remain with respect to its national system would be better and more appropriately addressed by the FB. Even if Romania remains an economy in transition, it has demonstrated a clear commitment to improving its national inventory and, as shown further below, has already made substantial improvements both since the ERT's review of its 2010 NIR, and, moreover, since the hearing of 7 July 2011. It is these precise circumstances for which the flexibility afforded to the EB in referring a question of implementation to the FB was designed, and to do so would not only be wholly supported by the letter and architecture of the compliance procedures and the prevailing international practice, but would constitute the most effective and appropriate operationalization of the compliance procedure's function.

V. Further Improvements

49. In paragraph 17 of its preliminary finding, the EB notes the view of the independent experts that it was "difficult to see" how the substantial

[27] See, e.g., in the context of the Aarhus Convention's NCP, Svitlana Kravchenko, 'The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements', 18 *Colo. J. Int'l Envtl. L. & Pol'y* 1 (2007) at 32: "Before stronger measures are considered, all possible positive measures encouraging Parties to comply-advice, facilitation, and assistance-should be exhausted." The same approach was evinced in the treatment of the first major case under the NCP of the Montreal Protocol, concerning Russia. See David G. Victor, 'The Early Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure', International Institute for Applied Systems Analysis (1996).

improvements Romania is undertaking with respect to its National System could be implemented before 2012, and thus incorporate before the 2012 submission.

50. Romania would first like to point out that the independent experts explicitly stated that they were not in a position to assess the likely effects of the proposed measures, only noting that it was "difficult to see" how they could be implemented before 2012.

51. In the second instance, Romania notes that the foregoing position of the *independent experts* is simply a repetition of the position provided by the *same experts* in paragraph 23 of the ERT's review of Romania's NIR. There is no indication that the factual information presented by Romania in Section V of its first written submission, in the implementation schedule in Section VI and during the oral hearing has been thoroughly taken into consideration to the effect that the majority of improvements underway had either already been completed or were due to be completed in early 2012 and thus ready for inclusion in the 2012 inventory.

52. In this context, Romania sees it incumbent on the EB to assess each country's compliance at the time of its decision and based on its own considered assessment of the facts and law before it and to ensure that the decision is not anticipated by the ERT's assessment or the ERT expert opinion heard at the hearing.

53. Romania reiterates its position that the implementation schedule is both realistic and achievable. In this context, Romania would like to draw the EB's attention to the following progress that has been made in implementing the improvements outlined in the implementation schedule.

VI. Elements on strengthening the National System

54. Following the governmental approval of establishing a new unit at NEPA having exclusively the responsibilities of administrating the NS and the NGHGI and allowing for an increased staff number, from 5 to 16, the following progress has been achieved:

- Finalization of the first phase of staff selection: a total of 3 people have been recruited; the second phase will be implemented by the end of August. As a result, 11 more people will be hired until the end of August 2011;
- Providing appropriate working space and facilities;

- Continuation of the acquisition of sufficient and performing IT equipment through the support of study "Environmental Integrated Informational System";

- Training the dedicated staff is planned in the context of the UNFCCC training courses and of the study "Support for the implementation of the European Union requirements on the monitoring and reporting of the carbon dioxide (CO_2) and other greenhouse gas emissions"; additionally, the European Environment Agency (EEA) has confirmed that the EEA and the European

Topic Centre for Air pollution and Climate change Mitigation will provide technical assistance to the NS/NGHGI dedicated team.

VII. Elements on improving the NGHGI

55. Based on the intermediary results of the study "NGHGI LULUCF both under the UNFCCC and KP obligations" and on NEPA's work, the following important improvements have been developed and incorporated within version 2 of the 2011 NGHGI.

A. Improving the accuracy

Based on the intermediary results of the study "NGHGI LULUCF both under the UNFCCC and KP obligations":

- Revised estimates associated to the Forest land remaining forest land category based on a revised land use change matrix (LULUCF under the UNFCCC);

- New estimates of emissions/removals associated to the Land converted to Forest Land, Cropland, Grassland, Settlements and Other land categories (LULUCF under the UNFCCC);

- New characterization of the activities pertaining to the Wetlands category (LULUCF under the UNFCCC);
- Implementation of a combined Tier 1 - Tier 2 approach to estimate the emissions/removals from KP Article 3.4 Forest management activity (LULUCF under the KP).

Based on NEPA's work:

- Tier 2 CO_2 estimates for Public electricity and heat production (Energy);

- Tier 2 CO_2 estimates for Manufacturing industries and construction, Other sectors and Road transport categories, based on COPERT 3 model use (Energy; activities performed earlier than planned-January 2012, as part of the 2012 NGHGI submission);
- Tier 3 CO_2 emissions estimates and Tier 2 PFC emissions estimates associated to the Aluminium production category (Industrial processes; elements developed earlier than planned – Mid September 2011, as part of the version 3 of the 2011 NGHGI);

- Tier 2 estimates for Managed waste disposal on land category (Waste).

B. Improving the completeness

Based on intermediary results of study "NGHGI LULUCF both under the UNFCCC and KP obligations":

- New estimates of emissions/removals associated to the Land converted to Forest Land, Cropland, Grassland, Settlements and Other land categories (LULUCF under the UNFCCC);

- New characterization of the activities pertaining to the Wetlands category (LULUCF under the UNFCCC);

- As a result of implementing the two activities mentioned above, the number of categories whose emissions/removals were not estimated (NE categories) decreased with 111 (from 127, for 2009, within the 2011 version 1.3 NGHGI submission, to 16, for 2009, within the version 2 of the 2011 NGHGI submission).

Based on NEPA's work:

- the number of NE categories in the Energy Sector decreased with 20, from 64, for 2009, within the 2011 v. 1.3 NGHGI, to 44, for 2009, within the 2011 v. 2 NGHGI, as a result of a improved characterization of emissions/removals associated to several categories.

In total, the number of NE categories decreased for 2009 with 131, from 247 within the 2011 v. 1.3 NGHGI submission (April 2011) to 116 within the 2011 v. 2 NGHGI submission (August 2011).

C. Improving the transparency

- The NIR's sections relevant for the LULUCF under the UNFCCC and, respectively, under the KP, have been updated by the Forest Research and Management Planning Institute, the contractor of the study "NGHGI LULUCF both under the UNFCCC and KP obligations", a third party organization with LULUCF advanced expertise, allowing for better transparency.

D. Improving the consistency

- As a result of the ongoing study "NGHGI LULUCF both under the UNFCCC and KP obligations", the time series consistency and the consistency between the LULUCF under the UNFCCC and the LULUCF under the KP have been improved through revising the land use change matrix associated to the LULUCF under the UNFCCC and the land use change matrix associated to the LULUCF under the KP.

56. It is noted that there will be an ERT in-country review in September this year. The review will verify the further improvements made and it is expected that it will confirm both Romania's compliance with all applicable rules, provisions and guidelines under the KP and relevant decisions of the CMP, but also that Romania is on track with its implementation schedule.

VIII. Conclusions

57. The Enforcement Branch of the Compliance Committee is kindly asked not to confirm its preliminary finding concerning Romania and to adopt the decision not to proceed with the matter.

58. Should the EB find that the proceedings should be continued, Romania considers it should refer them to the Facilitative Branch.

59. Should the EB find that the declaration of non-compliance and the suspension of Romania's eligibility are warranted under the current procedures, it is requested to clarify its findings, especially in relation with paragraph 17 as it is for the next review to assess whether sufficient improvements have been implemented to warrant reinstatement of Romania.

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National Focal Point for UNFCCC

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