



UNITED  
NATIONS



Framework Convention  
on Climate Change

Distr.  
GENERAL

FCCC/SBI/2006/21  
4 October 2006

Original: ENGLISH

**SUBSIDIARY BODY FOR IMPLEMENTATION**

Twenty-fifth session

Nairobi, 6–14 November 2006

**Item 14 (d) of the provisional agenda**  
**Administrative, financial and institutional matters**  
**Privileges and immunities for individuals serving on**  
**constituted bodies established under the Kyoto Protocol**

**Privileges and immunities for individuals serving on constituted bodies  
established under the Kyoto Protocol**

**Note by the secretariat\***

*Summary*

In response to the request from the Subsidiary Body for Implementation (SBI), at its twenty-fourth session, the secretariat has prepared this note that analyses two issues:

- (a) The consequences and resource implications of obtaining written agreements from private or national entities seeking to participate in the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol that any complaints, disputes or claims against constituted bodies under the Kyoto Protocol or members thereof shall be brought in accordance with the decisions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (COP/MOP) and shall be made at the headquarters of the secretariat;
- (b) The consequences, including resource implications for the secretariat, of providing assistance to members of constituted bodies who are faced with disputes, complaints or claims concerning their official functions and the role of the Executive Secretary in defending such claims.

In the light of this analysis, the SBI is invited to consider and recommend a draft decision to the COP/MOP, as appropriate.

\* This document was submitted late owing to the extensive research and consultations made necessary by the complexity of the issues addressed.

## CONTENTS

|  | <i>Paragraphs</i> | <i>Page</i> |
|--|-------------------|-------------|
| I. INTRODUCTION .....  | 1–4               | 3           |
| A. Mandate .....   | 1                 | 3           |
| B. Scope of the note .....   | 2–3               | 3           |
| C. Possible action by the Subsidiary Body for Implementation .   | 4                 | 4           |
| II. BACKGROUND .....   | 5–14              | 4           |
| A. Overview .....  | 5–6               | 4           |
| B. Participation of private and public legal entities<br>in mechanisms under the Kyoto Protocol .....  | 7–11              | 4           |
| C. Nature of possible disputes, complaints or claims<br>against individuals serving on constituted bodies .....  | 12–14             | 6           |
| III. FORMAL CONSENT OR DECLARATION FROM PRIVATE AND PUBLIC<br>LEGAL ENTITIES THAT CLAIMS WILL BE MADE AT THE<br>HEADQUARTERS OF THE SECRETARIAT AND IN<br>ACCORDANCE WITH DECISIONS OF THE CONFERENCE OF<br>THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO<br>THE KYOTO PROTOCOL ..... | 15–34             | 6           |
| A. Objectives and elements .....   | 15–22             | 6           |
| B. Consequences of the declaration at the international level ....   | 23–26             | 8           |
| C. Consequences of the declaration at the national levels .....  | 27–31             | 9           |
| D. Consequences for existing decisions of the<br>Conference of the Parties serving as the meeting<br>of the Parties to the Kyoto Protocol .....  | 32–33             | 10          |
| E. Resource implications for the secretariat .....   | 34                | 10          |
| IV. PROVISION OF ASSISTANCE TO INDIVIDUALS SERVING ON<br>CONSTITUTED BODIES TO DEAL WITH DISPUTES,<br>COMPLAINTS AND CLAIMS .....  | 35–71             | 10          |
| A. Role of the Executive Secretary .....   | 36–44             | 10          |
| B. Arrangements for dispute settlement .....   | 45–59             | 12          |
| C. Resource implications .....   | 60–71             | 14          |
| V. CONCLUSIONS .....   | 72–75             | 17          |

## I. Introduction

### A. Mandate

1. The Subsidiary Body for Implementation (SBI), at its twenty-fourth session, requested the Executive Secretary to prepare a note that analyses a number of issues concerning privileges and immunities for individuals serving on constituted bodies and expert review teams under the Kyoto Protocol for consideration by the SBI at its twenty-fifth session:

- (a) The issues at the international and national levels, including practical and legal implications and the resource implications for the secretariat of obtaining written agreement from private and public legal entities seeking to participate in the mechanisms pursuant to the Kyoto Protocol that any complaints, claims or disputes against constituted bodies or individuals serving on constituted bodies and expert review teams (ERTs) under the Kyoto Protocol shall be brought in accordance with the decisions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (COP/MOP) and be made at the headquarters of the secretariat.
- (b) The legal and practical issues, including the resource implications for the secretariat, of providing assistance upon request to individuals serving on constituted bodies and ERTs under the Kyoto Protocol who are faced with complaints, claims or disputes concerning their official functions and, in such cases, the options for the Executive Secretary to contact, as appropriate, the competent authorities of the country or countries in question to discuss the issues further.

### B. Scope of the note

2. This note discusses the issues surrounding privileges and immunities for individuals serving on constituted bodies, including:

- (a) The implications for private and public legal entities of the activities of constituted bodies and ERTs, as well as the possible disputes, complaints and claims that could be brought by private and public legal entities against individuals serving on constituted bodies.
- (b) The objectives and elements of the formal consent or declaration to be made by private and public legal entities participating in the mechanism under the Protocol to make disputes, complaints and claims at the headquarters of the secretariat, including the consequences at the international and national levels of such a declaration.
- (c) The types of assistance that could be provided by the Executive Secretary to individuals serving on constituted bodies to deal with disputes, complaints and claims; possible arrangements for dispute settlement; and the resource implications that may be associated with providing such assistance.

3. This note should be read in conjunction with the following documents:

- (a) The note prepared by the secretariat that provides an overview of the issues concerning privileges and immunities for individuals serving on constituted bodies and lays out various options for consideration by the COP/MOP (FCCC/KP/CMP/2005/6);
- (b) The reports on the consultations by the secretariat with the Secretary-General of the United Nations on privileges and immunities for individuals serving on constituted bodies (FCCC/SBI/2006/6 and FCCC/SBI/2006/20);

- (c) Views from Parties on this issue (FCCC/SBI/2006/MISC.6 and Add.1).

### **C. Possible action by the Subsidiary Body for Implementation**

4. The SBI may wish to consider what action to take to provide the necessary immunities for individuals serving on constituted bodies and ERTs, taking into consideration the proposals from the Office of Legal Affairs of the United Nations contained in document FCCC/SBI/2006/20. The SBI may also wish to recommend a draft decision for adoption by the COP/MOP:

- (a) That requires private and public legal entities seeking to participate in the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol to make a formal consent or declaration in writing that any disputes, complaints or claims against the constituted bodies or individuals serving on constituted bodies or ERTs under the Kyoto Protocol will be made in accordance with decisions of the COP/MOP and at the headquarters of the secretariat;
- (b) That establishes dispute settlement arrangements for addressing any disputes, complaints or claims against constituted bodies or individuals serving on constituted bodies or ERTs under the Kyoto Protocol;
- (c) That requires the Executive Secretary to assist individuals serving on constituted bodies with disputes, complaints and claims made against them;
- (d) That addresses the resource implications for the Executive Secretary of assisting individuals serving on constituted bodies with disputes, complaints and claims made against them, the establishment of the dispute settlement arrangements and the settlement of possible successful claims.

## **II. Background**

### **A. Overview**

5. The issue of privileges and immunities was first considered officially by the COP/MOP, at its first session, in response to concerns raised about the absence of privileges and immunities for individuals serving on constituted bodies established under the Kyoto Protocol (the Executive Board of the clean development mechanism, the Joint Implementation Supervisory Committee (JISC), the Compliance Committee and the ERTs under Article 8).<sup>1</sup> The issues were discussed further by the SBI during its twenty-third and twenty-fourth sessions.<sup>2</sup>

6. In response to requests from Parties, the secretariat contacted the Secretary-General of the United Nations to obtain his views on the provision of privileges and immunities to individuals serving on constituted bodies and ERTs under the Kyoto Protocol, in particular within the context of the 1946 Convention on the Privileges and Immunities of the United Nations (hereinafter referred to as the General Convention). The responses from the United Nations Office of Legal Affairs are referred to as the documents FCCC/SBI/2006/6 and FCCC/SBI/2006/20.

### **B. Participation of private and public legal entities in mechanisms under the Kyoto Protocol**

7. The Kyoto Protocol establishes a number of mechanisms that can be used by Parties to the Protocol to facilitate achievement of the quantified emission limitation and reduction commitments under

---

<sup>1</sup> See document FCCC/KP/CMP/2005/6.

<sup>2</sup> See documents FCCC/SBI/2005/23 and FCCC/SBI/2006/11 and decision 33/CMP.1.

Article 3, paragraph 1, of the Kyoto Protocol. These are the clean development mechanism (CDM), pursuant to Article 12, joint implementation (JI), pursuant to Article 6, and emissions trading (ET), pursuant to Article 17. Parties can authorize private and/or public legal entities to participate in these mechanisms (see decisions 3/CMP.1, 9/CMP.1 and 11/CMP.1). Private and public legal entities are thus directly involved in the implementation of the mechanisms and indirectly in treaty compliance. There are approximately 7,000 private and legal entities currently participating in the mechanisms under the Kyoto Protocol. They include:

- (a) Project participants – private and/or public legal entities authorized by a Party to participate in a CDM or JI project activity;
- (b) Designated operational entities (DOEs) – domestic legal entities or international organizations accredited and designated by the CDM Executive Board on a provisional basis until confirmed by the COP/MOP;
- (c) Accredited independent entities (AIEs) – domestic legal entities or international organizations accredited by the JISC;
- (d) Legal entities authorized to transfer and/or acquire emission reduction units (ERUs), certified emission reductions (CERs), assigned amount units (AAUs) or removal units (RUs) under Article 17 of the Kyoto Protocol.

8. Other interested private legal entities beyond those listed as project participants or entities involved in emissions trading will be affected by decisions concerning CDM, JI or ET. There is a wide range of entities that do not have any direct dealings with the CDM Executive Board or JISC and are not listed as being officially involved in a CDM or JI project activity, but may still feel aggrieved by decisions of constituted bodies. Such entities could include:

- (a) Those directly involved in a CDM/JI project (but not in the project activity itself), such as project developers, financing institutions, equipment suppliers and land owners;
- (b) Beneficiaries of the project, such as electricity consumers, employees of the project and their families, communities benefiting from improvements of the local environment.

9. The decisions of constituted bodies under the Kyoto Protocol, in particular the CDM Executive Board and the JISC, have a direct impact on investment decisions by the public and private sectors worldwide. The investment activities triggered by the CDM, JI and ET constitute one of the successes of the mechanisms, but they also increase the risk for the bodies and their members that the decisions could be contested.

10. The decisions and activities of the Compliance Committee may also affect private and legal entities. In particular, the enforcement branch of the Compliance Committee has the power to determine the consequences for Parties of not meeting their commitments, including whether or not they are eligible to continue to participate in the mechanisms under the Kyoto Protocol. The decisions of the enforcement branch therefore have significant consequences for Parties as well as private and public or legal entities participating in these mechanisms.

11. ERTs are called upon to assess the implementation of a Party's commitments and identify performance related problems. While ERTs do not take decisions, their assessments form the basis for decisions of the Compliance Committee and the COP/MOP. The assessments of the ERTs are of a scientific nature and involve State Parties rather than third parties.

### **C. Nature of possible disputes, complaints or claims against individuals serving on constituted bodies**

12. Parties to the Kyoto Protocol are provided with procedures and means of appeal to defend themselves whenever they consider a decision of a constituted body to be flawed and unjustified. It is unlikely that Parties would file claims in national courts against individuals serving on constituted bodies. Instead, they may be expected to make use of the rights and tools offered by the Kyoto Protocol and the procedures provided in the decisions of the COP/MOP concerning the constituted bodies. They may also bring complaints to the COP/MOP directly, for example, during the discussion of the report of the constituted body, or during consideration and preparation of decisions with respect to a particular body.

13. On the other hand, private and/or public entities affected by decisions of a constituted body currently have no means or procedures to raise their dispute, complaints or concerns. The absence of formal procedures for private or public legal entities to bring their concerns and have them addressed increases the risk that such entities will raise complaints, contest decisions or seek redress in national courts.

14. The possible disputes, complaints and claims that may be brought against individuals serving on constituted bodies or ERTs could include the following:

- (a) **Acting outside of the delegated authority** – that certain determinations of a constituted body or the ERT are ultra vires their delegated authority, or that some of the decisions and/or interpretations of COP/MOP decisions had been taken without legal foundation;
- (b) **Substantially incorrect decisions** – decisions taken are based on factually incorrect technical or scientific conclusions. This is particularly relevant where determinations infringe the rights of private or public legal entities, and the constituted body failed to take all precautionary measures as required by decisions of the COP/MOP in order to avoid such injury;
- (c) **Conflict of interest** – that individuals serving on a constituted body or ERT have a conflict of interest concerning decisions taken;
- (d) **Breach of confidentiality** – alleged breach of confidentiality;
- (e) **Violation of procedural rights** – allegations that the conduct of a member of a constituted body or ERT is not in conformity with the operational policies, procedures and practices, which has resulted in the violations of procedural rights of private and/or legal entities;
- (f) **Bias in decision-making** – accusations that the decisions, recommendations or other actions of the constituted body or ERT are biased or made improperly.

## **III. Formal consent or declaration from private and public legal entities that claims will be made at the headquarters of the secretariat and in accordance with decisions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol**

### **A. Objectives and elements**

15. Private and public legal entities seeking to participate in the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol could be required to give their formal consent, for example through a

declaration, that any disputes, complaints or claims relating to an application for or participation in projects under the mechanisms must be brought in accordance with decisions of the COP/MOP and be made at the headquarters of the secretariat.

16. What is meant by “made at the headquarters of the secretariat”? This could mean one of two possibilities:

- (a) The disputes, complaints and claims could be made in a national court in the host country of the secretariat, in which case the secretariat has to request dismissal of the complaint under the provisions of the Headquarters Agreement,<sup>3</sup> and the secretariat would be obliged to resolve the dispute, complaint and claim through dispute settlement arrangements;
- (b) The disputes, complaints and claims could be brought directly to the Executive Secretary, who would be obliged to resolve the matter through dispute settlement arrangements in accordance with the headquarters agreement.

17. Under both scenarios, the secretariat is legally obliged to ensure the resolution of the dispute, complaint or claim through dispute settlement (see paras. 25–26 below).

18. The objective of a declaration that claims will be made in accordance with decisions of the COP/MOP and be made at the headquarters of the secretariat would be to protect the individuals serving on the constituted bodies of the Kyoto Protocol from claims in national courts. Entities considering such a declaration should therefore ensure the following:

- (a) That it encompasses the activities and decisions of the members, alternates and experts of the constituted bodies and expert panels established by the constituted body;
- (b) That private and public legal entities agree that all disputes, complaints and claims against constituted bodies or individuals serving on constituted bodies or ERTs under the Kyoto Protocol **shall be made at the headquarters of the secretariat** using the dispute settlement arrangements established by the COP/MOP;
- (c) That the private and public legal entities agree that decisions of this dispute settlement arrangements shall be final and binding.

19. In particular, if the declaration is made a condition of participating in the mechanisms pursuant to the Kyoto Protocol, the following criteria would need to be met:

- (a) It is made in writing;
- (b) The private and public legal entities acknowledge that dispute settlement arrangements are open to them;
- (c) It contains a reference to the relevant decisions of the COP/MOP concerning dispute settlement arrangements;
- (d) It emphasizes that the referred dispute settlement arrangements are exclusive and provides for full and final settlement;

---

<sup>3</sup> Agreement between the Federal Republic of Germany, the United Nations and the secretariat of the United Nations Framework Convention on Climate Change concerning the Headquarters of the Convention secretariat, amended on 7 December 2005.

- (e) It states clearly that participation in the mechanisms under the Kyoto Protocol is conditional upon consent to the dispute settlement arrangements;
- (f) It states clearly that any other disputes, complaints or claims are to be made at the headquarters of the secretariat and in accordance with the decisions of the COP/MOP;
- (g) It includes confirmation of full legal understanding, namely the confirmation that legal counsel has been consulted.

20. The submission of such a written declaration would become a condition for the accreditation of operational (CDM) or independent (JI) entities; for the registration of a CDM or JI project activity; and for the submission of a new methodology or request for modification of an existing methodology. All private and public legal entities requesting to be listed as project participants in a particular project activity would have to formally consent to these conditions.

21. The declaration would be submitted, for example by the DOE or the AEI, to the secretariat together with the relevant communications applying for registration of a project, approval of a methodology, or application for accreditation. Parties that participate in several projects would have to execute a single declaration.

22. In the case of CDM or JI projects that are already registered at the time of the adoption of the decision by the COP/MOP, the requirement would apply to the next interaction of the DOE or AEI with a constituted body. The DOE or AEI could be asked to obtain the declaration, which would be submitted to the secretariat. The secretariat should be requested to provide the CDM Executive Board, the JISC and the COP/MOP with an update of the declarations received.

#### **B. Consequences of the declaration at the international level**

23. It is not unusual for the United Nations to enter into individual agreements regarding the settlement of disputes. Pursuant to Article VIII of the General Convention, it is the practice of the United Nations to make provisions in its commercial agreements for recourse to arbitration in all cases in which disputes cannot be settled through negotiations or amicable means. With respect to disputes of a private law character, which are not based on commercial agreements and where no other dispute settlement mechanisms are provided, it is the practice of the United Nations to enter into a separate arbitration agreement.<sup>4</sup>

24. Such an arbitration agreement provides that the parties to the agreement will submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. Both the arbitration clauses in contracts as well as the separate arbitration agreements provide for an arbitration procedure that follows the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. Most disputes involving the United Nations are settled through negotiations. Arbitration constitutes the final dispute settlement mechanism where amicable means do not result in a settlement of the dispute.

25. The Headquarters Agreement for the secretariat extends the General Convention to officials and representatives of the United Nations Framework Convention on Climate Change (Convention) and its Kyoto Protocol while they are in the host country of the secretariat on official business. This means that individuals serving on constituted bodies serving in their personal capacity enjoy immunity while on

---

<sup>4</sup> A/C.5/49/65 of 24 April 1995.



official business in the host country of the secretariat. In return the secretariat is obliged to make provisions for the appropriate modes of settlement of:

- (a) Disputes arising out of contracts and other disputes of a private law character to which the secretariat is a party;
- (b) Disputes involving an official of the secretariat, who by reason of his or her official position enjoys immunity, if such immunity has not been waived.

26. The Headquarters Agreement accordingly extends, in the host country of the secretariat, the dispute settlement provisions of the General Convention to the Convention and its Kyoto Protocol.

### **C. Consequences of the declaration at the national levels**

27. It has to be said that even if third parties declare in writing that they agree to submit disputes to a dedicated international dispute settlement arrangement, some legal systems may enable recourse to national courts in some circumstances. But such a declaration is likely to be respected by national courts if the court is convinced that there is an independent and impartial remedy system under the Kyoto Protocol that is capable of awarding sufficient protection to third parties.

28. A national court will check carefully whether the private entity has been fully informed and advised about the implications of such a declaration. It is therefore important that the declaration describes the procedural rights of the party renouncing its access to national courts under the disputes settlement arrangements agreed by the COP/MOP.

29. **The establishment of procedures for settling disputes, complaints and claims brought by private and public legal entities is therefore a condition for effectively protecting members serving on constituted bodies and ERTs.** Even where declarations cannot be obtained retroactively, the existence of dispute settlement arrangements is likely to encourage national courts to refer law suits to national courts at the headquarters of the secretariat in accordance with the decisions of the COP/MOP.

30. The essential elements for the national courts to recognize the effect of a declaration to submit a dispute, complaint or claim to a dispute settlement process should include the following:

- (a) The dispute settlement arrangements under the Protocol provide an accessible and effective remedy;
- (b) The declaration:
  - (i) Provides for a full independent review of disputes, complaints and claims;
  - (ii) Satisfies due process requirements;
  - (iii) Provides a reasonably accessible system for a full and fair hearing of disputes, complaints and claims;
  - (iv) Enables the claimants to be accorded full opportunity to present their case.

31. For possible law suits against individuals serving on constituted bodies and ERTs in States that are not Parties to the Kyoto Protocol, the Executive Secretary would still rely upon the declaration made by private and public legal entities concerned to use the dispute settlement arrangements established by the COP/MOP. The only real difference might be the degree of cooperation received by the Executive Secretary interacting with the authorities of a State Party as compared with those of a non-State Party.

**D. Consequences for existing decisions of the  
Conference of the Parties serving as the meeting of the Parties  
to the Kyoto Protocol**

32. In line with the discussions above, the COP/MOP would need to adopt a decision that requires private and public legal entities seeking to participate in CDM, JI and ET to make a declaration that any disputes, complaints and claims against individuals serving on constituted bodies and ERTs will be brought in accordance with decisions of the COP/MOP and made at the headquarters of the secretariat. Such a decision would inter alia:

- (a) Set out essential elements of such a declaration;
- (b) Authorize the secretariat to facilitate completion and submission of such declarations, and the report to the COP/MOP, the CDM Executive Board and the JISC on the status of declarations submitted and those pending;
- (c) Make the submission of such a declaration a condition for participation in CDM, JI and ET;
- (d) Establish final and binding dispute settlement arrangements pursuant to the Headquarters Agreement.

33. In this decision, the COP/MOP should invite Parties, the CDM Executive Board and the JISC to ensure implementation of such a decision so that all private and public legal entities authorized to participate in the mechanisms comply with this requirement.

**E. Resource implications for the secretariat**

34. To ensure efficiency, the secretariat would need to assign dedicated staff and resources to process and manage the preparations and submission of these declarations, as well as to answer questions from private and public legal entities with respect to the agreement, and report to the COP/MOP, the CDM Executive Board and the JISC on the declarations made and those outstanding. For more discussion on the resource implications for the secretariat, see paragraphs 60–71 below.

**IV. Provision of assistance to individuals serving on constituted bodies  
to deal with disputes, complaints and claims**

35. Generally, the conduct of officials or agents of an international body is considered to be an act of that body if the official or agent was acting in their official capacity, even if that conduct exceeds the authority granted or contravenes instructions given. Provided that an expert serving on a constituted body or on an ERT under the Kyoto Protocol was acting in his or her official capacity, the body would generally be responsible for the act of the individual. The scope of the assistance provided by the Executive Secretary will depend on whether the dispute or claim has been filed in a national court or has been made at the headquarters of the secretariat pursuant to the declaration by private and public legal entities participating in the mechanisms under Articles 6, 12 and 17 of the Kyoto Protocol, in accordance with the decisions of the COP/MOP.

**A. Role of the Executive Secretary**

1. Assistance with disputes, complaints and suits filed in national courts

36. It is crucial that any member of a constituted body or ERT who is sued in a national court, or threatened with such a suit, immediately forward all relevant papers to the Executive Secretary. Time is of the essence in dealing with litigation or the threat of litigation. The Legal Adviser of the secretariat

ought to participate in the preparation of any institutional response to legal actions or threat of such action. The Legal Adviser will need to have unrestricted access to the individuals serving on constituted bodies and ERTs, as well as to relevant areas of work of the secretariat and, if necessary, to outside technical or professional assistance.

37. A vital part of any system to deal with lawsuits in national courts is prompt access to the relevant authorities of the Party in whose courts the suit against the member has been instituted. In the United Nations, the Secretary-General has access to Member States through the system of Permanent Missions to the United Nations, which enables him or her to seek assistance if an official, an expert on mission or the organization is sued in the courts of that Member State.

38. A formally recognized channel of communication to the appropriate authorities is invaluable in ensuring that the request will be handled promptly by the relevant authorities of the Party. It is recommended that the COP/MOP, in a decision, request all Parties to advise the Executive Secretary of the official channel of communication that he or she should use concerning the legal proceedings against individuals serving on constituted bodies and ERTs in a national court of a Party.

39. The reason for establishing an official channel of communication for these matters is to enable the Executive Secretary to request assistance from the Party in order to have the matter referred to the appropriate dispute settlement arrangements. The appropriate State authorities may be able to use their good offices to convince a plaintiff to use the dispute settlement arrangements established by the COP/MOP. Some Parties may be able to notify their national courts of the arrangements made by the COP/MOP for settlement of disputes with their nationals, others may supply official confirmation of this fact but may be unwilling or unable to intervene in a timely manner in a private law suit.

40. The Executive Secretary must thus have authority to engage local counsel if necessary because some jurisdictions permit access to courts only through properly licensed local attorneys.<sup>5</sup>

## 2. Initial review of disputes, complaints and claims

41. Most private and public legal entities with a grievance will contact the Executive Secretary or the member of the constituted body with details of their complaint and seek some remedy. There are a number of reasons which make it appropriate that the Executive Secretary provide an initial review of the matter:

- (a) Central handling of grievances by the Executive Secretary will ensure an effective and consistent response because the Executive Secretary has access to the required expertise secretariat-wide;
- (b) The Executive Secretary should have standing authority to obtain professional and external help to conduct an effective initial review, if this is necessary. This will ensure that the Executive Secretary is able to effectively recommend remedial measures, if needed, to the appropriate constituted body or the COP/MOP, as the case may be;

---

<sup>5</sup> Generally, national courts tend to act on letters from the United Nations, or the Member State, referring to the United Nations immunity, because that immunity is set out in national law implementing the General Convention. But, at times, the United Nations has appeared in court to assert its immunity (e.g., *De Luca v. United Nations Organization*, 841 F. Supp. 531 (1994)). In the case of the Kyoto Protocol the situation is more complex, because there is no immunity to rely upon other than in Germany, under the Headquarters Agreement, or in States in which a host country agreement has been concluded concerning the meeting of the constituted body. The main question will be whether the national court should enforce the declaration to use the dispute settlement arrangements becomes an issue under the applicable law chosen by the national court to resolve the case before it.

- (c) It will ensure that only the most difficult disputes will need to be considered under the dispute settlement arrangements.

42. This is the approach used by the United Nations to settle disputes and claims. At the first stage, the United Nations attempts to resolve disputes through negotiation. Contracts entered into by the United Nations provide that the negotiation process can be assisted by formal conciliation procedures if the parties agree. Only when all efforts to settle a case amicably have been exhausted does the United Nations turn to formal dispute resolution process through arbitration.<sup>6</sup>

43. The advantages of a two-stage approach for dealing with third party claims against the United Nations were described in a 1996 report of the Secretary-General that noted, "In the vast majority of cases, the offer is accepted by the claimant and payment is made against the execution of a release form".<sup>7</sup> The same conclusion is reached in the Secretary-General's 1995 survey of the operation of all dispute resolution mechanisms in the United Nations.<sup>8</sup> The importance of an effective initial review thus cannot be overemphasized.

44. Once an entity decides to submit a dispute, complaint or claim, it is also crucial that the member of a constituted body or ERT against whom the claim is made immediately forwards all relevant papers to the Executive Secretary. If the case cannot be settled during the initial review, it will have to be submitted to the formal dispute settlement arrangement. The Legal Adviser would be required to assist in defending the disputes, complaints and claims in an arbitration process. Depending on the complexity of the matter, this assistance could be provided by existing staff, by recruiting specialist temporary staff, and/or through a specialist law firm.

## **B. Arrangements for dispute settlement**

### **1. Necessary characteristics**

45. The dispute settlement arrangements should be established by a decision of the COP/MOP and should provide for a full and independent review of claims. The procedures have to ensure that decisions are binding on the parties.

46. A national legal system is more likely to recognize as valid the formal consent or declaration to submit a dispute for final adjudication to an agreed dispute settlement arrangement that provides a fair, independent and binding process that enables claimants to have an independent review of their claims after a full and fair hearing that satisfies basic due process requirements and enables claimants to be accorded proper opportunities to present their case. Guidance as to the necessary characteristics of dispute settlement arrangements for addressing claims by private and public legal entities can be found in a number of international legal instruments.<sup>9</sup>

---

<sup>6</sup> Section 16 of the United Nations General Conditions of Contract contains provisions for the settlement of disputes, including first stage negotiation using, if necessary, conciliation procedures which may be formal conciliation pursuant to the UNCITRAL Conciliation Rules. Only if negotiation is unsuccessful is there resort to the formal dispute settlement process of arbitration (see <<http://www.un.org/Depts/ptd/pdf/gencon.pdf>>).

<sup>7</sup> See Report of the Secretary-General, *Administrative and budgetary aspects of the financing of the United Nations peacekeeping operations: financing of the United Nations peacekeeping operations*, A/51/389, 20 September 1996, paragraph 23.

<sup>8</sup> Report of the Secretary-General, *Procedures in Place for Implementation of Article VIII, Section 29, of the Convention on the Privileges and Immunities of the United Nations*, A/C.5/49/65, supra note 4.

<sup>9</sup> Article 10 of the Universal Declaration of Human Rights; Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; Article V of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

47. The COP/MOP should ensure that the arrangements for dispute settlement are independent of the COP/MOP and its bodies, and that the adjudication of disputes is not subject to its direction, or that of the Executive Secretary. The arrangements could either use an existing institution or be separately established.

## 2. Utilize dispute settlement arrangements established by the United Nations

48. Such a dispute settlement procedure would require specialized expertise. Consequently, it is highly unlikely that an existing dispute settlement arrangement or dispute resolution mechanism in the United Nations would be suitable or easily adaptable to this task.

49. A 1995 report of the Secretary-General<sup>10</sup> described various bodies that the United Nations has utilized to adjudicate disputes. The most common method is arbitration pursuant to the UNCITRAL Arbitration Rules, often facilitated by having the arbitration administered by an established arbitral body such as the International Chamber of Commerce (ICC). The procedures to be followed by the ICC would be general arbitration procedures rather than the provisions adopted by the COP/MOP, relating to the special needs of the Kyoto Protocol and the disputes arising out of the operation of the mechanisms under the Kyoto Protocol.

50. The United Nations has also established a Claims Commission in its peacekeeping operations, but these bodies would be totally unsuited as vehicles to adjudicate disputes arising under the Kyoto Protocol.

51. The United Nations Administrative Tribunal adjudicates disputes between the Secretary-General and staff. However, the statutes and rules of that body would require substantial revision to make them suitable and that would require concurrence of the Tribunal as well as the General Assembly. This is likely to be a lengthy process, especially as major reforms of the Tribunal are now before the General Assembly.

## 3. Creation of new dispute settlement arrangements

52. The credibility of the dispute settlement arrangements is crucial, and a precondition to their acceptance is that they must be seen by all stakeholders to be fair, equitable and impartially administered. It follows that it is crucial that the proposed structure and procedures of the arrangements should be established by the COP/MOP. The venue for the settlement of any disputes, complaints or claims would be based in the host country of the secretariat, where the regime of privileges and immunities established by the Headquarters Agreement is in force.

53. The body set up to settle the disputes should be composed of experts in the appropriate fields, with qualifications elaborated by the COP/MOP, working in accordance with the Kyoto Protocol and the procedures established by the COP/MOP. It may therefore be more efficient to establish separate arrangements for the purposes of the Protocol rather than try to adapt existing mechanisms from other organizations.

54. Such a body need not be a standing body but would meet as necessary to consider cases submitted for adjudication. Delegates or former delegates of Parties to sessions of the COP/MOP or current or former members of a constituted body or ERT would not serve in this body. A roster of experts nominated by the COP/MOP or the secretariat on the basis of their professional expertise could be established, and in the event of a dispute each party would select one member and the third would be selected by both parties. In the event that they could not agree on the third member of this body, the rules

---

<sup>10</sup> A/C.5/49/65, supra note 8, paragraphs 7, 13, 17 and 21.

of procedure could supply a process where the Presiding Officer is chosen by an independent third person.

55. The decision of the COP/MOP that establishes the dispute settlement body should ensure that its decisions are binding and specify the operational independence of the process. Of course, the COP/MOP may prospectively change substantive rules or procedures in the light of decisions of the dispute settlement body but the decision itself must be binding on the COP/MOP. To further simplify the establishment of and work of this body, the UNCITRAL Arbitration Rules, which are accepted worldwide, could form the basis of rules of procedure of the dispute settlement body.

56. In order to avoid the appearance of conflicts of interest the staff providing support to the dispute settlement body must, in the performance of their duties, be subject to direction by the Presiding Officer(s) of this new body and not by the Executive Secretary, just as United Nations staff serving in the Secretariat of the United Nations Administrative Tribunal are subject to direction by the President of the Tribunal.<sup>11</sup>

#### 4. Acceptance of the dispute settlement arrangements

57. Approval by the COP/MOP of any dispute settlement arrangements would need to emphasize that they constitute the exclusive remedy system, and that participants in the mechanisms under the Kyoto Protocol must formally consent or declare that their participation is conditional on their acceptance of these arrangements as the exclusive remedy system in case of any disputes, complaints or claims against constituted bodies or members thereof.

58. Any decision by the COP/MOP to establish a separate dispute settlement body should unequivocally state that the body has exclusive jurisdiction in respect of all disputes arising from the mechanisms under the Kyoto Protocol. If the dispute settlement arrangements are credible, the creation of the body will be welcomed by most private and public legal entities because it would ensure that errors would be subject to a competent remedial process rather than a protracted dispute in a national court against the unanimous wishes of the Parties to the Kyoto Protocol.

59. The effectiveness of the dispute settlement arrangements will depend on national courts recognizing and enforcing the decision of the COP/MOP. In preparing the decision to establish the dispute settlement body and the conditions for putting it into operation, Parties should ensure that the draft decision includes necessary provisions obliging all Parties to inform their national courts of these arrangements through their State Legal Counsel or Attorney General.

### **C. Resource implications**

60. As recommended above, all disputes, claims and suits against individuals serving on constituted bodies and ERTs should be handled by the Executive Secretary using the resources of the secretariat augmented, as appropriate, by temporary staff and such external legal and professional services as needed. This would ensure that each case is handled professionally and consistently. It would enable the Kyoto Protocol mechanisms to profit from lessons learned from each case. Such central handling of appeals and claims by the Executive Secretary is also consistent with the Headquarters Agreement, which applies the United Nations regime of privileges and immunities to the Kyoto Protocol in Germany and empowers the Executive Secretary to represent it in legal proceedings.

61. There are three major aspects in planning the resources and budget for providing assistance to individuals serving on constituted bodies and ERTs to deal with disputes, complaints and claims:

---

<sup>11</sup> See Article 3, paragraph 1, of the Rules of the United Nations Administrative Tribunal, AT/11/Rev.6.

- (a) Provision of legal counsel to assist in handling the disputes, complaints and claims before national courts or before a dispute settlement body;
- (b) Financing the dispute settlement arrangements and meetings of a dispute settlement body;
- (c) Funds to cover the payment of awards against claims decided by the national courts or a dispute settlement body.

62. Given the uncertainties in the number and scope of cases, it is not possible at this stage to present credible estimates of resource requirements. The 2006–2007 programme budget for the secretariat does not include resources to deal with disputes, complaints or claims against constituted bodies or members thereof, or to implement the responsibilities described above. Additional Professional and General Service staff would be required, with the numbers based on the scale of resources needed to engage specialist legal advice. Budgetary estimates could range from hundreds to thousands of dollars based on the assumptions. One approach for the initial period would be for the Executive Secretary to seek authority to incur necessary expenses within overall budgetary authority and report any adjustments at the end of the budget period. Estimates of future costs would then be made based on experience during the initial period.

#### 1. Legal Counsel

63. The first aspect is the cost of addressing the disputes, complaints or claims filed in national courts. This includes the cost of secretariat resources, i.e., the Office of the Legal Adviser of the secretariat, perhaps working with the assistance of the authorities of the Party concerned, in seeking to convince the national court to dismiss the case. This may be time-consuming and labour-intensive since the court may need full details of the dispute settlement arrangements and a detailed explanation of how the mechanism can resolve the particular grievance of the plaintiff in a fair and objective manner. Initially it may be possible to utilize secretariat resources to defend the substance of the claim, but the complexity of some matters may warrant using a specialist law firm, or recruiting specialist staff, to lead the defence of the cases before the dispute settlement arrangements.

64. If a national court decides to assume jurisdiction, or if an initial hearing has been scheduled before the assistance of the relevant Party has been secured, it may be necessary to retain local counsel in order to attempt to have the case dismissed. Obtaining dismissal of a suit instituted in a national court may result in difficult legal issues. Requests for dismissal will have to be based on the fact that the entity that instituted the litigation had agreed to use the dispute settlement arrangements adopted by the COP/MOP, agreement to which was made a condition of participation in the mechanisms under the Kyoto Protocol. This raises factual issues that a court may examine and may seek the views of the plaintiff. It follows that the duration of the case and, consequently, estimating the costs of convincing a national court to dismiss the appeal will depend on many variables. The costs are even more difficult to predict if the suit is instituted by an entity that is not participating in the mechanisms under the Kyoto Protocol.

65. If an independent dispute settlement body is created by the COP/MOP, the task of a local counsel may be confined to showing why the agreement to submit the dispute to the dispute settlement arrangements should be enforced.

66. The Office of the Legal Adviser of the secretariat currently has no capacity to handle these claims. Accordingly, the Executive Secretary could be authorized to recruit additional staff or retain a legal counsel to deal with such lawsuits, if necessary, and therefore funding to retain legal counsel and costs of travel to attend any hearings should be included in the budget.

67. The costs of retaining legal counsel to engage in substantive litigation before a national court could range from about USD 250,000 to USD 450,000 annually, depending on the jurisdiction where the claim is filed, the nature of the claim, and the amount of time required by the legal counsel.

## 2. Financing the dispute settlement arrangements and tribunal

68. The cost of the support for a dispute settlement body would need to be covered. If a roster of experts was used (see paras. 53–54 above) the costs would be limited to time worked, although it may be necessary to pay an honorarium to encourage qualified persons to volunteer for the roster. There would be initial uncertainty on the utilization rate of the dispute settlement arrangements, i.e., how often, and for what duration the dispute settlement body would need to meet. However, the costs would be directly related to the number and length of disputes. The estimated costs for supporting meetings of the dispute settlement body range from about USD 100,000 to USD 150,000 annually, depending on the number of cases to be addressed. These costs would comprise the following:

- (a) The cost of travel;
- (b) Daily subsistence allowance and other emoluments for the panel of the dispute settlement body;
- (c) Fees to be paid to the panel of the dispute settlement body.

## 3. Budgeting for the payment of awards

69. The third type of costs would be the cost of implementing any decision or award made by the arbitration body. It is hard to estimate the amount of such costs or awards. One possibility could be to attempt to obtain commercial insurance to cover the risk of litigation caused by errors committed by individuals serving on constituted bodies and ERTs in performing their duties. This would involve the secretariat engaging a reputable insurance broker to examine the functions being performed by individuals serving on constituted bodies and ERTs and the consequent risk of loss.

70. Even if coverage were obtained, there would be the normal protracted discussions with the insurance company over whether attorney fees and other costs incurred were reasonable and necessary. Insurance is a tool for risk management and, depending on its cost and coverage, it might be an attractive option. This could be discussed further with an insurance broker. The premium for insurance for this type of coverage could be very high and involves many complex issues. The secretariat should be requested to consult further with relevant insurance agencies on this issue and report on the outcome of the consultations to the SBI at its next session.

## 4. Secretariat support

71. As noted above, secretariat support would be required to process and manage the preparation and submission of the declarations from private and public entities participating in CDM, JI and ET, and report on the submissions made and those outstanding to the COP/MOP, the CDM Executive Board and the JISC. Dedicated secretariat support would be required to deal with the disputes, complaints and claims submitted to dispute settlement, and to support the panel of the dispute settlement body, if a new body were established. Resources would be required to cover the salary and travel for Professional and General Services staff, including the travel and expenses for officials from the Office of Legal Affairs of the United Nations to provide assistance, if necessary. The estimated costs of secretariat support range from about USD 250,000 to USD 270,000 annually.



## V. Conclusions

72. It is difficult to determine if and when disputes, complaints and claims may be made against constituted bodies under the Kyoto Protocol, or individuals serving on such bodies. Such disputes, complaints or claims may be made by private and public legal entities participating in the mechanisms under the Kyoto Protocol, or by other affected legal entities that are not participating in the mechanisms. Such claims may be brought in any national court worldwide. As has been noted, the lack of the necessary privileges and immunities for individuals serving on constituted bodies and ERTs leaves them vulnerable to such claims being brought against them.

73. Parties need to take a decision on providing the necessary privileges and immunities to shield the individuals serving on constituted bodies from personal liability. The Office of Legal Affairs of the United Nations has provided a number of options for consideration by Parties.

74. Parties should also consider the arrangements that should be put in place to deal with the substance of the disputes, complaints and claims concerning the decisions taken by individuals serving on constituted bodies. Parties may wish to consider whether to use existing dispute settlement bodies under the United Nations, or establish a new dispute settlement arrangement.

75. Such a decision or decisions by Parties would help to provide certainty and clarity to Parties, private and public legal entities participating in the mechanisms, and other stakeholders that disputes, complaints and claims concerning the work of the constituted bodies will be dealt with within the framework of the Kyoto Protocol, and not in domestic courts worldwide.

-----