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Privileges and immunities for individuals serving on constituted bodies under the Kyoto Protocol: implementation of decision 9/CMP.2

Note by the secretariat*

Summary

This document presents a report from the Executive Secretary on actions taken in accordance with decision 9/CMP.2 on privileges and immunities for individuals serving on constituted bodies under the Kyoto Protocol. Details are provided on actions taken by the Executive Secretary to minimize the risks of disputes, complaints and claims against such individuals, including the implementation of a training programme for members of expert report teams. The document also summarizes concerns and issues raised by private legal entities involved in the clean development mechanism (CDM), and actions taken by the secretariat and the Executive Board of the CDM in response thereto. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol is invited to consider the report and provide further guidance to the Executive Secretary.

* This document was submitted late owing to the need for internal consultations.

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I. Introduction

A. Mandate

1. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), by its decision 9/CMP.2, requested the Executive Secretary to take a number of actions, especially in response to concerns and issues raised by private or public legal entities involved in the mechanisms established under the Kyoto Protocol, to minimize the risks of disputes, complaints and claims against individuals serving on constituted bodies established under the Kyoto Protocol.¹ The CMP also requested the Executive Secretary to report to it, as deemed necessary, in particular in the light of any concerns or issues that may arise in relation to the constituted bodies.

B. Scope of the note

2. This document contains a report on the actions taken by the Executive Secretary in accordance with decision 9/CMP.2, in particular: (1) actions taken to minimize the risk of disputes, complaints and claims against individuals serving on constituted bodies established under the Kyoto Protocol; and (2) actions taken in response to concerns or issues raised by private legal entities involved in the mechanisms established under the Kyoto Protocol during the period November 2006 to August 2007.

C. Possible action by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol

3. The CMP is invited to consider the report and provide guidance on further actions that should be taken by the Executive Secretary.

II. Implementation of decision 9/CMP.2

A. Background

4. The issue of privileges and immunities for individuals serving on constituted bodies under the Kyoto Protocol is currently being discussed by the CMP.² Among the issues being considered are options for providing a legal regime that ensures the necessary immunities and provides arrangements for addressing disputes, complaints and claims raised by private or public and legal entities against individuals serving on these bodies.

5. At its second session, the CMP adopted decision 9/CMP.2, by which it requested the Executive Secretary to take a number of actions to minimize the risk of legal action against individuals serving on constituted bodies established under the Kyoto Protocol. Specifically, the CMP requested the Executive Secretary:

- (a) To take action, including through his good offices, where practicable, especially in response to concerns or issues raised by private or public legal entities involved in the mechanisms established pursuant to Articles 6, 12 and 17 of the Kyoto Protocol, to minimize the risks of disputes, complaints and claims against individuals serving on constituted bodies established under the Kyoto Protocol;

¹ Constituted bodies in this context include the Executive Board of the clean development mechanism, the Joint Implementation Supervisory Committee, the Compliance Committee and the expert review teams established under Article 8 of the Kyoto Protocol.

² For further information, see documents FCCC/KP/CMP/2005/6, FCCC/SBI/2006/6, FCCC/SBI/2006/20 and FCCC/SBI/2006/21.

- (b) To provide advice and assistance to any individual serving on a constituted body established under the Kyoto Protocol with regard to any concerns or issues raised in connection with the exercise of his or her official functions;
- (c) To consult, as appropriate, the chair of the relevant constituted body on any concerns or issues raised;
- (d) To contact, as appropriate, the national focal point and the competent authorities of the Party or Parties concerned to discuss the concerns or issues raised;
- (e) To incur necessary expenses, subject to the availability of resources, and within his overall budgetary authority, to cover the activities outlined in decision 9/CMP.2;
- (f) To include the resource requirements for the activities outlined in the decision in the proposed programme budget for the biennium 2008–2009;
- (g) To provide reports to the CMP, as deemed necessary, in particular in the light of any concerns or issues that may arise in relation to constituted bodies established under the Kyoto Protocol.

6. In accordance with this decision, the Executive Secretary has taken a number of actions to minimize the risks of disputes, complaints and claims against individuals serving on constituted bodies, as well as actions in response to concerns or issues raised by private legal entities involved in the mechanisms under the Kyoto Protocol. This report contains a summary of these actions.

B. Actions taken to minimize the risks of disputes, complaints and claims against individuals serving on constituted bodies under the Kyoto Protocol

7. The Executive Secretary has taken a number of actions to strengthen the support provided by the secretariat to the constituted bodies. After the conclusion of CMP 2 in Nairobi, the Executive Secretary continued to recruit qualified staff to ensure that the secretariat continues to provide high-quality support to the constituted bodies. This includes a Legal Officer, who was recruited to provide legal support to the Executive Board of the clean development mechanism (hereinafter referred to as the Executive Board or the Board) and the Joint Implementation Supervisory Committee (JISC). This has helped to ensure that the decisions of the Executive Board and the JISC, as well as the panels and working groups of these bodies, are in accordance with the modalities, procedures and guidelines adopted by the CMP and are legally sound. Many of these new posts are funded from voluntary contributions and from the share of proceeds from clean development mechanism (CDM) and joint implementation projects.

8. Meetings of the constituted bodies that were convened in 2007 were held in Bonn, the seat of the secretariat, where individuals serving on constituted bodies have privileges and immunities in accordance with the provisions of the Headquarters Agreement of the secretariat.³

9. In decision 24/CMP.1, the CMP requested the secretariat to develop and implement the training programme for members of expert review teams established under Article 8 of the Kyoto Protocol (ERTs) participating in the initial reviews under Article 8 of the Kyoto Protocol, including requirements for testing of experts. In accordance with this decision, the secretariat developed an online programme in 2006. All experts wishing to participate as a member of an ERT are required to complete the online course and pass an examination conducted by the secretariat. The training programme is designed to address the requirements for greenhouse gas inventory reviews under the Kyoto Protocol and ensures that all individuals participating in the reviews are adequately trained. The implementation of the training

³ FCCC/KP/CMP/2005/6, paragraph 9.

programme is dependent upon supplementary funds provided by the Parties. This contribution is at a minimum level in the current biennium, and further implementation of the training programme in the next biennium will depend on support by Parties.

C. Actions taken in response to concerns or issues raised by private or public legal entities with regard to project activities under the clean development mechanism

10. During the period October 2006–August 2007, the Executive Secretary received 12 letters addressed to the Executive Board from private legal entities expressing concern or raising issues regarding project activities under the CDM. The letters concerned:

- (a) Decisions by the Board to reject requests for validation and registration of project activities;
- (b) A decision by the Board to reject a request for deviation of a project activity;
- (c) A decision by the Board to issue only a portion of the requested certified emission reductions (CERs) with respect to a registered project activity;
- (d) Recommendations of the Methodologies Panel to the Board;
- (e) A delay in the consideration of a project activity by the Board.

11. Some private legal entities stated that as a result of the decisions of the Executive Board, they have suffered losses amounting to several million euros, including in “prompt start” CERs, as well as damage to their reputation due to negative publicity.

12. For two project activities, the private legal entities requested the Executive Board to revoke its decision “without prejudice to any other rights and remedies”, including the right to commence legal proceedings.

13. The main concerns raised by the private legal entities in these letters are:

- (a) That the Board has failed to follow the review procedures of the CDM modalities and procedures (see decision 3/CMP.1);
- (b) That the Board has violated principles of due process;
- (c) That there is a lack of transparency of the CDM modalities and procedures, and their interpretation by the Board;
- (d) That there is inconsistency in the decisions concerning similar project activities by the Board.

14. The Executive Secretary forwarded each letter to the Executive Board for its consideration, together with an analysis of the issues raised and a recommendation on how the Chair and/or the Board should proceed.

15. On behalf of the Chair of the Executive Board, the secretariat sent letters to each private legal entity to clarify the decisions of the Board, provide an update of actions taken by the Board in response to the letter and/or recommend that the project activity be re-submitted for consideration by the Board. In the letters, the secretariat informed the private legal entities as follows:

- (a) In two cases, the Executive Board considered new or additional information provided by the project participants and decided to register the project activity or issue the CERs;

- (b) In one case, the Executive Board reconsidered the recommendation of the Methodologies Panel and suggested that the project participant submit a request for deviation;
- (c) In one case, the Methodologies Panel was still considering the proposed methodology for the project activity, and would finalize the recommendation to the Board at its next meeting;
- (d) In eight cases, the secretariat, on behalf of the Executive Board, informed the project participants why the project activity was rejected and invited the project participant to submit a request for revision of the proposed methodology or project activity for registration, noting in one case that the project activity had already been resubmitted for registration.

D. Inclusion of resource requirements in the programme budget for the biennium 2008–2009

16. The Executive Secretary has reorganized and consolidated the legal support of the secretariat into a new Legal Affairs programme and provided resources for more staff to be retained to provide legal support to the constituted bodies. During the discussion of the proposed programme budget by the Subsidiary Body for Implementation (SBI) at its twenty-sixth session, Parties decided that no other resource requirements for the activities outlined in decision 9/CMP.2 should be included in the proposed programme budget for the biennium 2008–2009.

III. Conclusions

17. The support provided by the secretariat has helped to ensure that the work and decisions of the constituted bodies continue to be of high quality and in accordance with the modalities, procedures, and guidelines adopted by the CMP. Prompt action has been taken to respond to letters of concern from private legal entities participating in the mechanisms, in particular the CDM, and assistance provided to the Executive Board in all cases. In some instances, the Board, based on the advice of the secretariat, has reconsidered and revised its previous decisions. The Executive Secretary will continue to improve the support and assistance provided to the constituted bodies and the ERTs, and to respond promptly to concerns and issues raised by private or public legal entities participating in the mechanisms under the Kyoto Protocol.

18. At the twenty-sixth session of the SBI, Parties also recognized that although decision 9/CMP.2 authorizes the Executive Secretary to take a number of actions, it does not address the underlying issue of immunities for individuals serving on constituted bodies established under the Kyoto Protocol. Parties need to take a decision that provides the necessary privileges and immunities for individuals serving on these bodies and establishes arrangements for addressing the substance of any dispute, complaint or claim concerning decisions taken by these individuals in their official capacity as members of constituted bodies under the Kyoto Protocol.
