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Procedural requirements and the scope and content of applicable law for the consideration of appeals under decision 27/CMP.1 and other relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, as well as the approach taken by other relevant international bodies relating to denial of due process

Technical paper

Summary

This document was prepared in response to a request made by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), at its sixth session, for the secretariat to prepare a technical paper outlining the procedural requirements and the scope and content of applicable law for the consideration of appeals under decision 27/CMP.1 and other relevant CMP decisions, as well as the approach taken by bodies constituted under other multilateral environmental agreements and other international bodies in relation to provisions for the consideration of denial of due process. The request was made in the context of agenda item 8, “Matters relating to compliance under the Kyoto Protocol”, sub-item (b), “Appeal by Croatia against a final decision of the enforcement branch of the Compliance Committee in relation to the implementation of decision 7/CP.12”. Parties agreed that the findings of the secretariat will be used in their further discussions.

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I. Introduction

A. Background

1. At its sixth session, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (hereinafter referred to as the CMP) initiated consideration of the appeal by Croatia against a final decision of the enforcement branch of the Compliance Committee (FCCC/KP/CMP/2010/2) and concluded that a common understanding of the procedural and substantive aspects relating to Croatia's appeal was required to ensure fair and due consideration. In view of the importance of reaching such a common understanding, particularly since this was the first appeal submitted to the CMP, Parties engaged in a constructive discussion reflecting a range of views. Given the considerable importance attached by Parties to these issues, and the limited time available, the CMP was not able to complete its consideration of this agenda sub-item at the session. Consequently, the CMP decided that the item will be included on the provisional agenda for its seventh session.¹

B. Mandate

2. In order to facilitate further consideration of the appeal by Croatia at its seventh session, the CMP requested the secretariat to prepare a technical paper outlining the procedural requirements and the scope and content of applicable law for the consideration of appeals under the "Procedures and mechanisms relating to compliance under the Kyoto Protocol" (contained in the annex to decision 27/CMP.1, and hereinafter referred to as decision 27/CMP.1) and other relevant CMP decisions, as well as the approach taken by bodies constituted under other multilateral environmental agreements (MEAs) and other international bodies in relation to provisions for the consideration of denial of due process. Parties agreed that the findings of the secretariat will be used in their further discussions.²

C. Scope of the paper

3. This document has been prepared in response to the mandate described in paragraph 2 above.

4. It consists of this introduction, a conclusion, and three substantive chapters as follows:

(a) An analysis of the procedural requirements for the consideration of appeals under decision 27/CMP.1 and other relevant CMP decisions;

(b) An analysis of the scope and content of applicable law for the consideration of appeals under decision 27/CMP.1;

(c) An analysis of the approach taken by bodies constituted under other MEAs and other international bodies in relation to due process and its denial.

¹ FCCC/KP/CMP/2010/12, paragraph 67.

² FCCC/KP/CMP/2010/12, paragraph 68.

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

5. The CMP may wish to review the information contained in this technical paper under its agenda item “Matters related to compliance under the Kyoto Protocol”, in order to facilitate its consideration of appeals against final decisions of the enforcement branch of the Compliance Committee under decision 27/CMP.1.

II. Procedural requirements for the consideration of appeals

A. Introduction

6. This chapter focuses on the procedural requirements for the consideration of appeals under decision 27/CMP.1 and other relevant CMP decisions. It outlines the requirements under section XI of decision 27/CMP.1 and highlights some of the issues that the CMP may wish to provide further guidance on. With regard to the reference to “other relevant CMP decisions”, it is the finding of this technical paper that no other CMP decisions are specifically relevant to the consideration of appeals under section XI of decision 27/CMP.1.

7. Section XI, on “Appeals”, paragraph 1, of decision 27/CMP.1 provides that a Party in respect of which a final decision has been taken by the enforcement branch may appeal to the CMP. The following requirements are set out in section XI in relation to appeals:

(a) The appeal must be against a decision of the enforcement branch relating to Article 3, paragraph 1, of the Kyoto Protocol (section XI, paragraph 1);

(b) The appeal must be based on the belief of the Party against which a final decision has been taken by the enforcement branch that it has been denied due process (section XI, paragraph 1);

(c) The appeal must be lodged with the secretariat within 45 days after the Party has been informed of the decision of the enforcement branch (section XI, paragraph 2);

(d) The CMP shall consider the appeal at its first session after the lodging of the appeal (section XI, paragraph 2);

(e) The CMP may agree by a three-fourths majority vote of the Parties present and voting at the meeting to override the decision of the enforcement branch, in which event the CMP shall refer the matter of the appeal back to the enforcement branch (section XI, paragraph 3).

8. The requirements detailed in paragraph 7(a–c) above set out the preconditions for a Party to exercise its right to appeal. The requirements detailed in paragraph 7(d) and (e) above indicate how the CMP is required to deal with an appeal. The sections below address in more detail each of these requirements, with a view to highlighting possible issues that the CMP may wish to address and clarify.

B. Final decision of the enforcement branch relating to Article 3, paragraph 1, of the Kyoto Protocol

9. In order to understand the significance of this requirement, it may be useful to note the issues that the enforcement branch is mandated to determine non-compliance with. In accordance with section V, paragraph 4, of decision 27/CMP.1, the enforcement branch is responsible for determining whether a Party included in Annex I to the Convention is not in

compliance with: (a) its quantified emission limitation or reduction commitment under Article 3, paragraph 1, of the Kyoto Protocol; (b) the methodological and reporting requirements under Article 5, paragraphs 1 and 2, and Article 7, paragraphs 1 and 4, of the Kyoto Protocol; and (c) the eligibility requirements under Articles 6, 12 and 17 of the Kyoto Protocol. The enforcement branch also determines whether to apply: adjustments to inventories under Article 5, paragraph 2, of the Kyoto Protocol, in the event of a disagreement between an expert review team under Article 8 of the Kyoto Protocol and the Party involved; and a correction to the compilation and accounting database for the accounting of assigned amounts under Article 7, paragraph 4, of the Kyoto Protocol, in the event of a disagreement between an expert review team under Article 8 of the Kyoto Protocol and the Party involved concerning the validity of a transaction or such Party's failure to take corrective action.

10. As indicated in paragraph 7 above, section XI, paragraph 1, of decision 27/CMP.1 requires the appeal to be against a decision of the enforcement branch "relating to Article 3, paragraph 1, of the [Kyoto] Protocol". There could be two possible interpretations of this provision.

11. One interpretation could be that the text is aiming at establishing a requirement for an appeal to concern a decision of the enforcement branch relating to non-compliance with Article 3, paragraph 1, of the Kyoto Protocol. It is useful to recall, in this regard, that Article 3, paragraph 1, establishes that Parties included in Annex I to the Convention shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of greenhouse gases listed in Annex A to the Kyoto Protocol do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B to the Kyoto Protocol, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period from 2008 to 2012. In this context, it must also be recalled that under section XIII of decision 27/CMP.1 an additional period is envisaged for the purpose of fulfilling commitments under Article 3, paragraph 1, of the Kyoto Protocol.³ Since the review process for the last year of the commitment period is not expected to be completed until 2015, the enforcement branch is not expected to address compliance with emission targets until after those reviews have been completed. Hence, until then final decisions of the enforcement branch will not strictly relate to non-compliance with the commitments under Article 3, paragraph 1, of the Kyoto Protocol.

12. Another interpretation could be that all final decisions adopted by the enforcement branch so far have a role in relation to Parties' ability to comply with their commitments under Article 3, paragraph 1, of the Kyoto Protocol and the achievement of the goal of reducing emissions of greenhouse gases. For example, final decisions of the enforcement branch which relate to the failure of a Party to meet the eligibility requirements under Articles 6, 12 and 17 of the Kyoto Protocol may affect the relevant Party's ability to meet its emission targets, since one of the consequences attendant to such a finding is the suspension of the eligibility to participate in the mechanisms.⁴

³ Section XIII of decision 27/CMP.1 states that "[f]or the purpose of fulfilling commitments under Article 3, paragraph 1, of the [Kyoto] Protocol, a Party may, until the hundredth day after the date set by the Conference of the Parties serving as the meeting of the Parties to the [Kyoto] Protocol for the completion of the expert review process under Article 8 of the [Kyoto] Protocol for the last year of the commitment period, continue to acquire, and other Parties may transfer to such Party, emission reduction units, certified emission reductions, assigned amount units and removal units under Articles 6, 12 and 17 of the [Kyoto] Protocol from the preceding commitment period, provided the eligibility of any such Party has not been suspended in accordance with section XV, paragraph 4[, of decision 27/CMP.1]".

⁴ Cf. Fitzmaurice M. 2009. Non-Compliance Procedures and the Law of Treaties. *In*: T Treaves et al.

13. Generally, the phrase “relating to Article 3, paragraph 1, of the [Kyoto] Protocol” clearly indicates that Parties do not have the right to appeal against all final decisions of the enforcement branch. Therefore, this requirement can be read as an attempt to preserve the independence of the enforcement branch and prevent possible use of the appeals procedure to obstruct the work of the branch and overload the CMP.

14. In view of the above, the CMP may wish to further clarify the meaning of the phrase “relating to Article 3, paragraph 1, of the [Kyoto] Protocol”, in order to determine what kind of relationship is required, and how close that relationship must be, between the decision of the enforcement branch and Article 3, paragraph 1, of the Kyoto Protocol. In particular, was it the intention of the CMP to limit the right to appeal against final decisions of the enforcement branch concerning compliance specifically with Article 3, paragraph 1 (under section V, paragraph 4(a), of decision 27/CMP.1), or was the intention of the CMP to allow appeals also in respect of decisions which have a direct effect on Parties’ ability to comply with that Article, such as decisions regarding compliance with the eligibility requirements under Articles 6, 12 and 17 of the Kyoto Protocol (under section V, paragraph 4(c), of decision 27/CMP.1).

C. Denial of due process

15. Section XI, paragraph 1, of decision 27/CMP.1 establishes that a Party may appeal against a final decision of the enforcement branch if that Party believes it has been “denied due process”. Hence, while under section XI, paragraph 1, the substance of the final decision of the enforcement branch against which a Party can lodge an appeal has to relate to Article 3, paragraph 1, of the Kyoto Protocol (see chapter II.B above), that paragraph also indicates that the grounds for an appeal have to relate to denial of due process. This section will analyse requirements relating to due process in the context of decision 27/CMP.1.

1. The concept of due process

16. The concept of due process rights can be traced back to England’s Magna Carta of 1215. Today, due process rights are recognized in many domestic judicial and administrative adjudication systems, but they do not necessarily have the same scope and content in all legal systems.⁵ Due process standards are also reflected in international instruments and general principles of international law, as well as in the practice of a number of international bodies.⁶

2. Substantive and procedural grounds for appeal

17. The requirement under section XI, paragraph 1, of decision 27/CMP.1 relating to “due process” indicates that the grounds for appeal are limited to denial of procedural rights. There appears to be no right to appeal against the substance of the decision by the enforcement branch (i.e. the legal and technical conclusions and reasons which led the branch to a finding of non-compliance, as well as its finding and consequences). This interpretation is supported by the need to preserve the independent character of the enforcement branch, as also evidenced by the limited action that can be taken by the CMP

(eds.). *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*. pp.475, 478 and 479.

⁵ Della Cananea G. 2010. Minimum Standards of Procedural Justice in Administrative Adjudication. *In: SW Schill (ed.). International Investment Law and Comparative Public Law*.

⁶ See chapter III of this document on applicable law for the consideration of appeals and chapter IV of this document on approach taken by bodies constituted under other MEAs and other international bodies concerning due process and its denial.

in dealing with appeals (i.e. the CMP can override the final decision of the enforcement branch and refer the matter of appeal back to the enforcement branch) (see paras. 33–38 below).⁷

3. Procedural requirements under decision 27/CMP.1

18. Sections VII–X of decision 27/CMP.1, as well as relevant rules in the “Rules of procedure of the Compliance Committee of the Kyoto Protocol” (annex to decision 4/CMP.2 and the amendments contained in the annex to decision 4/CMP.4, hereinafter referred to as the rules of procedure of the Compliance Committee), establish a number of procedural requirements applicable to the work of the enforcement branch, in particular:

- (a) Setting time limits for decisions;⁸
- (b) Requiring a preliminary examination of the question of implementation;⁹
- (c) Requiring notifications to be sent to the Party in respect of which a question of implementation has been raised (the “Party concerned”) at the different stages of the process;¹⁰
- (d) Making information available to the Party¹¹ and allowing the Party an opportunity to comment in writing on all information relevant to the question of implementation and the decision to proceed,¹² as well as on any decision of the relevant branch;¹³
- (e) Allowing the Party to designate persons to represent it during the consideration of the question of implementation by the relevant branch, excluding during the elaboration and adoption of a decision of the branch;¹⁴
- (f) Allowing written submissions from the Party;¹⁵
- (g) Allowing the Party to request a public hearing (unless the Compliance Committee decides, of its own accord or at the request of the Party, that the hearing shall take place in private), where it may present expert testimony or opinion;¹⁶
- (h) Requiring decisions to include conclusions and reasons.¹⁷

⁷ This approach is supported by the text of decision 27/CMP.1 in other official United Nations languages, which clearly indicate that the right to appeal is limited to claims that procedural requirements have not been fulfilled.

⁸ Decision 27/CMP.1, section VII, paragraph 3; section IX, paragraphs 1–4, 7, 8 and 11; and section X, paragraph 1.

⁹ Decision 27/CMP.1, section VII, paragraphs 2–7; and rule 23(3) of the rules of procedure of the Compliance Committee.

¹⁰ Decision 27/CMP.1, section VII, paragraphs 4 and 5; section VIII, paragraph 7; and section IX, paragraph 6.

¹¹ Decision 27/CMP.1, section VIII, paragraph 6; and rule 16 of the rules of procedure of the Compliance Committee.

¹² Decision 27/CMP.1, section VII, paragraph 7; and section VIII, paragraph 6; and rules 17 and 18 of the rules of procedure of the Compliance Committee.

¹³ Decision 27/CMP.1, section VIII, paragraph 8.

¹⁴ Decision 27/CMP.1, section VIII, paragraph 2; and rule 25(3) of the rules of procedure of the Compliance Committee.

¹⁵ Decision 27/CMP.1, section IX, paragraphs 1 and 7; and rule 17 of the rules of procedure of the Compliance Committee.

¹⁶ Decision 27/CMP.1, section IX, paragraph 2; and rule 9(1) of the rules of procedure of the Compliance Committee.

¹⁷ Decision 27/CMP.1, section VIII, paragraph 7; and section IX, paragraphs 5 and 9; and rule 22(1)(g) of the rules of procedure of the Compliance Committee.

19. In addition to the requirements detailed in paragraph 18 above, section II, paragraph 6, of decision 27/CMP.1 provides that members of the Compliance Committee and their alternates “shall serve in their individual capacities” and rule 4 of the rules of procedure of the Compliance Committee establishes requirements to ensure that members and alternate members of the Compliance Committee act in an independent and impartial manner.

20. The procedural requirements outlined in paragraph 18 above establish basic rights concerning fair proceedings and a right to be heard. Whether the inclusion of denial of due process as the grounds for appeals under section XI, paragraph 1, of decision 27/CMP.1 has a broader application, beyond the specific requirements outlined in paragraph 18 above, under general legal principles applicable to international institutions, will be further considered in chapter III below.

21. While some of the requirements outlined in paragraph 18 above are rather straightforward, others may need further consideration by the CMP. The following sections provide further details on the latter.

4. Independence, impartiality and conflict of interest

22. As mentioned in paragraph 19 above, section II, paragraph 6, of decision 27/CMP.1 provides that members of the Compliance Committee and their alternates “shall serve in their individual capacities”. Rule 4, paragraph 1, of the rules of procedure of the Compliance Committee provides that each member and alternate member of the Compliance Committee “shall serve in his or her individual capacity and, with respect to any matter that is under consideration by the Committee, act in an independent and impartial manner and avoid real or apparent conflicts of interest”.

23. Rule 4, paragraph 2, of the rules of procedure of the Compliance Committee establishes that members and alternate members shall take and agree to respect a written oath of service that his or her function will be undertaken “honourably, faithfully, impartially and conscientiously” and that he or she will disclose “any interest in any matter under discussion before the Compliance Committee which may constitute a conflict of interest or which might be incompatible with the requirements of independence and impartiality expected of a member or alternate member of the Compliance Committee” and that he or she “shall refrain from participating in the work of the Compliance Committee in relation to such matter”.

What constitutes a conflict of interest?

24. One of the issues addressed by the Compliance Committee in relation to conflict of interest is the relationship between being a member of a delegation to meetings under the Convention or its Kyoto Protocol and being a member or alternate member of the Compliance Committee. In this regard, the Committee has stated:

“The plenary of the Committee agreed that being a member of a delegation to meetings under the Convention or its Kyoto Protocol and a member or alternate member of the Compliance Committee does not constitute in or of itself a conflict of interest or incompatibility with the requirements of independence and impartiality. However, the plenary of the Committee recognized that there may be circumstances in which this situation could result in a conflict of interest or incompatibility with the requirements of independence and impartiality. Members and alternate members of the Committee should exercise due diligence in such circumstances”.¹⁸

25. The circumstances in which such a double role may result in conflict of interest, or may give rise to a perception of conflict of interest, could include, for example, situations in

¹⁸ FCCC/KP/CMP/2010/6, paragraph 50.

which the enforcement branch examines a case of compliance by a State of nationality of a member.¹⁹ Furthermore, the CMP may wish to consider whether there may be a conflict of interest if a member has expressed any view on the relevant Party's obligations during relevant negotiations or if he or she was a member of another Party's delegation which has expressed itself on the contents of the obligations of a Party subject to a question of implementation. When considering this issue, Parties may also wish to take into account that limiting nominations to nominees that are non-members of a delegation may pose difficulties, especially for small countries.

Can a member or alternate member with a conflict of interest participate in any part of the enforcement branch decision-making process?

26. The oath of service taken by members and alternate members of the Compliance Committee requires them to refrain "from participating in the work of the Compliance Committee in relation to such matter" (see para. 23 above). The CMP may wish to clarify whether this means that a member or alternate member should not participate in any stage of the process, including the consideration of relevant issues. This approach may be supported by the fact that, under section II, paragraph 9, of decision 27/CMP.1, the Committee "shall make every effort to reach agreement on any decisions by consensus". This means that members and alternate members are expected to interact at an early stage of the decision-making process, with a view to reaching consensus; hence, participation at all stages of the decision-making process may be of relevance to reaching a final decision.

When must a Party claim that there is a conflict of interest?

27. The Compliance Committee, in its report to the CMP at its sixth session, stated:

"The plenary of the Committee noted that issues relating to potential conflicts of interest or incompatibility with the requirements of independence and impartiality should be raised in a timely manner. Such issues should be brought to the Committee's attention at the earliest possible time in the proceedings, when the information on the facts giving rise to a potential conflict of interest is available to the Party concerned, and not later than the hearing".²⁰

28. Rule 4, paragraph 4, of the rules of procedure of the Compliance Committee establishes a right for a Party to provide evidence to the Executive Secretary of the UNFCCC on circumstances which may indicate a conflict of interest of a member or alternate member of the Compliance Committee. However, this provision does not explicitly establish an obligation to provide such evidence if possessed by the Party. Nor does it stipulate any loss of rights if the Party fails to submit such evidence at any particular time. Nevertheless, if the Party chooses not to exercise its right to provide evidence to the Executive Secretary on circumstances which may indicate a conflict of interest before the final decision is adopted by the enforcement branch, the CMP may wish to consider whether such Party should be stopped from raising a claim of denial of due process.

5. Availability of information to the Party concerned

29. Section VIII, paragraph 6, of decision 27/CMP.1 provides that "[a]ny information considered by the relevant branch shall be made available to the Party concerned. The branch shall indicate to the Party concerned which parts of this information it has considered. The Party concerned shall be given an opportunity to comment in writing on such information". Section VIII, paragraph 7, of decision 27/CMP.1 establishes that

¹⁹ It should be noted in this regard that neither the rules of procedure of the Compliance Committee nor decision 27/CMP.1 explicitly disqualify a member or alternate member from participating in the consideration of a question of implementation relating to his or her country of nationality.

²⁰ FCCC/KP/CMP/2010/6, paragraph 52.

“[d]ecisions shall include conclusions and reasons. The relevant branch shall forthwith, through the secretariat, notify the Party concerned in writing of its decision, including conclusions and reasons therefore”.

30. Rule 22, paragraph 1, of the rules of procedure of the Compliance Committee establishes that a preliminary finding or a final decision shall contain, inter alia: a description of the information considered in the deliberations; a summary of the proceedings; conclusions and reasons for the decision; and the names of the members who participated in the consideration of the question of implementation, as well as in the elaboration and adoption of the decision.

31. Decision 27/CMP.1 does not provide explicit guidance as to the level of detail required for the conclusions and reasons upon which the decision is based. Furthermore, decision 27/CMP.1 does not specify whether the duty to make information available to the Party concerned and to indicate which part of the information has been considered by the enforcement branch also covers procedural aspects, such as information about conflict of interest. Providing such information to the Party concerned may, however, be important in assessing whether the Party has been denied due process.

D. Time frame for lodging the appeal

32. Under section XI, paragraph 2, of decision 27/CMP.1, the appeal must be lodged with the secretariat within 45 days after the Party has been informed of the decision of the enforcement branch. Compliance with this requirement, which is generally of an administrative character, is monitored by the secretariat, and the CMP is informed accordingly.

E. Consideration of the appeal by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol

33. Under section XI, paragraph 2, of decision 27/CMP.1, the CMP shall consider the appeal at its first session after the lodging of the appeal. The requirement is for the CMP to “consider” rather than to “decide on” the appeal. This can be interpreted as leaving it to the discretion of the CMP to decide whether to defer a decision on the appeal to a subsequent session.

34. The Party concerned will generally have an interest in a decision being taken by the CMP as soon as possible, since, under section XI, paragraph 4, of decision 27/CMP.1, the decision of the enforcement branch will stand pending the decision on appeal (see paras. 17 above and 36–38 below). In fact, the timing of a decision being taken by the CMP may have important repercussions for the relevant Party, including in cases where the enforcement branch suspended the eligibility of the Party to participate in the mechanisms under Articles 6, 12 and 17 of the Kyoto Protocol. Furthermore, the time frame for a decision to be adopted by the CMP is of particular concern in view of the fact that the CMP meets only once a year; hence, if a decision is not taken at the first session after the lodging of the appeal, the Party would have to wait an entire year for a decision.

35. This suggests that the final decision on the appeal should be taken, to the extent possible, at the first session of the CMP after the lodging of the appeal. On the other hand, the CMP should not feel compelled to adopt a decision at the same session at which it first considers an appeal if the Party concerned so requests or if further time for the decision-making process is necessary to ensure due process and proper consideration of the issue.

F. Final decision of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol

36. Under section XI, paragraph 3, of decision 27/CMP.1, the CMP may agree by a three-fourths majority vote of the Parties present and voting at the meeting to “override” the decision of the enforcement branch, in which event the CMP shall “refer the matter of the appeal back to the enforcement branch”.

37. The wording of this paragraph clearly indicates that the CMP may set aside a decision taken by the enforcement branch. At the same time, the CMP does not appear to have the authority to make its own substantive decision with respect to the appeal, as demonstrated by the fact that the CMP is required to refer the case back to the enforcement branch. This is consistent with the approach of leaving substantive decisions on compliance to an independent organ, in the form of the enforcement branch, in order to prevent the involvement of the CMP, a political organ, in substantive decision-making relating to compliance. The need to keep discussions relating to compliance at the technical level is also supported by those provisions aimed at securing the independence of the members of the Compliance Committee as well as by those requiring a three-fourths majority vote to override a decision of the enforcement branch. Hence, this provision seems to indicate that the CMP may not provide substantive guidance on how the enforcement branch should deal with a decision that has been overridden. It would be a different matter if the CMP should decide to make use of its general powers to adopt decisions that would alter the substantive rules which may have led to non-compliance by a Party (see para. 17 above).

38. The CMP is under no obligation to override a decision taken by the enforcement branch. The term “may” means that it is up to the discretion of the CMP to either confirm or override a decision of the branch. It can, for example, hold that there was no violation of due process rights, or only a minor violation of due process rights, or that the violation could not be assumed to have influenced the outcome of the decision. In such cases, the CMP may choose not to override the decision of the enforcement branch. It may, however, choose to provide some guidance on due process in relation to the decision of the enforcement branch (under section XII, paragraph (c), of decision 27/CMP.1).

III. Applicable law for the consideration of appeals

39. Applicable law is understood to be the body of law which governs the rights and responsibilities of parties in a given situation. It is understood to refer to the body of law to be applied by the CMP in its consideration of the merits of an appeal.

40. As discussed in chapter II above, the grounds for appeal under section XI of decision 27/CMP.1 are limited to due process considerations. While specific procedural requirements to be applied by the enforcement branch are clearly established under decision 27/CMP.1 and in the rules of procedure of the Compliance Committee, relevant due process rights could also follow from general international law.

41. It is a well-established principle of international law that general international law continues to apply in the relations between parties to a treaty, to the extent that it is not expressly excluded.²¹ As a result, customary international law and general principles of law²² can be considered as applicable law for the consideration of appeals. In addition, due process provisions under other international conventions may be taken into account as

²¹ Cf. *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p.15, paragraph 50.

²² See Article 38(1)(c) of the Statute of the International Court of Justice.

“relevant rules of international law applicable in the relations between the parties” under Article 31, paragraph 3(c), of the Vienna Convention on the Law of Treaties.²³

42. In this regard, the Compliance Committee of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) stated that it did not exclude the possibility, when determining issues of non-compliance, of taking into consideration general rules and principles of international law, including international environmental and human rights law, which might be relevant in the context of the interpretation and application of the Convention.²⁴

43. In relation to due process requirements applicable to the work of the enforcement branch, due process rights must be determined on the basis of the special functions and rules of the Compliance Committee and its enforcement branch. The Committee is neither an international organization nor an international court. It deals with States, and not individuals. The function of the enforcement branch may, however, be described as ‘quasi-judicial’, in the sense that the branch determines whether States have complied with their legal obligations under the Kyoto Protocol and it applies predetermined consequences in cases of non-compliance. As such, due process rights of both an international administrative and a judicial character may be of relevance in order to identify whether there are requirements that should be taken into account by the CMP in addition to those clearly incorporated in decision 27/CMP.1.

44. In terms of general international institutional law, it may be difficult to establish whether certain principles can be considered to have general application, and, in that case, to discern which principles have attained a general legal status, and to establish their specific content.²⁵

45. In relation to the imposition of sanctions by the Security Council, it has been recommended that the Security Council should observe the requirements of: transparency; consistency; equality; due process, including the right to be heard; and proportionality.²⁶

46. Relevant principles may also be found in the Code of Good Administration adopted by the Committee of Ministers of the Council of Europe in 2007, which includes the principles of lawfulness, equality, impartiality, proportionality, legal certainty, taking action

²³ The Vienna Convention on the Law of Treaties (1969) is not directly applicable to the interpretation of CMP decisions, which do not have the status of treaties under international law. Nevertheless, in its advisory opinion on Kosovo (2010), the International Court of Justice (ICJ) stated that Articles 31 and 32 of the Vienna Convention may provide guidance in the interpretation of Security Council resolutions, while other factors must also be taken into account, including the Security Council’s status as a single collective body and differences between the drafting of treaties and Security Council resolutions (Accordance with International Law of the Unilateral Declarations of Independence in Respect of Kosovo, 22 July 2010, General List No. 141, paragraph 94, pp.34 and 35). While there are obvious differences between Security Council resolutions and CMP decisions, the opinion of ICJ may be relevant also in interpreting CMP decisions, in relation to the need to examine the guidance provided by Articles 31 and 32 of the Vienna Convention, especially that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (Article 31, paragraph 1). Also in the case of CMP decisions, account should be taken of the fact that the CMP is a body with its own functions and decision-making procedures.

²⁴ United Nations Economic and Social Council document ECE/MP.PP/C.1/2005/2/Add.4, paragraph 18.

²⁵ Amerasinghe CF. 2005. *Principles of the Institutional Law of International Organizations*. 2nd ed. Cambridge University Press. pp.16–20.

²⁶ Farrall JM. 2007. *United Nations Sanctions and the Rule of Law*. Cambridge University Press. pp.230–241.

within a reasonable time limit, participation, respect for privacy, and transparency. These principles were developed in relation to the exercise of public power at the national, rather than international, level.

47. In the academic literature,²⁷ Wilfred Jenks argued already in 1962 that due process “may well prove to be the basic concept of international administrative law”. While his focus was primarily on the rights and obligations of international staff members, the elements of due process that he identified may be of interest in the present context. He included among the elements of due process: a fair hearing, proper evidence, access to relevant documents, and reasoned decisions.²⁸ Other principles found in the literature include: the protection against bias and conflict of interest; sound decision-making; and transparency and public participation.²⁹

48. With respect to relevant principles to be applied by courts and tribunals, it should be noted that Article 14 of the International Covenant on Civil and Political Rights requires that parties to a judicial process are “equal before the courts and tribunals” and that everyone shall be entitled to a “fair and public hearing” by a “competent, independent and impartial tribunal established by law”. Additional requirements are established for criminal prosecution. Similar guarantees are contained in the European Convention on Human Rights (1950), Article 6, the American Convention on Human Rights (1969), Article 8, and the African Charter on Human and Peoples’ Rights (1981), Article 7. It should be kept in mind that these conventions do not refer to the concept of due process in relation to States’ rights, as they deal with the protection of individuals in national courts. It should also be kept in mind that these conventions are not necessarily consistent in the way in which due process rights are recognized.

49. The negotiations of the global and regional human rights conventions on the right to a fair trial reflect the difficulty of reaching agreement on which rights should be considered as due process rights.³⁰

50. Admittedly, these instruments lay down the basic requirements for courts at the national level, and not for international tribunals. Nevertheless, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia³¹ held in the Tadic case that an international criminal court “ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments”. The rule of law requires that the court must be established “in accordance with the proper international standards; it must provide all the guarantees of fairness, justice, and even-handedness, in full conformity with internationally recognized human rights instruments”.

51. Among the requirements to be applied by courts and tribunals, as listed in academic literature, is the need for the necessary expertise, the independence of courts, equal access, a fair hearing and reasoned decisions.³² While international law may not accept the doctrine

²⁷ See Article 38(1)(d)BTW of the Statute of the International Court of Justice.

²⁸ Jenks CW. 1962. *The Proper Law of International Organisations*. London: Stevens.

²⁹ See Esty DC. 2005. Good Governance at the Supranational Scale: Globalizing Administrative Law. *Yale Law Journal*. 115: pp.1493–1562 at 1523–1537. See also Kingsbury B, Krisch N and Stewart RB. 2004–2005. The Emergence of Global Administrative Law. *Law and Contemporary Problems*. 68: pp.15–62 at 17; and Kingsbury B. 2009. The Concept of ‘Law’ in Global Administrative Law. *European Journal of International Law*. 20: pp.23–57 at 32–33.

³⁰ Nowak M. 2005. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. 2nd rev. ed. Kehl: N.P. Engel. pp.306 and 307.

³¹ The Prosecutor vs. Dusko Tadic, Case No. IT-94-1-A, 15 July 1999.

³² See Merrills JG. 2005. *International Dispute Settlement*. 4th ed. Cambridge University Press. p.317; Terris D, Romano CPR and Swigart L. 2007. *The International Judge*. Waltham, Massachusetts: Brandeis University Press. p.15; Mahoney P. 2008. The International Judiciary – Independence and Accountability. *The Law and Practice of International Courts and Tribunals*. 7: pp.313–349; Ulfstein

of binding precedents of judgments by international courts, the courts will generally strive at consistency in their decision-making.³³

52. In view of the above, the concept of due process seems to provide the CMP with wide latitude to define what should be considered relevant due process rights in the context of appeals under decision 27/CMP.1. While it is not clear which principles applied by international institutions and courts have the status of general principles of law, nor what their content is, it can nevertheless be concluded that at the core of due process are the requirements of a fair hearing by an impartial organ, the right to be heard and the duty to give reasoned decisions. In addition, the need for consistency in decision-making can also be considered an important element of due process.

IV. Approach taken by bodies constituted under other multilateral environmental agreements and other international bodies concerning due process and its denial

53. This chapter examines, for comparative purposes, to what extent the constituted bodies under other MEAs and other international bodies have developed principles and procedures for the consideration of denial of due process. First, it will provide an overview of the procedures developed under other MEAs for the protection of due process rights; and second, it will outline the different approaches to ensuring that such due process guarantees are implemented.

54. The compliance regime under the Kyoto Protocol is unique in terms of its institutional complexity, character and the consequences available to it.³⁴ It embodies numerous procedural requirements and due process guarantees, including an appeals mechanism in cases where due process rights have been denied (see chapter I above). Procedures aiming at the protection of due process rights have also been developed in a number of international bodies, even though in some cases references to due process are not

G. 2009. The International Judiciary. In: J Klabbbers, A Peters and G Ulfstein (eds.). *The Constitutionalization of International Law*. Oxford University Press. pp.127–135; and Waldron J. 2011. Are Sovereigns Entitled to the Benefit of the International Rule of Law? *European Journal of International Law*. 22: pp.315–343 at 317. See also the Burgh House Principles on the Independence of the International Judiciary, adopted by the International Law Association Study Group on the Practice and Procedure of International Tribunals, reprinted in Sands P, McLachlan C and Mackenzie R. 2003. The Burgh House Principles on the Independence of the International Judiciary. *The Law and Practice of International Courts and Tribunals*. 4: pp.247–260; Fitzmaurice M. 2009. Non-Compliance Procedures and the Law of Treaties. In: T Treves et al. (eds.). *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*. pp.475, 478 and 479; and Montini M. 2009. Non-Compliance Procedures and the Law of Treaties. In: T Treves et al. (eds.). *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*. pp.393 and 394.

³³ Shahabuddeen M. 1996. *Precedent in the World Court*. Cambridge University Press. pp.2, 3 and 107–109; Brown C. 2007. *A Common Law of International Adjudication*. Oxford University Press. pp.227 and 228; and Ulfstein G. 2009. The International Judiciary. In: J Klabbbers, A Peters and G Ulfstein (eds.). *The Constitutionalization of International Law*. Oxford University Press. p.139.

³⁴ Milano E. 2009. The Outcomes of the Procedure and their Legal Effects. In: T Treves et al. (eds.). *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*. p.415; and Werksman J. 2005. The Negotiation of a Kyoto Compliance System. In: OS Stokke, J Hovi and G Ulfstein (eds.). *Implementing the Climate Regime: International Compliance*. p.19.

explicit. Recent surveys have noted that mechanisms under MEAs consistently incorporate due process and other procedural guarantees.³⁵

55. The following discussion does not aim at a comprehensive treatment of the approach to the consideration of due process rights under all comparable bodies. Its objective is rather to highlight elements that could be of particular relevance to the compliance mechanism under the Kyoto Protocol. In that regard, it must be borne in mind that appeals mechanisms are rare in international legal frameworks and that existing appeal bodies are of a different institutional nature to the CMP as the appeal body under the Kyoto Protocol.³⁶

A. Due process guarantees consistently included in the practice of other multilateral environmental agreements and other international bodies

56. Due process guarantees consistently included in the practice of other MEAs can be summarized as follows: rights of parties to participate in the compliance proceedings; time frames for submissions; languages which may be used by the parties; confidentiality and transparency during the procedures; the need for decisions to include conclusions and reasons; voting procedures; and issues related to conflict of interest.³⁷

57. In terms of the participation of parties in the meetings of compliance committees, there is a common practice reflected in the provisions of most MEAs making it a necessary requirement to allow for the participation of the parties concerned in the meetings at which their compliance issue is discussed. For example, the compliance procedures under the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol) and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention) emphasize the rights of the Party whose compliance is at issue to submit its statements and participate in the meeting of the committee at which its statements are considered.³⁸ The Protocol to the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Protocol) provides that parties may participate in the compliance meetings, except that when an individual compliance case is under consideration the meeting shall be closed if the Party whose compliance is in question so requests.³⁹

58. With respect to the participation of the parties in the final stage of the meetings, where the committee adopts a report/decision, other MEAs reflect different approaches. For example, the Montreal Protocol and the Basel Convention provide that the parties concerned shall not take part during the discussion on the elaboration and adoption of the

³⁵ Montini M. 2009. Non-Compliance Procedures and the Law of Treaties. *In*: T Treves et al. (eds.). *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*. pp.393 and 394.

³⁶ One example is the United Nations Appeals Tribunal.

³⁷ Montini M. 2009. Non-Compliance Procedures and the Law of Treaties. *In*: T Treves et al. (eds.). *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*. p.395.

³⁸ Montreal Protocol, Non-compliance procedure, Article 10; Basel Convention, Mechanism for Promoting Implementation and Compliance – terms of reference, paragraph 15; and Cartagena Protocol, rules of procedure for meetings of the Compliance Committee (BS-II/1), section IX, rule 13.

³⁹ London Protocol, Compliance Procedures and Mechanisms pursuant to Article 11 of the 1996 Protocol to the London Convention 1972, paragraph 3.8.

reports of the compliance committee.⁴⁰ It has been suggested by some writers that the reason for excluding parties at this stage of the deliberations is to ensure impartiality.⁴¹

59. The Aarhus Convention, on the other hand, contains a provision distinct from the other MEAs allowing the participation of the parties concerned in the final phase of the compliance procedure and requiring the consideration by the committee of any comments which any of the parties involved in the compliance procedure make at that stage.⁴²

60. In order to further facilitate the participation of the parties concerned in the compliance proceedings, some MEAs contain provisions giving the Party concerned the opportunity to analyse and comment on the draft recommendations/decisions which are prepared by the compliance committee before the draft is adopted.⁴³

61. With respect to the issue of the language for submissions and communications between the Party concerned and the compliance bodies, in order to ensure the effective participation of parties, various MEAs have provisions which allow parties to make their submissions and communications in various languages.⁴⁴

62. Deadlines for submissions by parties is another fundamental due process guarantee under MEAs.⁴⁵ There are provisions under various MEAs' non-compliance procedures dealing with deadlines for the submission of comments or documents by both the parties⁴⁶ and the secretariats.⁴⁷

63. The issue of the confidentiality of the meetings of compliance committees and whether or not these meetings are open or closed is an issue which most other MEAs do not directly address. In some cases, the chair of the committee decides on a case-by-case basis, depending on the issues to be discussed in the meeting.⁴⁸

64. Various MEAs make provisions addressing issues of transparency. As regards the practice of adopting decisions containing conclusions and reasons, it is the established practice of most international and national tribunals and public bodies to issue their decisions in writing with the reasons, facts and rules on which they are based.⁴⁹ Judgements of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal are

⁴⁰ Montreal Protocol, Non-compliance procedure, Article 11; and Basel Convention, Mechanism for Promoting Implementation and Compliance – terms of reference, paragraph 15.

⁴¹ As footnote 35 above.

⁴² Aarhus Convention, Procedures for the Review of Compliance, section IX.

⁴³ Cartagena Protocol, rules of procedure for meetings of the Compliance Committee, section IV, rule 4; and Aarhus Convention, Procedures for the Review of Compliance, section IX.

⁴⁴ See Aarhus Convention, Procedures for the Review of Compliance, section I, paragraph 5; and the Stockholm Convention on Persistent Organic Pollutants, draft non-compliance procedures, decision SC-1/1 on rules of procedure, document UNEP/POPS/COP.1/SC-1/1, p.14, rule 55.

⁴⁵ Montini M. 2009. Non-Compliance Procedures and the Law of Treaties. *In*: T Treves et al. (eds.). *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*. p.396.

⁴⁶ Basel Convention, Mechanism for Promoting Implementation and Compliance – terms of reference, paragraph 13; Montreal Protocol, Non-compliance procedure, paragraph 2; and Aarhus Convention, Procedures for the Review of Compliance, paragraph 15.

⁴⁷ Basel Convention, Mechanism for Promoting Implementation and Compliance – terms of reference, paragraph 14; Montreal Protocol, Non-compliance procedure, paragraph 2; and Aarhus Convention, Procedures for the Review of Compliance, paragraph 15.

⁴⁸ See United Nations Environment Programme Convention on Biological Diversity document UNEP/CBD/BS/CC/2/1/Add.1, item 3, paragraph 14.

⁴⁹ See Coffey G. 2009. *Administrative Law*. Round Hall Essential Law Text. Dublin: Thomson Reuters. p.288.

required to be communicated to each party, published (while protecting personal data) and made generally available by the Registry.⁵⁰

65. The compliance procedure rules of the Montreal Protocol provide that reports of compliance committees should be made available to parties, provided that such information does not contain confidential information, and that all compliance-related information should be made available to the parties on request.⁵¹ The London Protocol provides that the notice of all compliance-related submissions should be sent to all parties for their information, with a copy of the full submission available to any party upon request.⁵²

66. A number of international bodies address issues of conflict of interest by electing members that do not exercise functions at the national or international level that may lead to doubts about their impartiality and independence. For example, the Statute of the International Court of Justice establishes that “[n]o member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature” (Article 16, paragraph 1) and the Statute of the International Tribunal for the Law of the Sea provides that “[n]o member of the Tribunal may exercise any political or administrative function” (Article 7, paragraph 1). The Human Rights Council has established that individuals holding decision-making positions in government or in any other organization or entity which may give rise to a conflict of interest with the responsibilities inherent to its mandate shall not be appointed as special procedures mandate-holders.⁵³

67. There is also a practice under certain conventions that members of independent organs must submit a declaration of interest upon nomination, at meetings of the organ or by annual disclosures. The practice of the Executive Board of the clean development mechanism is that members of the Board are requested ahead of a meeting to fill out a form indicating a conflict of interest with any specific case/project discussed at the meeting and to submit a statement relating thereto.⁵⁴ Members of the Persistent Organic Pollutants Review Committee (POPRC) of the Stockholm Convention on Persistent Organic Pollutants must submit a declaration of interest form. Members of POPRC must also disclose, on an annual basis, activities, including business or financial interests, which might call into question their ability to discharge their duties and responsibilities objectively.⁵⁵ The Technology and Economic Assessment Panel of the Montreal Protocol requires members to disclose their interests. An illustrative list of types of interest to be disclosed has been developed and a list of disclosures made by members is posted on the Ozone Secretariat’s website.⁵⁶

⁵⁰ United Nations General Assembly resolution 63/253, Administration of justice at the United Nations, document A/RES/63/253, 23 February 2009, annex I, Statute of the United Nations Dispute Tribunal, Articles 11.5 and 11.6, and annex II, Statute of the United Nations Appeals Tribunal, Articles 10.8 and 10.9.

⁵¹ Montreal Protocol, Non-compliance procedure, paragraph 16.

⁵² Compliance Procedures and Mechanisms pursuant to Article 11 of the 1996 Protocol to the London Convention 1972, paragraph 4.4.

⁵³ Human Rights Council resolution 5/1, Institution-building of the United Nations Human Rights Council, 18 June 2007.

⁵⁴ See an example in relation to the 61st meeting of the Board, available at <<http://cdm.unfccc.int/Meetings/MeetingInfo/DB/QUVLA2RY65CPJNI/CoIIndex>>.

⁵⁵ Compliance Committee “Procedures and practices relating to conflict of interest in bodies constituted under other multilateral environmental agreements and other relevant United Nations bodies”, document CC/8/2010/3, paragraph 8.

⁵⁶ Compliance Committee “Procedures and practices relating to conflict of interest in bodies constituted under other multilateral environmental agreements and other relevant United Nations bodies”, document CC/8/2010/3, paragraph 16.

68. In addition, there are requirements in some conventions that members should not participate in decision-making relating to their country of nationality. The Compliance Group of the London Protocol is of the view that it would be a conflict of interest for a member to participate in the consideration of a matter involving the country that nominated the member.⁵⁷ On the other hand, the practice of the Aarhus Convention is that being a national of the Party whose compliance is at issue does not in and of itself constitute a conflict of interest.⁵⁸ International courts will usually have special arrangements if any of the judges is a national of one of the parties (e.g. appointment of an ad hoc judge of the International Court of Justice, under Article 31, paragraph 2, of the Statute of the International Court of Justice). It is also the practice of the Human Rights Committee, the Committee on the Elimination of Discrimination against Women of the Convention on the Elimination of All Forms of Discrimination Against Women and the Committee on the Rights of the Child of the Convention on the Rights of the Child that a member should not participate in the examination of reports presented by his or her country, which in relation to the Human Rights Committee also includes communications (i.e. individual complaints) from the relevant country.⁵⁹

B. Approaches to address denial of due process

69. This section analyses how other MEAs and international bodies address the issue of denial of due process. The focus will be, in particular, on the approach to decision-making relating to compliance under other MEAs and the effect that that has on due process guarantees, as well as on the approach taken under other international bodies which have established appeals mechanisms to deal with denial of due process.

70. Under the Montreal Protocol, interim and final decisions on compliance are adopted by the Meeting of the Parties.⁶⁰ The Implementation Committee submits its reports to the Meeting of the Parties, with recommendations for the Meeting of the Parties to adopt its recommendations related to compliance.⁶¹ The idea of appeals against the decisions of the Meeting of the Parties on compliance was discussed during the first review of the non-compliance procedures, but no support was expressed for this idea, which was perceived as premature at that time.⁶²

71. The Compliance Committee established under the Basel Convention makes non-binding recommendations to the Conference of the Parties on measures needed to address compliance, taking into account the capacity of the Party concerned, as well as the cause, type, degree and frequency of the compliance problem.⁶³

⁵⁷ Compliance Committee “Procedures and practices relating to conflict of interest in bodies constituted under other multilateral environmental agreements and other relevant United Nations bodies”, document CC/8/2010/3, paragraph 37.

⁵⁸ Guidance Document on the Aarhus Convention Compliance Mechanism, page 11, available at <http://live.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf>.

⁵⁹ Compliance Committee “Procedures and practices relating to conflict of interest in bodies constituted under other multilateral environmental agreements and other relevant United Nations bodies”, document CC/8/2010/3, paragraphs 43, 48 and 52.

⁶⁰ Romanin Jacur F. 2009. The Non-Compliance Procedure of the 1987 Montreal Protocol to the 1985 Vienna Convention on Substances that Deplete the Ozone Layer. In: T Treves et al. (eds.). *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*. p.25. See also rule 26.6 of the rules of procedure for meetings of the Conference of Parties to the Vienna Convention and Meetings of the Parties to the Montreal Protocol.

⁶¹ Montreal Protocol, Non-compliance procedure, paragraphs 7(d), 9, 13 and 14.

⁶² See United Nations Environment Programme document UNEP/OzL.Pro/WG.4/1/3.

⁶³ Basel Convention, Mechanism for Promoting Implementation and Compliance – terms of reference,

72. Likewise, under the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (1972), the Compliance Group makes recommendations to the Meeting of the Contracting Parties on the measures to undertake in relation to a party's possible non-compliance⁶⁴ and reviews the implementation by the contracting parties of such recommendations and decisions on compliance.⁶⁵ Paragraph 5.4 of the Compliance Procedures and Mechanisms Pursuant to Article 11 of the 1996 Protocol to the London Convention 1972 provides that the Meeting of the Contracting Parties "shall make the final decision regarding any measures proposed by the Compliance Group to be taken in response to a Party's possible non-compliance".

73. The Compliance Committee of the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution takes decisions with respect to the compliance of the parties. The Convention provides that the Meeting of the Contracting Parties may decide, upon consideration of the report and any recommendations of the Committee, how to bring about full compliance with the Convention and its Protocols.⁶⁶

74. Under the compliance procedures of the Aarhus Convention, the Compliance Committee reports on its activities at each ordinary Meeting of the Parties and makes such recommendations as it considers appropriate. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, decide upon appropriate measures to bring about full compliance with the Convention.⁶⁷

75. The examples above show that most MEAs embody a different approach, compared with that under the Kyoto Protocol, as to which body takes final decisions relating to non-compliance. The compliance mechanisms under those MEAs make only recommendations to their governing bodies. By empowering the governing bodies to adopt final decisions related to compliance, other MEAs seem to implicitly empower those bodies to ensure that due process guarantees are implemented. No special procedures are established for the governing bodies to exclusively address issues of non-compliance, including in relation to denial of due process. As a result, no comparable appeals mechanisms exist under other MEAs which may have provided guidance to the CMP on how to consider appeals against final decisions of the enforcement branch based on denial of due process.

76. A specific example of an appeals mechanism is provided by the United Nations Appeals Tribunal. The Tribunal is competent to hear and pass judgement on appeals filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has, *inter alia*, committed an error in procedure such as to affect the decision of the case. The Appeals Tribunal may affirm, reverse, modify or remand the judgement of the Dispute Tribunal and, to that end, it may admit additional evidence in the interest of justice.⁶⁸

77. In order to discharge its functions, the Appeals Tribunal established its own rules of procedure, which were approved by the General Assembly. The rules of procedure include provisions concerning, *inter alia*: time limits for filing applications; the format of and information to be included in the applications, including the action and remedies sought and

paragraph 20.

⁶⁴ Compliance Procedures and Mechanisms pursuant to Article 11 of the 1996 Protocol to the London Convention 1972, paragraphs 2.2.3 and 5.1.

⁶⁵ Compliance Procedures and Mechanisms pursuant to Article 11 of the 1996 Protocol to the London Convention 1972, paragraph 2.2.5.

⁶⁶ 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution, Draft Decision on procedures and mechanisms on compliance under the Barcelona Convention and its Protocols, paragraph 33.

⁶⁷ See the annex to decision I/7 of the Meeting of the Parties to the Aarhus Convention.

⁶⁸ Article 2 of the Statute of the United Nations Appeals Tribunal, contained in United Nations General Assembly resolution 63/253, annex II.

any supporting documentation; the procedure to be followed with respect to applications (e.g. the signed original application form and the annexes thereto shall be submitted together; the documents may be transmitted electronically, etc.); procedures for the oral hearings by the Appeals Tribunal; admissibility of new evidence; and publication of judgements (e.g. judgements are to be issued in writing and shall state the reasons, facts and law on which they are based).⁶⁹

C. Procedures for the consideration of appeals

78. It is recalled that section XI of decision 27/CMP.1 already provides guidance on the following: the grounds for appeals; the time limits for the lodging of appeals; the time frame for the consideration of appeals by the CMP; the status of the decision of the enforcement branch pending an appeal; the majority requirements for decision-making; and the consequences in the case that the CMP decides to override a decision of the enforcement branch (see paras. 7–38 above). This section highlights the issues that the CMP may wish to consider with a view to further developing its procedures for considering appeals. The United Nations Appeals Tribunal procedural requirements have been used to identify what procedural issues may need to be addressed by the CMP.

79. The procedure for lodging an appeal with the secretariat and the information to be submitted therein:⁷⁰ current practice⁷¹ has been for the secretariat to accept the appeal as transmitted by the designated agent of the Party, following the practice established under the rules of procedure of the Compliance Committee.⁷² The CMP may wish to consider whether to continue such practice or whether appeals could also be submitted by the national focal point. In addition, further guidance may be necessary on the type of information to be included in the appeal document. For example, it may be clarified: whether the appeal document should provide information on the grounds for the appeal (e.g. how the appeal relates to a decision of the enforcement branch relating to Article 3, paragraph 1, of the Kyoto Protocol, as well as information relating to denial of due process; see paras. 9–31 above); and what documentation should be annexed to the appeal document (e.g. copies of each document referred to in the appeal).

80. The role of the secretariat, as the receiver of the appeal under section XI, paragraph 2, of decision 27/CMP.1, may also be further elaborated upon. In particular, the CMP may wish to consider whether to continue the current practice,⁷³ whereby the secretariat submits the appeal and the documents annexed thereto (reproduced in the language in which they were received and without formal editing) as an official document to the CMP at its first session after the lodging of the appeal. Current practice has also been to include the consideration of the appeal as a sub-item to the agenda item on “Matters related to compliance under the Kyoto Protocol”. Should more than one appeal be lodged by Parties, the CMP should also determine the order in which it will consider them. One option could be to consider appeals in the order that they were received by the secretariat.

81. In addition to the documentation to be submitted with the appeal (see para. 80 above), the CMP could also consider whether and under what circumstances the Party lodging the appeal is entitled to submit additional evidence after the lodging of the appeal and in addition to that contained in the appeal document. A further question is whether and

⁶⁹ United Nations General Assembly document A/RES/64/119, annex I, rules of procedure of the United Nations Appeals Tribunal.

⁷⁰ Requirement based on Article 8 of the rules of procedure of the United Nations Appeals Tribunal.

⁷¹ See document FCCC/KP/CMP/2010/2.

⁷² See rule 2, paragraph k, of the rules of procedure of the Compliance Committee.

⁷³ See document FCCC/KP/CMP/2010/2.

under what circumstances the CMP itself could request such additional documentary evidence.⁷⁴

82. With respect to the issue of the representation of the Party which has lodged the appeal,⁷⁵ it may be considered whether a Party may present its case before the CMP in an oral hearing. Consideration may also be given to whether the oral hearing should be held in public and what would be the most appropriate forum for such a public hearing. With regard to the issue of forum, given the nature of contact groups and informal consultations, the CMP may wish to consider whether they are the most appropriate bodies to consider issues of denial of due process. The CMP may consider establishing a special committee, possibly composed of legal experts.⁷⁶

83. The CMP may also wish to consider the procedures for the adoption and issuance of its decisions relating to appeals. In particular, guidance may need to be provided on: whether the CMP prefers to keep its deliberations on appeals confidential or make them public; whether, once adopted, the decision of the CMP on an appeal would be issued as a decision of the session at which it was adopted; whether decisions should state the reasons, facts and law on which they are based; and whether the secretariat should transmit a copy of the decision to the Party concerned as well as to the enforcement branch. With regard to the decision-making for the adoption of decisions on appeals, the rules of procedures applied by the CMP would apply.

84. Article 21 of the rules of procedure of the United Nations Appeals Tribunal addresses the question of the Registry of the Appeals Tribunal. In the case of appeals under section XI of decision 27/CMP.1, it appears that the UNFCCC secretariat is mandated to provide the necessary administrative and support services for the consideration of appeals by the CMP. In this regard, the CMP may wish to specify what actions it expects the secretariat to undertake, such as: transmitting documents and making all notifications required in connection with the appeal; establishing for each case a master registry file and recording all actions taken in connection with the appeal; and performing any other duties that are required by the CMP for the efficient disposal of the appeal.

85. Decision 27/CMP.1 does not address a Party's right to withdraw an appeal. The right of appeal is, however, instituted in the interest of the Party concerned. It follows that Parties should have the right to withdraw their appeals and that that right could be exercised until the completion by the CMP of its consideration of the appeal.

86. In this regard, the CMP may wish to consider elaborating on the following four issues: whether Parties have the right to withdraw an appeal; what is the effect of a withdrawal on the further consideration of the appeal by the CMP; what are the procedures that the CMP is to follow; and what decisions can the CMP take in the event of a withdrawal. In particular, the CMP may wish to clarify whether the withdrawal of an appeal has the effect of ending any further consideration of the appeal by the CMP. In this case, the CMP would simply take note of the withdrawal under the relevant agenda item. Alternatively, the CMP could consider the withdrawal and complete its consideration of the appeal by a decision to terminate the appeal.

⁷⁴ Requirement based on Article 10 of the rules of procedure of the United Nations Appeals Tribunal.

⁷⁵ Requirement based on Articles 13 and 18 of the rules of procedure of the United Nations Appeals Tribunal.

⁷⁶ Under rule 2 of the UNFCCC "Draft Rules of Procedures of the Conference of the Parties and its Subsidiary Bodies" (FCCC/CP/1996/2), as applied by the CMP, the CMP can establish subsidiary bodies, including committees and working groups.

V. Conclusions

87. This document has been prepared in response to a request made by the CMP at its sixth session (see para. 2 above). As indicated in the request made by the CMP, the findings of the secretariat are to be used in the further discussions of the Parties under the relevant CMP agenda item. In this regard, at its seventh session, the CMP may wish to consider the need to further develop its procedures for the consideration of appeals (see paras. 78–86 above). Furthermore, the CMP may wish to clarify substantive issues relating to its consideration of appeals, such as: the meaning of the phrase “relating to Article 3, paragraph 1, of the [Kyoto] Protocol” (see paras. 9–14 above); and the applicable law relating to due process considerations (see chapter III above).
