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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

The Executive Board of the clean development mechanism (CDM), in its report to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (COP/MOP), at its first session, expressed concern about the absence of privileges and immunities for its members and the impact this may have on the functioning of the CDM. The Board has noted that its activities and decisions may affect third parties, who may resort to legal action in national courts for redress. The Board has requested the COP/MOP to consider what steps to take to find a solution.

This document highlights some of the potential risks of legal action that members, alternates and experts of constituted bodies face when discharging their functions under the Kyoto Protocol. It reviews privileges and immunities in the context of the United Nations and the climate change process, and outlines a number of options for consideration by the COP/MOP in its determination of whether and how members, alternates and experts of constituted bodies should be provided with the necessary privileges and immunities to carry out their functions under the Kyoto Protocol, and what process should be put in place to settle disputes brought by third parties.

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I. Introduction

A. Mandate

1. The Executive Board of the clean development mechanism (CDM), in its report to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (COP/MOP), at its first session, has expressed concern about the absence of privileges and immunities for its members and the impact this may have on the functioning of the CDM (see FCCC/KP/CMP/2005/4 and Add.1). The Board has requested the COP/MOP to consider this issue and take steps to find a solution.

B. Scope of the note

2. The secretariat has prepared this note to assist Parties in their consideration of this matter. The note discusses the regime of privileges and immunities in the context of the United Nations, and in the context of the Convention and the Kyoto Protocol. It addresses some of the potential risks of legal action by third parties participating in Kyoto Protocol mechanisms against individuals serving as members, alternates and experts of constituted bodies (i.e. the Executive Board of the CDM, the Article 6 Supervisory Committee, the Compliance Committee, and expert review teams under Article 8). It outlines options for providing the necessary privileges and immunities to members, alternates and experts of constituted bodies and for putting in place a process whereby third parties may settle disputes against these individuals.

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

3. The COP/MOP may wish to consider and adopt a decision on whether and how privileges and immunities should be provided to members, alternates and experts of constituted bodies in the discharge of their functions under the Kyoto Protocol, and what process should be put in place whereby third parties may settle any disputes against these individuals.

II. Overview

A. The regime of privileges and immunities under the United Nations

4. Article 105, paragraph 1, of the Charter of the United Nations provides that: “The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes”. Article 105, paragraph 2, provides that the representatives of its Members and its officials “shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization”. These two paragraphs encapsulate the rationale for privileges and immunities within the United Nations – the need for the organization and its representatives and officials to be able to undertake mandated tasks without interference.

5. Article 105, paragraph 3, of the Charter provides that the General Assembly may make recommendations concerning the details of such privileges and immunities or may propose conventions to Members for this purpose. In 1946, the General Assembly adopted the Convention on Privileges and Immunities of the United Nations¹ (the General Convention), which establishes the detailed privileges and immunities needed by the United Nations.

6. Privileges and immunities are designed to permit activities of the United Nations to take place **without national hindrance**. The centrepiece of the regime is immunity from suit in national courts for

¹ *United Nations Treaty Series 15*, 13 February 1946.

the United Nations, representatives of Members to the United Nations and officials and persons carrying out official functions (“experts on mission”), together with an obligation on the United Nations to provide for an alternative means of settling such disputes if immunity is not waived by the Secretary-General. Member States of the United Nations that have not ratified the General Convention are still obliged to give effect to paragraphs 1 and 2 of Article 105 of the Charter in their territory so that the United Nations and its representatives and officials may have the privileges and immunities needed to carry out their functions.

7. The regime of privileges and immunities for United Nations officials, representatives and experts on mission, accepted by virtually all States, either through acceptance of the General Convention or through headquarters and other agreements with the United Nations, reflects two cardinal principles:

- (a) **First**, protection of those implementing the decisions of the United Nations and its organs
- (b) **Second**, protection of third party claimants by obligating the United Nations, if immunity of an official or expert is not waived, to provide a mechanism for the final and binding resolution of the dispute. In other words, the immunity is jurisdictional immunity from national courts. There is no immunity from the substance of the claim, which must be finally settled through negotiation or, if this fails, by an appropriate mechanism for resolution of the dispute, usually binding arbitration.

8. Within the United Nations system, the regime of privileges and immunities extends to cover the work of individuals that are not formal representatives of States or United Nations officials. Examples are judges of the Law of the Sea Tribunal, inspectors for the International Atomic Energy Agency, and human rights rapporteurs.

B. Privileges and immunities in the climate change process

9. The Convention and the Kyoto Protocol do not contain any provisions conferring privileges and immunities on their organs or on officials and representatives serving on these organs.² By decision 15/CP.2, the Conference of the Parties (COP) approved the **Headquarters Agreement** for the Convention secretariat with the Federal Government of Germany. The Headquarters Agreement grants to officials and representatives to the COP the privileges and immunities granted to United Nations officials and representatives of Members to the United Nations under the General Convention. It also provides in its Article 5 that “all persons invited to participate in the official business of the Convention shall enjoy immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity” and that they shall be accorded “inviolability for all papers and documents” and that such “immunity shall continue to be accorded after termination of their business”. This would apply to members, alternates and experts of constituted bodies serving in their personal capacity while in Germany and would encompass others performing services for the COP and its bodies.

² The 1982 United Nations Convention on the Law of the Sea provides privileges and immunities for representatives of State Parties attending meetings of the Assembly, the Council or organs of the Assembly or the Council, and the Secretary-General and staff of the Authority, and for members of the International Tribunal of the Law of the Sea, in the exercise of their functions (Part XI, Article 182, and Annex VI, Article 10, of the 1982 United Nations Convention on the Law of the Sea). The Agreement establishing the World Trade Organization (WTO) grants to its Members, representatives of Members and the officials of the WTO privileges and immunities similar to those stipulated in the General Convention (Article VIII of the Agreement Establishing the World Trade Organization of 2002). Under the Montreal Protocol on Substances that Deplete the Ozone Layer, the Meeting of the Parties adopted decision VI/16 which provides that the Multilateral Fund and officials of the Multilateral Fund shall enjoy such privileges and immunities as are needed for the independent exercise of their official functions.

10. In return for these privileges and immunities, as is the case under the General Convention, the secretariat is obliged, under Article 3 (b) of the Headquarters Agreement, to make provision for the appropriate **settlement of disputes** arising out of contracts to which the secretariat is party and disputes involving an official of the secretariat who, by reason of his or her official position enjoys immunity which has not been waived. The International Court of Justice (ICJ) has made clear that the same principle applies to experts on mission performing services for the United Nations.³ In other words, in Germany the regime of the General Convention is made applicable to the activities of the Convention and its organs except that the detailed regime applicable to experts on mission contained in the General Convention is replaced by the more general provision in Section 5 of the Headquarters Agreement.⁴

11. The privileges and immunities in the Headquarters Agreement that encompass the activities of the COP and its subsidiary and constituted bodies are limited to Germany. Accordingly, the secretariat enters into **conference agreements** with other States that host meetings of the COP or other bodies. These agreements are based on the model United Nations conference agreement and ensure that the detailed regime of privileges and immunities in the General Convention is applicable to all who attend meetings under the auspices of the Convention and the Kyoto Protocol. The agreements also extend the regime of the General Convention to observers, to others invited to attend meetings and to personnel provided by Governments for meeting services. Moreover, these conference agreements deal with matters not covered in the General Convention. They provide for unimpeded access to and departure from the meeting venue, ensure that the host government is responsible for third-party claims that may arise out of services provided by it, and provide mechanisms for the effective settlement of disputes. This regime provides effective protection to all participants in such meetings.

12. The COP has recommended to the COP/MOP various procedures to deal with claims from Parties when a decision of any constituted body under the Kyoto Protocol improperly affects their interests, for example, in relation to eligibility to utilize the various mechanisms that are to function pursuant to Articles 6, 12 and 17 of the Kyoto Protocol. There is no particular need for jurisdictional immunity in this type of situation because Parties must, and obviously will, resort to the dispute resolution procedures that they have established as an integral part of the mechanism that they seek to utilize.

13. Third parties may, however, be affected by such decisions and it is difficult to see how they could be compelled to accept such mechanisms unless they had agreed to them. Nevertheless, even in cases of agreement to submit disputes or claims to a defined settlement procedure, some legal systems may enable third parties to resort to their local courts if improper motive or conflicts of interest are being alleged. In any event, third parties may simply resort to legal actions in national courts against the individual members of the constituted bodies. Whether such suits would be dismissed would depend on the substantive law of the State Party concerned, which may not enforce resort to dispute settlement mechanisms under the Kyoto Protocol or established by the COP/MOP.

14. Disputes that arise between third parties and those tasked to implement activities authorized by the COP/MOP should be settled by **impartial and binding mechanisms** designated by the COP/MOP rather than by the judicial authorities of one State according to the substantive provisions of its local law. This need for **operational independence** is why privileges and immunities are accorded to international organizations. Under the Convention, the risk of third party litigation appears low. However, as the

³ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999 (The Cumaraswamy Case) I.C.J. Reports, 1999, pp. 62 and 66.

⁴ Section 23 of the General Convention grants to United Nations experts on mission the following additional privileges and immunities: immunity from personal arrest and detention and from seizure of personal baggage; the right to use codes and to send correspondence by courier or in sealed bags; and the same currency facilities and personal baggage facilities as are accorded to diplomatic envoys.

activities of the Kyoto Protocol commence, and have impacts in countries other than the **host** country of the secretariat, the risk of third party claims will inevitably increase.

III. Mandated activities under the Kyoto Protocol that could be susceptible to third party claims

15. Operational activities in Germany are subject to the privileges and immunities under the Headquarters Agreement. In accordance with Article 5 of the Headquarters Agreement, activities of the members, alternates and experts of constituted bodies are subject to privileges and immunities when conducted in Germany. Through the conclusion of conference agreements, activities at conferences of the COP, the COP/MOP, and the subsidiary and constituted bodies held outside Germany may also be subject to privileges and immunities. In these cases, the secretariat has to ensure that a mechanism is provided for the final and binding resolution of any dispute caused by the activities in Germany or in a host country where a conference agreement has been concluded.

16. However, the activities of the Kyoto Protocol may affect third parties elsewhere. It is thus prudent to review those activities to ascertain if the lack of privileges and immunities exposes persons performing mandated functions to unnecessary risks.

17. The **range of risks** depends on the functions undertaken:

- (a) Those whose role is advisory will be at low risk
- (b) Those who make decisions, or make recommendations that are based on highly technical expertise that lead to decisions by organs, whose representatives must rely on that expertise, will be at higher risk
- (c) Activities and decisions that the COP/MOP has mandated be free from conflict of interest will be susceptible to claims that adverse decisions were caused by conflicts of interest. Information that the COP/MOP has mandated be kept confidential will be susceptible to claims that it was improperly made public.

A. The Executive Board of the clean development mechanism

18. By its decision 17/CP.7, the COP adopted “Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol” (CDM modalities and procedures), and recommended them for adoption by the COP/MOP. This decision established the Executive Board of the CDM, and gave the Executive Board wide-ranging responsibilities to supervise the CDM “under the authority and guidance of the COP/MOP”, to whom it shall “be fully accountable”. Before the entry into force of the Kyoto Protocol, the COP exercised this authority.

19. The members and alternates of the Executive Board are required to have defined expertise, undertake to preserve confidentiality, undertake to have no interest in any project or operational entity and take an oath of office. Rule 4 of the Executive Board’s rules of procedure provides that members and alternates “shall act in their personal capacity” (FCCC/CP/2002/7/Add.3). Rules 16 and 19 of those rules of procedure encourage the Executive Board to meet at the headquarters of the secretariat, but permit it to meet elsewhere. Rule 18 enables it to constitute, inter alia, expert panels to assist it in carrying out mandated activities. Members of the panels act in their personal capacity. The Board, and by extension, and its panels and working groups are “serviced” by the secretariat.⁵

⁵ The Executive Board has established three panels – the Accreditation Panel, the Methodologies Panel, and the Small-Scale Panel – and two working groups – the Working Group on Afforestation and Reforestation for CDM project activities, and the Small-Scale Working Group.

20. The CDM modalities and procedures emphasize the need for the CDM to preserve confidential information, which may include that of private entities. Claims that such information has been inadvertently or improperly made public are a possibility.

21. Other duties and responsibilities of the Executive Board may directly affect third parties. Most of its responsibilities are highly technical requiring specialized expertise, for example:

- (a) Approval of new baseline and monitoring methodologies and any revision to approved methodologies;
- (b) Accreditation and designation of “operational entities” and reviews of such accreditation under specified standards;
- (c) Ensuring accountability of designated operational entities;
- (d) Formal registration of validated projects, including reconsiderations of such actions;
- (e) Issuance of certified emission reduction certificates including review of such issuance and decision-making power on review.

22. The Executive Board reports to the COP/MOP. Apart from the designation of operational entities, where the COP/MOP has an advisory role, the COP/MOP can reverse such technical decisions. However, the reality is that the Executive Board will more often than not decide these matters. In other words, the COP/MOP will usually act on the information placed before it by the Executive Board and if a third party considers that such information prejudices them, the chances of claims against the individuals who recommended such decisions or actions may increase. Under paragraph 65 of the CDM modalities and procedures, if the Executive Board wishes to conduct a review it must conclude that its decision to proceed to a review is based on a finding of “fraud, malfeasance or incompetence” on the part of the “operational entity” which finding, if made public and later found to be unsupported by the facts, may lead to libel claims.

23. The members and alternates entrusted with the substantive tasks have no status or privileges or immunities, except when they are in Germany or while they are exercising functions in connection with meetings covered by conference agreements that are drafted in terms that are broad enough to cover their activities. The COP recognized aspects of risks of third party claims against the Executive Board by amending the rules of procedure of the Executive Board to provide that decisions of the Executive Board taken through electronic voting shall be deemed to have been taken in Germany (see decision 12/CP.10). Except in Germany or in a host State pursuant to a conference agreement, the efficacy of this amendment would be determined by a national court in the event of a lawsuit by a third party against a member of the Executive Board.

B. Article 6 Supervisory Committee

24. By its decision 16/CP.7, the COP recommended to the COP/MOP that it establish an Article 6 Supervisory Committee to verify emission reduction units to be transferred and acquired pursuant to Article 6 of the Kyoto Protocol. This decision establishes detailed “Guidelines for the implementation of Article 6 of the Kyoto Protocol” (Article 6 guidelines) setting out the duties of the Article 6 Supervisory Committee and the manner in which it must discharge those duties. It has authority to meet at least twice a year but is not obligated to meet at the headquarters of the secretariat or in conjunction with meetings of the COP/MOP. The Article 6 guidelines provide that the members of the Article 6 Supervisory Committee serve in their personal capacity and are subject to strict rules to attempt to prevent conflicts of interest and are prohibited from having a financial interest in Article 6 projects. They must make a

written oath of service to comply with all the requirements of the position. The Article 6 Supervisory Committee may draw on outside expertise and the secretariat “services” the Supervisory Committee.

25. The Article 6 Supervisory Committee is responsible for a number of important decision-making functions, including in circumstances defined in section E of the Article 6 guidelines, determine whether a project meets the required standards, which may directly affect third parties. The Committee is also responsible for:

- (a) The accreditation of “independent entities” in accordance with criteria set out in appendix A to the Article 6 guidelines;
- (b) The suspension or withdrawal of such accreditation if it considers that the required standards are no longer met, although a project will not be affected unless “significant deficiencies” are identified, in which case the Article 6 Supervisory Committee shall take its decision “only after the affected project participants have had the opportunity of a hearing”. Costs incurred in relation to this exercise are to be borne by the entity whose accreditation has been suspended or withdrawn.

26. It seems reasonable to suppose that an entity affected by such decisions might decide to bring a claim against those who made them if it is dissatisfied with the conduct of the review on the basis, for example, of its belief that the decisions were improperly influenced by conflict of interest.

27. The members of the Article 6 Supervisory Committee have privileges and immunities in Germany where they would be considered as persons falling under Article 5 of the Headquarters Agreement and under conference agreements, if drafted broadly enough to encompass their activities. Elsewhere they will have no such privileges or immunities.

C. Compliance Committee

28. Article 18 of the Kyoto Protocol delegates to the COP/MOP the task of approving procedures and mechanisms to address non-compliance. By its decision 24/CP.7, the COP adopted and recommended to the COP/MOP the procedures and mechanisms relating to compliance, including the establishment of a Compliance Committee comprising a facilitative branch and an enforcement branch. The procedures and mechanisms provide that the members of the Compliance Committee are selected by the COP/MOP and serve in their individual capacities. The Compliance Committee is to meet at least twice a year “taking into account the desirability of holding such meetings in conjunction with the meetings of the subsidiary bodies under the Convention”.

29. The facilitative branch provides “advice and facilitation” to the Parties. This appears to be a “low risk” activity.

30. The enforcement branch, on the other hand, is responsible for determining whether a Party is in compliance with its obligations. In exercising that responsibility, the enforcement branch must follow due process procedures. The enforcement branch is empowered to take “final decisions” on compliance, including under the eligibility requirements of the mechanisms established by Articles 6, 12 and 17 of the Kyoto Protocol. There are procedures to enable a Party to have a decision of the enforcement branch concerning its eligibility to participate in the mechanisms reviewed on an expedited basis, and procedures enabling an affected Party to appeal to the COP/MOP.

31. A Party must follow the review and appeal procedures established by the COP/MOP and thus the risk of national judicial action may be disregarded. But it is possible that third parties affected by findings of the Compliance Committee, which they consider to have been improperly motivated, may seek to make a claim against members of the Committee, who will have no privileges and immunities,

except in Germany or pursuant to a conference agreement drafted broadly enough to cover such activities.

D. Expert review teams

32. Article 8, paragraphs 2 and 3 of the Kyoto Protocol authorizes the appointment of expert review teams to provide “a thorough and comprehensive technical assessment of all aspects of the implementation by a Party of this Protocol”, including information submitted by Parties in their annual inventories under Article 7 of the Kyoto Protocol. The members of the expert review teams are selected by the secretariat from a roster of experts composed of persons nominated by the Parties and serve in their personal capacity (see decision 23/CP.7). The assessments of expert review teams play an important role in determining eligibility, or evaluating requests for re-instatement of eligibility, for the various mechanisms in the Kyoto Protocol.

33. The COP has recommended various decisions to the COP/MOP regulating the way in which the expert review teams are to carry out their duties (e.g., decisions 23/CP.7 and 22/CP.8). The COP, in annexes to these decisions has recommended “Guidelines for review under Article 8 of the Kyoto Protocol” and methodologies for work under Articles 3, 5, 7 and 8 of the Protocol, notably on the conduct of in-country visits and the need to respect confidential information. Decision 12/CP.9 promulgated a code of practice for the treatment of confidential information and the adopted strict criteria which must be met by lead reviewers of the expert review teams. That decision, and decision 21/CP.9, require members of expert review teams to sign an agreement that seeks to ensure that they will act properly and will disclose any potential conflict of interest.

34. Expert review teams do not make decisions. However, they make the technical assessments upon which decisions will be based. Such decisions by the COP/MOP could affect the financial interests of third parties who may try to make claims against individual experts if they believe – whatever the truth of the matter – that an expert acted through conflict of interest or was otherwise improperly motivated.

35. Members of expert review teams have no privileges and immunities from third party suits, except in Germany and in those countries where a conference agreement has been drafted broadly enough to encompass their activities.

IV. Measures to provide privileges and immunity to members, alternates and experts of constituted bodies

36. The Kyoto Protocol mechanisms provide procedures for review by Parties of contested decisions. However, third parties affected by these decisions may take legal action against members of constituted bodies, especially if they consider or allege that those individuals have improperly disclosed confidential information or have performed official functions motivated by conflict of interest. Staff of the secretariat have privileges and immunities worldwide. However, members, alternates and experts of the constituted bodies have no privileges and immunities except in Germany or for acts that occurred during a conference or activity covered by a conference agreement with a host State. The mere existence of a regime of privileges and immunities will not prevent institution of legal proceedings. However, the debate will not be on the substance of the claim but only on the validity of the assertion of immunity.

37. It is difficult to estimate the risk of lawsuits by third parties participating in Kyoto Protocol mechanisms. One option would be to take no action because there is no experience to assess the degree of risk. It could also be argued that any claims that arise could be defended in national courts and that action by the COP/MOP to institute a regime of privileges and immunities should be taken only after some actual experience of litigation. However, is it reasonable to leave the risk of defending official acts on individuals who were carrying out an international mandate? Is it reasonable to deliberately leave

adjudication of such claims to the vagaries of a variety of national laws rather than to a mechanism adopted by the COP/MOP?

38. The establishment of an appropriate regime of privileges and immunities that has force in all Parties will involve action by the COP/MOP and by Parties to give effect to those measures in their law. This will take time. However, work under the Kyoto Protocol must continue. A range of measures could be adopted by the COP/MOP to help address the present situation where individuals carrying out tasks mandated by the COP/MOP are obliged to bear the risk of lawsuits against them. These measures, which are not mutually exclusive, include:

- (a) Parties agreeing on the elements of an umbrella agreement, which contains provisions for privileges and immunities, that could be used by States that want to host meetings of constituted bodies and visits by expert review teams;
- (b) Requesting that all third party claims against members, alternates and experts of constituted bodies under the Kyoto Protocol be handled by the Executive Secretary;
- (c) Agreement from national and private entities that any claims must be made in accordance with the Kyoto Protocol mechanisms and made to the Executive Secretary at the headquarters of the secretariat;
- (d) Adopting a decision to confer privileges and immunities on representatives and members of its organs when performing official functions under the Protocol;
- (e) Adopting a decision, supported by unilateral declarations by Parties, to confer privileges and immunities on representatives and members of its organs when performing official functions under the Protocol;
- (f) Amending the Kyoto Protocol to confer privileges and immunities on representatives and members of its organs when performing official functions under the Protocol.

39. In addition to agreeing on measures to provide the necessary privileges and immunities to members, alternates and experts of constituted bodies, the COP/MOP will need to consider how to address the possible budgetary implications arising from claims brought by third parties against individual members of constituted bodies.

**A. Parties to agree on the elements of an umbrella agreement
that contains provisions for privileges and immunities**

40. Sessions of the COP/MOP are convened either in Germany or in States pursuant to a conference agreement (see paragraph 11 above). Where possible, meetings of constituted bodies should be under the protection of these types of agreement and, when such agreements are not possible, meetings should be held at the headquarters of the secretariat or in conjunction with sessions of the COP/MOP.

41. The negotiation of individual agreements with States will take time and, in the interim, the work of the Kyoto Protocol must continue, including in-country visits of expert review teams. This makes it all the more urgent to start the process of establishing a set of uniform agreements with Parties that host Kyoto Protocol activities. The process will be expedited if these agreements can be in the form of an "umbrella agreement" that provide that subsequent meetings can be undertaken on the same terms and conditions by an exchange of letters specifying the duration, purpose and other specific details of the meeting. The process would be further facilitated if the COP/MOP were to approve a model umbrella agreement that would be the basis for individual negotiations. COP/MOP approval will also help ensure acceptability of the draft agreement by host Governments of Parties.

42. These agreements, even in the absence of a complete regime of privileges and immunities, would help provide privileges and immunities to members of constituted bodies. Because if a member of a constituted body was sued personally in a third State the existence of the agreement covering the acts where they took place would be evidence that a personal suit is inappropriate.

**B. Executive Secretary to handle all claims against members,
alternates and experts of constituted bodies**

43. The COP/MOP could decide that lawsuits and claims concerning official duties made personally against representatives, members, alternates and experts of constituted bodies could be coordinated and handled centrally by the Executive Secretary on their behalf. This would ensure that the defence is managed institutionally, rather than by the individual. It would place the risk of lawsuits where it should fall, i.e., on the entity rather than solely on the individual carrying out mandated tasks. Parties would need to ensure that the secretariat has adequate resources, both financial and personnel, to coordinate any such lawsuits and claims.

44. This would help to assure those acting for the COP/MOP that they could do so without fear of being personally at risk because of performing their duty. This recommendation would not absolve the individual of personal accountability because the Executive Secretary would have to determine whether the act complained of occurred in the execution of official duties. If the action of the member was ultra vires, the Executive Secretary would properly decline to intervene. If it was an official act, but performed badly, the usual administrative sanctions against the individual would apply.⁶

45. A decision along these lines by the COP/MOP would also assist the Executive Secretary in obtaining the active help of the Party concerned to have the matter resolved according to the mechanisms approved by the COP/MOP rather than by a local court. The decision ought to be limited to the actions for which immunity would be available if the COP/MOP adopted the United Nations regime of privileges and immunities and could be along the following lines:

“Claims or legal process in respect of words spoken or written and acts performed in an official capacity by representatives of the COP/MOP or its subsidiary bodies, members, alternate members, experts and others performing services for the COP/MOP or its subsidiary and constituted bodies or the secretariat, shall be transmitted to the Executive Secretary. If the Executive Secretary considers that the claim relates to official acts the Executive Secretary shall seek the assistance of the State Party concerned to have the case dealt with according to the procedures established by the COP/MOP, including the Headquarters Agreement with Germany. If necessary the Executive Secretary may engage local counsel to help achieve this result.”

**C. Agreement from national and private entities that any claims be
made in accordance with the Kyoto Protocol mechanisms
and made to the Executive Secretary**

46. Any private or national entities seeking to participate in mechanisms pursuant to the Kyoto Protocol, or seeking designation as operational entities, could be required to agree in writing that any claims or disputes relating to such application, or later participation if the application is granted, must be brought in accordance with mechanisms established, or to be established, by the COP/MOP. All such national/private entities could also be obliged to agree in writing that any claim must be made at the headquarters of the secretariat pursuant to the regime on the Headquarters Agreement (see paragraphs 9 and 10 above).

⁶ For example, suspension or termination of members or alternates of the Executive Board (see CDM modalities and procedures, paragraph 10).

47. Such written agreements may not be respected. However, their existence would be a powerful argument that could be submitted by the Executive Secretary to any court hearing such a claim that the appropriate forum for the settlement of disputes under the Kyoto Protocol is in Germany and according to the Headquarters Agreement and the decisions of the COP/MOP, as acknowledged in writing by the plaintiff. This will complement the obligation of the Party responsible for compliance of the national or private entity under their jurisdiction with the relevant Kyoto Protocol mechanisms to seek to ensure that the Kyoto Protocol mechanisms are respected.

D. Decision of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to confer privileges and immunities

48. The COP/MOP has the authority to take whatever actions it considers are necessary to further the objectives of the Kyoto Protocol. It could adopt a decision similar to decision IV/16 that was adopted by the Meeting of the Parties to the Montreal Protocol⁷ to confer an appropriate regime of privileges and immunities by a decision which could explicitly adopt the regime of the General Convention by reference to it or by setting out its elements.

49. It would be up to each Party to give force to such a decision in its national law. At a minimum, such a decision by the COP/MOP would facilitate defence of suits instituted in local courts by being evidence to a court seized of a claim against representatives, members, alternates and experts of constituted bodies, that the claim was to be resolved by provisions under the relevant Kyoto Protocol procedures rather than by resort to national law.

E. Decision of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, supported by unilateral declarations of Parties, to confer privileges and immunities

50. The adoption by the COP/MOP of a decision on privileges and immunities would not necessarily create an unequivocal international legal obligation on Parties to give effect to the decision in their national law.

51. A possible way to achieve the same result as an amendment to the Kyoto Protocol, but without its attendant complexities, would be for the COP/MOP to include in such a decision a provision calling on Parties to make a unilateral declaration that they will implement the decision of the COP/MOP in their national law. Such a technique was used by the General Assembly in resolution 32/64 of 8 December 1977 which called on Member States to make unilateral declarations against torture and other cruel, inhuman or degrading treatment or punishment along the lines of a model unilateral declaration contained in the annex to the resolution.

52. The form of such a unilateral declaration is simple and could be along the following lines, which is based on the model annexed to General Assembly resolution 32/64:

“The Government of ----- hereby declares its intention to implement, through legislation or other effective measures, the provisions of decision --/-- adopted by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at [date]”

53. The advantage of such a mechanism is that it would avoid the need to amend the Kyoto Protocol. The declaration would be deposited with the United Nations and circulated to all Parties.

⁷ See footnote 2.

F. Amending the Kyoto Protocol to confer privileges and immunities

54. The conferring of privileges and immunities could be achieved through the adoption of an amendment to the Kyoto Protocol pursuant to its Article 20. The amendments could explicitly adopt the regime of the General Convention by express reference to it, or by setting out its elements.

55. An amendment to the Kyoto Protocol would require submission of a written proposed text six months in advance of the COP/MOP session and adoption of the amendment by consensus if possible. If consensus is not possible, adoption by voting requires a three quarters majority of the Parties present and voting. When the amendment came into force, the Parties would be obligated to ensure that their national law reflected the regime of privileges and immunities adopted by those amendments. Adopting an amendment would be a lengthy process because it would take time for Parties to negotiate and reach agreement, and for the required number of ratifications to be obtained to enable the amendment to enter into force. Until entry in force, no privileges and immunities would be available to members, alternates and experts of constituted bodies. After entry into force, such privileges and immunities would be only applicable to those Parties for which the agreement has entered into force – different regimes would therefore apply.

V. Conclusion

56. The functions of the members of the constituted bodies may attract third party claims at some stage. Although these individuals have privileges and immunities in Germany or in a State which has agreed to a conference agreement drafted broadly enough to cover their activities, they have no such protection elsewhere against claims from third parties brought against them in their personal capacity. In these instances, the risk of claims – be they great or small – is placed on the individual shoulders of the members, alternates or experts. Accordingly, some reforms to the present regime of privileges and immunities are advisable. Several possible measures have been outlined above for consideration by Parties. The COP/MOP is invited to consider what reforms are necessary to ensure that members, alternates and experts of constituted bodies have the necessary privileges and immunities to carry out their functions under the Kyoto Protocol, and what process shall be put in place to settle disputes brought by third parties.
