

24 February 2006

ENGLISH ONLY*

UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

SUBSIDIARY BODY FOR IMPLEMENTATION

Twenty-fourth session

Bonn, 18–26 May 2006

Item 13 (c) of the provisional agenda

Administrative, financial and institutional matters

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

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

Submissions from Parties

1. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, by its decision 33/CMP.1, invited Parties to submit to the secretariat, by 13 February 2006, their views on privileges and immunities for individuals serving on constituted bodies established under the Kyoto Protocol.
2. The secretariat has received five such submissions. In accordance with the procedure for miscellaneous documents, these submissions are attached and reproduced* in the language in which they were received and without formal editing.

* These submissions have been electronically imported in order to make them available on electronic systems, including the World Wide Web. The secretariat has made every effort to ensure the correct reproduction of the texts as submitted.

CONTENTS

	<i>Page</i>
1. ARGENTINA (Submission received 15 February 2006)	3
2. AUSTRIA ON BEHALF OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES* (Submission received 31 January 2006)	4
3. JAPAN (Submission received 22 February 2006)	5
4. MEXICO (Submission received 20 February 2006)	6
5. UZBEKISTAN (Submission received 22 February 2006)	7

* This submission is supported by Bulgaria, Romania, Croatia, Albania, Bosnia and Herzegovina, The former Yugoslav Republic of Macedonia, and Serbia and Montenegro.

PAPER NO. 1: ARGENTINA

With reference to the issue above, Argentina would like to submit to SBI-24 the following comments as requested per document FCCC/SBI/2005/L.32 para. 6:

The potential threat of legal actions against the members of constituted bodies under the Kyoto Protocol, in particular, the Executive Board, implies a serious hurdle for the normal operation of these bodies. This may discourage experts from participating in the deliberations of the Protocol bodies undermining their functioning.

Argentina shares the view that some action should be taken by the Parties in order to address this issue. The options put forward by the Secretariat in document FCCC/KP/CMP/2005/6 are a good starting point for discussions and deserve further consideration at SBI-24.

From a legal point of view, Argentina considers that the most appropriate mechanism to establish a binding privileges and immunities regime is the adoption of an amendment to the Kyoto Protocol pursuant to its article 20. The amendment would confer privileges and immunities on representatives and members of the Protocol bodies when performing official functions under the Protocol. As the Secretariat points out in para. 55 of its document, once the amendment came into force, the Parties would be obliged to ensure that their national law reflected the regime adopted by the amendment. Furthermore, the privileges and immunities incorporated to the Kyoto Protocol will be automatically exigible to all the Parties to the amended Protocol, which could not invoke their domestic law in order to justify their non compliance with that regime according to article 27 of the Vienna Convention on the Law of the Treaties.

In case the Parties to the Kyoto Protocol decide to amend the Protocol, the specific content of such an amendment should be considered.

Argentina prefers the amendment option for both reasons of legal certainty and enforceability. Nevertheless, Argentina agrees with the Secretariat's opinion that adopting an amendment is a lengthy process and until its entry into force no privileges and immunities would be available to the experts concerned. Further, after its entry into force the amendment would be only applicable to those Parties for which the agreement has entered into force and different regimes would therefore apply.

Having said that, it is Argentina's view that some interim solution is also necessary.

A legally viable way out could be the option contained in para. 46 of the Secretariat's document. Any private or national entities seeking to participate in mechanisms pursuant to the Kyoto Protocol, or seeking designation as operational entities, would 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 by the COP/MOP.

A COP/MOP decision could incorporate to the CDM regime the requirement for all such national/private entities to agree in writing that any claim must be made at the headquarters of the Secretariat pursuant to the regime on the Headquarters Agreement.

Even though such an agreement do not have the legal form of an international treaty opposable to the States and would only oblige the national/private entities according to their own capacities and competences, it will in fact imply an anticipated renunciation to initiate legal actions made personally against the members, alternates and experts of the bodies constituted under the Protocol.

PAPER NO. 2: AUSTRIA ON BEHALF OF THE EUROPEAN COMMUNITY AND
ITS MEMBER STATES

This submission is supported by Bulgaria, Romania, Croatia, Albania, Bosnia and Herzegovina, former Yugoslav Republic of Macedonia and Serbia and Montenegro

Submitted at the 24th Session of SBI

15 May 2006

Agenda Item 13 (c)

Administrative, financial and institutional matters. Views from Parties on privileges and immunities for individuals serving on constituted bodies established under the Kyoto Protocol

Austria, on behalf of the European Community and its Member States, welcomes this opportunity to submit views on the issue of Privileges and Immunities for Individuals serving on Constituted Bodies under the Kyoto Protocol.

The European Union wishes to express its gratitude to the Secretariat for preparing document FCCC/KP/CMP/2005/6 on Privileges and Immunities for Individuals serving on Constituted Bodies under the Kyoto Protocol.

The issues raised in the document need to be analysed in detail as they raise fundamental questions on the status of the members of the Constituted Bodies. The potential risk (although low) to be sued before national courts exists, in particular, for members, alternates and experts serving in their individual capacity on the CMD Executive Board, the Article 6 Supervisory Committee, the Compliance Committee (enforcement branch) and the Experts Review Teams. The above listed bodies are central for the successful operation of the Kyoto Protocol.

Therefore, for the European Union it is of utmost importance to ensure the effective functioning of the Kyoto Protocol bodies and for this purpose members of constituted bodies must be adequately protected from claims before local courts against them. Thus, the European Union hopes that a speedy and effective solution on privileges and immunities is to be found. We therefore welcome the decision taken at CMP.1 which “requests the Executive Secretary to consult the United Nations Secretary-General on the issues of ensuring necessary privileges and immunities for individuals serving on the constituted bodies established under the Kyoto Protocol.”

In our view, a solution within the existing legal framework elaborated under the auspice of the United Nations would be best suited to ensure effective functioning of the Kyoto Protocol bodies. Particular consideration should be given to the provisions of the Convention on the Privileges and Immunities of the United Nations 1946 and the opinions of the International Court of Justice.

In support of a speedy and effective solution we would welcome that as a first step all third party claims against members of Kyoto Protocol bodies are to be reported to the Executive Secretary. In such cases the Executive Secretary should explain the legal situation of the individual concerned to the competent authorities (i.e. court or administrative authorities) of the country in question, i.e. that the individual acted within the framework of the Kyoto Protocol fulfilling specific functions. Furthermore, the Executive Secretary should provide legal advice to the individual concerned or instruct lawyers to assist the individual.

In our view, the collection of information on cases as well as the support given to the individual would assist the Subsidiary Body on Implementation in its further considerations of privileges and immunities for individuals serving on constituted bodies.

PAPER NO. 3: JAPAN

Administrative, financial and institutional matters: Consideration on privileges and immunities for individuals serving on the constituted bodies established under the Kyoto Protocol

Japan shares the concern of the Secretariat expressed in the document FCCC/KP/CMP/2005/6 and the importance of conferring privileges and immunities to the members of the constituted bodies.

We, however, find it difficult at this moment to express our views as to which legal framework of privileges and immunities among those proposed in paragraph 38, FCCC/KP/CMP/2005/6 would be appropriate, since the content and the extent of privileges and immunities we should confer have not yet been fully examined.

We, therefore, request further information from the Secretariat on the following points;

1. Specific cases in which privileges and immunities are deemed necessary (actual precedents, possible cases which might occur in relation to provisions of the Protocol, frequency of occurrence, alternative measures to process the cases)
2. Contents of privileges and immunities to be conferred
3. Subjects to which privileges and immunities are to be conferred (constituted bodies established under the Kyoto Protocol, individuals serving on these bodies, capacities, tasks and responsibilities of those individuals)
4. Possible benefits, and implications for the Parties by conferring those privileges and immunities

PAPER NO. 4: MEXICO

ADMINISTRATIVE, FINANCIAL AND INSTITUTIONAL MATTERS

PRIVILEGES AND IMMUNITIES FOR INDIVIDUALS SERVING ON CONSTITUTED BODIES ESTABLISHED UNDER THE KYOTO PROTOCOL

SUBMISSION FROM THE GOVERNMENT OF MEXICO

I. MANDATE

The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (COP/MOP) at its first session (Montreal, Canada, 28 November – 9 December 2005), invited Parties to submit to the Secretariat, by 13 February 2006, their views on privileges and immunities for individuals serving on constituted bodies established under the Kyoto Protocol for consideration by the Subsidiary Body for Implementation at its twenty-fourth session (May 2006), with a view to preparing a draft decision for adoption by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its second session.

Mexico welcomes this opportunity to provide views and submits the following inputs on the issue.

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

1. Mexico attaches the highest importance to the issue of privileges and immunities for individuals serving on the above mentioned constituted bodies, as a means to ensure their proper functioning. As a result, among the different options considered to provide privileges and immunities to the civil servants working under the framework of the Kyoto Protocol, the Mexican Government favours the negotiation of an “Umbrella Agreement”.
2. Currently the Headquarters Agreement with the German Government applies only to the civil servants working permanently in that State.
3. In this regard, when Mexico receives a request from an international agency to establish its Headquarter or a Representative Office in Mexico’s territory, the government negotiates a Headquarters Agreement, specifying the obligations of the international agency in Mexican territory, as well as the privileges and immunities granted by the Mexican government as host country.
4. The Headquarters Agreement has the hierarchical level of a Treaty, requiring the approval of the Mexican State to enter into force, due to the fact that its provisions are “exceptions” to legislative norms.
5. Therefore, even though the negotiation of an “Umbrella Agreement” entails a long process at the international and domestic levels, our country considers such an Agreement as the soundest legal option.

PAPER NO. 5: UZBEKISTAN

The opinion of the Republic of Uzbekistan on the privileges and immunities of persons working in the official bodies set up in accordance with the Kyoto Protocol

The Republic of Uzbekistan supports the efforts of Secretariat on the creation of favourable conditions for the persons working in the official bodies set up in accordance with the Kyoto Protocol.

In the processes of the Kyoto mechanisms implementation in the adjustment of the differences with the third parties the provision of the privileges and immunities is important for the persons working in the official bodies set up in accordance with the Kyoto Protocol.

To our opinion, the following version of the proposed in FCCC/KP/CMP/2005/6 document options of the privileges and immunities set up is the most accessible and easiest for the implementation:

“To entrust the Executive Secretary of UNFCCC with the regulation of all claims against persons working in the official bodies set up in accordance with the Kyoto Protocol”.

- - - - -