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气候变化框架公约

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作为《京都议定书》缔约方会议的《公约》缔约方会议
第六届会议
2010 年 11 月 29 日至 12 月 10 日在 X 举行
临时议程项目 X

克罗地亚对遵约委员会强制执行事务组的一项最后决定的上诉

秘书处的说明

1. 2009 年 11 月 26 日， 遵约委员会强制执行事务组通过了一项最后决定(CC-2009-1-8/Croatia/EB 号文件)，[1] 确定克罗地亚没有遵照执行《东京议定书》第三条第 7 和 8 款、以及《东京议定书》第七条第 4 款下的计算分配数量的方式(第 13/CMP.1 号决定)依照与《京都议定书》之下的遵约有关的程序和机制的第九节第 10 段(第 27/CMP.1 号决定的附件；下称“程序和机制”)的规定，克罗地亚于 2009 年 12 月 1 日接获关于这项最后决定的书面通知。

2. 2010 年 1 月 14 日，秘书处接到克罗地亚对上文第一段提及的最后决定提出的上诉。上诉书按照“《京都议定书》遵约委员会议事规则”第二条 k 款的规定由克罗地亚指定人员签署(第 4/CMP.2 号决定附件和第 4/CMP.4 号决定附件所载的修订)，由克罗地亚气候变化国家联络中心送交秘书处。

3. “程序和机制”第十一节第 2 段规定，作为《东京议定书》缔约方会议的《公约》缔约方会议应在该缔约方提出上诉后的第一届会议上审议这一上诉。“程序和机制”第十一节第 3 段还规定，作为《东京议定书》缔约方会议的《公约》缔约方会议可由出席会议并参加表决的缔约方四分之三多数否决强制执行事务组的决定。如遇这种情况，作为《议定书》缔约方会议的《公约》缔约方会议应将上诉事项退回执行事务组处理。根据第十一节第 4 段，在就上诉作出决定以前，强制执行事务组的决定将维持不变。

[1] 这项决定以联合国六种正式语文刊载于<http//unfccc.int/kyoto_protocol/compliance/enforcement_branch/items/3785.php>。本文件附件中载有上述决定的副本。

4. 上诉书以及上诉书后所列文件载于本文件的附件中，按原文文本照印，未经正式编辑。*

5. 请作为《东京议定书》缔约方会议的《公约》缔约方会议审议克罗地亚的上诉，并酌情作出任何决定。

* 上诉书以及上诉书后所列文件已有电子本输入包括万维网在内的电子系统，供查阅。秘书处已尽力确保提交的文本准确无误地照样复制。

Annex[*]

[ENGLISH ONLY]

Appeal by Croatia against a final decision of the enforcement branch of the Compliance Committee, and related documentation

REPUBLIC OF CROATIA

MINISTRY OF ENVIRONMENTAL PROTECTION,

PHYSICAL PLANNING AND CONSTRUCTION

CONFERENCE OF THE PARTIES

SERVING AS THE MEETING OF THE PARTIES

Secretariat

UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

Executive Secretary

APPEAL OF THE REPUBLIC OF CROATIA

against

Final decision CC-2009-1-8/Croatia/EB

of

Enforcement branch of the Compliance Committee

Zagreb, 14 January 2010

[*] Translations of the appeal and the documents listed at the end of the appeal are available at: <http://unfccc.int/documentation/documents/document_lists/items/2960.php>.

In accordance with section XI of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1, the Republic of Croatia hereby lodges its appeal against the final decision CC-2009-1-8/Croatia/EB of the enforcement branch of the Compliance Committee adopted on 26 November 2009 for the reason of denial of due process, as follows hereinafter.

INTRODUCTORY NOTE

In light of respective appeal Croatia wishes to emphasise its strong commitment to fulfil its emission target under the Kyoto Protocol, as well as to continue complying with it in subsequent commitment periods. Although Croatia is already implementing a variety of measures in order to limit its anthropogenic emissions, the recognition of COP decision 7/CP.12 for Croatia is *conditio sine qua non* to keep Croatia on track towards attaining its Kyoto Protocol commitments. Therefore, Croatia would like to bring to the attention of the Conference of the Parties serving as the meeting of the Parties (CMP) the fact that a favourable outcome of this initiative resulting in recognition of COP decision 7/CP.12 shall, in Croatia's case, under no circumstance result in surplus emission allowance, but provide Croatia with a realistic opportunity to implement its commitments under the Kyoto Protocol, which otherwise shall prove impossible.

BACKGROUND

1. In its report FCCC/IRR/2008/HRV, regarding the review of Croatia's initial report, the expert review team (ERT) raised two questions of implementation relating to (i) Croatia's calculation of its assigned amount and compliance with Article 3, paragraphs 7 and 8 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (the Convention) and the modalities for accounting of assigned amounts under Article 7, paragraph 4 of the Kyoto Protocol, elaborated by decision 13/CMP.1, as well as (ii) Croatia's calculation of its commitment period reserves and its compliance with mentioned modalities for accounting of assigned amounts.

2. The resolution of the second question of implementation above, follows on from the resolution of the first, i.e. whether the addition of 3.5 million tonnes (Mt) carbon dioxide equivalent (CO_2 eq) by Croatia to its base year level following decision 7/CP.12 is in accordance with the Kyoto Protocol.

Decision 7/CP.12

Level of emissions for the base year of Croatia

The Conference of the Parties,

Recalling Article 4, paragraph 6, of the Convention,

Responding to the request of the Government of Croatia that its base year greenhouse gas emissions be considered in accordance with Article 4, paragraph 6, of the Convention,

Recalling decisions 9/CP.2, 11/CP.4 and 10/CP.11,

Taking into account the submission from Croatia contained in FCCC/SBI/2006/MISC.1,

Noting the report of the individual review of the greenhouse gas inventory of Croatia submitted in 2004 and contained in FCCC/WEB/IRI/2004/HRV, which, inter alia, recognized that the greenhouse gas inventory of Croatia does not contain emissions from power plants outside the boundaries of Croatia for 1990 or subsequent years,

Noting that this decision has no implications for historical emission levels of any other Party, in particular for Bosnia and Herzegovina, Serbia, and Montenegro,

Considering that the flexibility under Article 4, paragraph 6, of the Convention to choose a base year different from 1990, in order to take into account the economic circumstances of countries undergoing the process of transition to a market economy, **has previously been invoked by five Parties,**

Considering the specific circumstances of Croatia with regard to greenhouse gas emissions before and after 1990, and the structure of the electricity generation sector of the former Yugoslavia,

Noting the intention that the approach taken should be conservative, and that unduly high flexibility should not be provided,

1. *Notes* that the inventory reported in 2004 showed the total greenhouse gas emissions in 1990 to be 31.7 Mt CO2 equivalent；

2. *Decides* that Croatia, having invoked Article 4, paragraph 6, of the Convention, shall be allowed to add 3.5 Mt CO2 equivalent to its 1990 level of greenhouse gas emissions not controlled by the Montreal Protocol for the purpose of establishing the level of emissions for the base year for implementation of its commitments under Article 4, paragraph 2, of the Convention.

The disputed decision 7/CP.12 referring to Croatia, was adopted based on Article 4, paragraph 6, of the Convention and COP decision 9/CP.2, identical to the earlier comparable cases of five other countries undergoing the process of transition to a market economy, namely Bulgaria, Romania, Poland, Hungary and Slovenia. Prior to Croatia's case, these countries were granted flexibility on the same grounds for the purpose of implementation of commitments under the Kyoto Protocol.

3. The enforcement branch of the Compliance Committee (EBCC) proceeded with respective questions of implementation regarding Croatia and upon its evaluation adopted the preliminary finding of non-compliance CC-2009-1-6/Croatia/EB dated 13 October 2009 (the preliminary decision)， disregarding decision 7/CP.12 adopted by the Conference of the Parties (COP) as not applicable to the Kyoto Protocol, and suggested reverting the issue to the Conference of the Parties serving as meeting of the Parties (CMP).

4. Croatia opposed these arguments and the conclusion of the preliminary finding CC-2009-1-6/Croatia/EB adopted by EBCC, by way of its Statement of position CC-2009-1-7/Croatia/EB, dated 12 November 2009, as well as in its address to the EBCC at its 8th meeting held 23 – 24 November 2009, in Bonn, Germany, where Croatia pointed to a clear violation of the equal treatment principle and other irregularities.

5. Upon further consideration of the Statement of position CC-2009-1-7/Croatia/EB, the EBCC adopted its final decision CC-2009-1-8/Croatia/EB, upholding in its entirety the preliminary finding CC-2009-1-6/Croatia/EB (the final decision)， whilst unexpectedly noting that securing equal treatment of Parties, as well as, the application of decision 11/CP.4 for Slovenia and decision 14/CP.7 for Iceland under the Kyoto Protocol, was not within its mandate, and once again recommended that Croatia revert the issue to the CMP.

6. Croatia continued to strongly oppose the final decision CC-2009-1-8/Croatia/EB, by submitting its Comments on the final decision dated 24 December 2009, in which it pointed out numerous violations of the provisions of the Convention, the Kyoto Protocol, the COP and the CMP decisions and international law principles, including the equal treatment principle respectively.

7. Croatia disputes the final decision CC-2009-1-8/Croatia/EB in its entirety by way of this appeal.

REASONING

8. Violation of Article 31, paragraph 1 and 2 of the Vienna Convention on the Law of Treaties

In paragraph 3(a) of the final decision EBCC states：

> Final decision, paragraph 3
>
> (a) Pursuant to Article 31 of the 1969 Vienna Convention on the Law of Treaties and customary international law, a treaty must 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. In addressing the questions of implementation before it, the enforcement branch followed this general rule and was not persuaded that it is necessary to follow another method of interpretation.

The final decision is not in line with Article 31, paragraphs 1 and 2 of the Vienna Convention on the Law of Treaties, requiring that a treaty should be (i) interpreted in good faith and (ii) in light of its object and purpose, and that (iii) for the purpose of interpretation both the annex and the preamble of the treaty should be taken into consideration. Therefore, the Vienna Convention on the Law of Treaties obviously calls for the broadest possible perspective to be taken into account in cases where interpretation of an international treaty is necessary for resolving any matter under the same treaty. This applies to the Croatian case as well.

Contrary to above, the EBCC based its preliminary finding and final decision on the assumption that no explicit provision of the Kyoto Protocol or CMP decision allows COP decision 7/CP.12 referring to Croatia, to be applied for the purposes of the Kyoto Protocol. The EBCC essentially failed to recognize that the Kyoto Protocol should be read in furtherance to and in line with the Convention from which it derives, particularly in observing the preamble of the Kyoto Protocol and the Convention's object and purpose.

Under its preamble, the Kyoto Protocol was adopted 'in pursuit of the ultimate objective of the Convention as stated in Article 2'， 'recalling the provisions of the Convention'， 'being guided by Article 3 of the Convention'， and 'pursuant to Berlin Mandate adopted by decision 1/CP.1 of the Conference of the Parties to the Convention at its first session'. It is without doubt that, the Kyoto Protocol is profoundly based on and derives from the Convention, and that it should always be interpreted in line with the Convention, primarily with regard to its object and purpose.

With respect to the Convention's ultimate objective and purpose – the process of stabilization of greenhouse gas (GHG) concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interferences with the climate system – one should note that the Convention's success, in particular the achievement of its objective and purpose, entirely depends on determining, as accurately as possible, the actual amount of GHG concentrations of each Party to the Convention at the starting point, the base year or period (the initial level of GHG emissions). In addition to establishing the initial levels of GHG emissions, Article 3 of the Convention sets out principles guiding the Convention striving for an 'equitable approach in accordance with common but differentiated responsibilities and respective capabilities' and 'the right to

promote sustainable development', calling for an individual and equitable approach to each Party's specific circumstances in achieving the Convention's goals.

Applied to Croatia's case, the aforementioned imposes an obligation that specific circumstances with regard to GHG emissions before and after 1990, as well as to the structure of the electricity generation sector of former Yugoslavia should be observed, in order to establish at least relatively accurate and fair initial level of Croatian GHG emissions in the base year, and provide Croatia with an opportunity to fulfil the Convention's and the Kyoto Protocol targets. In particular, Croatia once again emphasises that it gained independence in 1991, and that in 1990 (the base year), only 27% of its consumed electricity was generated in fossil-fuelled power plants located on Croatian territory, sourcing the remainder from power plants located elsewhere in other former Yugoslav republics, which are now sovereign and independent states. Obviously neither 1990, nor any other historical base year or period, addresses Croatia's specific circumstances, thus requiring a differentiated approach to be applied in Croatia's case.

For that particular reason, noting that the base year or period other than 1990 would not solve the problem, the Parties to the Convention adopted COP decision 7/CP.12, thereby recognizing specific historical circumstances in allowing Croatia to add 3.5 Mt CO_2 equivalent to its 1990 level of greenhouse gas emissions (amounting to 31.7 Mt CO_2) not controlled by the Montreal Protocol, for the purpose of establishing the level of emissions for the base year for implementation of its commitments under Article 4, paragraph 2, of the Convention. By virtue of doing so, the Parties to the Convention took into consideration not only Croatia's specific circumstances, but also established a fair initial level of GHG emissions for Croatia in the base year, applied the 'common but differentiated responsibilities' principle to Croatia's case, as well as allowed for further 'sustainable development' and furthermore, 'enhanced Croatia's ability to address climate change', the latter being required pursuant to Article 4, paragraph 6, of the Convention. The EBCC's final decision fails to reflect any of the aforementioned requirements, thereby avoiding an equitable and reasonable solution to the distinctiveness of Croatia's situation.

This restrictive interpretation by the EBCC, further contradicts the fact that, the Kyoto Protocol was adopted in furtherance of and based on the Berlin Mandate, as laid out in decision 1/CP.1 of the Conference of the Parties, following the review of Article 4, paragraphs 2(a) and (b), of the Convention and the subsequent conclusion that the aforementioned paragraphs were inadequate. Indeed, the Berlin Mandate opted for strengthening the commitments of the Parties under Article 4, paragraph 2(a) and (b),), in order to ensure effective achievement of the Convention's goals. This initiative resulted in the adoption of the Kyoto Protocol. As the Kyoto Protocol derived from Article 4, paragraph 2 of the Convention, it should obviously be read in light of the Convention and its objective and purpose. It is important to note here that Croatia was granted flexibility for the implementation of its commitments under, no other but, Article 4, paragraph 2, of the Convention.

As indicated above, the Convention and the Kyoto Protocol form an inseparable body of principles, rules and regulations that should be read and interpreted together in unison. Therefore, when interpreting provisions of the Kyoto Protocol, the EBCC should have taken into consideration the preamble of the Kyoto Protocol, which recalls the United Nations Framework Convention on Climate Change, in particular the pursuit of the Convention's ultimate objective (Article 2), its guiding principles (Article 3), its obligation to enhance Croatia's ability to address climate change (Article 4, paragraph 6), and the Berlin Mandate (decision 1/CP.1). Accordingly, pursuant to the preamble of the Kyoto Protocol and international legal standards, the EBCC was under the obligation to interpret the Kyoto Protocol as an extension of the Convention and in light of its objective and purpose, instead of treating it as an entirely separate treaty. Had the EBCC followed this course of action, an equitable decision would be one that would respect Croatia's particular

circumstances and capabilities as previously recognized under the Convention pursuant to decision 7/CP.12, for the purpose of implementation of Croatian commitments under the Kyoto Protocol.

As a further argument in favour of Croatia's position that the Kyoto Protocol should have been interpreted in accordance with the Convention, is the fact that the Kyoto Protocol in no way regulates the base year or period and initial level of GHG emissions. These categories arise directly from the Convention and respective COP decisions (such as decision 7/CP.12). Accordingly, the EBCC should have reverted to the Convention and decision 7/CP.12 in the case of Croatia, as it previously did in comparable cases of some other Parties, as explained further hereinafter.

Finally, by requiring that a treaty be interpreted in good faith and in light of its object and purpose, the Vienna Convention on the Law of Treaties entirely endorses and favours a teleological interpretation of treaties over a grammatical one, as Croatia advocates and insists upon.

In delivering its final decision, the EBCC failed to take into consideration all the aforementioned factors, particularly the broader prospective of the issue in Croatia's case that calls for establishing a fair and equitable initial level of GHG emissions for Croatia, in order for it to be in a position to fulfil the Convention's ultimate objective.

With respect to Croatia's arguments as to the manifest violation of a *bona fide* principle, please refer to paragraph 15 below.

9. Violation of Article 31, paragraph 3(b) of the Vienna Convention on the Law of Treaties

It should be further noted that paragraph 3(a) of the final decision and its interpretation of the Kyoto Protocol, is not in line with Article 31, paragraph 3(b) of the Vienna Convention on the Law of Treaties, which stipulates that any subsequent practice in the application of the treaty shall be taken into account regarding its interpretation.

Contrary to the above, the EBCC failed to take into consideration flexibility for application of the Kyoto Protocol target as allowed under the Convention in the comparable cases of Bulgaria, Hungary, Poland, Romania, Slovenia and Iceland. In all these cases flexibility was granted under the Convention by the decisions of the Conference of the Parties (decisions 9/CP.2, 11/CP.4 and 14/CP.7). Furthermore, in all the aforementioned cases, the granted flexibility was recognized under the Kyoto Protocol directly for the implementation of its commitments, without ever requiring additional confirmation by the Conference of the Parties serving as the meeting of the Parties, or any other body. In these cases, no objections were raised by relevant bodies of the Kyoto Protocol to such implementation of COP decisions under the Kyoto Protocol whatsoever, except with respect to Croatia.

Although Croatia sought and was provided with, flexibility identical to those of Bulgaria, Hungary, Poland, Romania, Slovenia and Iceland, for reasons incomprehensible to Croatia, the EBCC failed to recognize the respective flexibility under COP decision 7/CP.12, thus preventing Croatia from accomplishing the 2012 emissions target.

The EBCC should have taken under advisement these respective precedents clearly constituting subsequent practice in application of the Kyoto Protocol, pursuant to Article 31, paragraph 3(b), of the Vienna Convention on the Law of Treaties. Hence, the EBCC and bodies of the Kyoto Protocol already set a transparent and consistent practice (precedents) for the recognition of flexibility for Croatia under decision 7/CP.12 with respect to the Kyoto Protocol, as previously done in all the aforementioned cases.

This fact alone represents a clear violation of the equal treatment principle.

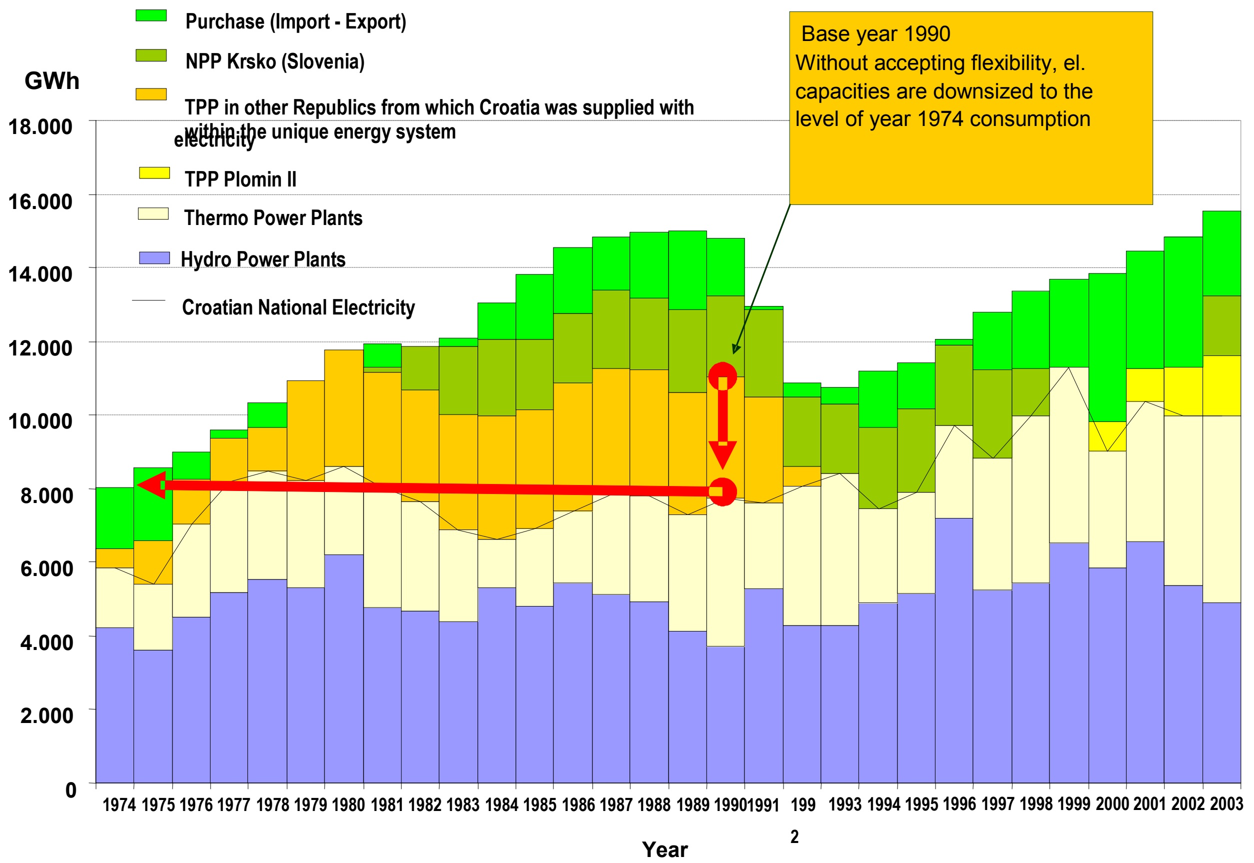
10. Violation of Article 32 of the Vienna Convention on the Law of Treaties

It should be further noted that with regard to paragraph 3(a) of the final decision and interpretation of the Kyoto Protocol, the final decision is not in line with Article 32 of the Vienna Convention on the Law of Treaties, which stipulates that when the interpretation of the treaty leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion should be taken into account.

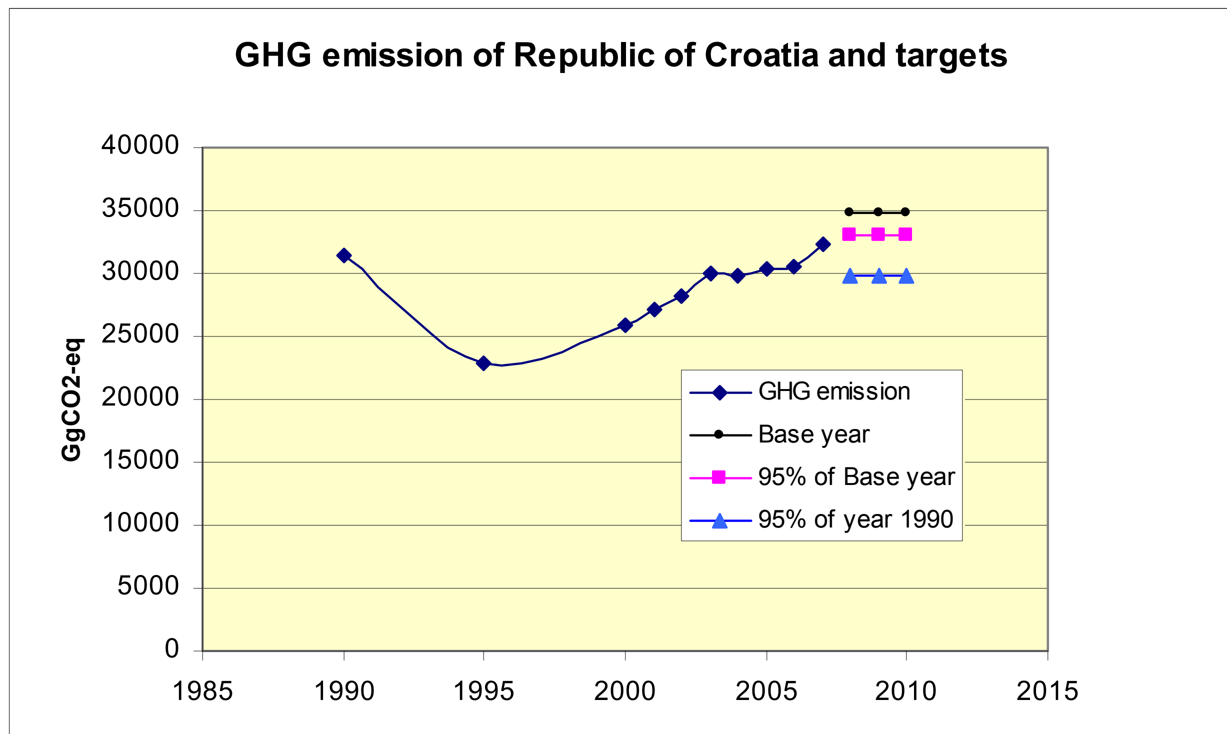
As pointed out by Croatia during the entire procedure before the Compliance Committee, the EBCC's final decision of non-compliance denying flexibility to Croatia under decision 7/CP.12 is manifestly absurd and unreasonable from several different aspects, as explained further:

(i) Bearing in mind that the denial of already approved flexibility for Croatia's particularities would *de facto* set back the Croatian economy for decades to energy demands from 1974.

On several occasions Croatia explained in great detail the uniqueness of the energy system, which existed in the former Yugoslavia, within which Croatia was compelled to invest in thermal power plants located in other Social Federal Republics of the former Yugoslavia. It is important to note that the former State had a single energy system for all of its six federal states and two autonomous regions, as well as that its Energy strategy was based on policies by which the power production facilities were constructed and maintained in the vicinity of coal mines, none of which, unfortunately, was situated on the Croatian territory. For this reason, Croatia was prevented from investing in electricity generation capacities based on fossil fuels on its own territory. This turn of events resulted in a situation where Croatia in 1990 sourced only 27% (or 4 TWh) of consumed electricity from fossil-fuelled power plants on its territory. Hence, in 1990 Croatia's own generation of electricity was sufficient only to meet demand levels from 1974 or earlier. Therefore, in practical terms, denying flexibility to Croatia under decision 7/CP.12, would artificially reduce Croatia's electricity needs to demand levels from 1974. Here it should be noted that neither the year 1990 nor any other historical base year or period, addresses Croatia's specific circumstances, by reason of which the flexibility was required and achieved, in order to reflect Croatia's particular circumstances and enable Croatia to meet required targets under the Convention and the Kyoto Protocol, as described in the tables below.



Purchase (Import - Export)
NPP Krsko (Slovenia)
TPP in other Republics from which Croatia was supplied with electricity within the unique energy system
TPP Plomin II
Thermo Power Plants
Hydro Power Plants
Croatian National Electricity
GWh
18.000
16.000
14.000
12.000
10.000
8.000
6.000
4.000
2.000
0
Base year 1990
Without accepting flexibility, el. capacities are downsized to the level of year 1974 consumption
1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003
Year



GHG emission of Republic of Croatia and targets
GgCO2-eq
40000
35000
30000
25000
20000
15000
10000
5000
0
1985
1990
1995
2000
2005
2010
2015
GHG emission
Base year
95% of Base year
95% of year 1990

(ii) Bearing in mind that by ignoring decision 7/CP.12, Croatia was and still is in non-compliance with the GHG emissions target under the Convention and the Kyoto Protocol as of year 2005 onwards (as described in the table above)， which was the exact reason why the flexibility was allowed to Croatia.

(iii) Bearing in mind that decision 7/CP.12 was adopted on 17 November 2006, at a point of time when the Kyoto Protocol was already in force and when Croatia was well aware of its future commitments, if it ratified the Kyoto Protocol. For this exact reason, adopting decision 7/CP.12 was a crucial precondition set by Croatia with respect to its ratification, in order to ensure Croatia's compliance with the Kyoto Protocol.

(iv) Bearing in mind that if not applied to the first commitment period decision 7/CP.12 is literally meaningless for Croatia and would give rise to a critical situation in the country, in terms of economy and otherwise.

(v) Bearing in mind that at the point of time when the decision 7/CP.12 was adopted in 2006, Croatia was no longer in position of intervening in the text of the Kyoto protocol to clarify beyond a doubt that the respective decision is applicable to the Kyoto Protocol, thereby avoiding an unnecessary predicament by this proceeding.

(vi) Bearing in mind that, implementation of commitments under any commitment period, shall always be calculated as of the initial level of GHG emissions in 1990 or other base year or period. However in Croatia's case, if the disputed final decision would stand as is, this could result in an absurd outcome that flexibility is denied for the first commitment period and accepted for the second and any subsequent periods. It should be noted in particular that Croatia shall (again) request acknowledgment of flexibility under decision 7/CP.12 as a precondition for its ratification of a new commitment period instrument.

When adopting the final decision, the EBCC failed to take into consideration：

(a) consequences for Croatia arising from the dissolution of the former Yugoslavia as explicitly recognized by decision 7/CP.12 of the Conference of Parties whereby, based on Article 4, paragraph 6, of the Convention, Croatia was allowed to add 3.5 Mt CO2 equivalent to its 1990 level of GHG emissions not controlled by the Montreal Protocol for the purpose of establishing the level of emissions for the base year for implementation of its commitments under Article 4, paragraph 2, of the Convention；

(b) that Croatia and the Parties to the Convention were well fully cognisant of Croatia's historical circumstances and its inability to meet the 2012 Kyoto Protocol target. The Parties to the Convention acknowledged this by virtue of their unanimous adoption of decision 7/CP.12, thereby ensuring that Croatia would have a fair chance of meeting the required target, which would otherwise, undisputedly prove impossible；

(c) that decision 7/CP.12 was a vital precondition for Croatia to ratify the Kyoto Protocol, and

(d) that in the official List of Annex I Parties to the Convention published on official UNFCCC internet site (http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php) ， Croatia was explicitly recognized as a "*Party for which there is a specific COP and/or CMP decision*" – the respective decisions being 4/CP.3, 10/CP.11 and 7/CP.12.

The EBCC conclusion that the relevance of COP decisions 9/CP.2 and 7/CP.12 is restricted only to implementation of commitments under the Convention, and that the first commitment period under the Kyoto Protocol remains excluded, is not only absurd and unreasonable but simply beyond comprehension. The EBCC omitted to note that the objective of the Convention and any of its protocols elaborating the Convention is the same – gradual global reduction of level of GHG emissions. Therefore, if objective is the same, what would be rationale and justification behind the alleged approval of the flexibility under the Convention and, at the same time, denial of such flexibility under the protocol to the same Convention, especially when noting that the initial level of GHG emission of any Party is regulated solely under the Convention and relevant COP decisions. The EBCC failed to elaborate this inconsistency in its final decision.

All these omissions resulted in the EBCC's final decision being absurd and unreasonable, particularly in light of Croatia's historical circumstances and circumstances leading to the ratification of the Kyoto Protocol by Croatia.

11. Improper application of Article 3, paragraph 5, of the Kyoto Protocol

The Article 3, paragraph 5 and 6, of the Kyoto Protocol reads:

Kyoto Protocol, Article 3

5. The Parties included in Annex I undergoing the process of transition to a market economy whose base year or period was established pursuant to **decision 9/CP.2** of the Conference of the Parties at its second session shall use that base year or period for the implementation of their commitments under this Article. Any other Party included in Annex I undergoing the process of transition to a market economy which has not yet submitted its first national communication under Article 12 of the Convention may also notify the Conference of the Parties serving as the meeting of the Parties to this Protocol that it intends to use an historical base year or period other than 1990 for the implementation of its commitments under this Article. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall decide on the acceptance of such notification.

6. Taking into account Article 4, paragraph 6, of the Convention, in the implementation of their commitments under this Protocol other than those under this Article, a certain degree of flexibility shall be allowed by the Conference of the Parties serving as the meeting of the Parties to this Protocol to the Parties included in Annex I undergoing the process of transition to a market economy.

Pursuant to the first sentence of Article 3, paragraph 5 of the Kyoto Protocol, Annex I Parties undergoing the process of transition to a market economy (EIT Parties) whose base year or period was established pursuant to decision 9/CP.2 of the Conference of Parties at its second session shall use that base year or period for the implementation of their commitments under the Kyoto Protocol. This particular provision is applicable without prejudice to Croatia's case, since decision 7/CP.12 is explicitly based on decision 9/CP.2.

The EBCC's interpretation of respective provision is as follows:

Final decision, paragraph 3

(b) Article 3, paragraph 5, of the Kyoto Protocol limits the flexibility available to Parties included in Annex I undergoing the process of transition to a market economy (EIT Parties) for the implementation of their commitments under Article 3 of the Kyoto Protocol to the use of an historical base year or period other than 1990. The first sentence of Article 3, paragraph 5, of the Kyoto Protocol explicitly determines the historical base year or period **for the four EIT Parties identified in decision 9/CP.2**. The second and third sentences of Article 3, paragraph 5, of the Kyoto Protocol provide for other EIT Parties to use an historical base year or period other than 1990 in certain circumstances, subject to notification to and acceptance by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP).

The EBCC's understanding of the relevant paragraph of the Kyoto Protocol, using very strict, inflexible and purely *grammatical* interpretation, results in the following conclusions: (i) flexibility available to EIT Parties is limited solely to the use of a base year or period other than 1990 (no other form of flexibility is allowed), and (ii) flexibility is allowed only to four EIT Parties explicitly indentified in decision 9/CP.2 (no other Party may use flexibility under decision 9/CP.2), and (iii) no confirmation of the CMP or other Kyoto Protocol body is required for recognition of flexibilities granted under 9/CP.2 for the implementation of commitments under the Kyoto Protocol. The EBCC, consequently, concludes that Croatia may not invoke Article 3, paragraph 5, of the Kyoto Protocol as it has not met any of the above preconditions.

The final decision is not in line with Article 31, paragraphs 1, 2, and 3(b), as well as Article 32 of the Vienna Convention on the Law of Treaties. In adopting its final decision, the EBCC has not observed the object and purpose of the Convention, the main principles of the Convention, subsequent practice in application of the Convention, nor circumvented a manifestly absurd or unreasonable result in its respective final decision, as elaborated in paragraphs 8 – 10 above.

In Croatia's case, the EBCC's final decision obviously lacks the consideration of a broader perspective that may be achieved only through the use of a *teleological* (instead of grammatical) interpretation of the provisions of the Kyoto Protocol. In doing so the focus would be given to the intention of the Parties when drafting and adopting the Convention, as well as to the purpose of Article 4, paragraph 6 of the Convention, in particular respecting the historical circumstances of each individual Party.

When interpreting the respective provision, the EBCC should have chosen from among several possible interpretations, the one which is most conducive to putting the purpose of Article 3, paragraph 5, of the Kyoto Protocol into practice. Such (teleological) interpretation is clearly the only interpretation which authorises, as well as obliges, the EBCC to adopt a fair and equitable decision with respect to Croatia, by honouring the Convention, decisions 9/CP.2 and 7/CP.12, specific historical circumstances referring to Croatia, as well as the provisions of the Kyoto Protocol (as explained in paragraph 12 herein). A teleological interpretation is also mandatory in Croatia's case, bearing in mind that Croatia was not able to intervene into the text of the Kyoto Protocol *post festum* upon adoption of decision 7/CP.12, thus avoiding a restrictive interpretation of Article 3, paragraph 5, of the Kyoto Protocol and decision 9/CP. 2, as currently applied by the EBCC.

Contrary to the EBCC's understanding, the purpose and intention of the first sentence in Article 3, paragraph 5 of the Kyoto Protocol, is not the use of a base year or period (other than 1990) *per se,* but determining a historical base point for establishing a fair and just level of initial GHG emission of EIT Parties, such as Croatia. In the case of Croatia, due to the fact that in 1990 Croatia predominantly sourced its electricity from the former Federal Republics of Yugoslavia, (*nota bene,* in 1990 only 27% of consumed electricity was produced by Croatian fossil-fuelled power plants), its initial GHG emissions in 1990 produced on its territory did not reflect the quantity of GHG emissions Croatia was actually 'responsible' for. For this particular reason, initial GHG emissions of Croatia in 1990, in order to be fair and just, could not have been precisely calculated, rather they had to be established after rough estimation by COP decision 7/CP.12. Therefore, decision 7/CP.12 established Croatia's initial GHG emissions in 1990 in a fair and equitable manner, at the same time fulfilling the actual purpose and intention of Article 3, paragraph 5, first sentence, of the Kyoto Protocol, in light of objective and requirements of the Convention. Any other interpretation would result in recognition of Croatia's initial GHG emissions in 1990 as the level from 1974, which is absurd both from the point of the Convention and the Kyoto Protocol.

The final decision is also not in line with decision 9/CP.2 of the Conference of the Parties adopted on 19 July 1996.

Decision 9/CP.2

5. Decides that the four Parties that have invoked Article 4.6 of the Convention, requesting in their first communications flexibility to use base years other than 1990, be allowed this degree of flexibility, as follows：

• Bulgaria： to use 1989 as a base year；

• Hungary： to use the average of the years 1985 to 1987 as a base year；

• Poland： to use 1988 as a base year；

• Romania： to use 1989 as a base year；

6. Requests the Subsidiary Body for Implementation to consider any additional requests on the basis of Article 4.6 of the Convention and to take decisions as appropriate on its behalf, and to report thereon to the Conference of the Parties；

7. Requests that the Annex I Parties with economies in transition invoking Article 4.6 of the Convention in the implementation of their commitments should do so by explicitly indicating the nature of this flexibility (e.g.， choice of a base year other than 1990, use of the revised guidelines for the preparation of national communications, schedule of submission of national inventory data other than indicated in paragraph 4 (b) above, etc.)， and should state clearly the special consideration they are seeking and provide an adequate explanation of their circumstances；

Paragraph 5 of decision 9/CP.2 explicitly identifies Bulgaria, Hungary, Poland and Romania as EIT Parties allowed to use, as a degree of flexibility the base year or period other than 1990. In addition, paragraphs 6 and 7 of decision 9/CP.2 clearly indicate that the nature of flexibility is in no way restricted, and under no circumstances limited to the use of a base year or period other than 1990. Therefore, contrary to the EBCC's perspective, it is beyond any doubt that the Parties of the Convention never intended to restrict the nature of respective flexibility with respect to the initial GHG emissions of EIT countries, thus providing a clear and obvious foundation for resolving any Party's particularities, including Croatia's. This standpoint is clearly put forward in the principles of the Convention calling for 'common but differentiated responsibilities'， a principle which applies to the Kyoto Protocol.

Bearing in mind that respective flexibility was already granted to Bulgaria, Hungary, Poland and Romania, that the flexibility is available to other EIT Parties (as confirmed by COP decisions for Slovenia and Croatia)， and that the nature of flexibility for EIT Parties is in no way restricted, such identical flexibility, as well as its overall effect extending over the Kyoto Protocol, should be recognized in Croatia's case on equal terms and to the fullest extent. The EBCC omitted to take note of all previous relevant factors in the Croatian case. However, a completely different approach was taken by the EBCC in the Bulgarian, Hungarian, Polish, Romanian and Slovenian cases where the ERT and EBCC immediately recognized flexibility under the Convention for the purpose of the Kyoto Protocol, as set out above.

12. Violation of COP and CMP decisions and provisions of Kyoto Protocol

In paragraph 3(c) of the final decision EBCC states：

Final decision, paragraph 3

(c) The application of decision 7/CP.12 under the Kyoto Protocol does not follow from any of the provisions of the Kyoto Protocol or from CMP decisions. Since the COP and the CMP are two distinct decision-making bodies, the fact that all Parties to the Kyoto Protocol are also Parties to the United Nations Framework Convention on Climate Change does not provide a sufficient basis for establishing the application of COP decisions under the Kyoto Protocol.

The EBCC concludes that application of decision 7/CP.12 does not follow from any of the provisions of the Kyoto Protocol or from CMP decisions. Croatia can only assume that the EBCC unintentionally omitted to take note of the following Kyoto Protocol provisions and CMP decisions：

> Kyoto Protocol, Article 7
>
> 1. Each Party included in Annex I shall incorporate in its annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol, submitted in accordance with the relevant decisions of the Conference of the Parties, the necessary supplementary information for the purposes of ensuring compliance with Article 3, to be determined in accordance with paragraph 4 below.
>
> Decision 13/CMP.1
>
> 7. Part one of the report referred to in paragraph 6 above shall contain the following information, or references to such information where it has been previously submitted to the secretariat：
>
> (a) Complete inventories of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for all years from 1990, or another approved base year or period under Article 3, paragraph 5, to the most recent year available, prepared in accordance with Article 5, paragraph 2, and relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (COP/MOP)， taking into account any relevant decisions of the Conference of the Parties.
>
> Kyoto Protocol, Article 8
>
> 1. The information submitted under Article 7 by each Party included in Annex I shall be reviewed by expert review teams pursuant to the relevant decisions of the Conference of the Parties and in accordance with guidelines adopted for this purpose by the Conference of the Parties serving as the meeting of the Parties to this Protocol under paragraph 4 below. The information submitted under Article 7, paragraph 1, by each Party included in Annex I shall be reviewed as part of the annual compilation and accounting of emissions inventories and assigned amounts. Additionally, the information submitted under Article 7, paragraph 2, by each Party included in Annex I shall be reviewed as part of the review of communications.
>
> Decision 27/CMP.1, Annex, Section II
>
> 11. The Committee shall take into account any degree of flexibility allowed by the Conference of the Parties serving as the meeting of the Parties to the Protocol, pursuant to Article 3, paragraph 6, of the Protocol and taking into account Article 4, paragraph 6, of the Convention, to the Parties included in Annex I undergoing the process of transition to a market economy.

In line with above, pursuant to very clear and precise Kyoto Protocol provisions and CMP decisions cited above, a Party is obligated to submit an annual inventory of GHG emissions in accordance with relevant COP decisions (including decisions 9/CP.2 and 7/CP.12)， which should be reviewed by an expert review team in accordance (again) with the relevant COP decisions (including decisions 9/CP.2 and 7/CP.12). Finally, the Compliance Committee is obligated to take into account Article 4, paragraph 6, of the Convention, i.e. the flexibility regime provided for EIT Parties under the Convention, when deciding on implementation of the commitments under the Kyoto Protocol. The final decision directly contradicts the above provisions under the Kyoto Protocol by disregarding both 9/CP.2 and 7/CP.12 decisions rendered by COP, instead of applying them.

13. Violation of the equal treatment principle

In paragraph 3(e) of the final decision EBCC states：

> Final decision, paragraph 3
>
> (e) The issue of whether and, if so, how decision 11/CP.4, allowing Slovenia to use 1986 as a base year, and decision 14/CP.7, addressing the impact of single projects in the commitment period, apply under the Kyoto Protocol is not

> before the enforcement branch. The enforcement branch considers questions of implementation received by the Compliance Committee in accordance with paragraph 1 of section VI and allocated to the enforcement branch in accordance with paragraph 1 of section VII. Whether the guidelines for review under Article 8 of the Kyoto Protocol (decision 22/CMP.1) and their application secure equal treatment of Parties is not an issue that is within the mandate of the enforcement branch.

The EBCC has proclaimed itself not competent for addressing decision 11/CP.4 related to Slovenia and decision 14/CP.7 pertaining to Iceland, precedents that both provide strong arguments in favour of Croatia's standpoint presented before the EBCC on numerous occasions and again in this appeal. The EBCC apparently believes that it is *in good faith* and within international law standards, to adopt a final decision on non-compliance, by disregarding crucial precedents and vital information in favour of Croatia, under which Croatia's position would be fully accepted. Using the same rationale as the EBCC does, one could conclude that if not competent for evaluating or disputing COP decisions 11/CP.4 and 14/CP.7, the EBCC would also not be competent for evaluating or disputing COP decision 7/CP.12, otherwise a clear violation of equal treatment principle has occurred, as is explained further.

Slovenia

Slovenia was awarded flexibility under COP decision 11/CP.4 dated 14 November 1998.

Decision 11/CP.4

13. *Decides* that Slovenia, having invoked Article 4.6 of the Convention requesting flexibility to use a base year other then 1990, should be allowed.

It is evident from the aforementioned that Slovenia gained flexibility pursuant to Article 4.6 of the Convention by way of a COP decision. The respective flexibility was granted to Slovenia subsequent to the adoption of the Kyoto Protocol but based on the Convention. Neither the ERT, nor the EBCC ever questioned the flexibility awarded to Slovenia under the Convention for the purpose of implementation of its commitments under the Kyoto Protocol. Furthermore, it is crucial to note here that neither the ERT, nor the EBCC ever requested Slovenia to stand before the CMP in order to re-evaluate, or re-confirm flexibility it gained under Article 4.6 of the Convention from the perspective of Article 3, paragraphs 5 or 6, or any other provision of the Kyoto Protocol. Consequently, the Slovenian flexibility under COP decision 11/CP.4 has been automatically applied to its Kyoto Protocol commitments.

By comparing the Slovenian case to Croatia's, one could easily establish crucial similarities in terms that, identically to Slovenia's case, Croatia was also awarded flexibility under Article 4.6 of the Convention and in line with decision 9/CP.2, as well as that the respective flexibility was awarded after the Kyoto Protocol was already adopted. However, unlike the Slovenian case and for reasons not known to Croatia, both the ERT and the EBCC denied applying flexibility allowed to Croatia under the Convention, for the purpose of implementation of its commitments under the Kyoto Protocol.

The EBCC justified its position by stating that it has not been able to find grounds to apply the Croatian decision 7/CP.12 on the Kyoto Protocol, thus omitting the Slovenian case where Article 4.6 of the Convention provided a sufficient basis for the ERT and EBCC to acknowledge the flexibility and establish compliance with the Kyoto Protocol commitments.

Since the EBCC is obviously under the obligation to equally apply provisions of the Convention and the Kyoto Protocol to equal situations, by disregarding practice established under the Slovenian case the EBCC put Croatia in unequal position, thus clearly violating the equal treatment principle.

Additionally, it should be noted the Slovenian case directly contradicts the EBCC's conclusion set out in paragraph 3(b) of the final decision - that flexibility awarded under the Convention for the purpose of implementation of the Kyoto Protocol commitments applies only to four EIT Parties identified in decision 9/CP.2 (Bulgaria, Romania, Poland and Hungary). This assumption is obviously incorrect. The Slovenian case explicitly proves that decision 9/CP.2 provides a clear basis for all EIT countries to request and achieve flexibility, subject to a valid reason, and that such flexibility is entirely applicable to the Kyoto Protocol commitments. From a purely rational perspective, if Slovenia can enjoy flexibility under the Convention, then Croatia should be allowed to do likewise.

Iceland

Iceland is yet another vivid example of unequal treatment towards Croatia in comparison to other countries that have gained flexibility under the Convention and have been allowed to apply it for the purpose of implementation of their Kyoto Protocol commitments.

Iceland achieved its flexibility by way of single project methodology reflected in COP decision 14/CP.7 of 10 November 2001, which reads as follows：

Decision 14/CP.7

Impact of single projects on emissions in the commitment period

The Conference of the Parties,

Recalling its decision 1/CP.3, paragraph 5 (d)，

Recalling further its decision 5/CP.6, containing the Bonn Agreements on the implementation of the Buenos Aires Plan of Action,

Having considered the conclusions of the Subsidiary Body for Scientific and Technological Advice at its resumed thirteenth session,

Recognizing the importance of renewable energy in meeting the objective of the Convention,

1. *Decides* that, for the purpose of this decision, a single project is defined as an industrial process facility at a single site that has come into operation since 1990 or an expansion of an industrial process facility at a single site in operation in 1990；

2. *Decides* that, for the first commitment period, industrial process carbon dioxide emissions from a single project which adds in any one year of that period more than 5 per cent to the total carbon dioxide emissions in 1990 of a Party listed in Annex B to the Protocol shall be reported separately and shall not be included in national totals to the extent that it would cause the Party to exceed its assigned amount, provided that：

(a) The total carbon dioxide emissions of the Party were less than 0.05 per cent of the total carbon dioxide emissions of Annex I Parties in 1990 calculated in accordance with the table contained in the annex to document FCCC/CP/1997/7/Add.1；

(b) Renewable energy is used, resulting in a reduction in greenhouse gas emissions per unit of production；

(c) Best environmental practice is followed and best available technology is used to minimize process emissions；

3. *Decides* that the total industrial process carbon dioxide emissions reported separately by a Party in accordance with paragraph 2 above shall not exceed 1.6 million tonnes of carbon dioxide annually on the average during the first commitment period and cannot be transferred by that Party or acquired by another Party under Articles 6 and 17 of the Kyoto Protocol；

4. *Requests* any Party that intends to avail itself of the provisions of this decision to notify the Conference of the Parties, prior to its eighth session, of its intention；

5. *Requests* any Party with projects which meet the requirements specified above, to report emission factors, total process emissions from these projects, and an estimate of the emission savings resulting from the use of renewable energy in these projects in their annual inventory submissions;

6. *Requests* the secretariat to compile the information submitted by Parties in accordance with paragraph 5 above, to provide comparisons with relevant emission factors reported by other Parties, and to report this information to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol.

The relevance of decision 14/CP.7 for Croatia's case is in that:

(i) Iceland's decision 14/CP.7 was adopted by the COP, identically to Croatia's decision 7/CP.12., i.e. flexibility under both decisions were granted by the COP.

(ii) No authority or body under the Convention or the Kyoto Protocol ever requested that this decision 14/CP.7 be confirmed or approved by the CMP, or other body established under the Kyoto Protocol. Therefore, the authority of the COP, as the highest decision-making body under the Convention, was accepted and respected by the Parties to the Kyoto Protocol and the CMP to the full extent, without any dispute or objection. This fact demonstrates that COP decisions are directly applicable to the Kyoto Protocol and its bodies without any subsequent approval, consent or recognition by the CMP or other Kyoto Protocol body, as decisions by the highest decision-making body should be treated.

In absolute contradiction of this clear and well established principle, the EBCC in paragraph 3(c) of the final decision concludes:

Final decision, paragraph 3

(c) The application of decision 7/CP.12 under the Kyoto Protocol does not follow from any of the provisions of the Kyoto Protocol or from CMP decisions. Since the COP and the CMP are two distinct decision-making bodies, the fact that all Parties to the Kyoto Protocol are also Parties to the United Nations Framework Convention on Climate Change does not provide a sufficient basis for establishing the application of COP decisions under the Kyoto Protocol.

Following its incorrect basic rationale – that the Kyoto Protocol actually represents a separate treaty different from the Convention – the EBCC assumed the standpoint that under no circumstances can a COP decision be applied to the Kyoto Protocol, particularly bearing in mind that the COP and the CMP are two distinct decision-making bodies, despite the fact that all Parties of the Kyoto Protocol are also the Parties of the Convention, as well as the fact that, the Kyoto Protocol is derived from the Convention as an extension and further elaboration of the same. Here, the EBCC disregarded the obvious fact that the COP (as the highest decision-making body) is a higher ranking decision-making body compared to the CMP, and that COP decisions are entirely applicable to the CMP and the Kyoto Protocol, as is clearly demonstrated by the application of COP decision 14/CP.7. Any other interpretation would prevent Iceland from using its flexibility gained under COP decision 14/CP.7, for the purpose of implementation of its Kyoto Protocol commitments. Since the EBCC does not dispute the application of COP decision 14/CP.7 on the Kyoto Protocol for Iceland, it remains unclear on what grounds the EBCC believes it can dispute COP decision 7/CP.12 in Croatia's case.

Here it should be further noted that, no particular provision under the Kyoto Protocol (such as the first sentence of Article 3, paragraph 5, or similar), nor any CMP decision, provide the direct basis for the applicability of decision 14/CP.7 to the Kyoto Protocol, which goes to show that, for the purpose of the Kyoto Protocol, COP decision 14/CP.7 derives all its authority from the COP itself and the Convention, and not from the Kyoto Protocol. This is entirely consistent with Croatia's arguments presented before the EBCC

that, the Kyoto Protocol should be read in line and in furtherance of the Convention, and that the disputed COP decision 7/CP.12 is directly applicable to the Kyoto Protocol.

(iii) By virtue of decision 14/CP.7, Iceland was allowed to exclude in national totals, to the extent it would cause to exceed its assigned amount, industrial process carbon dioxide emissions from a single project which adds in any one year of that period more than 5 per cent to its total carbon dioxide emissions in 1990 up to 1.6 Mt of CO_2 eq annually. In other words, Iceland was unequivocally allowed to add 1.6 Mt of CO_2 eq to its level of GHG emissions to enable implementation of its commitments under the Kyoto Protocol.

In absolute contradiction of this obvious fact in paragraph 17 of the preliminary decision, which forms an integral part of the final decision, the EBCC concludes:

Preliminary decision, paragraph 17

17. The enforcement branch notes that neither of the COP decisions referred to in paragraph 16 above allowed the addition of tonnes CO2 eq to the level of emissions for a base year or period.

The EBCC failed to take into consideration the fact that under decision 14/CP.7, with regard to the implementation of Island's commitments under the Kyoto Protocol, Island was in effect allowed an addition of 1.6 Mt of CO_2 eq both to its initial level of GHG emissions for the base year and on an annual basis. By omitting to do so in Croatia's case, the EBCC clearly violated the equal treatment principle.

Taking into consideration the aforementioned facts, it is clear that the flexibility allowed to Bulgaria, Hungary, Poland, Romania and Slovenia, was based on the Convention's flexibility regime (Article 4, paragraph 6 and decision 9/CP.2), which is the identical flexibility regime applied to Croatia. Furthermore, Iceland was allowed flexibility under a separate principle (single project methodology) but also based on the Convention. In all the aforementioned cases, flexibilities were awarded by COP decisions that were never subsequently confirmed by the CMP or other body of the Kyoto Protocol, as a precondition for their applicability to the Kyoto Protocol commitments.

Moreover, in all these respective cases, the countries in question were in fact allowed additional tonnes CO_2 eq to their levels of emissions by the use of a base year or period other then 1990, or by simply adding a specific CO_2 eq amount as previously approved by the COP. The Croatian case is no different to any of these mentioned cases and should therefore be treated in an equal manner.

An unprecedented practice is established by the EBCC in calling for COP decision 7/CP.12 under which flexibility is granted to Croatia, to be subsequently confirmed by the CMP, given that this was not requested in the similar cases of Bulgaria, Hungary, Poland, Romania, Slovenia and Iceland. In doing so constitutes an unprecedented practice and a manifest violation of the equal treatment principle.

The EBCC has failed to offer any plausible explanation for its different treatment of Croatia in comparison to the cases of Bulgaria, Hungary, Poland, Romania, Slovenia and Iceland, and has only referred to its alleged incompetence in the matter, in particular with regard to the cases of Slovenia and Iceland, as well as concerning the application of the equal treatment principle supporting Croatia's position. Consequently in Croatia's case, the EBCC basically finds itself incompetent to acknowledge in every single instance, all the decisive and valid facts which fully corroborate Croatia's position.

Contrary to the EBCC's position, it is important to note:

Decision 27/CMP.1, Annex, Section V

4. The enforcement branch shall be responsible for determining whether a Party included in Annex I is not in compliance with：

(a) Its quantified emission limitation or reduction commitment under Article 3, paragraph 1, of the Protocol；

(b) The methodological and reporting requirements under Article 5, paragraphs 1 and 2, and Article 7, paragraphs 1 and 4, of the Protocol； and

(c) The eligibility requirements under Articles 6, 12 and 17 of the Protocol.

5. The enforcement branch shall also determine whether to apply：

(a) Adjustments to inventories under Article 5, paragraph 2, of the Protocol, in the event of a disagreement between an expert review team under Article 8 of the Protocol and the Party involved； and

(b) A correction to the compilation and accounting database for the accounting of assigned amounts under Article 7, paragraph 4, of the Protocol, in the event of a disagreement between an expert review team under Article 8 of the Protocol and the Party involved concerning the validity of a transaction or such Party's failure to take corrective action.

Within the responsibilities of the EBCC set out in Section V of the annex to decision 27/CMP.1, the power of the EBCC to adjust inventories, and to correct the compilation and accounting database for the accounting of assigned amounts in event of disagreement between the ERT and the Party involved, is clearly envisaged. Therefore, the EBCC has full competence to make all necessary adjustments and corrections regarding Croatian inventories and databases for the purpose of applying decision 7/CP.12 on flexibility.

The EBCC was under an obligation to exercise its authority with respect to Croatia, bearing in mind that Croatia disputed the Report of the ERT regarding the review of the initial report of Croatia FCCC/IRR/2008/HRV, as well as, the ERT conclusion in paragraph 159 of the same report, which states that the applicability of COP decisions flexibility falls outside the ERT's mandate. Having regard that applicability of decision 7/CP.12 is primarily a legal issue, the EBCC's claim of lack of authority to address this matter is totally unsubstantiated, particularly when authority in respective matter clearly exist..

As far as safeguarding the equal treatment principle is concerned, taking into consideration international law standards it is manifestly clear that the EBCC failed to observe the aforementioned principle, in deciding on matters within its competence. In determining Croatia's cases, one of the EBCC's primary tasks was to establish how the ERT acted in similar situations. As vividly shown above, the ERT had no objection whatsoever to flexibilities allowed under the Convention for the purpose of implementation of Kyoto Protocol commitments, in the cases of Bulgaria, Hungary, Poland, Romania, Slovenia and Iceland. Accordingly, a fundamental omission by the EBCC was committed in failing to determine in what way Croatia was different from these countries, particularly as far as Slovenia and Iceland were concerned. If the EBCC had done so, a reasonable conclusion would have been drawn that, there was no relevant difference between Croatia and these countries. Therefore, all the arguments set out in the Croatian case substantiate that there was a fundamental violation of the equal treatment principle by the fact that, with the exception of Croatia only, in all the previous cases flexibilities awarded under the Convention, were allowed for the purposes of implementing the Kyoto Protocol.

14. Violation of the Procedures and mechanisms relating to compliance – indication of information relevant for decision and right to respond

The final decision is not in accordance with section VIII, paragraph 6 of the Procedures and mechanisms relating to compliance under the Kyoto Protocol, as contained in the annex to decision 27/CMP.1. This stipulates that any information considered by the relevant branch, shall be made available to the party

concerned and that the branch shall indicate to the party which parts of this information it has considered, and consequently that the party shall be given an opportunity to comment in writing on such information.

At the 8th meeting of the EBCC held on 23 and 24 November 2009 in Bonn, Germany, as well as on several previous occasions, the EBCC made reference to the EU delegation's remark expressed at COP 12 held in Nairobi, Kenya, in which Croatia could not apply decision 7/CP.12 for the purposes of its compliance with the Kyoto Protocol target. In its final decision, the EBCC explicitly referred to paragraphs 132 - 135 of document FCCC/SBI/2006/28 once again referencing the EU delegation's remark, thus acknowledging that the respective remark was, in the EBCC opinion, of great significance for the resolution of Croatia's case.

As the EU delegation remark from COP 12 was undisputedly an important element in initiating the EBCC procedure against Croatia, as well as in its final outcome, the EBCC was under a clear obligation to provide an explanation of the EU delegation's remark, as the EBCC understood it, as well as, its implications for Croatia's case, both in its preliminary finding and in its final decision. Furthermore, the EBCC was obliged to provide Croatia with an opportunity to respond to the EBCC's position on this matter in writing.

It is important however to point out here, that the EU delegation voted in favour of decision 7/CP.12, which was adopted by acclamation, and only afterwards made the oral remark which does not create a legal precedent, nor should have any actual legal relevance. The EBCC omitted to take note of this relevant fact. Omission by the EBCC to offer its understanding of EU delegation's remark and present Croatia with opportunity to respond in writing on the EBCC's standpoint represents a clear procedural violation on the part of the EBCC.

15. Violation of the Procedures and mechanisms relating to compliance – violation of independence, impartiality and conflict of interest principles

The final decision is not in accordance with Rule 4 of the Rules of procedure of the Compliance Committee contained in the annex to decision 4/CMP.2 as amended by decision 4/CMP.4, which prescribes that each member and alternate member shall serve in its individual capacity and act in an independent and impartial manner and avoid any real or apparent conflicts of interest.

Contrary to the above, Mr. Tuomas Kuokkanen, alternate EBCC member, who participated in the consideration and elaboration of the upheld preliminary finding with respect to Croatia, was also a member of the EU delegation at COP 12 in Nairobi, which had expressed its reservation regarding the application of flexibility under decision 7/CP.12 for Croatia to the Kyoto Protocol.

Therefore, the same individual who advocated that flexibility for Croatia, as provided by decision 7/CP.12, could not be applied for the purpose of implementation of the Kyoto Protocol, was the same person who was directly involved in the consideration and elaboration of the upheld preliminary finding on Croatia.

The involvement of Mr. Kuokkanen is an evident conflict of interest, and a grave violation of the principle of independence and impartiality, as well as an infringement of the oath of service sworn by members of the Compliance Committee. Croatia shall address this matter directly with the Executive Secretary of the United Nations Framework Convention on Climate Change.

REQUEST

In full consideration of the arguments set out hereinabove, Croatia hereby submits its appeal against the final decision CC-2009-1-8/Croatia/EB, adopted by the enforcement branch of the Compliance Committee on 26 November 2009 and hereby requests the Conference of the Parties serving as meeting of the Parties, :

(a) to adopt CMP decision confirming the application of COP decision 7/CP.12 for the purpose of implementation of Croatia's commitments under the Kyoto Protocol and any subsequent commitment period； or

(b) to override the respective decision in its entirety and refer the matter back to the enforcement branch of the Compliance Committee, with the mandatory instruction to revise the final decision by replacing it with a decision not to proceed with questions of implementation designated by the expert review team in the review of initial report of Croatia FCCC/IRR/2008/HRV, thereby allowing Croatia to add 3.5 Mt CO_2 eq to its 1990 GHG emissions not controlled by the Montreal Protocol for the purpose of establishing the level of emissions for the base year for implementation of its commitments under the Kyoto Protocol following decision 7/CP.12.

* * * *

Schedules：

- Comments of Croatia
- Final decision
- Statement of position of Croatia
- Background document

[ENGLISH ONLY]

REPUBLIC OF CROATIA

MINISTRY OF ENVIRONMENTAL PROTECTION,

PHYSICAL PLANNING AND CONSTRUCTION

COMPLIANCE COMMITTEE

Secretariat

Enforcement Branch

COMMENTS OF CROATIA

on

Final decision CC-2009-1-8/Croatia/EB

Zagreb, 24 December 2009

In accordance with section VIII, paragraph 8 of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1 and rule 22, paragraph 2, of the Rules of procedure of the Compliance Committee contained in the annex to decision 4/CMP.2 as amended by decision 4/CMP.4, the Republic of Croatia hereby provides its comments on the final decision CC-2009-1-8/Croatia/EB of the enforcement branch of the Compliance Committee adopted on 26 November 2009, as follows hereinafter.

Croatia hereby expresses a profound disappointment and disbelief with regard to the final decision CC-2009-1-8/Croatia/EB (the final decision) upholding the preliminary finding CC-2009-1-6/Croatia/EB in its entirety. Croatia believes that the respective final decision is groundless, inequitable, as well as unbalanced, and, as it currently stands, extremely damaging for Croatia, particularly bearing in mind that the enforcement branch of the Compliance Committee (EBCC) assumed the standpoint of not being competent to consider any of the arguments in favour of Croatia that are crucial for resolving this matter, especially the violation of the equal treatment principle.

Since the EBCC's final decision omitted to elaborate in detail crucial arguments provided by Croatia, Croatia hereby once again refers to the Statement of position of Croatia CC-2009-1-7/Croatia/EB of 12 November 2009. The comments hereof shall be read together with and in furtherance of the Statement of position of Croatia CC-2009-1-7/Croatia/EB, enclosed hereto as an annex.

COMMENTS

1. In deciding the Croatian case, the EBCC on the account of alleged non-competency, disregarded all arguments provided by Croatia, thus adopting an inappropriate and inequitable decision.

2. The final decision is not in line with Article 31, paragraphs 1 and 2 of the Vienna Convention on the Law of Treaties which calls for a treaty to be interpreted in good faith and in the light of its object and purpose, and that for the purpose of interpretation, both the annex and the preamble of the treaty should be taken into consideration.

Contrary to the above, when interpreting provisions of the Kyoto Protocol, the EBCC failed to take into consideration the preamble of the Kyoto Protocol, which recalls the United Nations Framework Convention on Climate Change (the Convention), in particular with respect of pursuing its ultimate objective (Article 2) and guiding principles (Article 3) striving for 'equitable approach in accordance with common but differentiated responsibilities and respective capabilities', as well as the Berlin Mandate. Accordingly, pursuant to the preamble of the Kyoto Protocol and international legal standards, the EBCC was under an obligation to interpret the Kyoto Protocol as an extension of the Convention and in light of its objective and purpose, as opposed to treating it as an entirely separate treaty. Had the EBCC followed this course of action, an equitable decision would be one that would respect Croatia's particular circumstances and capabilities as previously recognized under the Convention pursuant to decision 7/CP.12.

Hence, the EBCC's restrictive interpretation clearly contradicts the fact that the Kyoto Protocol was adopted in furtherance of and based on the Berlin Mandate, as laid out in decision 1/CP.1 of the Conference of the Parties, following the review of Article 4, paragraphs 2(a) and (b,) of the Convention and the subsequent conclusion that the aforementioned paragraphs were inadequate. Indeed, the Berlin Mandate opted for strengthening the commitments of the Parties under Article 4, paragraph 2(a) and (b) in order to ensure effective achievement of the Convention's goals. This initiative resulted in the adoption of the Kyoto Protocol. As the Kyoto Protocol derived from Article 4, paragraph 2 of the Convention, it should obviously be read in light of the Convention's objective and purpose. It is important to note here that Croatia was granted flexibility for the implementation of its commitments under, no other but, Article 4, paragraph 2, of the Convention and consequently its amendments or elaborations.

In calling for a treaty to be interpreted in good faith and in light of its object and purpose, the Vienna Convention on the Law of Treaties therefore fully endorses and favours a teleological interpretation of treaties over a grammatical one. A position Croatia strongly advocates and calls for to be fully respected and adhered to.

3. The final decision is not in line with Article 31, paragraph 3, subparagraph (b)， of the Vienna Convention on the Law of Treaties, which stipulates that any subsequent practice in the application of the treaty shall be taken into account regarding its interpretation.

Contrary to the above, the EBCC failed to take into consideration the flexibility allowed under the Convention for application of the Kyoto Protocol in the comparable cases of Bulgaria, Hungary, Poland, Romania, Slovenia and Iceland. In these cases, flexibility was allowed without ever requiring confirmation of the Conference of the Parties serving as meeting of the Parties to the Protocol (CMP) or any other additional confirmation, hence setting transparent and consistent practice (precedents) for recognition of flexibility to Croatia under decision 7/CP.12 with respect of the Kyoto protocol, as already done in all aforementioned cases. This fact alone represents a clear violation of the equal treatment principle.

4. The final decision is not in line with Article 32 of the Vienna Convention on the Law of Treaties, which stipulates that when the interpretation of the treaty *"a) leaves the meaning ambiguous or obscure； or b) leads to a result which is manifestly absurd or unreasonable"，* supplementary means of interpretation including the preparatory work of the treaty and the circumstances of its conclusion should be taken into account.

As pointed out by Croatia during the entire procedure before the Compliance Committee, EBCC's final decision of non-compliance denying flexibility to Croatia under decision 7/CP.12 is obviously absurd and unreasonable from several different aspects：

(a) Denying previously approved flexibility for Croatia's particularities would setback the country's economy by forty years, to energy demands in 1974. It should be recalled here that in 1990 only 27% of consumed electricity was generated in fossil-fuelled power plants on Croatian territory.

(b) Full consideration should have been taken that decision 7/CP.12 was adopted in 2006 when the Kyoto Protocol was already in force, therefore at the point when Croatia was no longer in position of intervening into text of the Kyoto protocol, and that this decision was a crucial precondition set by Croatia with regard to its ratification, so as to ensure Croatia's compliance with the Kyoto Protocol.

(c) If the decision 7/CP.12 is not to be applied to Croatia during the first commitment period, then it brings into question the whole purpose of several years of negotiations, as well as the ultimate unanimous decision 7/CP.12 taken at COP 12 in Nairobi, Kenya. Denying the applicability of the decision 7/CP.12 would prevent Croatia enjoying the envisaged flexibilities prescribed therein, to enable full compliance and in turn, would give rise to a critical economic situation to Croatia.

(d) The consequence of ignoring decision 7/CP.12 is that Croatia was and still is in non-compliance of the greenhouse gases emissions target under both the Convention and the Kyoto Protocol from 2005 onwards. This is the exact reason why flexibility was requested by and subsequently granted to Croatia pursuant to decision 7/CP.12.
The EBCC failed to take into consideration the consequences for Croatia arising from the dissolution of former Yugoslavia which were explicitly recognized under decision 7/CP.12 of the Conference of the Parties (COP) whereby, pursuant to Article 4, paragraph 6, of the Convention, Croatia was allowed to add 3.5 Mt

CO2 equivalent to its 1990 level of greenhouse gas emissions not controlled by the Montreal Protocol, for the purpose of establishing the level of emissions for the base year for implementation of its commitments under Article 4, paragraph 2, of the Convention.

The EBCC further failed to take into consideration that Croatia and the Parties to the Convention were well aware of Croatia's historical circumstances and its inability of meeting the 2012 Kyoto Protocol target and duly acknowledged this fact by adopting COP decision 7/CP.12. In doing so the parties to the Convention ensured that Croatia would have a fair chance of meeting the required target, which otherwise would undisputedly prove impossible for Croatia to achieve.

The EBCC failed to take into account that decision 7/CP.12 was a vital precondition for Croatia to ratify the Kyoto Protocol.

The EBCC failed to take into consideration the official List of Annex I Parties to the Convention, published on the Convention's official internet site, whereby Croatia is recognized as a *"** Party for which there is a specific COP and/or CMP decision*" – the relevant decisions being decision 4/CP.3, decision 10/CP.11 and decision 7/CP.12.

Together these substantial omissions on the part of the EBCC have rendered its final decision unreasonable and without grounds, especially when taking into account Croatia's historical circumstances and particularities leading to Croatia's ratification of the Kyoto Protocol.

5. The final decision is not in line with Article 7, paragraph 1, of the Kyoto Protocol, which prescribes obligations for each Party included in Annex I to provide its annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol, in accordance with relevant decisions of the Conference of the Parties (including decision 7/CP.12).

6. The final decision is not in line with Article 8, paragraph 1 of the Kyoto Protocol, which prescribes that any information submitted under Article 7 by each Party included in Annex I shall be reviewed by expert review teams pursuant to the relevant decisions of the Conference of the Parties (including decision 7/CP.12).

7. The final decision is not in line with paragraph 7(a) of the annex to decision 13/CMP.1, which prescribes that part one of the report referred to in paragraph 6 shall, among other, contain complete inventories of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for all years from 1990, or another approved base year or period under Article 3, paragraph 5, to the most recent year available, prepared in accordance with Article 5, paragraph 2, and relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), taking into account any relevant decisions of the Conference of the Parties (including decision 7/CP.12).

8. The final decision is not in line with section II, paragraph 11, of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1, which obligates the Compliance Committee to take into account Article 4, paragraph 6, of the Convention and any degree of flexibility allowed to the Parties included in Annex I undergoing the process of transition to a market economy (including decision 7/CP.12).

9. The EBCC omitted to apply its authority under decision 27/CMP.1, annex, section V, paragraph 5, to adjust inventories and correct the compilation and accounting database for the accounting of assigned amounts in the event of a disagreement between an expert review team (ERT) and the party concerned. Since

the ERT disregarded its obligation under Article 8, paragraph 1 of the Kyoto Protocol to perform an expert review of Croatia's inventory data pursuant to the relevant decisions of the Conference of the Parties (decisions 9/CP.2 and 7/CP.12)， the EBCC should have exercised its authority under decision 27/CMP.1, annex, section V, paragraph 5, by applying the respective flexibility allowed to Croatia and adjusting the ERT disputed data. Furthermore it should be taken into account that the application of COP decisions on flexibility falls outside the ERT mandate, as explicitly stated in paragraph 159 of the Report of the review of the initial report of Croatia FCCC/IRR/2008/HRV.

10. The final decision is not in line with section VIII, paragraph 6, of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1, which stipulates that any information considered by the relevant branch shall be made available to the party concerned and that branch shall indicate to the party which parts of this information it has considered, and consequently that the party shall be given an opportunity to comment in writing on such information.

At the Eighth meeting of the EBCC held on 23 and 24 November 2009 in Bonn, Germany, as well as on several previous occasions, the EBCC made reference to the EU delegation's remark expressed at COP 12 held in Nairobi, Kenya, that Croatia could not apply decision 7/CP.12 for the purposes of its compliance with the Kyoto Protocol target. However, it is important to point out here, that the EU delegation voted in favour of decision 7/CP.12, which was adopted by acclamation, and only afterwards made an oral remark which does not create a legal precedent. As the EU delegation remark from COP 12 was undisputedly an important element in initiating the EBCC procedure against Croatia, as well as in its final outcome, the EBCC was under a clear obligation to provide an explanation of the EU delegation's remark and its implications for Croatia's case, both in its preliminary finding and in its final decision. Furthermore, the EBCC was obliged to provide Croatia with an opportunity to respond to the EBCC's standpoint in writing. Omission by the EBCC to this end represents a clear procedural violation on the part of the EBCC.

11. The final decision is not in line with rule 4 of the Rules of procedure of the Compliance Committee contained in the annex to decision 4/CMP.2 as amended by decision 4/CMP.4, which prescribes that each member and alternate member shall serve in its individual capacity and act in an independent and impartial manner and avoid any real or apparent conflicts of interest.

Contrary to the above, it should be stressed that Mr. Tuomas Kuokkanen, alternate EBCC member, who participated in the consideration and elaboration of the upheld preliminary finding with respect to Croatia, was also a member of the EU delegation at COP 12 in Nairobi which had expressed its reservation regarding the application of flexibility under decision 7/CP.12 for Croatia to the Kyoto Protocol. The involvement by Mr. Kuokkanen is an evident conflict of interest in which rule 4 of the Rules of Procedure of the Compliance Committee is entirely applicable.

* * * *

The Croatia hereby kindly requests translation of these comments with annex to Spanish language pursuant to section VIII, paragraph 9, of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1.

The arguments set out above and in the course of the entire process shall be further elaborated in Croatia's appeal against the final decision CC-2009-1-8/Croatia/EB of the enforcement branch of the Compliance Committee, adopted on 26 November 2009 pursuant to section XI of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1.

The final decision shall stand pending the CMP decision on appeal.

[ENGLISH ONLY]

ENFORCEMENT BRANCH
OF THE COMPLIANCE COMMITTEE

CC-2009-1-8/Croatia/EB
26 November 2009

FINAL DECISION

Party concerned： *Croatia*

In accordance with the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1 and adopted under Article 18 of the Kyoto Protocol and the Rules of procedure of the Compliance Committee, [1] the enforcement branch adopts the following final decision：

BACKGROUND

1. On 13 October 2009, the enforcement branch adopted a preliminary finding of non-compliance with respect to Croatia (CC-2009-1-6/Croatia/EB). On 12 November 2009, the enforcement branch received a further written submission from Croatia in accordance with paragraph 7 of section IX, [2] paragraph 1 (e) of section X and rule 17 of the Rules of procedure (CC-2009-1-8/Croatia/EB). The enforcement branch considered this further written submission in elaborating a final decision at its eighth meeting held in Bonn from 23 to 24 November 2009.

2. In accordance with paragraph 1 (d) of rule 22 of the Rules of procedure, the enforcement branch confirms that the Party concerned had an opportunity to comment in writing on all information considered.

CONCLUSIONS AND REASONS

3. After full consideration of the further written submission from Croatia, the enforcement branch concludes that there are not sufficient grounds provided in the submission to alter the preliminary finding of this branch. In this respect, the branch notes that：

(a) Pursuant to Article 31 of the 1969 Vienna Convention on the Law of Treaties and customary international law, a treaty must 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. In addressing the questions of implementation

[1] All references to the Rules of procedure in this document refer to the rules contained in the annex to decision 4/CMP.2 as amended by decision 4/CMP.4.

[2] All section references in this document refer to the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1.

before it, the enforcement branch followed this general rule and was not persuaded that it is necessary to follow another method of interpretation.

(b) Article 3, paragraph 5, of the Kyoto Protocol limits the flexibility available to Parties included in Annex I undergoing the process of transition to a market economy (EIT Parties) for the implementation of their commitments under Article 3 of the Kyoto Protocol to the use of an historical base year or period other than 1990. The first sentence of Article 3, paragraph 5, of the Kyoto Protocol explicitly determines the historical base year or period for the four EIT Parties identified in decision 9/CP.2. The second and third sentences of Article 3, paragraph 5, of the Kyoto Protocol provide for other EIT Parties to use an historical base year or period other than 1990 in certain circumstances, subject to notification to and acceptance by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP).

(c) The application of decision 7/CP.12 under the Kyoto Protocol does not follow from any of the provisions of the Kyoto Protocol or from CMP decisions. Since the COP and the CMP are two distinct decision-making bodies, the fact that all Parties to the Kyoto Protocol are also Parties to the United Nations Framework Convention on Climate Change does not provide a sufficient basis for establishing the application of COP decisions under the Kyoto Protocol.[3]

(d) In its preliminary finding, the enforcement branch has explicitly recognized the different degrees of flexibility available to EIT Parties under the Convention and the Kyoto Protocol and the respective roles of decisions 9/CP.2 and 7/CP.12 in this context. Decisions 9/CP.2 and 7/CP.12 have ongoing relevance with respect to the implementation of commitments of Parties included in Annex I under Article 4, paragraph 2, of the Convention.

(e) The issue of whether and, if so, how decision 11/CP.4, allowing Slovenia to use 1986 as a base year, and decision 14/CP.7, addressing the impact of single projects in the commitment period, apply under the Kyoto Protocol is not before the enforcement branch. The enforcement branch considers questions of implementation received by the Compliance Committee in accordance with paragraph 1 of section VI and allocated to the enforcement branch in accordance with paragraph 1 of section VII. Whether the guidelines for review under Article 8 of the Kyoto Protocol (decision 22/CMP.1) and their application secure equal treatment of Parties is not an issue that is within the mandate of the enforcement branch.

4. The specific circumstances of Croatia arising from the dissolution of the former Yugoslavia cannot be addressed by action that is within the mandate of the enforcement branch, and for this reason the enforcement branch reiterates that Croatia may wish to bring them to the attention of the CMP for its consideration.

[3] In this context, the enforcement branch took note of paragraphs 132–135 of document FCCC/SBI/2006/28.

DECISION

5. The branch confirms, in accordance with paragraph 8 of section IX, paragraph 1 (f) of section X, and rule 22 of the Rules of procedure, the preliminary finding annexed hereto, which shall be deemed to form an integral part of this final decision.

6. The consequences set out in paragraph 23 of the preliminary finding shall take effect forthwith, and the consequences set out in paragraph 23 (c) of the preliminary finding shall be applied taking into account the guidelines adopted under Articles 6, 12 and 17 of the Protocol.

Members and alternate members participating in the consideration and elaboration of the final decision： René LEFEBER, Mary Jane MACE, Stephan MICHEL, Bernard NAMANYA, Ainun NISHAT, Sebastian OBERTHÜR, Ilhomjon RAJABOV, Gladys Kenabetsho RAMOTHWA, Oleg SHAMANOV, Mohamed SHAREEF.

Members voting for： Johanna G. Susanna DE WET, Raúl ESTRADA-OYUELA, René LEFEBER, Stephan MICHEL, Bernard NAMANYA, Sebastian OBERTHÜR, Ilhomjon RAJABOV, Mohamed SHAREEF, SU Wei.

Members abstaining： Oleg SHAMANOV.

This decision was adopted in Bonn on 26 November 2009.

Annex

ENFORCEMENT BRANCH
OF THE COMPLIANCE COMMITTEE

CC-2009-1-6/Croatia/EB
13 October 2009

PRELIMINARY FINDING

Party concerned: *Croatia*

In accordance with the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1 and adopted under Article 18 of the Kyoto Protocol and the Rules of procedure of the Compliance Committee, [1] the enforcement branch adopts the following preliminary finding:

BACKGROUND

1. On 26 August 2009, the secretariat received two questions of implementation indicated in the report of the expert review team regarding the review of the initial report of Croatia and contained in document FCCC/IRR/2008/HRV. In accordance with paragraph 1 of section VI[2] and paragraph 2 of rule 10 of the Rules of procedure, the questions of implementation were deemed received by the Compliance Committee on 27 August 2009.

2. The bureau of the Compliance Committee allocated these questions of implementation to the enforcement branch on 28 August 2009, under paragraph 1 of section VII, in accordance with paragraphs 4(b) and (c) of section V and paragraph 1 of rule 19 of the Rules of procedure.

3. On 28 August 2009, the secretariat notified the members and alternate members of the enforcement branch of the questions of implementation, in accordance with paragraph 2 of rule 19 of the Rules of procedure, and of their allocation to the enforcement branch.

4. On 8 September 2009, the enforcement branch decided, in accordance with paragraph 2 of section VII and paragraph 1(a) of section X, to proceed with the questions of implementation (CC-2009-1-2/Croatia/EB).

5. The first question of implementation relates to Croatia's calculation of its assigned amount and its compliance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts under Article 7, paragraph 4, of the Kyoto Protocol (decision 13/CMP.1; hereinafter referred to as "the modalities for the accounting of assigned amounts").

[1] All references to the Rules of procedure in this document refer to the rules contained in the annex to decision 4/CMP.2 as amended by decision 4/CMP.4.

[2] All section references in this document refer to the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1.

In particular, the expert review team considered that the addition of 3.5 million tonnes (Mt) carbon dioxide equivalent (CO_2 eq) by Croatia to its base year level following decision 7/CP.12 is not in accordance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts.[3]

6. This question of implementation is related to the eligibility requirements referred to in paragraph 31(b) of the annex to decision 3/CMP.1, paragraph 21(b) of the annex to decision 9/CMP.1 and paragraph 2(b) of the annex to decision 11/CMP.1. Consequently, the expedited procedures as contained in section X apply.

7. The second question of implementation relates to Croatia's calculation of its commitment period reserve and its compliance with the modalities for the accounting of assigned amounts. On the second question of implementation the expert review team considered that the calculation of Croatia's commitment period reserve, based on the calculation of its assigned amount following decision 7/CP.12, is not in accordance with paragraph 6 of the annex to decision 11/CMP.1.[4] Paragraph 8(a) of the annex to decision 13/CMP.1 requires each Party to calculate its commitment period reserve in accordance with decision 11/CMP.1.

8. Both questions of implementation referred to in paragraphs 5 and 7 above relate to the same issue, namely whether Croatia's calculation of its assigned amount is in compliance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts. The resolution of the second question of implementation follows from the resolution of the first. Consequently, both questions of implementation are considered jointly in the expedited procedures referred to in paragraph 6 above.

9. On 24 September 2009, the enforcement branch agreed to invite three experts drawn from the UNFCCC roster of experts to provide advice to the branch (CC-2009-1-3/Croatia/EB). All three of these experts belonged to the expert review team that reviewed Croatia's initial report.

10. On 25 September 2009, the enforcement branch received a request for a hearing from Croatia (CC-2009-1-4/Croatia/EB). On 9 October 2009, the enforcement branch received a written submission under paragraph 1(b) of section X (CC-2009-1-5/Croatia/EB) in accordance with paragraph 1 of section IX, paragraph 1(b) of section X, and rule 17 of the Rules of procedure.

11. As requested by Croatia on 25 September 2009, a hearing was held on 11 October 2009 in accordance with paragraph 2 of section IX and paragraph 1(c) of section X. The hearing formed part of the meeting of the enforcement branch that was held from 11 to 13 October 2009 to consider the adoption of a preliminary finding or a decision not to proceed further. During the hearing, Croatia made a presentation. The enforcement branch received advice from one of the three invited experts during the meeting.

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[3] See paragraph 157 and section II.C of the report of the expert review team contained in document FCCC/IRR/2008/HRV.

[4] See paragraph 158 and section II.D of the report of the expert review team contained in document FCCC/IRR/2008/HRV.

12. In its deliberations, the enforcement branch considered the review report, the written submission of Croatia contained in document CC-2009-1-5/Croatia/EB, information presented by Croatia during the hearing and advice from an expert invited by the branch. No competent intergovernmental or non-governmental organization provided any information under paragraph 4 of section VIII.

CONCLUSIONS AND REASONS

13. In its written submission and at the hearing, Croatia argued that, following decision 7/CP.12, it is allowed to add 3.5 Mt CO_2 eq to its 1990 level of greenhouse gas emissions not controlled by the Montreal Protocol for the purpose of establishing the level of emissions for the base year for implementation of its commitments under Article 3 of the Kyoto Protocol. It made reference to several provisions of the United Nations Framework Convention on Climate Change and its Kyoto Protocol relating to flexibility for Parties included in Annex I undergoing the process of transition to a market economy, including Article 4, paragraph 6, of the Convention and Article 3, paragraph 5, of the Kyoto Protocol. It also referred to relevant decisions of the Conference of the Parties (COP) and the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP).

14. The enforcement branch notes that under the Convention：

(a) Article 4, paragraph 6, of the Convention together with relevant decisions of the COP, including decision 9/CP.2, provide the basis for the COP to allow a certain degree of flexibility to the Parties included in Annex I undergoing the process of transition to a market economy in the implementation of their commitments under Article 4, paragraph 2, of the Convention, including with regard to the historical level of anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol chosen as a reference；

(b) Decision 7/CP.12 relating to the level of emissions for the base year of Croatia was adopted under Article 4, paragraph 6, of the Convention.

15. The enforcement branch further notes that, under the Kyoto Protocol, the degree of the flexibility available to Parties included in Annex I undergoing the process of transition to a market economy is different in that：

(a) Article 3, paragraph 5, of the Kyoto Protocol only addresses flexibility in the use of an historical base year or period other than 1990 for the implementation of commitments under Article 3 of the Kyoto Protocol by a Party included in Annex I undergoing the process of transition to a market economy；

(b) Article 3, paragraph 6, of the Kyoto Protocol provides that a certain degree of flexibility shall be allowed by the CMP to the Parties included in Annex I undergoing the process of transition to a market economy, but only in the implementation of commitments under the Kyoto Protocol other than those under Article 3；

(c) Neither paragraph 5 nor paragraph 6 of Article 3 of the Kyoto Protocol provides a basis for allowing the addition of tonnes CO_2 eq to the level of emissions for a base year or period in the implementation of commitments under Article 3 of the Kyoto Protocol.

16. Croatia further argued that decisions 11/CP.4 and 14/CP.7 have made special provision to take account of specific circumstances of other Parties and have been applied under the Kyoto Protocol without requiring confirmation by the CMP.

17. The enforcement branch notes that neither of the COP decisions referred to in paragraph 16 above allowed the addition of tonnes CO_2 eq to the level of emissions for a base year or period.

18. Croatia emphasized that in decision 7/CP.12 the COP has recognized Croatia's specific circumstances with regard to greenhouse gas emissions before and after 1990 and the structure of the electricity generation sector of the former Yugoslavia. In its written submission and at the hearing, Croatia stated that it had gained independence in 1991 in the course of the dissolution of the former Yugoslavia. In 1990, a large part of Croatia's consumed electricity was sourced from plants located in other republics of the former Yugoslavia. Croatia explained that the use of an historical base year or period other than 1990 in accordance with Article 3, paragraph 5, of the Kyoto Protocol does not address Croatia's specific circumstances.

19. The enforcement branch acknowledges that Croatia's specific circumstances, in particular the consequences arising from the dissolution of the former Yugoslavia, have not been addressed by the CMP to date.

20. The enforcement branch recognizes that when decision 7/CP.12 was adopted in 2006, Croatia was not yet a Party to the Kyoto Protocol. Since that time, Croatia has become a Party to the Kyoto Protocol. Croatia may wish to bring its specific circumstances to the attention of the CMP for its consideration.

21. Based on the information submitted and presented as well as the above considerations, the enforcement branch concludes that：

(a) In the absence of a decision of the CMP on Croatia's specific circumstances, decision 7/CP.12 taken under the Convention does not provide a basis under the Kyoto Protocol for Croatia to add 3.5 Mt CO_2 eq to its level of emissions for the base year for implementation of its commitments under Article 3 of the Kyoto Protocol；

(b) Accordingly, the addition of 3.5 Mt CO_2 eq by Croatia to the level of emissions for its base year following decision 7/CP.12 is not in compliance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts；

(c) Further, the calculation of Croatia's commitment period reserve, based on the calculation of its assigned amount following decision 7/CP.12, is not in compliance

with paragraph 6 of the annex to decision 11/CMP.1 as required by paragraph 8(a) of the annex to decision 13/CMP.1.

FINDING AND CONSEQUENCES

22. The enforcement branch determines that Croatia is not in compliance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts under Article 7, paragraph 4, of the Kyoto Protocol (decision 13/CMP.1). Croatia does not have its assigned amount pursuant to Article 3, paragraphs 7 and 8, calculated and recorded in accordance with decision 13/CMP.1 and therefore does not yet meet the eligibility requirements under Articles 6, 12 and 17 of the Kyoto Protocol.

23. In accordance with section XV, the enforcement branch applies the following consequences：

(a) Croatia is declared to be in non-compliance.

(b) Croatia shall develop a plan referred to in paragraph 1 of section XV and submit it within three months to the enforcement branch in accordance with paragraph 2 of section XV. The plan should address the calculation of the assigned amount and the commitment period reserve of Croatia in accordance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol and the modalities for the accounting of assigned amounts contained in decision 13/CMP.1, and any other steps Croatia may wish to take to remedy the non-compliance.

(c) Croatia is not eligible to participate in the mechanisms under Articles 6, 12 and 17 of the Kyoto Protocol pending the resolution of the questions of implementation.

24. These findings and consequences take effect upon confirmation by a final decision of the enforcement branch.

Members and alternate members participating in the consideration and elaboration of the preliminary finding： Joseph Armathé AMOUGOU, Johanna G. Susanna DE WET, Patricia ITURREGUI BYRNE, Kirsten JACOBSEN, Tuomas KUOKKANEN, René LEFEBER, Mary Jane MACE, Stephan MICHEL, Bernard NAMANYA, Ainun NISHAT, Sebastian OBERTHÜR, Gladys Kenabetsho RAMOTHWA, Oleg SHAMANOV, Mohamed SHAREEF.

Members participating in the adoption of the preliminary finding： Johanna G. Susanna DE WET, Patricia ITURREGUI BYRNE (alternate member serving as member)， René LEFEBER, Mary Jane MACE (alternate member serving as member)， Stephan MICHEL, Bernard NAMANYA, Ainun NISHAT (alternate member serving as member)， Sebastian OBERTHÜR, Oleg SHAMANOV.

This decision was adopted by consensus in Bangkok on 13 October 2009.

[ENGLISH ONLY]

REPUBLIC OF CROATIA

MINISTRY OF ENVIRONMENTAL PROTECTION,

PHYSICAL PLANNING AND CONTRUCTION

COMPLIANCE COMMITTEE

Enforcement Branch

STATEMENT OF POSITION OF CROATIA

in relation to

Preliminary finding CC-2009-1-6/Croatia/EB

Zagreb, 12 November 2009

In accordance with section X, paragraph 1(e) of the Procedures and mechanisms relating to compliance contained in the annex to decision 27/CMP.1 and the Rules of procedure of the Compliance Committee contained in the annex to decision 4/CMP.2 as amended by decision 4/CMP.4, the Republic of Croatia hereby contests the preliminary finding CC-2009-1-6/Croatia/EB of the enforcement branch of the Compliance Committee adopted on 13 October 2009 based on the following：

BACKGROUND

1. In its report FCCC/IRR/2008/HRV, regarding the review of the initial report of Croatia, the expert review team (ERT) raised two questions of implementation relating to (i) Croatia's calculation of its assigned amount and compliance with Article 3, paragraph 7 and 8 of the Kyoto Protocol (KP) to the United Nations Framework Convention on Climate Change (the Convention) and the modalities for accounting of assigned amounts under Article 7, paragraph 4 KP, as elaborated by decision 13/CMP.1, as well as (ii) Croatia's calculation of its commitment period reserves and its compliance with the mentioned modalities for accounting of the assigned amounts. The resolution of the second question of implementation follows from the resolution of the first, ie whether addition of 3.5 million tones (Mt) carbon dioxide equivalent (CO_2 eq) by Croatia to its base year level following decision 7/CP.12 is in accordance with KP.

2. The enforcement branch of the Compliance Committee (EBCC) proceeded with the respective questions of implementation regarding Croatia and upon evaluation of presented documents and facts adopted the preliminary finding CC-2009-1-6/Croatia/EB of non-compliance, disregarding decision 7/CP.12 adopted by the Conference of the Parties (COP) and suggested reverting issue to the Conference of the Parties serving as the meeting of the Parties (CMP).

3. Croatia is by way of this statement of position strongly opposing the arguments and conclusion of the preliminary finding CC-2009-1-6/Croatia/EB adopted by EBCC.

REASONING

4. In paragraph 20 of the preliminary finding EBCC recognizes the fact that decision 7/CP.12 was adopted in 2006, when Croatia was not yet a party to KP. Having in mind that Croatia has become a party to KP since, in EBCC opinion, Croatia should revert to the Conference of the Parties serving as the meeting of the Parties for consideration of its specific circumstances. In other words, EBCC assumed a standpoint that upon Croatia's becoming a party to KP, decision 7/CP.12 was actually invalidated and CMP became the only competent body to grant flexibility to Croatia.

EBCC entirely disregards historical circumstances leading to ratification of KP by Croatia. Contrary to EBCC understanding, decision 7/CP.12 was crucial precondition for Croatia to ratify KP, as Croatia and all parties to the Convention recognized the consequences arising from dissolution of the former Yugoslavia preventing Croatia from reaching the Convention's and KP greenhouse gas (GHG) emissions target. Those consequences are clearly indicated within the COP decision 7/CP.12.

7/CP.12

Level of emissions for the base year of Croatia

The Conference of the Parties,

Recalling Article 4, paragraph 6, of the Convention,

Responding to the request of the Government of Croatia that its base year greenhouse gas emissions be considered in accordance with Article 4, paragraph 6, of the Convention,

Recalling decisions 9/CP.2, 11/CP.4 and 10/CP.11,

Taking into account the submission from Croatia contained in FCCC/SBI/2006/MISC.1,

Noting the report of the individual review of the greenhouse gas inventory of Croatia submitted in 2004 and contained in FCCC/WEB/IRI/2004/HRV, which, inter alia, recognized that the greenhouse gas inventory of Croatia does not contain emissions from power plants outside the boundaries of Croatia for 1990 or subsequent years,

Noting that this decision has no implications for historical emission levels of any other Party, in particular for Bosnia and Herzegovina, Serbia, and Montenegro, 1

Considering that the flexibility under Article 4, paragraph 6, of the Convention to choose a base year different from 1990, in order to take into account the economic circumstances of countries undergoing the process of transition to a market economy, has previously been invoked by five Parties,

Considering the specific circumstances of Croatia with regard to greenhouse gas emissions before and after 1990, and the structure of the electricity generation sector of the former Yugoslavia,

Noting the intention that the approach taken should be conservative, and that unduly high flexibility should not be provided,

1. *Notes* that the inventory reported in 2004 showed the total greenhouse gas emissions in 1990 to be 31.7 Mt CO2 equivalent；

2. *Decides* that Croatia, having invoked Article 4, paragraph 6, of the Convention, shall be allowed to add 3.5 Mt CO2 equivalent to its 1990 level of greenhouse gas emissions not controlled by the Montreal Protocol for the purpose of establishing the level of emissions for the base year for implementation of its commitments under Article 4, paragraph 2, of the Convention.

EBCC fails to take into consideration that without flexibility provided under decision 7/CP.12 Croatia has not been in compliance with GHG emissions targets under the Convention and KP as of year 2005 onwards, which was the exact reason why Croatia requested and COP approved flexibility regarding establishing the level of emissions for the base year of Croatia in the first place. Pursuant to EBCC quite illogical interpretation, Croatia supposedly ratified KP in 2007 despite then being fully aware of continuous inability to comply with KP targets. Quite contrary to EBCC standpoint, Croatia ratified KP following the adoption of COP decision 7/CP.12 thus ensuring it will be in the position to fulfil KP commitments to the full extent.

In addition, EBCC disregards the fact that decision 7/CP.12 was adopted by the Conference of the Parties in 2006 unanimously (including affirmative votes of all KP Parties)， which was a year and a half after KP came into force and after first CMP was held in November and December 2005. If

any KP Party would have had any objections pertaining to the competency of CMP over COP or to the procedure of awarding the respective flexibility in this matter, it would surely have indicated so during the decision making process in COP, which was not the case. Therefore, EBCC's proposal that opts for CMP decision for Croatia does not make sense, not only because such identical decision was already adopted by COP, but also because all KP Parties already voted on the respective matter in COP as Parties of the Convention.

5. In paragraph 15 of the preliminary finding EBCC notes that under KP the degree of flexibility available to the Annex I Parties undergoing process of transition to a market economy is different in that： (a) Article 3, paragraph 5, of the Kyoto Protocol only addresses flexibility in the use of an historical base year or period other than 1990 for the implementation of commitments under Article 3 of the Kyoto Protocol by Annex I Parties undergoing process of transition to a market economy； (b) Article 3, paragraph 6, of the Kyoto Protocol provides that a certain degree of flexibility shall be allowed by CMP to the Parties included in Annex I undergoing the process of transition to a market economy, but only in the implementation of commitments under the Kyoto Protocol other than those under Article 3； (c) Neither paragraph 5 nor paragraph 6 of Article 3 of the Kyoto Protocol provides a basis for allowing the addition of tonnes CO_2 eq to the level of emissions for a base year or period in the implementation of commitments under Article 3 of the Kyoto Protocol.

When interpreting Article 3, paragraphs 5 and 6 KP, EBCC omitted to recognise dualism of regimes allowing flexibility regarding the establishing of the level of emissions for the base year for Annex I Parties undergoing process of transition to a market economy – one under the Convention and the other under KP, both of which EBCC is obligated to honour.

For Annex I Parties undergoing process of transition to a market economy the flexibility under the Convention was established according to Article 4, paragraph 6 of the Convention, further elaborated by decision 9/CP.2, paragraphs 5, 6 and 7. Pursuant to the Convention's regime, flexibility was allowed to Bulgaria, Hungary, Poland, Romania, Slovenia and Croatia. EBCC accepted flexibility allowed under the Convention for all aforementioned countries, except for Croatia.

> 9/CP.2
>
> 5. Decides that the four Parties that have invoked Article 4.6 of the Convention, requesting in their first communications flexibility to use base years other than 1990, be allowed this degree of flexibility, as follows：
>
> • Bulgaria： to use 1989 as a base year；
>
> • Hungary： to use the average of the years 1985 to 1987 as a base year；
>
> • Poland： to use 1988 as a base year；
>
> • Romania： to use 1989 as a base year；
>
> 6. Requests the Subsidiary Body for Implementation to consider any additional requests on the basis of Article 4.6 of the Convention and to take decisions as appropriate on its behalf, and to report thereon to the Conference of the Parties；
>
> 7. Requests that the Annex I Parties with economies in transition invoking Article 4.6 of the Convention in the implementation of their commitments should do so by explicitly indicating the

> nature of this flexibility (e.g., choice of a base year other than 1990, use of the revised guidelines for the preparation of national communications, schedule of submission of national inventory data other than indicated in paragraph 4 (b) above, etc.), and should state clearly the special consideration they are seeking and provide an adequate explanation of their circumstances;

Croatia particularly emphasises paragraphs 6 and 7 above clearly indicating that nature of flexibility is in no way restricted and is under no circumstance limited to use of base year or period other then 1990. Therefore, Parties of the Convention beyond any doubt never intended to restrict the nature of the respective flexibility with respect of base year GHG emissions providing clear and obvious foundation for resolution of any Party's particularities, including Croatian. This standpoint is clearly put forward in principles of the Convention demanding 'common but differentiated responsibilities'. EBCC omitted to take note of all previous relevant factors in Croatian case. However, completely different approach was taken by EBCC in Bulgarian, Hungarian, Polish, Romanian and Slovenian case where ERT and EBCC immediately recognized flexibility under the Convention as set out above.

In addition to flexibility regime under the Convention awarded by COP, KP sets out its own flexibility regime awarded by CMP pursuant to Article 3, paragraphs 5 second and third sentence and paragraph 6 KP. Here it should be noted that flexibility regime under KP in no way invalidates or sets aside flexibility regime awarded under the Convention, as Bulgarian, Hungarian, Polish, Romanian and Slovenian case vividly show.

> Article 3 KP
>
> 5. The Parties included in Annex I undergoing the process of transition to a market economy whose base year or period was established pursuant to **decision 9/CP.2** of the Conference of the Parties at its second session shall use that base year or period for the implementation of their commitments under this Article. Any other Party included in Annex I undergoing the process of transition to a market economy which has not yet submitted its first national communication under Article 12 of the Convention may also notify the Conference of the Parties serving as the meeting of the Parties to this Protocol that it intends to use an historical base year or period other than 1990 for the implementation of its commitments under this Article. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall decide on the acceptance of such notification.
>
> 6. Taking into account Article 4, paragraph 6, of the Convention, in the implementation of their commitments under this Protocol other than those under this Article, a certain degree of flexibility shall be allowed by the Conference of the Parties serving as the meeting of the Parties to this Protocol to the Parties included in Annex I undergoing the process of transition to a market economy.

Contrary to EBCC standpoint, Article 3, paragraph 5, first sentence is entirely applicable to Croatian case. The respective clause explicitly invokes decision 9/CP.2, pursuant to which exact decision Croatia was awarded flexibility, later unjustifiably denied by EBCC. EBCC claims that the aforementioned clause is not applicable to Croatia as its effects are supposedly restricted only to use of base year or period other than 1990. This assumption is not correct as explained hereinafter.

The error EBCC committed is primarily caused by *grammatical* interpretation of the clause, contradicting the Convention and COP decisions, 9/CP.2 in particular.

Instead of grammatical interpretation, EBCC should have used *teleological* interpretation focusing on the intention of the Parties of the Convention, respecting particular circumstances of each party. Such interpretation would enable EBCC to adopt fair and equitable decision with respect to Croatia honouring the Convention, decision 7/CP.12, specific historical circumstances referring to Croatia, but also provisions of KP (as explained in paragraph 6 herein).

Contrary to EBCC opinion, the purpose of KP Article 3, paragraph 5, first sentence is not the use of base year or period (other than 1990) *per se,* but rather determining a historical base point for establishing the fair and just level of GHG emissions of Parties included in Annex I undergoing the process of transition to a market economy, such as Croatia. This principle was applied by EBCC without exemption to Bulgaria, Hungary, Poland, Romania and Slovenia. The same as in the aforementioned cases, in Croatian case EBCC should have taken into consideration any flexibility allowed pursuant to decisions 9/CP.2 and 7/CP.12, as prescribed by KP Article 3, paragraph 5, first sentence. Since Croatia was allowed to add 3.5 Mt CO_2 equivalent for the purpose of establishing the level of emissions for the base year under decision 9/CP.2 and 7/CP.12, EBCC is compelled to apply them identically with its (until now) consistent practise.

6. Beside incorrect application of KP Article 3, paragraph 5, first sentence (as described under paragraph 5 above)， by adopting the preliminary finding CC-2009-1-6/Croatia/EB, EBCC has not complied with numerous obligatory provisions of KP and CMP decisions regulating accounting of the assigned amounts and commitment period reserve, as set out below.

> Article 7 KP
>
> 1. Each Party included in Annex I shall incorporate in its annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol, submitted in accordance with the relevant decisions of the Conference of the Parties, the necessary supplementary information for the purposes of ensuring compliance with Article 3, to be determined in accordance with paragraph 4 below.
>
> 13/CMP.1
>
> 7. Part one of the report referred to in paragraph 6 above shall contain the following information, or references to such information where it has been previously submitted to the secretariat：
>
> (a) Complete inventories of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for all years from 1990, or another approved base year or period under Article 3, paragraph 5, to the most recent year available, prepared in accordance with Article 5, paragraph 2, and relevant decisions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (COP/MOP)， taking into account any relevant decisions of the Conference of the Parties.
>
> Article 8 KP
>
> 1. The information submitted under Article 7 by each Party included in Annex I shall be reviewed by expert review teams pursuant to the relevant decisions of the Conference of the Parties and in accordance with guidelines adopted for this purpose by the Conference of the Parties serving as the meeting of the Parties to this Protocol under paragraph 4 below. The information submitted under Article 7, paragraph 1, by each Party included in Annex I shall be reviewed as part of the annual compilation and accounting of emissions inventories and assigned amounts. Additionally, the information submitted under Article 7, paragraph 2, by each Party included in Annex I shall be reviewed as part of the review of communications.

> 27/CMP.1, annex, section II
>
> 11. The Committee shall take into account any degree of flexibility allowed by the Conference of the Parties serving as the meeting of the Parties to the Protocol, pursuant to Article 3, paragraph 6, of the Protocol and taking into account Article 4, paragraph 6, of the Convention, to the Parties included in Annex I undergoing the process of transition to a market economy.

Pursuant to very clear KP (based) rules cited above, a Party is obligated to submit annual inventory of GHG emissions in accordance with the relevant COP decisions (including 9/CP.2 and 7/CP.12)， annual inventory should be reviewed by ERT (again) in accordance with the relevant COP decisions (including 9/CP.2 and 7/CP.12) and finally the Compliance Committee is obligated to take into account Article 4, paragraph 6, of the Convention, ie flexibility regime under the Convention, when deciding on implementation of the commitments under KP. The preliminary finding CC-2009-1-6/Croatia/EB directly contradicts to the above provisions under KP, as it intentionally disregards both 9/CP.2 and 7/CP.12 decisions rendered by COP, instead of applying them.

7. In paragraph 21 of the preliminary finding EBCC concludes that, in the absence of a decision of the CMP on Croatia's specific circumstances, decision 7/CP.12 taken under the Convention does not provide a basis under the Kyoto Protocol for Croatia to add 3.5 Mt CO2 eq to its level of emissions for the base year for implementation of its commitments under Article 3 of the Kyoto Protocol and that accordingly the accounting of the assigned amounts is not in compliance with KP.

Pursuant to EBCC standpoint, decisions 9/CP.2 and 7/CP.12 referring to Croatia are for some reason not applicable to KP. Essentially EBCC believes that it is authorised and competent to invalidate COP decisions 9/CP.2 and 7/CP.12 for the purpose of KP application. This assumption is not correct as explained hereinafter.

Not only that the preliminary finding CC-2009-1-6/Croatia/EB contradicts Article 3, paragraph 5, first sentence KP, and violates Article 7, paragraph 1 KP, Article 8, paragraph 1 KP, decision 27/CMP.1, annex, section II, paragraph 11 and decision 13/CMP.1, annex, paragraph 7(a) (as described under paragraph 5 and 6 herein)， rendering such decision is also not allowed under EBCC procedural rules under KP and CMP decisions.

EBCC, contrary to its opinion, does not have jurisdiction to set aside the COP decision on any grounds. COP is, according to Article 7, paragraph 2 of the Convention defined as the supreme body of the Convention and the highest decision-making authority. On the other hand, the Compliance Committee is a subsidiary body competent for implementation of KP. Under no circumstance and on no legal grounds one can conclude that the Compliance Committee, as a subsidiary body, can overturn (or decide not to apply) any decision of COP, as the supreme body, as EBCC does by explicitly setting aside relevant COP decisions referring to Croatia.

Further, decision 27/CMP.1, annex, section V, paragraphs 4 and 5, or any other provision designating competence of the enforcement branch of the Compliance Committee does not stipulate any responsibilities of the enforcement branch regarding application of Article 3, paragraph 5 KP which is relevant for the Croatian case. In accordance with decision 27/CMP.1, annex, section V, paragraph 4(a)， responsibilities of EBCC extend exclusively over Article 3, paragraph 1 KP, and do not include paragraph 5. Consequently, as Article 3, paragraph 5 is not explicitly foreseen within EBCC's responsibilities, EBCC is not competent to decide/overturn/interpret any COP decision referring to Article 3, paragraph 5 KP, also under its own procedural rules. This last mentioned argument is confirmed by the fact that the used flexibilities had always been adopted by COP and then implemented by the Compliance Committee.

In other words, the Compliance Committee is responsible for implementation of COP decisions, not for dismissing them.

> 27/CMP.1, annex, section V
>
> 4. The enforcement branch shall be responsible for determining whether a Party included in Annex I is not in compliance with：
>
> (a) Its quantified emission limitation or reduction commitment under Article 3, paragraph 1, of the Protocol；
>
> (b) The methodological and reporting requirements under Article 5, paragraphs 1 and 2, and Article 7, paragraphs 1 and 4, of the Protocol； and
>
> (c) The eligibility requirements under Articles 6, 12 and 17 of the Protocol.
>
> 5. The enforcement branch shall also determine whether to apply：
>
> (a) Adjustments to inventories under Article 5, paragraph 2, of the Protocol, in the event of a disagreement between an expert review team under Article 8 of the Protocol and the Party involved； and
>
> (b) A correction to the compilation and accounting database for the accounting of assigned amounts under Article 7, paragraph 4, of the Protocol, in the event of a disagreement between an expert review team under Article 8 of the Protocol and the Party involved concerning the validity of a transaction or such Party's failure to take corrective action.

Contrary to EBCC's standpoint, pursuant to decision 27/CMP.1, annex, section V, paragraph 5, EBCC has direct authority to adjust inventories and correct compilation and accounting database for the accounting of assigned amounts in the event of a disagreement between an expert review team and the Party. Since ERT disregarded its obligation under Article 8, paragraph 1 KP to perform expert review of Croatia's inventory data pursuant to the relevant decisions of the Conference of the Parties (decisions 9/CP.2 and 7/CP.12)， EBCC should have exercised its authority under decision 27/CMP.1, annex, section V, paragraph 5 by applying the respective flexibility allowed to Croatia. Moreover so having in mind that application of COP decisions on flexibility <u>falls outside ERT mandate</u> as explicitly recognised by ERT in its Report of the review of the initial report of Croatia FCCC/IRR/2008/HRV, paragraph 159.Therefore, both ERT and the Compliance Committee are under KP (based) regulation obligated to apply decisions 9/CP.2 and 7/CP.12 to the case of Croatia.

8. EBCC offered no plausible explanation for different treatment of Croatia compared to the cases of Bulgaria, Hungary, Poland, Romania, Slovenia and Iceland. EBCC only notes in paragraph 16 and 17 of the preliminary finding CC-2009-1-6/Croatia/EB that flexibilities allowed to Slovenia (decision 11/CP.4) and Iceland (decision 14/CP.7) have been applied without requiring confirmation by CMP, and that supposedly COP decisions referring to Slovenia and Iceland do not allow the additional tonnes of CO_2 eq. Croatia therefore concludes that EBCC finds the nature of flexibility allowed to Croatia by the supreme body of the Convention supposedly questionable in terms of implementation of its commitments under KP.

Contrary to EBCC standpoint, Iceland was directly allowed additional tonnes of CO_2 eq under decision 14/CP.7 (single project methodology)， which was *nota bene* taylor-made specifically for Iceland. Pursuant to the respective decision, Iceland was entitled to exclude in national totals the

amount to the extent that would cause Iceland to exceed its assigned amount, or in other words was allowed to add 1.6 Mt of CO_2 eq to its level of GHG emissions for implementation of its commitments under KP. Croatia emphasises that flexibility allowed under decision 14/CP.7 was never confirmed by CMP and was accepted by ERT and EBCC without objections, as it stands in the respective decision.

Contrary to EBCC standpoint, flexibility allowed to Bulgaria, Hungary, Poland, Romania and Slovenia was based on the Convention flexibility regime (Article 4, paragraph 6 and decision 9/CP.2)， which is identical flexibility regime as applied to Croatia. All those flexibility related COP decisions were never confirmed by CMP and as such were accepted by ERT and EBCC without objections. The flexibility in the use of an historical base year or period other than 1990 for the implementation of commitments under Article 3 of the Kyoto Protocol by Annex I Parties undergoing process of transition to a market economy – the sole difference between Croatia and other mentioned countries –in no way prevents other means of flexibility allowed under decision 9/CP.2, including adding 3.5 Mt of CO_2 eq to its 1990 level granted to Croatia pursuant to decision 7/CP.12, as explained under paragraph 5 herein.

The fact that EBCC opts for confirmation of COP decision allowing flexibility to Croatia (7/CP.12) by CMP, which EBCC has not requested in the similar cases of Bulgaria, Hungary, Poland, Romania, Slovenia and Iceland, and which would constitute unprecedented practise, results in the preliminary finding CC-2009-1-6/Croatia/EB against Croatia’s interest and grave violation of equal treatment principle.

CONCLUSION AND REQUEST

9. Croatia strongly believes that the preliminary finding CC-2009-1-6/Croatia/EB is not in line with the Convention, the Kyoto Protocol and relevant COP and CMP decisions according to all aforementioned arguments, particularly emphasising the following：

- The EBCC fails to take into consideration the consequences for Croatia arising from dissolution of former Yugoslavia
- The EBCC fails to recognize that that preliminary decision denies Croatia’s ability to comply with 2012 emissions target
- The EBCC overlooks fundamental fact that decision 7/CP.12 was crucial precondition for Croatia to ratify the Kyoto Protocol, particularly having in mind compliance with 2012 emissions target
- The EBCC suggested that CMP should adopt a decision allowing flexibility to Croatia, although such identical decision was already adopted by COP, with affirmative votes of all parties to the Kyoto Protocol
- The EBCC fails to recognize that it should equally apply flexibility regimes regarding establishing the level of emissions for the base year for Annex I Parties undergoing process of transition to a market economy as provided under both, the Convention and the Kyoto Protocol

- The EBCC does not take into account that under applicable decision 9/CP.2 the nature of flexibility is in no way restricted, nor limited to use of base year or period other then 1990
- The preliminary finding overlooks the fact that the first sentence of Article 3, paragraph 5, of the Kyoto Protocol, invoking decision 9/CP.2, should be applied to Croatia using teleological interpretation
- Preliminary decision directly contradicts Article 7, paragraph 1 KP, Article 8, paragraph 1 KP, decision 27/CMP.1, annex, section II, paragraph 11 and decision 13/CMP.1, annex, paragraph 7(a)
- The EBCC does not recognize the fact that it is not competent for setting aside or denying application of any COP decisions, including decision 7/CP.12 referring to Croatia
- By its finding, The EBCC has contravened the equal treatment principle with respect to Croatia allowing flexibility in comparable cases of Bulgaria, Hungary, Poland, Romania, Slovenia and Iceland, without requiring CMP or any other additional confirmation
- By adopting the respective preliminary finding as a final the EBCC would neglect its obligation and crucial principle under the Convention to apply ‘common but differentiated responsibilities’ approach

10. Croatia would appreciate the opportunity to elaborate its position and answer any question that EBCC members might have on the matter at the meeting in Bonn, on 23- 24 November 2009.

11. Having said the above, Croatia kindly requests the EBCC, based on this statement of position and written submission CC-2009-1-5/Croatia/EB, to re-examine the provided arguments and its position expressed in the preliminary finding CC-2009-1-6/Croatia/EB, and to revise it by replacing it with a decision not to proceed with questions of implementation designated by the expert review team in the review of initial report of Croatia FCCC/IRR/2008/HRV, thereby allowing Croatia to add 3.5 Mt CO_2 eq to its 1990 GHG emissions not controlled by the Montreal Protocol for the purpose of establishing the level of emissions for the base year for implementation of its commitments under the Kyoto Protocol following decision 7/CP.12.

[ENGLISH ONLY]

Background document
for the consideration of the application of Decision 7/CP.12 for Croatia

General overview of Croatia

The Republic of Croatia gained independence in 1991 in the course of the dissolution of the former Yugoslavia. According to the 2001 census, the total population of Croatia is 4,437,460. Croatia has a natural negative growth rate of -2.9 per mil. The total land surface of the Croatia is 56,594 km^2. Its territorial waters and internal marine waters cover an area of 31,067 km^2.

By its geographical location Croatia belongs to the Central-European, Adriatic-Mediterranean and Pannonian-Danube basin group of countries. According to macro-geographic terms, Croatia's climate is differentiated between continental, mountainous and Mediterranean climates, which result in a high demand for heating in winter and for air conditioning in summer. The specific profile of the territory situated between Central and Southern Europe and between the large mountain ranges comprising the Alps and the Dinaric Alps generates a high demand for road transport, while its topography reduce the possibility of further development of rail transport.

Croatia is a country particularly vulnerable to climate change by virtue of its 5800 km long coastline with 1185 islands, as well as its fragile agriculture and forestry sectors that are socially and economically significant for the country. In addition, there is the potential impact on hydrology, water resources, mainland and coastal ecosystems. Consequently, Croatia has a cause to be concerned and motivated to actively engage in international efforts aimed at finding practical and effective solutions towards addressing climate change.

Croatia became a party to the United Nations Framework Convention on Climate Change (hereinafter referred to as the UNFCCC or the Convention) in 1996 (Official Gazette, International Treaties No. 2/96). As a country in the undergoing process of transition to a market economy, Croatia has, pursuant to Article 22, paragraph 3, of the Convention, assumed the commitments of countries encompassed in Annex I.

Croatia ratified the Kyoto Protocol (hereinafter referred to also as the Protocol) in April 2007 (Official Gazette, International Treaties No. 5/2007)， which entered into force on 28 August 2007. Having ratified the Protocol, Croatia, as an Annex B Party to the Protocol, has undertaken the commitment to limit greenhouse gas emissions during the Protocol’s commitment period 2008-2012, to 95% of registered emission levels during the base year 1990.

Following adoption by the Croatian Parliament of the Resolution on the Accession of the Republic of Croatia to the European Union in 2002, Croatia was granted the status of ´´EU candidate country´ in 2004 and accession negotiations commenced in 2005.

Croatia's emissions and the Kyoto target

In 1990 emissions in Croatia amounted to 31.3 MtCO_2-eq. In the case of the Republic of Croatia, neither 1990 nor the years prior to 1990 were representative of the base year.

Due to the unique energy system which existed in the former Yugoslavia, Croatia invested into thermal power plants located in other Social Federal Republics (Serbia and Bosnia and Herzegovina) of the former state, which was determined by the location of coalmines. Consequently, Croatia did not invest in electricity generation capacities based on fossil fuels on its own territory. Corresponding emissions from such electricity generation, which was ensured via long-term contracts, amounted to ca. 4.2 MtCO_2-eq.

In 1990, 27% of consumed electricity was generated in Croatia's own fossil-fuelled power plants (4 TWh). Thus, in 1990 Croatia's own generation of electricity was at a level to meet demands from 1974, which practically meant that ignoring flexibility for Croatia's specificity would *de facto* setback its economy by forty years.

Croatia's specific circumstances have been recognised within the Convention, during negotiations on the base year. Under Decision 7/CP.12, in determining its base year, Croatia was allowed an emission increase by 3.5 MtCO_2-eq, in comparison to its 1990 emission levels. This allowance is stipulated in the aforementioned Decision： 'Considering the specific circumstances of Croatia with regard to greenhouse gas emissions before and after 1990, and the structure of the electricity generation sector of the former Yugoslavia'. This represents an increase of 11% and it is proportional to the flexibilities achieved by other countries undergoing the process of transition, who invoked Article 4, paragraph 6, of the Convention, and whose emission levels increased by 9-23% on choosing a different base year.

Due to an economic recovery, emissions have started to grow after 1995, and in the period 2002-2007 emissions levels grew at a rate of 2.9%， while GDP grew at an average rate of 4.7%. Significant variation in emission levels of a range up to ±6% is mostly due to the varying share of electricity generation from hydropower plants.

In 2006 emissions per capita amounted to 6.9 t CO_2-eq, which is among the lowest emission levels of Annex I countries, notably 38% below the average of Annex I countries, and 34% below the EU average (FCCC/TP/2008/10). Emissions in 2007 amounted to 32.4 MtCO_2-eq, which is 2% below the Kyoto target (33.1 MtCO_2-eq with recognition of the Decision on the base year)， or 8.8% above the Kyoto target (29.8 MtCO_2-eq without recognition of the Decision).

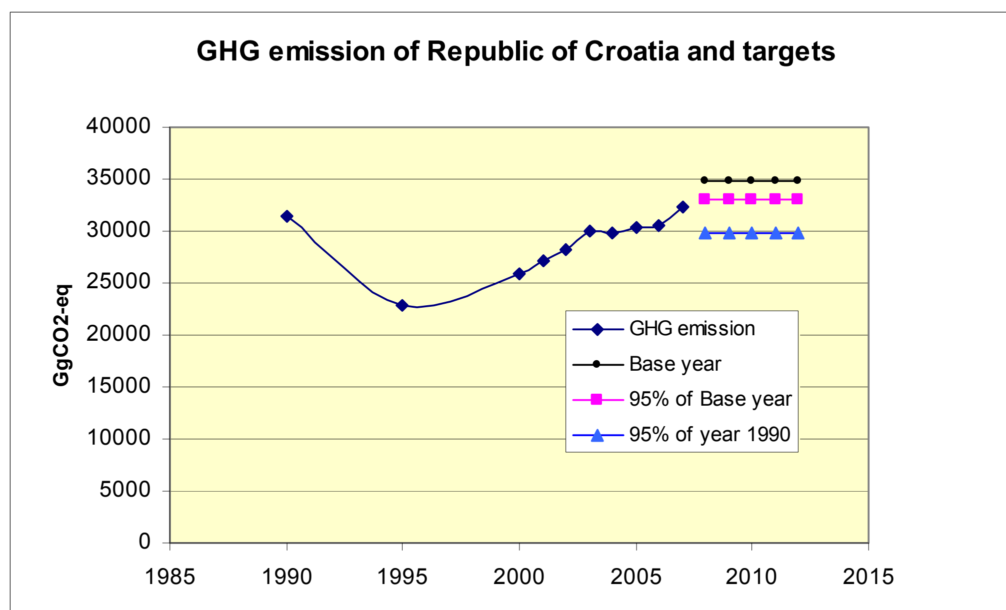

Table. 1： Greenhouse gas emissions in the Republic of Croatia, (NIR 2009)

Sector (CO_2-eq Gg)	1990	1995	2000	2005	2006	2007
Energy sector	22.172	16.402	18.837	22.155	22.434	23.803
Industrial Processes	4.186	2.565	3.206	3.672	3.855	4.073
Solvent Use	80	80	69	155	182	233
Agriculture	4.328	3.048	3.154	3.469	3.423	3.410
Waste	579	732	644	855	697	868
LULUCF	-4.185	-9.154	-5.281	-7.726	-7.490	-6.303
Total GHG without LULUCF	31.345	22.828	25.909	30.305	30.591	32.385
Base year	34.845					
95% of Base year	33.103					
95% of year 1990	29.778					

Croatia has fully completed the transfer of the *acquis communautaire* of the EU, which means that implemented climate change mitigation measures in Croatia are in align with those implemented by all EU Member States. The difference between the economic growth rate and the increase in emission levels continues to increase. Nevertheless, despite full efforts by Croatia to implement the aforementioned measures, emission levels in 2007 only came close to meeting the Kyoto target level. Consequently, in order to meet the Kyoto target pursuant to Decision 7/CP.12, additional measures will be required.

The target of 95% of the 1990 emission level (without the recognition of the Decision) is unrealistic, since it has been already exceeded. Moreover ， it is very likely that in the five-year Kyoto period, the target will be exceeded by the amount of 21-25 MtCO_2-eq, corresponding to 14-18% per year. By way of conclusion in so much a penalty of 30%

emission increase should be applied pursuant to the Kyoto Protocol rules, this would mean that Croatia would have to find a solution for ca. 30 MtCO_2-eq, which is almost 100% of its total annual emission levels.

In implementation of the provisions of the Convention and Kyoto Protocol the parties are guided by the principle of their common but differentiated responsibilities and their respective capabilities to implement measures, as well as the principle that economic development of each party is necessary for adoption and implementation of measures.

In compliance with these principles, when determining all the circumstances surrounding Croatia's implementation of its emission reduction commitments - the low level of greenhouse gas emissions, its economic capability for the implementation of measures, as well as, the necessity for economic development of Croatia - should all be taken into consideration.

For countries undergoing the process of transition to a market economy in particular, both the Convention and the Kyoto Protocol recognise a certain degree of flexibility, in order to strengthen their capacity to implement measures. Therefore, it is necessary to fully take into account the national circumstances of Croatia, which significantly impact its capability to fulfil the commitments under the Kyoto Protocol (already recognised and adopted by Decision 7/CP.12). Thereby, in the fulfilment of the commitments under the Kyoto Protocol, Croatia would be in an equal position to those countries in the undergoing process of transition to a market economy / and other Annex I countries.

Following the adoption of Decision 7/CP.12 the prerequisites were laid for ratification of the Kyoto Protocol by Croatia. Subsequently, the Croatian Parliament ratified the Kyoto Protocol, recognizing the applicability of Decision 7/CP.12 and its implementation for the Kyoto Protocol period.

Non-acceptance of Decision 7/CP.12 would constitute a crisis situation which in Croatia could give raise to an atmosphere of mistrust towards the Convention, with regard to consistency in the implementation of general principles, in particular of the principle of '*common but differentiated responsibilities*', as well as the principle of flexibility towards countries undergoing the process of transition to a market economy, as determined by Article 4, paragraph 6, of the Convention.

Legal feasibility

At the Conference of the Parties (COP 7) in Marrakesh, in 2001, Croatia submitted a request for consideration of its specific circumstances pursuant to Article 4, paragraph 6, of the Convention, relating to an emission increase in the 1990 base year.

Under Decision 10/CP.11 of the Conference of the Parties (COP 11) adopted in Montreal in 2005, Croatia was allowed a certain degree of flexibility with regard to its historical emission level. Furthermore, the Decision stipulates that the Subsidiary Body for

Implementation would consider *'the level of greenhouse gas emissions for the base year of Croatia and the exact nature of such flexibility and recommend a draft decision for adoption by the Conference of the Parties at a future session*'.

The base year for Croatia was established by Decision 7/CP.12 of the Conference of the Parties, at its Twelfth Session (COP 12) which was held in Nairobi in November 2006. The Decision is in accordance with Article 4, paragraph 6, of the Convention. In its preamble Decision 7/CP.12 refers to Decision 9/CP.2.

Croatia uses the base year established in accordance with Article 4, paragraph 6, of the Convention, when fulfilling its commitments under the Protocol pursuant to Article 3, paragraph 5, of the Protocol.

Article 3, paragraph 5, of the Protocol applies to Croatia on the basis of paragraph 6 of Decision 9/CP.2. Article 3, paragraph 5, of the Protocol, stipulates that a Party whose base year was established pursuant to Decision 9/CP.2, may use that base year for the fulfillment of its commitments under the Protocol. Similar to the cases of Bulgaria, Hungary, Poland and Romania (Decision 9/CP.2, paragraph 5)， Croatia is also covered by paragraphs 6 and 7 of the same Decision. Namely, in invoking paragraph 6, the Subsidiary Body for Implementation is requested to consider any additional requests by a Party on the basis of Article 4, paragraph 6, of the Convention, and to take decisions as appropriate on its behalf, and to report thereon to the Conference of the Parties. Consequently, it can be argued that all countries which requested and were given a certain degree of flexibility in accordance with Article 4, paragraph 6, of the Convention, fall within the scope of Decision 9/CP2 (Bulgaria, Hungary, Poland, Romania, Croatia and Slovenia).

This Decision recognises the specific circumstances of Croatia regarding greenhouse gas emissions prior to and after 1990, and allows for an increase in emissions by an additional 3.5 $MtCO_2$-eq in the base year for the purpose of establishing the level of emissions for the base year for implementation of its commitments under Article 4, Paragraph 2, of the Convention.

By quotation of the commitments under Article 4. paragraph 2, of the Convention, in Decision 7/CP.12, part of the Article 4.6 has been citied that provides：
'In the implementation of their commitments under paragraph 2 above, a certain degree of flexibility shall be allowed by the Conference of the Parties to the Parties included in Annex I undergoing the process of transition to a market economy, in order to enhance the ability of these Parties to address climate change, including with regard to the historical level of anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol chosen as a reference.´

Croatia is of the opinion that commitments pursuant to the Protocol should not be considered in isolation, given that the Protocol builds upon the provisions of the UNFCCC. Specifically, Article 4, paragraph 2(d)， stipulates a review of the adequacy of commitments under Article 4(a) and (b)， of the Convention.

The first review was undertaken at Conference of the Parties (COP 1)， in 1995, in accordance with Article 4.2(d) which concluded in its decision (´Berlin Mandate´)， that Article 4.2(a) and (b) were not adequate, and have subsequently been strengthened for Annex I countries within the framework of the Kyoto Protocol. Decisions pertaining to the Berlin Mandate and the adoption of the Kyoto Protocol refer to Article 4, paragraph 2, of the Convention, precisely the exact Article to which Decision 7/CP.12 also refers, when prescribing the level of emission for the base year for implementation of Croatia's commitments under the Convention. Therefore, on these grounds the aforementioned Decisions are equally valid.

Furthermore, this is not the first time that a Decision on the base year established pursuant to Article 4, paragraph 6, of the Convention has been adopted at a Conference of Parties to UNFCCC. As in Croatia's case, the same was done for Slovenia, which used the same base year for fulfilling its commitments under both the UNFCCC and the Kyoto Protocol, without having to confirm that Decision at the Conference of Parties to the Kyoto Protocol.

This situation did not pose a problem during the review process undertaken by the Expert team for assessing implementation of the Convention as submitted by Parties, nor was it raised as an issue in the Report on the review of the Initial Report of Slovenia.

The aforementioned Review Report only stated that Slovenia defined 1986 as its base year pursuant to the Kyoto Protocol, which as previously stated, was based on the Decision of the Conference of Parties to UNFCCC to establish a base year for the purpose of fulfilling commitments under the UNFCCC. Having regard to the above, the Republic of Croatia deems that it is not at fault for indicating the emission levels in 1990 as its base year, as prescribed by Decision 7/CP.12, for the fulfillment of its commitments under the Kyoto Protocol

Furthermore, in overlooking the decision allowing Croatia to add 3.5 MtCO_2-eq to its base year, Croatia would *de facto* be twice required to reduce its greenhouse gas emissions during the Kyoto Protocol commitment period 2008-2012： firstly, by a 5% emission reduction below 1990 base year levels, as established by the Kyoto Protocol； and secondly followed by an additional reduction by 3.5 MtCO_2-eq, which Decision 7/CP.12 granted Croatia towards fulfillment of its commitments under the UNFCCC

The Republic of Croatia is of the opinion that it is necessary to respect its national specificities. These have been well documented during the negotiation process on the Croatian request, and were further recognized by the Parties to the UNFCCC, which culminated in the adoption of Decision 7/CP.12.

Similar to other Parties, Croatia made efforts to have its national specific circumstances of losing a large share in power plants situated outside the borders of Croatia under the process of the dissolution of the former Yugoslavia, recognized within the framework of appropriate implementation instruments under the UNFCCC and the

Kyoto Protocol, namely： in determining the Kyoto Protocol target, establishing the ´single project´ methodology, and establishing the quota for LULUCF and in invoking the principle of flexibility pursuant to Article 4, paragraph 6, of the Convention.

Croatia's emission reduction target by 5% was fixed on the understanding that Croatia similar to a number of other countries in the undergoing process of transition to a market economy would make use of the flexibility principle under Article 4, paragraph 6. Upon determining Croatia's registration for ´single project activity´， Croatia was requested to address its specific circumstances through invoking Article 4, paragraph 6, of the Convention so that in effect the ´single project´ methodology would only be applicable to Iceland.

Moreover, Croatia submitted an application for an increase of its quota for LULUCF, invoking footnote 5, by which a quota increase outside the prescribed methodology is foreseen, if by invoking such the issue of inability to fulfill commitments under the Kyoto Protocol is resolved. In Croatia's case, a quota was adopted in line with the methodology, once again on the understanding that its national specific circumstance would be resolved through Article 4, paragraph 6, of the Convention which was indeed the case.

During the negotiation process on Croatia's base year some open issues were encountered which Croatia deems have been resolved. The European Union expressed its concern that the case of Croatia would create a precedent – which, in Croatia's opinion, is unfounded, due to the uniqueness of its circumstances.

Since the second year of the Kyoto Protocol commitment period has nearly passed, Croatia believes that there is little danger of its case undermining the system. Moreover, at this point, it is important to stress that all unresolved bilateral issues with neighboring states have been resolved, which has been particularly stressed in the Decision 7/CP.12 *´Noting that this decision has no implications for historical emission levels of any other Party, in particular for Bosnia and Herzegovina, Serbia, and Montenegro´*.

Conclusion

In light of the aforementioned, Croatia states that Croatia's calculation of Assigned Amount Units (hereinafter referred to as AAU) to add 3.5 $MtCO_2$-eq to its base year, is in accordance with Articles 3, paragraphs 7 and 8, of the Kyoto Protocol.

Articles 3, paragraphs 7 and 8, of the Kyoto Protocol prescribe, amongst other things, the manner of calculating AAU for 1990 or the base year, as determined in accordance with Article 3, paragraph 5, of the Kyoto Protocol. In particular, Article 3, paragraph 5, of the Kyoto Protocol refers to decision 9/CP.2 in its entirety.

Given that Croatia, pursuant to paragraphs 6 and 7 of the Decision 9/CP.2 requested and was granted the degree of flexibility, Croatia thereby falls under the purview

of Article 3, paragraph 5 of the Kyoto Protocol, and as such AAU has been calculated in compliance with Article 3, paragraphs 7 and 8, of the Kyoto Protocol.

Furthermore, according to the established practice to date, in identical (Slovenia) and similar (Iceland) cases, the right granted to an individual Party pursuant to a Conference of the Parties (COP) decision did not require confirmation by a Conference of the Parties serving as s meeting of the Parties (COP-MOP) decision.

Croatia therefore deems that the application of Decision 7/CP.12 is a just and legally founded solution. Croatia is of the opinion that there is no longer a risk of jeopardizing the integrity of the Kyoto Protocol by establishing a precedent, or by submitting new requests of a similar kind. This was the main reason behind reservations expressed to date by some states regarding Croatia’s case.

Should no solution be found, a much deeper problem will arise, since Croatia will not be able to reduce emissions to the levels representing 95% of 1990 emissions, and the requested commitment would be relatively incomparable with commitments of other Annex I countries, especially those undergoing the process of transition to a market economy.

Zagreb, 10 October 2009