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Seventeenth session

New Delhi, 23–29 October 2002

Item 4 (b) of the provisional agenda

## METHODOLOGICAL ISSUES

### GUIDELINES UNDER ARTICLES 5, 7 AND 8 OF THE KYOTO PROTOCOL

#### **Views on the treatment of confidential data during the review activities under Article 8 of the Kyoto Protocol**

##### **Submissions from Parties**

1. By its decision 23/CP.7, the Conference of the Parties (COP), at its seventh session, requested the SBSTA, at its seventeenth session, to consider options for the treatment of confidential data during the review activities under Article 8 of the Kyoto Protocol, with a view to recommending to the COP, at its eighth session, a decision on this matter for adoption by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its first session after the entry into force of the Kyoto Protocol (FCCC/CP/2001/13/Add.3).
2. By the same decision, the COP invited Parties to submit their views on this issue, by 1 August 2002.
3. The secretariat has received two submissions. In accordance with the procedure for miscellaneous documents, these submissions are attached and reproduced in the language in which they were received and without editing.\*
4. The secretariat has also received a submission from the Verification Research, Training & Information Centre (VERTIC). It is the practice of the secretariat not to reproduce documents from non-governmental organizations. However, Parties may wish to request copies of this submission directly from VERTIC at the following address: Baird House, 15/17 St Cross Street, London EC1N 8UW, United Kingdom. E-mail: m.anderson@vertic.org, telephone: + 44 20 7440 6967, fax: +44 20 7242 3266, Website: www.vertic.org.

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

**Parties making submissions**

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## PAPER NO. 1: NEW ZEALAND AND CANADA

### **Overview**

Decision 23/CP.7 paragraph 7 requests the SBSTA at its seventeenth session to consider options for the treatment of confidential data during the review activities under Article 8 of the Kyoto Protocol. Paragraph 8 requested the Secretariat to prepare an analysis of the practices of other international bodies on the treatment of confidential information (FCCC/TP/2002/2), which was noted by SBSTA at its sixteenth session.

This submission responds to the invitation to Parties in Decision 23/CP.7 paragraph 9 to submit views on the question of confidentiality referred to in paragraph 7. This submission:

- summarises the confidentiality provisions in the Article 8 guidelines;
- defines the mandate for SBSTA at its seventeenth session; and
- considers options for the maintenance of confidentiality.

### **Relevant provisions in the Article 8 Guidelines**

Under the *Guidelines for review under Article 8 of the Kyoto Protocol* (Decision 23/CP.7, FCCC/CP/2001/13/Add.3), provision is made for confidential information in paragraphs 9 and 10. Pursuant to those paragraphs:

- A Party may indicate that additional information requested by the ERT is confidential.
- The Party should provide the basis for protecting the information.
- Upon receipt of assurance that confidentiality will be maintained by the ERT, the party shall submit the information in accordance with domestic law and in the manner required by paragraph 9.
- The ERT shall maintain the confidentiality of the information “in accordance with any decisions on this matter adopted by the COP/MOP”.

It is apparent that these confidentiality provisions are only triggered by an ERT request for additional data. The guidelines do not contain any rules for regulating the submission and handling of confidential information in general.

### **The mandate for SBSTA at its seventeenth session**

Decision 23/CP.7 paragraph 7, together with paragraph 9 of the Guidelines for review under Article 8, define the scope of SBSTA’s mandate: to consider options for the treatment of confidential data. SBSTA is not, for example, mandated to consider:

- what types of information can be classified as confidential; or
- how confidential information should be treated in contexts other than an ERT request for additional data during an Article 8 review.

### **Options for maintenance of Confidentiality**

New Zealand and Canada support the development of a code of practice, which could be included in decision language for adoption by COP/MOP 1, to ensure that the confidentiality of information supplied to the ERT pursuant to paragraph 9 of the *Guidelines for review under Article 8* is effectively maintained.

New Zealand and Canada believe that the Secretariat, rather than SBSTA, is in the best position to develop efficient and effective confidentiality procedures. This is because the Secretariat will have primary responsibility for maintaining confidentiality – both as the recipient of confidential information, and through its relationship with the ERT. The Secretariat should be able to draw on past practice and experience, including by reference to international best practice, in helping to develop efficient and effective systems that are most appropriate to its circumstances. The Secretariat will be able to design a code of practice that best fits its own systems, structure and organisation. The code of practice should apply to the treatment of confidential information to which paragraph 9 applies, both by the ERT and by Secretariat staff. The Secretariat will be able to ensure the application of the code of practice to the ERT through its role in coordinating the review process.

We therefore suggest that the Secretariat develop a code of practice for the handling and storage of and access to confidential information to which paragraph 9 applies. SBSTA 17 could task the Secretariat to develop a code of practice for consideration by SBSTA at its eighteenth or nineteenth session, with a view to recommending a decision to COP 9.<sup>1</sup>

To assist the secretariat in that task, we make the following general observations which should be taken into account in developing the code of practice:

- While procedures are required to protect confidential information provided to the ERT, this needs to be balanced with the competing transparency requirement that other Parties should be able to assess the data upon which the ERT relied in coming to its conclusions. Paragraphs 46-48 and 83 of the Guidelines for review under Article 8 of the Kyoto Protocol prescribe the generic content of the ERT reports, while paragraph 49 provides for their publication by the Secretariat. It would be useful if the Secretariat could explore for inclusion in the code of practice methods of publishing the maximum amount of information while maintaining its essential confidentiality (eg in the form of aggregated data).
- Access to confidential information should be limited to only secretariat staff and experts who have been trained in, and have demonstrated an understanding of, the procedures established to protect confidential information.
- Access should be restricted to the minimum number of individuals necessary for review of the particular source.
- Confidential information should only be provided to experts participating in a desk review if the Parties are able to agree on adequate provisions for the maintenance of the confidentiality of such information.
- An ERT member, pursuant to paragraph 10 of decision 23/CP/7, has a continuing obligation to maintain, after termination of his or her service on an ERT, the confidentiality of any confidential information submitted by a Party.
  - An undertaking to comply with the Secretariat's code of practice, and with the continuing obligation not to disclose confidential information after termination of service with an expert review team, could form part of the formal arrangement between the Secretariat and lead reviewers as suggested in the submission by New Zealand, Canada, Australia and Japan on Terms of Service for Lead Reviewers of Expert Review Teams under Article 8 of the Kyoto Protocol. That submission also notes the importance of an agreement covering issues such as terms of service, confidentiality and professional responsibility and independence.

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<sup>1</sup> If necessary, SBSTA 17 could also recommend a decision to the Conference of the Parties at its eighth session (as envisaged by paragraph 7 of Decision 23/CP.7) reflecting this tasking.

## PAPER NO. 2: UNITED STATES OF AMERICA

Decision 23/C.P.7 requests the SBSTA “to consider options for the treatment of confidential data during the review activities under Article 8 of the Kyoto Protocol, with a view to recommending to the Conference of the Parties, at its eight session, a decision on this matter for adoption by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its first session.” The United States notes the protection of confidential information used in the preparation of GHG inventories is also important to the Convention, as the type of inventory information submitted under both instruments is the same.

A Party to the Convention has the right under Article 12(9) of the Convention both:

- to designate information as confidential (assuming any COP-approved criteria are met); and
- to have such information aggregated by the secretariat to protect its confidentiality before being made available to relevant Convention bodies.

Assuming Parties consistently take advantage of their right to have confidential information aggregated before it reaches relevant Convention bodies, such as review teams, then rules regarding the handling of confidential information would not technically be necessary. However, a Party might voluntarily choose to allow more access to such information than is actually required under Article 12. For example, it might consider it desirable to provide a review team with disaggregated inventory information, beyond what is required by Article 12 and inventory reporting guidelines.

Because Parties to the Convention should not be discouraged from sharing complete and transparent inventory information, rules developed in the Kyoto Protocol context relating to the protection of confidential information, such as by review team personnel, should also be considered by the COP for appropriate application to the Convention. For this reason, the United States intends to participate in discussions regarding the appropriate treatment of confidential information by review teams under the Protocol and recommends that any relevant provisions be adopted for application under the Convention. These provisions would not change the inventory reporting requirements under the Convention in any way, but rather ensure that if a Party voluntarily chooses to submit information - beyond what is required by Article 12/inventory reporting guidelines - that information would be afforded the same guarantee of protection under the Convention as it would under the Protocol.

Unless and until the COP identifies confidentiality criteria under the Convention, a Party’s declaration of confidentiality should be deemed valid, provided that the Party also indicates the reason that it considers the information confidential. An assertion regarding the confidentiality of data or information used in the preparation of an inventory can be made by a Party at time of submission or upon a request by a review team and need not be dependent on a request by a review team for additional information or access to information.

Access to confidential information provided by a Party should be limited to experts and Secretariat staff that have been trained in the appropriate handling of confidential information, have demonstrated understanding of these procedures and are under a contractual obligation not to disclose the information. The legal obligation should continue even after the term of the expert, or staff member’s appointment. Access to confidential information should also be limited to the minimum number of experts necessary for review of a particular source. Under no circumstance should confidential information be provided to experts participating in a desk review, as there is no way for the Secretariat to ensure that appropriate procedures are followed.

We recommend that Secretariat develop internal procedures for handling and storage of confidential information and for providing written documentation of these procedures for review and approval by the COP. These procedures should primarily cover both the treatment of information that is submitted to the

Secretariat and subject to a centralized review, but should also apply to any information that may be provided during an in-country visit.

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