

**CDM Watch, Earthjustice and Transparency International’s views on  
Procedures for appeals in accordance with the CMP requests in paragraphs 42-43 of  
Decision 2/CMP.5<sup>1</sup>**

CDM Watch, Earthjustice and Transparency International respectfully submit these comments in response to a call for public input by the Clean Development Mechanism (“CDM”) Executive Board (“EB”) on a proposed appeals procedure.<sup>2</sup> The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (“CMP”) has requested that the EB develop such procedures pursuant to Decision 2/CMP 5, *Further Guidance on the Clean Development Mechanism*.<sup>3</sup>

The inclusion of an appeals procedure in the CDM project approval process presents a crucial opportunity for the EB to promote enhanced accountability, legitimacy and public trust in and acceptance of the CDM as a valid tool for reaching its goals under the Kyoto Protocol – namely, mitigating global climate change while promoting sustainable development. It is likewise an opportunity to introduce coherence and quality control into the EB decision-making process. As such, the purpose of these comments is to highlight key safeguards that must be included in the appeal procedure in order to promote transparency, accountability, and consistency in the CDM project approval process, improve the efficacy of the CDM as a tool for reducing greenhouse gas emissions, and allow for more meaningful public input into the EB’s decision-making – something that is woefully lacking under the current procedures.<sup>4</sup>

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<sup>1</sup> While some of the text and recommendations in this submission draw from comments submitted by CAN International, this submission elaborates on those comments and makes additional recommendations.

<sup>2</sup> See [http://cdm.unfccc.int/public\\_inputs/2010/cmp5\\_para42\\_43/index.html](http://cdm.unfccc.int/public_inputs/2010/cmp5_para42_43/index.html).

<sup>3</sup> FCCC/KP/CMP/2009/21/Add.1, p. 4, available at <http://unfccc.int/resource/docs/2009/cmp5/eng/21a01.pdf#page=4>.

<sup>4</sup> These shortcomings were clearly recognized by the CMP in Decision 2/CMP 5 when it requested that the EB, “as its highest priority, continue to significantly improve transparency, consistency and impartiality in its work by, *inter alia*:

- (a) Continuing its efforts to improve consistency in its decision-making;
  - (b) Publishing detailed explanations of and the rationale for decisions taken, . . . ;
  - (c) Taking into account input from relevant international organizations . . . in its decision-making process[.];
- Decision 2/CMP 5, ¶ 7.

Not discussed here are concerns of both governments and non-governmental organizations with respect to numerous flaws in the CDM or suggestions as to how it might be fundamentally restructured in the post-2012 period.<sup>5</sup> Because of the substantial evidence indicating that a significant number of CDM projects do not meet their requirements or actually mitigate global climate change, the EB should look upon the creation of a public appeals process as a welcome opportunity to address accountability and integrity issues. These comments are focused on general principles and features that characterize fair, objective and effective appeals processes; specific procedures for appeal must ensure compliance with these principles. Once the EB develops draft procedures for appeal, we welcome the opportunity to submit additional comments on their design and on specific provisions.

As further discussed below, we strongly recommend that the EB adopt procedures that meet the following basic criteria:

- The right of stakeholders to appeal must be implemented as broadly as possible to address the wider impacts that flawed CDM projects have on global climate change and sustainable development.
- Stakeholders must be afforded the right to request a review of registration or issuance requests in order to avoid unnecessary appeals.
- Appeals must be allowed on EB decisions to approve a project following review, not just rejections, and include both procedural and substantive violations.
- Appeals must be allowed on EB decisions whenever there is probable cause that a DOE may not have performed its duties in accordance with the rules or requirements of the CMP or EB.
- The time within which appeals may be brought should not be limited where new, material facts come to light indicating that a CDM project does not meet the core requirements.

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<sup>5</sup> See, e.g., US Government Accountability Office (GAO), *Lessons Learned from the European Union's Emission Trading Program and the Kyoto Protocol's Clean Development Mechanism* (November 2008), available at <http://www.gao.gov/new.items/d09151.pdf>; GOA Testimony to Congress, *Observations on the Potential Role of Carbon Offsets on Climate Legislation* (March 5, 2009), available at [http://energycommerce.house.gov/Press\\_111/20090305/testimony\\_stephenson.pdf](http://energycommerce.house.gov/Press_111/20090305/testimony_stephenson.pdf); *Intervention prepared by Climate Action Network International for the AWG-KP Contact Group on emissions trading and the project based mechanisms* (April 7, 2009), available at [http://climatenetwork.org/climate-change-basics/by-meeting-and-date/bonn-i-mar-apr-2009/Intervention\\_CDM\\_%20AWG-KP\\_flexmex\\_Final.pdf](http://climatenetwork.org/climate-change-basics/by-meeting-and-date/bonn-i-mar-apr-2009/Intervention_CDM_%20AWG-KP_flexmex_Final.pdf); *CAN Positions on CDM Options* (March 2009), available at <http://www.climatenetwork.org/climate-change-basics/by-meeting-and-date/cop-14-poznan-december-2008/March%202009%20-%20CAN%20position%20on%20CDM%20options.doc/view>; *CAN Position Statement The Role of International Offsets in Light of Current Annex I Emissions Reduction Targets and Climate Financing Commitments* (November 2009), available at [http://climatenetwork.org/climate-change-basics/by-meeting-and-date/copenhagen-december-2009/CAN\\_position\\_offsets\\_Nov09.pdf](http://climatenetwork.org/climate-change-basics/by-meeting-and-date/copenhagen-december-2009/CAN_position_offsets_Nov09.pdf). The California Senate passed a bill that would prohibit the use of CDM credits to comply with California's greenhouse gas regulations. See <http://www.internationalrivers.org/en/node/4656>.

- An accurate and complete record upon which the appeal is based must be compiled and made publicly available.
- Rules, procedures, and codes of conduct and ethics must be put in place to ensure that the appeals body is independent, competent, impartial, and accountable.

**A. The Right of Stakeholders to Appeal Must Be Broadly Implemented.**

According to Decision 2/CMP 5, the EB is required to adopt appeal procedures for “stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation” of a CDM project activity. *Id.*, ¶ 42. Despite the suggestion that stakeholders entitled to appeal should be interpreted in a “conservative manner,” we strongly urge the EB to implement the right of stakeholders to appeal as broadly as possible. This stems from the fact that CDM project activities affect the rights not only of communities living in the physical vicinity of the project, but also citizens across the globe who are affected, or will be affected, by global climate change.

Too narrow an interpretation of the right of stakeholders to appeal questionable CDM projects is likely to undermine meaningful public input into the process. Current practice indicates that there are serious deficits in the local stakeholder consultation process undertaken by most project developers. Moreover, limiting the definition of stakeholders entitled to appeal to those that submit comments on the validation report is also likely to be insufficient. Practice shows that a limited number of comments are submitted during the validation stage, most likely due to language or capacity issues, or insufficient notice. As such, limiting the right to appeal to concerned stakeholders living in the vicinity of the project or to stakeholders that submitted comments during the validation stage of a project activity is likely to prove ineffective.

A broader, more inclusive definition of concerned stakeholders is likely to enable a more robust public check on the CDM project approval process, and promote transparency, accountability and integrity in the decision-making process. Public review can act as an important tool for verifying that a proposed project activity will result in real, additional, permanent reductions in greenhouse gases without imposing adverse environmental or social impacts. Concerned stakeholder engagement involving civil society in the appeal procedure serves to enhance the overall legitimacy of the CDM, its direction and its operations.

As demonstrated by stakeholder comments on past projects, stakeholders living or working near a proposed project (or otherwise “directly involved, as defined in a conservative manner”) are often interested in the promise of immediate economic benefits. They often have little incentive and/or capacity to address more complicated questions relating to the project’s impacts on global climate change – *e.g.*, additionality, baselines calculations, and other issues that are the basis of a project’s eligibility for CDM credits. Although some coordinated efforts among civil society are being developed to address these deficits and develop capacities, clearly much more capacity development is required globally. Urgently and crucially, a recognized and

active role of concerned stakeholders to participate in the CDM project approval process is needed to ensure the climate integrity of the CDM. Omitting from the process concerned stakeholders and the evidence, expertise, perspectives, and opinions they bring is likely to lead to situations where questionable and potentially flawed CDM projects are approved. Moreover, the very existence of a public review process works to promote compliance by project participants who in the absence of such a mechanism may be less inclined to comply with all standards and procedures.

A more sound approach would be to include in the definition of “stakeholders” non-governmental organizations and civil society groups that have the capacity to monitor and review proposed CDM project activities,<sup>6</sup> and who can both provide a voice for citizens living in the vicinity of a project site to ensure that environmental and social impacts are addressed, and serve as “public attorneys general” to ensure the integrity and efficacy of the CDM as a means of mitigating global climate change and promoting sustainable development.

For example, the European Commission has adopted an internal review procedure (pursuant to the Aarhus Convention, discussed below) wherein NGOs meeting certain criteria may request the Commission to consider whether an administrative act or omission is contrary to Community law relating to the environment. In order to do so, the NGO must demonstrate that: (a) it is an independent, non-profit making, legal person in accordance with a Member State’s national law or practice; (b) its primary stated objective is to promote environmental protection in the context of environmental law; (c) it has existed for more than two years and is actively pursuing environmental protection; and (d) the subject matter of the request for internal review is covered by its objective and activities.<sup>7</sup>

Finally, despite the suggestion that the EB define stakeholders entitled to an appeal “in a conservative manner,” the broad right of members of the public to access justice in environmental matters is enshrined in international law and numerous conventions to which many UNFCCC/Kyoto Protocol parties are party. These principles are based on the recognition that the public plays an important role by drawing to the attention of decision-makers concerns, errors, inaccuracies or facts that were overlooked, thereby acting as an extra check on actions that potentially harm the environment or public health. At the same time, introducing transparency and allowing public input into the process serves to eliminate distrust in the decision-making process, and in the decision-makers themselves. Thus, one of the key requirements of meaningful public participation in environmental decision-making is public access to judicial or administrative proceedings. As set forth in Principle 10 of the 1992 Rio

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<sup>6</sup> For example, UNFCCC accredited NGOs.

<sup>7</sup> Regulation (EC) No 1367/2006, Articles 10, 11(1), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1367:EN:NOT>. Another example is the Office of the Compliance Advisor/Ombudsman (“CAO”) is the independent recourse mechanism for IFC and MIGA, the private sector lending arms of the World Bank Group. CAO’s mission is to address complaints by people affected by IFC/MIGA projects and to enhance the social and environmental accountability of both institutions. See CAO website at <http://www.cao-ombudsman.org>.

Declaration on Environment and Development, agreed to at the UN Conference on Environment and Development (“UNCED”),

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities,... and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. *Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*<sup>8</sup> (Emphasis added.)

At the World Summit on Sustainable Development in Johannesburg (South Africa, 2002) 191 governments further reaffirmed the central role of broad-based stakeholder participation including access to “judicial and administrative proceedings, in environmental matters, as well as public participation in decision-making, so as to further principle 10 of the Rio Declaration on Environment and Development.”<sup>9</sup>

The vital role of public access to judicial or administrative proceedings is further enshrined in the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”), to which many UNFCCC/Kyoto Protocol Parties have subscribed.

[E]very person has the right to live in an environment adequate to his or her health and well-being.... Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights ...each Party shall guarantee the rights of access to

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<sup>8</sup> 1992 Rio Declaration on Environment and Development, *available at* <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

<sup>9</sup> World Summit on Sustainable Development [WSSD], Aug 26 – Sep.4 2002, Plan of Implementation, para. 128 (Sep 4, 2002), *available at* [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIToc.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm). *See also* United Nations Environment Program Malmö Declaration of the Global Ministerial Environment Forum, May 28 – May 31, 2000. (June 1 2000), *Available at* [http://www.unep.org/malmo/malmo\\_ministerial.htm](http://www.unep.org/malmo/malmo_ministerial.htm). The Malmö conference was held in pursuance of United Nations General Assembly resolution 53/242 of 28 July 1999 to enable the world’s environment ministers to gather to review important and emerging environmental issues and to chart the course for the future, and over 100 of the world’s environmental ministers attended. Paragraph 16 of the declaration states that “[t]he role of civil society at all levels should be strengthened through freedom of access to environmental information to all, broad participation in environmental decision-making, as well as access to justice on environmental issues. Governments should promote conditions to facilitate the ability of all parts of society to have a voice and to play an active role in creating a sustainable future.”

information, public participation in decision-making, and access to justice in environmental matters....<sup>10</sup> (Emphasis added.)

The European Commission has adopted various Directives and Decisions implementing the access to justice requirement of the Aarhus Convention.<sup>11</sup> In 2006, the European Parliament and Council adopted *Regulation (EC) N° 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies* (OJ L 264, 25.9.2006, p.13) (“Aarhus Regulation”). The Aarhus Regulation enables environmental NGOs meeting certain criteria to request an internal review under environmental law of acts adopted, or omissions, by Community institutions and bodies.<sup>12</sup>

In sum, we urge the EB, in determining which stakeholders may appeal its decisions, not to overlook the broad right of stakeholders to be afforded access to redress from improper or unlawful decisions affecting the environment as well-recognized under international laws and agreements.

#### **B. Stakeholders Should Be Afforded the Right to Request a Review of a Registration Request in Order to Avoid Unnecessary Appeals.**

The *Draft Procedures for Review of a Proposed CDM Project Activity* (“Draft Procedures for Review”) limit the right to request a review of a project seeking registration to a “Party involved in the proposed CDM activity” and members of the EB. *Id.*, ¶¶ 6, 10. As noted in comments on the *Draft Procedures for Review*, the right to request a review of a registration request should be extended to the public, including stakeholders and UNFCCC accredited NGOs.<sup>13</sup> Providing the public the right to request a review will help ensure that CDM projects seeking registration meet all of the applicable requirements, and that all errors, inconsistencies, or omissions in the Project Design Document (“PDD”) and supporting documentation are clarified and explained *before* the project is formally registered, thereby avoiding a future appeal. At present, the public (limited to “stakeholders and UNFCCC accredited non-governmental organizations”) only has the right to submit comments during the validation stage.<sup>14</sup> Often the

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<sup>10</sup> United Nations Economic Commission for Europe [UNECE], Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters preamble, art. 1, June 25, 1998, available at <http://www.unece.org/env/pp/documents/cep43e.pdf>.

<sup>11</sup> See generally EC Aarhus Convention website, available at <http://ec.europa.eu/environment/aarhus/#justice>.

<sup>12</sup> See also Commission Decision 2008/50/EC, which lays down detailed rules for the application of the Aarhus Regulation as regards requests for the internal review of administrative acts. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008D0050:EN:NOT>.

<sup>13</sup> See, e.g., Comments submitted by Earthjustice, March 5, 2010, available at [http://cdm.unfccc.int/public\\_inputs/2010/review\\_proc\\_rev/cfi/LQ1SSQ8K9ZA8TYB6JB7N2222MTP9RV](http://cdm.unfccc.int/public_inputs/2010/review_proc_rev/cfi/LQ1SSQ8K9ZA8TYB6JB7N2222MTP9RV).

<sup>14</sup> Prior to submitting the a request for registration to the EB, the DOE is required to make the project design documents publicly available, and allow a 30-day comment period wherein the Parties, stakeholders, and UNFCCC accredited NGOs are permitted to submit comments on the validation requirements. CDM Modalities and Procedures, ¶ 40(b) & (c).

comments relate to inaccuracies in the PDD (prepared by the project developer), or the lack of supporting documentation to demonstrate that the project meets the registration requirements (e.g., additionality, stakeholder consultation, evaluation of environmental impacts). While the DOE is supposed to address the public comments in the validation report that it submits to the EB along with a request for project registration, where the documentation remains incomplete or inaccurate, there is no right of the public to request a review of the registration request. In other words, the public is only permitted to comment on the PDD, which is prepared by the project developer and often incomplete and inaccurate, rather than the complete application for registration (in the form of the DOE's validation report). It is important that the public have the opportunity to comment on the complete application as contained in the validation report because it is the report, not the PDD alone, that provides the basis of the EB's decision whether or not to approve the project. The right to comment only on the PDD is insufficient because it does not include all of the information and data justifying the project, thereby depriving the public of the ability to ensure that all of the requirements have been met and to effectively act as a check on the integrity of the CDM approval process.

Allowing the public to request a review of a DOE's request for registration will provide the DOE and project participants with the chance to address concerns before the EB decides whether to approve or reject the project. This works in both parties' favor. Without the right to raise issues early on at the registration stage, the public must wait for the EB to approve the project and then lodge an appeal. Providing the public an opportunity for input and to participate in the registration approval process at the early stages of review may preempt later appeals that will only serve to further delay the process. Moreover, allowing concerned stakeholders to participate enhances the institutional and operational legitimacy and accountability of the DOEs, the CDM and the EB.

### **C. Grounds for Appeal**

According to Decision 2/CMP 5, the appeal must be in relation to: (a) situations where a DOE may not have performed its duties in accordance with the rules or requirements of the CMP and/or EB; and (b) rulings taken by or under the authority of the EB in accordance with the procedures referred to in paragraph 39 (requests for review of a request for registration of a CDM project) regarding the rejection or alteration of requests for registration or issuance.

*1. Appeals should be allowed on EB decisions to approve a registration and issuance request following a review, not just rejections.*

The appeals procedures adopted by the EB must allow appeals both from EB decisions to reject and approve a proposed CDM project following review. Allowing appeals from positive EB decisions to register a project or issue CERs is key to ensuring the climate integrity of the CDM process, as well as the legitimacy and accountability of the EB. The alternative would be an appeals process that merely provides another venue for project developers to push for

registration of questionable projects without an equal opportunity for civil society to voice concerns about evidence of violations of key requirements in the EB decision-making process. Moreover, coupled with the right of the public to trigger a review of registration and issuance requests, the possibility of a subsequent appeal of a positive EB decision following review will promote greater compliance by project developers. The absence of such a mechanism may provide opportunities for gaming, fraud and corruption by project developers and poor performance by DOEs.

The right of stakeholders to appeal from EB decisions to register a project is supported by the language of Decision 2/CMP 5, which states that stakeholder appeals procedures should be established in relation to “[s]ituations where a designated operational entity may not have performed its duties in accordance with the rules or requirements of the [CMP] and/or the Executive Board.” *Id.*, ¶ 42(a). This does not preclude situations, and in fact is likely to include situations, where the EB has decided to approve a project, but where questions nonetheless remain regarding whether the project meets the CDM rules and requirements. Moreover, it is also worth noting that while subparagraph (b) refers back to paragraph 39, which relates to requests for review of a registration request, subparagraph (a) does not, indicating that the right to appeal in situations where the DOE has not performed its duties could arise at an earlier or later stage. (See section C.3 below.) Given the significant number of EB-approved CDM projects that have been proven non-additional or otherwise not in compliance with the CDM rules and procedures, an appeals process that only allows project developers to appeal EB decisions to reject a proposed project would not serve its primary purpose of ensuring the legitimacy, accountability and integrity of the system.

*2. Appeals should be allowed on both substantive and procedural grounds.*

The appeals procedures adopted by the EB should allow appeals for violations of both substantive and procedural rules and requirements.<sup>15</sup> For example, failure to invite stakeholder participation and/or take due account of any comments received, failure to undertake an environmental impact assessment where project impacts are considered significant,<sup>16</sup> or where the PDD has not been made publicly available,<sup>17</sup> should provide grounds for an appeal. Lesser penalties only encourage developers to violate procedural requirements. Likewise, the appeals procedure must entertain substantive challenges to the project’s additionality, baseline

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<sup>15</sup> The right to appeal from procedural violations is widely recognized. For example, the US Administrative Procedure Act requires agency actions to be set aside where they are “without observance of procedure required by law.” 5 U.S.C. § 706(D).

<sup>16</sup> CDM Modalities and Procedures, ¶ 37(b) & (c).

<sup>17</sup> *Id.*, ¶ 40(b).



calculations, crediting period,<sup>18</sup> contribution(s) to sustainable development, and other issues that lie at the core of the CDM's mission.

*3. Appeals should be allowed whenever there is probable cause that a DOE may not have performed its duties in accordance with the rules or requirements of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and/or the Executive Board.*

In particular and as this call for public comments suggests, the appeals procedures should allow appeals in “[s]ituations where a designated operational entity may not have performed its duties in accordance with the rules or requirements of the [CMP] and/or the Executive Board.” *Id.*, ¶ 42(a). The draft policy framework to monitor performance and address non-compliance by DOEs is currently under discussion at the EB.<sup>19</sup> In line with this draft policy framework that aims for “zero-tolerance” in the longer term, appeals should be allowed whenever there is reason to believe that a DOE has not complied with key requirements. Criteria for lodging appeals should be aligned with the thresholds included in the policy framework but should at least be allowed for key requirements weighted with 3, 4 and 5 in the progress update which was presented at EB 52 in February 2010.<sup>20</sup>

*4. Stakeholders should be allowed to lodge an appeal from a registration or issuance decision at any time based on the discovery of new, previously undisclosed facts.*

It is likely that the EB will set a time limit within which stakeholders may lodge an appeal on an EB registration or issuance decision.<sup>21</sup> However, stakeholders should be allowed to lodge an appeal at any time after the EB decision where facts come to light that indicate that the project does not meet the core requirements of the CDM (e.g., additionality, permanence, erroneous calculation of baseline or CERs) or there has been non-compliance by the DOE with key requirements, as discussed above. This is necessary to ensure that the appeals process is an effective check on the integrity of the CDM.

*5. Procedures should be in place to penalize DOEs or project participants that intentionally violate the rules or intentionally fail to disclose material facts.*

Any successful appeals procedure should sanction DOEs or project participants that intentionally violate the rules or intentionally fail to disclose material facts. In addition to spot-

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<sup>18</sup> *Id.*, ¶¶ 43-52.

<sup>19</sup> [http://cdm.unfccc.int/Reference/Notes/accr\\_note01.pdf](http://cdm.unfccc.int/Reference/Notes/accr_note01.pdf).

<sup>20</sup> <http://cdm.unfccc.int/EB/052/eb52annagan1.pdf>.

<sup>21</sup> This time period should be long enough to ensure that stakeholders are given sufficient advance notice of the decision and time within which to review the EB decision and the record upon which it was based (e.g., at least ninety days).

check and suspensions, these sanctions should include additional financial penalties. Moreover, in line with procedures for suspensions of DOEs, if the appeals process reveals that excess CERs were issued, the DOE shall acquire and transfer an amount of reduced tones of CO<sub>2</sub>-equivalent equal to the excess CERs issued, as determined by the EB, to a cancellation account in the CDM registry.<sup>22</sup> Project participants that deliberately violate key requirements or intentionally fail to disclose material facts must be excluded from participation in the CDM (both as buyer and generator of credits).

#### **D. The Scope of Review – Compiling a Complete Record**

Should the EB determine that the appeal body will base its review on a “record” developed by the EB during the registration review process, it is vital that procedures be in place to ensure that a complete, written record is compiled and made available for public review. Such a record is key not only to the extent that it will provide a basis upon which the appeals body will then make its determination as to whether the EB decision was warranted, but also to ensure transparency in the EB’s decision-making. In order to be accountable, the EB must ensure that its decisions and the reasons/basis for those decisions are published and made publicly available.

A review of current CDM procedures suggests numerous areas for improvement in this regard. For example, as noted in comments on the *Draft Procedures for Review*, there needs to be a requirement that the Secretariat, when preparing its “assessment of responses and recommendation,” maintain a written record of discussions with and submissions from the DOE which will become part of the record and must be made publicly available along with the assessment and recommendation. The same should be true with respect to the independent technical assessment prepared by the member of the RIT.

In addition, as noted in Decision 2/CMP 5, the procedures will need to ensure that the EB has provided an adequate justification for its decision by “[p]ublishing detailed explanations of and the rationale for decisions taken, including sources of information used, without compromising the confidentiality of the opinion of any individual Executive Board member or alternate member.” *Id.*, ¶ 7(b). Such opinions must explain the EB’s findings and conclusions on material issues with sufficient specificity to advise the parties and any reviewing court of their record and legal basis.

Under the current procedures for review, the EB makes a decision on whether to approve or reject a CDM project for which review has been requested at its meetings. While some parts of the EB meetings are open to the public, discussions about individual projects are not. Subsequent EB meeting reports, which are supposed to provide complete information about decisions taken during the meeting, are often general and cursory. The reports often provide limited or no information on the reasoning or rationales behind the EB’s decisions on registration

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<sup>22</sup> CMP/2005/8/Ad1, p11 para22-24.

and issuance reviews. They frequently omit references to the sources of information on which decisions are based. Corrective action to enable fuller reporting in a public manner would substantially increase transparency and build public trust.

The appeals procedure should also specify the degree of deference or standard of review to be employed by the appeals body when deciding whether to uphold or set aside an EB decision.<sup>23</sup> Where the review is based on the record, the appeals body should determine whether the EB decision was based on substantial evidence, and in making that determination, should review the whole record and evidence, with full impartiality and without prejudice.

**E. Rules, Procedures, and Codes of Conduct are Needed to Ensure that the Appeals Body is Independent, Competent, Impartial, and Accountable.**

The requirement that an appeals body or tribunal be competent, independent and impartial is well recognized under international and national law, and widely reflected in judicial conventions and traditions across the globe.<sup>24</sup> This stems from the recognition that the protection of fundamental rights and the fair administration of justice depend on the ability of the reviewing body and its members to act independently and impartially. Moreover, independence and impartiality are necessary to instill public confidence in the appeals process and in the moral authority and integrity of the appeals body.

In order to meet these standards, it is recommended that:

- The CDM appeals body be comprised of persons who are independent from the EB and UNFCCC Secretariat.
- The CDM appeals body be required to abide by codes of conduct and ethics that guarantee that they are able to act impartially.
- Procedures for the selection and removal of CDM appeals body members ensure appropriate transparency and accountability.
- Operational procedures of the CDM appeals body ensure that its members maintain independence and impartiality.

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<sup>23</sup> For example, under the US Administrative Procedure Act, 5 U.S.C §§ 500, *et seq.*, a court is required to set aside agency actions that are “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(A). Canadian administrative law uses a contextual approach which requires the court to consider various factors and apply one of two standards of review. Where deference was intended the courts will review the decision on the basis of reasonableness. Where little or no deference is intended the decision will be reviewed on a standard of correctness. *See Dunsmuir v. New Brunswick*, 2008 SCC 9 [2008] 1 S.C.R. 190.

<sup>24</sup> *See, e.g.*, The Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct.

- Members of the CDM appeals body have appropriate competence to perform their duties, including expertise and knowledge of the technical and procedural requirements for CDM project activities.
- Members of the CDM appeals body be compensated sufficiently, and provided with appropriate resources to enable their performance within appropriate timeframes.
- Procedures be in place to address conflicts of interest, should they arise. These procedures should include requiring the recusal of appellate body members who may have such conflicts.
- Rules and procedures be established to guide the work of the appeals body and to ensure impartiality in its decision-making, in order to maximize its legitimacy and public confidence in its authority.

In sum, CDM Watch, Earthjustice and Transparency International strongly recommend that the EB develop rules and procedures – including codes of conduct and ethics – to ensure that the CDM appeals body is comprised so as to meet these standards.

Respectfully submitted,

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