



Annex 9

APPEALS PROCEDURES SUMMARY OF RESPONSES TO CALL FOR INPUTS

I. Background

A. Requests of the CMP

1. At its fifth meeting, in decision 2/CMP.5 paragraph 42, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) requested:

“The Executive Board to establish, following consultation with stakeholders, procedures for considering appeals that are brought by stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation of clean development mechanism project activities or proposed clean development mechanism project activities, in relation to:

- (a) Situations where a designated operational entity 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;
- (b) Rulings taken by or under the authority of the Executive Board in accordance with the procedures referred to in paragraph 39 above regarding the rejection or alteration of requests for registration or issuance.”

2. At its fifth meeting, in decision 2/CMP.5 paragraph 43, the CMP further requested:

“The Executive Board to design the procedures referred to in paragraph 42 above focusing on, but not limited to, ensuring due process and to report on implementation to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its sixth session.”

B. Executive Board call for inputs

3. At its fifty-third meeting (EB 53 report, paragraph 97), the Executive Board launched a call for inputs. Specifically the Executive Board stated:

“In accordance with the CMP requests in paragraphs 42-43 of Decision 2/CMP.5, the Board agreed to launch a call for public inputs opening on 26 March 2010 and closing on 23 April 2010, inviting views on procedures for appeals brought by stakeholders directly involved in the design, approval or implementation of CDM project activities or proposed CDM project activities, in relation to: (a) situations where a DOE may not have performed its duties in accordance with rules/requirements of the CMP and/or the Board; and (b) rulings taken by or under the authority of the Board regarding the rejection or alteration of requests for registration or issuance. The Board agreed that this call for inputs include views on how procedures for appeals interrelate to revised procedures for registration, issuance and review currently under the Board's consideration in accordance with paragraph 37 of Decision 2/CMP.5.”



II. Responses to call for inputs

A. Preliminary notes

4. The secretariat received 25 submissions. The submitters included groups and companies such as the Project Developer Form, Carbon Markets & Investors Association, CDM Watch, Earth Justice, Climate Action Network, The World Bank, the International Emissions Trading Association; as well individuals. Some of the 25 submissions, although submitted by different entities, were duplicates.

5. Despite the Executive Board's call for such, only one of the submissions provided substantive comments on how an appeals procedure would interrelate to the draft revised procedures for registration, issuance and review. Other than the timing of the initiation of the appeal – which the commenter tied to specific events in draft revised procedures for registration, issuance and review – the comments were generic to the procedures for appeals and are summarized below.

6. Many of the submissions did not specify whether their comments related to subparagraph 42 (a), regarding situations where a DOE may not have performed its duties in accordance with rules/requirements of the CMP and/or the Board; or subparagraph 42 (b), relating to rulings taken by or under the authority of the Executive Board regarding the rejection or alteration of requests for registration or issuance. Where the submitter's comments differentiated between subparagraph 42 (a) and 42 (b), or where it was clear that the submitter's comments related to only one of the subparagraphs, the below summary of comments identifies the specific subparagraph.

7. In addition, where the commenter's recommendation was dependent on the type of commenter (i.e. environmental NGOs, project participants and associated entities, DOEs and associated entities), the type of commenter is identified.

B. Independence and competency of the appeals body

8. Citing general legal principles, all of the commenters strongly recommended the need for an independent appeals body. To ensure the independence of the appeals body, the commenters recommended that:

- (a) the appeals body should not be comprised anyone who is: a current or former Executive Board member, a Panel member, a Registration and Issuance Team member, associated with the secretariat, a government employee with a role associated with the CDM;
- (b) the appointed members of the appeals body should serve for appointed terms, and that the Executive Board should not have power over the appeals body except in limited circumstances (e.g. misconduct);
- (c) appropriate rules are put in place to ensure that members of the appeals body have no conflict of interest in a particular matter, and are not perceived as having any conflict of interest in a particular matter.

9. Commenters recommended that no member of the appeals body have any role in the original ruling, even if that original ruling was only 'rubber stamped' by members of the appeals body.

10. In making these recommendations, commenters cited, *inter alia*, the need for the perceived legitimacy of the appeals body, the need for separating the powers of the body responsible for creating and implementing standards (i.e. the Executive Board) from the body responsible for the ultimate



ruling on a particular matter, the need for the appeals body to be seen as fair and unbiased, and the need to reduce the perceived risk faced by investors.

11. Commenters recommended that the Executive Board or nominating body ensure the competency of the appeals body. Commenters recommended the appeals body have the requisite knowledge of the CDM, as well as the following requisite skills and experience: technical, legal, regulatory and policy.

12. To achieve independence and competency, commenters suggested that the members of the appeals body should be nominated by an impartial nominations panel such as exists in the tribunal for the World Trade Organization, and appointed by the CMP. Some commenters also recommended that the appeals body have the ability to access any needed technical expertise.

C. Jurisdiction of appeals body (scope of allowed appeal)

13. Subparagraph 42 (a) limits appeals to: “Situations where a designated operational entity 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”.

(a) Comments of DOEs:

- (i) Some commenters recommended allowing a DOE to appeal a decision by the Executive Board to suspend or revoke accreditation.
- (ii) Some commenters recommended that the appeals process should not include commercial or contractual disputes.

(b) Comments of project participants:

- (i) Commenters recommended allowing an appeal where a DOE issues a negative validation/verification opinion and the DOE: did not consider some of the information provided or made available to it; asked for the wrong type of information; made unjustified interpretations of standards, guidance, or methodologies; fielded an unqualified assessment team; made an error in the process in general, or has not performed its duties in accordance with the rules and requirements of the CMP and/or the Executive Board.
- (ii) Some commenters recommended that appeals should not be limited to situations where a DOE has issued a negative validation/verification opinion. These commenters recommended allowing appeals in situation where a DOE issues a positive validation/verification opinion, but the project participant takes issue with the judgement by a DOE that affects emissions reductions, such as emissions factors, other conservative assumptions, interpretations of methodologies and the CDM rules and requirements in general.

(c) Comments of environmental NGOs:

- (i) Commenters recommended allowing an appeal where a DOE issues a positive validation/verification opinion, or where the Executive Board registers a proposed project activity or issues CERs, but a DOE may not have performed its duties in accordance with the rules and requirements of the CMP and/or the Executive Board.



- (ii) Commenters recommended allowing an appeal on both substantive grounds (e.g. incorrect baseline calculations) and procedural grounds (e.g. failure to take due account of stakeholder comments).

14. Paragraph 42 (b) limits appeals to: “Rulings taken by or under the authority of the Executive Board in accordance with the procedures referred to in paragraph 39 above regarding the rejection or alteration of requests for registration or issuance”.

- (a) Some commenters recommended that appeals should not be limited to the reasoning for a ruling (e.g. incorrect interpretation of the requirements, incorrect interpretation of information provided, lack of consideration of information provided). These commenters suggested allowing appeals to challenge whether the Executive Board acted outside the authority provided to it by the CMP in adopting the requirement (e.g. methodology, CDM rule) that the Executive Board applied in making its ruling.
- (b) Some commenters recommended allowing an appeal to challenge whether they have been afforded due process during the review process (e.g. whether review procedures were correctly followed, whether the Executive Board correctly followed its decision making procedures).

D. Stakeholders allowed to appeal

15. The chapeau of paragraph 42 limits the appeals procedures to “stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation of clean development mechanism project activities or proposed clean development mechanism project activities”.

16. Stakeholders who can appeal under subparagraph 42 (a):

- (a) Comments of regulated entities:
 - (i) All commenters recommended that project participants should be allowed to appeal.
 - (ii) Some commenters recommended also allowing DNAs to appeal.
 - (iii) Commenters who recommend allowing DOEs to appeal a suspension or withdrawal of accreditation also recommended allowing DOEs to appeal.
- (b) Comments of environmental NGOs:
 - (i) All commenters recommended allowing project participants to appeal.
 - (ii) All commenters recommend allowing any environmental NGOs who submitted comments during the GSC to appeal. These commenters also recommended that DOEs and DNAs should not be allowed to appeal. The commenters making these recommendations reasoned that only allowing project participants and environmental NGOs to appeal strikes a balance between inclusiveness while limiting the redundancy of who may appeal.
 - (iii) Some commenters recommended allowing any environmental NGO meeting certain requirements should be allowed to appeal, regardless of whether they submitted comments during the GSC. Some of the commenters recommended allowing any UNFCCC-accredited environmental NGO to appeal. Some commenters also recommend allowing any NGO to appeal: whose stated



objective is promoting environmental protection in the context of environmental law, has existed for two or more years, and is actively pursuing environmental protection.

17. Stakeholders who can appeal under subparagraph 42 (b):
- (a) All commenters recommended allowing project participants to appeal.
 - (b) Some commenters recommend allowing DNAs to appeal.
 - (c) Some commenters recommended allowing DOEs to appeal. Environmental-NGO commenters recommended not allowing DOEs to appeal. These commenter suggested that DOEs should be impartial.

E. Decisions and authority of the appeals body

1. Generally

18. Under paragraph 42 (a), in the case of a negative validation opinion, commenters recommend that the appeals body should have the authority to overturn or remand a DOE's negative validation opinion. In the case of a positive validation opinion, project participant commenters recommended that the appeals body should have the authority to overturn or remand a DOE's opinion that, because of conservative assumptions or interpretations by DOE, limited the quantity of CERs. Environmental-NGO commenters recommend that the appeals body should have the authority to overturn or remand a positive validation/verification opinion of a DOE, as well as overturn the registration of a project activity or the issuance of CERs.

19. Under paragraph 42 (b), commenters recommended that the appeals body should have the authority to uphold, overturn and/or remand the original ruling made by or under the Executive Board.

20. Commenters recommend that the appeals body produce a written opinion explaining the reasons and rationale for its decision.

21. Commenters suggested including provisions to ensure that the decision of the appeals body is final and cannot be challenged further.

22. Commenters suggested that, in the event of a decision overturning a ruling rejecting the registration of a proposed project activity, the appeals body should have the authority to back-date the effective date of the registration to the date of the original ruling.

23. Some commenters recommended that the opinion of the appeals body should set a binding precedent that must be followed by future rulings by or under the Executive Board.

2. Standard of proof/deference

24. In the context of paragraph 42 (a), for appeals against a DOE, some commenters suggested the appeals body should be highly deferential to a conservative opinion of a DOE. In other words, a DOE should be allowed to err on the side of conservativeness, for example, in interpreting a CDM rule and requirements, interpreting information provided by the project participants, and calculating emissions reductions. Other commenters recommended that a DOE's opinion should not be entitle to any deference.

25. In the context of paragraph 42 (b), for appeals against rulings by or under the Executive Board, some commenters recommended that the appeals body should be highly deferential to the



original ruling. That is, the appeals body should overturn or remand the original ruling only when the ruling is patently unreasonable (e.g. only when the defect of the ruling is immediate and obvious). Other commenters recommended that the appeals body should not owe any deference to the original ruling.

3. Cost of appeal, compensation, and damages

26. Preliminary note: In making their comments, some commenters did not distinguish between the cost of an appeal, compensation, or damages. For example, for any appeal there is a cost to the UNFCCC. There are also costs incurred by the appellant in bringing an appeal, and costs incurred by the respondent in defending an appeal. The costs incurred bringing or defending an appeal would be more appropriately described as compensation or damages. As stated above, however, some commenters did not make these distinctions.

27. Some commenters recommended that the appeals body should have the authority to decide whether the cost of the appeal shall be paid by the appellant or the respondent or divided between them. Commenter suggested overhead costs of the appeals body should be borne by the UNFCCC.

28. Some commenters recommend that the appeals body should not have the authority to award any compensation or damages.

29. DOEs: Commenters recommended that, under paragraph 42 (a), the appellant should not be awarded any costs or compensation unless the DOE is found to be incompetent.

30. Environmental NGOs: Commenters recommended that, under paragraph 42 (a), the appeals body should have the authority to sanction a DOE if it is found to have not performed its duties in accordance with rules/requirements of the CMP and/or the Board. Further, the commenters recommended that, if the appeals body finds that excess CERs have been issued, the appeals body should have the authority to order the DOE to transfer an equal amount of CERs to the cancellation account. Finally, the commenters recommended that, if a project participant deliberately violated a key requirement or intentionally failed to disclose a material fact, the appeals body should have the authority to bar the project participant from further participating in the CDM.

F. Other procedural matters

1. Basis for appeal and dismissing appeal

31. Commenters recommend requiring the Executive Board (or entity under the Executive Board making a ruling) provide a detailed reasoning and rationale, in writing, explaining the basis of its ruling so that a DOEs and/or project participants can understand the rejection of the request for registration/issuance. This would inform the basis for the appeal.

32. Commenters recommend that, to initiate an appeal, an appellant should be required to submit a written argument specifying the basis for the appeal (e.g. legal and factual basis).

33. Commenters recommended that, if the appellant does not provide sufficient basis for an appeal, the appeals body should have the authority to dismiss the appeal with prejudice (i.e., the appellant can not re-initiate the appeal) and/or should have the authority require the appellant to make clarifications to its appeal. The lack of a sufficient basis could include: the appeal lacks a factual or legal basis, the appellant is not a 'stakeholder' as defined in the procedures, the appeal is outside of the scope of appeals allowed by the procedures, and/or the appeal is not initiated within the prescribed time limits.



2. Time and cost for initiating an appeal, and time limits

34. Some commenters recommended only allowing for an appeal after providing for voluntary or, perhaps, mandatory arbitration.
35. Some commenters recommended imposing a cost to initiate an appeal. Commenters suggested that this cost should not be prohibitive, but should be significant enough to limit frivolous appeals.
36. In the context of paragraph 42 (a), which allows for appeals against a DOE:
- (a) Comments of project participants: Some commenters recommend allowing an appeal after a DOE submits the request for registration or issuance. Some commenters recommended allowing an appeal at any time during or after validation or verification.
 - (b) Comments of DOEs:
 - (i) Some commenters recommended allowing an appeal by a project participant only after the Executive Board rejects a request for registration of a proposed project activity or rejects a request for issuance of CERs for a registered project activity.
 - (ii) Some commenters recommended allowing an appeal by a project participant only after the validation or verification process is completed, and only after it has taken all opportunities provided by a DOE's system of complaints, disputes, and appeals as provided in accordance with the CDM accreditation standard.
 - (iii) Commenters recommended that either of the above recommendations would limit a project participant from using the threat of an appeal as a means to pressure a DOE to change its validation/verification opinion, or relax its standard of conservativeness.
 - (c) Comments of environmental NGOs: Commenters recommended allowing for an appeal after a DOE issues a positive validation/verification opinion, or after the registration of a proposed project activity or the issuance of CERs.
37. In the context of paragraph 42 (b), which allows for appeals against rulings, commenters recommended allowing an appeal only after the ruling becomes final.
38. Commenters recommend that the procedures provide time limits for initiating an appeal (30 – 60 days). An environmental-NGO commenter recommended that, in the context of paragraph 42 (a) (appeals against a DOE), an appeal should be allowed any time new, previously undisclosed information comes to light that a DOE may not have performed its duties in accordance with rules/requirements of the CMP and/or the Executive Board .
39. Commenters recommend that the procedures include time limits for hearing the appeal and time limits for the final decision.



3. The record

40. Commenters recommend that the entire record (all documents) before the appeals body should be publicly available.
41. Some commenters recommended including procedures for determining and not disclosing sensitive or confidential information.
42. Under paragraph 42 (a), commenters recommended that the factual record should be limited to the information provided by project participants to a DOE and the records of a DOE.
43. Under paragraph 42 (b), commenters recommended that the record should be limited to the information in the documentation submitted to, or through, the secretariat regarding a particular request for registration or issuance. The commenters expressed the view that a hearing should not provide an opportunity for project participants or a DOE to submit new arguments or information.
44. Some commenters recommended including in the record all assessments of the secretariat, and all records of communications between the secretariat and the DOE and/or project participants.

4. Types of Processes

45. Commenter recommend that the Executive Board consider two types of process: an inquisitional system and a two-party system. In the a two-party system, the appeals body would rely entirely on the written submissions and, if allowed by the appeals body, oral arguments from the parties (appellant and respondent). In an inquisitional the appeals body would have the authority to conduct its own investigation and engage in its own fact finding. The appeals body could, for example, call for submissions from parties (e.g. arguments, documents), hear witness testimony, and hear expert testimony.
46. Most commenter focused their comments based largely on a two-party system. During an appeal based on a two-party system, commenters suggested that the parties submit a series of alternating written arguments that make specific citations to the factual record. For example, the respondent would submit written arguments addressing the arguments in the appeal. The appellant would submit written argument addressing the respondent's written arguments, and finally, the respondent would submit its final written arguments. Commenters recommended that procedures should require each submission to be provided by a certain date.
47. Commenters recommended that an appellant should be allowed to choose a representative to make arguments on its behalf.
48. Commenters suggested allowing the parties to make oral arguments, perhaps at the discretion of the appeals body.
49. Commenters suggested, at the discretion of the appeals body, allowing other interested persons or entities to make additional written arguments on behalf of either party.

G. **Suggested Models**

50. Commenters recommended that the Executive Board review the procedures of other international arbitration bodies and tribunals in developing the appeals procedures. Those arbitration bodies and tribunals include the United Nations Commission on International Trade Law, the Dispute Settlement Body of the World Trade Organisation, the World Bank Inspection Panel, the World Anti-Doping Agency's Court of Arbitration for Sport, the Court of Arbitration for Sport, the arbitration



instruments of the International Chamber of Commerce, the International Centre for Settlement of Investment Disputes, the European Ombudsman's office, the Inter-American Court of Human Rights, and the European Court of Human Rights.
