

**DRAFT****Annex 11****INFORMATION NOTE REGARDING THE APPEALS PROCESS  
FOR APPEALS AGAINST ADVERSE RULINGS****I. Background****A. Requests of the CMP**

1. At its fifth session, the Conference of the Parties Serving as the Meeting to the Parties to the Kyoto Protocol (CMP), in decision 2/CMP.5 paragraphs 42 (b) and 43, requested the CDM Executive Board (hereinafter referred to as the Board) to create procedures for appeals against “rulings taken by or under the authority of the Executive Board ... regarding the rejection or alteration of requests for registration or issuance”.

2. Specifically, decision 2/CMP.5, paragraph 42, provides:

“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.”

3. 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’s call for inputs**

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

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issuance and review currently under the Board's consideration in accordance with paragraph 37 of Decision 2/CMP.5.”

**C. Summary of Executive Board’s call for inputs**

5. At its fifty-fourth meeting, the secretariat provided the Board with a summary of comments received from the Board’s call for inputs (EB 54 meeting annotation, annex 9).

**II. Fundamental aspects of the appeals procedures for consideration by the Executive Board****A. Introduction and purpose of this section of the information note**

6. The following subsections of this information note present fundamental aspects of the procedures for appeals under decision 2/CMP.5, paragraph 42 (b), that the Board may wish to consider and decide in order to allow the secretariat to develop the procedures for such appeals.

7. It should be noted that this information note only deals with appeals under paragraph 42 (b), which concerns appeals regarding the rejection or alteration of requests for registration or issuance. This document does not deal with appeals under paragraph 42 (a), which deals with appeals against a designated operational entity (DOE) which may not have performed its duties in accordance with CDM requirements.

**B. Who should act as the appellate body?**

8. Context for the question: The CMP did not specify who should act as the appellate body.

9. Relevant CMP text: “procedures...focusing on, but not limited to, ensuring due process” (decision 2/CMP.5, paragraph 43).

10. Options:

- (a) Either the Board acts as the appellate body (and a separate, independent body acts as the initial decision maker and, absent an appeal the final decision maker); or
- (b) Alternatively, a separate body, potentially appointed by the CMP, acts as the appellate body (and the Board acts as the initial decision maker and absent an appeal the final decision maker).

11. Considerations/points for discussion:

- (a) Due process requires that the appellate body and initial decision maker must be independent entities that have no undue influence on one another.
- (b) In addition, it seems that separation of powers would dictate that the rule-making functions of the Board would prohibit it from acting as the appellate body.
- (c) Further, it would seem that the other authorities of the Board, such as its authority to initiate reviews and its authority to provisionally suspend or withdrawal accreditation of a DOE, may create partiality (or the appearance thereof) and the apprehension of bias.
- (d) Finally, it is the opinion of Legal Affairs and the Sustainable Development Mechanisms (SDM) Legal Officer, that decision 3/CMP.1, paragraphs 36, 41 and 65, unless revised, would prohibit the Board from acting as the appellate body.

**DRAFT****C. What should be the scope of appeals allowed?**

12. Context for the question: The procedures should specify what issues a stakeholder may be allowed to appeal.
13. Relevant CMP text: “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” (decision 2.CMP/5, paragraph 42 (b)).
14. Options:
- (a) The Board may wish to tailor the scope of allowed appeals to situations where:
    - (i) The initial decision maker failed to consider or clearly misinterpreted a material fact that:
      - 1. Would have changed the result;
      - 2. Was clearly and unambiguously validated/verified as part of the original record submitted as part of the request for registration/issuance.
    - (ii) The initial decision maker misinterpreted or misapplied a CDM requirement that, if correctly interpreted or applied, would have changed the result.<sup>1</sup>
  - (b) The Board may wish to allow, as part of the scope, appeals relating to general violation of due process, such as whether the ruling by the initial decision maker was made “in accordance with the procedures referred to in paragraph 39”. Paragraph 39 of decision 2/CMP.5 includes:
    - (i) Whether an “adequate opportunity” was provided to DOEs/PPs “to address issues raised in reviews”;
    - (ii) Whether the review provided an “independent technical assessment of the analysis conducted by the secretariat”;
    - (iii) Whether the process ensured “timely consideration of registration and issuance requests”;
  - (c) The Board may wish to not allow appeals based on the elements laid out in above paragraph (14) (b), if the procedures for review as adopted by the Board are complied with. The appeals procedures could specifically state that, if properly followed, the procedures for registration/issuance provide for adequate due process. The appellant would then be limited to appealing whether the procedures were properly followed. The initial decision maker could specifically determine and state in its ruling whether the above procedures were properly followed.
15. Considerations/points for discussion:
- (a) Requiring the appellant to establish that all of the facts that it relies on in its appeal are credible, have been clearly presented, and have been sufficiently validated/verified, and that the initial decision maker’s ruling failed to consider or clearly misinterpreted

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<sup>1</sup> The secretariat considered that an appeal would not allow a challenge to the Board’s authority to adopt the CDM requirement(s) that formed the basis of the initial ruling.

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these facts, would provide an incentive to DOEs to clearly and unambiguously state and validate/verify the facts.

- (b) Under decision 3/CMP.1, paragraph 28, “participation in a CDM project activity is voluntary”. Therefore, the appellant should be required to establish that the proposed project activity complies with the applicable CDM rules and requirements.
- (c) Requiring the appellant to establish that initial decision maker misinterpreted or misapplied a CDM requirement would allow the ruling of the initial decision maker some latitude to take into account the policies, intentions and goals of the CDM program.
- (d) Not allowing an appellant to challenge the Board’s procedures for review of requests for registration/issuance, if properly followed, would limit frivolous appeals. In addition, if the CMP does not believe that the review procedures afford adequate due process, it could request changes to the review procedures.

**D. Who should be allowed to appeal?**

16. *Context for the question:* The CMP did not specify the entities that should be allowed to appeal, but instead provided the below guidance to the Board.

17. *Relevant CMP text:* “Stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation of a clean development mechanism project activities or proposed clean development mechanism project activities” (decision 2/CMP.5, paragraph 42).

18. *Options:* Potential stakeholder allowed to appeal could include PPs, DOEs, DNAs, and/or communities affected, or likely to be affected by the proposed project activity.

19. *Considerations/points for discussion:*

- (a) The above relevant CMP text should likely be read in conjunction with the definition of “stakeholders” provided in decision 3/CMP.1, annex, paragraph 1 (e), which defines stakeholders as “the public, including individuals, groups or communities affected, or likely to be affected, by the proposed clean development mechanism activity”.
- (b) It should be noted the text of decision 2/CMP.5, paragraph 42 applies to appeals under decision 2/CMP.5, paragraphs 42 (a) and paragraph 42 (b). In other words, the entities allowed to appeal adverse rulings under paragraph 42 (b) may be different than the entities allowed to appeal situations where a DOE may not have performed its duties under paragraph 42 (a). The options and points for consideration presented in this information note only focus only on entities potentially allowed to appeal under paragraph 42 (b).
- (c) It seems that PPs should be included in the category of entities allowed to appeal because PPs are the entities that are most affected by the ruling.
- (d) It seems the above definition of stakeholders would eliminate DNAs from consideration because the definition of stakeholders does not include governmental entities. In addition, allowing a DNA (a governmental entity) to appeal could make the appeal highly politically charged.

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- (e) The Board may wish to exclude DOEs from the category of entities allowed to appeal because DOEs should be considered as an impartial arm of the Executive Board. Further, a DOE's interest is sufficiently protected by a PP's right to appeal where a PP believes the request for registration/issuance received an incorrect, adverse ruling. Finally, where a project participant (PP) believes that a DOE did not sufficiently validate/verify the request, the proper avenue would be for the PP to file an appeal against the DOE under paragraph 42 (a).

**E. What information should the appellate body consider?**

20. *Context for the question:* The appellate body must have a record on which to base its ruling. There are essentially two groups of entities that hold information that is potentially relevant to an appeal: (a) the Board and its support structure, and (b) the PP and the DOE with which the PP contracted.
21. *Relevant CMP text:* "procedures...focusing on, but not limited to, ensuring due process" (decision 2/CMP.5, paragraph 43).
22. *Options -- Records of the PP/DOE:*
- (a) For request for registration, Board may wish to limit the record only to information submitted by a PP/DOE as part of the request for registration (e.g. PDD, VR, responses to requests for review).
  - (b) For requests for issuance, in addition to the above, the Board may also wish to allow the appellate body, at the request of the initial decision maker, to consider information submitted by a PP/DOE as part of a past request for issuance/registration. In other words, where a PP/DOE provides information in a current request for issuance that is different than the information provided in past request for issuance/registration, without sufficient explanation, the appellate body may be allowed to find that the information presented in the current request is not credible or, in the alternative, may be allowed to choose to adopt as fact the information that is less favourable to a current request for issuance.
  - (c) Where information is provided by the PP, but that information has not been validated/verified by the DOE, the Board may wish to provide the appellate body with the authority to find the information not credible or, in the alternative as the appellate body sees fit, the authority to find as fact the information provided by the PP that has not been validated/verified by the DOE and that is unfavourable to the request for issuance/registration.
23. *Considerations/points for discussion – Records of PP/DOE:*
- (a) To allow a PP/DOE to introduce additional information as part of the appeals process may provide a perverse incentive for a PP/DOE to provide less information to the Board and its support structure as part of the request for registration/issuance, and then introduce additional information only if the request receives an unfavourable ruling.
  - (b) To allow the appellate body to consider and find as fact, at the request of the initial decision maker, information submitted to the Board and its support structure as part of past requests for issuance/registration would prevent a PP/DOE from changing,

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without sufficient explanation, the information submitted to the Board and its support structure in a current or a subsequent request for issuance.

24. *Options -- Records of the Executive Board and its support structure:*

- (a) The Board may wish to limit the consideration of the records of the Board and its support structure to the ruling of the initial decision maker – so long as the ruling sufficiently explains the reasons and rationale for its conclusion, including the facts it relied on and its interpretation of the CDM rules and requirements as applied to the facts.
  - (i) Currently, the Board relies on the secretariat to produce information notes – which currently are not adopted by the Board – to provide the reasons and rationale for the ruling.
  - (ii) Therefore, The Board may wish to either formally adopt the information notes as the rulings of the initial decision maker, or formally provide that the information notes produced by the secretariat contains the considerations of the initial decision maker, which an entity may file an appeal against.
- (b) The Board may wish to formally exclude other records and information of the Board and its support structure from the appeals record.

25. *Considerations/points for discussion – records of Executive Board and its support structure:*

- (a) The ruling should constitute the culmination of the initial decision maker's considerations, and should provide sufficient information for a entity to file an appeal.
- (b) Other records of the Board and its support structure simply constitute the deliberative process leading to the ruling.
- (c) Providing other records of the Board and its support structure would prevent full and frank preliminary discussions of the relevant facts and interpretations of the CDM rules and requirements as applied to the facts.
- (d) In addition, these records, because they are pre-decisional, would not necessarily represent the views of the initial decision maker as contained in its ruling, and may simply confuse and muddle the essential issue(s) raised in an appeal.

**F. Generally, what should be the type of appeals process?**

26. *Context for the question:* In general, the process may take one of two forms: (a) a two-party process in which the appellate body relies entirely on the current record before the initial decision maker (e.g., PDD, VR, response to requests for review) and a system of alternating written submissions from the parties, or (2) an inquisitional system where, after the appellant files its appeal, the appellate body conducts its own inquiry.

27. *Relevant CMP text:* “procedures ... focusing on, but not limited to, ensuring due process” (decision 2/CMP.5, paragraph 43).

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- (a) Two-party system:
  - (i) In a two party system, the appellant, as part of its appeal, would be required to file a brief in which it would be required to provide the grounds and arguments supporting its appeal, including specific citations to the record. The initial decision maker (with the potential support of the secretariat) would then be required to file an opposing brief limited to addressing the arguments raised by the appellant in its brief;
  - (ii) The process could either end there, or the parties could be required to file a second round of briefs. In the second round of briefs, the appellant would be required to file a brief limited to addressing the arguments raised by the initial decision maker in its initial brief. The initial decision maker would then be required file a final brief limited to addressing the arguments made by the appellant in its second-round brief.
- (b) Inquisitional system:
  - (i) In an inquisitional system, the appellant, as part of its appeal, would be required to file a brief in which it would be required to provide the grounds and arguments supporting its appeal, including specific citations to the record;
  - (ii) In an inquisitional system, the process would end there unless the appellate body requests further action from either party under the authority provided to it;
  - (iii) In the inquisitional system, the appellate body could, for example, require additional information from either party, such as written submissions or documents.
- (c) Both systems (or hybrid): In either system, or a hybrid system, the Executive Board could provide the appellate body with the authority to require additional information from either party, including:
  - (i) Where the DOE provides a citation to a document that it relied on to validate/verify a fact or set of facts (but does not provide the document), the appellate body could request the document from the DOE (with a signed declaration by the DOE that the document was contained in its files or an explanation for why the document was not contained within its files);
  - (ii) If the appellant does not provide a sufficient basis for its appeal, the appellate body could dismiss the appeal with prejudice (i.e. the appellant would be prohibited from re-filing the appeal) or could require the appellant to make clarifications to its appeal;
  - (iii) The appellate body could require additional explanation of the ruling from the initial decision maker;
  - (iv) The appellate body could require oral arguments from the parties;

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- (v) The appellate body could require witness testimony, including expert testimony.

29. *Considerations/points for discussion:*

- (a) A two-party system would provide the initial decision maker the right to affirmatively defend its initial ruling and address the arguments made by the appellant in its appeal;
- (b) In an inquisitional system, the initial decision maker would not have the affirmative right to defend its initial ruling or address the arguments raised by the appellant;
- (c) Providing the appellate body with the authority to request a document from a DOE that it relied on to validate/verify a fact or set of acts may provide an incentive for DOEs to provide more accurate and credible validation/verification statements in their validation/verification reports;
- (d) By providing the appellate body with the authority to dismiss an appeal with prejudice if the appellant does not provide sufficient grounds for the appeal would provide an incentive for the appellant to provide higher quality appeals that clearly address all elements;
- (e) Providing such authorities to the appellate body may lengthen and complicate the process, but may also provide for more accurate and informed decisions.

**G. What deference should the appellate body owe to the ruling of the initial decision maker?**

30. Context for the question: The Board should define the degree of deference that the appellate body should owe to the ruling of the initial decision maker.

31. Relevant CMP text: “procedures...focusing on, but not limited to, ensuring due process” (decision 2/CMP.5, paragraph 43).

32. *Options:*

- (a) The Board may wish to provide that the appellate body owes no deference to the initial decision maker’s conclusions, interpretations of material facts and interpretations of the applied CDM rules and requirements.
- (b) In the alternative, the Board may wish to provide that, unless clearly erroneous or patently unreasonable, the appellate body should defer to the initial decision maker’s conclusions, interpretations of material facts and interpretations of the applied CDM rules and requirements.

33. *Considerations/points for discussion:*

- (a) Presumably, the initial decision maker, especially if it is the Board would have significant expertise and experience in understanding the CDM rules and requirements, and significant expertise and experience dealing with a wide variety of technical issues.
- (b) Allowing for some latitude in the interpretation of the CDM rules and requirements would allow the initial decision maker to take into account the policies, intentions and goals of the CDM program.



**DRAFT****H. What obligations should be placed on the appellant to receive a favourable ruling?**

34. *Context for the question:* In an appeals process, for the appellate body to rule in the appellant's favour, the appellant must meet some minimum thresholds for presenting information to the appellate body and for persuading the appellate body.
35. *Relevant CMP text:* “procedures...focusing on, but not limited to, ensuring due process” (2/CMP.5, paragraph 43).
36. *Options:*
- (a) The Board may wish to require the appellant to have the obligation of presentation of information to and persuasion of appellate body that, more likely than not, the initial ruling was incorrect.
  - (b) Alternatively, once the appellant comes forward with its presentation of information and argument, the Board could place the obligation on the initial decision maker to persuade the appellate body that, more likely than not, its ruling was correct.
37. *Considerations/points for discussion:*
- (a) **Presentation:** Requiring an appellant to establish that all of the facts that it relies on in its appeal are credible and have been sufficiently validated/verified, and that the initial decision maker’s ruling failed to consider or clearly misinterpreted these facts, would provide an incentive to DOEs to clearly and unambiguously state and validate/verify the facts.
  - (b) **Persuasion:** The basis for requiring an appellant to carry the burden of persuasion would be founded in decision 3/CMP.1, paragraph 28, which establishes that “participation in a CDM project activity is voluntary”. Therefore, the appellant should have the obligation to sufficiently present credible information that has been sufficiently validated/verified and the obligation to establish that the proposed project activity complies with the applicable CDM rules and requirements.

**III. Specific questions for the Executive Board**

38. The following paragraphs present questions for the Board regarding specific, fundamental aspects of the procedures for appeals under decision 2/CMP.5, paragraph 42 (b) that the Board may wish to consider and decide to allow the secretariat to further develop the procedures for appeals.
39. These questions may be addressed and decided in light of the considerations addressed above or other considerations of the Board.
40. It should be noted that all of these questions relate *only* to the procedures for appeals under decision 2/CMP.5, paragraph 42 (b), regarding “rulings taken by or under the authority of the Executive Board ... regarding the rejection or alteration of requests for registration or issuance”.
41. **Who should act as the appellate body?** Specifically:
- (a) Either the Board acts as the appellate body (and a separate, independent body acts as the initial decision maker and, absent an appeal the final decision maker); or

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- (b) Alternatively, a separate body, potentially appointed by the CMP, acts as the appellate body (and the Board acts as the initial decision maker and, absent an appeal the final decision maker).
42. **What should be the scope of appeals allowed?** Specifically, should the Board tailor the scope of appeals allowed for “rulings ... regarding the rejection or alteration of requests for registration or issuance”?
43. **Who should be allowed to appeal?** Specifically, what stakeholders should be allowed to appeal in light of the chapeau of decision 2/CMP.5, paragraph 42 (e.g. PPs, DOEs, DNAs) and the definition of stakeholders set forth at decision 3/CMP.1, annex, paragraph 1 (e)?
44. **What information should the appellate body consider in making its decision?** Specifically, what information should the appellate body consider in making its decision and what authority, if any, should the appellate body have to request additional information or submissions from a party?
45. **Generally, what should be the type of appeal process?** Specifically, should the appeals process be two-party system, an inquisitional system, or a hybrid of both? If the appeals process consists in part of an inquisitional system, what authorities should the appellate body have to request additional information or submissions from a party?
46. **What deference should the appellate body owe to the ruling of the initial decision maker?** Specifically, this could range from no deference to upholding the initial decision maker’s ruling unless it is clearly erroneous and patently unreasonable.
47. **What obligations should be placed upon the appellant to receive a favourable ruling?** Specifically, should the appellant carry the obligation of presentation of information to and persuasion of the appellate body that the ruling, more likely than not, was incorrect, and therefore should be overturned and remanded back to the initial decision maker for further consideration?

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