CARBON & CLIMATE LAW REVIEW

lexxion
BERLIN

UNFCCC Secretariat
Attn.: CDM Executive Board
P.O. Box 260124
D-53153 Bonn
Germany

Berlin, 25 April 2008

Calls for Inputs 46th EB Meeting:
Efficiency in the Operation of the CDM and Regional Distribution

Dear Madam/Sir,

For the ongoing operation and success of the Clean Development Mechanism, it is critical for the Executive Board to continue developing processes that reflect the rule of law; and there is no time to spare – this must be advanced as part of the decisions in Copenhagen if there is any hope of bringing disparate interests such as those voice by the United States, China and India into a long-term, binding agreement.

Enclosed, please find a special issue of the *Carbon & Climate Law Review*, titled "Reforming the CDM: Aspects of Law & Governance", that addresses this and other urgent questions raised in the context of the Clean Development Mechanism. We hope the timely and insightful articles by leading experts in the field can help inform the deliberations at the Executive Board.

With sincere regards,

Elisabeth DeMarco, Michael Mehling and Karl Upston-Hooper
On behalf of the Editorial Board

Lexxion Verlagsgesellschaft mbH
Güntzelstraße 63 • 10717 Berlin, Germany
www.lexxion.de • info@lexxion.de • Tel.: +49 -30-81 45 06 - 0• Fax +49-30-81 45 06-22
geschäftsführender Gesellschafter: Dr.Wolfgang Andreae,
Commerzbank Berlin, Konto 0 770 065, BLZ 120 400 00, IBAN DE29 1204 0000 0077 0065 00, BIC COBADEFF
Amtsgericht Charlottenburg HRB 75875, USt-IdNr.: DE209981990, Steuer-Nr.: 453/20540, Verkehrs-Nr.: 11026

Editorial

On 12 August 1990, Butch Reynolds ran the 400 m at the Monte Carlo Grand Prix. He finished third in 44.21 seconds. The world record holder at the time failed a random drug test following the race and was banned by the International Amateur Athletics Association (IAAF) for two years, effectively preventing his participation at the Barcelona Olympics. What makes this relevant to the current issue of the Carbon & Climate Law Review are the events that followed: Reynolds decided to sue the IAAF in the District Court of Ohio for breach of his due process rights guaranteed under the Fifth Amendment. After a protracted series of court cases that ended in the Supreme Court of the United States, he was awarded US$27.3 million. In response to this and other challenges to doping suspensions, the International Olympic Committee established the International Council for Arbitration in Sport to be the supervisory body of the Court of Arbitration for Sport, and instituted the quasi-legal framework of the anti-doping code to protect the due process rights of athletes.

The Clean Development Mechanism (CDM) created by the Kyoto Protocol is a unique experiment in the use of international law to resolve a global environmental problem: unique not only in terms of scale and its innovative use of the market, but also in the extent to which responsibility is delegated from the Meeting of the Parties to the CDM Executive Board (EB) and from the EB, in turn, to the various panels, working groups and teams assisting it. The imposition of due process around the delegation and exercise of delegated power is at the heart of recent calls for CDM reform, and resolution of this legitimacy crisis will be key to the survival of the CDM as part of the Post-2012 regulatory architecture, and to participation by the United States, which has a long tradition of affording its corporations and citizens the highest levels of due process. The editors hope this issue and its focus on aspects of CDM law and governance will play a constructive role in the ongoing debate and assist stakeholders in their preparation for the intense year of negotiations ahead.

In his introductory article, Ray Purdy provides an excellent analysis of the outcomes of the *cause célèbre* of the recent climate talks in Poznan: reform of the CDM. His review of the decision on further guidance relating to the CDM and the measures discussed (but not adopted) under the Article 9 process highlight the wide range of proposals under consideration in Poznan, some of which the EB has now been formally requested to implement. As he cautions, however, before coherent and effective reform can be undertaken there must be a

consensus developed by stakeholders as to the legal nature and roles of the EB, the Secretariat, DOEs and ultimately the COP/MOP itself.

Following the map of reform options laid out by Purdy, Grant Boyle et al. consider where the CDM fits within the wider structure of climate regulation, suggesting that the CDM should be viewed as a transitional measure, on the path to a combination of a Clean Development Fund and an expansion of Track I JI that would include major developing country emitters. This proposition is eloquently built around an analysis of the dichotomy of the twin pillars of the CDM: the creation of cost-effective offsets for Annex I parties and the promotion of sustainable development. As noted by the authors, "you have to be very lucky to kill two birds with one stone". In accordance with the principle of subsidiarity, the suggested reform would place governance issues at the appropriate domestic level, where the tools of administrative law would be available to market participants. However, none of the proposed options fully addresses the issue of effecting trade protectionism through the use of environmental measures such as the CDM.

Rudi Lof's contribution approaches the question of reforming the CDM from a more economic perspective, arguing that many of the distributional shortcomings of the CDM could be remedied through direct funding, and that such funding would enable the CDM to refocus on achieving the sustainable development necessary in a carbon constrained world.

Charlotte Streck and Moritz von Unger, building on Streck's earlier work on the issue of CDM governance, confront the thorny issues of designing an appeals system head-on. Their article also places such reform within the wider jurisprudence of transnational administrative law. As defined by Benedict Kingsbury et al., this growing body of legal thought focuses on "mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies in particular by ensuring [that] they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make". Undoubtedly, this emerging discourse will be significant in setting the normative framework for CDM reform, and will need to consider the normative assumptions governing regulation of the global citizen in these times of unprecedented economic contraction and increasing global conflict.

Ilona Miller and Martijn Wilder also consider the role of the EB as "the de facto regulator of the carbon market", and undertake a detailed review of existing due process opportunities and the developments at Poznan. In arguing for a framework to improve the governance of the CDM, Miller and Wilder consider various analogous bodies, and conclude that any reform will need to balance the need for transparency, accountability and predictability with goal of ensuring the CDM can operate effectively and cost-efficiently.

Wytze Van der Gaast and Katherine Begg present their study, ENTTRANS, on the practical measures that could be taken to address the normative goals of the CDM, particularly technology transfer. Their research reinforces recent calls for reform of the CDM focused on programmatic CDM and bundling.

The crisis of legitimacy that underpins many of the calls for reform of the CDM, finally, is addressed by Francesca Romanin Jacur through an analysis of other international bodies that have faced similar criticism: the Global Environment Facility and the World Bank Inspection Panel. She concludes that, ultimately, the solution to the question of legitimacy may lie in a revision of the function of the EB so that it performs a more supervisory role.

Complementing the thematic focus on CDM reform, three general articles address highly relevant issues in the evolving climate regime. Ralph Czarnecki and Kaveh Guilanpour provide a detailed legal analysis of the adaptation fund, and discuss a range of challenging questions raised by the recent decision adopted at Poznan, such as legal capacity. Marjan Peeters and Stefan Weishaar follow with an article considering the regulatory uncertainties faced by participants in the future European emissions trading scheme, and ask whether the objectives of the current amendment process might not have been achieved with less uncertainties through more consistent implementation of the existing legislative framework. Concluding this section with a more philosophical perspective, finally, Felix Ekardt and Antonia von Hövel examine the issue of distributive justice and competitiveness, and propose a novel approach to European and international climate policy based on the concept of equal emission rights.

This focus of this issue on CDM reform and the appropriate balance to achieve fair but effective regulation is especially poignant during the current financial crisis, when certain domestic regulators seem to have fallen asleep at the wheel and are now scrambling to protect domestic economies. But reform processes should always ensure that the baby does not get thrown out with the bath water. The editors suggest that any substantive reform of the CDM and its bodies should be preceded by a thorough debate about the desired normative goals of such reform with all key stakeholders, including the U.S. In this manner, due process and the CDM itself may be used to assist achievement of the global emission reduction targets that continue to elude much of North America. We hope this issue contributes to the debate and demonstrates that the emerging discourse of transnational administrative law has much to offer policy makers as they approach Copenhagen. In light of this specific discussion over CDM reform and the wider global debate about the divide between public and private, the market vs. regulator, in achieving sustainability, it is noteworthy that the sustainability of CDM institutions and decisions themselves is also very relevant. We may therefore seek to be guided by the words of John Adams and approach CDM reform with a view to ensuring that in the "end it may be a government of laws and not men."

Karl Upston-Hooper, Michael Mehling
and Elisabeth DeMarco