

April 23, 2010

CDM Executive Board  
UNFCCC Secretariat  
Martin Luther King Strasse 8  
P.O. Box 260124  
D-53153  
Germany

Dear Mr. Mahlung,

I am writing to you in response to your request for input from EB 53, in accordance with paras 42-43 of Decision 2/CMP.5, which states:

*“42. Requests 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:*

*43. Requests 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;”*

The following comments are set out on my personal behalf as a legal practitioner with considerable experience in CDM projects and transactions, and an academic interest in facilitating due process in the ongoing and important work of the CDM Executive Board (“EB”). These comments are my own and should not be taken as the position of Macleod Dixon LLP

and/or of any of its clients. These comments are put forth in the spirit of procedural fairness and natural justice that transcends all legal systems and traditions in order to facilitate just and enduring decisions that uphold the rule of law. They are organized as follows:

- (i) ***The Appellate Body. Who shall hear the appeal?***
- (ii) ***What appeals should be heard?***
- (iii) ***Status and Standing: Who May be a Party?***
- (iv) ***Due Process and Procedural Protections***
- (v) ***The Standard of Review***
- (vi) ***Remedies***

**(i) *The Appellate Body. Who shall hear the appeal?***

The EB is required to consider and determine the appropriate appellate body in the context of its express and limited jurisdiction provided to the EB by the COP/MOP in Decision 2/CMP.5 (the “Decision”). Specifically the Decision does not provide for the creation of a body or tribunal with superior jurisdiction to the EB or an over-arching body within the UNFCCC structure. Instead it requires the EB, itself to establish the appropriate entity to hear appeals from certain of its decisions. The EB does have express jurisdiction to delegate specialized functions, which it has exercised in the creation of the methodology panel, the registration and issuance teams and the completion of other specialized tasks. The appropriate body to hear EB appeals is therefore required to be either a subset of EB members or an independent tribunal appointed by the EB.

In determining whether to hear appeals directly or through a delegated body/tribunal, the EB may wish to consider: (a) the administrative law principle relating to independence (b) the administrative law principle relating to reasonable apprehension of bias and (c) the requisite expertise of the appellate body.

**(a) Independence**

Due process generally mandates that a decision should not only be fair, but it should also be seen to be fair by the affected public. This fairness is upheld, in part, by ensuring that the decision maker is entirely independent from the parties, and the outcome of the decision. Implicit in this is the independence and impartiality of the tribunal itself and each member of the appellate body. In the context of an appeal, this favours an approach where the people/entities hearing the appeal are distinct and separate from the parties, the process, and the outcome of the decision that is being appealed.

In the EB context, the principle of independence would mandate an approach whereby a separate and discrete delegated body/tribunal was established to hear the appeal. At a very minimum, the EB members that heard the appeal should be separate and distinct from the EB members that were active in the original decision. As a practical matter achieving independence may be very difficult given that the entire EB membership is regularly involved in decisions. Achieving

independence may be very difficult if the EB hears appeals from its own decisions directly and does not establish a delegated body/tribunal to hear the appeals. Such an approach is also likely to limit participation of certain EB members in regular decisions and require further procedural changes in regular EB decision-making in order to facilitate independence on appeals. As a result, I recommend that the EB establish a separate and discrete delegated body/tribunal to hear appeals from its decisions that are within the scope permitted by the Decision.

**(b) Reasonable apprehension of bias.**

Members of the appellate body should also be objectively free from any and all bias, and also be free from any reasonable apprehension of bias. The decision-maker should be free from any and all commercial, political, or other direct interests in the outcome of the decision. In situations where the people hearing the appeal are the same people that made the original decision that is being appealed, it is difficult to avoid at least a perception of bias to uphold the original decision in the appellate decision. As a result, I recommend that would suggest that the EB establish a separate and discrete delegated body/tribunal to hear appeals from its decisions that are within the scope permitted by the Decision, or, at a minimum, set aside a small group of 3 EB members that are tasked exclusively with hearing appeals within the scope of the Decision.

**(c) Expertise**

The Decision limits appeals to the determination of whether a DOE is performing its duties in accordance with the rules and decisions of the COP/MOP and the EB (the “CDM Rules”). This will first and foremost require a legal/administrative consideration of the CDM Rules. In very limited circumstances, it may also require a consideration of the scientific and technical judgments made by the DOE. Similarly, an appeal of the EB’s registration and issuance decisions, will first require a legal/administrative consideration of the CDM Rules and may also require a consideration of the EB’s (and possibly the Methodology Panel’s) judgment on scientific and technical matters. The EB should therefore ensure that appellate tribunal/body has both the legal and technical expertise to hear, consider, decide upon and provide reasons for the matters that may come before it, consistent with the Decision.

The EB should also avoid fettering its discretion over CDM decisions and detracting from its body of decisions by establishing an appellate body that is limited by lack of expertise in the CDM Rules, and technical knowledge of the subject matter.

As a result, I recommend that the EB establish a separate and discrete delegated body/tribunal and appoint members with the requisite legal and technical expertise to hear appeals from its decisions that are within the scope permitted by the Decision. This expertise should extend beyond technical expertise and focus on expertise in the CDM Rules and the process and procedures of the United Nations Framework Convention on Climate Change (“UNFCCC”).

**(ii) *What appeals should be heard?***

The Decision also limits the scope of appeals to EB decisions relating to: (a) situations where a designated operational entity (DOE) may not have performed its duties in accordance with the CDM Rules, and (b) registration and issuance. The EB must, therefore, circumscribe the rights of appeal from its decisions to these two main areas. Accordingly, the rights of appeal should not therefore extend to regular EB decisions relating to its processes and the other functions it performs in response to specific COP/MOP direction. Similarly, the appeal should not allow for wholesale review of methodology panel and registration and issuance team recommendations, but rather only the EB decisions in relation to such recommendations. Such limitation is not only consistent with the Decision, but is also integral to minimizing the nature and number of appeals that could otherwise grind regular EB business to a halt.

The EB may also wish to consider limiting appeals to those made in a timely fashion in order to avoid frustration of the EB processes. Generally, administrative decisions are subject to a defined period for launching an appeal from a decision that is in the range of thirty (30) to sixty (60) days of the date the decision is handed down.

**(iii) *Status and Standing: Who May be a Party?***

The EB should take all reasonable care to ensure that the process established by the EB does not facilitate specious, frivolous, or vexatious appeals that frustrate, slow, or otherwise obstruct the EB in conducting its regular business and work mandated by the COP/MOP. As a result, I recommend an approach that is particularized to the nature of the appeal.

In the context of Section 42(a) (DOE appeals), the appeal right should be limited to the impugned DOE, and standing should be limited to the Project Proponent, the Host Country of the Project, and a representative of the EB. In the context of Section 42(b) (registration and issuance appeals), the appeal right should be limited to the Project Proponent (either directly or through agent), and standing should be limited to the DOE, the Host Country of the Project, and a representative of the EB. Other parties (such as industry associations) may wish to seek standing to participate in the written portion of the appeal, but the decision on whether to grant standing to ancillary entities should be entirely at the discretion of the appellate body in light of the nature and impact of the appeal.

**(iv) *Due Process and Procedural Protections.***

The EB may wish to consider incorporating the following common administrative safeguards into the appeal process in order to facilitate due process and ensure procedural fairness in the conduct of appeals.

- **Notice.** All parties that are directly and materially impacted by the outcome of the decision that is likely to be heard during the course of the appeal should be provided with full, written and timely notice of the appeal to be heard. This should include a clear indication of the

time within which it may seek standing or to otherwise participate in the appeal. As a corollary, the notice should also indicate that parties that do not seek to intervene in accordance with the notice may be prohibited from doing so. The notice should also ensure that there is adequate disclosure of the case to be heard in order to allow stakeholders to determine if they are materially affected and make an informed decision on whether or not to seek standing.

- **Effective Participation.** Due process is also likely to require the EB to ensure that appellants and those with standing can effectively participate in the hearing of the appeal. In the event of a written appeal, this may require allowing for written submissions and evidence of the parties to the appeal. In the event of an oral hearing of the appeal, this may require allowing the parties that are directly and materially affected to be present throughout the hearing. In each case, this may include direct representation and/or participation through counsel or an agent. For complex and contentious cases it may wish to consider whether or not the hearing of the appeal should be in public and open to the broader EB committee or *in camera* (private) due to confidential or commercially sensitive matters.

Effective participation may also require the EB to facilitate the right for parties to bring and/or test relevant and material evidence. This may include consideration of whether or not the EB would wish to hear from witnesses, have the ability to call evidence, provide for the cross-examination of witnesses, exclude witnesses, and have all these proceedings transcribed and translated for the benefit of EB or regulated public. The EB may wish to consider whether its current jurisdiction around corrective action requests and further action requests provide it with the requisite authority to compel or require evidence on an appeal. This may include specific technical documentation and data and/or expert opinion. In all cases, it must ensure that the appellate body has adequate and sufficient information to make the decision on the appeal.

Effective participation is also likely to require the right to an interpreter in light of the UNFCCC context. Finally, implicit in the rights to effectively participate, is the right to refrain from participating by withdrawing from the processing or the appeal.

- **Standard of Proof.** Due process is also likely to require the EB to define the standard or onus of proof that it will require of parties to an appeal. Specifically, it should consider whether it will make determinations of fact on a balance of probabilities (i.e., it is more likely than not) or beyond a reasonable doubt (i.e. it is very likely that). Alternatively, it may wish to have differing standards that are applied contingent on the nature of the decision being appealed from. For example where a DOE is appealing on a decision that is within the DOE's technical expertise, the appellate body may indicate that the standard of proof that the DOE has to meet in relation to proving any facts is a "balance of probabilities standard". In contrast where a Project Proponent is appealing a registration decision that has involved the methodology panel, the appellate body may indicate that the standard of proof that the Project Proponent has to meet in relation to proving any facts is a higher standard.

Alternatively, this may be addressed through the broader consideration of the appropriate standard of review to be applied (as set out below).

- **Inappropriate Delegation.** Ensuring due process through the avoidance of inappropriate delegation may be better understood through the maxim: “*he who hears, must decide*”. This effectively requires that the decision-maker that hears the appeal is the same decision-maker that decides the appeal. On contentious matters, the EB may wish to ensure that the appellate body has more than one decision maker (a panel of decision-makers) hearing the appeal and participating in the decision-making. In the event that the panel or quorum does not present a consensus view, it may wish to establish that the majority will rule and allow for dissenting views with reasons to further guide stakeholders.

**(v) *The Standard of Review.***

The EB may wish to tailor the standard of review to be applied by the appellate body to the nature of the EB decision being appealed from. Specifically, where the decision is very technical and requires considerable expertise of the EB (registration and issuance decisions), we recommend that the EB appellate body take a very deferential approach to the original decision and only defer from the original decision in the event that it is patently unreasonable. That is, the decision on the face of the record has a defect that is immediate and obvious and there is no real possibility of doubting that the decision is defective. If the original decision is combined technical expertise and jurisdictional, the EB may wish to consider imposing a standard of reasonableness in light of both the complicated technical nature and the over-reaching procedural nature of the decision.

In the event of s.42 (a) DOE appeals, the appellate body may wish apply recognize the unique DOE expertise and require EB decisions that relate to DOE performance to be correct. Finally, if the decision is primarily one of the EB’s jurisdiction or governing authority, the appellate body should have far more jurisdiction to ensure that the decision was correct and the EB appellate body may undertake its own reasoning process to arrive at the ultimate recommendation to the EB to either uphold its original decision or reconsider same.

**(vi) *Remedies.***

Given that the ultimate jurisdiction over the appellate body as set out in the Decision appears to remain and rest with the EB, it is likely that the COP/MOP intended the final decision to rest with the EB. It is therefore likely that the available remedies on appeal are limited to: (i) the appellate body issuing a recommendation to the EB to uphold its original decision; or (ii) the appellate body issuing a recommendation to the EB to reconsider its original decision in light of defined factors that became evident on the appeal, on the understanding that the EB would be reticent to do something other than follow the recommendations and issue a new decision.

The acceptance and longevity and endurance of the appellate body decisions will be greatly facilitated by a number of procedural steps which may include: (i) providing written decisions of

the nature of the matters heard, the factors considered in the outcome of the appeal; (ii) providing notice of the decision to all affected stakeholders; (iii) ensuring that the decisions are made within a defined time period; (iv) specifying the contents of the order or decision; (v) providing clear and written reasons for the decision; and (vi) ensuring that such reasons are sufficient for consistency and predictability in future appeals and related decisions.

We thank you for the opportunity to make these submissions and are happy to assist the EB in developing a pragmatic implementation of these principles in the context of defined rules should it wish to proceed in accordance with the same.

Sincerely,

Elisabeth L. DeMarco

ELD/ELD:sp