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Private & Confidential
Chairman and Members of the CDM Executive Board
Mr Clifford Mahlung – Chairman
UNFCCC Secretariat
Martin-Luther-King-Strasse 8
D53153 Bonn
Germany

23rd April 2010

Dear Mr Mahlung,

Honourable Members of the CDM Executive Board,

Input on appeals procedure in accordance with the CMP requests in paragraphs 42-43 of Decision 2/CMP.5

EcoSecurities would like to thank the CDM Executive Board for the opportunity to respond to this Call for Public Inputs.

This note has been prepared by members of the CMIA who are employed in the legal profession. Its purpose is to outline the rationale for the application of the rule of law in the context of the CDM as this should form the basis and context for the design and implementation of the appeals procedures in relation to the decisions of the Executive Board and Designated Operational Entities. In particular, the paper seeks to highlight the opportunity presented by an appeals process to enhance the international reputation of the CDM and its decision makers. The authors seek to stimulate discussion and debate amongst stakeholders through sharing their professional experience of differing legal systems and appeals processes. The purpose of the paper is to illustrate the opportunity to strengthen the CDM and increase the confidence of all stakeholders in the complex decision making processes that take place within the CDM and therefore its overall robustness and environmental integrity.

EcoSecurities would like to gratefully acknowledge the considerable legal expertise and effort that has been put into this document by the CMIA membership and would like to highlight the contribution made by Dr Ludger Giesberts, Partner of DLA Piper, Head of Litigation & Regulatory Germany and lecturer at the University of Cologne and Chris Staples, Partner Environment and Climate Change Linklaters (London).

Yours sincerely,

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ECO SECURITIES

1. A rationale for the independent review of administrative decisions

1.1. The rule of law

The rule of law is a legal maxim encompassing legal principles which might be considered the "foundation of a society". There are differing academic approaches to exactly what the "rule of law" means. These range from simply requiring the law to be well-understood and have characteristics of generality, equality, through to an interpretation that it protects some or all individual rights.

Given the range of academic literature on the subject it is particularly useful, when considering the application of the rule of law to the administrative functions discharged by the EB under the (United Nations Framework Convention on Climate Change (the "UNFCCC"), to note that the United Nations defines the rule of law as:

'…a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'[1]

Although this statement relates primarily to states, the principles upon which it is based apply equally to any self-contained legal system, particularly those in which private entities are subject to the direction and control of a governing body acting under a legal mandate. It makes clear that, under a legal system operating within the concept of the rule of law, entities discharging executive power, for example the EB and its secretariat, must be subject to the law of that system to the same extent as other, non-state actors within it. In this context accountability is the key concept and means that such bodies must be capable of justifying the propriety of their decisions against the legal framework upon which their powers are based.

We welcome the decision by the EB to reform the CDM framework with a view to further promoting the rule of law within the system and to provide market participants with an effective mechanism through which to access independent review of the decisions to which they are subject.

1.2. The principle of separation of powers

The separation of powers is a fundamental constitutional concept which has its roots in the time of Aristotle (384 – 323 BC) and can be traced back in England to the reign of Edward I (1272 – 1307). The essence of the doctrine is that powers vested in the principal institutions of a state (or other equivalent legal entity such as the EB) should

[1] For more details, please see the website of United Nations Rule of Law: http://www.unrol.org/article.aspx?article_id=3

not be concentrated in the hands of any one institution. The reason for that separation is to provide checks on the exercise of power by each institution and to ensure that powers are exercised justly.

The powers associated with a complete system of law can be separated into the executive (controlling policy direction, initiating legislation and whose organs of state administrate the law) legislature (the body holding law making power and which holds the executive to account) and the judiciary (the body responsible for interpreting and applying laws and which ensures the legality/propriety of the exercise of government powers through appeal proceedings).

Different national legal regimes exhibit a range of how those powers may be configured. Most "presidential" systems have clearly demarcated legislatures and executives whilst in other cases the separation requires a more thorough investigation before it becomes apparent (e.g. UK). In all cases however the judiciary, and its independent status, should be without question.

This is not currently the case as regards the administrative framework of the CDM, and we welcome the initiative of the EB in attempting to address this issue.

1.3. How the presence of an appeals mechanism promotes better decisions

The absence of a review function over the discharge of an administrative body's powers can lead to suboptimal results. Conversely, the presence of an independent review process can sharpen thinking, promote rigour in the decision making process, and provide a route through which understanding (of both market participants and the decision making body) can be clarified, thereby promoting market certainty.

In the majority of circumstances in which an appeal avenue has been introduced a similar pattern emerges. Often the institution whose decisions it is proposed should be the subject of appeal, resists the change on the basis that its processes are fit for purpose and deliver fair and consistent results. On closer analysis of the benefits of such a process, it is often decided that the benefits outweigh the costs and a decision is taken to introduce an appeals process.

Shortly after such a mechanism is introduced it is often the case that a relatively high number of appeals are seen as stakeholders access their right to justice and test the system. This tends to drive immediate reform in the administrative entity as new decision making frameworks and checks are put in place designed to ensure that the decisions taken are robust as possible to challenge. The number of appeals often then declines, as the improved decision making system delivers outcomes which market participants have renewed confidence in.

In the medium term the administrative body can become reticent to make decisions with far reaching implications, or those which, if the subject of a negative review, might undermine some of its key areas of policy. However, over a period of time, this

obstacle is overcome as the institution in question recognises the necessity of continuing to make tough decisions and defending them where necessary.

We would encourage the EB to continue to make the decisions which it considers to be correct. Oversight of those decisions via the appeals mechanism, will lend greater legitimacy to the final outcome of any areas where those decisions are called into question and will greatly aid the EB in its work

Typically, once the process of review and reform is complete, the introduction of independent review is often seen as having led to increased confidence in the administrative body and to better decisions being taken in the light of appropriate evidence in almost all cases.

1.4. Market participants place value in independent reviews

The concept of review necessitates that the matter being challenged is reviewed by persons and an entity other than those responsible for the original decision. If this is not the case then the obvious concern of potential appellants is that the organisation will fail to deliver a truly independent review as its institutional knowledge and approach will influence the outcome of the review. This is compounded should the individuals in question be the same as those who made the original decision, or have a close working relationship with them, as decisions made under such a scenario cannot be fairly viewed to be independent in nature, regardless of the facts of the case in question.

Conversely, having a review undertaken by an independent and non-associated body gives stakeholders comfort that the review is one which will revisit the issues without tending towards following the previously established lines of thinking that produced the decision in question.

This is the type of reassurance of independence of thought and action on the part of the appellate body that stakeholders need in order to accept the results of an appeal process, particularly where that review is not resolved as they had hoped.

It also provides the decision maker with a mechanism through which the quality of good decisions can be verified by an independent entity, thus further increasing the credibility of the body in question.

Finally, appeals mechanisms provide confidence to the market by reducing the perceived level of risk faced by investors. This in turn encourages investment and leads to effective market development.

1.5. Appeal mechanisms are a frequently seen outcome of legal best practice

The principles referred to above have not been raised solely by way of justification for the introduction of an appeals mechanism within the CDM; they are at the heart of the

vast majority, if not all, national legal systems which are regarded by the international community as effective and proportionate. The CDM architecture bears significant resemblance to the legal framework of nation states due to their activities of creating law, regulating markets, and controlling private actors. As such it is both reasonable and proportionate for market participants to expect a similar degree of institutional accountability as is seen in at a national level.

It is also worth noting that many of the nation states which embody these principles in their respective constitutions are signatories to the UNFCCC and the Kyoto Protocol and the entities through which the raison d'être for the existence of the EB has arisen. Ensuring that the system put in place to manage the CDM provides its stakeholders with similar institutional safeguards as are available within those 'parent states' is a natural next step.

2. Contextual background of the need for a review process

2.1 Context of the scheme

The Kyoto Protocol introduced the three market based mechanisms of, Emissions Trading (Art. 17), Joint Implementation (Art. 6), and the Clean Development Mechanism (Art. 12), each intended to stimulate green investments and allow the parties to the Kyoto Protocol to meet their emission reduction targets. Although emissions trading addresses the trading of units between member states, and JI provides the opportunity for the inclusion of national rules and the development of national infrastructure to convert AAUs into ERUs, it was the CDM that, from the beginning, required the most sophisticated international infrastructure. The independence of the CDM from national involvement is reflected most descriptively by the fact that CERs are issued directly by the EB. The necessary state parties' participation is ensured mainly by the presence of a national authority that would issue a country approval for the participation in a CDM project. Further host and investor country involvement is limited compared to the other mechanisms.

2.2 Public international law, but with private actors

Contrary to general principles of international public law and multilateral environmental agreements and international treaties in general, the CDM is a governance structure which invites and encourages the participation of private actors and regulates such participation by making decisions that directly affect these actors. To that extent the CDM breaks through historic limitations under international public law and resembles an unprecedented framework.

Following the initial mandate in the Kyoto Protocol a number of institutions had to be created in order to allow the implementation of the mechanisms. Under the auspices of the EB, the meth panel, the Registration and Issuance Team, independent verifiers and the Accreditation Panel have been created and are operating with the secretariat to facilitate the CDM. In this system the EB has been created as the supreme body

with the power to make the final decisions, with the aforementioned other institutions taking no more that an advisory and recommendatory capacity.

The opening of the system to private entities and actors was recognized very early in the process as one of the key drivers of the CDM and private entities are responsible for the majority of the investments in CDM projects. These private entities, which are directly involved in the CDM system may participate voluntarily but become subject to the rules and regulations and, of course, the institutions of the scheme. These entities are involved in many ways, as primary investors in underlying emission reduction projects, as service providers to implement CDM projects, as technology suppliers, as providers for validation and verification services (i.e. DOE, although the DOEs act on behalf of the EB), and as buyers of CERs. Subsequently, an entire industry has been built around emission trading schemes in financial institutions from traders to exchange platforms.

2.3 The role of the Executive Board – an inappropriate multiplicity of functions?

The decisions with the most direct impact on the regulated entities under the CDM (private or public investors) are those related to the registration of the projects and the issuance of CERs. When making a decision in relation to registration the EB will review the application of the project participant by assessing whether the proposed project activity meets the requirements of the existing CDM rules. Similarly, the EB will assess whether or not to issue CERs for a registered project by reviewing whether the registered project activity has been performed in accordance with the applicable rules and the registration requirements as determined at the time of registration. If the EB comes to the conclusion that the project activity is in compliance with the registration requirements and the applicable laws it will issue the CERs, if not it might request further clarifications to make a decision or ultimately reject the request.

The decisions taken related to the registration and issuance directly affect the position and the rights of the subject of the decision and are taken as top-down and quasi-administrative decisions. To this extent the role of the EB is that of a classical administrative body in a vertical regulatory structure and after having made such a case-by-case decision the EB is not accountable to any other body, since the COP/MOP does not review individual cases.

However, this is not the only function of the EB. According to the official UNFCCC website, the EB's decisions:

"are hierarchical in nature and are published in the reports and report annexes of the CDM EB. Taking into account both the rule-making and rule-enforcing roles of the CDM EB, decisions of the Board can be divided into three main classes:

I Decisions of an operational nature relating to the functioning of the regulatory body;

II Decisions of a regulatory nature relating to the supervision of the CDM in implementing its modalities and procedures throughout the project activity cycle; and

III Rulings relating to the observance of the modalities and procedures by the project participants and/or operational entities".[2]

The EB, therefore, acts as a quasi-legislative organ, an administrative body making case-by-case decisions, as well as performing a function of self-review. As described elsewhere in this paper such a concentration of powers is rarely seen in national systems and is contrary to general principles of law. Furthermore, the concentration of power has led to repeated criticisms from the regulated entities that participate in the CDM, but also by parties to the UNFCCC and the Kyoto Protocol.

The main criticisms are of both a practical and a legal nature. A common criticism is that the EB is understaffed to fulfil all of these roles and clearly the fact that a small group is limited by its mandate to meet only a few times a year accentuates this. Another criticism is that, whilst the EB has a wealth of expertise and accumulated knowledge, would one allocate all these responsibilities to just one body in a different system other than the CDM? This leads to not only a lack of efficiency but the governance and structural shortcomings addressed elsewhere in this submission raise concerns about the legitimacy of the system as a whole.

In fact, the governance structure has come under increasing pressure from the reputational damage incurred by a system that is both perceived to be and in reality is, unaccountable to regulated entities. Equally concerning is the criticism from parties to the UNFCCC and/or Kyoto Protocol apparently questioning whether the CDM is at all capable of reforming itself and building on the lessons learnt since its establishment. In particular, the key current and future demand nations for international offsets (e.g. United States of America, Japan and the member states of the European Union) have raised the possibility of creating new offsets under alternative schemes such as internal systems (Japan and USA) or under bilateral treaties which could lead to credits scheme being set up on a bilateral basis.

2.4 Recommendation / conclusion

The inclusion of a functioning appeal system would address many of the changes needed and which have been requested by market participants and could allay the concerns that the system is not able to improve and fulfil its objective. However, only sincere approaches to address the mandate to include an appeals body in the governance structure of the CDM will be recognized as an improvement by private and public investors and the international community as a whole. These actions need to result in a high level of independence and functionality, if work in this area is to be recognized as an improvement.

[2] http://cdm.unfccc.int/EB/background.html

3. The need for independent review

3.1. Support for the independence of the decision makers

Legal and political theorists, such as Montesquieu, have emphasised that each branch of a political system should be independent and separate from the others – fundamental to this is the independence of the judiciary and specifically the judges within it. It took many years however for legal theory to develop a coherent view of what an effective and independent judiciary entailed. Although this is the case similar principles are now identifiable across many of the world's leading legal systems. in that country.

3.2. Requirements for an independent judiciary

Certain key features have been identified that may define an independent judiciary. One commentator has suggested that these include (i) the judicial body must be institutionally independent, (ii) the judiciary must possess security of tenure, (iii) stable judicial compensation must be guaranteed as long as they practised good behaviour. Lastly, (iv) judges must also possess factual independence – that is, as distinct from formal independence, they must also have the power to fulfil their task without undue reliance on the other branches of government. This distinction between de jure and de facto independence is crucial as without the resources to reach decisions and the power and authority to have their decisions implemented, the judiciary may formally be independent but in practice be impotent[3]. The institutional and factual independence, combined with the security of tenure and compensation allows judges the ability to reach decisions without fear of repercussions nor the need to curry favour with the parties being judged. By being above reproach, judges are able to reach legitimate and therefore respected decisions, thereby enhancing the authority and power of the judicial system and of the government.

Other ways in which the independence of judges has been protected include: judges being independent of the executive and the legislative arms and not being involved in any political debate; aside from rules on ill health and age, judges of certain courts may not be removed from office without an order requiring a high and politically encompassing level of support; judges are almost completely immune from the risk of being sued or prosecuted for what they do in their capacity as a judge; and the principle that judges should, in general, not be criticised by members of the legislature or executive. It is also a typical requirement that judges must stand down in cases where they have or potentially have a conflict of interest, and their declared interests must be made public in order to enhance transparency.

3.3. The actual appeal body and its individuals

The separation of powers maxim may be achieved in the CDM context through the establishment of a separate appellate body ("AB") which is entirely independent of the

[3] **Hayo B and Voigt S (2004)** *Explaining de facto judicial independence* International Review of Law and Economics Working Paper No. 1 / 2004

EB. Proposals for members of the AB should either come from direct applications from prospective candidates, or be nominated by a specifically created panel, such as exists in tribunals such as the World Trade Organisation (the "WTO") (see 1.4). Members of the AB should be impartial individuals who are competent to hear cases and issue judgements in relation to claims concerning violation of substantial rules or procedural rules under the CDM and should have technical experience of the sectors in which CDM projects are established. Members of the AB should be required to confirm they do not have conflicts of interest in relation to any projects before hearing any case before the EB (which should include political and financial conflicts of interest) and if such a conflict is declared, should be removed/replaced for that particular case. All interests should be declared publically and a register of such interests be open for public scrutiny. Members of the AB should be selected at random for each appeal from the larger pool of approved AB members, with one of their number chosen to take the procedural lead.

3.4. Recommendation

A modern example of a successful independent international tribunal is the Dispute Settlement Body (the "DSB") of the WTO[4] which consists of several dispute panels and an appellate body which adjudicates trade disputes between the parties. The independence of the DSB is a marked development from the ad hoc basis of the former GATT tribunals, which were forced, for example, to choose one party's remedy rather than adjudicating and reaching a measured decision. The DSB and its appellate body are provided with a secretariat of experienced lawyers and staff which enables efficient and informed handling of appeals cases. One key concept of the DSB is the expeditious nature of its review process.[5] This expeditious process has given the DSB the command and respect necessary to forge sufficient factual independence to see its decisions implemented.

Appointments to the AB could be made by COP/MOP (i) upon the recommendations of an impartial nominations panel or (ii) could be agreed to by the parties to the appeal as in the WTO's DSB or (iii) by a minimum number of supporting Kyoto Protocol signatories subject to COP/MOP ratification or by a combination of these three options. Current EB appointments are made politically and therefore its impartiality is often called into question. Members of the AB should be independent from political interference and therefore need to be appointed independently of the EB by a nominations panel with clear selection criteria. Currently, within the EB, political conflicts of interests are common, with EB members often acting as UNFCCC/ Kyoto Protocol negotiators for their country or sometimes also representing the DNA for the CDM. An independent nominations panel must then be established with clear criteria for choosing the eligible AB members including by considering ratifying nominations made by KP signatories potentially subject to further ratification by the COP/MOP. Members of the AB should have a guaranteed tenure

4 The WTO replaced the General Agreement on Tariffs and Trade (GATT) in 1994.

5 The panel's procedures are intended to conclude a maximum of six to nine months after the commencement of the dispute, and rulings made within one year of from the date of the establishment of the panel. Any subsequent appeal is settled within two to three months, with final implementation of the decision occurring within 18 months of the establishment of the panel.

until the expiry of their term of office. Duration of the terms of office should be relatively short term (e.g. 3 years) to ensure new members come in regularly and keep the AB impartial. There should also be a limit on either the number of consecutive terms or total terms of office each AB member is permitted to undertake. Lastly, it should be mandatory for each AB member to produce a declared interests register which is open for public inspection. Each of these measures is intended to establish the AB members as above reproach and thereby increase the legitimacy and impact of their decisions.

For each appeal judges should be drawn from the members of the appellate body by the appellate body secretariat.

4. Scope and restrictions of claims

The establishment of an AB inevitably raises issues relating to the principle of standing (locus standi) and the types of claims that can be brought for revision. The principle of standing is also a consequence of the principles of separation of powers and rule of law as discussed in section 2 above.

4.1. Principle of standing or locus standi

The principle of standing is the right to bring an action, to be heard in court, or to address the court on a matter before it. It is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case.

Rules about judicial review procedures and its remedies, and consequently the principle of standing are influenced by considerations of the balance between the interests of the individuals affected by a decision and public interests. The rationale for standing is based on the need to protect and defend parties' legitimate rights and interests but also based on the need to protect public bodies from harassment from professional litigants, ration scarce judicial resources, and ensure that litigants' interests in an action are personal and not ideological, as with pressure groups; the rules of locus standi are therefore important in the task of establishing the boundary between the judicial and the political realms, and of keeping the courts out of political fights.

Standing is one of the several procedural devices meant to ensure that judicial institutions can do their job, by setting limits upon the types of claims and/or claimants that may bring for hearing. Claims which are not made within a fair delay (dilatoriness), which are made about matters already over and done (mootness), which are the concern of others but not the law (non-justiciability) share this purpose. One could consider the entire procedural law as regulating this purpose, by determining how matters may come before the courts and leading to dismissal of what is not brought in that way.

4.2. Standing requirements and restrictions of claims

Typically, the doctrine of standing limits access to the court based on a number of general requirements, although these may be expressed in different ways in different systems: (1) injury or personal rights affected by a decision: the party has to demonstrate that it has suffered or imminently will suffer injury or loss. The injury or loss must be distinct and palpable, not abstract or too remote. (2) causation: there must be a causal connection between the injury and the conduct complained of, so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court; and (3) redressability: it must be likely, as opposed to merely speculative, that a favourable court decision will redress the injury (although there are limited exceptions to this rule in some jurisdictions).

4.3. Principle of standing before a CDM AB and CMP Guidance to the EB (decision 5)

The CMP decision 5 sets out the scope of the appeals process under consideration. The interpretation of the mandate will give the EB further guidance as to how to structure the appeals body, but also defines the potential scope and restrictions of the Appellate Body's powers. The chapeau clarifies that "procedures for considering appeals" have to be established. The chapeau further clarifies that "stakeholders directly involved" will have access to this appeal mechanism. Subsections (a) and (b) define in which situations the appeals process may be evoked.

An appeal in its general meaning implies the review after a decision was already taken. Any such review would require that an institution or body would be allocated this responsibility. The reference to appeal further implies that it is an elevated or at least independent review of the initial decision. Such decision does not have to be superior to the decision of the previously deciding body, but it does imply that it is a review and decision separate from the initial decision.

The CMP Guidance to the EB (decision 5) incorporates implicitly the principle of standing by limiting the scope of the review 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" and it further limits the actions that can be challenged by clarifying two categories, i.e. "(a) situations where a designated operational entity may not have performed its duties in accordance with the rules or requirements of the COP serving as the meeting of the Parties of the Kyoto Protocol and/or the EB; and (b) rulings taken by or under the authority of the EB in accordance with the procedures referred in paragraph 39 regarding the rejection or alteration of request for registration or issuance."

With regards to section (a) it needs to be noted that the DOE itself does not make final decisions on a CDM project that would have a direct impact on a project participant. It is the EB that would decide over registration and issuance. In the event that a DOE would seek to issue a negative validation or verification report, it would

still be the EB confirming this assessment with its final decision. Hence, the project participant may seek to stop the DOE from issuing such report, but it would be advised to do so by enforcing its contractual right under the service agreement that it has in place (either written or implied). Therefore, section (a) includes a mandate to establish procedures that give designated operational entities the right to appeal if they are affected in the exercise of their profession by a decision of the EB, in particular through the denial or revoking of accreditation. Clearly the finding that leads to an EB decision to revoke or suspend will be based on the assessment that a DOE "may [have not] performed its duties in accordance with the rules or requirement". Section (b) in contrast would only affect the rights of the project participants as any appeals would be limited to "rulings taken by or under the authority of the EB […] regarding the rejection or alteration of request for registration or issuance." Another view could be that the Executive Body would have similar rights or member of the EB in a personal capacity, however, the chapeau limits the appeals procedures to stakeholders. The intention of the parties giving the mandate to include predominantly project participants can be viewed in the further restrictions made in the chapeau, where it states that "stakeholders" have to be limited to stakeholders, defined in a conservative manner, and further directly involved in the "design, approval, or implementation" of a CDM project.

Appeals could either be made only to verify that due process had been followed or also be made to question technical issues verifying the additionality of a project or the correct implementation of a monitoring plan. The proposed AB should have the authority to review whether the EB has applied the relevant decisions of the COP/MOP and whether it has acted in compliance with its rules and procedures.

4.4. A time-bar on applications

In order to promote market certainty and ensure that decisions of a body such as the EB are not challenged where to do so would be inappropriate, it is reasonable to require participants affected by a decision to make their case for review within a particular time period. The timetable against which administrative decisions taken at nation state level may be challenged varies from state to state, but the common premise is to ensure that claims are raised as soon as reasonably practicable. Indeed, it is reasonable to assume that, where a market participant has good standing to initiate an appeal, the commercial imperatives to do so should be such that it represents a priority issue for the organisation.

It would therefore appear reasonable to suggest a time bar on new claims taking effect six months after the decision which the participant claims to be disadvantaged by was issued. This need not be an absolute rule and the appellate body could be granted the power to make exceptions, particularly in cases where information of substantial relevance to an appeal has been withheld by a decision making entity.

5. Types of proceedings

5.1. Inquisitorial system

An inquisitorial system is characterized by the governance of the respective administrative body. The fact finding as well as the development of the basis of the decision lies within the area of responsibility of the administration. Therefore, the administration is entitled to investigate the case on its own motion. However, the administration will not commence to investigate without initial information about relevant circumstances. Thus, in most cases the beginning of the investigation is subject to a prior notification or a formal request.

5.2. Party system

A party system is based on the contribution of the parties affected. The burden of providing all the relevant information lies with the parties. In order to make its decision, the administrative body will only assess the submitted information without performing own investigations.

5.3. Pros and Cons of each system

The inquisitorial system provides for a thorough investigation of all significant facts on the instigation of the examining judge while under the party system the presentation of the necessary information is addressed by the parties' interest in ensuring that matters supporting their position are placed before the arbiter. In principle therefore, there should be little difference between the information placed before the tribunal, although an administrative body may be able to investigate the case by using other sources of information wider than those available to the parties. In terms of timing, the administrative procedure under the inquisitorial system may take longer than the same procedure under the party system because the end of the investigation process depends on the appetite of the judiciary rather than the parties. On the other hand, under the party system the participants could, in theory, continue adducing evidence of significant detail over a protracted period of time, and therefore the administrative body is usually entitled to set time limits for the submission of relevant information; facts that are presented after the deadline may be precluded.

In general terms, the party system is designed for disputes with opposing parties, based on the idea of equality of arms. In case of appeals against decisions of the DOE or the EB, there is a risk that this equality of arms is not guaranteed due to the situation where a private entity is opposing an international administrative body. In practice this risk is managed by the retention of legal counsel (a feature often present in both the inquisitorial and party systems) and in the commercial arena the competence of the appellants in their relevant fields.

It should be borne in mind that one objective of the appeals process should be to verify the compliance of the administrative decision with the respective rules. It should be noted that for example in case of validation of the CDM project the party is obligated to submit explicit PDDs to the DOE. These obligations of the project participants should remain unchanged in the appeals process. Also the review of the

administrative decision should be subject to a formal request (appeal) because the appeals process primarily enables the appellant to protect his individual rights.

6. Representation in front of the AB

The appellant may not be able to represent his own interests in the best way. Regarding the fact that a formal procedure follows certain rules the appellant should be acquainted with the relevant provisions. Also the appellant may not have the technical expertise to assess technical statements or to present technical information to the appellate body. Representation by a lawyer may expedite the process since the legal expertise provides for a more purposeful dealing with the subject matter. However, the competence to represent the appellant should not be limited to Hence, within the appeals process the appellant should have the opportunity to be represented by lawyers or other legal professionals who are authorized by law to represent someone's legal interests.

7. The appeals process – Rights of the participants before and during the proceedings

7.1. Notice

It can be considered a general principle that acts imposing a burden or negative decisions must not be imposed/made without information about initiation of proceedings. This should not be an issue in cases where the PP initiates the appeals process as in the terms of reference provided by the guidance ot the EB by COP 15 which clearly states that the appeals process shall be limited to project participants[6].

7.2. Hearing

One aspect of the principle of due process is the possibility for every party involved to make statements before the ruling. It is the basic understanding of an administration that acts in accordance with the rule of law that every person has the right to be heard, before any individual measure which would affect him adversely is taken. This right is not limited to the possibility to express individual opinion. In addition, the submitted opinion must be considered in the process of decision making. However, the described right may be restricted in favour of an efficient appeals procedure.

[6] As a general principle in cases where a third party challenges a positive decision of a regulator, affected parties must be informed about the third party's appeal by the appellate body in order to bring forward arguments that strengthen the affected parties position. If the CDM appeals process were at some future point to go beyond the mandate provided by COP 15 and allow this, the AB must at a minimum be obligated to inform the PP, the authority that made the challenged decision and other parties involved. While these communications should be made expressly to the above-mentioned parties, it may be considered to inform the public about the institution of an appeals procedure (e.g. via a designated website or an official publication organ).

Therefore, it should be considered to determine a time frame for statements regarding the appeal. This time frame may vary depending on the complexity of the subject matter. However, the existence of such limitation and the consequences in case of default must be clearly articulated beforehand.

Another issue that needs consideration is the question whether the public may have access to the hearings. A public procedure generally provides for a greater acceptance by the public or third parties. However, the discussion of individual CDM projects will often necessitate the disclosure of confidential information concerning financial, technical or strategic issues. Confidential information of this nature must remain confidential and as such outside of the public domain.

7.3. Access to records produced by the parties

A very important aspect of the participant's rights is the access to records. Even though the appeals body is obligated to investigate the subject matter without submission of information by the parties, the appellant may be able to improve his reasoning after gaining an insight into the official files that provide the basis for the challenged decision. The possibility of looking through the respective files of the authority before initiating the appeals process could, for instance, convince the party to refrain from challenging the decision.

Nevertheless, the procedure rules for the appeal should provide for the possibility to constrain access to the records when otherwise the investigation may be jeopardized. Also, confidential information included in the files must be protected from disclosure. This is an issue of particular importance in cases where the access to the files is requested by third parties. While this kind of information must never be disclosed to third parties, also the access to the files should in general be subject to the declaration of legitimate interests by the requesting party.

In some cases crucial information must not be disclosed to any of the parties involved (e.g. information concerning the state security or military intelligence). In order to also take this information into consideration the AB may perform an "in-camera proceeding" so that only the deciding members of the AB have insight into these documents. The members of the AB should, of course, be sworn to secrecy due to their role in the AB.

7.4. Evidence

The AB should be entitled to investigate the subject matter in all its aspects. For this purpose, the AB should be entitled to hear experts, question witnesses, evaluate records, etc. Although the investigation of the case lies within the hands of the AB, the parties should have the right to move for a specific investigation, e.g. hear a witness. This motion should only be rejected on lawful grounds, for example if the witness is not necessary since the AB is already convinced of the facts to be testified. Furthermore, the parties should have the right to ask questions to a witness or expert and to object to them under certain circumstances. However, the AB must take into account the relevance of the evidence as well as the comments of the parties to the evidence. Also, there should be clear and predetermined rules for the evaluation of

evidence. Although the AB should investigate the case, the unconfirmability of a certain fact must be considered to the disfavour of the party that would yield an advantage by this fact.

For the purpose of an efficient appeals procedure, the AB should be entitled to set time limits for the potential presentation of evidence by the parties.

7.5. Requirements for decisions

As for the formal requirements of the AB's decision the principles of writtenness and notification should be respected. The decision should be available for the parties of the appeals process in written form and in the language of the case. Since the AB should not be obligated to announce its decision immediately after the hearing process in attendance of the parties, the decision must be passed on to them in a predetermined way. This act of notification provides for the proof of the receipt. Without notification, administrative acts have no legal effects due to the simple fact that the recipient must obtain information about the administrative measure before or at least at the same time the decision enters into force. In case the administrative decision can be challenged with a temporary appeal, the formal notification also activates the deadline for the appeal.

8. Duty to give reasons

The AB should be obligated to explain its reasoning behind its decision on any given appeal. The decision should include comprehensible reasons and weighing of evidence. First of all, the duty to give reason forces the deciding body to consider all of the obtained information and submitted opinions. Also, the duty to give reasons manifests the appreciation of the parties of the appeals process as participants of a fair and transparent procedure and their entitlement of a justified decision. With this in mind, the decision of the AB will in any case achieve a greater acceptance by the parties involved and the public. Furthermore, in case the AB decision could be challenged with another appeal, the reasoning of the decision provides the basis for the evaluation of the legitimacy of the decision. Moreover, a solid reasoning can serve as a rule for similar cases in the future.

9. Precedent and rights of the appeals body to overturn previous decisions / types of decisions

The answer to the question whether the AB is entitled to overturn previous decision determines the actual scope of the appeals procedure. One could think of a system where the AB is only entitled to review the administrative decision (of the DOE or the EB). In that case the decision would either reject the appeal or confirm the unlawfulness of the challenged decision and revoke this decision. In the latter case the challenged decision has no more legal effect. However, an appellant who contests a negative validation by the DOE usually not only wants the decision revoked but turned into a positive validation. While this is a major disadvantage of the

described system, this limitation of AB's authority means a clear separation between the power of the originating authority and the appeals body.

Another possible solution would be a system where the AB can review and – if necessary –overturn the previous decision. That means that the AB would be entitled to decide the subject matter in place of the originating authority. From the appellants perspective this is the most efficient and advantageous alternative. Since the appellant can not only challenge a negative decision but also seek for a positive decision replacing the previous one, this method would clearly be preferable in terms of time and money. However, this alternative softens the clear distinction between the competences of the originating authority and the appeals body.

The third alternative relates to a system where the AB can – after assessing the unlawfulness of a previous decision – revoke the former decision and give orders to the originating authority to make a new decision. While respecting the competence of the originating authority, this method involves the danger that – after a new decision – the case may not be resolved. Also, this alternative extends the duration of the administrative procedure since the originating body will have to initiate a new process of decision making. Therefore, despite the cons of the second alternative, a system where the AB is entitled to substitute the previous decision should be considered the most favourable regime.

10. Legal effects of challenged decision

There is another issue which requires consideration: what are the legal effects of the challenged decision during the appeals process? While in some jurisdictions, the submission of an appeal also leads to the suspension of the decision, in other jurisdictions the appellant would have to successfully file for a temporary injunction in order to obtain the same effect. This objective however is of significant importance since the negative effects of a challenged decision can create a fait accompli. During the suspension the decision is considered to be non-existent. The automatic release of the suspensive effect usually benefits the recipient of a negative decision while in case of an appeal against a positive decision by a third party the suspensive effect leads to a disadvantage for the decision's recipient. Therefore, a system where the respective party has to obtain a temporary injunction provides the favourable flexibility in handling most cases appropriately.

Regarding the appeal against a negative validation of the DOE with the consequence that the CDM project can not be registered the suspension of the decision would not meet the appellants wish to have the project registered. Besides it should be noted that in a favourable system of legal protection the consequences of an unlawful decision should be compensated as far as possible. Therefore, in case the challenged decision is considered to be unlawful, the appellant's situation should match the hypothetic situation in case the lawful decision would have been made in the first place. As for the negative validation of a CDM project the registration should be considered completed on the date of the appeal. In this case the subsequently issued CERs can be backdated to this date.

11. Enforcement of decisions

Provision of a rule which obliges all parties to accept and be bound by the decisions of the AB should be considered. Such an agreement could be concluded before the introduction of the whole proceeding. Moreover, other concepts from international arbitration practice could be considered as a solution.

12. Other

12.1 Non-recourse in other forum: How can it be achieved that the decision is final and not challenged elsewhere?

The CDM is dominated by private sector interests but does not provide entities affected by decisions of the EB with procedural rights comparable to domestic administrative law regimes. Without being granted procedural rights and access to appeal and review of EB decisions, there is a danger that private sector participants may turn to domestic courts as a forum of redress when global administrative bodies are seen as infringing their rights. Domestic courts may decide to review the legality, procedures and substance of international regulatory and other administrative decisions taken by the EB that directly affect the claimants. If an AB is established, proper procedural rights and access to appeal will be afforded to private sector and other interests, ensuring that proceedings taken in domestic courts are less likely. Furthermore under an AB, appeal decisions should be made pursuant to pre-agreed decision making criteria. Foreign investors directly affected by decisions taken by an international body are much more likely to accept them if they feel the procedures which led to such decisions were fair and due process was provided.

However, there is still a risk decisions of the AB might be challenged in certain cases. In international arbitral tribunals such as ICSID, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1966[7] ("ICSID Convention"), decisions of the tribunal are final and binding and not subject to any review extraneous to the Convention. Access to the dispute settlement facilities of the ICSID Convention depends on written consent by the host state and the foreign investor. The ICSID Convention stipulates a general "exclusive remedy rule" which means that once consent to ICSID arbitration has been given, a party may no longer resort to another remedy and domestic courts are no longer available for disputes that have been submitted to ICSID arbitration nor may they issue orders to stay ICSID proceedings or intervene in any other manner.

It would be advisable that the instrument establishing the AB contain similar provisions to the ICSID Convention in order to ensure its decisions are final and not challenged elsewhere.

[7] The underlying idea is to provide facilities for the settlement of investment disputes in the form of conciliation and arbitration hereby furthering the investment climate in developing countries.

12.2 Mediation and preliminary proceedings: Should the appellant be obligated to complete preliminary proceedings before submission of the appeal?

There are significant advantages to enforcing mandatory preliminary proceedings prior to an appeal to an international tribunal or body, with the major advantage being possibility of early settlement and consequent reduced cost. The inclusion of an "escalation clause" (other wise known as multi-tiered, multi-step or alternative dispute resolution ("ADR") first clauses) are increasingly being seen in the context of international arbitration agreements. Such a clause has several advantages. Firstly, it can help focus the minds of the parties at an early stage and therefore encourage settlement prior to full arbitration. Secondly, it can help maintain an existing relationship between the parties, as the negotiations are in good faith prior to arbitration. Further, arbitration seen as a last resort is then less likely to be challenged itself[8]. Arbitration should only be reached as the last resort, as conflicts should be filtered out by the preliminary ADR proceedings before they reach the ultimate arbitration stage. The effectiveness of ADR proceedings as a preliminary to arbitral proceedings greatly depends on whether the parties can 'freely' express themselves in these proceedings without having to fear that statements could be used against them in the subsequent arbitral proceedings. Art. 10 of the UNCITRAL Model Law on International Commercial Conciliation guards against this risk. According to this provision, parties to ADR proceedings are forbidden from using such evidence in the subsequent arbitral proceedings, such as by nominating the mediator, a representative of the party or the other party itself as a witness. Drafting an escalation clause in the instrument establishing the AB would ensure more efficient conflict resolution and would provide associated savings of time and cost.

The WTO's DSB emphasizes the importance of consultations in securing dispute resolution, requiring a member to enter into consultations within 30 days of a request for consultations from another member. If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. Where consultations are denied, the complaining party may move directly to request a panel. The parties may voluntarily agree to follow alternative means of dispute settlement, including conciliation, mediation and arbitration.

However, in this instance a private body would be challenging the decision of a technical body, and consequently it would be difficult to engage in dialogue or to compromise. Mediation is therefore more applicable where there are two private parties. An alternative is for a judge or AB member to receive preliminary appeals and recommend further negotiations if an outcome is probable or otherwise order the establishment of a full AB panel.

12.3 Costs of review

The costs of the AB panel need to be funded either through member subscriptions based upon ability to pay or directly by the appellant. The traditional argument against the latter form of funding is that it limits access to justice. The operational

[8] **Berger KP (2006)** Law and Practice of Escalation Clauses Arbitration International Volume 22 No 1 pgs 1-18

costs associated with each appeal are distinct from the establishment and operational overheads of the AB panel and the latter must be met through general subscription. However, the most equitable means and, as a disincentive for frivolous and vexatious claims, the most efficient means of funding the AB panel is through direct fees levied against the appellant in each case. Sensible levels of fees can be justified as a successful appeal would open revenue streams previously denied to the appellant; as a result only the most commercially viable appeals will be pursued.

12.4 Recommendation

The decisions of the AB panel must be final and binding as those are under the ICSID convention. The appellant must be compelled to consent to such terms prior to the opportunity to seek redress before the AB panel. This is in order to prevent extraneous challenges to the authority of the AB panel and the EB itself. If decisions are based upon transparent criteria emanating from an institutionally and factually independent AB panel members, with all decisions being final and binding, the authority and thereby the power of the AB panel and EB will increase. Preliminary mediation should be encouraged as far as is possible through the use of a preliminary hearing before a judge, but commercial ADR is unlikely to succeed given the party dynamic. Lastly, the costs of the AB panel should be divided between overhead and operational. The former should be satisfied through general member subscription based upon the ability to pay whereas the latter should be directly funded by the individual appellants.

13. Summary

Introduction

The CDM architecture bears significant resemblance to the legal framework of nation states via the activities of creating law, regulating markets, and controlling private actors. As such it is both reasonable and proportionate for market participants to expect a similar degree of institutional accountability as is seen at a national level. It is worth noting that the vast majority of the signatories to the UNFCCC and the Kyoto Protocol embody the principle of the separation of powers and the right to due process in their national legal frameworks.

Ensuring that the system put in place to manage the CDM provides its stakeholders with similar institutional safeguards as are available within those ‘parent states’ is a natural next step.

The inclusion of a functioning appeal system would address many of the changes needed and in so doing could allay concerns that the CDM system is not able to improve and fulfil its objective.

However, in approaching the mandate to include an appeals body in the governance structure of the CDM it must be borne in mind that only an appeals body with full independence from both the EB and UNFCCC secretariat will be recognized as an improvement by private and public investors and the international community as a whole.

These actions need to result in a high level of independence and functionality, if work in this area is to be recognized as an improvement.

Appellate body selection and constitution
A modern example of a successful independent international tribunal is the Dispute Settlement Body (the "DSB") of the WTO which consists of several dispute panels and an appellate body which adjudicates trade disputes between the parties.

The DSB and its appellate body are provided with a secretariat of experienced lawyers and staff which enables efficient and informed handling of appeals cases. One key concept of the DSB is the expeditious nature of its review process. This expeditious process has given the DSB the command and respect necessary to forge sufficient factual independence to see its decisions implemented.

Appointments to the AB could be made by COP/MOP (i) upon the recommendations of an impartial nominations panel or (ii) could be agreed to by the parties to the appeal as in the WTO's DSB or (iii) by a minimum number of supporting Kyoto Protocol signatories subject to COP/MOP ratification or by a combination of these three options.

Members of the AB should be independent from political interference and therefore an independent nominations panel must be established with clear criteria for choosing the eligible AB members including by, considering ratifying nominations made by KP signatories potentially subject to further ratification by the COP/MOP.

Members of the AB should have a guaranteed tenure until the expiry of their term of office. Duration of the terms of office should be relatively short term (e.g. 3 years) to ensure new members come in regularly and keep the AB impartial. There should also be a limit on either the number of consecutive terms or total terms of office each AB member is permitted to undertake.

Lastly, it should be mandatory for each AB member to produce a declared interests register which is open for public inspection. Each of these measures is intended to establish the AB members as above reproach and thereby increase the legitimacy and impact of their decisions.

For each appeal judges should be drawn from the members of the appellate body by the appellate body secretariat.

Scope and restrictions of claims
Appeals could either be made only to verify that due process had been followed or also be made to question technical issues verifying the additionality of a project or the correct implementation of a monitoring plan. The proposed AB should have the authority to review whether the EB has applied the relevant decisions of the COP/MOP and whether it has acted in compliance with its rules and procedures.

In order to promote market certainty and ensure that decisions of a body such as the EB are not challenged where to do so would be inappropriate, it is reasonable to require participants affected by a decision to make their case for review within a particular time period. It would therefore appear reasonable to suggest a time bar on

new claims taking effect six months after the decision which the participant claims to be disadvantaged by was issued.

Within the appeals process the appellant should have the opportunity to be represented by lawyers or other legal professionals who are authorized by law to represent someone's legal interests.

Rights of the participants before and during the proceedings hearing
It is the basic understanding of an administration that acts in accordance with the rule of law that every person has the right to be heard, before any individual measure which would affect him adversely is taken. However, the described right may be restricted by a time frame for statements regarding the appeal. This time frame may vary depending on the complexity of the subject matter. However, the existence of such limitation and the consequences in case of default must be clearly articulated beforehand.

A public procedure generally provides for a greater acceptance by the public or third parties. However, the discussion of individual CDM projects will often necessitate the disclosure of confidential information which must remain confidential and as such outside of the public domain.

Access to records produced by the parties
A very important aspect of the participant's rights is the access to records, an appellant may be able to improve his reasoning after gaining an insight into the official files that provide the basis for the challenged decision. The possibility of looking through the respective files of the authority before initiating the appeals process could, equally, convince the party to refrain from challenging the decision.

Evidence
The AB should be entitled to hear experts, question witnesses, evaluate records, etc. Although the investigation of the case lies within the hands of the AB, the parties should have the right to move for a specific investigation, e.g. hear a witness. This motion should only be rejected on lawful grounds, parties should have the right to ask questions to a witness or expert and to object to them under certain circumstances.

The AB must take into account the relevance of the evidence as well as the comments of the parties to the evidence. Also, there should be clear and predetermined rules for the evaluation of evidence.

For the purpose of an efficient appeals procedure, the AB should be entitled to set time limits for the potential presentation of evidence by the parties.

The AB's decisions should be available for the parties of the appeals process in written form and in the language of the case. Since the AB should not be obligated to announce its decision immediately after the hearing process in attendance of the parties, the decision must be passed on to them in a predetermined way.

The AB should be obliged to explain its reasoning behind its decisions on any given appeal. The decision should include comprehensible reasons and weighing of evidence. Furthermore, in case the AB decision could be challenged with another

appeal, the reasoning of the decision provides the basis for the evaluation of the legitimacy of the decision. Moreover, a solid reasoning can serve as a rule for similar cases in the future.

Precedent and rights of the appeals body to overturn previous decisions
The AB should be able to review and – if necessary –overturn previous decisions. That means that the AB would be entitled to decide the subject matter in place of the originating authority. From the appellants perspective this is the most efficient and advantageous alternative. Since the appellant can not only challenge a negative decision but also seek for a positive decision replacing the previous one, this method would clearly be preferable in terms of time and money. However, this alternative softens the clear distinction between the competences of the originating authority and the appeals body.

Enforcement of decisions

Provision of a rule which obliges all parties to accept and be bound by the decisions of the AB should be considered. Such an agreement could be concluded before the introduction of the whole proceeding. Moreover, other concepts from international arbitration practice could be considered as a solution.

Mediation and preliminary proceedings:

There are significant advantages to enforcing mandatory preliminary proceedings prior to an appeal to an international tribunal or body, with the major advantage being possibility of early settlement and consequent reduced cost. The inclusion of an "escalation clause" (otherwise known as multi-tiered, multi-step or alternative dispute resolution ("ADR") first clauses) are increasingly being seen in the context of international arbitration agreements. Such a clause has several advantages. Drafting an escalation clause in the instrument establishing the AB would ensure more efficient conflict resolution and would provide associated savings of time and cost.

An alternative is for a judge or AB member to receive preliminary appeals and recommend further negotiations if an outcome is probable or otherwise order the establishment of a full AB panel.

The decisions of the AB panel must be final and binding as those are under the ICSID convention. The appellant must be compelled to consent to such terms prior to the opportunity to seek redress before the AB panel. This is in order to prevent extraneous challenges to the authority of the AB panel and the EB itself. If decisions are based upon transparent criteria emanating from an institutionally and factually independent AB panel members, with all decisions being final and binding, the authority and thereby the power of the AB panel and EB will increase. Preliminary mediation should be encouraged as far as is possible through the use of a preliminary hearing before a judge, but commercial ADR is unlikely to succeed given the party dynamic. Lastly, the costs of the AB panel should be divided between overhead and operational. The former should be satisfied through general member subscription based upon the ability to pay whereas the latter should be directly funded by the individual appellants.

14. Next steps

Given the complexities surrounding the institution of a CDM AB, further consultation with stakeholders will speed and guide the process towards a conclusion where both the Executive Board, UNFCCC secretariat and regulated stakeholders have confidence and trust in the chosen solution.

We would therefore recommend that formal and informal consultations are held in order to develop a sound system of administration within a reasonable timeframe. The authors of this report and the broader CMIA membership gladly offer their support in this matter and will continue to put themselves at the disposal of the EB and UNFCCC secretariat in order to help in this undertaking.

We therefore recommend that the next steps to be taken are outlined by SB32 with a road map indicating key milestones and the expectation of what will be achievable before during and after COP16, with a date for the selection and appointment of the first CDM AB.