

22 April 2010

Dear Sirs,

**SUBMISSION TO THE CDM EXECUTIVE BOARD IN RESPONSE TO THEIR CALL FOR INPUT AT EB 53 – DRAFT APPEAL PROCESS**

This submission is being made on behalf of Sindicatum Carbon Capital Group Limited, in response to the Call for Inputs from EB53, pursuant to paras 42-43 of decision 2/CMP5, regarding proposals for an appeals process for:

- (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; and
- (b) Rulings taken by or under the authority of the Executive Board in accordance with the procedures referred to in paragraph 39 regarding the rejection or alteration of requests for registration or issuance.

Sindicatum Carbon Capital Group Limited is the parent company of the Sindicatum Carbon Capital group, and is an international clean development mechanism project developer and investor in clean development mechanism projects in South East Asia, China and India.

**Background**

The Executive Board is constituted pursuant to the Kyoto Protocol to supervise the CDM:

*"The clean development mechanism shall ... be supervised by an executive board of the clean development mechanism". (Kyoto Protocol, Article 12(4))*

The authority and functions of the Executive Board (**EB**) were further elaborated through a series of interim decisions of the EB, ultimately adopted and approved by the COP at its eighth, ninth and tenth meetings and finally approved at the first Conference of the Parties serving as the meeting of the Parties (COP/MOP) in Montreal. The Executive Board has a number of functions, enumerated in 3/CMP.1, Annex, paragraph 5. Although the Executive Board has decision making powers in a number of areas (for instance, accreditation of designated operational entities), importantly, it has no powers to amend or make decisions on the rules of the CDM. It can, however, make recommendations to the COP/MOP on further modalities and procedures of the CDM.

The Executive Board has also deliberated on the interaction between its own authorities and the COP/MOP (EB47, Annex 61), concluding:

*"The Board supervises the CDM under the authority and guidance of the CMP, and is fully accountable to the CMP. The Board has authority over, and provides guidance to, the business activities and processes of the CDM. Decisions of the Board must be consistent with and support the formal decisions of the CMP. Decisions of the Board are hierarchical in nature and are published in the reports and report annexes of the Board" (EB 47, Annex 61, paragraph 3).*

At the same meeting, the EB classified its decisions into three categories: operational, regulatory and rulings (EB 47, Annex 61, paragraph 3). Operational decisions are essentially administrative in nature. Regulatory rulings are defined by the EB as relating to the establishment of standards, procedures, guidelines and clarifications. By their nature, these decisions are generic in nature. The third category, rulings, is project and/or entity specific. Notably, 'rulings' apply to the accreditation of designated operational entities; approving methodologies; registering project activities; and issuing certified emissions reductions.

In relation to registration of activities, the EB, in addition to accepting projects for registration, has a review function. Specifically, a party involved in a project activity or at least three members of the Executive Board can request a review of the registration of that project activity. 3/CMP.1, Annex, paragraph 41 sets out the parameters for reviewing a request for registration:

*"The review by the Executive Board shall be made in accordance with the following provisions:*

- 1. It shall be related to issues associated with the validation requirements*
- 2. It shall be finalized no later than at the second meeting following the request for review, with the decision and the reasons for it being communicated to the project participants and the public" (3/CMP.1, Annex, paragraph 41).*

The Executive Board also has a review function in relation to issuance, although the grounds for requesting a review are more limited:

*"The issuance shall be considered final 15 days after the date of receipt of the request for issuance, unless a Party involved in the project activity or at least three members of the Executive Board request a review of the proposed issuance of CERs" (3/CMP.1, Annex, paragraph 65).*

3/CMP.1, Annex, paragraph 65 sets out the parameters for a reviewing a request for issuance:

*"Such a review shall be limited to issues of fraud, malfeasance or incompetence of the designated operational entities."*

## **Submissions**

Sindicatum Carbon Capital Group Limited is an international project developer and investor in clean development mechanism projects in India, South East Asia and China. As such, the group's business is dependent on the efficiency and integrity of the clean development mechanism. The consistency, transparency and timeliness of

decision-making by the Executive Board and the UNFCCC Secretariat are critical to the performance of our investments. We strongly support the call for inputs on an appeals process as this should help to ensure the consistency and integrity of decision-making by the EB.

However, the appeals process should not delay or undermine the effectiveness of the EB. The EB remains the body tasked with supervising the clean development mechanism, under the authority of the COP/MOP. An appeal body should not, in our view, have authority to substitute its own decision for that of the EB thereby overruling the EB's initial decision. This thought is elaborated further below in 'What decisions the appeal body can take?'

We also consider that the grounds for appeal and the persons with 'locus' or 'standing' to appeal should be interpreted conservatively so that both projects and requests for issuance are not at risk of frivolous or vexatious appeals leading to further delays. Again, we have commented further on this under 'Who can appeal?' below.

We have set out below our recommendations on the scope and outcomes of an appeal process. We have not, at this stage, given thought to any detailed procedures which would need to be developed by the EB and then adopted by the COP/MOP.

1 What can be appealed?

Any final 'rulings' of the EB can be subject to appeal. This is on the basis that the final rulings of the EB (as defined by the EB itself and described above) are most relevant to project activities affecting individual entities. Specifically, a rejection of a project activity, rejection of a request for issuance or rejection of a request to renew a crediting period would be subject to appeal.

2 Who can appeal?

Appeals could only be lodged by those directly involved in a project "defined in a conservative manner". We would suggest that appeals could only be lodged by project participants in a project or by the designated operational entity for that project. Consideration should also be given as to whether lenders to a project should have 'locus' to appeal, given their involvement in a project.

There should also be a deadline for bringing an appeal. We suggest appeals should be brought promptly and no later than six weeks from the date of the final EB decision.

3 How should the appeal body be constituted?

The appeal body would need to be constituted under the authority of the COP/MOP. The composition and membership of an appeals body would need to have the following characteristics to be effective:

- Suitable qualifications to hear appeals. The members would not have to possess technical qualifications, but they must have access to suitable technical advice. They should also have a suitable range of project or project related experience to ensure 'real world' expertise is brought to bear on any decisional process.

- Be independent of the EB and not be involved in any way with the decision being appealed. Independence would be strengthened if the members of the appeal body were appointed for a fixed term and could not be removed except by the COP/MOP and had had no prior involvement with the EB.
- Be open to individuals from the private sector and academia, as well as government officials and supra-national bodies.
- The appeal body would need to hear appeals in a timely manner. Delays in any appeal process would only exacerbate the current problems with the clean development mechanism. We suggest appeals should be heard within three months of the date of the appeal.

4 What decisions can the appeal body take?

The appeal body would have the power to hear an appeal and, if appropriate, determine that the decision being appealed was an 'abuse of discretion' by the EB. By abuse of discretion, we mean that the EB had failed to follow due process in reaching its decision or had acted unreasonably or irrationally.

The error could be purely procedural – i.e. the EB had failed to consider material submitted to it or not reached a decision within the required time-frame; or it could be substantive – i.e. the EB had considered the material submitted to it but reached a conclusion which was inconsistent with previous rulings or which no rational decision-making body could have reached. A decision of the EB could also be challenged on the grounds that it was outside the scope of its authority pursuant to the CDM modalities and procedures. For instance, an EB decision to trigger a request for review of a project which did not relate to "issues associated with the validation requirements" would be outside the scope of its authority and therefore subject to appeal.

In the case of an appeal against a decision to request a review of issuance of CERs from a project, it should be noted that the grounds for this are already limited to "fraud, malfeasance or incompetence of the designated operational entities". Therefore a decision to request a review of issuance of CERs from a project, on the basis that the project was not 'additional', could be appealed by a project participant.

The outcome of the appeal process would be (i) the appeal is rejected; or (ii) the appeal is upheld, with the matter being referred back to the EB for the EB to reconsider its original decision. This should take place no later than the next EB meeting. The EB would be required by the COP/MOP to take into account the decision of the appeal body in reconsidering its decision.

5 What evidence could be submitted to the appeal body?

It follows that in hearing the appeal, the appeal body would only be considering the substantive evidence submitted to the EB when it reached its original decision. The appeal process should not be an opportunity for participants to submit additional material or introduce new arguments in



support of their project, which had not been submitted as part of the original request for registration or request for issuance.

6 Costs and Compensation

We do not recommend that compensation is paid to project participants or designated operational entities who successfully challenge an EB decision, as this would simply increase the overall cost of administering the clean development mechanism. We do, however, consider it right that project participants are not unduly penalized by a decision taken in error by the EB. If the EB reverses its original decision on appeal, we would recommend that the start date for the crediting period for that project is the date of the original decision of the EB and not the date of the subsequent decision.

7 Grandfathering

We appreciate it may take some time to design and implement an appeal procedure. To ensure any appeal process is meaningful (bearing in mind the expiry of the commitment period in 2012), we would recommend that the appeal process is grandfathered, so that decisions taken prior to the introduction of the appeal process could still be subject to appeal.

8 Publication of decisions

To ensure transparency, all decisions of the appeal body should be made publicly available.

On behalf of Sindicatum Carbon Capital Group Ltd, we thank you for this opportunity to contribute to this call for inputs.

Yours faithfully,

Nicholas Kelly (Legal Director)  
Sindicatum Carbon Capital Group Limited