Recourse to justice - the CDM appeals process

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Although Copenhagen may not have produced the results the carbon market had been hoping for, it did produce quite a lot of homework for the executive board.

The summit requested the board to deliver several results by the time of the next high-profile UN meeting (conference of parties) to be held in Cancun this year. Among one of the most interesting for project developers is the long awaited proposal for an appeals procedure.

Developers will have an opportunity to seek a reversal of rulings made by the EB regarding the rejection or alteration of requests for registration or issuance.

This may seem like a painful exercise for the EB, which has not been a shining example of transparency and interaction with those who have been subject to their rulings.

But measures that are required for an appeals process have already made a lot of progress, and will draw upon much of the existing infrastructure that underpins international arbitration.

You should not reinvent the wheel, the EB chair told an American audience recently while addressing the design of an emissions trading scheme. I could not agree more and would hope that the EB takes the advice of its chair into account.

In 1976 the general assembly of the UN adopted arbitration rules proposed by the UN Commission on International Trade Law. These UNCITRAL rules are broadly accepted as providing for due process in dispute resolution, and are used widely to intercede in disputes not only between parties from the private sector, but also in disputes involving countries.

These rules would appear to be the obvious set of procedural rules to be used for appeals against decisions taken by the EB. The rules are flexible, impartial and give both parties in the dispute – the aggrieved project participant and the EB - equal rights to present and defend their case.

The rules do not refer to a list of arbitrators, but do provide a mechanism on appointing an appeals panel.

It may make sense to have COP/MOP provide for a list of potential arbitrators in CDM disputes.

However, the choice of middlemen could also be left to the parties at the time the arbitration is initiated, whereby each party designates one arbitrator.

Both arbitrators are then to appoint the chair jointly.

The advantage of UNCITRAL arbitration is that the appeal is being handled outside the UN, albeit under the auspices of UN rules.

This should be acceptable both to the UN, and to private sector market participants.

Last year the Gold Standard announced its wish to establish an appeals mechanism against decisions taken by its technical advisory committee, a body set up to decide whether CDM or voluntary projects are worthy of the much sought after stamp of approval from the foundation.

The intent is to start consultations on the proposed appeals procedural rules with market participants before the summer.

Although it is too early to say what form these rules will take, the market can be assured that impartiality, independence, speed, due process and accessibility will all play a role in the design of the system. Such systems have been set-up before so it's not as if the standard is 'reinventing the wheel'.

The costs of arbitration should not be prohibitive neither for market participants seeking appeal, nor for the EB or TAC defending their decisions.

Typically the party that loses the appeal would pay, but arbitrators may decide on a different allocation.

The cost would depend primarily on the hourly rates of the arbitrators and the time they have to spend on the arbitration.

However, some form of financial threshold for appealing seems in order, so as to discourage frivolous appeals.