



Hamburg Global Climate Foundation, Große Theaterstr. 14, 20354 Hamburg, Germany

UNFCCC Call for Public Input on decision 2/CMP.5

by Christopher Brandt on behalf of the Hamburg Global Climate Foundation

Appeal procedures against CDM relevant decisions?

I. The CDM as an element of international public law and the effect of private sector involvement: why a CDM appeals mechanism is needed

As specified by Art. 12 KP, the CDM was designed as a device to grant the Kyoto member states additional flexibility for meeting their commitments and contribute to sustainable development. Focusing on the first aim of the CDM, the CERs generated are to be used as a supplement to domestic reductions making cheaper reduction potential available to Annex-1 countries. The idea is that a state could finance emission reduction activities in a non-Annex-1 country. Accordingly, the CDM's original intention was to address states and not the private sector.

However, practice shows that the vast majority of CDM projects are initiated by private sector entities. The reasons behind this are twofold:

Firstly, climate policy instruments such as the European Emissions Trading System (EU ETS) are enforcing emission reductions at EU-based CO₂-emitting sources which can – in part – be fulfilled with Kyoto units. Also, Japanese companies are allowed to meet their reduction commitments by acquisition of Kyoto flexible mechanism carbon certificates. Finally, emerging climate policy regimes are often considering the admission of Kyoto units as well. In consequence, business is interested in realizing emission reduction potential under the CDM as a cheaper alternative to reducing emissions at home.

Secondly, investment in CDM projects involves significant risk with regard to whether the prospected emission reductions are achieved or not. Governments and state authorities tend to be rather risk averse

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and therefore rarely engage in CDM project development directly. Instead, some states organize acquisition programs for Kyoto units buying primary certificates out of projects leaving the associated development risks with the project developers.

In consequence, the CDM project development activities are dominated by the private sector. Companies involved in the carbon markets are thus directly affected by CDM related decisions of UNFCCC governing bodies.

This is, however, not reflected by the framework conditions of CDM project development. While a private entity affected by an act of administrative law is granted a right to appeal against such decision in almost any jurisdiction, this is not so in the CDM. In order to enhance predictability, transparency and improving the consistency of how CDM relevant provisions are applied, it would be very helpful to create a functional and effective appeals mechanism against CDM relevant decisions.

Therefore, decision 2/CMP.5 is welcomed. The Hamburg Global Climate Foundation would like to respond to the call for public input and thus contribute to the task mandated by the CMP.

II. Legal aspects of general nature to be considered

Given that appeal procedures for private entities do not exist in international public law, it is appropriate to seek for other sources of inspiration for the envisaged procedure. Looking for principles that are commonplace in administrative and constitutional law in most national administrative legislations, one can derive a few basic requirements for rule-of-law procedures.

a. Independence of appellate body

Mostly, administrative law places significant emphasis on the fact that the body judging an appeal must be independent from the entity responsible for the decision against which the claimant appealed. If this is not the case, a balanced re-evaluation of the questioned decision is unlikely to take place. Those responsible for the challenged decision would be tempted to defend it by influencing the appellate body in favor of upholding the challenged decision.

For this reason, it would be advisable to ensure that (i) either the persons appointed to the appellate body are not involved in CDM relevant decisions, i.e. not part of UNFCCC governing bodies, or (ii) business- and NGO-representatives are also made part of the appellate body.

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We would favor the former solution, because decision making would be more unanimous and there is no danger of business representatives ruling against their competitor's CDM projects.

b. Predictability

Enhancing the predictability of CDM relevant decision making is of paramount importance for ensuring that the CDM sends a consistent and reliable signal to carbon markets that supports investor confidence. While understanding that the CDM has been a "constant learning experience" that may at times have required adapting regulations to reflect an actualized understanding of the regulatory needs, it needs to be recognized that such practice decreases the predictability of CDM decision making and thus impacts on investor confidence.

For this reason, it would be advantageous if the appellate body ensured that

- 1) CDM decision making is based on the regulatory requirements that were in force at the time the relevant question had been addressed in the CDM project specific context (e.g. a CDM project must be assessed based on the methodology version under which it was submitted in accordance with decision 3/CMP.1, Annex, paragraph 39).
- 2) In case new regulations (in exceptional cases only) are to be applied onto a registered CDM project (i.e. for questions of CER issuance), it should be ensured that such application is not done retroactively but only *ex nunc*. Project proponents should be granted an adequate grace period to adapt to new regulation.

Past decision making by UNFCCC governing bodies occasionally did not observe these principles which reduced the efficiency of the CDM process unnecessarily.

c. Right to be heard / obligation to provide reasons

To ensure that acceptance of the appellate body's rulings, those involved in the procedure should be adequately represented and heard in the procedures. This could be done by allowing company representatives or establishing a roster of independent lawyers accredited for representing a client's case in front of the appellate body. Project proponents could then choose to be represented by one of these UNFCCC external experts who would be mandated by them.

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If perceived necessary for limiting the work load of the appellate body, the obligation to provide reasons for appeals decisions could be limited to rulings, where the appeal has been declined.

III. More specific questions of the appeals procedure that is to be designed

a. Right to make a claim against a CDM relevant decision

Decision 2/CMP.5, Annex, paragraph 42 states that appeals procedures should be created for "...stakeholders directly involved..." in the design, approval or implementation of a (proposed) CDM project.

Certainly, directly involved stakeholders are the project participants and the countries authorizing their participation. However, also the mandated DOE are involved in the validation / verification process.

i. Right to appeal for DOEs only in cases of decision 2/CMP.5, Annex, paragraph 42 (a)

It appears questionable whether DOEs should be granted the right to appeal. Being independent stakeholders in the CDM process, their contribution is meant to be of impartial nature. This does not go together well with appealing against decisions referred to in decision 2/CMP.5, Annex, paragraph 42 (b). Here, the DOE already had opportunity to present its view in the validation / verification process itself. Its viewpoint has been included in the CDM relevant decision by the UNFCCC governing body, because the decision required the submission of a Validation / Verification Report.

Taking a position here against the validated / verified CDM would contradict the DOEs impartiality.

However, there are no objections to DOEs appealing against CDM relevant decisions referred to in decision 2/CMP.5, Annex, paragraph 42 (a), such as decisions to withdraw / suspend a DOEs accreditation. Here, the DOE is directly affected by the decision.

ii. Right to appeal for competitors / environmental NGOs

One could also consider granting a right to appeal to competitors / environmental NGOs. This notion could be supported by the point of critique that the global stakeholder consultation only allows for stakeholder input at the very beginning of the CDM project cycle. Also, the DOE statement (Validation Report or Verification Report) only becomes available to global stakeholders after the commenting

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period has expired. Last but not least, submission documents tend to be revised significantly in between their initial publication for global stakeholder consultation and the finalization of the CDM project cycle step.

However, if this idea is implemented it should be ensured that the efficiency of the CDM process is maintained. Claim should only be possible within a short period after the publication of the relevant documents. In case a claimant launches an arbitrary claim that is subsequently found to be completely unjustified, the appellant should be made responsible for the losses caused to the project proponents.

Admitting environmental NGOs to take advantage of the appeals mechanism could be helpful for enabling the UNFCCC governing bodies to focus on the administrative side of CDM governance and leave the advocacy role of defending environmental integrity to the NGOs. This could help improving the perception of the CDM by business stakeholders who would certainly welcome a more impartial role of UNFCCC governing bodies in the CDM process.

Given that the CDM is a tool of environmental policy it appears adequate that environmental NGOs are admitted to advocate environmental integrity in the project specific context to a certain degree that does not unduly undermine the overall efficiency of the process. Indeed, the right to bring forth claims to the appellate body could be limited to those environmental NGOs that have been accredited by UNFCCC governing bodies (e.g. based on documented qualification in both CDM related issues and professional legal expertise) for being admitted to do so.

b. Costs of procedure

In order to deter unjustified claims being made, the costs should be distributed to the party losing the procedure. Possibly, environmental NGOs (if granted a right to appeal) could be exempted from paying any fees due to their charitable status or liable for discounted fees only.

IV. Conclusion

The Hamburg Global Climate Foundation welcomes the notion of creating an appeals mechanism for CDM relevant decisions very much. Whilst the importance of ensuring the environmental integrity of the CDM remains undisputed, the acceptance of the CDM as a framework enabling investors to undertake financially viable projects is also very relevant.

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Trust in the CDM has not only been under debate from an environmental point of view, but also from a business perspective. Both aspects should be addressed equally when seeking to improve the CDM.

For business, an appeals procedure reflecting generally accepted principles accepted in administrative law and the rule of law would improve investment certainty and predictability. This would certainly help making the CDM more attractive for investors.

At the same time, maintaining the environmental integrity of the system remains equally important. By admitting environmental NGOs on a (qualification based) restricted basis only could be useful for ensuring this.

At the same time, this step could help the CDM governing bodies to take a more impartial stance in the entire CDM process leaving the role of environmental advocacy to selected environmental NGOs. Investors perceiving the CDM administration as neutral institution may have more confidence in the procedures than presently the case.

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