



CLIMATE FOCUS

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Subject **Call for inputs on procedures for appeals** Date **22 April, 2010**

Dear Mr Mahlung, dear Executive Board Members,

In response to the special call for inputs inviting views on procedures for appeals Climate Focus would like to present the following comments and suggestions. We hope that both the Executive Board as well as the UNFCCC Secretariat find these comments useful. We are at your disposal for further questions and discussion:

I. General comments

At its fifth session, the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) requested the Executive Board

[Decision 2 CMP 5, paras 42/43]

“to establish, following consultation with stakeholders, procedures for considering appeals that are brought by stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation of clean development mechanism project activities or proposed clean development mechanism project activities, in relation to:

(a) Situations where a designated operational entity may not have performed its duties in accordance with the rules or requirements of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol and/or the Executive Board;

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

[...] Requests the Executive Board to design the procedures referred to in paragraph 42 above focusing on, but not limited to, ensuring due process and to report on implementation to the Conference of the Parties serving as the meeting of the Parties at its sixth session...”

The request stands in the context of the Executive Board’s and CMP’s continuous efforts to strengthen the Board’s procedures and to “improve the efficiency and impartiality of the operation of the clean development mechanism” (2 CMP 5, para. 5). The request also responds to concerns raised over the past years by State Parties, academia, and the public, and recommendations made.

Climate Focus welcomes the initiative taken by the Executive Board for launching this special call for input. We see the introduction of an appeals procedure as a major step forward in securing due process rights for non-state actors and in strengthening the credibility of the Clean Development



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Mechanism (CDM). The availability of a functioning and independent appeals process is a core feature of administrative law throughout the globe and, if properly designed, can render the CDM more transparent, efficient, reliable, and impartial.

Adding a judicial layer fulfils various functions. First, it serves to uphold the rule of law and to protect the legitimate interests of the private parties concerned. Second, it enforces the transparency, the stringency and the coherence of the CDM's governance by controlling its acts and establishing a consolidated case law. Third, it accelerates procedures by freeing resources of the Board which would otherwise have to serve both functions, executive and judicial. Fourth, the existence of an appeals process guarantees the impartiality of the governance as a whole—an important feature to prevent that certain decisions would ever be challenged in national forums and that members of the administrative body, here the Executive Board, would ever be sued in domestic courts. Fifth, the availability of an appeals process adds trust and reliability to the international mechanism—an important factor to attract the private sector and its investments.

In order to guarantee that the future appeals architecture is both comprehensive and efficient, it is important that any appeals body or section does indeed *strengthen* the procedures and not duplicates, complicates or simply prolongs them. It seems indispensable in this context that, while being given a maximum of competence to make investigations and to rule on substance, it should be strictly confined to its remedial nature, i.e. it should become involved only on the request of a limited number of stakeholders.

II. Suggestion for an appeal mechanism

An appeals mechanism for the CDM could be modelled after existing systems that currently deal with the relationship between private entities and international organizations. These include the World Bank Inspection Panel, the World Anti-Doping Agency's Court of Arbitration for Sport, the European Ombudsman, and arbitration mechanisms. Each of these models will have its own set of advantages and disadvantages. An efficient and robust CDM appeal mechanism should seek to learn from the positive features of each the above-mentioned models, while adjusting for the particularities of the CDM.¹

We would argue that the creation of an *independent panel with comprehensive investigative and review powers* modelled after the World Bank Inspection Panel and the Court of Arbitration for Sport would best respond to the request made by the CMP. While international arbitration between states and corporations, or international organization and corporations, has a long tradition and has the advantage that existing arbitration instruments such as the International Chamber of Commerce (ICC) or the International Centre for the Settlement of Investment Disputes (ICSID) could be used, we believe that the relationship Executive Board/Project Participant/Designated Operational Entity (DOE) is administrative rather than commercial in nature and that for reasons of consistency a body within the regulatory framework of the UNFCCC is the preferred option. The European Ombudsman office has become a model instrument for good administration and governance and we are supportive of any attempts by the Executive Board and the CMP to establish a similar ombudsperson mechanism for the UNFCCC and the CDM, in particular. However, as the powers of an ombudsperson are both

¹ Note that the expansion of the functions of the current non-compliance procedures within the Kyoto Protocol (involving the Compliance Committee) could also serve as model. However, this option would require considerable modifications to the scope and mandate of the Kyoto Protocol's non-compliance procedure, to be introduced in the form of an amendment to the Kyoto Protocol. We therefore do not consider this alternative in the present response.



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wide (an ombudsperson investigates all forms of mal-administration and not the violation of legal positions only) and narrow (an ombudsperson usually issues recommendations only), it has not too much in common with the necessities of an administrative appeals procedures.

The creation of an independent panel with comprehensive investigative and review powers (Review Panel) could be structured as follows.

Composition

Just as the World Bank Inspection Panel, the Review Panel under the CDM could consist of three panellists. In order to secure impartiality in the decision-making process and the necessary technical/legal expertise, the members of the Review Panel could be selected from a roster of experts with specific climate change law and/or recognised CDM-related expertise. Members of the Review Panel would act in their personal capacity and be broadly representative of the range of State-Parties to the Kyoto Protocol. The Review Panel could operate as a standing body or convened on an *ad-hoc* basis.

It is crucial for the credibility of the Review Panel that its members do not give rise to a risk of conflict of interest. Review Panel members should not be former or existing staff of the CDM regulatory regime or DOEs and should not be allowed to take up employment therein for a period of time after the end of their term on the Review Panel. Equally, Review Panel members coming from the private sector should not be nominated to hear cases in which they may have a direct or indirect interest or connection.

Institutional Set-Up

The Review Panel should be established under the CMP but outside the influence (i.e., instruction or guidance) of any other constituted body, panel or working group of the CDM. The Review Panel could convene in Germany, at the seat of the UNFCCC Secretariat, where its members would be covered by the privileges and immunities established by the Headquarters Agreement. Provisions would have to be established however to facilitate access and reduce costs for legal entities from non-Annex I countries.

Competence

According to the request made by the CMP, the Review Panel would be competent to hear cases

- *in situations where a designated operational entity may not have performed its duties in accordance with the rules or requirements of the CMP and/or the Executive Board; and*
- *against rulings taken by or under the authority of the Executive Board.*

Claims against DOEs

The duties of DOEs are defined by the Marrakesh Accords, subsequent CMP decisions and the regulatory framework of the Executive Board. These specific tasks and obligations are embedded in the principle of good governance. DOEs do not only assess but they assist project participants with leading the project through the project cycle. The Review Panel would have sweeping powers to examine whether a DOE has breached any of its obligations towards the CDM and/or the project participants.

Note, however, that as long as DOEs are contracted by project participants, the issue of competing responsibilities and jurisdictions remains. As DOEs are currently contracted by project participants under private law, their performance is subject to the jurisdiction of (domestic) courts or arbitrators. As long as this relationship is not changed, an option could be to empower the Review Panel to hear cases brought against DOEs only if the contract between project owner and DOE allowed the jurisdiction of the panel. Alternatively, the Review Panel could assume restricted (arguably exclusive)



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competence for cases in which the basis of the complaint is an act or omission of the Executive Board and not one of the DOE.²

Claims against the Executive Board:

A basis for review could be any of the following incidents:

- a regulatory decision or ruling of the Executive Board violates, or is otherwise inconsistent, with the rules or requirements of the CMP;
- a ruling of the Executive Board is not in accordance with its own regulatory decisions and practices;
- a ruling of the Executive Board modifies the regulatory position retro-actively and to the detriment of the claimant;
- an action or omission of the Executive Board is arbitrary or *ultra vires* or violates the principle of equal treatment and established procedural rights.

Standing

The CMP request gives some guidance on the spectrum of claimants. From the wording of the request, at least, it seems that only “stakeholders directly involved, defined in a conservative manner” should have access to the appeals instrument. This would include all project participants. For third parties standing would be restricted, i.e. may be granted only if the party in question is directly and immediately affected by a project activity and the CDM project cycle.³

As mentioned above, the ombudsperson model may be used in a complementary way. If appeals procedures were to be restricted to project participants only, the parallel creation of an ombudsperson’s office may become the appropriate place of refuge for those who do not meet the strict standing requirements for an appeal.

Procedural Rules and Investigative Powers

As stated above, the relationship between legal entities participating in the CDM and the Executive Board is of an administrative, more vertical nature, and less of a private law, horizontal nature. The law of arbitration, therefore, is of limited value for the appeals proceedings under the CDM. Nonetheless, the UNCITRAL or the ICSID rules, for instance, may still provide a useful set of norms on various procedural aspects including the standards of proof and investigative powers of the Review Panel. In addition, the Executive Board may find inspiration in the procedural rules of those established international courts that grant standing to individuals (such as the Inter-American Court of Human Rights or the European Court of Human Rights).

² Note there may be occasions in which the DOEs act in compliance with the rules and guidance set by the Executive Board and where the claimant seeks to challenge these rather than the implementing act of the DOE. As the DOE is not culpable of any wrongdoing, a complaint against it would be likely to fail; however, a direct claim against the Executive Board can hardly be brought before the DOE has finished validation. An indirect review of the acts of the Executive within a case brought against the DOEs could solve this unsatisfactory situation.

³ This would arguably exclude those parties that are affected by certain measures taken in relation with the project activity but which are governed by a separate set of (domestic) norms. The establishment of a wind farm, for instance, usually involves several domestic procedures (building license, construction permit, other) that guarantee that neighbors, among others, are heard. Any breach of the related norms should not allow that a neighbor acquires standing in CDM appeals proceedings. Rather, this would have to be solved under national law. On the other hand, if there is a violation of public participation requirements under the CDM process, this may give, in certain instances, standing for a CDM related appeal.



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Remedies and Enforcement

In contrast to the World Bank Inspection Panel, which is only endowed with a fact-finding capacity, the Review Panel would be empowered to make binding decisions and establish a course of remedial action. The Review Panel would be able to:

- determine the existence of an inconsistency/illegality; and
- annul an act or omission of the Executive Board or the DOE.

We believe that the appeals mechanism would be strongest if the Review Panel was given powers to reverse decisions of the Executive Board. In very specific situations, the list of remedies should also include damages. Regarding acts and omissions of the Executive Board, established principles of state liability should be used as model. Regarding acts and omissions of DOEs, there should be a dual approach. Where DOEs implement Executive Board rulings only, the Review Panel should have the power to award damages to the claimant to be paid by the Executive Board. For its own performance, DOEs should be liable according to contractual principles of due diligence.

It is expected that enforceability will be less of a problem for a Review Panel's decision against the Executive Board. However, for decisions against DOEs, provisions on enforceability seem necessary. Once more, international arbitration rules may serve as an appropriate model in this respect.

Future consultation

For all the precedents, the creation of CDM appeals procedures will pioneer into a new field of international dispute settlement. We would respectfully ask the Executive Board to engage in public consultations through the decision-making process.

Sincerely,

Charlotte Streck
Director