

To the CDM Executive Board

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Our ref. 1068\Kantoor\CO2 - EU\Input CDM Appeals

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Re: Procedures for Appeals

Dear Sir, Madame,

Reference is made to your call for public inputs, inviting views on procedures for appeals in accordance with the CMP requests in paragraphs 42-43 of Decision 2/CMP.5. In addition to the input already provided by my colleague Mr Rutger de Witt Wijnen, please note the following.

Legal gap

Private parties play an important role in the flexible mechanisms of the Kyoto Protocol. However, the current Kyoto framework does not safeguard the legal position of these private parties. The CDM Executive Board now has the important task to fill this legal gap by designing a robust dispute resolution mechanism that should ideally not only be used for CDM appeals, but eventually also for disputes under the other flexible mechanisms.

Access to justice

Private parties engaging in the flexible mechanisms of the Kyoto Protocol are dependent on institutions such as the UNFCCC Secretariat, the CDM Executive Board and the JI Supervisory Committee. Those institutions may take decisions that the participating private parties disagree with, but the system offers these private parties no remedies against such decisions. This is inconsistent with the fundamental right of access to justice. See, *inter alia*, the article "Legal Protection and (the Lack of) Private Party Remedies in International Carbon Emission Reduction Projects" in the *Journal of Energy & Natural Resources Law*, Vol 28 No 1 2010, p. 172 ff (which has also been uploaded to your website). The article focuses on JI, but the issues raised equally apply to CDM as well.

As this type of dispute (disagreement between private parties and Kyoto bodies) concerns the interpretation and application of the Kyoto rules, the UNFCCC legal framework is missing an essential component. Whereas it explicitly creates an opportunity for private parties to engage in international emission reduction projects and emissions trading, it does not provide those private parties with adequate legal protection in case their interests are prejudiced.

A new dispute resolution mechanism

It would therefore be desirable that a robust dispute resolution mechanism be included in the relevant UNFCCC procedures. The best solution seems to be the establishment of a new independent appeal body for all flexible mechanisms to hear private party complaints, carry out judicial review of the decision of the relevant Kyoto institution and, if necessary, annul such decision or issue binding instructions. Such independent review mechanism would contribute to a uniform interpretation of the applicable Kyoto rules and increase trust in the system.

The relevant legal framework should ideally not only provide a means to resolve the dispute of the individual private party concerned, but also contribute to increase the integrity of the entire Kyoto process. If judgments serve as precedents, the dispute settlement mechanism can advance uniformity in the application of the Kyoto rules and a degree of consistency necessary to ensure equity among the private parties involved. In the case of proceedings against an institution that has taken a decision which impairs the rights of a private party, these should include a review of the reasoning of the relevant institution and an independent check on the validity of its decision. The resulting judgment should then not only annul, amend or rectify the impairing decision, but also be an incentive to the relevant institution and similar decision-making bodies to stay within the boundaries of the applicable rules and conform their future decisions to the judgment. This will improve the functioning of the relevant institution and contribute to its legitimacy. Judgments should therefore be issued in writing and made publicly accessible. To avoid fragmentation and conflicting interpretations of applicable rules, there is a clear advantage in having a single competent (supreme) body to review cases. Such body can then acquire expertise and build a uniform and consistent set of review standards to ensure unity of review and interpretation of the applicable rules.

If these conditions are met, access to justice will lead to better decision-making by the relevant Kyoto institutions, increase trust in the system and thereby stimulate private party participation. Private parties expect fair, predictable and non-arbitrary treatment from the competent authorities. They are more likely to make long-term investment decisions in a stable and predictable regulatory climate, with a solid system of rules and effective remedies in case their interests are harmed.

Conclusion

The CDM Executive Board now has the unique opportunity to establish an appeals procedure that can serve as the blueprint for a dispute resolution mechanism for all

types of disputes between private party and Kyoto institutions under all flexible mechanisms, which can then also be included in the post-Kyoto framework. Such dispute resolution mechanism should meet the requirements set out above to ensure unity of review and interpretation of the applicable rules. As suggested by my colleague Rutger de Witt Wijnen, it would make sense to base the mechanism on UNCITRAL arbitration (with certain adaptations).

The scope of the appeals mechanism as described in paragraph 42 of Decision 2/CMP.5 is rather narrow. We believe that it should include *all* decisions of the CDM Executive Board that affect private parties (including, for example, decisions by the CDM Executive Board on (dis)accreditation of DOEs). In addition, we believe that the scope should eventually be broadened to all flexible mechanisms. Therefore, in its report on the basis of paragraph 43 of Decision 2/CMP.5, the CDM Executive Board should advise the CMP to extend the scope of the appeals procedure to all decisions of Kyoto bodies that affect private parties (including all such decisions of the CDM Executive Board, the UNFCCC Secretariat and the JISC).

The possibility to challenge decisions of the Kyoto institutions would increase the legal protection of private parties playing their important role in the flexible mechanisms and advance the stable investment environment necessary for long-term private sector involvement in combating climate change

We would be happy to further advise and assist on the design of the appeals mechanism. If you have any questions, or would like to discuss, please do not hesitate to contact me.

Yours sincerely,

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Sander Simonetti