

23 April 2010

**CDM Executive Board**

UNFCCC Secretariat  
Martin Luther King Strasse 8  
P.O. Box 260124  
D-53153  
Germany

Dear Mr. Mahlung,

I am writing to you on behalf of the International Emissions Trading Association (IETA) in response to the request for input from EB 53, in accordance with paras 42 -43 of decision 2/CMP5. That decision:

*“42. Requests the Executive Board 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;*

*43. 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 to the Kyoto Protocol at its sixth session;*

We propose below an approach that we feel keeps within the spirit of the CMP decision and ensures that the addition on an appeals process will improve, and not further hinder, the functioning of the CDM.

We strongly welcome this opportunity, as the creation of an appeal process has been one of the long-time recommendations of the business community and is a tool commonly used in many regulatory processes.



One issue needs to be clearly stated. Establishing an appeal process is an undertaking that requires substantial experience and expertise in this area; it will be a fundamental element of the CDM and its governance structure. Its design and implementation cannot be taken lightly. IETA members from industry, electric power, legal, project development, and other relevant fields have significant experience in regulatory matters, and we look forward to an ongoing dialogue with the Executive Board as it continues to take steps towards the establishment of this appeal process.

In setting up an appeals process, we would like to first propose a set of principles that should be followed, some of which were discussed when the CMP decision was drafted, and were captured in the decision itself.

- **Conservative range of interveners.** The appeals process should not provide an opportunity for frivolous interventions and create gridlock for the CDM. Consequently, those that appeal should have a “direct interest” in the project activity, such as those that are affected by rejection or alteration of request for issuance or registration. Para 42 of the CMP decision clearly states that it should be available to stakeholders “directly involved, defined in a conservative manner”. It is clear that the CMP wanted to ensure that range of interveners would be narrowly defined.
- **Broad scope for appeal.** The decisions which one could appeal should be broad, as described in paras 42, (a) and (b). They should be able to address any decisions taken under the authority of the EB or by DOEs, even if decisions by DOEs can be overruled by the EB anyway.
- **Broad scope of grounds.** The grounds of appeal should be clearly defined and include both decisions related to the merits of the CDM project and also the way in which the EB or DOE has acted administratively in making that decision (e.g. in applying the CDM Rules or matters related to its conduct).
- The body hearing the appeal shall not make final decisions on the project the subject of the appeal. Instead they shall make a decision on the issue under appeal and refer the matter back to the EB for final determination
- **Independence of the appeal body.**
  - A body with responsibility for the decision being appealed should not be involved in the appeal process, nor have any power over those that sit in judgment of the appeal.
  - Those whose decision is being appealed (i.e. EB, DOE) cannot be seen to be in a position to dismiss or appoint those that undertake the appeal.
  - Those hearing an appeal cannot, at some point, have had final say in the decision, even if the decision making process is set up in such a way that they only have to “rubber stamp the recommendation of other bodies. The EB, according to the Marrakech Accord (MA) is the final decision maker and has to discharge that duty, unless the MA are modified by the CMP.
  - It follows and it is self evident, that as a result, the Appeals Board cannot be appointed or comprised of EB members or DOE staff, as an extended arm of the Board.



- **That the panel has expertise in appeals procedures.** The panel need not be a technical body, but it should have access to technical advisors whom its members may choose to call in.
- **Barriers to appeals.** Costs should not be a barrier to appeals.
- **Timeliness.** Any appeal should not cause undue delay to the CDM project and should observe predetermined timelines.
- **Transparency.** Any appeal process should be conducted in public, on the record, with full disclosure.
- **Reparations:** If an appeal in the case of a request for registration is accepted and the project registered, the project registration date and the start date of the crediting period shall be appropriately back-dated.

## Proposal

Taking into account the principles outlined above, IETA proposes below an outline for an Appeals Process for decisions taken by or under the authority of the CDM Executive Board.

For appeals raised against a validation or verification decision taken by a DOE, where a DOE may not have performed its duties in accordance with the rules or requirements of CMP and/or the Executive Board, IETA believes that they should *first* be heard by the CDM Executive Board or the Accreditation Panel, acting under its authority. Ultimately, however, they must have recourse to the same appeal body described below.

## Composition & Appointment

- An appeal body, the Appeals Board (AB), comprised of 12 members shall be created and appointed by the CMP for a period of 6 years.
- Members cannot be re-appointed, but can be dismissed by the CMP under strict rules
- The AB is not a full-time appointment. Members will serve on an ad-hoc basis when allocated appeals to hear.
- There will be clear ToRs for the members of the AB.
  - The ToRs should emphasize the requisite policy, regulatory and appellate background, standing in the community, independence, and freedom from conflicts of interest.
  - It should specifically state that membership is not limited to government employees, but rather it is open to individuals from the private sector, academia and civil society who possess the requisite qualifications.
  - The ToRs should ensure that there is no overlap with current or past membership in the EB.
  - It should also ensure that the AB is not a technical panel akin to, or one that duplicates or overlaps with, the competencies of the Methodologies Panel or the Registration and Issuance Team (RIT).
  - Individuals that have served on the EB and its bodies worked for DOEs, the UNFCCC Secretariat, or in government roles directly related to the CDM (e.g. DNAs or negotiators



- in the UNFCCC process) in the 2 years prior to their nomination should not be able to serve on the AB.
- 50% of membership in the AB should turn over every 3 years.
- Candidates for the AB can be submitted by any interested person or organization. Limiting nominations of candidates to Parties would only reinforce the same appointment cycle as in the CDM EB, and emasculate any independence of the AB.

## **Type of decisions that the AB can make**

- The AB will be authorized to hear appeals on any decision by the EB, including but not necessarily limited to:
  - Initial accreditation and renewal of accreditation of DOEs;
  - Project registration;
  - Issuance of CERs;
  - Methodology approval.
- The grounds for an appeal must be clearly stated in the appeal documents and may fall into one or more of the following categories:
  - review of the merits of the EBs (or DOEs) decision;
  - misapplication of the CDM rules;
  - failure to take into account relevant considerations;
  - failure to accord the appellant due process;
  - acting beyond the power afforded the decision-maker; or
  - bias or irrationality.
- The AB will only address the grounds raised in the appeal documents for the purposes of making its decision.
- The AB can hear an appeal and send it back to the EB with a decision asking it to review its decision according to assigned criteria: such as, it had made an error in the way it considered certain parts of the material submitted, has not considered some of the evidence before it, has asked for the wrong type of information, or has made an error in the process in general, etc.
- The AB has no power to substitute its decision for the decision of the EB.

## **Elements of the life cycle of an Appeal**

- In order to lodge an appeal, an appellant must submit a written Appeal within 60 days of a relevant determination or decision.
- A written Appeal must identify the grounds of the appeal (e.g. provide specific allegations of misinterpretations of fact, procedural mistakes or errors in judgment). Allegations must be supported with written evidence which may be in the form of preliminary written submissions and/or affidavit evidence (sworn testimony).
- The AB should assign cases to an Appeals Panel (AP) of 3 members of the AB, chosen at random among its members. Any member that has a conflict of interest will be disqualified and replaced.



- On the basis of the Appeal document, the AP shall decide whether to hear the case or not.
- The AB will make the Appeal public, as well as all documentation submitted that is not determined to be commercial-in-confidence, and invite, at its discretion, submissions and/or evidence from other entities that it considers relevant to the Appeal.
- If it believes that the Appeal contains insufficient claims to substantiate a prima facie case based on the grounds of appeal identified, the AP can make a Preliminary Determination that rejects the claim pending additional clarifications, which the Appellant must provide in writing within 15 days.
- The Appellant shall be given one opportunity to cure any defects in the appeal documentation before a Final Decision is entered.
- Where an Appeal is accepted, the AP will notify the Appellant and invite the Appellant and the decision-maker to submit further evidence to respond to the grounds of appeal within a limited timeframe. Such further evidence may be in the form of submissions and/or affidavit evidence (sworn testimony). The Appellant will be given the opportunity to respond to any evidence presented by the decision-maker.
- The AP may seek evidence on aspects of the appeal from independent technical experts or other persons. Experts will be engaged by and be accountable to the AP.
- The AP may determine the matter based upon the documentary evidence submitted by the parties to the appeal or after holding a hearing with all parties to the appeal present.
- An Appellant may request that the appeal is determined on the basis of a hearing at which it is able to present its case in person or via electronic means.
- The AB shall be supported by a separate Appeals Unit of the UNFCCC Secretariat, with a dedicated team of staff that is independent of the CDM and its Panels and Working Groups.
- An Appeal shall be decided within 30 calendar days.

### **Who has standing in an Appeal**

- Appeals can only be lodged/initiated by those “directly involved, defined in a conservative manner” (CMP para 42).
- The AB will invite entities and individuals, at its own discretion, to make submissions or provide evidence relevant to the appeal.

### **What can be appealed**

- All decisions of the EB or its subsidiary bodies and panels can be appealed, including, but not limited to, validation, registration, verification, issuance, etc.

### **Transparency**

- The AP’s decisions will be issued in writing and made publically available. This includes both preliminary decisions and final decisions.
- The AP will provide written reasons for its decision and, where appropriate, reference previous decision on the same or similar issues.
- All evidence in an appeal will be on the record and available to the public via internet
- The debates of the AB and AP will not be open to the public.



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**Costs & Compensation**

- It will be decision of the AB whether the costs of the appeal will be borne by the appellant or the CDM.
- The AB cannot impose or award any damages or compensation.

**Regular Review**

- The appeals process will be regularly reviewed by the CMP with a view to ensuring it is capable of fulfilling its mandate in an effective way.

**Decisions Taken before the Appeal Mechanism is Established**

- Decisions taken by the EB previous to the establishment of the appeal mechanism will be open for appeal for a period of 120 days following the publication of and approval of appeal procedures. In order to allow for these cases to be processed without creating a backlog within the AP and its Secretariat staff, these appeals will be decided within a 90-day period.

Once again, on behalf of IETA and its over-170 member companies, I would like to thank you for taking this submission into consideration. IETA looks forward to commenting on further calls for input.

Sincerely,

Henry Derwent  
President and CEO

