

## Memo

To: SBI

From: CDM Watch, ClientEarth and Transparency International

**Re: Procedures, mechanisms and institutional arrangements under the CMP to allow for appeals against CDM Executive Board decisions**

London, Brussels, Berlin 29 March 2011

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### Key recommendations for appeals procedures:

- Comply with requirements for appeals processes, including institutional arrangements for the appeals mechanisms. This includes rules, procedures, and codes of conduct and ethics must be put in place to ensure that the appeals body is independent, competent, impartial, and accountable.
- Comply with due process requirements embedded in the appeals process.
- The appeals procedure should provide for broad legal standing. This would include a provision of public interest and a provision to allow civil society organizations (CSOs) with environmental objectives to stand in for the public in environmental matters. Given the nature of the environment as a general public good, citizens and CSOs must have the right to use the appeal procedure to raise justified concerns over questionable and potentially flawed CDM projects.
- Grounds for filing an appeal should include;
  - Against EB decisions to approve a project following review, not just rejections.
  - Against both procedural and substantive violations.
  - Against EB decisions whenever there is probable cause that a DOE 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.
- The timeframe within which appeals may be brought should not be limited where new, material facts come to light indicating that a CDM project does not meet the core requirements.

- Litigation costs and fees should be affordable
- An accurate and complete record upon which the appeal is based must be compiled and made publicly available.

The guiding principles on which these recommendations are based are:

- The right to information, the right to public participation and the right to seek justice are intrinsic to every individual and inherently human rights.
- Transparency, accountability, and integrity are integral components of an effective governance system in particular where public resources and decision making processes impact on human rights and sustainable development.

## Introduction

The right to information<sup>1</sup>, the right to public participation<sup>2</sup> and the right to seek justice<sup>3</sup> are intrinsic to every individual and inherently human rights. The right to access information is widely recognized as an indivisible part of the freedom of expression<sup>4</sup>. Likewise, public participation is an essential aspect of the rights of political participation, freedom of association and assembly, and freedom of expression. The right to justice derives from the right to an effective remedy by a competent tribunal for acts violating rights granted by a country's constitution or by law. It also extends from the right to a fair and public hearing by an independent and impartial tribunal.

Given the central role the international community has played in promoting these access rights, multilateral environmental agreements including the United Nations Framework Convention on Climate Change, the Stockholm Convention, the Montreal Protocol and the Convention on Biological Diversity contain strong commitments towards the effective implementation of access rights.

The inclusion of an appeals procedure in the CDM project approval process presents a crucial opportunity for the Executive Board (EB) to secure these human rights and to promote enhanced accountability, legitimacy and public trust in and acceptance of the CDM as a valid tool for reaching its goals under the Kyoto Protocol – namely, mitigating global climate change while promoting sustainable development.

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<sup>1</sup> Right to information refers to the availability of information relating to the environment and the mechanisms by which public authorities provide environmental information.

<sup>2</sup> Public participation refers to the availability of opportunities for individuals, groups and organizations to provide input to decision making that will have or is likely to have an impact on the environment.

<sup>3</sup> Access to justice refers to effective judicial and administrative procedures and remedies available to individuals, groups and organizations for actions that affect the environment and contravene laws or rights. The legal standing to sue and the ability to litigate are components of access to justice.

<sup>4</sup> See International Convention on Civil and Political Rights <http://www2.ohchr.org/english/law/ccpr.htm>

It should be noted that an appeals procedure should not trigger floods of unjustified appeals. An appeals procedure should provide an opportunity to introduce coherence and quality control into the EB decision-making process, as access to justice is a vital aspect of accountability, providing venues for the enforcement of procedural and substantive environmental rights and duties.

The purpose of these comments is to outline the critical procedural aspects that must be considered and included in a future CDM appeal procedure, so that it might promote transparency, accountability, and consistency in the CDM project approval process and improve the efficacy of the CDM as a tool for reducing greenhouse gas emissions. Additionally, it may allow for more meaningful public input into the EB's decision-making – something that is woefully lacking under the current procedures.<sup>5</sup>

As further discussed below, we strongly recommend that the EB adopt an effective appeals procedure that provides for due process, by introducing the following procedural considerations:

- Comply with requirements for appeals processes including;
  - Institutional arrangements for the appeals mechanisms: rules, procedures, and codes of conduct and ethics must be put in place to ensure that the appeals body is independent, competent, impartial, and accountable.
  - Due process requirements must be embedded in the appeals process;
- Stakeholders allowed to appeal;

The appeals procedure should provide for broad legal standing.

If the appeals procedure decides to provide limited/conservative legal standing to appeal any questionable and potentially harmful CDM project, it will undermine the effectiveness and objective of the appeals procedure by perpetuating the current constrained participation of stakeholders and promoting the number of potential situations where questionable and potentially flawed CDM projects can be approved without a chance of appeal.

- Clarify grounds for filing an appeal;
  - Against EB decisions to approve or reject a project following review
  - Against both procedural and substantive violations

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<sup>5</sup> These shortcomings were clearly recognized by the CMP in Decision 2/CMP 5 when it requested that the EB, “as its highest priority, continue to significantly improve transparency, consistency and impartiality in its work by, *inter alia*:

(a) Continuing its efforts to improve consistency in its decision-making;

(b) Publishing detailed explanations of and the rationale for decisions taken, . . . ;

(c) Taking into account input from relevant international organizations . . . in its decision-making process[.]; Decision 2/CMP 5, ¶ 7.

- Against EB decisions whenever there is probable cause that a Designated Operational Entity (DOE) 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
- Filing an appeal;
  - Timeframe: the time within which appeals may be brought should not be limited where new, material facts come to light indicating that a CDM project does not meet the core requirements.
  - Costs: court fees should be affordable
- The Record
  - An accurate and complete record upon which the appeal is based must be compiled and made publicly available.

## Principles the Appeal Process should comply with

### Institutional arrangements for the appeals mechanisms

The requirement that an appeals body or tribunal be competent, independent and impartial is well recognized under international and national law.<sup>6</sup> This stems from the recognition that the protection of fundamental rights and the fair administration of justice depends on the ability of the reviewing body and its members to act independently and impartially. Moreover, independence and impartiality are necessary to instil public confidence in the appeals process and in the moral authority and integrity of the appeals body.

In order to meet these standards, it is recommended that:

- The CDM appeals body be comprised of persons who are independent from the EB and UNFCCC Secretariat, such as through the creation of a new body under the authority of the CMP<sup>7</sup>;

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<sup>6</sup> See, *e.g.*, The Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the UN Basic Principles on the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct.

<sup>7</sup> See example of Lisbon Treaty: Under Regulation (EU) 182/2011, as in the past, the mechanism of control foreseen is based on "comitology", committees composed by representatives of Member States to which the Commission submits draft implementing measures. However, contrary to the previous system, there can be no intervention from the Council as an appeal body. The Regulation establishes the possibility in some specific cases to go to an "appeal committee", which follows the same rules as other Committees and is therefore composed by officials from Member States and chaired by the Commission,

- The CDM appeals body be required to abide by codes of conduct and ethics that guarantee that they are able to act impartially and without conflicts of interest;
- Criteria and procedures for the selection, and removal processes of CDM appeals body members, ensure appropriate transparency, accountability and integrity.
- Operational procedures of the CDM appeals body ensure that its members maintain independence and impartiality.
- Members of the CDM appeals body have appropriate competence to perform their duties including expertise and knowledge of the technical and procedural requirements for CDM project activities.
- Members of the CDM appeals body be compensated sufficiently, and provided with appropriate resources to enable their performance within appropriate time-frames.
- Procedures should be in place to address conflicts of interest should they arise. These procedures should include requiring the suspension and/or removal of appellate body members who may have such conflicts.
- Rules and procedures to guide the work of the appeals body and to ensure impartiality in its decision-making, in order to maximize its legitimacy and public confidence in its authority.

We strongly recommend that the EB develop rules and procedures – including codes of conduct and ethics – to ensure that the CDM appeals body is comprised so as to meet these standards.

## **Due process requirements must be embedded in the appeals process**

On the basis of constitutional and statutory rules and practices common to a great number of States of all regions of the world, and as guaranteed by universal and regional human rights instruments, rights of due process, have been generally recognized in international law protecting individuals from arbitrary or unfair treatment. Generally recognized, due process rights include the right of every person to be heard before an individual measure which would affect him or her adversely is taken, and the right of a person claiming a violation of his or her rights and freedoms to an effective remedy before an impartial tribunal or authority. Less widely recognized is the right of CSOs to seek due process in regards to matters of public interest of the environment.

These rights can be considered as part of the corpus of customary international law, and are also protected by general principles of law in the meaning of Article 38, paragraph 1, lit. c, of the International Court of Justice Statute.

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albeit of a higher level of representation and different to the officials in specific Examination committees.

Principles of due process, or fair trial, are fundamental to the protection of human rights.<sup>8</sup> Such rights can only be protected and enforced if the citizen has recourse to courts, tribunals or other impartial institutions which enjoy a sufficient measure of independence from the governmental or administrative organs of a State, and which resolve disputes in accordance with fair procedures.

We support the CMP request to the EB to focus on ensuring the appeal procedure provides for due process (decision 2/CMP.5, paragraph 43) and stress that this procedure should follow the following due process requirements:

- Respect the right of every person to be heard before measures are taken that can affect him/her adversely
- Fairness
- Impartiality and independence of the appellate body
- Affordability of fees
- Transparency
- Ability to make decision efficiently and in a timely manner
- Access to information

## Stakeholder's Right to appeal must be implemented through Broad Legal Standing

According to Decision 2/CMP 5, the EB is required to adopt appeal procedures for “stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation” of a CDM project activity. *Id.*, ¶ 42. Despite the suggestion that stakeholders entitled to appeal should be interpreted in a “conservative manner,” we strongly recommend that a broad legal standing approach be adopted and implemented through the suggested routes outlined in Box 1.

Implementing broad legal standing, does not mean that the appeals process can and will be used against every single project. Through broad legal standing, stakeholders, including CSOs will be able to use the appeals procedure to legitimately voice justified concerns, as the arguments provided further below will illustrate.

Broad legal standing will contribute to the successful implementation of the CDM appeals procedure, which will depend in part on perceptions of legitimacy, which in turn depend on the fairness and inclusiveness of the process.

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<sup>8</sup> Richard Clayton & Hugh Tomlinson, (2000) *The Law of Human Rights*, Oxford: Oxford University Press, p. 550.

### Box 1: Implementing Broad Legal Standing

One of the challenges with access to justice in the environmental realm is the questions of who has legal standing. Legal standing is the ability of a person to show a sufficient legal interest in a matter to allow him or her to bring a claim.

There are two main routes around the problem of environmental standing:

- The first is the provision of public interest or the right of any individual to seek remedy and redress for the violation of certain collective rights.
- The second is to allow Civil Society Organizations (CSOs) with environmental objectives to stand in for the public in environmental matters.

The arguments for providing broad legal standing are the following:

- **Broad legal standing can increase access to justice of affected communities, enabling sustainable development, climate benefits and environmental integrity**

One of the key difficulties in protecting the environment is that those most affected can be separate individuals and families who lack the means capacity or information to take individual or coordinate a larger collective action. Often, activities and projects that degrade the environment bestow concentrated wealth on a small group of people, or on organizations that can hire lawyers to defend their positions relatively easily. Therefore, groups that are degrading the environment often have to spend less time and efforts to defend their position than those who are directly harmed.

Furthermore, the current levels of participation by stakeholders in the CDM process are already limited. The practice indicates that there are serious deficits in the local stakeholder consultation processes undertaken by most project developers, providing little opportunities to reflect the public's concerns and interests. Additionally, practice shows that a limited number of comments are submitted during a CDM project validation stage, most likely due to language barriers, illiteracy, insufficient information and insufficient notice.

As demonstrated by stakeholder comments on past projects, stakeholders living or working near a proposed project (or otherwise "directly involved, as defined in a conservative manner") are often interested in the promise of immediate economic

benefits. They often have little incentive and/or capacity, to understand and address more complicated questions relating to the project's impacts on global climate change – e.g., additionality, baselines calculations, and other issues that are the basis of a project's eligibility for CDM credits. Although some coordinated efforts among civil society are being developed to address these deficits and develop capacities, clearly much more capacity development is required globally.

By introducing broad legal standing (see Box 1), the CDM EB can effectively ensure that due process is widely recognized and implemented. When it may be difficult for a citizen to challenge environmental decision making, CSOs may be able to seek due process as a matter of general public interest.

- **Broad legal standing can support effective local participation, consultation and oversight regarding CDM project design and implementation**

Providing limited legal standing to appeal of any questionable and potentially harmful CDM projects will undermine citizens' rights to participate meaningfully in the CDM process and it will conflict with the CDM EB efforts to increase transparency and accountability of its decision making process. Testimonies from directly affected local communities often suggest that they are not properly consulted as part of the local stakeholder consultation. A case currently pending registration, involving the construction of a new hydro power project in Western Panama<sup>9</sup> clearly shows the problematic: The PDD states that *"in accordance with the data obtained from the 58 surveys performed, 50% of the persons surveyed were in favour and 50% against the project, obtaining the following results from the Community"*. It also says that *"But the current position of the community is favourable, getting support for the project from local communities and local authorities..."* While the CDM project developers carried out 58 surveys it is important to note an official habitat survey<sup>10</sup> about the local population around the Tabasara River, the river where the hydro power project is planned, estimates the local population to be more than 30,000. Locally affected communities, particularly the Ngäbe indigenous communities who live closest to the river, are vehemently opposed to the project because it would mean the end to their livelihoods. Despite the numerous complaints and previous demonstrations by residents, the indigenous communities were not duly notified when the public consultation by the company was held.<sup>11</sup>

Additionally, practice shows that a limited number of comments are submitted during a CDM project validation stage, most likely due to language barriers, illiteracy, insufficient information and insufficient notice.

An essential element of public participation is to facilitate that affected stakeholders actually have a real possibility to submit comments during the global stakeholder consultation period. Since the vast majority of stakeholders in CDM host countries do not speak English, financial and human resources constraints combined with the limited time available for submitting comments makes it almost impossible for many

<sup>9</sup> Barro Blanco Hydroelectric Power Plant Project, (Ref. 3237)

<sup>10</sup> Page 150 on 3.4 Medio Socioeconomico, cultural y Arqueología of the Tabasara

<sup>11</sup> [http://www.thepanamanews.com/pn/v\\_16/issue\\_11/economy\\_special\\_01.html](http://www.thepanamanews.com/pn/v_16/issue_11/economy_special_01.html)



stakeholders to prepare a comment on the basis of an English project design document (PDD), which first has to be translated to be understood. Another serious obstacle is that the current CDM procedures do not foresee any notification system which causes that many times the deadline for submitting comments is being missed.

Moreover, meaningful public input to PDDs is extremely hamstrung by the unavailability of supporting documentation, such as IRR analysis, spread sheets and the environmental impact assessments. While this documentation may be required for the Board's review of validation, it is typically not provided during the public commenting period. Without this documentation, public review and comments on the crucial issues of additionality and public participation in environmental analysis is limited to the summary information provided in the PDD itself and thus rather superficial.

Combined with the lack of meaningful local stakeholder consultation, these deficiencies make it almost impossible for many stakeholders to make use of the global stakeholder consultation, the only official possibility to voice concerns justified under international law.

- **Broad legal standing can support the transparency, accountability and integrity of CDM operations, enhancing the overall legitimacy and credibility of the mechanisms**

If the CDM EB provides limited legal standing in its appeal procedure, the legitimacy, transparency, integrity and credibility of the CDM process is under threat. The appeals procedure must provide for an expansive interpretation of "stakeholders", thereby allowing that the public's interests are truly taken into consideration and are reflected in the CDM decision making process. Meaningful stakeholder engagement involving CSOs in the appeal procedure serves to enhance the overall legitimacy of the CDM, its direction and its operations.

Broad legal standing will enable a more robust public check on the CDM project approval process, and promote transparency, accountability and integrity in the decision-making process. Public review can act as an important tool for verifying that a proposed project activity will result in sustainable development, real, additional, permanent reductions in greenhouse gases without imposing adverse environmental or social impacts.

By implementing this procedural consideration, the CDM EB ensures that responsible institutions are kept accountable if they fail to fulfil their obligations.

- **Broad legal standing can enable needed capacity building efforts as well as the representation of affected communities by civil society organisations**

The consequences of excluding CSOs from the CDM appeals procedure can be especially severe.

Poor people, whose lives and livelihoods often depend on natural resources and who are most vulnerable to environmental risk, are often unable to exercise their rights. Studies show that the poor people in countries face daunting array of barriers to access, including low literacy (including the ability to understand technical content), high costs (official fees, travel, foregone work, corruption) and language barriers to influence environmental decision making processes. The lack of ability to take part in decisions and little ability to influence public policies and political priorities can result in unfair or even harmful CDM related decision which can lead to a loss of livelihood or wellbeing<sup>12</sup>

These and other barriers, will limit the participation of poor stakeholders in a future CDM appeals procedure, unless CSOs are provided with the right to appeal and assist them.

By providing broad legal standing non-governmental organizations and civil society groups that have the capacity to monitor and review proposed CDM project activities,<sup>13</sup> can both provide a voice for citizens living in the vicinity of a project site to ensure that environmental and social impacts are addressed, and ensure the integrity and efficacy of the CDM as a means of mitigating global climate change and promoting sustainable development.<sup>14</sup>

- **Broad legal standing can enable better compliance with CDM rules and procedures**

Urgently and crucially, a recognized and active role of concerned stakeholders to participate in the CDM project approval process is needed to ensure the climate integrity of the CDM.

Omitting from the process concerned stakeholders and the evidence, expertise, perspectives, and opinions they bring are likely to lead to situations where questionable and potentially flawed CDM projects are approved. Moreover, the very existence of a public review process works to promote compliance by project participants who in the absence of such a mechanism may be less inclined to comply with all standards and procedures.

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<sup>12</sup> World Resource Institute, (2004), *The Wealth of the Poor: Managing Ecosystems to Fight Poverty*, Washington DC.

<sup>13</sup> For example, UNFCCC accredited NGOs.

<sup>14</sup> For example, the European Commission has adopted an internal review procedure (pursuant to the Aarhus Convention, discussed below) wherein NGOs meeting certain criteria may request the Commission to consider whether an administrative act or omission is contrary to Community law relating to the environment. In order to do so, the NGO must demonstrate that: (a) it is an independent, non-profit making, legal person in accordance with a Member State's national law or practice; (b) its primary stated objective is to promote environmental protection in the context of environmental law; (c) it has existed for more than two years and is actively pursuing environmental protection; and (d) the subject matter of the request for internal review is covered by its objective and activities. Regulation (EC) No 1367/2006, Articles 10, 11(1), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006R1367:EN:NOT>. Another example is the Office of the Compliance Advisor/Ombudsman ("CAO") is the independent recourse mechanism for IFC and MIGA, the private sector lending arms of the World Bank Group. CAO's mission is to address complaints by people affected by IFC/MIGA projects and to enhance the social and environmental accountability of both institutions.

- **Broad legal standing enables fundamental principles of access to justice enshrined in human rights and environmental law**

Finally, despite the suggestion that the EB define stakeholders entitled to an appeal “in a conservative manner,” the practice of openness for any individual to access justice in environmental matters is enshrined in international and national law and numerous conventions to which many UNFCCC/Kyoto Protocol parties are bound. These principles and obligations are based on the recognition that public interest plays an important role by drawing to the attention of decision-makers the concerns, errors, inaccuracies or facts that were overlooked, thereby acting as an extra check on actions that potentially harm the environment or public health. At the same time, introducing transparency and allowing public input into the process serves to eliminate distrust in the decision-making process, and the decision-makers themselves. Thus, one of key requirements of meaningful public participation in environmental decision-making is public access to judicial or administrative proceedings. As set forth in Principle 10 of the 1992 Rio Declaration on Environment and Development, agreed to at the UN Conference on Environment and Development (“UNCED”),

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities,..., and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. *Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*<sup>15</sup>  
(emphasis added)

Although the Rio Declaration is not a legally binding instrument, a number of its 27 principles, including Principle 10 have been reflected in international treaties and national law, and some are considered to reflect binding customary international law.

At the World Summit on Sustainable Development in Johannesburg (South Africa, 2002) 191 governments further reaffirmed the central role of broad-based stakeholder participation including access to “judicial and administrative proceedings, in environmental matters, as well as public participation in decision-making, so as to further principle 10 of the Rio Declaration on Environment and Development.”<sup>16</sup>

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<sup>15</sup> 1992 Rio Declaration on Environment and Development, *available at* <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

<sup>16</sup> World Summit on Sustainable Development [WSSD]. Aug 26 – Sep.4 2002, Plan of Implementation, para. 128 (Sep 4, 2002), *available at* [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIToc.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm). See also United Nations Environment Program Malmo Declaration of the Global Ministerial Environment Forum. May 28 – May 31, 2000. (June 1 2000), *Available at* [http://www.unep.org/malmo/malmo\\_ministerial.htm](http://www.unep.org/malmo/malmo_ministerial.htm). The Malmo conference was held in pursuance of United Nations General Assembly resolution 53/242 of 28 July 1999 to enable the world’s environment ministers to gather to review important and emerging environmental issues and to chart the course for the future, and over 100 of the world’s environmental ministers attended. Paragraph 16 of the declaration states that “[t]he role of civil society at all levels

The Universal Declaration of Human Rights firmly states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations...”<sup>17</sup>

The vital role of public access to judicial or administrative proceedings is further enshrined in the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“Aarhus Convention”), the principal internationally binding treaty. Many of the UNFCCC/Kyoto Protocol Parties are signatories as a Party to the Aarhus Convention; through which Parties are obliged to promote the application of the principles of the Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.<sup>18</sup>

[E]very person has the right to live in an environment adequate to his or her health and well-being...Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights ...each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters....<sup>19</sup> (emphasis added)

The European Commission has adopted various Directives and Decisions implementing the access to justice requirement of the Aarhus Convention.<sup>20</sup> In 2006, the European Parliament and Council adopted Regulation (EC) N° 1367/2006 *on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies* (OJ L 264, 25.9.2006, p.13) (“Aarhus Regulation”). The Aarhus Regulation enables environmental NGOs meeting certain criteria to request an internal review under environmental law of acts adopted, or omissions, by Community institutions and bodies.<sup>21</sup> Furthermore, the draft findings and recommendations of the

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should be strengthened through freedom of access to environmental information to all, broad participation in environmental decision-making, as well as access to justice on environmental issues. Governments should promote conditions to facilitate the ability of all parts of society to have a voice and to play an active role in creating a sustainable future.”

<sup>17</sup> Universal Declaration of Human Rights, 1948, art. 10

<sup>18</sup> UN/ECE Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters, Art. 3, paragraph 7Dannenmaier, Eric (2007), *A European Commitment to Environmental Citizenship: Article 3.7 of the Aarhus Convention and Public Participation in International Forums*, Oxford University Press.

<sup>19</sup> United Nations Economic Commission for Europe [UNECE], *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* preamble, art. 1, June 25, 1998, *available at* <http://www.unece.org/env/pp/documents/cep43e.pdf>.

<sup>20</sup> See generally EC Aarhus Convention website, available at <http://ec.europa.eu/environment/aarhus/#justice>.

<sup>21</sup> See also Commission Decision 2008/50/EC, which lays down detailed rules for the application of the Aarhus Regulation as regards requests for the internal review of administrative acts. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008D0050:EN:NOT>.

compliance committee recommend that all relevant EU institutions within their competences take steps to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters.

In sum, the CDM appeals procedure should follow the practice of openness increasingly ingrained in political cultures across the globe. As expressed before, many of the Parties to the UNFCCC Convention and Kyoto Protocol are Parties to the Aarhus Convention, and therefore obliged to promote the application of the principles of the Aarhus Convention in international environmental decision-making processes, such as this.

Additionally, we have highlighted the barriers of costs, time, and capacity that would limit poor stakeholders from accessing the CDM appeals procedure. We have proven that the opportunity to influence decisions is intrinsically connected to the ability to do so. Positive action must be taken in order to make access effective for the poor and ensure the CDM appeals procedure can be accessed and used with regards to questionable and potentially flawed CDM projects. To this end, we propose broad legal standing be provided in the CDM appeals procedure, which will empower civil society organizations to serve the interests of the poor and the environment.

## Grounds for Appeal

According to Decision 2/CMP 5, the appeal must be in relation to: (a) situations where a DOE may not have performed its duties in accordance with the rules or requirements of the CMP and/or EB; and (b) rulings taken by or under the authority of the EB in accordance with the procedures referred to in paragraph 39 (requests for review of a request for registration of a CDM project) regarding the rejection or alteration of requests for registration or issuance.

We strongly recommend appellants should be allowed to file an appeal on the following grounds.

### **EB decisions that approve or reject a registration and issuance request**

The appeals procedures adopted by the EB must allow appeals both from EB decisions to reject or approve a proposed CDM project following review. Allowing appeals from positive EB decisions to register a project or issue CERs is key to ensuring the climate integrity of the CDM process, as well as the legitimacy and accountability of the EB. The alternative would be an appeals process that merely provides another “venue” for project developers to push for registration of questionable projects without an equal opportunity for civil society to voice concerns about evidence of violations of key requirements in the EB decision-making process. Moreover, coupled with the right of

the public to trigger a review of registration and issuance requests, the possibility of a subsequent appeal of a positive EB decision following review will promote greater compliance by project developers. The absence of such a mechanism may provide opportunities for gaming, fraud and corruption by project developers and poor performance by DOEs.

The right of stakeholders to appeal from EB decisions to register a project is supported by the language of Decision 2/CMP 5, which states that stakeholder appeals procedures should be established in relation to “[s]ituations 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.” *Id.*, ¶ 42(a). This does not preclude situations, and in fact is likely to include situations, where the EB has decided to approve a project, but where questions nonetheless remain regarding whether the project meets the CDM rules and requirements. Moreover, it is also worth noting that while subparagraph (b) refers back to paragraph 39, which relates to requests for review of a registration request, subparagraph (a) does not, indicating that the right to appeal in situations where the DOE has not performed its duties could arise at an earlier or later stage. Given the significant number of EB-approved CDM projects that have been proven non-additional or otherwise not in compliance with the CDM rules and procedures, an appeals process that only allows project developers to appeal EB decisions to reject a proposed project would not serve its primary purpose of ensuring the legitimacy, accountability and integrity of the system.

## Appeals should be allowed on both substantive and procedural grounds

The appeals procedures adopted by the EB should allow appeals for violations of both substantive and procedural rules and requirements.<sup>22</sup> For example, failure to invite stakeholder participation and/or take due account of any comments received, failure to undertake an environmental impact assessment where project impacts are considered significant,<sup>23</sup> or where the PDD has not been made publicly available,<sup>24</sup> should provide grounds for an appeal. Lesser penalties only encourage developers to violate procedural requirements.

Likewise, the appeals procedure must entertain substantive challenges to the project’s additionality, baseline calculations, crediting period,<sup>25</sup> contribution(s) to sustainable development, and other issues that lie at the core of the CDM’s mission.

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<sup>22</sup> The right to appeal from procedural violations is widely recognized. For example, the US Administrative Procedure Act requires agency actions to be set aside where they are “without observance of procedure required by law.” 5 U.S.C. § 706(D).

<sup>23</sup> CDM Modalities and Procedures, ¶ 37(b) & (c).

<sup>24</sup> *Id.*, ¶ 40(b).

<sup>25</sup> *Id.*, ¶¶ 43-52.

## **Appeals should be allowed whenever there is probable cause that a DOEs 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;**

In particular and as this call suggests, the appeals procedures should allow appeals against “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.” *Id.*, ¶ 42(a). The draft policy framework to monitor performance and address non-compliance by DOEs is currently under discussion at the EB<sup>26</sup>. In line with this draft policy framework that aims for “zero-tolerance” in the longer term, appeals should be allowed whenever there is reason to believe that a DOE has not complied with key requirements. Criteria for lodging appeals should be aligned with the thresholds included in the policy framework but should at least be allowed for key requirements weighted with 3, 4 and 5 in the progress update which was presented at EB 52 in February 2010<sup>27</sup>.

### **Filing an Appeal**

#### **Timing to file an appeal**

Stakeholders should be allowed to lodge an appeal from a registration or issuance decision at any time based on the discovery of new, previously undisclosed facts.

It is likely that the EB will set a time limit within which stakeholders may lodge an appeal on an EB registration or issuance decision.<sup>28</sup> However, stakeholders should be allowed to lodge an appeal at any time after the EB decision where facts come to light that indicate that the project does not meet the core requirements of the CDM (e.g., additionality, permanence, erroneous calculation of baseline or CERs). This is necessary to ensure that the appeals process is an effective check on the integrity of the CDM even if grounds for appeals, including non-compliance of DOEs, be discovered after registration or issuance that has taken place despite the failure to comply with key requirements.

Moreover, allowing an appeal where material facts are disclosed that indicate that the CDM requirements were not met is supported by the language of Decision 2/CMP 5,

<sup>26</sup> [http://cdm.unfccc.int/Reference/Notes/accr\\_note01.pdf](http://cdm.unfccc.int/Reference/Notes/accr_note01.pdf)

<sup>27</sup> <http://cdm.unfccc.int/EB/052/eb52annagan1.pdf>

<sup>28</sup> This time period should be long enough to ensure that stakeholders are given sufficient advance notice of the decision and time within which to review the EB decision and the record upon which it was based (e.g., at least ninety days).

which requires the EB to develop procedures for appeal in “[s]ituations 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.” *Id.*, ¶ 42(a). It is entirely possible that facts or evidence that the DOE has not complied with the rules or requirements will arise after the time to appeal an EB registration or issuance decision has expired.

## Costs for an Appeal

An enabling condition to access justice is its affordability. The imposition of a fee to access the CDM appeals procedure can be a barrier to access justice by the general public.

A strong enabling condition for access to justice is not to impose fees to access the CDM appeals procedure, or that fees can be waived for individuals or public interests groups.

## Access to a Complete Record

A complete, written record should be compiled and made available for public review.

Should the EB determine that the appeal body will base its review on a “record” developed by the EB during the registration review process, it is vital that procedures be in place to ensure that a complete, written record is compiled and made available for public review. Such a record is key not only to the extent that it will provide a basis upon which the appeals body will then make its determination as to whether the EB decision was warranted, but also to ensure transparency in the EB’s decision-making. In order to be accountable, the EB must ensure that its decisions and the reasons/basis for those decisions are published and made publicly available.

A review of current CDM procedures suggests numerous areas for improvement in this regard. For example, as noted in comments on the *Draft Procedures for Review*, there needs to be a requirement that the Secretariat, when preparing its “assessment of responses and recommendation,” maintain a written record of discussions with and submissions from the DOE which will become part of the record and must be made publicly available along with the assessment and recommendation. The same should be true with respect to the independent technical assessment prepared by the member of the RIT.<sup>29</sup>

In addition, as noted in Decision 2/CMP 5, the procedures will need to ensure that the EB has provided an adequate justification for its decision by “[publishing detailed explanations of and the rationale for decisions taken, including sources of information used, without compromising the confidentiality of the opinion of any individual

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<sup>29</sup> *Supra*, note 8.



Executive Board member or alternate member; ..." *Id.*, ¶ 7(b). Such opinions must explain the EB's findings and conclusions on material issues with sufficient specificity to advise the parties and any reviewing court of their record and legal basis.

Under the current procedures for review, the EB makes a decision on whether to approve or reject a CDM project for which review has been requested at its meetings. While some parts of the EB meetings are open to the public, discussions about individual projects are not. Subsequent EB meeting reports, which are supposed to provide complete information about decisions taken during the meeting, are often general and cursory. The reports often provide limited or no information on the reasoning or rationales behind the EB's decisions on registration and issuance reviews. They frequently omit references to the sources of information on which decisions rely. Corrective action to enable fuller reporting in a public manner would substantially increase transparency and build public trust.

The appeals procedure should also specify the degree of deference or standard of review to be employed by the appeals body when deciding whether to uphold or set aside an EB decision.<sup>30</sup> Where the review is based on the record, the appeals body should determine whether the EB decision was based on substantial evidence, and in making that determination, should review the whole record and evidence, with full impartiality and without prejudice.



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<sup>30</sup> Under the US Administrative Procedure Act, a court is required to set aside agency actions that are "**arbitrary and capricious**, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(A). Canadian administrative law uses a contextual approach which requires the court to consider various factors and apply one of two standards of review. Where deference was intended the courts will review the decision on the basis of **reasonableness**. Where little or no deference is intended the decision will be reviewed on a standard of **correctness**. See *Dunsmuir v. New Brunswick*, 2008 SCC 9 [2008] 1 S.C.R. 190.