



AUSTRALIA

Submission under the Cancun Agreements | March 2011

Procedures, mechanisms, and institutional arrangements for a CDM appeals procedure | SBI

I. Overview

This submission contains the views of the Australian Government on the establishment of a Clean Development Mechanism (CDM) appeals procedure as requested under Decision 3/CMP.6 (*Further guidance relating to the CDM*).

Australia welcomes the opportunity to submit its views under the Cancun Agreements on the establishment of a CDM appeals procedure. In summary, Australia considers:

- The CDM will continue to play an important role post-2012 in providing cost-effective mitigation opportunities and promoting sustainable development.
- Properly designed, an appeals mechanism would improve decision-making and promote more impartial, transparent and consistent processes in relation to requests for registration and issuance.
- The CDM Executive Board (EB) Recommendations on the Procedure for Appeals¹ (EB's Recommendations) provides a good basis for the design of a CDM appeals procedure, subject to some changes set out in this submission.
- The appellate body should be independent from the Executive Board, as well as impartial, fair, and competent. This could be achieved by appointing a roster of members on the basis of clearly defined terms of reference. Three members should be selected on an ad hoc basis by the UNFCCC Secretariat from the roster to hear each appeal, subject to each member confirming that it has no conflict of interest in the appeal/s.
- Overall, an appeals procedure should strengthen the governance structure of the CDM which is important if it is to further grow in the future and attract investment from a wide variety of sources.

¹ See Annual Report of the Executive Board to the Clean Development Mechanism, 2010, *Recommendation on the procedure for appeals against rulings by the Executive Board of the clean development mechanism regarding requests for registration or issuance*, Annex II.

II. CDM and Appeals

A key objective of an appeals procedure is to promote procedural fairness and due process. Establishing an appeals procedure for the CDM could therefore provide a means of promoting these principles. One important aspect of procedural fairness is for the entity subject to a decision of an administrative body to understand the decision and be satisfied that the reasoning is fair and transparent; and if not then it should have an avenue to review the original decision maker's ruling.

The CDM, in providing for the direct interaction between international institutions and non-state actors, is a rare development in international law. The governance structure of the CDM invites the participation of private actors and regulates such participation by making decisions that directly impact on these actors. To this extent the CDM represents an unprecedented framework. While Australia supports the establishment of an appeals procedure in the CDM, it considers that it should not be precedent setting in international law. The unique design of the CDM warrants the establishment of an appeals procedure in these circumstances.

III. Role of a CDM appeals procedure

A properly designed appeals procedure could play an important role in improving the CDM. It could improve the consistency and transparency of the CDM's decision-making, which is fundamental to the effective operation of the CDM, and a prerequisite to its future expansion.

An appeals procedure could improve decision-making in the CDM in two ways. First, it could motivate the EB to enhance the clarity and quality of the reasons provided in its original decision. As discussed in the following section, to promote better original decisions, the EB should not be given a right to reply to the appellant's appeal, as this may compromise clear and well-reasoned original decisions.

Second, over time, an appeals procedure could provide clarity and consistency in relation to areas of the CDM rules that are uncertain, ambiguous or disputed. It could build a body of jurisprudence that the appellate body and the EB could follow when making decisions on registration and issuance. Past decisions of the appellate body could be cited in the reasoning of the EB and appellate body in decisions. It could also enhance the EB's credibility to the extent that the appellate body's findings affirm EB decisions.

Focusing on improving the transparency and consistency of the EB's original reasons should ultimately reduce demand for the appeal function. Overall, this would increase the efficiency of the decision-making process in the CDM.

III. Elements of an appeals procedure

It is essential that the appeals procedure is designed so that it is able to perform the roles described in the section above. In order to do this careful consideration needs to be given to the following steps in the procedure: (i) standing (ii) grounds and scope of appeal (iii) procedure for filing an appeal (iv) remedies and (v) costs.

The EB's Recommendations on the elements above provide a good basis for the design of an appeals procedure. Australia supports the EB's Recommendations subject to the following important exceptions.

Grounds of Appeal

The EB's Recommendations set out three grounds for filing an appeal. Some further clarification is required in relation to the elements comprising these grounds of appeal. In relation to an appeal based on factual grounds (set out in paragraph 7 of Secretariat's Recommendations), the appellant must prove that the ruling contained a "clearly erroneous finding of fact". "Clearly erroneous" is a very high standard to satisfy. "Erroneous" may be more appropriate, as a more reasonable standard.

In relation to an appeal grounded on the interpretation of one or more CDM rules, one of the elements that must be present is that "the ruling contained an unreasonable interpretation or application of one or more of CDM rules". There can only be a correct and incorrect interpretation of a particular rule, and not a spectrum of reasonable interpretations.

The EB's Right to Reply

In relation to *Section VI the Executive Board's Response*, it is an unusual characteristic for an original decision maker to be given the right to file a written response to the appeal. In administrative law, the original decision maker usually provides reasons for its decision and it is those reasons that form the basis for a review by an appeals panel. Providing an original decision maker with a right to reply creates the risk that it might change the basis of its original decision, or provide additional information not in its original ruling, or that contradicts aspects of its original decision.

This may impact on the appellant's right to procedural fairness and a fair hearing. It also risks making the process more inefficient if the original decision maker is aware that it will get a chance to clarify or expand upon its reasons at a later stage if the decision is appealed.

The objectives of the appeals procedure may not be achieved by the EB having a right to reply. Instead the focus should be on enhancing the clarity and transparency of the EB's reasons in its original decision. This would improve original decisions, as well as establish a fair appeals system. It would also enable the EB to focus its resources on its principal roles of considering registration and issuance requests, rather than taking on new roles such as preparation of replies to appeals.

A right to reply may also place more strain on the EB's workload and lead to further delays in registration of CDM projects and issuance of CERs. It would also significantly extend the timeline for resolving the appeal. An important consideration in an appeals procedure is the timely resolution of the appeal.

Appellate body's right to seek further information

There may be instances where the appellate body needs to clarify a point or seek further information from the EB or the appellant. The appellate body should be able to clarify, in writing, questions it has for the EB or the appellant at any time during the appeal procedure, and the other party should also have the opportunity to comment on the response. The responses should form

part of the record. While the EB's Recommendations allow for the appellate body to clarify information at the stage when the appellant initially files its appeal, this right to clarify and seek further information and ask questions should exist throughout the appeal procedure.

Interventions in the Appeal

The appeal procedure should be focused on efficiently and effectively resolving the specific claims of the appellant. To maintain this focus, we see limited value in third party intervention. Such actors have adequate opportunity to engage in the early stages of a CDM project life cycle, including at the validation and verification stages of a CDM project.

Timeframes for determination of Appeal

Appeals should be determined as expediently as possible while allowing for the proper consideration of the issues subject to appeal. The EB's Recommendations do not specify a time period in which the appellate body is required to make its determination. The approach taken in other appeals procedures, such as in the World Trade Organization (WTO), of including time frames for each step of the procedure should be mirrored in the CDM appeal procedures. Such timeframes are particularly important in the CDM. Investors' interests may be significantly impacted by a lengthy delay in registration of a CDM project and in issuance of CERs and project participants should be able to rely on a determination being given within a set period of time. In the WTO the appellate body is required to deliver its decision within 90 days of the filing of a notice of appeal. This provides a good guide for the time frame in which the appellate body of the CDM should make a determination.

IV. The design of the appeals body

The appellate body should be designed to be independent, impartial, and appropriately constituted by experts with the requisite knowledge of CDM rules and procedures. Australia recognises the five options that the EB outlined for the identity of the appellate body at its 57th meeting² and draws on aspects of these in its proposal.

Structure of appellate body

The appellate body should consist of a roster of around twelve persons. Each appeal should be heard by a panel of three persons selected from the roster. Following UNFCCC practice, the Secretariat should co-ordinate the formation of the panels and select each panel on an ad hoc basis.³

The panel should meet in person to consider the appeals, preferably in Germany to minimise costs associated with Secretariat support and manage concerns regarding members' potential exposure to litigation.

² See CDM Executive Board 57th Report, paragraph 17.

³ This is consistent, for example, with the process for selecting the Expert Review Teams from the UNFCCC roster of experts. See Decision 22/CMP.1 *Guidelines for review under Article 8 of the Kyoto Protocol*, para 22.

Expertise

It is important that each member on the roster has expertise. The necessary experience and qualifications for selection should be specified in terms of reference, which should require that each member has detailed knowledge of the operation and rules of the CDM. In order to ensure that the roster comprises people with requisite expertise, positions should be open to those working in Government, as well as non-government entities. Following UNFCCC practice, each member on the roster should serve in their personal capacity and not as a representative of any Government or non-government entity.

It is unlikely that a position on the roster will require a full-time commitment. Instead, the three person panel should be convened on an ad hoc basis to hear appeals as necessary.

Size

A roster of twelve persons is considerably smaller than the UNFCCC Roster of Experts, which contains more than 600 members. It is important to have a roster of a more manageable size for the CDM appeals procedure for the following reasons. First, if it is decided that the roster is remunerated for its work then its size must be manageable. Second, in order to achieve the objective of making decisions more consistent and transparent, the panel of three should share (for example via teleconference meeting) their reasoning for each appeal with the remaining roster members after they have reached a decision. A similar concept exists in the WTO appellate body context and enables the whole roster to stay updated on decisions that have been made. This is more difficult to achieve, the larger a roster becomes. Finally, a smaller roster of members will likely take their responsibilities seriously and have greater commitment to serving on the appellate body. In the event that a twelve person roster proves to be an inadequate size, then the Parties could decide to appoint more members to the roster at a later stage.

Representation

The roster should be broadly representative of the Kyoto Protocol Parties and members of the roster should be nominated through UN regional groupings. As with the appointment of EB members, the breakdown of representatives from each UN grouping should be specified in the decision establishing the appeals procedure. Each state representative should then determine the process for submitting its nomination and whether it allows non-governmental entities to seek nomination.

Term

The term of each member on the roster should be four years, with appointments being staggered initially so that half the members are replaced every two years. This provides a good balance between allowing adequate time for each member to make a solid contribution to the appellate body's work and providing for other interested and qualified persons to participate.

If a member can no longer serve, they should be able to resign on the condition that any appeal they were hearing has been finalised and they have provided written notice of their resignation to the Secretariat. The Secretariat should then move promptly to replace that member with a new member

from the same regional UN grouping. If a member is hearing an appeal at the end of the four year period, then the member's term should not expire until it has completed its work on all of its appeals.

Independence

It is an essential element of any appeals procedure that the body determining the appeal is independent from the original decision maker. This is a basic requirement of the doctrine of separation of powers and is a fundamental aspect of any appeals procedure in a domestic or international context. The appellate body should not be under the authority of the CDM Executive Board, and the EB should play no role in the selection of members to the roster. However, the appellate body should be under the guidance of and accountable to the CMP. The CMP requested the EB to establish a procedure for appeals, and should provide ongoing guidance to the appellate body through CMP decisions.

The professionalism, impartiality and independence of each panel hearing an appeal is crucial to the credibility of the appeals procedure. It is therefore important that the appellate body's procedures adequately address members' management of confidential information and disclosure of conflict of interest. Such procedures could mirror those used by other bodies constituted under the Kyoto Protocol, and embodied in an Oath of Service taken by each member.

Privileges and Immunities

Consideration should also be given as to whether the members' are likely to be exposed to threats of legal action. Such threats could discourage qualified participation and the ability of members to discharge their official duties in a professional, conscientious and impartial manner. Mirroring the approach taken by other bodies of the Kyoto Protocol, the risk of legal action could be reduced by: holding the body's meetings, where feasible, in Germany or in countries where either the UNFCCC Headquarters Agreement with Germany (the Agreement) or a conference agreement confers immunity from legal action; and mirroring procedures relating to alleged breaches of conditions of service, such as failure to disclose conflicts of interest, to promote transparency, accountability and build third party confidence, thereby reducing interest in pursuing legal claims. Further protection could also be considered in the context of the SBI's ongoing discussion of treaty arrangements to confer privileges and immunities on persons serving on bodies constituted under the Kyoto Protocol.

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Australia looks forward to discussing and further elaborating on its submission with a view to adopting a decision to establish the CDM appeals procedure at CMP7, which will contain the procedures and modalities for an appeals procedure, including the terms of reference for the appointment of members to the appellate body.