



Framework Convention on Climate Change

Distr.: Limited
3 December 2011

Original: English

Subsidiary Body for Implementation

Thirty-fifth session

Durban, 28 November to 3 December 2011

Agenda item 16

**Procedures, mechanisms and institutional arrangements for appeals
against the decisions of the Executive Board of the clean development
mechanism**

Procedures, mechanisms and institutional arrangements for appeals against the decisions of the Executive Board of the clean development mechanism

Draft conclusions proposed by the Chair

1. The Subsidiary Body for Implementation (SBI) made progress in reaching an agreement with regard to the form and some of the features of the possible appeals body. However, Parties maintained different interpretations of the mandate for the establishment of the appeals process currently being negotiated.
2. The SBI took note of the revised draft text, as proposed by the co-chairs of the contact group, contained in the annex, while noting that, for the time being, it remained the co-chairs' text. It agreed to continue the consideration of this matter at its next session with a view to forwarding a draft text for consideration by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its eighth session.

Annex

Co-chair's proposed text

Appeals mechanism

[The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol,

Recalling decisions 2/CMP.5, paragraph 42, and 3/CMP.6, paragraph 18,

Recalling also decisions 2/CMP.1 and 3/CMP.1,

Cognizant of its decisions 4/CMP.1, 5/CMP.1, 6/CMP.1, 7/CMP.1, 1/CMP.2, 2/CMP.3 and 2/CMP.5,

Recognizing the importance of timely and effective decision-making by the Executive Board of the clean development mechanism on issues related to project activities,

Emphasizing the importance of consistency and correctness in the application of the modalities and procedures of the clean development mechanism,

Wishing to provide for an independent, impartial, fair, equitable, transparent and efficient mechanism to enable review of the decisions of the Executive Board of the clean development mechanism,

- 1. Approves and adopts the procedures and mechanisms relating to appeals against decisions of the Executive Board of the clean development mechanism, as contained in the appendix to this decision;*
- 2. Agrees that appeals may be brought before the appeals body¹ at the earliest six calendar months following the adoption of this decision;*
- 3. Agrees also that appeals may be brought before the appeals body only with regard to decisions of the Executive Board concluded following the adoption of this decision;*
- 4. Requests the Subsidiary Body for Implementation to consider the experience gained with the appeals mechanism with a view to proposing recommendations for modifications or adjustments, if necessary, for consideration by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its tenth session.*

¹ Name to be determined.

Appendix

Procedures, mechanisms and institutional arrangements for appeals against the decisions of the Executive Board of the clean development mechanism

PART I: THE APPEALS BODY

I. Establishment and powers

1. An appeals body is hereby established that considers appeals against decisions of the Executive Board of the clean development mechanism (CDM) regarding the [approval,] rejection or alteration of requests for the registration of project activities and the issuance of certified emission reductions (CERs).
2. The appeals body shall report annually to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) on its deliberations.
3. Subject to the provisions of this decision, taking into account the recommendations made by the Executive Board in document FCCC/CMP/2010/10, the appeals body shall establish the procedure governing appeals, for consideration and approval by the CMP at its ninth session. The appeals body shall also develop its operational modalities on matters relating to the organization of its work, including procedures for the protection of proprietary or confidential information.

II. Membership

4. The CMP shall elect 30 members to the appeals body roster [as follows: [X] member[s] from each of the five United Nations regional groups, [X] member[s] from Parties included in Annex I to the Convention, [X] member[s] from Parties not included in Annex I to the Convention and [X] member[s] from small island developing States].
5. Members shall be elected for a period of four years [and shall be eligible to serve a maximum of [two][X] consecutive terms]. In order to ensure continuity, half of the members shall be elected initially for a term of [X] years and the remaining members shall be elected for the full term of office. Members of the appeals body shall remain in office until their successors are elected.
6. Each constituency referred to in paragraph 4 above shall endeavour to conduct a rigorous selection process in order to ensure that the nominees meet the criteria set out in paragraph 8 below.
7. In making nominations, Parties are invited to recall decision 36/CP.7 and give active consideration to the nomination of women.
8. To be eligible for election as a member, a person shall:
 - (a) Be of high standing and moral character;
 - (b) Possess at least 10 years of relevant experience in international law, administrative law [or in the field of the CDM];
 - (c) Be available at all times and at short notice to hear appeals[;]

[(d) Be unaffiliated with any government].

9. A member of the appeals body shall not be a member of the Executive Board, a member or employee of its support structure, designated operational entity or designated national authority, and shall not have served on the Executive Board or in its support structure [for at least seven years] prior to his or her appointment to the appeals body. Members of the appeals body shall not be eligible to serve on the Executive Board of the CDM or in its support structure within for a minimum of [one] year[s] following the completion of their service on the appeal body.

10. A member of the appeals body may resign by notifying the CMP through the Executive Secretary. The resignation shall take effect 90 calendar days from the date of notification.

11. The appeals body may suspend a member in the event of incapacity or misconduct, including breach of the provisions related to conflict of interest as set out in chapter III below, breach of provisions related to confidentiality of information as set out in chapter IV below or a failure to attend two consecutive meetings without proper justification, pending consideration of the matter by the CMP.

12. A member of the appeals body may only be removed by the CMP for reasons outlined in paragraph 11 above.

13. In the event that a member becomes unable to serve on an appeal for which he or she was originally selected, another member shall be selected to replace him or her in accordance with the procedure set out in paragraph 21 below.

14. Members of the appeals body shall be remunerated for their time spent on consideration of appeals in the amount of [XXX].

III. Impartiality and independence

15. A member of the appeals body shall serve in his or her personal capacity and shall enjoy full independence.

16. A member of the appeals body shall swear an oath that he or she shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings before the appeals body.

17. Should any direct or indirect conflict of interest arise, the member concerned shall immediately recuse himself or herself from the appeal in question.

IV. Internal management

18. Decisions, other than in the context of individual appeals, shall be made by the full membership of the appeals body. For such decisions, X members must be present to constitute a quorum. Decision shall be taken by consensus, whenever possible. If all efforts at reaching consensus have been exhausted and no agreement has been reached, decisions shall be taken by a majority vote of the members present and voting. Members abstaining from voting shall be considered as not voting.

19. The appeals body shall elect its own Chair and Vice-Chair for the term of [x] years.

20. Appeals shall normally be heard by a panel of three members and shall be decided by a majority vote.

21. The members constituting a panel shall be selected on a random basis.

22. The internal discussions, deliberations and voting on, and drafting of, the decision by a panel during an appeal proceeding shall be confidential.

V. Collegiality

23. The members shall remain informed of the decisions, modalities and procedures concerning an appeal as well as the relevant modalities and procedures of the CDM.

24. To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the members, the members of the appeals body shall convene at least once a year to discuss matters of policy, practice and procedure relating to appeals and to the modalities and procedures of the CDM generally. [The ad hoc panel responsible for an appeal shall share their reasoning with the other members of the appeals body after finalizing its decision.]

PART II: GENERAL ISSUES

VI. Transparency and confidential information

25. The decisions of the appeals body shall be issued in writing and shall state the reasons, facts and rules on which they are based.

26. Subject to the provisions of paragraphs 22 above and 27 below, the decisions of the appeals body with regard to individual appeals shall be communicated to the entities involved in the appeal and to the Executive Board of the CDM, and shall be made publicly available.

27. As a general rule, information obtained by the appeals body marked as proprietary or confidential shall not be disclosed without the written consent of the provider of the information, unless the appeals body determines that, in accordance with the CDM modalities and procedures, such information cannot be claimed proprietary or confidential. Provisions with regard to confidential information contained in decision 3/CMP.1, annex, paragraph 6, shall be applicable to the workings of the appeals body.

VII. Administrative and financial support

28. The secretariat of the United Nations Framework Convention on Climate Change shall make the administrative arrangements necessary for the functioning of the appeals mechanism.

29. Staff members of the secretariat assigned to assist the appeals body in the carrying out of its functions [related to the implementation of this decision] shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of the proceedings before the appeals body.

30. [Reasonable expenses associated with the establishment and overhead costs of the appeals mechanism shall be borne out of the share of proceeds for the clean development mechanism and shall be allocated in a way that ensures the independence and impartiality of the mechanism [and on the basis of a management plan for the mechanism to be developed by the appeals body]. The expenses associated with the consideration of appeals shall be funded through the fees in accordance with paragraph 43 of this annex.]

VIII. Working language

31. The working language of the appeals body shall be English.

PART III. CONSIDERATION OF APPEALS

IX. Grounds for appeal

32. The appeals body shall be competent to decide on an appeal within the scope of its powers, as set out in paragraph 1 above, on whether the Executive Board:

- (a) Exceeded its jurisdiction or competence;
- (b) Committed an error in procedure, such as to materially affect the decision in the case;
- (c) [Incorrectly] interpreted or applied one or more CDM modalities and procedures [in a way that [is unreasonable] and, if done differently, would have resulted in a materially different outcome];
- (d) [Clearly] erred on a question of fact available to the Executive Board at the time of it reaching its decision, [in a way that [is unreasonable] [and, if done differently, would have resulted in a materially different outcome];
- (e) In reconsidering its decision on remand pursuant to paragraph 34 below, rendered a decision that is inconsistent with the judgement of the appeals body [on the same request for registration or issuance or with the previous ruling of the Executive Board with regard to that request].

33. Subject to provisions of this decision, the appeals body shall establish, in a transparent manner, the criteria for admissibility of appeals.

X. Decisions and orders

34.

Option A

With respect to decisions relating to the grounds of review stipulated in paragraph 33 above, the appeals body may affirm a decision of the Executive Board or remand it back to the Executive Board for reconsideration.

Option B

With respect to decisions relating to the grounds of review stipulated in paragraphs (a), (b), and (c) of paragraph 32 above, the appeals body may affirm or reverse a decision of the Executive Board.

With respect to decisions relating to the grounds of review stipulated in paragraphs (d) and (e) of paragraph 32 above, the appeals body may affirm, reverse or remand a decision of the Executive Board.

35. Decisions of the appeals body shall be final and binding on the entities referred to in paragraph 38 below and on the Executive Board.

36. In the interests of fairness and orderly procedure, the appeals body may issue procedural orders as necessary and appropriate to assist the functioning of an appeal proceeding.

XI. The record

37. Any document or oral evidence that was available to the Executive Board in connection with its consideration of the decision being appealed shall constitute the record for the appeal in question. The complete record pertaining to the decision of the Executive Board being appealed shall be made available to the appeals body not later than seven calendar days of the receipt of the appeal by the secretariat.

XII. Commencement of an appeal

38. Any Party, project participant [or DOE] directly involved in [or stakeholder or organization referred to in decision 3/CMP.1, annex, paragraph 40(c), which has submitted comments with regard to] a CDM project activity or a proposed CDM project activity with respect to which the Executive Board has [registered or] made a rejection or alteration decision relating to the registration of such a project activity or the issuance of CERs (“petitioners”) may file, individually or jointly, a petition for appeal against such a decision.

39. Multiple appeals can be filed against the same decision, so long as no single petitioner is a signatory to more than one appeal.

40. A petition for appeal shall be filed no later than [45][60] calendar days after the decision of the Executive Board has been made publicly available.

XIII. Time limits

41. As a general rule, the appeals proceedings shall not exceed 90 calendar days from the date a petition is received by the appeals body to the date it issues its final decision.

42. The Executive Board shall reach a decision reconsidered on remand in accordance with the provisions of paragraph 34 above at its first meeting, which will take place at least after 21 calendar days following the receipt of the remand.

XIV. Filing fee

43. Taking into account the costs of the appeals process and the need to deter frivolous appeals, the filing of an appeal shall be subject to a reasonable and not prohibitively expensive fee.]