

21 April 2011

English only

UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

Subsidiary Body for Implementation

Thirty-fourth session

Bonn, 6–16 June 2011

Item X of the provisional agenda

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

Submissions from Parties and relevant organizations

1. The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, at its sixth session, invited Parties, intergovernmental organizations and admitted observer organizations to submit to the secretariat, by 28 March 2011, their views on procedures, mechanisms and institutional arrangements under the Conference of the Parties serving as the meeting of the Parties under the Kyoto Protocol to allow for appeals against Executive Board decisions based on decision 2/CMP.5, paragraph 42, taking into account the recommendations of the Executive Board contained in annex II to its annual report.¹

2. The secretariat has received eight such submissions. In accordance with the procedure for miscellaneous documents, the four submissions from Parties and one from a United Nations organization are attached and reproduced* in the languages in which they were received and without formal editing. In line with established practice, the three submissions from non-governmental organizations have been posted on the UNFCCC website.²

¹ Decision 3/CMP.6 paragraphs 18–20.

* These submissions have been electronically imported in order to make them available on electronic systems, including the World Wide Web. The secretariat has made every effort to ensure the correct reproduction of the texts as submitted.

² <<http://unfccc.int/3689.php>>.

FCCC/SBI/2011/MISC.2

GE.11-60878

Please recycle 

Contents

	<i>Page</i>
1. Australia (Submission received 28 March 2011)	3
2. China (Submission received 30 March 2011)	9
3. Grenada on behalf of the Alliance of Small Island States (Submission received 13 April 2011)	10
4. Hungary and the European Commission on behalf of the European Union and its member States* (Submission received 23 March 2011)	12
5. United Nations Development Programme (Submission received on 30 March 2011).....	16

* This submission is supported by Albania, Bosnia and Herzegovina, Croatia, Iceland, the former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey.

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.

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.

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.

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 expeditiously 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 coordinate 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.

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.

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.

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.

* * *

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.

China's Submission on Procedures, Mechanisms and Institutional Arrangements to Allow for Appeals Against Executive Board Decisions

The Conference of the Parties at its sixteenth session held in Cancun invites Parties, intergovernmental organizations and admitted observer organizations to submit to the secretariat, by 28 March 2010, their views on matter related to the procedures, mechanisms and institutional arrangements under the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to allow for appeals against Executive Board decisions based on decision 2/CMP.5. China welcomes this opportunity and would like to submit the following views.

1. The recommendations of the Executive Board on this matter as contained in annex 2 of its annual report to the CMP16 is well prepared and could serve as a good basis for the deliberation of the SBI.
2. As the appellate body will consider appeals against decisions of the Executive Board, it is extremely important that this body is independent from the Executive Board. Taking into consideration of the urgency of this matter and in order to make full use of the existing bodies under the CMP, China recommends to designate the enforcement branch of the Compliance Committee as the appellate body.

Subsidiary Body for Implementation (SBI)

Draft submission by Grenada on behalf of the Alliance of Small Island States (AOSIS)

April 2011

Appeals against the Executive Board of the CDM

Grenada welcomes the opportunity to present views on behalf of the forty three (43) members of the Alliance of Small Island States (AOSIS) on further guidance relating to the clean development mechanism on procedures, mechanisms and institutional arrangements for appeals against Executive Board decisions.

Decision 2/CMP.5, paragraph 42, requested the Executive Board to establish, following consultation with stakeholders, procedures for considering appeals that are brought by stakeholders directly involved in the design, approval or implementation of clean development mechanism project activities or proposed clean development mechanism project activities.

Annex II of the 2010 Annual Report of the Executive Board of the Clean Development Mechanism (FCCC/KP/CMP/2010/10 at 36) provides a detailed list of recommendations on procedures, mechanisms and institutional arrangements to guide the establishment of an appeals procedure. In the view of AOSIS these recommendations should be followed as closely as possible. They allow for a process that will provide the right of appeal to relevant stakeholders, including Designated Operational Entities, who feel that the rejection of their request for registration or issuance was not in keeping with requirements.

The only area that is not fully addressed in Annex II is that of the composition and terms of reference for the appellate body.

The members of AOSIS are of the view that this appellate body should be constituted as follows:

- Ten members, with one (1) nominated from each of the five regional groupings, two other members from the Parties included in Annex I, two other members from the Parties not included in Annex I, and one representative of the small island developing States, taking into account the current practice in the Bureau of the Conference of the Parties.
- Members should serve for a term of two (2) years;
- Terms can be renewed for a second term of two (2) years;
- Members should have significant knowledge and experience in the design or validation of clean development mechanism project methodologies and/or have served as members of the Executive Board of the Clean Development Mechanism in the past.
- No alternates are required.

Appellate panels should consist of three (3) members drawn from the Appellate Body as a whole

AOSIS looks forward to the adoption of a decision at CMP.7 for the establishment of this body and the recommended appeals process.

**SUBMISSION BY HUNGARY AND THE EUROPEAN COMMISSION ON BEHALF OF THE
EUROPEAN UNION AND ITS MEMBER STATES**

This submission is supported by Albania, Bosnia and Herzegovina, Croatia, Iceland, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey.

Budapest, 23 March, 2011

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

1. We welcome the opportunity to submit our views on procedures, mechanisms and institutional arrangements under the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to allow for appeals against CDM Executive Board.

I. Introduction

2. Given the establishment of the complaints procedure in respect of AE/DOEs by the Executive Board, we are focusing exclusively on appeals in relation to decisions by the CDM Executive Board.
3. It is important that the procedure should be fair, transparent and that the process be independent, ensuring “due process requirements”, and in general be fit for the purpose of addressing, in a long term perspective and legally sound manner, the needs that have been identified by the CMP, while minimizing the complexity, cost and time-consumption of the procedure for both the appellate body and for the appellants.

II. Institutional Arrangements

4. The EB’s 2010 Annual Report sets out five options for the CMP to consider in relation to the choice of appellate body, namely:
 - a) The designation of the enforcement branch of the Compliance Committee;
 - b) The creation of a new Body under the authority of the CMP;
 - c) The delegation of the authority to an official designated by the Executive Secretary to establish ad hoc or standing appeals panels in consultation with the Bureau of the CMP;
 - d) The Delegation of the authority to the Board to establish ad hoc or standing appeals panels;
 - e) The selection of any other Body considered appropriate by the CMP.
5. The EU is of the view that an Appellate Body should, at a minimum, meet the following criteria:
 - a) Independence and impartiality, i.e. members should not have connection with EB decision-making, not be dependent on the EB, and should be required to abide by codes of conduct and ethics that guarantee that they act in an independent and impartial manner;

- b) Relevant expertise: i.e. members should have legal expertise related to matters of international law and technical expertise in relation to CDM;
 - c) Adequate resources and members should be compensated sufficiently;
 - d) Accountability to the CMP;
 - e) Providing for a fair and public hearing;
 - f) Not unduly expensive;
 - g) Capable of making decisions in a transparent and timely manner in accordance with established procedures;
 - h) Capable of ensuring due-process requirements;
 - i) Capable of providing for predictability by ensuring consistency over time in its decision making and in the practice to be established in its decisions.
6. The EU is willing to enter in an open and constructive discussion with other Parties on different options proposed.

III. Rules of Procedure for the Appellate Body

- 7. In addition to rules of procedure for the appeals process itself, the appellate body will need appropriate rules governing how it functions (e.g. governing membership, appointment of members, term of office etc.). Those rules will need to ensure the appellate Body can satisfy the criteria set out above. In view of this, we would expect the rules to include provisions in relation to the following:
- 8. The Appellate Body shall comprise X members
- 9. Members (including alternate members) of the Appellate Body shall be nominated by Parties for a short list of candidates based on qualification and expertise only.
- 10. Members shall be elected for a period of X years and be eligible to serve a maximum of X consecutive years.
- 11. The Appellate Body may suspend and recommend to the COP/MOP the termination of the membership of a particular member, including an alternate, for cause including, inter alia, breach of the conflict of interest provisions, breach of the confidentiality provisions or failure to attend X consecutive meetings of the Appellate Body without proper justification.
- 12. Any motion calling for the suspension of, and recommendation to the COP/MOP to terminate the membership of, a member, or an alternate member, shall immediately be put to the vote in accordance with the voting rules of the Appellate Body.
- 13. Members, (including alternate members), of the Appellate Body shall have no professional, pecuniary or financial interest in any aspect of the matter which is the subject of the appeal.
- 14. Members, (including alternate members), of the Appellate Body shall not be members of the Executive Board, members or employees of its support structure, Designated Operational Entities or Designated

National Authorities, and shall not have served on the Executive Board or in its support structure in the last X years prior to his/her appointment to the Appellate body.

15. The Appellate Body shall be accountable to the COP/MOP. The Appellate Body will deliver an annual report to the COP/MOP on the exercise of its functions and shall make recommendations to the COP/MOP on any amendments or additions to rules of procedure for the Body, as appropriate.
16. The list above is not intended to be exhaustive and is intended to highlight some of the key issues which the rules governing the body would need to cover.

IV. Rules of Procedure for the Appeal Process

IV.a) Principles of the procedure

17. As a general principle and to the extent possible the EU stresses that the appeal process should not put extensive burden on the EB, and should not impact the timelines for Registration, Issuance and Review of CDM projects.
18. The EU supports the procedure for the appeal as proposed by the EB, while noting that the procedure still needs to be completed by setting time limits for the decisions to be taken by the Appellate Body (as it is the case for the stakeholders wishing to file an appeal, for DOE and for any decision by the EB).
19. The EU stresses the will that this procedure would be guided by the following principles, consistently with the “due process requirements”¹:
 - a) Independence and impartiality,
 - b) Conflict of interest preventions
 - c) Adequate resources;
 - d) Ability to make decisions efficiently and in a timely manner
 - e) Transparency
 - f) Cost-effectiveness
 - g) Fairness
 - h) Public hearing
 - i) Access to Records.

IV.b) Specific Comments:

20. The comments below set out in relation to specific aspects of the rules are not intended to be exhaustive.

¹ The due process requirements are also consistent with decision 2/CMP.5 as well as the international customary law.

21. Grounds of appeal: An appellant should be allowed to file an appeal against a ruling of the Executive Board based on:
- a) factual grounds - confined to the facts available to the Board at the time of its decision (i.e. a failure to consider a material fact available to the Board at the point of decision)
 - b) grounds of interpretation or application of one or more of the CDM rules and requirements
 - c) grounds that the reconsidered ruling of the Executive Board is inconsistent with previous rulings of the EB and the previous judgment of the appellate Body on the same request for registration or issuance
22. Decision 2/CMP.5 suggests that an appeal can be brought by "stakeholders directly involved, defined in a conservative manner, in the design, approval or implementation of clean development mechanism project activity". In order to ensure the continued functioning of the mechanism, it is important that stakeholder in this case is defined in a conservative manner. Nonetheless, in order to ensure that we are allowing the appeals procedure to address concerns regarding environmental integrity as defined in the CDM rules and requirements and in order to maximise the legitimacy and confidence in the EB decision making, the EU would like to explore an expansion of the right of appeal. This could encompass those that claim benefit of a clear CDM rule, including participants as in the procedure drafted by the Executive Board, and those that have a right to be consulted and to comment on a project according to the "Modalities and Procedures for the CDM" (Decision 3/CMP.1 Art. 37 and 40), under the condition that they submitted comments during the period for comments.

To assure a fair balance between the interests of project participants and third persons affected by the project in their rights the appeal should be possible against rulings taken by or under the authority of the Executive Board regarding the rejection, approval or alteration of requests for registration or issuance.

The EU is open to explore the potential consequences of such an expansion of the right of appeal, in particular on the legal consequences and on its impact on the duration of the CDM process.

V. Conclusion

23. It is crucial to ensure that the appeals procedure contribute to significantly improve the functioning of the CDM in relation to its objectives while maintaining its environmental integrity and contribution to sustainable development as defined in the CDM rules and requirements. We look forward to discussions with other Parties on this issue.

Paper no. 5: United Nations Development Programme

Date 28 March 2011

Subject **Inputs to SBI considerations of appeals against CDM Executive Board decisions, as referred to in document FCCC/KP/CMP/2010/L.8, paragraph 19**

UNDP thanks the CMP for the opportunity to comment on this key issue in 2011.

UNDP strongly supports the implementation of the Clean Development Mechanism (CDM), in particular paragraph 2 of Article 12 of the Kyoto Protocol: "The purpose of the [CDM] shall be to assist [non-Annex I] Parties in achieving sustainable development..." Social and economic development and poverty eradication are legitimately the first and overriding priorities of developing country Parties.

Establishing an appeals body to the Executive Board (EB) should improve investor confidence in the CDM, and hence encourage investment in sustainable development. Therefore, UNDP endorses and supports the establishment of a fair and transparent appeals procedure that is accessible to all, including the poorest.

Decisions of the CDM Executive Board (EB) have the potential for substantial financial consequences for project developers and investors. As a 'learning-by-doing' mechanism, it is reasonable for EB to take decisions that may have a varying emphasis, or differ from earlier decisions. Nevertheless, EB decisions that have unforeseen and/or punitively damaging consequences for project investors deserve independent reconsideration.

Currently, there is no such procedure for reconsideration.

Some EB decisions in the past have led to real financial losses for investors. Market participants must accept risks in investment. However to maximise investment (and hence deliver mitigation and sustainable development through the CDM), risks should be minimised and as far as possible, risks should be able to be reasonably assessed by investors. EB decisions have not always been predictable, and in some instances have arguably been counter to earlier rulings on which investment decisions have been made. This is 'regulatory uncertainty', and the CDM is considered by most investors to have medium to high regulatory uncertainty.

Regulatory uncertainty is discouraging investment at a time when it is needed most. Implementation of fair and transparent appeals procedures will immediately improve investor confidence, but will also provide additional incentives for consistency and predictability in EB decision-making. Moreover, such procedures are in accordance with principles of transparency and good governance. UNDP supports and endorses the implementation of a credible appeals process, and the recognition of legal rights of participants.

UNDP would like to provide the following views, intended to constructively improve the appeals procedure proposed in FCCC/KP/CMP/2010/10:

- First, mediation: The procedures as proposed by the EB are very formal and rigid, reflecting a command-and-control approach to regulation. Best practice in governance would suggest an escalation of appeal, rather than going straight to a strictly defined approach. This is

especially relevant for a still relatively new mechanism that is inherently about public-private partnerships. A first step should be mediation, aimed at providing an objective hearing that can determine whether there are reasonable grounds to question an EB decision. Ideally, through dialogue, most cases can be resolved without going to the expense of arbitration. An appellant retains the legal right, if unsatisfied, to escalate to a formal appeal.

- Eventual broad scope: The procedures are very tightly defined in scope, which is appropriate for the introduction of an appeals process. However, for a mechanism that should be evolving rapidly to meet the challenge of climate change, such limited scope will soon prove restrictive. In the medium term, the appeals procedure should be expanded (but not apply retrospectively) to enable appeal of *any* EB decision, and provide standing for CSOs and NGOs. Initially this seems daunting, but in fact this level of transparency is simply good democratic governance, and with consistent and sound decision making by the EB, there is no reason to expect a flood of appeals, as may be feared.

- Balance: under the proposed procedures, the best result an appellant can reach is for *...remanding the [decision] to the [EB] for further consideration...*¹ An EB decision cannot be revoked or overturned, but an appellant's case can be dismissed at several stages (and presumably forego the filing fee). It is entirely reasonable to require a filing fee, but the EB or Secretariat apparently does not need to contribute to the cost of appeals. Appellants, particularly project investors, face potentially months of extended uncertainty that places financial strain on any project, while the EB are not financially impacted or judged by such delays. Apart from personal integrity, there is no incentive then for the EB to seek rapid or efficient resolutions to appeals, and there is the possibility of abuse of the procedures (though there is no reason to see this as likely). Overall, the proposed procedures are inordinately slanted in favour of the EB, which discourages access and legal remedies. Given the limited scope and substantial filing fee, frivolous cases are very unlikely, so it is unnecessary to construct the appeals process so defensively. Instead, an objective mediation process that seeks fair and mutually agreed outcomes should first be pursued through facilitated dialogue. Where that does not succeed, arbitration proceeds. Where arbitration finds an adverse EB decision, an alternate decision should be issued, overriding the original (erroneous) EB decision. It should be noted that in a well functioning, fair and professionally managed mechanism, such outcomes will be rare.

In addition to these specific comments, UNDP would like to recommend the SBI consider a comparable appeals mechanism already underway in the case of the Gold Standard Foundation². Clearly there are differences between the EB and the Gold Standard Technical Advisory Committee (TAC), as well as important differences between CDM and voluntary market projects. Nonetheless, there are also clear similarities and lessons that can be drawn. UNDP has supported the establishment of the Gold Standard's appeal procedure, and believes it represents a balanced, fairer and more accessible approach.

¹ See paragraph 47 of Annex 2 of FCCC/KP/CMP/2010/10

² See <http://www.cdmgoldstandard.org/Detail-Page.366+M5ba3189f8c0.0.html>

UNDP also respectfully suggests that the SBI consider (in recommendations to the CMP at COP 17/CMP 7 in Durban) The International Bureau of the Permanent Court of Arbitration³ at the Peace Palace in The Hague to serve as the appellate body, as it is objective, capable, familiar with regulatory and UN processes, and most importantly, convincingly independent.

UNDP supports the continuation and enhancement of the CDM, and its ongoing improvement and reform, including the establishment of a fair, objective and transparent appeals mechanism that is accessible to all, including the poorest and most vulnerable.

UNDP would be happy to provide further elaboration on any of these points or related subjects as desired.

³ See http://www.pca-cpa.org/showpage.asp?pag_id=363