



Facilitator of the Subsidiary Body for Implementation

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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 FCC/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

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

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.

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.

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

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