

Subject: IETA Submission to SBI on the Development of an Appeals Mechanism for the CDM

28 March 2011

UNFCCC Secretariat
Martin-Luther-King-Strasse 8
D 53153 Bonn
Germany

Dear Mr. Owen-Jones,

IETA is writing to you in response to the call for input in *Guidance relating to the Clean Development Mechanism* from CMP6 requesting views on procedures, mechanisms and institutional arrangements under the COP to allow for appeals against Executive Board decisions based on decision 2/CMP.5, para 42, taking into account the recommendations of the EB contained in annex 2 to its annual report. You will find below IETA's views on two major elements of an appeals mechanism: (1) the make-up of the appellate body and (2) rules of procedure for the appeals mechanism.

The Appellate Body

Identity, source and composition of the Appellate Body (AB)

- The appellate body should be a newly established roster of at least 30 and no more than 40 members who meet the terms of reference established by the CMP (see below). The appropriateness of these numbers should be reviewed a year after the AB is created and on a regular basis thereafter.
- It should be established by a decision of the CMP.
- The CDM Executive Board should manage the selection process for members of the appellate body, based on the Terms of Reference established by the CMP.
- A general call for applicants should be issued by the CDM Executive Board to which any individual who meets the required professional criteria should be eligible to apply.
- The call for applicants should remain open until a panel of 30 members has been filled. The review of the applications should be made on a first-come-first-reviewed basis until the maximum is reached.
- If at any point the appellate body falls below 30 members, due to term completion or voluntary withdrawal, a new call for applicants should be issued by the CDM Executive Board.

Reporting and Governance

- The AB should report to the CMP on a yearly basis.
- The AB should meet twice a year (at SBI/SBSTA and COP/MOP) as a group to review experience and to develop the yearly general report to the CMP, which should address, inter alia, the need to adjust the procedures of the appellate body, the number of appellate body members and appellate panel members, and the appropriateness of the filing fee.

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- At its first meeting, the AB should self-select Co-Chairs to serve as CMP rapporteur, work with the UNFCCC Secretariat to coordinate the case assignments of AB members, and generally coordinate the workings of the AB.
- The meetings and the ongoing operation of the AB should be facilitated by the UNFCCC secretariat.

The Roster of Members

- Appellate body members should serve for a term of 4 years. Half of the initial members should serve for 6 years in order to stagger the end of term dates for the first round of members.
- AB members should not be able to be re-nominated.
- The authority to dismiss AB members should remain with the CMP. The CDM Executive Board should have no authority to dismiss AB members.
- Grounds for dismissal: AB members should only be dismissed for gross disregard of their duties as set out in the terms of reference; on grounds of personal misconduct, including bias, fraud, undeclared conflict of interests, or misappropriation of funds. (We suggest referencing Chapter 10 of the UN Staff Rules on misconduct and serious misconduct).
- Temporary suspension: In the event that a 2/3 majority of EB members request suspension of an AB member for the above-noted reasons, the member should be temporarily suspended and the issue should be placed on the agenda of the next CMP meeting. A hearing should be scheduled at that meeting of the CMP to determine whether or not the member should be dismissed. (Procedures for this hearing will need to be developed.)

Selection for specific cases

- A group of 3 members from the appellate body roster shall be chosen at random to sit as the appellate panel for each appeal. The selection should be managed by the AB Co-Chairs, with the assistance of the UNFCCC Secretariat. The appropriateness of the size of the appellate panels should be reviewed a year after the AB is created and on a regular basis thereafter.
- Neither the CDM Executive Board nor the Secretariat should have the ability to determine which members hear which appeal.
- The eligibility of appellate body members to hear each appeal shall not be determined by their particular qualifications. Each member of the roster shall be deemed equally fit to hear each appeal.
- AB members should be required to recuse themselves from any case for which they have a conflict of interest. In this event, a new AB member should be selected at random to replace that member.

Costs

- The costs for the first year associated with the AB, including secretariat costs, should be taken from the general CDM budget.
- The AB should aim to be self-financing from its second year of operation and should adjust its filing fees to ensure its self-sufficiency.

Terms of reference

*The main goal of the terms of reference should be to ensure that the appellate body, in its case-by-case decision-making, is entirely independent from the CDM Executive Board and Secretariat.

Appellate body members should meet the following criteria:

1. Appellate body members may not have served in any of the following capacities for 18 months prior to applying for a position as an appellate body member:
 - As a CDM Executive Board member

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- As a UNFCCC employee or contractor
 - As a member of a government delegation to the UNFCCC negotiations
2. Appellate body members may not serve in any of the following capacities for 12 months after serving as an appellate body member:
- As a CDM Executive Board member
 - As a UNFCCC employee or contractor
3. Appellate body members should meet the following qualifications:
- Members should have at least 10 years of post qualification legal and/or regulatory experience at the international, national, and/or local levels.
 - Members should be selected on the basis of their ability to deal thoroughly and fairly with the requests brought to them; their integrity and their independence from the CDM governance structure; and their lack of any fiduciary benefit from cases over which they preside.
 - Members should maintain a high reputation during their service and behave in a way that will not impair their independence or the independence of the AB.
 - Candidates with general knowledge of the CDM and its processes should be preferred.

Rules of Procedure for the Appellate Body

The following comments refer to the draft rules of procedure found in Annex II to the CDM EB Report to CMP 16 and follow the pattern of numbering utilized in that document. Each section contains IETA's suggested changes, if any.

III. Stakeholders allowed to appeal

IETA agrees with the limitations current placed on stakeholders allowed to appeal and does not suggest any changes.

IV. Ground for filing an appeal

Para 6 of the draft procedures provides for an appeal against an EB decision rejecting or requiring an alteration of a request for registration or issuance.

While IETA recognizes that the CMP Guidance relating to the CDM from CMP5 in Copenhagen limits the EB to these narrow parameters, IETA would like to flag that, in the future, it may be useful to widen the scope of appeals to include appeals against other forms of decisions taken by the EB, including but not limited to rejections or revisions of methodologies and clarifications issued by the EB.

Para 7 of the draft procedure provides for appeal in the following cases:

- A. For an appeal based on factual grounds, all of the following elements must be present and argued:
 - a. That the ruling contained a clearly erroneous finding of fact or set of fact, and/or did not

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- consider a fact, or set of facts;
- b. That the fact, or set of facts, was sufficiently validated or verified as part of the Record of the request for registration/issuance;
- c. That the fact, or set of facts, if corrected or considered, would not have resulted in the ruling that rejected or required an alteration to the request for registration or issuance.

IETA proposes making the following changes to this section:

- Altering (c) above to the following: “That it would be reasonable to assume that the fact, or set of facts, if corrected or considered, would not have resulted in the ruling that rejected or required an alteration to the request for registration or issuance.”
- Defining the term “reasonable” as meaning that “a similar decision-maker, faced with a similar set of information and facts, would be expected to make the same decision.”

Para 8 of the of the draft procedure stipulates the following:

8. For an appeal grounded on the interpretation or application of one or more of the CDM rules and requirements, all of the following elements must be present and argued:
 - a. EB decision contained unreasonable interpretation or application of CDM Rule(s) or requirements in light of text of CDM rules and requirements and past judgments of the appellate body;
 - b. That the CDM rules and requirements, if interpreted or applied differently, would not have resulted in the ruling that rejected or required an alteration to the request for registration or issuance.

IETA proposes making the following changes to this section:

- Expanding 8(a) to include “Article 12 of the Kyoto Protocol and the Modalities and Procedures of the Clean Development Mechanism as laid out in the Marrakech Accords, and any further decisions or clarification made to them by the CMP or by the EB under the direction of the CMP.”
- Also expanding 8(a) to include “past judgments of the CDM Executive Board.”
- Defining the term “unreasonable” as meaning that “a similar decision-maker, faced with a similar set of information and facts, would not be expected to make the same decision.”
- Defining “rules and requirements” as “rules and requirements at the time the request for registration or issuance was submitted and taking into account previous judgments of the appellate body.” Rewriting in this way would both clarify which requirements are to be applied and provide the AB the flexibility to develop the jurisprudence of “CDM Rule” as they see fit over time.
- Altering 8(b) above to the following: “That it would be reasonable to assume that the CDM rules and requirements, if interpreted or applied differently, would not have resulted in the ruling that rejected or required an alteration to the request for registration or issuance.”
- Add a new section (b bis) stating “or EB, when applying discretion in interpreting or applying CDM rule(s), exercised its discretion unreasonably or not at all”.

Para 9 of the of the draft procedure stipulates the following:

9. For an appeal based on the grounds that the reconsidered ruling of the Executive Board is

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inconsistent with the previous judgment of the appellate body on the same request for registration or issuance, all of the following elements must be present and argued:

- a. That the reconsidered ruling is inconsistent with the judgment of the appellate body;
- b. That the reconsidered ruling, if consistent with the judgment of the appellate body, would not have rejected or required an alteration to the request for registration or issuance.

IETA proposes making the following changes to this section:

- Clarifying the meaning of inconsistent in this context in order to ensure that the appellant is not unduly aggrieved by the EB not implementing an AB's decision.
- Altering 9(b) to begin with: "That it would be reasonable to assume"

V. Filing an Appeal

A. Action Required by the Appellants

IETA has no comments in this section.

B. Consideration by the Appellate Body

Para 21 of the draft procedures stipulate the following:

21. At any time during its consideration of the appeal, the appellate body may request the DOE that validated or verified the request for registration or issuance under appeal to clarify any information contained in its validation or verification report or submitted to the Executive Board in response to a request for review. The [appellate body] shall not consider any further validation or verification of information in the clarification of the DOE. The clarification shall provide references to where each fact, or set of facts, can be located in the Record by the [appellate body]. The DOE shall file its clarification within 14 days of receipt of the order for such clarification.

IETA proposes the following changes in relation to this para 21:

- Adding a new 21bis: "At any time during its consideration of the appeal, any party to the appeal may nominate experts to provide information and/or answer questions of a technical, legal or regulatory nature. The appellate body shall have the authority to decide to hear from those experts and/or if they would like to call additional experts to respond to questions of a technical, legal, or regulatory nature."
- IETA notes that there is a timeline established in para 21, but that such references are missing in several other places throughout the document. IETA suggests that the procedures be redrafted to ensure that each step in the process has a clear timeline associated with it.

VI. The response of the Executive Board

A. Action Required by the Executive Board

B. Consideration by the Appellate Body

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IETA has no comments in this section.

VI.bis. The hearing

IETA proposes adding a new VIbis following the current “VI, The response of the Executive Board”. VIbis should outline the following:

“A. Scheduling and attending the hearing

30bis. If the Appellant Body determines that the appellant and the Executive Board have complied with all requirements, it will [within 14 days] contact the appellant, the DOE, and the Chair of the Executive Board to schedule a hearing.

31bis. If both the Chair of the CDM Executive Board and the appellant wave their respective rights to a hearing, then the hearing will be canceled.

32bis. Video or tele-conference facilities may be used to facilitate the hearing in the event that either the Chair of the CDM Executive Board or the appellant are unable to attend the hearing.

33bis. Attendance at the hearing, in any form, is not obligatory.

B. Hearing procedures

34bis. (A complete set of procedures will need to be drafted and consideration given to how parties can present expert evidence, cross examine evidence and present oral submissions. IETA will be happy to contribute more at a later time. There are experiences worldwide that can inform the development of these procedures.)

35bis...”

VII. The Record

A. Appeals in relation to requests for registration:

Para 31 of the draft procedures stipulates that the Record falls into two categories:

- a. Information that shall be automatically deemed to be introduced into the record and
- b. Information that may be introduced into the Record, but only for the purposes of:
 - i. Asserting, in the Executive Board’s ruling or response, that the previously submitted information is inconsistent with, or contrary to, the information submitted as part of the request for registration under appeal, without sufficient explanation;
 - ii. Rebutting, in the appellant’s appeal, an assertion by the Executive Board in its ruling or response that the previously submitted information is inconsistent with, or contrary to, the information submitted as part of the request for registration under appeal, without sufficient explanation.

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IETA proposes that the following changes be made to this section:

- Change to “without sufficient explanation as to why it is not consistent with the information submitted in the request for registration.” This wording would clarify the intention of these provisions.

Para 32 stipulates the following:

32. The following information shall automatically be deemed to be introduced into the Record:
- a. Any previous judgments by the [appellate body] on the same request for registration under appeal;
 - b. The Executive Board’s ruling and any previous ruling of the Executive Board on the same request for registration under appeal;
 - c. Any appeal or response that was previously filed with the [appellate body] by the same appellant as part of a previous appeal in relation to the same request for registration currently under appeal;
 - d. All written information submitted to the Executive Board as part of the current request for registration under appeal.

Para 33 stipulates the following:

33. The following information may be introduced into the Record, but only for the purposes specified in paragraph 31 (b) above:
- (a) All written information submitted to the Executive Board as part of any previous request for registration for the same proposed project activity;
 - (b) The project design document submitted and published for global stakeholder consultation;
 - (c) Any other written information submitted to the Executive Board by a project participant or DOE regarding the request for registration under appeal, as required or allowed by the CDM rules and requirements.

IETA proposes making the following changes to this section:

- Altering 33(c) to state: “...the request for registration under appeal, unless explicitly prohibited.”
- Adding a new “33(d) Any written information relating to previous Executive Board or Appellate Body rulings from a request for registration from another proposed project activity utilizing the same or a similar methodology, which the appellant reasonably considers to be relevant to their appeal.”

Paras 36-37 stipulate that the Appellant and the EB, respectively, must introduce all of the required information into the Record.

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IETA is concerned about the lack of explicit provision by which the Record is provided to the appellant and EB. Therefore, IETA would like to see language introduced clarifying that all records, including records accumulated in closed sessions that were used by the EB in making its initial decision shall be available to the AB and the parties to the appeal. Where necessary, such information may be restricted to the AB and the parties of the appeal only but in order to allow for a fair process the aggrieved party must have access to the complete records.

Paras 38-40 stipulate cover the same issues for issuance as 31-33 above do for registration.

IETA proposes making the following changes to this section, which mirror the changes suggested in 33(d):

- Adding a new “40(e) Any written information relating to previous Executive Board or Appellate Body rulings from another request for issuance for a project activity utilizing the same or a similar methodology, which the appellant reasonably considers to be relevant to their appeal.”

VIII. Consideration by and judgment of the appellate body

Para 45 of the draft procedure states the following:

33. In considering the merits of the matter and formulating its judgment, the [appellate body] shall take into consideration only:
 - a. The Record;
 - b. The appellant’s appeal;
 - c. The Executive Board’s response;
 - d. Any requested clarification filed by the DOE, in accordance with paragraph 21 above;
 - e. Any factual information from a source, the accuracy of which cannot be questioned (e.g. the day of the week on a certain date).

IETA proposes the following changes:

- Adding a new 33(f) “Any requested clarification filed by an expert, in accordance with suggested new 21bis above.
- Adding a new 33(g) “The hearing” based on the suggested new “VI.bis” above.

Paras 46-47 of the draft procedure states that:

46. In considering the merits of the matter and formulating its judgment, the [appellate body] shall:
 - a. Defer to the Executive Board’s finding of fact, unless they are clearly erroneous;
 - b. Defer to the Executive Board’s interpretation and application of the CDM rules and requirements, unless they are unreasonable in the light of the text of the CDM rules and requirements and past judgments of the [appellate body].
47. The judgment of the [appellate body] shall conclude in one of the following ways:
 - a. By affirming the ruling of the Executive Board;

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- b. By remanding the request for registration or issuance to the Executive Board for further consideration.

IETA proposes the following changes:

- Change 46(a) above to “Defer to the Executive Board’s finding of facts, unless the appellate panel determines that the facts were not correctly visited during the Executive Board’s deliberation;”
- Adding a new 47(c), “By instructing the Secretariat to register the project or issue CERs, in the event that a decision that has previously been remanded to the Executive Board, denied again by the Executive Board, and successfully appealed a second time.

IX. Reconsideration by the Executive Board upon remand

A. Reconsidered decisions on requests for registration or issuance

B. Reconsidered rulings upon decisions to reject

IETA has no comments on these sections.

X. Filing Fee

Para 61 regards the filing fee.

IETA proposes the following changes to this section:

- The incorporation of a mandatory review of the fees on a specific date in the future instead of leaving it open-ended.

Para 65 says that the appellate whose appeals led to the remand shall be reimbursed the filing fee.

IETA suggests the following changes to this section:

- That all appellants related to that project/request for issuance shall be reimbursed their filing rather than only the appellants whose appeal led to the remand, in the case that other appellants case had not yet been heard but they had already paid the filing fee.
- That project participants whose requests for registration were remanded and eventually registered should have the option of backdating their date of registration to the date on which their “complete” request for registration was been submitted.

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XII. Other procedural matters

IETA has no suggested changes to this section.

IETA greatly appreciates the opportunity to provide our input on this issue. Please do not hesitate to contact myself or Kim Carnahan, at carnahan@ieta.org, if you have questions regarding this submission.

Sincerely,

A handwritten signature in black ink, appearing to read "H. Derwent", with a long, sweeping horizontal line extending to the right.

Henry Derwent
President and CEO, IETA