

In paragraph 18 of CMP Decision 3/CMP.6, the Conference of the Parties Serving as the meeting of the Parties to the Kyoto Protocol requested the Subsidiary Body for Implementation to make recommendations 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 Executive Board decisions based on decision 2/CMP.5, paragraph 42.”

In paragraph 19 of CMP Decision 3/CMP.6, COP/MOP invited “Parties, intergovernmental organizations and admitted observer organizations to submit to the secretariat, by 28 March 2011, their views on this matter.”

The members of the CMIA would like to thank the COP/MOP for the opportunity to make a submission on this matter and to thank the secretary for its assistance in collecting these submissions and preparing a technical paper for consideration by the Subsidiary Body for Implementation. The nature of this submission is relatively narrow in its focus but more detailed within that focus than the two previous submissions that the CMIA has made to the UNFCCC on this issue.

Finally it is worth reiterating that the CMIA and its membership are firmly of the opinion that the future uptake of the CDM and new market mechanisms will be affected positively by the timely and in some senses now overdue, institution of a CDM appeals mechanism and that both will be negatively impacted by further delays.

I. Purposes of Appellate Body

The CMIA believes that the purpose of the appellate body should not be to second-guess the political judgments and policies of the Executive Board or COP/MOP. Instead, the purpose should be to ensure that existing rules and policies are applied clearly, predictably, fairly, and consistently. In other words, the purpose should be to ensure that the CDM market is governed in accordance with the principles of the rule of law, by ensuring that that the EB’s actions are consistent with the rules that it and COP/MOP have already set down in previous decisions and guidance.

Strengthening the compliance of CDM decision-making with the principles of the rule of law will serve at least three crucial functions in the context of the CDM. First, by strengthening the mechanism in the eyes of all stakeholders, it will increase support for the CDM both politically and in the form of investment in CDM projects. Second, it will lead to more reasoned and transparent decision-making by the Executive Board by creating strong incentives for them to address potential problems early and clearly. Third, it will increase accountability of the Executive Board to COP/MOP by ensuring that the Executive Board’s actions are consistent with CMP guidance.

In order to accomplish these goals, the Appellate Body should be independent of the Executive Board. The CMIA notes that a fair hearing by an independent body is a universally recognized value, that serves to strengthen decision-making systems. The long-standing tradition of judges excusing themselves from hearing cases in circumstances where their impartiality may be undermined is based on the belief that even the most experienced and competent adjudicators cannot always be fully impartial. Unless final authority to interpret the rules rests in an independent body that sees its primary duty as enforcing the CDM rules as written, instead of as fulfilling a more political role, adherence to principles of the rule of law may be undermined, with the result that, the appellate body may fail to accomplish its broader purposes.

II. Institutional Design

The following recommendations highlight key aspects of institutional design necessary to ensure an effective appellate body. These recommendations are offered with four key values in mind: independence, consistency, competence, and practicality.

The CMIA places an especially high priority upon speed and efficiency. The appellate process will only have a significant impact on CDM governance if it is used, and it will not be used unless it is capable of resolving cases in a timeframe that is viable for stakeholders. Ideally, an individual appeal could be resolved within two to four months of an initial EB decision.

A. Under Guidance of COP/MOP vs. Under Authority of COP/MOP

In order to ensure sufficient independence, the AB should be placed under the guidance of COP/MOP rather than under the authority of COP/MOP.

B. Size/Membership

The CMIA favors the following approaches:

Standing Committee. The CMIA favors an AB made up of a standing committee of between seven and eleven members, rather than a larger roster of experts. The AB members would have a mixture of legal and technical expertise (see section C below for more details on proposed terms of reference). Each appeal would be heard by a panel of three members of the standing committee. Each panel should have at least one legal expert and one technical expert – ideally two legal experts and one technical. A small standing committee is more likely than a roster of experts to reach consistent decisions and will be easier to administer and set up quickly. As investors, the CMIA places a high priority on the enhanced predictability that will flow from consistent decision-making.

Time commitment. The CMIA favors allowing the AB to elect a chair who will serve full-time, while the others will be expected to serve on a part-time basis, at least initially. The chair will be expected to have extra responsibilities regarding the administration of the appellate body, including acting as rapporteur to the CMP.

Compensation. The CMIA favors providing competitive compensation for members of the body, in order to ensure a high level of competence and independence.

Privileges and Immunities. Even once the AB is established, it may be unable or unwilling to act until appropriate privileges and immunities have been granted. As a result, the UNFCCC should swiftly commence the processes necessary to ensure privileges and immunities granted by the host Party. For this reason, it may be most efficient to host the AB in Bonn, Germany, where minimal additional procedures would be required to establish the necessary legal framework, given the existing arrangements for the UN. Roaming (i.e. outside the location where P&I is granted) meetings should also be excluded for the AB for this reason.

C. Terms of Reference

C1. Appropriate Experience

The CMIA places a high priority on ensuring that a substantial portion of the appellate body membership has legal expertise, and that other members have technical expertise. As discussed in section B above, each panel should have at least one legal expert and one technical expert – ideally, two legal experts and one technical expert.

Legal Expertise – The CMIA envisions the role of the Appeals Body as ensuring that the EB governs according to principles of the rule of law – in other words, that EB decisions faithfully apply the rules that the CMP and EB have already laid down. The primary challenges involved in this task will be interpreting language, ensuring appropriate procedures are followed, preserving a proper balance of powers, and clearly explaining outcomes. These are legal tasks, for which lawyers (and especially judges and arbitrators) are best trained.

Technical Expertise – Many of the appeals will involve technical questions. In these circumstances, technical experts will have an advantage in understanding the key issues and assessing the credibility of the competing arguments. However, in contrast to legal expertise where a clearly defined core skill set is required, the diverse nature of the CDM project pipeline means it will not be possible to have a group of technical experts capable of addressing every case. When this occurs the AB should be able to call on outside experts with the appropriate expertise.

C2. Conflicts of Interest.

In order to ensure that the appellate body makes decisions in accordance with principles of the rule of law, rather than political expediency, CMIA favors taking an expansive approach toward the avoidance of conflicts of interest.

The following conflicts of interests should serve to render ineligible someone for serving as an appellate body member:

He or she has served on the Executive Board or other CDM decision-making body.

He or she is serving as a Party negotiator under the UNFCCC and related negotiations .

He or she is from a Party to the UNFCCC that is not a KP Party.

The following conflicts should render ineligible an appellate body member from hearing a particular appeal:

He or she has a personal interest or substantial involvement in the appeal.

He or she is a citizen of a country whose Government has a significant interest in any projects affected by the appeal.

C3. Availability. The members of the AB should have sufficient flexibility that they would be able to prepare to hear cases and travel to Bonn for hearings on relatively short notice. As a result, they would ideally work in a career offering appropriate flexibility (such as arbitration or consulting) and live within a reasonable travel distance of Bonn.

C4. Regional Distribution. The CMIA supports basing selection of AB members primarily on the ability of the individual to fulfill the role, consistent with the terms of reference. Adhering to a system based on strict, formalized regional distribution of members increases the likelihood that the selection process will become inappropriately politicized for an appeals mechanism. Furthermore, it may be difficult to find a wide variety of candidates who meet the terms of reference (especially those related to conflicts of interests) **and** are willing to be sufficiently flexible and available to hear cases in Bonn to allow the appeals system to function quickly and efficiently. However, CMIA recognizes the importance of regional distribution to the UN system. As a result, the CMIA makes the following recommendation:

- The members of the AB should be nominated by a body already chosen in accordance with regional distribution requirements, such as the Compliance Committee or Executive Board. This should guarantee that the AB members are sufficiently representative of COP/MOP membership, without excessively politicizing the process or placing impractical restrictions on membership.

D. Appointment and Removal

D1. Appointment

The CMIA favors the adoption of the following safeguards to ensure that the appointment process is not excessively politicized. Additionally, the CMIA opposes giving unrestricted authority to the EB to select the members of the AB.

Approval by two institutional actors. Under this approach, at least two institutional actors would need to approve each appellate body member. One institutional actor could primarily be responsible for making nominations, while the other could be the moderator of the proposed appointments to confirm that the first decision maker’s decisions are within established procedures. Ideally either the Compliance Committee or EB would make the initial nominations, and either COP/MOP or the Office of the Executive Secretary of the UNFCCC would be responsible for confirming the nominations.

Opportunity for objections. This procedure would be further strengthened if project participants and perhaps other stakeholders had the opportunity to register objections to proposed members before the final decision is made. These objections could be limited to issues related to compliance with the terms of reference.

Delegating appointment authority to AB members. The first several elected appellate body members could be responsible for selecting additional concurrent members or their own successors.

D2. Removal

It is essential that the members of the appellate body are only removable for cause. Otherwise, the party possessing the power to remove appellate body members will easily be able to influence AB decision-making.

In order to ensure that the ‘for cause’ provision is respected, the CMIA favors adopting at least one of the following protective measures:

Placing the removal power in either a highly politically insulated body (such as the Office of the Executive Secretary) or in COP/MOP;

Allowing appeals of removal decisions, perhaps through existing UN employment dispute machinery.

E. Budget/Support

In order to ensure that the appellate body is sufficiently independent, it should not need to rely on any other interested institutional actors, such as the Executive Board, in order to fulfill its duties. In order to achieve this goal, the CMIA favors considering the following measures:

The AB should be supported by a separate unit of the secretariat from the unit supporting the Executive Board.

The AB should be able to draw on an independent revenue stream not subject to the approval of the Executive Board.

For these purposes, it may be appropriate for the AB to be institutionally connected to the compliance committee.

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About the CMIA:

The Carbon Markets & Investors Association (CMIA) is an international trade association representing over 50 companies that finance, invest in, and provide enabling support to activities that reduce emissions. CMIA's membership accounts for an estimated 75 per cent of the global carbon market, valued at USD 130 billion in 2009. Solely representing organizations that provide services to and invest in the environmental sector, membership does not include any entities with compliance obligations under cap-and-trade schemes. This results in a unique advocacy platform with emphasis on the environmental integrity of market mechanisms and climate change policies.