



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 Executive 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.

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

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

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.