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Agenda item 16

**Procedures, mechanisms and institutional arrangements for appeals
against the decisions of the Executive Board of the clean development
mechanism**

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

Draft conclusions proposed by the Chair

1. The Subsidiary Body for Implementation (SBI) took note of the submissions by Parties, intergovernmental organizations and admitted observer organizations contained in FCCC/SBI/2011/MISC.2 and the information provided in the synthesis document prepared by the secretariat on procedures, mechanisms and institutional arrangements for appeals against decisions of the Executive Board of the clean development mechanism.¹
2. It noted the recommendations made by the Executive Board contained in annex II to its 2010 annual report.²
3. The SBI also noted the views on this matter expressed at the session.
4. The SBI took note of the initial draft text, as proposed by the co-chairs of the group, contained in the annex, while there were divergent views among Parties. It agreed to continue consideration of the matter at its next session.

¹ FCCC/TP/2011/3.

² FCCC/KP/CMP/2010/10.

Annex

[Co-chair's proposed text

Draft decision XX/CMP.7

Appeals mechanism

The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol,

Recalling decisions 2/CMP.5, paragraph 42, and 3/CMP.6, paragraph 18,

Recalling also decisions 2/CMP.1 and 3/CMP.1,

Cognizant of its decisions 4/CMP.1, 5/CMP.1, 6/CMP.1, 7/CMP.1, 1/CMP.2, 2/CMP.3 and 2/CMP.5,

Recognizing the importance of timely and effective decision-making by the Executive Board of the clean development mechanism on issues related to project activities,

Emphasizing the importance of consistency and correctness in the application of the modalities and procedures of the clean development mechanism,

Wishing to provide for an independent, impartial, fair, equitable, transparent and efficient mechanism to enable review of the decisions of the Executive Board of the clean development mechanism,

1. *Approves and adopts* the procedures and mechanisms relating to appeals against decisions of the Executive Board of the clean development mechanism, as contained in the annex to this decision;
2. *Agrees* that appeals may be brought before the [Appeals Body] [enforcement branch of the Compliance Committee] at the earliest six calendar months following the adoption of this decision;
3. *Agrees also* that appeals may be brought before the [Appeals Body] [enforcement branch of the Compliance Committee] only with regard to decisions of the Executive Board concluded following the adoption of this decision;
4. *Requests* the Subsidiary Body for Implementation to consider the experience gained with the appeals mechanism with a view to proposing recommendations for modifications or adjustments, if necessary, for consideration by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its tenth session;
- [5. *Requests also* the enforcement branch of the Compliance Committee to consider the provisions of decision 27/CMP.1 with a view to proposing to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its eighth session any amendments necessary to accommodate the mandate of the enforcement branch set out in the annex to this decision;]

Annex

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

PART I: THE APPEALS BODY

I. Establishment and powers

Option 1 - Roster-based ad hoc panels¹

1. An appeals body is hereby established that considers appeals against decisions of the Executive Board of the clean development mechanism (CDM) regarding the [approval,] rejection or alteration of requests for the registration of project activities and the issuance of certified emission reductions (CERs).

Option 2 - Enforcement branch of the Compliance Committee²

1. The enforcement branch of the Compliance Committee (“enforcement branch”), established through decision 27/CMP.1, is hereby designated to consider appeals against decisions of the Executive Board of the Clean Development Mechanism (CDM) regarding the [approval,] rejection or alteration of requests for the registration of project activities and the issuance of certified emission reductions (CERs).

2. The enforcement branch shall report annually to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) on its work.

3. Subject to the provisions of this decision, the enforcement branch shall amend, as necessary, procedures governing appeals, for approval by the CMP at its eighth session. The enforcement branch shall also develop its operational modalities on matters relating to the organization of its work, including procedures for the protection of proprietary or confidential information.

Option 3 - Standing body

1. An appeals body is hereby established that considers appeals against decisions of the Executive Board of the clean development mechanism (CDM) regarding the [approval,] rejection or alteration of requests for the registration of project activities and the issuance of certified emission reductions (CERs).

2. The appeals body shall report annually to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) on its deliberations.³

¹ The model based on an ad hoc panel system might require a set of detailed rules of procedure and a code of conduct to be developed and adopted by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) before the panels begin to hear appeals unless the roster has limited institutional features and is delegated such an authority. See paragraphs 43–44 and 140 of the technical paper FCCC/TP/2011/3 (hereinafter referred to as TP).

² Some of the considerations related to possible delegation of the appeals mandate to the Compliance Committee are outlined in paragraphs 100–103 of the TP.

³ See also paragraph 98 of the TP.

3. Subject to the provisions of this decision, the appeals body shall establish the procedure governing appeals, for consideration by the CMP at its eighth session. The appeals body shall also develop its operational modalities on matters relating to the organization of its work, including procedures for the protection of proprietary or confidential information.⁴

II. Membership⁵

4. The CMP shall elect [10] [12] [30][50] members to the appeals body [as follows: [X] member[s] from each of the five United Nations regional groups, [X] member[s] from Parties included in Annex I to the Convention, [X] member[s] from Parties not included in Annex I to the Convention and [X] member[s] from small island developing States].

5. Members shall be elected for a period of [two][four] years⁶ [and shall be eligible to serve a maximum of [two][X] consecutive terms]. In order to ensure continuity, half of the members shall be elected initially for a term of [X] years and the remaining members shall be elected for the full term of office. Members of the Appeals Body shall remain in office until their successors are elected.

6. Each constituency referred to in paragraph 4 above shall endeavour to conduct a rigorous selection process in order to ensure that the nominees meet the criteria set out in paragraph 8 below.

7. In making nominations, Parties are invited to recall decision 36/CP.7 and give active consideration to the nomination of women.

8. To be eligible for election as a member, a person shall:

- (a) Be of high standing and moral character;
- (b) Possess at least 10 years of relevant experience in international law, administrative law [or in the field of the CDM];
- (c) Be available at all times and at short notice to hear appeals[;]
- [(d) Be unaffiliated with any government].

9. A member of the appeals body shall not be a member of the Executive Board, a member or employee of its support structure, designated operational entity or designated national authority, and shall not have served on the Executive Board or in its support structure [for at least 7 years] prior to his or her appointment to the Appeals Body. Members of the appeals body shall not be eligible to serve on the Executive Board of the CDM or in its support structure within for a minimum of [1] year[s] following the completion of their service on the appeal body.

⁴ Parties may choose either to delegate the development of detailed rules of procedure and operational modalities to a standing appeals body (including the option of the enforcement branch of the Compliance Committee) or to provide such detailed rules and procedures in the decision itself (see TP, paragraphs 43–44 and 90–92). In the latter case, some of the provisions in the Executive Board recommendations (i.e. chapters V, VII, VIII, IX and XII of annex II to document FCCC/CMP/2010/10) could be used to further develop the detailed rules.

⁵ This chapter would only be relevant for a newly created body, such as a standing body or a roster. Unless Parties decide otherwise, the relevant provisions of decision 27/CMP.1 would apply to the composition and membership of the enforcement branch of the Compliance Committee, should it be designated to hear appeals.

⁶ Parties are also invited to examine considerations set out in paragraphs 76–78 of the TP and consider whether a longer term of office (e.g. 5 or 7 years) might be desirable.

10. A member of the appeals body may resign by notifying the CMP through the Executive Secretary. The resignation shall take effect 90 calendar days from the date of notification.

11. The appeals body may suspend a member in the event of incapacity or misconduct, including breach of the provisions related to conflict of interest as set out in chapter III below, breach of provisions related to confidentiality of information as set out in chapter IV below or a failure to attend two consecutive meetings without proper justification, pending consideration of the matter by the CMP.

12. A member of the appeals body may only be removed by the CMP for reasons outlined in paragraph 11 above.

13. In the event that a member becomes unable to serve on an appeal for which he or she was originally selected, another member shall be selected to replace him or her in accordance with the procedure set out in paragraph 21 below.

14. Members of the appeals body shall be remunerated for their time spent on consideration of appeals in the amount of [XXX].⁷

III. Impartiality and independence⁸

15. A member of the appeals body shall serve in his or her personal capacity and shall enjoy full independence.

16. A member of the appeals body shall swear an oath that he or she shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of proceedings before the appeals body.

17. Should any direct or indirect conflict of interest arise, the member concerned shall immediately recuse himself or herself from the appeal in question.

IV. Internal management⁹

18. Decisions, other than in the context of individual appeals, shall be made by the full membership of the appeals body. For such decisions, X members must be present to constitute a quorum. Decision shall be taken by consensus, whenever possible. If all efforts at reaching consensus have been exhausted and no agreement has been reached, decisions

⁷ Parties may wish to consider the appropriate amount and how the time should be calculated (e.g. only for the days spent in the panel meeting or an average time per appeal). Parties may also wish to consider whether a retainer fee should be paid to members to facilitate their availability to hear appeals on short notice. Considerations in this regard are set out in paragraphs 85–89 of the TP. The remuneration option is proposed for options 1 and 3. Parties may wish to consider the appropriateness of remuneration of the enforcement branch members in connection with option 2, bearing in mind that currently members of the Compliance Committee are not remunerated for their work related to the implementation of decision 27/CMP.1.

⁸ This chapter would only be relevant for a newly created body, such as a standing tribunal or a roster. Unless Parties decide otherwise, the relevant provisions of decision 27/CMP.1 would apply to the composition and membership of the enforcement branch of the Compliance Committee, should it be designated to hear appeals.

⁹ This chapter would only be relevant for a newly created body, such as a standing tribunal or a roster. The current procedures relating to the Compliance Committee would apply, unless Parties decide otherwise. Furthermore, paragraphs 20 and 21 would be relevant only to a standing appeals body unless Parties decide to confer such authority to the roster-based system (see also footnote 1 above).

shall be taken by a majority vote of the members present and voting. Members abstaining from voting shall be considered as not voting.

19. The appeals body shall elect its own Chair and Vice-Chair for the term of [x] years.
20. Appeals shall normally be heard by a panel of three members and shall be decided by a majority vote.
21. The members constituting a panel shall be selected by the Chair of the appeals body¹⁰ on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all members to serve regardless of their national origin.
22. The internal discussions, deliberations and voting on, and drafting of, the decision by a panel during an appeal proceeding shall be confidential.

V. Collegiality

23. The members shall remain informed of the decisions, modalities and procedures concerning an appeal as well as the relevant modalities and procedures of the CDM.
24. To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the members, the members of the [appeals body][enforcement branch] shall convene at least once a year to discuss matters of policy, practice and procedure relating to appeals and to the modalities and procedures of the CDM generally.¹¹ [The ad hoc panel responsible for an appeal shall share their reasoning with the other members of the [appeals body][enforcement branch] after finalizing its decision.¹²]

PART II: GENERAL ISSUES

VI. Transparency and confidential information

25. The decisions of the [appeals body][enforcement branch] shall be issued in writing and shall state the reasons, facts and rules on which they are based.
26. Subject to the provisions of paragraphs 22 above and 27 below, the decisions of the [appeals body][enforcement branch] with regard to individual appeals shall be communicated to the entities involved in the appeal and to the Executive Board of the CDM, and shall be made publicly available.
27. As a general rule, information obtained by the [appeals body][enforcement branch] marked as proprietary or confidential shall not be disclosed without the written consent of the provider of the information, unless the [appeals body][enforcement branch] determines that, in accordance with the CDM modalities and procedures, such information cannot be claimed proprietary or confidential. Provisions with regard to confidential information contained in decision 3/CMP.1, annex, paragraph 6, shall be applicable to the workings of the [appeals body][enforcement branch] in connection with the consideration of appeals against decisions of the CDM Executive Board].

¹⁰ For a roster-based system, this provision would only be relevant if Parties opt to confer some procedural and operational decision making authority to the full membership of the roster.

¹¹ See also TP, paragraphs 31–32 and 97.

¹² This provision would not be relevant to option 2 (enforcement branch) as it does not form panels.

VII. Administrative and financial support

28. The secretariat of the United Nations Framework Convention on Climate Change shall make the administrative arrangements necessary for the functioning of the appeals mechanism.

29. Staff members of the secretariat assigned to assist the [appeals body][enforcement branch] in the carrying out of its functions [related to the implementation of this decision¹³] shall be independent and impartial, shall avoid direct or indirect conflicts of interest and shall respect the confidentiality of the proceedings before the [appeals body][enforcement branch].

30. The expenses associated with the appeals mechanism shall be borne out of [X]. The funds for such expenses shall be allocated in a way that ensures the independence and impartiality of the mechanism [and on the basis of a management plan for the mechanism to be developed by the [appeals body][enforcement branch]¹⁴].

VIII. Working language¹⁵

31. The working language of the Appeals Body shall be English.

PART III. CONSIDERATION OF APPEALS¹⁶

IX. Grounds for appeal

32. The [appeals body][enforcement branch] shall be competent to decide on an appeal within the scope of its powers, as set out in paragraph 1 above, on whether the Executive Board:

- (a) Exceeded its jurisdiction or competence;
- (b) Committed an error in procedure, such as to materially affect the decision in the case;
- (c) [Incorrectly] interpreted or applied one or more CDM modalities and procedures [in a way that [is unreasonable] and, if done differently, would have resulted in a materially different outcome];
- (d) [Clearly] erred on a question of fact available to the Executive Board at the time of it reaching its decision, [in a way that [is unreasonable] [and, if done differently, would have resulted in a materially different outcome];
- (e) In reconsidering its decision on remand pursuant to paragraph 34 below, rendered a decision that is inconsistent with the judgement of the [appeals

¹³ Language in square brackets is only relevant to Option 2 (enforcement branch).

¹⁴ Preparation of a management plan option could be requested only from a standing body or possibly a roster with similar features and such delegated authority.

¹⁵ Only applies to options 1 and 3. Provisions of decision 27/CMP.1 would apply to option 2.

¹⁶ This part is based in the recommendations of the Executive Board contained in annex II to its 2010 annual report and the suggestions made by Parties in their written submissions as well as some language proposed by the co-chairs, including, based on the considerations contained in the TP. With several exemptions that are clearly set out in the footnotes, this part is not an alternative option to the Board's recommendations but rather a rewording thereof proposed, should Parties wish to confer development of detailed modalities to the appeals mechanism itself. Please also see footnote 4 above.

body][enforcement branch] [on the same request for registration or issuance or with the previous ruling of the Executive Board with regard to that request].

33. Subject to provisions of this decision, the [appeals body][enforcement branch] shall establish, in a transparent manner, the criteria for admissibility of appeals.

X. Decisions and orders

34.¹⁷

Option A

With respect to decisions relating to the grounds of review stipulated in paragraph 33 above, the [appeals body][enforcement branch] may affirm a decision of the Executive Board or remand it back to the Executive Board for reconsideration.

Option B

With respect to decisions relating to the grounds of review stipulated in paragraphs (a), (b), and (c) of paragraph 32 above, the [appeals body][enforcement branch] may affirm or reverse a decision of the Executive Board.

With respect to decisions relating to the grounds of review stipulated in paragraphs (d) and (e) of paragraph 32 above, the [appeals body][enforcement branch] may affirm, reverse or remand a decision of the Executive Board.

35. Decisions of the [appeals body][enforcement branch] shall be final and binding on the entities referred to in paragraph 38 below and on the Executive Board.

36. In the interests of fairness and orderly procedure, the [appeals body][enforcement branch] may issue procedural orders as necessary and appropriate to assist the functioning of an appeal proceeding.¹⁸

XI. The record¹⁹

37. Any document or oral evidence that was available to the Executive Board in connection with its consideration of the decision being appealed shall constitute the record for the appeal in question. The complete record pertaining to the decision of the Executive Board being appealed shall be made available to the [appeals body][enforcement branch] not later than seven calendar days of the receipt of the appeal by the secretariat.

XII. Commencement of an appeal

38. Any Party, project participant [or DOE] directly involved in [or stakeholder or organization referred to in decision 3/CMP.1, annex, paragraph 40(c), which has submitted comments with regard to] a CDM project activity or a proposed CDM project activity with respect to which the Executive Board has [registered or] made a rejection or alteration

¹⁷ Option A is based on paragraphs 47 of the EB recommendations. option B is a proposal of co-chairs taking into account the considerations set out in paragraphs 111–116 of the TP.

¹⁸ This is the proposal of the co-chairs taking into account the considerations set out in the TP paragraphs 119–121. It is proposed for the consideration by Parties as an alternative to the proposal contained in paragraphs 80 of the EB text.

¹⁹ The text in this section attempts to summarize that of section VII of the EB recommendations. See also TP, paragraphs 146–147.

decision relating to the registration of such a project activity or the issuance of CERs (“petitioners”) may file, individually or jointly, a petition for appeal against such a decision.

39. Multiple appeals can be filed against the same decision, so long as no single petitioner is a signatory to more than one appeal.

40. A petition for appeal shall be filed no later than [45][60] calendar days after the decision of the Executive Board has been made publicly available.

XIII. Time limits

41. As a general rule, the appeals proceedings shall not exceed 90 calendar days from the date a petition is received by the [appeals body][enforcement branch] to the date it issues its final decision.

42. The Executive Board shall reach a decision reconsidered on remand in accordance with the provisions of paragraph 34 above at its first meeting, which will take place at least after 21 calendar days following the receipt of the remand.

XIV. Filing fee

43. Taking into account the costs of the appeals process and the need to deter frivolous appeals, the filing of an appeal shall be subject to a reasonable and not prohibitively expensive fee.]
